SCSL-04-15-T
(29636-30073)

792)

29636

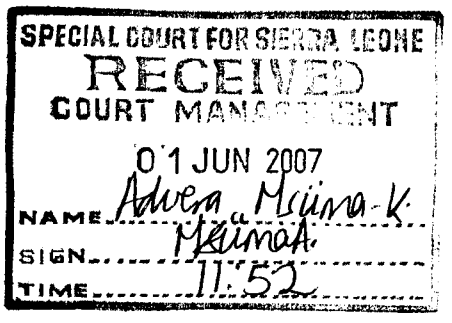
THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Hon. Justice Bankole Thompson, Presiding
Hon. Justice Benjamin Itoe,
Hon. Justice Pierre Boutet

Acting Registrar: **Mr. Herman von Hebel**

Date filed: **1st June 2007**



The Prosecutor

-v-

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No: SCSL-04-15-T

Authorities to be Relied Upon in
Oral Motion to Exclude Custodial Interviews of Mr. Sesay

Office of the Prosecutor
Peter Harrison
Charles Hardaway
Penelope-Ann Mamattah
Vincent Wagona

Defence Counsel for Sesay
Wayne Jordash
Sareta Ashraph

Defence Counsel for Kallon
Shekou Turay
Charles Taku
Melron Nicol-Wilson

Defence Counsel for Gbao
Andreas O'Shea
John Cammegh

1. The Sesay Defence, in its upcoming Oral Motion to Exclude the Custodial Interviews of Mr. Sesay, intends to rely upon the documents and authorities attached hereto in Annexes A-I.

2. The Sesay Defence has filed these documents as a courtesy and convenience to the court.

Dated 1st June 2007

WJ Wayne Jordash
SA Sareta Ashraph

Contents

The Prosecutor v. Zejnil Delalic Zdravko Mucic a/k/a "Pavo" Hazim Delic Esad Landzo a/k/a "Zenga", ICTY Trial Chamber, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 September 1997.
Prosecutor v. Sefer Halilovic, Decision on Admission into Evidence of Interview of the Accused, ICTY Trial Chamber I, Section A, 20 June 2005.
Prosecutor v. Sefer Halilovic, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, ICTY Appeals Chamber, 19 August 2005.
R v. Evans, [1991] 1 SCR 869

ANNEX F: Authorities on the Inadmissibility of Involuntary Statements or Confessions

Wong Kam-ming v. R., (1979) 69 Cr. App. R. 47
R. v. G. (B.), 240 N.R. 260, 24 C.R. (5th) 266 (1999)
Harold v. Territory of Oklahoma, 169 F. 47 (1909)
Bayless v. United States, 150 F.2d 236 (1945)
People v. Yeaton, 17 P. 544 (1888)
People v. Rodriguez, 136 P.2d 626 (1943)
People v. Hiller, 118 N.E.2d 11 (1954)
People v. Pelkola, 166 N.E.2d 54 (1960)
People v. Sweeney, 136 N.E. 687 (1922)
State v. Shephard, et al., 59 N.W. 449 (1894)
Johnson v. United States, 344 F. 2d 163 (1964)
R. v. Piche, 11 D.L.R. (3d) 700, [1970] 4

ANNEX G: Authorities on the need for a full hearing regarding the entirety of the circumstances surrounding a defendant's statements or confessions

Prosecutor v. Slobodan Milosevic, Decision on Prosecution Motion for Voir Dire Proceeding, ICTY Trial Chamber, 9 June 2005
Prosecutor v. Zejnil Delalic Zdravko Mucic a/k/a "Pavo" Hazim Delic Esad Landzo a/k/a "Zenga", ICTY Trial Chamber, Decision on the Motions for the Exclusion of Evidence by the Accused, Zejnil Delalic, 25 September 1997
Monette v. R., 23 C.R. 244 (1956)
Lynumn v. State of Illinois, 83 S.Ct. 917 (1963)
Jackson v. Denno, 84 S.Ct. 1774 (1964)
Ferguson v. Boyd, 566 F.2d 873 (1977)
Jarriel v. State, 317 So.2d 141 (1975)

ANNEX H: (Confidential)

The Prosecutor Against Issa Hassan Sesay, Defence Counsel's Extremely Urgent and Confidential Motion Requesting Permission to Intervene Regarding the Defence Office's Extremely Urgent and Confidential Motion, Special Court for Sierra Leone Trial Chamber I, 29 May 2003

ANNEX I: (Confidential)

The Prosecutor Against Issa Hassan Sesay, Confidential *Demande de Permission d'en Appeler de la* Decision on Request of Defence Office for Order Regarding Contact with Accused, Special Court for Sierra Leone Trial Chamber I, 9 June 2003

29641

Case No. SCSL 2003-05-PT

ANNEXE A

SPECIAL COURT FOR SIERRA LEONE 29642

OFFICE OF THE PROSECUTOR
1A SCAN DRIVE • OFF SPUR ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7100 or +39 0831 257100 or +232 22 236527
FAX: Extension: 174 6998 or +39 0831 236998 or +232 22 295998

22 May 2003

PROSECUTOR Against ISSA SESAY
CASE NO. SCSL-2003-05-PT

RECEIPT

Pursuant to the Prosecution's obligation to supply a copy of the transcript of interview with the Accused after the conclusion of questioning, under Rule 63 and 43, the following interview transcripts were submitted to William Hartzog, assigned DEFENCE COUNSEL representing the Accused, ISSA SESAY, on 22 May 2003:

DATE OF INTERVIEW	PAGES
10-March-03	50
11-March-03	109
12-March-03	149
13-March-03	94
14-March-03	138
17-March-03	139
18-March-03	158
24-March-03	54
31-March-03	44
14-April-03	59
15-April-03	92

Each interview transcript submitted is accompanied with a copy of the Rights Advisement read and signed by the Accused at the commencement of every interview session.

Pursuant to Rules 63 and 43, the Prosecutor is obligated to provide the Accused with an audio or video copy of each interview. At present, the Prosecution is undertaking duplication of such audio and video materials. The Accused/Defence Counsel agrees to receive interview transcripts without copies of the audio/video materials, with the understanding that such materials will be submitted to the Accused/Defence Council as soon as duplication is completed.

I, William Hartzog, assigned DEFENCE COUNSEL representing the Accused, ISSA SESAY, acknowledge receipt of the interview transcripts and Rights Advisement listed above.

Signature _____ Date: 22 May 2003, Freetown
William Hartzog

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KEY DATES

2003

7th March 2003	Indictment signed Warrant of Arrest and Order for Transfer and Detention issued (HHJ Thompson)
10th March 2003	12 noon: Sesay arrested and transferred into the custody of the Special Court 1:25 pm: John Berry (JB) and Joseph Saffa spoke to IS and asked him to speak to them about his involvement during the war. He was "advised to take his time as it was an important decision". No advice as to right to Counsel or what his statements could be used for was given. 1:30pm: IS indicates willingness to cooperate IS **1st interview** with OTP (3:03 pm – 4:37pm) IS taken to Bonthe.
11th March 2003	IS **2nd interview** with JB of the OTP (taken from Bonthe) 11:55am – 3:30pm
12th March 2003	IS **3rd interview** with JB of the OTP (taken from Bonthe) 11:16am – 3:30pm
13th March 2003	Request for Legal Assistance on behalf of IS filed. IS **4th interview** with JB of the OTP (taken from Bonthe) 12:12pm – 3:30pm
14th March 2003	Order that Indictment and Warrant be made public on 15th March 2003 (HHJ Itoe) IS **5th interview** with JB of the OTP (taken from Bonthe) 9:37am – 3:29pm
15th March 2003 **Annex A**	IS first appearance before HHJ Itoe [pg 1] HHJ Itoe: Do you have a lawyer? IS: "This is my first time I've been in court so I don't have any lawyer" HHJ Itoe: Do you want a lawyer or do you want to conduct your defence yourself? IS: Well, I will know when my charges shall be read [pg41]

OTP (Mr. Johnson): It also strikes me that perhaps the Accused does not fully understand that many of these charges and criminal responsibility is based on a theory of superior responsibility in that forces acting under him did these things.

[pg 55]
HHJ Itoe: Does he want to defend himself or he rests on his application for legal assistance?
IS: I will get a lawyer.

17th March 2003 — IS **6th interview** with JB of the OTP (taken from Bonthe)
11:37am – 4:30pm
JB's memo to Brenda Hollis and Gilbert Morrisette

18th March 2003 — IS **7th interview** with JB of the OTP (taken from Bonthe)
10:48am – 4:35 pm

24th March 2003 — IS **8th interview** with JB of the OTP (taken from Bonthe)
Annex B — 10:44am – 3:40pm
1pm: Sesay asks for a Mr. Robertson to represent him (see note signed by Mr. Sesay to that effect)

31st March 2003 — IS **9th interview** with JB of the OTP (taken from Bonthe)
10:02am –no time indicated

14th April 2003 — IS **10th interview** with JB of the OTP (taken from Bonthe)
10:29am –no time indicated
4:25pm: Gilbert Morrisette entered to have IS signed Specific Rights Advisement. JB present throughout.

"Q7: Do you want us to tell the Duty Counsel that you are talking and collaborating with us everytime we interview you?
A: Yes
Q8: Do you want us to give a Notice to your Duty Counsel of all future interviews if you still want to collaborate with us?
A: No"

15th April 2003 — IS **11th interview** with JB of the OTP
9:35am – 12:30pm
9:58am: Gilbert Morrisette entered to have IS signed Specific Rights Advisement. JB present throughout.
"Q7: Do you want us to tell the Duty Counsel that you are talking and collaborating with us everytime we interview you?
A: No
Q8: Do you want us to give a Notice to your Duty Counsel of all future interviews if you still want to collaborate with us?

A: Yes"

16th April 2003	OPD file Extremely Urgent and Confidential Motion regarding OTP's contact with IS. In its reply, the OPD set out the main issues as follows: "Where an Accused has appointed a legal representative, is the OTP entitled to approach the Accused directly or should it approach the Accused through its legal representative?" The issue of whether Mr. Sesay's waiver of his right to Counsel was informed and voluntary was not placed before the Trial Chamber.
23rd April 2003	Prosecution Response
29th April 2003	Defence Reply
30th April 2003	Court granted the Motion and ordered that "further questioning of the Accused by the Prosecution shall temporarily cease, with immediate effect, and shall be suspended until a final decision on the Defence Motion has been rendered by the Court".
22nd May 2003	Incomplete transcripts of interview disclosed by the Prosecution to Mr. W. Hartzog. No audio/ video materials yet disclosed.
29th May 2003 **Annex C**	Extremely Urgent and Confidential Motion of Defence Counsel Requesting Permission to Intervene Regarding the Defence Office's Extremely Urgent and Confidential Motion. Request to bring forward "unique and different information that was no available to the Defence Office when it filed its Motion and Reply" while at the same time "recognising the merits of the arguments of the Defence Office". Para 16: ..the [interim] Order has been breached insofar as Mr. Sesay made several phone calls to the OTP which were rebuffed immediately by the OTP in each case. The purposes of the calls were to arrange a visit with his wife, which Mr. Sesay erroneously believed to be under the control or at the discretion of the OTP".
30th May 2003	Interim Order revoked.
2nd June 2003 **Annex D**	Note by then Co-Counsel, Ms. Marcil (dated 9th June 2003) stated that on 2nd June 2003, she was informed by Mr. Robert Parnell, Chief of Security, that Mr. Sesay was to meet with the FBI after having been removed from Bonthe and brought to the OTP. Mr. Parnell said that Mr. Sesay had agreed to meet the FBI and had been told he could see his wife on the same day. Mr. Parnell said

	Co-Counsel need not attend. It was, in any event, too late to be registered for the helicopter flight to Bonthe.
5th June 2003	Prosecution Response to Extremely Urgent and Confidential Motion of the Defence Counsel, stating Motion "should be dismissed since the issues raised have become moot in light of the final decision". [No Reply was filed]
23rd June 2003	HHJ Thompson held "no useful purpose could be served in granting leave to intervene since the other matters adverted to by Counsel in their Motion are peripheral to the core issue already decided by the Chamber.... The Chamber wishes to emphasise that it is always an option open to the Defence to raise any detriment of the nature alleged as an issue of inadmissibility of evidence before or during the trial".
18th Nov 2003	Copies of 22 audio tapes used in OTP's interviews with IS disclosed to Mr. W. Hartzog.
2004	
17th Feb 2004	Copies of 22 video tapes (copied on CD) used in OTP's interviews with IS disclosed to Mr. W. Jordash.
24th Feb 2004 **Annex E**	Mr. Petit (in an inter office memo to Mr. Clayson) indicated that they are going to disclose the i/vs to Co-D and AFRC Defs on 27th Feb 2004. Mr. Petit stated "As you know because of his initial decision to give a statement to the OTP and the possibility of your client being a witness for the Prosecution, the OTP, under its budget, has been providing witness protection measures for your client's family for almost a year now."
25th Feb 2004	Confidential motion filed seeking an immediate order prohibiting the Prosecution from disclosing any part of the interview materials conducted with Issa Sesay between 10th March 2003 and 15th April inclusive until further order and expedited filing timetable. It noted that there would be a future argument as to admissibility at the appropriate time.
26th Feb 2004	Order for expedited filing
27th Feb 2004	Prosecution Response
3rd March 2004	Defence Reply

29th April 2004	Confidential Order to Specify Redactions and to Specify Timeline for Full Disclosure
4th May 2004	Sesay Defence Reply to the Order (cannot access on CMS)
17th June 2004	Unredacted video recording (copied on CD) of 17th March 2003 disclosed to Sesay team. Redacted transcripts 10th – 16th March, 18th March – 15th April 2003 disclosed
23rd June 2004	Complete, unredacted transcripts of IS i/vs disclosed to MK, AG, ATB, IBK and Kanu.
5th July 2004	Start of Prosecution case
12th October 2004	In response to applications from Co-def, TC orders that all confidential filings regarding the interviews be made available to AFRC and RUF defence teams

2006

2nd August 2006	Close of Prosecution case

2007

3rd May 2007	Start of Sesay Defence case and of IS testimony
17th May 2005	Prosecution files transcripts of interviews with the Accused with Court Management

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ANNEX B

29649 4

The Registrar
Special Court
for Sierra Leone
New England
free town.

I Issa H. Sesay I Want Mr Robinson to represent
Me and not in ERC Okuriya.

Signed [signature] 24-03-03 · 1.07 pm.

Signed [signature] 24-03-03. · 1.07 pm

Witness. JOHN BERRY

[signature] 2003-05-24
0115hrs

SPECIAL COURT FOR SIERRA LEONE
COURT RECORDS
RECEIVED
NAME [illegible]
SIGNATURE [signature]
DATE 24/03/03 TIME 13:45

29650

ANNEX C

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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 297000
FAX: EXTENSION: 178 7366 OR +39 0831 257366 OR +232 22 297366

INTEROFFICE MEMORANDUM

To: Timothy Clayson, Lead Counsel

From: Robert Petit, Senior Trial Attorney

C.c.: Gilbert Morissette, Deputy Chief Investigations

Date: 24 February 2004

Subject: Issa Sesay-Family protection and disclosure

Dear Mr. Clayson

We had scheduled a meeting yesterday afternoon unfortunately I did not hear from you or any other member of your team.

As you know because of his initial decision to give a statement to the OTP and the possibility of your client being a witness for the Prosecution, the OTP, under its budget, has been providing witness protection measures for your client's family for almost a year now. However after several interview sessions with your client we were advised that your client no longer wished to talk to us and this situation has now lasted several months.

I understand the disruption caused by the change in legal teams, however we simply can no longer afford to justify the expenses involved without any justification. That is why I had to insist on a meeting and decision on your client's part but unfortunately I did not hear from you.

Therefore I would suggest that you make the necessary contacts with the Registry's Witness and Victim's Support Unit (Saleem Vahidi, ext.7378, (076) 667874) to have them assess what assistance they can provide as the OTP's assistance to your client's family will cease as of Monday 1 March 2004. The family will be notified and arrangements can be coordinated with Gilbert Morissette, Deputy Chief Investigations.

Furthermore, as previously discussed, the Prosecution's disclosure obligations under Rules 66 and 68, especially in light of the now scheduled Status Conference, warrants a decision on disclosing your client's statements to the other accused. Therefore please be advised that such disclosure will take place on Friday 27th February 2004 and effected upon Morris Kallon, Augustine Gbao, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu.

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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 297000
FAX: EXTENSION: 178 7366 OR +39 0831 257366 OR +232 22 297366

You may wish to consult with the Detention Centre Authorities about any impact this may have on your client's detention conditions.

Regards

Robert Petit
Senior Trial Attorney

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ANNEX D

Authorities on international human rights standards

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Statute of the Special Court for Sierra Leone

Article 17 – Rights of the accused

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
c. To be tried without undue delay;
d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
g. Not to be compelled to testify against himself or herself or to confess guilt.

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International Covenant on Civil and Political Rights

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be

segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

African Charter on Human and Peoples' Rights

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Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

European Convention on Human Rights

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Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;
b. the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an

independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b. to have adequate time and facilities for the preparation of his defence;
c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

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American Convention on Human Rights

Article 5. Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.

4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.

5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Article 7. Right to Personal Liberty

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the

lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
b. prior notification in detail to the accused of the charges against him;
c. adequate time and means for the preparation of his defense;
d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
g. the right not to be compelled to be a witness against himself or to plead guilty; and
h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

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UN Convention Against Torture

Article 1

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

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General Comment No. 20: Replaces general comment 7concerning prohibition of torture and cruel treatment or punishment (Art. 7) : . 10/03/92. CCPR General Comment No. 20. (General Comments)

Convention Abbreviation: CCPR

GENERAL COMMENT 20

Replaces general comment 7 concerning prohibition
of torture and cruel treatment or punishment

(Article 7)

(Forty-fourth session, 1992)

1. This general comment replaces general comment 7 (the sixteenth session, 1982) reflecting and further developing it.

2. The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.

4. The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.

5. The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in

particular, children, pupils and patients in teaching and medical institutions. 29665.

6. The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7. As the Committee has stated in its general comment No. 6 (16), article 6 of the Covenant refers generally to abolition of the death penalty in terms that strongly suggest that abolition is desirable. Moreover, when the death penalty is applied by a State party for the most serious crimes, it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering.

7. Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of States parties generally contain little information on this point. More attention should be given to the need and means to ensure observance of this provision. The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.

8. The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

9. In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.

10. The Committee should be informed how States parties disseminate, to the population at large, relevant information concerning the ban on torture and the treatment prohibited by article 7. Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training. States parties should inform the Committee of the instruction and training given and the way in which the prohibition of article 7 forms an integral part of the operational rules and ethical standards to be followed by such persons.

11. In addition to describing steps to provide the general protection against acts prohibited under article 7 to which anyone is entitled, the State party should provide detailed information on safeguards for the special protection of particularly vulnerable persons. It should be noted that keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment. To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate

supervision when the investigation so requires, to family members. 2966

12. It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.

13. States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible. Consequently, those who have refused to obey orders must not be punished or subjected to any adverse treatment.

14. Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of States parties should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with.

15. The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.

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OFFICE OF THE HIGH COMMISSIONER
FOR HUMAN RIGHTS

General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14) : . 13/04/84. CCPR General Comment No. 13. (General Comments)

Convention Abbreviation: CCPR

GENERAL COMMENT 13

Equality before the courts and the right to a fair and public hearing by an independent court established by law

(Article 14)

(Twenty-first session, 1984)

1. The Committee notes that article 14 of the Covenant is of a complex nature and that different aspects of its provisions will need specific comments. All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Not all reports provided details on the legislative or other measures adopted specifically to implement each of the provisions of article 14.

2. In general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States parties to provide all relevant information and to explain in greater detail how the concepts of "criminal charge" and "rights and obligations in a suit at law" are interpreted in relation to their respective legal systems.

3. The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.

4. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of

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justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.

5. The second sentence of article 14, paragraph 1, provides that "everyone shall be entitled to a fair and public hearing". Paragraph 3 of the article elaborates on the requirements of a "fair hearing" in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1.

6. The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public.

7. The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

8. Among the minimum guarantees in criminal proceedings prescribed by paragraph 3, the first concerns the right of everyone to be informed in a language which he understands of the charge against him (subpara. (a)). The Committee notes that State reports often do not explain how this right is respected and ensured. Article 14 (3) (a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.

9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is "adequate time" depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and

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communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.

10. Subparagraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal.

11. Not all reports have dealt with all aspects of the right of defence as defined in subparagraph 3 (d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.

12. Subparagraph 3 (e) states that the accused shall be entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.

13. Subparagraph 3 (f) provides that if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.

14. Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

15. In order to safeguard the rights of the accused under paragraphs 1 and 3 of article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.

16. Article 14, paragraph 4, provides that in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. Not many reports have furnished sufficient information concerning such relevant matters as the minimum age at which a juvenile may be charged with a criminal offence, the maximum age at which a person is still considered to be a juvenile, the existence of special courts and procedures, the laws governing procedures against juveniles and how all these special arrangements for juveniles take account of "the desirability of

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promoting their rehabilitation". Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14.

17. Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences. In this connection, not enough information has been provided concerning the procedures of appeal, in particular the access to and the powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgement, and the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14.

18. Article 14, paragraph 6, provides for compensation according to law in certain cases of a miscarriage of justice as described therein. It seems from many State reports that this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant.

19. In considering State reports differing views have often been expressed as to the scope of paragraph 7 of article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of ne bis in idem as contained in paragraph 7. This understanding of the meaning of ne bis in idem may encourage States parties to reconsider their reservations to article 14, paragraph 7.

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THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

APR 16 2003

MEMORANDUM FOR THE COMMANDER, US SOUTHERN COMMAND

SUBJECT: Counter-Resistance Techniques in the War on Terrorism (S)

(U) ~~(S/NF)~~ I have considered the report of the Working Group that I directed be established on January 15, 2003.

(U) ~~(S/NF)~~ I approve the use of specified counter-resistance techniques, subject to the following:

(U) a. The techniques I authorize are those lettered A-X, set out at Tab A.

(U) b. These techniques must be used with all the safeguards described at Tab B.

(U) ~~(S)~~ c. Use of these techniques is limited to interrogations of unlawful combatants held at Guantanamo Bay, Cuba.

(U) ~~(S)~~ d. Prior to the use of these techniques, the Chairman of the Working Group on Detainee Interrogations in the Global War on Terrorism must brief you and your staff.

(U) ~~(S/NF)~~ I reiterate that US Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions. In addition, if you intend to use techniques B, I, O, or X, you must specifically determine that military necessity requires its use and notify me in advance.

(U) ~~(S/NF)~~ If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.

(U) ~~(S)~~ Nothing in this memorandum in any way restricts your existing authority to maintain good order and discipline among detainees.

Attachments:
As stated

UNCLASSIFIED

Classified By: Secretary of Defense
Reason: 1.5(a)
Declassify On: 2 April 2013

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TAB A

INTERROGATION TECHNIQUES

(U) ~~(S//NF)~~ The use of techniques A - X is subject to the general safeguards as provided below as well as specific implementation guidelines to be provided by the appropriate authority. Specific implementation guidance with respect to techniques A - Q is provided in Army Field Manual 34-52. Further implementation guidance with respect to techniques R - X will need to be developed by the appropriate authority.

(U) ~~(S//NF)~~ Of the techniques set forth below, the policy aspects of certain techniques should be considered to the extent those policy aspects reflect the views of other major U.S. partner nations. Where applicable, the description of the technique is annotated to include a summary of the policy issues that should be considered before application of the technique.

A. (U) ~~(S//NF)~~ Direct: Asking straightforward questions.

B. (U) ~~(S//NF)~~ Incentive/Removal of Incentive: Providing a reward or removing a privilege, above and beyond those that are required by the Geneva Convention, from detainees. [Caution: Other nations that believe that detainees are entitled to POW protections may consider that provision and retention of religious items (e.g., the Koran) are protected under international law (see, Geneva III, Article 34). Although the provisions of the Geneva Convention are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

C. (U) ~~(S//NF)~~ Emotional Love: Playing on the love a detainee has for an individual or group.

D. (U) ~~(S//NF)~~ Emotional Hate: Playing on the hatred a detainee has for an individual or group.

E. (U) ~~(S//NF)~~ Fear Up Harsh: Significantly increasing the fear level in a detainee.

F. (U) ~~(S//NF)~~ Fear Up Mild: Moderately increasing the fear level in a detainee.

G. (U) ~~(S//NF)~~ Reduced Fear: Reducing the fear level in a detainee.

H. (U) ~~(S//NF)~~ Pride and Ego Up: Boosting the ego of a detainee.

Classified By: Secretary of Defense
Reason: 1.5(a)
Declassify On: 2 April 2013

I. (U) ~~(S//NF)~~ Pride and Ego Down: Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW. [Caution: Article 17 of Geneva III provides, "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." *Other nations that believe that detainees are entitled to* POW protections may consider this technique inconsistent with the provisions of Geneva. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

J. (U) ~~(S//NF)~~ Futility: Invoking the feeling of futility of a detainee.

K. (U) ~~(S//NF)~~ We Know All: Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.

L. (U) ~~(S//NF)~~ Establish Your Identity: Convincing the detainee that the interrogator has mistaken the detainee for someone else.

M. (U) ~~(S//NF)~~ Repetition Approach: Continuously repeating the same question to the detainee within interrogation periods of normal duration.

N. (U) ~~(S//NF)~~ File and Dossier: Convincing detainee that the interrogator has a damning and inaccurate file, which must be fixed.

O. (U) ~~(S//NF)~~ *Mutt and Jeff: A team consisting of a friendly and harsh* interrogator. The harsh interrogator might employ the Pride and Ego Down technique. [Caution: Other nations that believe that POW protections apply to detainees may view this technique as inconsistent with Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

P. (U) ~~(S//NF)~~ Rapid Fire: Questioning in rapid succession without allowing detainee to answer.

Q. (U) ~~(S//NF)~~ Silence: Staring at the detainee to encourage discomfort.

R. (U) ~~(S//NF)~~ Change of Scenery Up: Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

S. (U) ~~(S//NF)~~ Change of Scenery Down: Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

T. (U) ~~(S//NF)~~ Dietary Manipulation: Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.

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(U)

U. (~~S//NF~~) Environmental Manipulation: Altering the environment to creat moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times. [Caution: Based on court cases in other countries, some nations may view application of this technique in certain circumstances to be inhumane. Consideration of these views should be given prior to use of this technique.]

(U)

V. (~~S//NF~~) Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.

(U)

W. (~~S//NF~~) False Flag: Convincing the detainee that individuals from a country other than the United States are interrogating him.

(U)

X. (~~S//NF~~) Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment. [Caution: The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command. This technique is not known to have been generally used for interrogation purposes for longer than 30 days. Those nations that believe detainees are subject to POW protections may view use of this technique as inconsistent with the requirements of Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation; Article 14 which provides that POWs are entitled to respect for their person; Article 34 which prohibits coercion and Article 126 which ensures access and basic standards of treatment. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

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TAB B

GENERAL SAFEGUARDS

(U) (S//NF) Application of these interrogation techniques is subject to the following general safeguards: (i) limited to use only at strategic interrogation facilities; (ii) there is a good basis to believe that the detainee possesses critical intelligence; (iii) the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); (iv) interrogators are specifically trained for the technique(s); (v) a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel) has been developed; (vi) there is appropriate supervision; and, (vii) there is appropriate specified senior approval for use with any specific detainee (after considering the foregoing and receiving legal advice).

(U) The purpose of all interviews and interrogations is to get the most information from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators. Operating instructions must be developed based on command policies to insure uniform, careful, and safe application of any interrogations of detainees.

(U) (S//NF) Interrogations must always be planned, deliberate actions that take into account numerous, often interlocking factors such as a detainee's current and past performance in both detention and interrogation, a detainee's emotional and physical strengths and weaknesses, an assessment of possible approaches that may work on a certain detainee in an effort to gain the trust of the detainee, strengths and weaknesses of interrogators, and augmentation by other personnel for a certain detainee based on other factors.

(U) (S//NF) Interrogation approaches are designed to manipulate the detainee's emotions and weaknesses to gain his willing cooperation. Interrogation operations are never conducted in a vacuum; they are conducted in close cooperation with the units detaining the individuals. The policies established by the detaining units that pertain to searching, silencing, and segregating also play a role in the interrogation of a detainee. Detainee interrogation involves developing a plan tailored to an individual and approved by senior interrogators. Strict adherence to policies/standard operating procedures governing the administration of interrogation techniques and oversight is essential.

Classified By: Secretary of Defense
Reason: 1.5(a)
Declassify On: 2 April 2013

SOERING v UNITED KINGDOM
(Series A, No 161; Application No 14038/88)

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EUROPEAN COURT OF HUMAN RIGHTS

(1989) 11 EHRR 439

7 JULY 1989

PANEL: The President, Judge Ryssdal; Judges Cremona, Thor Vilhjalmsson, Golcuklu, Matscher, Pettiti, Walsh, Sir Vincent Evans, Macdonald, Russo, Bernhardt, Spielmann, De Meyer, Carrillo Salcedo, Valticos, Martens, Palm, Foighel

CATCHWORDS: Penalty as inhuman and degrading treatment

HEADNOTE/SUMMARY

The applicant, **a West German national, alleged that the decision** by the Secretary of State for the Home Department **to extradite him to the United States of America to face trial in Virginia on a charge of capital murder would, if implemented, give rise to a breach by the United Kingdom of Article 3. If he were sentenced to death he would be exposed to the so-called 'death row phenomenon'. He also complained of a breach of Article 13, in that he had no effective remedy in the United Kingdom in respect of his complaint under Article 3, and of Article 6.** The Commission found a breach of Article 13 but no breach of either Article 3 or Article 6. The case was referred to the Court by the Commission and the Governments of the United Kingdom and of the Federal Republic of Germany.

Held, by the Court, unanimously

(a) that, in the event of the Secretary of State's decision to extradite the applicant to the United States of America being implemented, there would be a violation of Article 3.

(b) that in the same event, there would be no violation of Article 6(3)(c);

(c) that it had no jurisdiction to entertain the complaints under Article 6 concerning the extradition proceedings;

(d) that there had been no violation of Article 13;

(e) that the applicant should be awarded compensation in respect of his legal costs and expenses.

(f) that the remainder of the claim for just satisfaction was rejected.

1. Inhuman and Degrading Treatment: extradition, death penalty, death row phenomenon.

(a) Although extradition is specifically envisaged in Article 5(1)(f), it may have consequences adversely affecting the enjoyment of a Convention right and may consequently engage the responsibility of a Contracting State.

(b) Article 1 sets a territorial limit on the reach of the Convention, which does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other states. However, the provisions of the Convention must be interpreted and applied so as to make its safeguards practical and effective.

(c) The absolute prohibition on torture and on inhuman and degrading treatment or punishment under Articles 3 and 15 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also found in other international instruments and is generally recognised as an internationally accepted standard. It would hardly be compatible with the underlying values of the Convention, were a Contracting Party knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, inhuman or degrading treatment or punishment, however heinous the crime allegedly committed. Extradition in such circumstances would be plainly contrary to the spirit and intent of Article 3.

(d) The serious and irreparable nature of the alleged suffering risked warranted a departure from the rule, usually followed by the Convention institutions, not to pronounce on the existence of potential violations of the Convention.

(e) In the circumstances of the case it was found that the applicant, if returned to Virginia, ran a real risk of a death sentence and hence of exposure to the death row phenomenon.

(f) Capital punishment is permitted under certain conditions by Article 2(1). The Convention is a living instrument which must be interpreted in the light of present-day conditions. Some Contracting States retain the death penalty for some peacetime offences. However, death sentences are no longer carried out, while Protocol No 6, which provides for the abolition of the death penalty in time of peace, has been opened for signature without any objection and has been ratified by 13 Contracting States to the Convention. As observed by Amnesty International in their written comments, there exists virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards.

(g) Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contacting States to abrogate the exception provided for under Article 2(1) and hence remove a textual limit on the scope for evolutive interpretation of Article 3. The Contracting States have, however, opted for the normal method of amending the text of the Convention by an optional instrument, Protocol No 7. In these conditions Article 3 cannot be interpreted as generally prohibiting the death penalty.

(h) However, the manner in which the death penalty is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3.

(i) However well-intentioned and even potentially beneficial is the provision of a complex of post-sentence procedures, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.

(k) As a general principle the youth of the person concerned is a circumstance which is liable, with others, to put into question the compatibility with Article 3 of measures connected with a death sentence. Mental health has the same effect.

(l) In the circumstances of the case the applicant could expect to spend on death row six to eight years in a stringent custodial regime. At the time of the killings he was 18 years old and of a mental state which impaired his responsibility for his acts. The United Kingdom Government could have removed the danger of a fugitive criminal going unpunished as well as the anguish of intense and protracted suffering on death row by extraditing or deporting the applicant to face trial in the Federal Republic of Germany. In the light of all the above the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3.

2. Criminal Proceedings: extradition.

(a) An issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. The facts of the case did not disclose such a risk.

(b) The Court lacked jurisdiction to entertain the applicant's complaints regarding the fairness of the extradition proceedings as such.

3. Remedies: judicial review, extradition.

The English courts could review the 'reasonableness' of an extradition decision in the light of factors relied on by the applicant before the Convention institutions in the context of Article 3. The applicant had a remedy under Article 13 which he had failed to pursue. The English courts' lack of jurisdiction to grant interim injunctions against the Crown does not detract from the effectiveness of judicial review in extradition cases.

4. Just Satisfaction: enforcement of judgment, costs and expenses.

The Court's finding regarding Article 3 of itself amounted to adequate just satisfaction. The Court was not empowered to make accessory directions as to the enforcement of its judgments. The applicant was awarded full compensation for his costs and expenses.

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11. The applicant, Mr. Jens Soering, was born on 1 August 1966 and is a German national. He is currently detained in prison in England pending extradition to the United States of America to face charges of murder in the Commonwealth of Virginia.

12. The homicides in question were committed in Bedford County, Virginia, in March 1985. The victims, William Reginald Haysom (aged 72) and Nancy Astor Haysom (aged 53), were the parents of the applicant's girlfriend, Elizabeth Haysom, who is a Canadian national. Death in each case was the result of multiple and massive stab and slash wounds to the neck, throat and body. At the time the applicant and Elizabeth Haysom, aged 18 and 20 respectively, were students at the University of Virginia. They disappeared together from Virginia in October 1985, but were arrested in England in April 1986 in connection with cheque fraud.

13. The applicant was interviewed in England between 5 and 8 June 1986 by a police investigator from the Sheriff's Department of Bedford County. In a sworn affidavit dated 24 July 1986 **the investigator recorded the applicant as having admitted the killings in his presence and in that of two United Kingdom police officers.** The applicant had stated that he was in love with Miss Haysom but that her parents were opposed to the relationship. He and Miss Haysom had therefore planned to kill them. They rented a car in Charlottesville and traveled to Washington where they set up an alibi. The applicant then went to the parents' house, discussed the relationship with them and, when they told him they would do anything to prevent it, a row developed during which he killed them with a knife.

On 13 June 1986 a grand jury of the Circuit Court of Bedford County indicted him on charges of murdering the Haysom parents. The charges alleged capital murder of both of them and the separate non-capital murders of each.

14. On 11 August 1986 **the Government of the United States of America requested the applicant's and Miss Haysom's extradition under the terms of the Extradition Treaty of 1972 between the United States and the United Kingdom.** On 12 September a Magistrate at Bow Street Magistrates' Court was required by the Secretary of State for Home Affairs to issue a warrant for the applicant's arrest under the provisions of section 8 of the Extradition Act 1870. The applicant was subsequently arrested on 30 December at HM Prison Chelmsford after serving a prison sentence for cheque fraud.

15. On 29 October 1986 the **British Embassy in Washington addressed a request to the United States'** authorities in the following terms:

> **'Because the death penalty has been abolished in Great Britain, the Embassy has been instructed to seek an assurance,** in accordance with the terms of . . . the Extradition Treaty, **that, in the event of Mr. Soering being surrendered and being convicted of the crimes for which he has been indicted . . . , the death penalty, if imposed, will not be carried out.**
>
> Should it not be possible on constitutional grounds for the United States Government to give such an assurance, the United Kingdom authorities ask that the United States Government undertake to recommend to the appropriate authorities that the death penalty should not be imposed or, if imposed, should not be executed.'

16. On 30 December 1986 the **applicant was interviewed in prison by a German prosecutor** (Staatsanwalt) from Bonn. In a sworn witness statement the prosecutor recorded the applicant as having said, inter alia, that 'he had never had the intention of killing Mr. and Mrs. Haysom and . . . he could only remember having inflicted wounds at the neck on Mr. and Mrs. Haysom which must have had something to do with their dying later'; and that in the immediately preceding days 'there had been no talk whatsoever [between him and Elizabeth Haysom] about killing Elizabeth's parents.' The prosecutor also referred to documents which had been put at his disposal, for example the statements made by the applicant to the American police investigator, the autopsy reports and two psychiatric reports on the applicant.

On 11 February 1987 **the local court in Bonn issued a warrant for the applicant's arrest in respect of the alleged murders.** On 11 March the **Government of the Federal Republic of Germany requested his extradition to the Federal Republic** under the Extradition Treaty of 1872 between the Federal Republic and the

United Kingdom. The Secretary of State was then advised by the Director of Public Prosecutions that, although the German request contained proof that German courts had jurisdiction to try the applicant, the evidence submitted, since it consisted solely of the admissions made by the applicant to the Bonn prosecutor in the absence of a caution, did not amount to a prima facie case against him and that a magistrate would not be able under the Extradition Act 1870 to commit him to await extradition to Germany on the strength of admissions obtained in such circumstances.

17. In a letter dated 20 April 1987 to the Director of the Office of International Affairs, Criminal Division, United States Department of Justice, the Attorney for Bedford County, Virginia (Mr. James W Updike Jr) stated that, **on the assumption that the applicant could not be tried in Germany on the basis of admissions alone, there was no means of compelling witnesses from the United States to appear in a criminal court in Germany.** On 23 April the United States, by diplomatic note, requested the applicant's extradition to the United States in preference to the Federal Republic of Germany.

18. On 8 May 1987 Elizabeth Haysom was surrendered for extradition to the United States. After pleading guilty on 22 August as an accessory to the murder of her parents, she was sentenced on 6 October to 90 years' imprisonment (45 years on each count of murder).

19. On 20 May 1987 the Government of the United Kingdom informed the Federal Republic of Germany that the United States had earlier 'submitted a request, supported by prima facie evidence, for the extradition of Mr. Soering.' The United Kingdom Government notified the Federal Republic that it had 'concluded that, having regard to all the circumstances of the case, the court should continue to consider in the normal way the United States' request.' It further indicated that it had sought an assurance from the United States' authorities on the question of the death penalty and that 'in the event that the court commits Mr. Soering, his surrender to the United States' authorities would be subject to the receipt of satisfactory assurances on this matter.'

20. On 1 June 1987 Mr. Updike **swore an affidavit in his capacity as Attorney for Bedford County**, in which he **certified as follows**:

> 'I hereby certify that **should Jens Soering be convicted of the offence of capital murder as charged in Bedford County, Virginia . . . a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out.'**

This assurance was transmitted to the United Kingdom Government under cover of a diplomatic note on 8 June. It was repeated in the same terms in a further affidavit from Mr. Updike sworn on 16 February 1988 and forwarded to the United Kingdom by diplomatic note on 17 may 1988. In the same note the Federal Government of the United States undertook to ensure that the commitment of the appropriate authorities of the Commonwealth of Virginia to make representations on behalf of the United Kingdom would be honoured.

During the course of the present proceedings the Virginia authorities have informed the United Kingdom Government that Mr. Updike was not planning to provide any further assurances and intended to seek the death penalty in Mr. Soering's case because the evidence, in his determination, supported such action.

. . .

II. Relevant domestic law and practice in the United Kingdom

A. Criminal law

27. In England murder is defined as the unlawful killing of a human being with malice aforethought. The penalty is life imprisonment. The death penalty cannot be imposed for murder. (Murder (Abolition of the Death Penalty) Act 1965, § 1.) Section 2 of the Homicide Act 1957 provides that where a person kills another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts in doing the killing. A person who but for the section would be liable to be convicted of murder shall be liable to be convicted of manslaughter.

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28. English courts do not exercise criminal jurisdiction in respect of acts of foreigners abroad except in certain cases immaterial to the present proceedings. Consequently, neither the applicant, as a German citizen, nor Elizabeth Haysom, a Canadian citizen, was or is amenable to criminal trial in the United Kingdom.

. . .

DECISION:I. Alleged breach of Article 3

80. The applicant alleged that the decision by the Secretary of State for the Home Department to surrender him to the authorities of the United States of America would, if implemented, give rise to a breach by the United Kingdom of **Article 3 of the Convention, which provides:**

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

A. Applicability of Article 3 in cases of extradition

81. The alleged breach derives from the applicant's exposure to the so-called 'death row phenomenon.' This phenomenon may be described as consisting in a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death.

82. In its report (at paragraph 94) the Commission reaffirmed 'its case law that a person's deportation or extradition may give rise to an issue under Article 3 of the Convention where there are serious reasons to believe that the individual will be subjected, in the receiving State, to treatment contrary to that Article.'

The Government of the Federal Republic of Germany supported the approach of the Commission, pointing to a similar approach in the case law of the German courts.

The applicant likewise submitted that Article 3 not only prohibits the Contracting States from causing inhuman or degrading treatment or punishment to occur within their jurisdiction but also embodies an associated obligation not to put a person in a position where he will or may suffer such treatment or punishment at the hands of other States. For the applicant, at least as far as Article 3 is concerned, an individual may not be surrendered out of the protective zone of the Convention without the certainty that the safeguards which he would enjoy are as effective as the Convention standard.

83. The United kingdom Government, on the other hand, contended that Article 3 should not be interpreted so as to impose responsibility on a Contracting State for acts which occur outside its jurisdiction. In particular, in its submission, extradition does not involve the responsibility of the extraditing State for inhuman or degrading treatment or punishment which the extradited person may suffer outside the State's jurisdiction. To begin with, it maintained, it would be straining the language of Article 3 intolerably to hold that by surrendering a fugitive criminal the extraditing State has 'subjected' him to any treatment or punishment that he will receive following conviction and sentence in the receiving State. Further arguments advanced against the approach of the Commission were that it interferes with international treaty rights; it leads to a conflict with the norms of international judicial process, in that it in effect involves adjudication on the internal affairs of Foreign States not Parties to the Convention or to the proceedings before the Convention institutions; it entails grave difficulties of evaluation and proof in requiring the examination of alien systems of law and of conditions in foreign States; the practice of national courts and the international community cannot reasonably be invoked to support it; it causes a serious risk of harm in the contracting State which is obliged to harbour the protected person, and leaves criminals untried, at large and unpunished.

In the alternative, the United Kingdom Government submitted that the application of Article 3 in extradition cases should be limited to those occasions in which the treatment or punishment abroad is certain, imminent and serious. In its view, the fact that by definition the matters complained of are only anticipated, together with the common and legitimate interest of all States in bringing fugitive criminals to justice, requires a very high degree of risk, proved beyond reasonable doubt, that ill-treatment will actually occur.

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84. The Court will approach the matter on the basis of the following considerations.

85. As results from Article 5(1)(f), which permits 'the lawful . . . detention of a person against whom action is being taken with a view to . . . extradition,' no right not to be extradited is as such protected by the Convention. Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a contracting State under the relevant Convention guarantee. (See, mutatis mutandis, ABDULAZIZ, CABALES AND BALKANDALI V UNITED KINGDOM (1985) 7 EHRR 471, paras 59-60 -- in relation to rights in the field of immigration.) What is at issue in the present case is whether Article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State.

86. **Article 1 of the Convention, which provides that 'the High Contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I,'** sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('reconnaitre' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction.' Further, the Convention does not govern the actions of States not parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 in particular.

In the instant case it is common ground that **the United Kingdom has no power over the practices and arrangements of the Virginia authorities which are the subject of the applicant's complaints.** It is also true that in other international instruments cited by the United Kingdom Government -- for example the 1951 United Nations Convention relating to the Status of Refugees (Art 33), the 1957 European Convention on Extradition (Art 11) and the 1984 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Art 3) -- the problems of removing a person to another jurisdiction where unwanted consequences may follow are addressed expressly and specifically.

These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction.

87. **In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms.** (See IRELAND V UNITED KINGDOM 2 EHRR 25, para 239.) **Thus, the object and purpose of the convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.** (See, inter alia ARTICO V ITALY 3 EHRR 1, para 33.) In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.' (See KJELDSEN, BUSK MADSEN AND PEDERSEN V DENMARK 1 EHRR 711, para 53.)

88. Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency. (See Article 15(2) ECHR) This absolute prohibition on torture and on inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.

The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that 'no State Party shall . . . extradite a person where there are

substantial grounds for believing that he would be in danger of being subjected to torture.' The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.

89. What amounts to 'inhuman or degrading treatment or punishment' depends on all the circumstances of the case. Furthermore, inherent in the whole of the convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

90. It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article.

91. In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. **In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has a direct consequence the exposure of an individual to proscribed ill-treatment.**

B. Application of Article 3 in the particular circumstances of the present case

92. The extradition procedure against the applicant in the United Kingdom has been completed, the Secretary of State having signed a warrant ordering his surrender to the United States' authorities, this decision, albeit as yet not implemented, directly affects him. It therefore has to be determined on the above principles whether the foreseeable consequences of Mr. Soering's return to the United States are such as to attract the application of Article 3. This inquiry must concentrate firstly on whether Mr. Soering runs a real risk of being sentenced to death in Virginia, since the source of the alleged inhuman and degrading treatment or punishment, namely the 'death row phenomenon,' lies in the imposition of the death penalty. Only in the event of an affirmative answer to this question need the court examine whether exposure to the 'death row phenomenon' in the circumstances of the applicant's case would involve treatment or punishment incompatible with Article 3.

1. Whether the applicant runs a real risk of a death sentence and hence of exposure to the 'death row phenomenon'

93. The United Kingdom Government, contrary to the Government of the Federal Republic of Germany, the Commission and the applicant, did not accept that the risk of a death sentence attains a sufficient level of likelihood to bring Article 3 into play. Their reasons were fourfold.

Firstly, as illustrated by his interview with the German prosecutor where he appeared to deny any intention to kill, the applicant has not acknowledged his guilt of capital murder as such.

Secondly, only a prima facie case has so far been made out against him. In particular, in the United Kingdom Government's view the psychiatric evidence is equivocal as to whether Mr. Soering was suffering from a disease of the mind sufficient to amount to a defence of insanity under Virginia law.

Thirdly, even if Mr. Soering is convicted of capital murder, it cannot be assumed that in the general exercise of their discretion the jury will recommend, the judge will confirm and the Supreme Court of Virginia will uphold the imposition of the death penalty. The United Kingdom Government referred to the presence of important mitigating factors, such as the applicant's age and mental condition at the time of commission of the offence and his lack of previous criminal activity, which would have to be taken into account by the jury and then by the judge in the separate sentencing proceedings.

Fourthly, the assurance received from the United States must at the very least significantly reduce the risk of a capital sentence either being imposed or carried out.

At the public hearing the Attorney General nevertheless made clear his Government's understanding that if Mr. Soering were extradited to the United States there was 'some risk,' which was 'more than merely negligible,' that the death penalty would be imposed.

94. As the applicant himself pointed out, he has made to American and British police officers and to two psychiatrists admissions of his participation in the killings of the Haysom parents, although he appeared to retract those admissions somewhat when questioned by the German prosecutor. It is not for the European court to usurp the function of the Virginia courts by ruling that a defence of insanity would or would not be available on the psychiatric evidence as it stands. The United Kingdom Government is justified in its assertion that no assumption can be made that Mr. Soering would certainly or even probably be convicted of capital murder as charged. Nevertheless, as the Attorney General conceded on its behalf at the public hearing, there is 'a significant risk' that the applicant would be so convicted.

95. Under Virginia law, before a death sentence can be returned the prosecution must prove beyond reasonable doubt the existence of at least one of the two statutory aggravating circumstances, namely future dangerousness or vileness. In this connection, the horrible and brutal circumstances of the killings would presumably tell against the applicant, regarding being had to the case law on the grounds for establishing the 'vileness' of the crime.

Admittedly, taken on their own the mitigating factors do reduce the likelihood of the death sentence being imposed. No less than four of the five facts in mitigation expressly mentioned in the Code of Virginia could arguably apply to Mr. Soering's case. These are a defendant's lack of any previous criminal history, the fact that the offence was committed while a defendant was under extreme mental or emotional disturbance, the fact that at the time of commission of the offence the capacity of a defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly diminished, and the defendant's age.

96. These various elements arguing for or against the imposition of a death sentence have to be viewed in the light of the attitude of the prosecuting authorities.

97. **The Commonwealth's Attorney for Bedford County, Mr. Updike, who is responsible for conducting the prosecution against the applicant, has certified that 'should Jens Soering be convicted of the offence of capital murder as charged . . . a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out'.** The Court notes, like Lloyd LJ in the Divisional Court, that this undertaking is far from reflecting the wording of Article IV of the 1972 Extradition Treaty between the United Kingdom and the United States, which speaks of 'assurances satisfactory to the requested Party that the death penalty will not be carried out'. However, the offence charged, being a State and not a Federal offence, comes within the jurisdiction of the Commonwealth of Virginia; it appears as a consequence that **no direction could or can be given to the Commonwealth's Attorney by any State or Federal authority to promise more; the Virginia courts as judicial bodies cannot bind themselves in advance as to what decisions they may arrive at on the evidence; and the Governor of Virginia does not, as a matter of policy, promise that he will later exercise his executive power to commute a death penalty.**

This being so, Mr. Updike's undertaking may well have been the best 'assurance' that the United Kingdom could have obtained from the United States Federal Government in the particular circumstances. According to the statement made to Parliament in 1987 by a Home Office Minister, acceptance of undertakings in such terms 'means that the United Kingdom authorities render up a fugitive or are prepared to send a citizen to face an American court on the clear understanding that the death penalty will not be carried out . . . It would be a fundamental blow to the extradition arrangements between our two countries if the death penalty were carried out on an individual who had been returned under those circumstances'. Nonetheless, the effectiveness of such an undertaking has not yet been put to the test.

98. The applicant contended that representations concerning the wishes of a foreign government would not be admissible as a matter of law under the Virginia Code or, if admissible, of any influence on the sentencing judge.

Whatever the position under Virginia law and practice, and notwithstanding the diplomatic context of the extradition relations between the United Kingdom and the United States, objectively **it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom eliminates the risk of the death penalty being imposed.** In the independent exercise of his discretion the Commonwealth's Attorney has himself decided to seek and to persist in seeking the death penalty because the evidence, in his determination, supports such action. If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the 'death row phenomenon'.

99. The Court's conclusion is therefore that the likelihood of the feared exposure of the applicant to the 'death row phenomenon' has been shown to be such as to bring Article 3 into play.

2. Whether in the circumstances the risk of exposure to the 'death row phenomenon' would make extradition a breach of Article 3

(a) General considerations

100. As is established in the court's case law, **ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3.** The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method if its execution, it duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim. (See IRELAND V UNITED KINGDOM 2 EHRR 25, para 162; and TYRER V UNITED KINGDOM 2 EHRR 1, paras 29 and 80.)

Treatment has been held by the Court to be both 'inhuman' because it was premeditated, was applied for hours at a stretch and 'caused, if not actual bodily injury, at least intense physical and mental suffering.' and also 'degrading' because it was 'such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance'. (See IRELAND V UNITED KINGDOM, para 167.) In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading,' the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment. (See TYRER V UNITED KINGDOM, loc cit.) In this connection, account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him.

101. Capital punishment is permitted under certain conditions by Article 2(1) of the convention, which reads:

> **'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'**

In view of this wording, the applicant did not suggest that the death penalty per se violated Article 3. He, like the two Government Parties, agreed with the Commission that the extradition of a person to a country where he risks the death penalty does not in itself raise an issue under either Article 2 or Article 3. On the other hand. Amnesty International in their written comments argued that the evolving standards in Western Europe regarding

the existence and use of the death penalty required that the death penalty should now be considered as an inhuman and degrading punishment within the meaning of Article 3.

102. Certainly, 'the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions'; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3, 'the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. (See TYRER V UNITED KINGDOM 2 EHRR 1, para 31.) **De facto the death penalty no longer exists in time of peace in the contracting States to the Convention.** In the few Contracting States which retain the death penalty in law for some peacetime offences, death sentences, if ever imposed, are nowadays not carried out. This **'virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice,'** to use the words of Amnesty International, is reflected in Protocol No 6 to the Convention, which provides for the abolition of the death penalty in time of peace. Protocol No 6 was opened for signature in April 1983, which in the practice of the Council of Europe indicates the absence of objection on the part of any of the Member States of the Organisation; it came into force in March 1985 and to date has been ratified by 13 Contracting States to the Convention, not however including the United Kingdom.

Whether these marked changes have the effect of bringing the death penalty per se within the prohibition of ill-treatment under Article 3 must be determined on the principles governing the interpretation of the Convention.

103. The Convention is to be read as a whole and Article 3 should therefore be construed in harmony with the provisions of Article 2. (See, mutatis mutandis, KLASS V GERMANY 2 EHRR 214, 214, para 68.) On this basis Article 3 evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2(1).

Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2(1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3. However, Protocol No 6, as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, **notwithstanding the special character of the Convention, Article 3 cannot be interpreted as generally prohibiting the death penalty.**

104. **That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3. The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person with the proscription under Article 3.** Present-day attitudes in the contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.

(b) The particular circumstances

105. **The applicant submitted that the circumstances to which he would be exposed** as a consequence of the implementation of the Secretary of State's decision to return him to the United States, namely the 'death row phenomenon,' **cumulatively constitute such serious treatment that his extradition would be contrary to Article 3.** He cited in particular the **delays in the appeal and review procedures following a death sentence, during which time he would be subject to increasing tension and psychological trauma**; the fact, so he said, that the **judge or jury in determining sentence is not obliged to take into account the defendant's age and mental state** at the time of the offence; **the extreme conditions of his future detention in 'death row' in Mecklenburg Correctional Center, where he expects to be the victim of violence and sexual abuse because of his age, colour and nationality**; and the **constant spectre of the execution itself, including the ritual of execution.** He also relied on the **possibility of extradition or deportation, which he would not oppose, to the Federal Republic of Germany as accentuating the disproportionality of the Secretary of State's decision.**

The Government of the Federal Republic of Germany took the view that, taking all the circumstances together, the treatment awaiting the applicant in Virginia would go so far beyond treatment inevitably connected with the imposition and execution of a death penalty as to be 'inhuman' within the meaning of Article 3.

On the other hand, the conclusion expressed by the Commission was that the degree of severity contemplated by Article 3 would not be attained.

The United Kingdom Government shared this opinion. In particular, it disputed many of the applicant's factual allegations as to the conditions on death row in Mecklenburg and his expected fate there.

(i) Length of detention prior to execution

106. **The period that a condemned prisoner can expect to spend on death row in Virginia before being executed is on average six to eight years. This length of time awaiting death, is, as the commission and the United Kingdom Government noted, in a sense largely of the prisoner's own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law.** The automatic appeal to the Supreme Court of Virginia normally takes no more than six months. The remaining time is accounted for by collateral attacks mounted by the prisoner himself in habeas corpus proceedings before both the State and Federal courts and in applications to the Supreme Court of the United States for certiorari review, the prisoner at each stage being able to seek a stay of execution. The remedies available under Virginia law serve the purpose of ensuring that the ultimate sanction of death is not unlawfully or arbitrarily imposed.

Nevertheless, just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so **it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full.** However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, **the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.**

(ii) Conditions on death row

107. As to conditions in Mecklenburg Correctional Center, where the applicant could expect to be held if sentenced to death, the court bases itself on the facts which were uncontested by the United Kingdom Government, without finding it necessary to determine the reliability of the additional evidence adduced by the applicant, notably as to the risk of homosexual abuse and physical attack undergone by prisoners on death row.

The stringency of the custodial regime in Mecklenburg, as well as the services (medical, legal and social) and the controls (legislative, judicial and administrative) provided for inmates, are described in some detail above. In this connection, the United Kingdom Government drew attention to the necessary requirement of extra security for the safe custody of prisoners condemned to death for murder. Whilst it might thus well be justifiable in principle, the severity of a special regime such as that operated on death row in Micklenburg is compounded by the fact of inmates being subject to it for a protracted period lasting on average six to eight years.

(iii) The applicant's age and mental state

108. At the time of the killings, the applicant was only 18 years old and there is some psychiatric evidence, which was not contested as such, that he 'was suffering from [such] an abnormality of mind . . . as substantially impaired his mental responsibility for his acts'.

Unlike Article 2 of the Convention, Article 6 of the 1966 International Covenant on Civil and Political Rights and Article 4 of the 1969 American Convention on Human Rights expressly prohibit the death penalty from being imposed on persons aged less than 18 at the time of commission of the offence. Whether or not such a prohibition be inherent in the brief and general language of Article 2 of the European Convention, its explicit enunciation in other, later international instruments, the former of which has been ratified by a large number of States parties to the European Convention, at the very least indicates that **as a general principle the youth of the person concerned is a circumstance which is liable, with others, to put in question the compatibility with Article 3 of measures connected with a death sentence.**

It is in line with the Court's case law to treat disturbed mental health as having the same effect for the application of Article 3.

109. Virginia law, as the United Kingdom Government and the Commission emphasised, certainly does not ignore these two factors. Under the Virginia Code account has to be taken of mental disturbance in a defendant, either as an absolute bar to conviction it if is judged to be sufficient to amount to insanity or, like age, as a fact in mitigation at the sentencing stage. Additionally, indigent capital murder defendants are entitled to the appointment of a qualified mental health expert to assist in the preparation of their submissions at the separate sentencing proceedings. These provisions in the Virginia Code undoubtedly serve, as the American courts have stated, to prevent the arbitrary or capricious imposition of the death penalty and narrowly to channel the sentencer's discretion. They do not however remove the relevance of age and mental condition in relation to the acceptability, under Article 3, of the 'death row phenomenon' for a given individual once condemned to death.

Although it is not for this Court to prejudge issues of criminal responsibility and appropriate sentence, the applicant's youth at the time of the offence and his then mental state, on the psychiatric evidence as it stands, are therefore to be taken into consideration as contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3.

(iv) Possibility of extradition to the Federal Republic of Germany

110. For the United Kingdom Government and the majority of the Commission, the possibility of extraditing or deporting the applicant to face trial in the Federal Republic of Germany, where the death penalty has been abolished under the Constitution, is not material for the present purposes. Any other approach, the United Kingdom Government submitted, would lead to a 'dual standard' affording the protection of the Convention to extraditable persons fortunate enough to have such an alternative destination available but refusing it to others not so fortunate.

This argument is not without weight. Furthermore the Court cannot overlook either the horrible nature of the murders with which Mr. Soering is charged or the legitimate and beneficial role of extradition arrangements in combating crime. The purpose for which his removal to the United States was sought, in accordance with the Extradition Treaty between the United Kingdom and the United States, is undoubtedly a legitimate one. However, sending Mr. Soering to be tried in his own country would remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row. It is therefore a circumstances of relevance for the overall assessment under Article 3 in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case.

(c) Conclusion

111. For any prisoner condemned to death, some element of delay, between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. **The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial.** Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services.

However, in the Court's view, **having regard to the very long period of time spent on death row in such extreme conditions, with the ever-present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.** A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.

Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3.

This finding in no way puts in question the good faith of the United Kingdom Government, which has from the outset of the present proceedings demonstrated it's desire to abide by its Convention obligations, firstly by staying the applicant's surrender to the United States authorities in accord with the interim measures indicated by the Convention institutions and secondly by itself referring the case to the court for a judicial ruling.

. . .

IV. Application of Article 50

125. **Under the terms of Article 50,**

> **'If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the . . . Convention, and if the internal law of the said party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.'**

Mr. Soering stated that, since the object of his application was to secure the enjoyment of his rights guaranteed by the Convention, just satisfaction of his claims would be achieved by effective enforcement of the Court's ruling. He invited the Court to assist the State parties to the case and himself by giving directions in relation to the operation of its judgment.

In addition, he claimed the costs and expenses of his representation in the proceedings arising from the request to the United Kingdom Government by the authorities of the United States of America for his extradition. He quantified these costs and expenses at L1,500 and L21,000 for lawyers' fees in respect of the domestic and Strasbourg proceedings respectively, L2,067 and 4,885.60 FF for his lawyers' travel and accommodation expenses when appearing before the Convention institutions, and L2,185.80 and 145 FF for sundry out-of-pocket expenses, making an overall total of L26,752.80 and 5,030.60 FF.

126. No breach of Article 3 has as yet occurred. Nevertheless, the Court having found that the Secretary of State's decision to extradite to the United States of America would, if implemented, give rise to a breach of Article 3, Article 50 must be taken as applying to the facts of the present case.

127. The Court considers that its finding regarding Article 3 of itself amounts to adequate just satisfaction for the purposes of Article 50. The Court is not empowered under the Convention to make accessory directions of the kind requested by the applicant. (See, mutatis mutandis, DUDGEON V UNITED KINGDOM (1983) 5 EHRR 573, para 15.) By virtue of Article 54, the responsibility for supervising execution of the Court's judgment rests with the Committee of Ministers of the Council of Europe.

128. The United Kingdom Government did not in principle contest the claim for reimbursement of costs and expenses, but suggested that, in the event that the Court should find one or more of the applicant's complaints of violation of the Convention to be unfounded, it would be appropriate for the Court, deciding on an equitable basis as required by Article 50, to reduce the amount awarded accordingly. (See LE COMPTE, VAN LEUVEN AND DE MEYERE V BELGIUM (1983) 5 EHRR 183.)

The applicant's essential concern, and the bulk of the argument on all sides, focused on the complaint under Article 3, and on that issue the applicant has been successful. The Court therefore considers that in equity the applicant should recover his costs and expenses in full.

29690

HOUSE OF LORDS

SESSION 2005–06
[2005] UKHL 71

on appeal from: [2004] EWCA Civ 1123

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

A (FC) and others (FC) (Appellants) *v.* Secretary of State for the Home Department (Respondent) (2004)
A and others (Appellants) (FC) and others *v.* Secretary of State for the Home Department (Respondent)
(Conjoined Appeals)

Appellate Committee

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
Ben Emmerson QC
Philippe Sands QC
Raza Husain
Danny Friedman
(Instructed by Birnberg Peirce and Partners and Tyndallwoods, Birmingham)

Respondents:
Ian Burnett QC
Philip Sales
Robin Tam
Jonathan Swift
(Instructed by Treasury Solicitor)

Interveners

Sir Sydney Kentridge QC, Colin Nicholls QC, Timothy Otty, Sudhanshu Swaroop and Colleen Hanley (Instructed by Freshfields Bruckhaus Deringer) for the Commonwealth Lawyers Association and two other interveners.

Keir Starmer QC, Nicholas Grief, Mark Henderson, Joseph Middleton, Peter Morris and Laura Dubinsky (Instructed by Leigh Day & Co) for Amnesty International and thirteen other interveners.

Hearing dates:
17, 18, 19 and 20 October 2005
ON
THURSDAY 8 DECEMBER 2005

HOUSE OF LORDS 29691

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

A (FC) and others (FC) (Appellants) *v.* Secretary of State for the Home Department (Respondent) (2004)
A and others (Appellants) (FC) and others *v.* Secretary of State for the Home Department (Respondent)
(Conjoined Appeals)

[2005] UKHL 71

LORD BINGHAM OF CORNHILL

My Lords,

1. May the Special Immigration Appeals Commission ("SIAC"), a superior court of record established by statute, when hearing an appeal under section 25 of the Anti-terrorism, Crime and Security Act 2001 by a person certified and detained under sections 21 and 23 of that Act, receive evidence which has or may have been procured by torture inflicted, in order to obtain evidence, by officials of a foreign state without the complicity of the British authorities? That is the central question which the House must answer in these appeals. The appellants, relying on the common law of England, on the European Convention on Human Rights and on principles of public international law, submit that the question must be answered with an emphatic negative. The Secretary of State agrees that this answer would be appropriate in any case where the torture had been inflicted by or with the complicity of the British authorities. He further states that it is not his intention to rely on, or present to SIAC or to the Administrative Court in relation to control orders, evidence which he knows or believes to have been obtained by a third country by torture. This intention is, however, based on policy and not on any acknowledged legal obligation. Like any other policy it may be altered, by a successor in office or if circumstances change. The admission of such evidence by SIAC is not, he submits, precluded by law. Thus he contends for an affirmative answer to the central question stated above. The appellants' case is supported by written and oral submissions made on behalf of 17 well-known bodies dedicated to the protection of human rights, the suppression of torture and maintenance of the rule of law.

2. The appeals now before the House are a later stage of the proceedings in which the House gave judgment in December 2004: *A and others v Secretary of State for the Home Department, X and another v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68. In their opinions given then, members of the House recited the relevant legislative provisions and recounted the relevant history of the individual appellants up to that time. To avoid wearisome repetition, I shall treat that material as incorporated by reference into this opinion, and make only such specific reference to it as is necessary for resolving these appeals.

The Anti-terrorism, Crime and Security Act 2001

3. The 2001 Act was this country's legislative response to the grave and inexcusable crimes committed in New York, Washington DC and Pennsylvania on 11 September 2001, and manifested the government's determination to protect the public against the dangers of international terrorism. Part 4 of the Act accordingly established a new regime, applicable to persons who were not British citizens, whose presence in the United Kingdom the Secretary of State reasonably believed to be a risk to national security and whom the Secretary of State reasonably suspected of being terrorists as defined in the legislation. By section 21 of the Act he was authorised to issue a certificate in respect of any such person, and to revoke such a certificate. Any action of the Secretary of State taken wholly or partly in reliance on such a certificate might be questioned in legal proceedings only in a prescribed manner.

4. Sections 22 and 23 of the Act recognised that it might not, for legal or practical reasons, be possible to deport or remove from the United Kingdom a suspected international terrorist certified under section 21, and power was given by section 23 to detain such a person, whether temporarily or indefinitely. This provision was thought to call for derogation from the provisions of article 5(1)(f) of the European Convention, which it was sought to effect by a Derogation Order, the validity of which was one of the issues in the earlier stages of the proceedings.

5. Section 25 of the Act enables a person certified under section 21 to appeal to SIAC against his certification. On such an appeal SIAC must cancel the certificate if "(a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or (b) it considers that for some other reason the

certificate should not have been issued". If the certificate is cancelled it is to be treated as never having been issued, but if SIAC determines not to cancel a certificate it must dismiss the appeal. Section 26 provides that certifications shall be the subject of periodic review by SIAC.

SIAC

6. SIAC was established by the Special Immigration Appeals Commission Act 1997, which sought to reconcile the competing demands of procedural fairness and national security in the case of foreign nationals whom it was proposed to deport on the grounds of their danger to the public. Thus by section 1 (as amended by section 35 of the 2001 Act) SIAC was to be a superior court of record, now (since amendment in 2002) including among its members persons holding or having held high judicial office, persons who are or have been appointed as chief adjudicators under the Nationality, Immigration and Asylum Act 2002, persons who are or have been qualified to be members of the Immigration Appeal Tribunal and experienced lay members. All are appointed by the Lord Chancellor, who is authorised by section 5 of the Act to make rules governing SIAC's procedure. Such rules, which must be laid before and approved by resolution of each House of Parliament, have been duly made. Such rules may, by the express terms of sections 5 and 6, provide for the proceedings to be heard without the appellant being given full particulars of the reason for the decision under appeal, for proceedings to be held in the absence of the appellant and his legal representative, for the appellant to be given a summary of the evidence taken in his absence and for appointment by the relevant law officer of a legally qualified special advocate to represent the interests of an appellant in proceedings before SIAC from which the appellant and his legal representative are excluded, such person having no responsibility towards the person whose interests he is appointed to represent.

7. The rules applicable to these appeals are the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034). Part 3 of the Rules governs appeals under section 25 of the 2001 Act. In response to a notice of appeal, the Secretary of State, if he intends to oppose the appeal, must file a statement of the evidence on which he relies, but he may object to this being disclosed to the appellant or his lawyer (rule 16): if he objects, a special advocate is appointed, to whom this "closed material" is disclosed (rule 37). SIAC may overrule the Secretary of State's objection and order him to serve this material on the appellant, but in this event the Secretary of State may choose not to rely on the material in the proceedings (rule 38). A special advocate may make

submissions to SIAC and cross-examine witnesses when an appellant is excluded and make written submissions (rule 35), but may not without the directions of SIAC communicate with an appellant or his lawyer or anyone else once the closed material has been disclosed to him (rule 36). Rule 44(3) provides that SIAC "may receive evidence that would not be admissible in a court of law". The general rule excluding evidence of intercepted communications, now found in section 17(1) of the Regulation of Investigatory Powers Act 2000, is expressly disapplied by section 18(1)(e) in proceedings before SIAC. SIAC must give written reasons for its decision, but insofar as it cannot do so without disclosing information which it would be contrary to the public interest to disclose, it must issue a separate decision which will be served only on the Secretary of State and the special advocate (rule 47).

The appellants and the proceedings

8. Of the 10 appellants now before the House, all save 2 were certified and detained in December 2001. The two exceptions are B and H, certified and detained in February and April 2002 respectively. Each of them appealed against his certification under section 25. Ajouaou and F voluntarily left the United Kingdom, for Morocco and France respectively, in December 2001 and March 2002, and their certificates were revoked following their departure. C's certificate was revoked on 31 January 2005 and D's on 20 September 2004. Abu Rideh was transferred to Broadmoor Hospital under sections 48 and 49 of the Mental Health Act 1983 in July 2002. Conditions for his release on bail were set by SIAC on 11 March 2005, and on the following day his certificate was revoked and a control order (currently the subject of an application for judicial review) was made under the Prevention of Terrorism Act 2005, enacted to replace Part 4 of the 2001 Act. Events followed a similar pattern in the cases of E, A and H, save that none was transferred to Broadmoor and notice of intention to deport (currently the subject of challenge) was given to A and H in August 2005, since which date they have been detained. The control orders made in their cases were discharged. B's case followed a similar course to A's, save that he was transferred to Broadmoor under sections 48 and 49 of the 1983 Act in September 2005. In the case of G, bail conditions were set by SIAC in April 2004 and revised on 10 March 2005. His certificate was revoked and a control order made under the 2005 Act on 12 March 2005. He was given notice of intention to deport (which he is challenging) on 11 August 2005, and he has since been detained. His control order was discharged.

9. The appellants' appeals to SIAC under section 25 of the 2001 Act were heard in groups between May and July 2003. During these hearings argument and evidence were directed both to general issues relevant to all or most of the appeals and to specific issues relevant to individual cases. SIAC heard open evidence when the appellants and their legal representatives were present and closed evidence when they were excluded but special advocates were present. On 29 October 2003 judgments were given dismissing all the appeals. There were open judgments on the general and the specific issues, and there were also closed judgments. On the question central to these appeals to the House, raised in its present form when the proceedings before it were well advanced, SIAC gave an affirmative answer: the fact that evidence had, or might have been, procured by torture inflicted by foreign officials without the complicity of the British authorities was relevant to the weight of the evidence but did not render it legally inadmissible. In lengthy judgments given on 11 August 2004, a majority of the Court of Appeal (Pill and Laws LJJ, Neuberger LJ in part dissenting) upheld this decision: [2004] EWCA Civ 1123, [2005] 1 WLR 414. Despite the repeal of Part 4 of the 2001 Act by the 2005 Act, the appellants' right of appeal to the House against the Court of Appeal's decision under section 7 of the 1997 Act is preserved by section 16(4) of the Prevention of Terrorism Act 2005, and no question now arises as to the competency of any of these appeals.

THE COMMON LAW

10. The appellants submit that the common law forbids the admission of evidence obtained by the infliction of torture, and does so whether the product is a confession by a suspect or a defendant and irrespective of where, by whom or on whose authority the torture was inflicted.

11. It is, I think, clear that from its very earliest days the common law of England set its face firmly against the use of torture. Its rejection of this practice was indeed hailed as a distinguishing feature of the common law, the subject of proud claims by English jurists such as Sir John Fortescue (*De Laudibus Legum Angliae,* c. 1460-1470, ed S.B. Chrimes, (1942), Chap 22, pp 47-53), Sir Thomas Smith (*De Republica Anglorum,* ed L Alston, 1906, book 2, chap 24, pp 104-107), Sir Edward Coke (*Institutes of the Laws of England* (1644), Part III, Chap 2, pp 34-36). Sir William Blackstone (*Commentaries on the Laws of England,* (1769) vol IV, chap 25, pp 320-321), and Sir James Stephen (*A History of the Criminal Law of England,* 1883, vol 1, p 222). That reliance was placed on sources of doubtful validity, such as chapter 39 of Magna

Carta 1215 and *Felton's Case* as reported by Rushworth (*Rushworth's Collections,* vol (i), p 638) (see D. Jardine, *A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth,* 1837, pp 10-12, 60-62) did not weaken the strength of received opinion. The English rejection of torture was also the subject of admiring comment by foreign authorities such as Beccaria (*An Essay on Crimes and Punishments,* 1764, Chap XVI) and Voltaire (*Commentary on Beccaria's Crimes and Punishments,* 1766, Chap XII). This rejection was contrasted with the practice prevalent in the states of continental Europe who, seeking to discharge the strict standards of proof required by the Roman-canon models they had adopted, came routinely to rely on confessions procured by the infliction of torture: see A L Lowell, *"The Judicial Use of Torture"* (1897) 11 Harvard L Rev 220-233, 290-300; J Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (1977); D. Hope, "Torture" [2004] 53 ICLQ 807 at pp 810-811. In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice.

12. Despite this common law prohibition, it is clear from the historical record that torture was practised in England in the 16th and early 17th centuries. But this took place pursuant to warrants issued by the Council or the Crown, largely (but not exclusively) in relation to alleged offences against the state, in exercise of the Royal prerogative: see Jardine, *op cit.;* Lowell, *op cit.,* pp 290-300). Thus the exercise of this royal prerogative power came to be an important issue in the struggle between the Crown and the parliamentary common lawyers which preceded and culminated in the English civil war. By the common lawyers torture was regarded as (in Jardine's words: *op cit,* pp 6 and 12) "totally repugnant to the fundamental principles of English law" and "repugnant to reason, justice, and humanity." One of the first acts of the Long Parliament in 1640 was, accordingly, to abolish the Court of Star Chamber, where torture evidence had been received, and in that year the last torture warrant in our history was issued. Half a century later, Scotland followed the English example, and in 1708, in one of the earliest enactments of the Westminster Parliament after the Act of Union in 1707, torture in Scotland was formally prohibited. The history is well summarised by Sir William Holdsworth (*A History of English Law,* vol 5, 3rd ed (1945), pp 194-195, footnotes omitted):

> "We have seen that the use of torture, though illegal by the common law, was justified by virtue of the extraordinary power of the crown which could, in times of emergency, override the common law. We shall see that Coke in the earlier part of his career admitted the existence of this extraordinary power. He therefore saw no objection to the use of torture thus authorized. But we shall see that his views as to the existence of this extraordinary power changed, when the constitutional controversies of the seventeenth century had made it clear that the existence of any extraordinary power in the crown was incompatible with the liberty of the subject. It is not surprising therefore, that, in his later works, he states broadly that all torture is illegal. It always had been illegal by the common law, and the authority under which it had been supposed to be legalized he now denied. When we consider the revolting brutality of the continental criminal procedure, when we remember that this brutality was sometimes practised in England by the authority of the extraordinary power of the crown, we cannot but agree that this single result of the rejection of any authority other than that of the common law is almost the most valuable of the many consequences of that rejection. Torture was not indeed practised so systematically in England as on the continent; but the fact that it was possible to have recourse to it, the fact that the most powerful court in the land sanctioned it, was bound sooner or later to have a demoralising effect upon all those who had prisoners in their power. Once torture has become acclimatized in a legal system it spreads like an infectious disease. It saves the labour of investigation. It hardens and brutalizes those who have become accustomed to use it."

As Jardine put in (*op. cit.*, p 13):

> "As far as authority goes, therefore, the crimes of murder and robbery are not more distinctly forbidden by our criminal code than the application of the torture to witnesses or accused persons is condemned by the oracles of the Common law."

This condemnation is more aptly categorised as a constitutional principle than as a rule of evidence.

13. Since there has been no lawfully sanctioned torture in England since 1640, and the rule that unsworn statements made out of court are inadmissible in court was well-established by at latest the beginning of the 19th century (*Cross & Tapper on Evidence,* 10th edn (2004), p 582), there is an unsurprising paucity of English judicial authority on this subject. In *Pearse v Pearse* (1846) 1 De G & Sm 12, 28-29, 63 ER 950, 957, Knight Bruce V-C observed:

> "The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination . . . Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much . . ."

That was not a case involving any allegation of torture. Such an allegation was however made in *R (Saifi) v Governor of Brixton Prison* [2001] 1 WLR 1134 where the applicant for habeas corpus resisted extradition to India on the ground, among others, that the prosecution relied on a statement obtained by torture and since retracted. The Queen's Bench Divisional Court (Rose LJ and Newman J) accepted the magistrate's judgment that fairness did not call for exclusion of the statement, but was clear (para 60 of the judgment) that the common law and domestic statute law (section 78 of the Police and Criminal Evidence Act 1984) gave effect to the intent of article 15 of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1990, Cm 1775), "the Torture Convention", to which more detailed reference is made below.

Involuntary confessions

14. The appellants relied, by way of partial analogy, on the familiar principle that evidence may not be given by a prosecutor in English criminal proceedings of a confession made by a defendant, if it is challenged, unless the prosecution proves beyond reasonable doubt that the confession had not been obtained by oppression of the person who made it or in consequence of anything said or done which was likely, in

the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof. This rule is now found in section 76 of the Police and Criminal Evidence Act 1984, but enacts a rule established at common law and expressed in such decisions as *Ibrahim v The King* [1914] AC 599, 609-610, *R v Harz and Power* [1967] AC 760, 817, and *Lam Chi-ming v The Queen* [1991] 2 AC 212, 220.

15. Plainly this rule provides an inexact analogy with evidence obtained by torture. It applies only to confessions by defendants, and it provides for exclusion on grounds very much wider than torture, or even inhuman or degrading treatment. But it is in my opinion of significance that the common law (despite suggestions to that effect by Parke B and Lord Campbell CJ in *R v Baldry* (1852) 2 Den 430, 445, 446-447, 169 ER 568, 574, 575, and by the Privy Council, in judgments delivered by Lord Sumner, in *Ibrahim v The King* [1914] AC 599, 610 and Lord Hailsham of St Marylebone in *Director of Public Prosecutions v Ping Lin* [1976] AC 574, 599-600) has refused to accept that oppression or inducement should go to the weight rather than the admissibility of the confession. The common law has insisted on an exclusionary rule. See, for a clear affirmation of the rule, *Wong Kam-ming v The Queen* [1980] AC 247.

16. In *R v Warickshall* (1783) 1 Leach 263, 168 ER 234, this rule was justified on the ground that involuntary statements are inherently unreliable. That justification is, however, inconsistent with the principle which the case established, that while an involuntary statement is inadmissible real evidence which comes to light as a result of such a statement is not. Two points are noteworthy. First, there can ordinarily be no surer proof of the reliability of an involuntary statement than the finding of real evidence as a direct result of it, as was so in *Warickshall's* case itself, but that has never been treated as undermining the rule. Secondly, there is an obvious anomaly in treating an involuntary statement as inadmissible while treating as admissible evidence which would never have come to light but for the involuntary statement. But this is an anomaly which the English common law has accepted, no doubt regarding it as a pragmatic compromise between the rejection of the involuntary statement and the practical desirability of relying on probative evidence which can be adduced without the need to rely on the involuntary statement.

17. Later decisions make clear that while the inherent unreliability of involuntary statements is one of the reasons for holding them to be

inadmissible there are other compelling reasons also. In *Lam Chi-ming v The Queen* [1991] 2 AC 212, 220, in a judgment delivered by Lord Griffiths, the Privy Council summarised the rationale of the exclusionary rule:

> "Their Lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody."

Lord Griffiths described the inadmissibility of a confession not proved to be voluntary as perhaps the most fundamental rule of the English criminal law. The rationale explained by Lord Griffiths was recently endorsed by the House in *R v Mushtaq* [2005] UKHL 25, [2005] 1 WLR 1513, paras 1, 7, 27, 45-46, 71. It is of course true, as counsel for the Secretary of State points out, that in cases such as these the attention of the court was directed to the behaviour of the police in the jurisdiction where the defendant was questioned and the trial was held. This was almost inevitably so. But it is noteworthy that in jurisdictions where the law is in general harmony with the English common law reliability has not been treated as the sole test of admissibility in this context. In *Rochin v California* 342 US 165 (1952) Frankfurter J, giving the opinion of the United States Supreme Court, held that a conviction had been obtained by "conduct that shocks the conscience" (p 172) and referred to a "general principle" that "States in their prosecutions respect certain decencies of civilized conduct" (p 173). He had earlier (p 169) referred to authority on the due process clause of the United States constitution which called for judgment whether proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." In *The People (Attorney General) v O'Brien* [1965] IR 142, 150, the Supreme Court of Ireland held, per Kingsmill Moore J, that "to countenance the use of evidence extracted or discovered by gross personal violence would, in my opinion, involve the State in moral defilement." The High Court of Australia, speaking of a discretion to exclude evidence, observed (per Barwick CJ in *R v Ireland* (1970) 126 CLR 321, 335), that "Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price." In *R v Oickle* [2000] 2 SCR 3, a large majority of the Supreme Court of Canada cited with approval (para 66) an observation of Lamer J that "What should be

repressed vigorously is conduct on [the authorities'] part that shocks the community" and considered (para 69) that while the doctrines of oppression and inducements were primarily concerned with reliability, the confessions rule also extended to protect a broader concept of voluntariness that focused on the protection of the accused's rights and fairness in the criminal process.

Abuse of process

18. The appellants submit, in reliance on common law principles, that the obtaining of evidence by the infliction of torture is so grave a breach of international law, human rights and the rule of law that any court degrades itself and the administration of justice by admitting it. If, therefore, it appears that a confession or evidence may have been procured by torture, the court must exercise its discretion to reject such evidence as an abuse of its process.

19. In support of this contention the appellants rely on four recent English authorities. The first of these is *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42. This case was decided on the factual premise that the applicant had been abducted from South Africa and brought to this country in gross breach of his rights and the law of South Africa, at the behest of the British authorities, to stand trial here, and on the legal premise that a fair trial could be held. The issue, accordingly, was whether the unlawful abduction of the applicant was an abuse of the court's process to which it should respond by staying the prosecution. The House held, by a majority, that it was. The principle laid down most clearly appears in the opinion of Lord Griffiths at pp 61-62:

> ". . . In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

> My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. . . ."

Counsel for the Secretary of State points out that the members of the majority attached particular significance to the involvement of the British authorities in the unlawful conduct complained of, and this is certainly so: see the opinion of Lord Griffiths at p 62F, Lord Bridge of Harwich at pp 64G and 67G and Lord Lowry at pp 73G, 76F and 77D. But the appellants point to the germ of a wider principle. Thus Lord Lowry (p 74G) understood the court's discretion to stay proceedings as an abuse of process to be exercisable where either a fair trial is impossible or "it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case." He opined (p 76C):

> "that the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused."

Lord Lowry's opinion did not earn the concurrence of any other member of the House, but the appellants contend that this wider principle is applicable in the extreme case of evidence procured by torture. In *United States v Toscanino* 500 F 2d 267 (1974) the US Court of Appeals reached a decision very similar to *Bennett*.

20. In *R v Latif* [1996] 1 WLR 104 the executive misconduct complained of was much less gross than in *Bennett,* and the outcome was different. Speaking for the House, Lord Steyn (at pp 112-113) acknowledged a judicial discretion to stay proceedings as an abuse if they would "amount to an affront to the public conscience" and where "it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place." In that case the conduct complained of was not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed.

21. The premises of the Court of Appeal's decision in *R v Mullen* [2000] QB 520 were similar to those in *Bennett,* save that a fair trial had already taken place and *Mullen* had already been convicted of very serious terrorist offences, and sentenced to 30 years' imprisonment, before he was alerted to the misconduct surrounding his abduction from Zimbabwe. Despite the fairness of the trial, his conviction was quashed. Giving the reserved judgment of the court, Rose LJ said (at pp 535-536):

> "This court recognises the immense degree of public revulsion which has, quite properly, attached to the activities of those who have assisted and furthered the violent operations of the I.R.A. and other terrorist organisations. In the discretionary exercise, great weight must therefore be attached to the nature of the offence involved in this case. Against that, however, the conduct of the security services and police in procuring the unlawful deportation of the defendant in the manner which has been described represents, in the view of this court, a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts. The need to discourage such conduct on the part of those who are responsible for criminal prosecutions is a matter of public policy to which, as appears from *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 and *R v Latif* [1996] 1 WLR 104, very considerable weight must be attached."

22. The fourth authority relied on for its statements of principle was *R v Looseley, Attorney General's Reference (No 3 of 2000)* [2001] UKHL 53, [2001] 1 WLR 2060, which concerned cases of alleged entrapment. At the outset of his opinion (para 1) my noble and learned friend Lord Nicholls of Birkenhead declared that:

> "every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state."

A stay is granted in a case of entrapment not to discipline the police (para 17) but because it is improper for there to be a prosecution at all

for the relevant offence, having regard to the state's involvement in the circumstances in which it was committed. To prosecute in a case where the state has procured the commission of the crime is (para 19) "unacceptable and improper" and "an affront to the public conscience." Such a prosecution would not be fair in the broad sense of the word. My noble and learned friend Lord Hoffmann, having referred to Canadian authority and to *Bennett*, accepted Lord Griffiths' description of the power to stay in the case of behaviour which threatened basic human rights or the rule of law as (para 40) "a jurisdiction to prevent abuse of executive power".

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23. If, contrary to their submission (and to the opinion of the Divisional Court in *R (Saifi) v Governor of Brixton Prison*: see para 13 above) the common law and section 78 of the 1984 Act are not, without more, enough to require rejection of evidence which has or may have been procured by torture, whether or not with the complicity of the British authorities, the appellants submit that the European Convention compels that conclusion.

24. It is plain that SIAC (and, for that matter, the Secretary of State) is a public authority within the meaning of section 6 of the Human Rights Act 1998 and so forbidden to act incompatibly with a Convention right. One such right, guaranteed by article 3, is not to be subjected to torture or to inhuman or degrading treatment. This absolute, non-derogable prohibition has been said (*Soering v United Kingdom* (1989) 11 EHRR 439, para 88) to enshrine "one of the fundamental values of the democratic societies making up the Council of Europe". The European Court has used such language on many occasions (*Aydin v Turkey* (1997) 25 EHRR 251, para 81).

25. Article 6 of the Convention guarantees the right to a fair trial. Different views have in the past been expressed on whether, for purposes of article 6, the proceedings before SIAC are to be regarded as civil or criminal. Rather than pursue this debate the parties are agreed that the appellants' challenge to their detention pursuant to the Secretary of State's certification in any event falls within article 5(4). That provision entitles anyone deprived of his liberty by arrest or detention to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. It is well-established that such proceedings must satisfy the

basic requirements of a fair trial: *Garcia Alva v Germany* (2001) 37 EHRR 335; *R (West) v Parole Board, R (Smith) v Parole Board (No 2)* [2005] UKHL 1, [2005] 1 WLR 350. Sensibly, therefore, the parties are agreed that the applicability of article 6 should be left open and the issue resolved on the premise that article 5(4) applies. 29705

26. The Secretary of State submits that under the Convention the admissibility of evidence is a matter left to be decided under national law; that under the relevant national law, namely, the 2001 Act and the Rules, the evidence which the Secretary of State seeks to adduce is admissible before SIAC; and that accordingly the admission of this evidence cannot be said to undermine the fairness of the proceedings. I shall consider the effect of the statutory scheme in more detail below. The first of these propositions is, however, only half true. It is correct that the European Court of Human Rights has consistently declined to articulate evidential rules to be applied in all member states and has preferred to leave such rules to be governed by national law: see, for example, *Schenk v Switzerland* (1988) 13 EHRR 242, para 46; *Ferrantelli and Santangelo v Italy* (1996) 23 EHRR 288, para 48; *Khan v United Kingdom* (2000) 31 EHRR 1016, para 34. It has done so even where, as in *Khan*, evidence was acknowledged to have been obtained unlawfully and in breach of another article of the Convention. But in these cases and others the court has also insisted on its responsibility to ensure that the proceedings, viewed overall on the particular facts, have been fair, and it has recognised that the way in which evidence has been obtained or used may be such as to render the proceedings unfair. Such was its conclusion in *Saunders v United Kingdom* (1996) 23 EHRR 313, a case of compulsory questioning, and in *Teixeira de Castro v Portugal* (1998) 28 EHRR 101, para 39, a case of entrapment. A similar view would have been taken by the Commission in the much earlier case of *Austria v Italy* (1963) 6 YB 740, 784, had it concluded that the victims whom Austria represented had been subjected to maltreatment with the aim of extracting confessions. But the Commission observed that article 6(2) could only be regarded as being violated if the court subsequently accepted as evidence any admissions extorted in this manner. This was a point made by my noble and learned friend Lord Hoffmann in the much more recent devolution case of *Montgomery v H M Advocate, Coulter v H M Advocate* [2003] 1 AC 641, 649, when he observed:

> "Of course events before the trial may create the conditions for an unfair determination of the charge. For example, an accused who is convicted on evidence obtained from him by torture has not had a fair trial. But the breach of article 6(1) lies not in the use of torture

> (which is, separately, a breach of article 3) but in the reception of the evidence by the court for the purposes of determining the charge. If the evidence had been rejected, there would still have been a breach of article 3 but no breach of article 6(1)."

Lord Hoffmann, in *R v Governor of Brixton Prison, Ex p Levin* [1997] AC 741, 748, did not exclude the possibility (he did not have to decide) that evidence might be rejected in extradition proceedings if, though technically admissible, it had been obtained in a way which outraged civilised values. Such was said to be the case in *R (Ramda) v Secretary of State for the Home Department* [2002] EWHC 1278 (Admin), unreported, 27 June 2002, where the applicant resisted extradition to France on the ground that the evidence which would be relied on against him at trial had been obtained by torture and that he would be unable to resist its admission. The Queen's Bench Divisional Court concluded (para 22) that if these points were made out, his trial would not be fair and the Secretary of State would be effectively bound to refuse to extradite him. In the very recent case of *Mamatkulov and Askarov v Turkey* (App Nos 46827/99 and 46951/99, unreported, 4 February 2005) Judges Bratza, Bonello and Hedigan delivered a joint partly dissenting opinion, in the course of which they held in paras 15-17:

> "15. As in the case of the risk of treatment proscribed by Article 3 of the Convention, the risk of a flagrant denial of justice in the receiving State for the purposes of Article 6 must be assessed primarily by reference to the facts which were known or should have been known by the respondent State at the time of the extradition.
>
> 16. The majority of the Court acknowledge that, in the light of the information available, there 'may have been reasons for doubting at the time' that the applicants would receive a fair trial in Uzbekistan (judgment, § 91). However, they conclude that there is insufficient evidence to show that any possible irregularities in the trial were liable to constitute a flagrant denial of justice within the meaning of the Court's *Soering* judgment.
>
> 17. We consider, on the contrary, that on the material available at the relevant time there were substantial grounds not only for doubting that the applicants would receive a fair trial but for concluding that they ran a real risk of suffering a flagrant denial of justice. The Amnesty International briefing document afforded, in our view, credible grounds for believing that self-incriminating

> evidence extracted by torture was routinely used to secure guilty verdicts and that suspects were very frequently denied access to a lawyer of their choice, lawyers often being given access to their client by law enforcement officials after the suspect had been held in custody for several days, when the risk of torture was at its greatest. In addition, it was found that in many cases law enforcement officials would only grant access to a lawyer after the suspect had signed a confession and that meetings between lawyers and clients, once granted, were generally infrequent, defence lawyers rarely being allowed to be present at all stages of the investigation."

The approach of these judges is consistent with the even more recent decision of the Court in *Harutyunyan v Armenia* (App No 36549/03, unreported, 5 July 2005) where in paras 2(b) and (f) the Court ruled:

> "(b) As to the complaint about the coercion and the subsequent use in court of the applicant's confession statement, the Court considers that it cannot, on the basis of the file, determine the admissibility of this part of the application and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of the Court, to give notice of this complaint to the respondent Government.
>
> (f) As to the complaint about the use in court of witness statements obtained under torture, the Court considers that it cannot, on the basis of the file, determine the admissibility of this part of the application and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of the Court, to give notice of this complaint to the respondent Government."

Had the Court found that the complaints of coercion and torture appeared to be substantiated, a finding that article 6(1) had been violated would, in my opinion, have been inevitable. As it was, the Court did not rule that these complaints were inadmissible. Nor did it dismiss them. It adjourned examination of the applicant's complaints concerning the alleged violation of his right to silence and the admission in court of evidence obtained under torture.

27. The appellants' submission has a further, more international, dimension. They accept, as they must, that a treaty, even if ratified by the United Kingdom, has no binding force in the domestic law of this country unless it is given effect by statute or expresses principles of customary international law: *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696; *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976. But they rely on the well-established principle that the words of a United Kingdom statute, passed after the date of a treaty and dealing with the same subject matter, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it: *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771. The courts are obliged under section 2 of the 1998 Act to take Strasbourg jurisprudence into account in connection with a Convention right, their obligation under section 3 is to interpret and give effect to primary and subordinate legislation in a way which is compatible with Convention rights so far as possible to do so and it is their duty under section 6 not to act incompatibly with a Convention right. If, and to the extent that, development of the common law is called for, such development should ordinarily be in harmony with the United Kingdom's international obligations and not antithetical to them. I do not understand these principles to be contentious.

28. The appellants' argument may, I think, be fairly summarised as involving the following steps:

(1) The European Convention is not to be interpreted in a vacuum, but taking account of other international obligations to which member states are subject, as the European Court has in practice done.
(2) The prohibition of torture enjoys the highest normative force recognised by international law.
(3) The international prohibition of torture requires states not merely to refrain from authorising or conniving at torture but also to suppress and discourage the practice of torture and not to condone it.
(4) Article 15 of the Torture Convention requires the exclusion of statements made as a result of torture as evidence in any proceedings.
(5) Court decisions in many countries have given effect directly or indirectly to article 15 of the Torture Convention.

(6) The rationale of the exclusionary rule in article 15 is found not only in the general unreliability of evidence procured by torture but also in its offensiveness to civilised values and its degrading effect on the administration of justice.

(7) Measures directed to counter the grave dangers of international terrorism may not be permitted to undermine the international prohibition of torture.

It is necessary to examine these propositions in a little detail.

(1) *Interpretation of the Convention in a wider international context.*

29. Article 31 of the Vienna Convention on the Law of Treaties, reflecting principles of customary international law, provides in article 31(3)(c) that in interpreting a treaty there shall be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties. The European Court has recognised this principle (*Golder v United Kingdom* (1975) 1 EHRR 524, para 29, *HN v Poland* (Application No 77710/01, 13 September 2005, unreported, para 75)), and in *Al-Adsani v United Kingdom* (2001) 34 EHRR 273, para 55, it said (footnotes omitted):

> "55. The Court must next assess whether the restriction was proportionate to the aim pursued. It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that Article 31(3)(c) of that treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. The Convention, in including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity."

The Court has in its decisions invoked a wide range of international instruments, including the United Nations Convention on the Rights of the Child 1989 and the Beijing Rules (*V v United Kingdom* (1999) 30

EHRR 121, paras 76-77), the Council of Europe Standard Minimum Rules for the Treatment of Prisoners (*S v Switzerland* (1991) 14 EHRR 670, para 48) and the 1975 Declaration referred to in para 31 below (*Ireland v United Kingdom* (1978) 2 EHRR 25, para 167). More pertinently to these appeals, the Court has repeatedly invoked the provisions of the Torture Convention: see, for example, *Aydin v Turkey* (1997) 25 EHRR 251, para 103; *Selmouni v France* (1999) 29 EHRR 403, para 97. In *Soering v United Kingdom* (1989) 11 EHRR 439, para 88, the Court said (footnotes omitted):

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> "Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency. This absolute prohibition on torture and on inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.
>
> The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that 'no State Party shall . . . extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture.' The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he

would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article."

(2) *The international prohibition of torture.*

30. The preamble to the United Nations Charter (1945) recorded the determination of member states to reaffirm their faith in fundamental human rights and the dignity and worth of the human person and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. The Charter was succeeded by the Universal Declaration of Human Rights 1948, the European Convention 1950 and the International Covenant on Civil and Political Rights 1966, all of which (in articles 5, 3 and 7 respectively, in very similar language) provided that no one should be subjected to torture or inhuman or degrading treatment.

31. On 9 December 1975 the General Assembly of the United Nations, without a vote, adopted Resolution 3452 (XXX), a Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This included (in article 1) a definition of torture as follows:

"*Article 1*

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to,

lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

Articles 2-4 provided as follows:

> "*Article 2*
>
> Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.
>
> *Article 3*
>
> No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.
>
> *Article 4*
>
> Each State shall, in accordance with the provisions of this Declaration, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction."

Action was then taken to prepare a convention. This action culminated in the Torture Convention, which came into force on 26 June 1987. All member states of the Council of Europe are members with the exception of Moldova, Andorra and San Marino, the last two of which have been signed but not yet ratified.

32. The Torture Convention contained, in article 1, a definition of torture:

"*Article 1*

1. For the purposes of this Convention, 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

It is noteworthy that the torture must be inflicted by or with the complicity of an official, must be intentional, and covers treatment inflicted for the purpose of obtaining information or a confession. Articles 2, 3 and 4 provide:

"*Article 2*

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a

consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

33. It is common ground in these proceedings that the international prohibition of the use of torture enjoys the enhanced status of a *jus cogens* or peremptory norm of general international law. For purposes of the Vienna Convention, a peremptory norm of general international law is defined in article 53 to mean "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, 197-199, the *jus cogens* nature of the international crime of torture, the subject of universal jurisdiction, was recognised. The implications of this finding were fully and authoritatively explained by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija* [1998] ICTY 3, 10 December 1998 in a passage which, despite its length, calls for citation (footnotes omitted):

"3. Main Features of the Prohibition Against Torture in International Law.

147. There exists today universal revulsion against torture: as a USA Court put it in *Filartiga v. Peña-Irala*, 'the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an enemy of all mankind'. This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination. The prohibition against torture exhibits

three important features, which are probably held in common with the other general principles protecting fundamental human rights.

(a) The Prohibition Even Covers Potential Breaches.

148. Firstly, given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in *Soering*, international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.

149. Let us consider these two aspects separately. Normally States, when they undertake international obligations through treaties or customary rules, adopt all the legislative and administrative measures necessary for implementing such obligations. However, subject to obvious exceptions, failure to pass the required implementing legislation has only a potential effect: the wrongful fact occurs only when administrative or judicial measures are taken which, being contrary to international rules due to the lack of implementing legislation, generate State responsibility. By contrast, in the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, States must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.

150. Another facet of the same legal effect must be emphasised. Normally, the maintenance or passage of national legislation inconsistent with international rules

generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (lato sensu) only when such legislation is concretely applied. By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect.

(b) The Prohibition Imposes Obligations Erga Omnes.

151. Furthermore, the prohibition of torture imposes upon States obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

152. Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner.

(c) The Prohibition Has Acquired the Status of Jus Cogens.

153. While the erga omnes nature just mentioned appertains to the area of international enforcement (lato sensu), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through

international treaties or local or special customs or even general customary rules not endowed with the same normative force.

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154. Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.

155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: 'individuals have international duties which transcend the national obligations of obedience imposed by the individual State'.

156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court in *Demjanjuk*, 'it is the universal character of the crimes in question ie. international crimes which vests in every State the authority to try and punish those who participated in their commission'.

157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption."

There can be few issues on which international legal opinion is more clear than on the condemnation of torture. Offenders have been recognised as the "common enemies of mankind" (*Demjanjuk v Petrovsky* 612 F Supp 544 (1985), 566, Lord Cooke of Thorndon has described the right not to be subjected to inhuman treatment as a "right inherent in the concept of civilisation" (*Higgs v Minister of National Security* [2000] 2 AC 228, 260), the Ninth Circuit Court of Appeals has described the right to be free from torture as "fundamental and universal" (*Siderman de Blake v Argentina* 965 F 2d 699 (1992), 717) and the UN Special Rapporteur on Torture (Mr Peter Koojimans) has said that "If ever a phenomenon was outlawed unreservedly and unequivocally it is torture" (*Report of the Special Rapporteur on Torture*, E/CN.4/1986/15, para 3).

(3) *The duty of states in relation to torture.*

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34. As appears from the passage just cited, the *jus cogens erga omnes* nature of the prohibition of torture requires member states to do more than eschew the practice of torture. In *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883, paras 29, 117, the House refused recognition to conduct which represented a serious breach of international law. This was, as I respectfully think, a proper response to the requirements of international law. In General Comment 20 (1992) on article 7 of the ICCPR, the UN Human Rights Committee said, in para 8:

> "The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction."

Article 41 of the International Law Commission's draft articles on Responsibility of States for internationally wrongful acts (November 2001) requires states to cooperate to bring to an end through lawful means any serious breach of an obligation under a peremptory norm of general international law. An advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004, General List No 131), para 159 explained the consequences of the breach found in that case:

> "159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an

> end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."

There is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law. As McNally JA put it in *S v Nkomo* 1989 (3) ZLR 117, 131:

> "It does not seem to me that one can condemn torture while making use of the mute confession resulting from torture, because the effect is to encourage torture."

(4) *Article 15 of the Torture Convention.*

35. Article 12 of the 1975 Declaration provided:

> "Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings."

Article 15 of the Torture Convention repeats the substance of this provision, subject to a qualification:

> "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

The additional qualification makes plain the blanket nature of this exclusionary rule. It cannot possibly be read, as counsel for the Secretary of State submits, as intended to apply only in criminal proceedings. Nor can it be understood to differentiate between confessions and accusatory statements, or to apply only where the state in whose jurisdiction the proceedings are held has inflicted or been complicit in the torture. It would indeed be remarkable if national courts, exercising universal jurisdiction, could try a foreign torturer for acts of torture committed abroad, but could nonetheless receive evidence obtained by such torture. The matter was succinctly put in the Report by Mr Alvaro Gil-Robles, the Council of Europe Commissioner for Human Rights, in his Report on his visit to the United Kingdom in November 2004 (8 June 2005, Comm DH (2005)6):

> "torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose — the former can never be admissible in the latter."

(5) *State practice*.

36. A Committee against Torture was established under article 17 of the Torture Convention to monitor compliance by member states. The Committee has recognised a duty of states, if allegations of torture are made, to investigate them: *PE v France*, 19 December 2002, CAT/C/29/D/193/2001, paras 5.3, 6.3; *GK v Switzerland*, 12 May 2003, CAT/C/30/D/219/2002), para 6.10. The clear implication is that the evidence should have been excluded had the complaint been verified.

37. In Canada, article 15 of the Torture Convention has been embodied in the criminal code: see *India v Singh* 108 CCC (3d) 274 (1996), para 20. In France, article 15 has legal effect (*French Republic v Haramboure*, Cour de Cassation, Chambre Criminelle, 24 January 1995, No. de pourvoi 94-81254), and extradition to Spain was refused where allegations that a witness statement had been procured by torture in Spain was judged not to have been adequately answered (*Le Ministère Public v Irastorza Dorronsoro*, Cour d'Appel de Pau, No 238/2003, 16 May 2003). In the Netherlands, it was held by the Supreme Court to follow from article 3 of the European Convention and article 7 of the ICCPR that if witness statements had been obtained by torture they could not be used as evidence: *Pereira*, 1 October 1996, nr 103.094, para 6.2. In Germany, as in France, article 15 has legal effect:

El Motassadeq, decision of the Higher Regional Court of Hamburg, 14 June 2005, para 2.

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38. In the United States, torture was recognised to be prohibited by the law of nations even before the Torture Convention was made: *Filartiga v Peña-Irala* 630 F 2d 876 (1980). Earlier still, it had been said to be

> "unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case": *LaFrance v Bohlinger* 499 F 2d 29 (1974), para 6.

(6) *The rationale of the exclusionary rule.*

39. In their work on *The United Nations Convention against Torture* (1988), p 148, Burgers and Danelius suggest that article 15 of the Torture Convention is based on two principles:

> "The rule laid down in article 15 would seem to be based on two different considerations. First of all, it is clear that a statement made under torture is often an unreliable statement, and it could therefore be contrary to the principle of 'fair trial' to invoke such a statement as evidence before a court. Even in countries whose court procedures are based on a free evaluation of all evidence, it is hardly acceptable that a statement made under torture should be allowed to play any part in court proceedings.
>
> In the second place, it should be recalled that torture is often aimed at ensuring evidence in judicial proceedings. Consequently, if a statement made under torture cannot be invoked as evidence, an important reason for using torture is removed, and the prohibition against the use of such statements as evidence before a court can therefore have the indirect effect of preventing torture."

It seems indeed very likely that the unreliability of a statement or confession procured by torture and a desire to discourage torture by devaluing its product are two strong reasons why the rule was adopted. But it also seems likely that the article reflects the wider principle

expressed in article 69(7) of the Rome Statute of the International Criminal Court, which has its counterpart in the Rules of Procedure and Evidence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda:

> "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
>
> (a) the violation casts substantial doubt on the reliability of the evidence; or
>
> (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."

The appellants contend that admission as evidence against a party to legal proceedings of a confession or an accusatory statement obtained by inflicting treatment of the severity necessary to fall within article 1 of the Torture Convention will "shock the community", infringe that party's rights and the fairness of the proceedings (*R v Oickle*: see para 17 above), shock the judicial conscience (*United States v Hensel* 509 F Supp 1364 (1981), p 1372), abuse or degrade the proceedings (*United States v Toscanino* 500 F 2d 267 (1974), p 276), and involve the state in moral defilement (*The People (Attorney General) v O'Brien*: see para 17 above).

(7) *The impact of terrorism*

40. The European Court has emphasised that article 3 of the European Convention is an absolute prohibition, not derogable in any circumstances. In *Chahal v United Kingdom* (1996) 23 EHRR 413, para 79, it ruled:

> "79. Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses

> of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation."

That the Torture Convention, including article 15, enjoys the same absolute quality is plain from the text of article 2, quoted in para 32 above.

41. It is true, as the Secretary of State submits, that States Members of the United Nations and the Council of Europe have been strongly urged since 11 September 2001 to cooperate and share information in order to counter the cruel and destructive evil of terrorism. But these calls have been coupled with reminders that human rights, and international and humanitarian law, must not be infringed or compromised. Thus, while the Council of Europe's Parliamentary Assembly recommendation 1534 of 26 September 2001 refers to co-operation "on the basis of the Council of Europe's values and legal instruments", it also refers to Parliamentary Assembly Resolution 1258, para 7 of which states:

> "These attacks have shown clearly the real face of terrorism and the need for a new kind of response. This terrorism does not recognise borders. It is an international problem to which international solutions must be found based on a global political approach. The world community must show that it will not capitulate to terrorism, but that it will stand more strongly than before for democratic values, the rule of law and the defence of human rights and fundamental freedoms."

The Council of Europe Convention on the Prevention of Terrorism of 16 May 2005, recalling in its preamble

> "the need to strengthen the fight against terrorism and reaffirming that all measures taken to prevent or suppress terrorist offences have to respect the rule of law and democratic values, human rights and fundamental freedoms as well as other provisions of international law, including, where applicable, international humanitarian law",

went on to provide:

> "Article 3 – National prevention policies
>
> 1 Each Party shall take appropriate measures, particularly in the field of training of law enforcement authorities and other bodies, and in the fields of education, culture, information, media and public awareness raising, with a view to preventing terrorist offences and their negative effects while respecting human rights obligations as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law."

Other similar examples could be given.

42. The United Nations pronouncements are to the same effect. Thus Security Council resolution 1373 of 28 September 2001 called for co-operation and exchange of information to prevent terrorist acts, but also reaffirmed resolution 1269 of 19 October 1999 which called for observance of the principles of the UN Charter and the norms of international law, including international humanitarian law. By Security Council resolution 1566 of 8 October 2004 states were reminded

> "that they must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, and in particular international human rights, refugee and humanitarian law."

Again, other similar examples could be given. The General Assembly has repeatedly made the same point: see, for example, resolution 49/60 of 9 December 1994; resolution 51/210 of 17 December 1996; and resolution 59/290 of 13 April 2005. The Secretary General of the UN echoed the same theme in statements of 4 October 2002, 6 March 2003 and 10 March 2005.

43. The events of 11 September prompted the Committee against Torture to issue a statement on 22 November 2001 (CAT/C/XXVII/Misc 7) in which it said:

> "The Committee against Torture condemns utterly the terrorist attacks of September 11 and expresses its profound condolences to the victims, who were nationals of some 80 countries, including many State parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee is mindful of the terrible threat to international peace and security posed by these acts of international terrorism, as affirmed in Security Council resolution 1368. The Committee also notes that the Security Council in resolution 1373 identified the need to combat by all means, in accordance with the Charter of the United Nations, the threats caused by terrorist acts.
>
> The Committee against Torture reminds State parties to the Convention of the non-derogable nature of most of the obligations undertaken by them in ratifying the Convention.
>
> The obligations contained in Articles 2 (whereby 'no exceptional circumstances whatsoever may be invoked as a justification of torture'), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions and must be observed in all circumstances.
>
> The Committee against Torture is confident that whatever responses to the threat of international terrorism are adopted by State parties, such responses will be in conformity with the obligations undertaken by them in ratifying the Convention against Torture."

A statement to similar effect was made by the Committee against Torture, the Special Rapporteur on Torture, the Chairperson of the 22nd session of the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture and the Acting United Nations Commissioner for Human Rights on 26 June 2004 (CAT Report to the General Assembly, A/59/44 (2004), para 17). In its Conclusions and Recommendations on the United Kingdom dated 10 December 2004 (CAT/C/CR/33/3), having received the United Kingdom's fourth periodic report, the Committee welcomed the Secretary of State's indication that he did not

intend to rely upon or present evidence where there is a knowledge or belief that torture has taken place but recommended that this be appropriately reflected in formal fashion, such as legislative incorporation or undertaking to Parliament, and that means be provided whereby an individual could challenge the legality of any evidence plausibly suspected of having been obtained by torture in any proceeding.

44. This recommendation followed the judgment of the Court of Appeal in these appeals. Concern at the effect of that judgment was also expressed by the International Commission of Jurists on 28 August 2004, which declared that "Evidence obtained by torture, or other means which constitute a serious violation of human rights against a defendant or third party, is never admissible and cannot be relied on in any proceedings," and by the Council of Europe Commissioner for Human Rights, Mr Gil-Robles in his Report cited in para 35 above. In a Report of 9 June 2005 on a visit made to the United Kingdom in March 2004, the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT/Inf (2005) 10), para 31, observed:

> "31. During the 2004 visit, several persons whom the delegation met were very concerned that the SIAC could apparently take into consideration evidence that might have been obtained elsewhere by coercion, or even by torture. Such an approach would contravene universal principles governing the protection of human rights and the prohibition of torture and other forms of ill-treatment, to which the United Kingdom has adhered."

In Resolution 1433, adopted on 26 April 2005, on the Lawfulness of Detentions by the United States in Guantanamo Bay, the Parliamentary Assembly of the Council of Europe called on the United States to cease the practice of rendition and called on member states to respect their obligation under article 15 of the Torture Convention.

45. The House has not been referred to any decision, resolution, agreement or advisory opinion suggesting that a confession or statement obtained by torture is admissible in legal proceedings if the torture was inflicted without the participation of the state in whose jurisdiction the proceedings are held, or that such evidence is admissible in proceedings related to terrorism.

46. While counsel for the Secretary of State questions the effect and applicability of some of the material on which the appellants rely, he founds his case above all on the statutory scheme established by Part 4 of the 2001 Act. He builds on the appellants' acceptance that the Secretary of State may, when forming the reasonable belief and suspicion required for certification under section 21, and when acting on that belief to arrest, search and detain a suspect, act on information which has or may have been obtained by torture inflicted in a foreign country without British complicity. That acceptance, he submits, supports the important and practical need for the security services and the Secretary of State to obtain intelligence and evidence from foreign official sources, some of which (in the less progressive countries) might dry up if their means of obtaining intelligence and evidence were the subject of intrusive enquiry. But it would create a mismatch which Parliament could not have intended if the Secretary of State were able to rely on material at the certification stage which SIAC could not later receive. It would, moreover, emasculate the statutory scheme, which is specifically designed to enable SIAC, constituted as it is, to see all relevant material, even such ordinarily inadmissible material as may be obtained on warranted intercepts. This is reflected in rule 44(3) of the applicable Rules, which dispenses with all rules of evidence, including any that might otherwise preclude admission of evidence obtained by torture in the circumstances postulated. This is not a negligible argument, and a majority of the Court of Appeal broadly accepted it. There are, however, in my opinion, a number of reasons why it must be rejected.

47. I am prepared to accept (although I understand the interveners represented by Mr Starmer QC not to do so) that the Secretary of State does not act unlawfully if he certifies, arrests, searches and detains on the strength of what I shall for convenience call foreign torture evidence. But by the same token it is, in my view, questionable whether he would act unlawfully if he based similar action on intelligence obtained by officially-authorised British torture. If under such torture a man revealed the whereabouts of a bomb in the Houses of Parliament, the authorities could remove the bomb and, if possible, arrest the terrorist who planted it. There would be a flagrant breach of article 3 for which the United Kingdom would be answerable, but no breach of article 5(4) or 6. Yet the Secretary of State accepts that such evidence would be inadmissible before SIAC. This suggests that there is no correspondence between the material on which the Secretary of State may act and that which is admissible in legal proceedings.

48. This is not an unusual position. It arises whenever the Secretary of State (or any other public official) relies on information which the rules of public interest immunity prevent him adducing in evidence: *Makanjuola v Commissioner of Police of the Metropolis* [1992] 3 All ER 617, 623 e to j; *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274, 295F-297C. It is a situation which arises where action is based on a warranted interception and there is no dispensation which permits evidence to be given. This may be seen as an anomaly, but (like the anomaly to which the rule in *R v Warickshall* gives rise) it springs from the tension between practical common sense and the need to protect the individual against unfair incrimination. The common law is not intolerant of anomaly.

49. There would be a much greater anomaly if the duty of SIAC, hearing an appeal under section 25, were to decide whether the Secretary of State had entertained a reasonable belief and suspicion at the time of certification. But, as noted above in para 5, SIAC's duty is to cancel the certificate if it considers that there "are" no reasonable grounds for a belief or suspicion of the kind referred to. This plainly refers to the date of the hearing. The material may by then be different from that on which the Secretary of State relied. He may have gathered new and better information; or some of the material on which he had relied may have been discredited; or he may have withdrawn material which he was ordered but was unwilling to disclose. SIAC must act on the information lawfully before it to decide whether there are reasonable grounds at the time of its decision.

50. I am not impressed by the argument based on the practical undesirability of upsetting foreign regimes which may resort to torture. On the approach of the Court of Appeal majority, third party torture evidence, although legally admissible, must be assessed by SIAC in order to decide what, if any, weight should be given to it. This is an exercise which could scarcely be carried out without investigating whether the evidence had been obtained by torture, and, if so, when, by whom, in what circumstances and for what purpose. Such an investigation would almost inevitably call for an approach to the regime which is said to have carried out the torture.

51. The Secretary of State is right to submit that SIAC is a body designed to enable it to receive and assess a wide range of material, including material which would not be disclosed to a body lacking its special characteristics. And it would of course be within the power of a sovereign Parliament (in breach of international law) to confer power on

SIAC to receive third party torture evidence. But the English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention. I am startled, even a little dismayed, at the suggestion (and the acceptance by the Court of Appeal majority) that this deeply-rooted tradition and an international obligation solemnly and explicitly undertaken can be overridden by a statute and a procedural rule which make no mention of torture at all. Counsel for the Secretary of State acknowledges that during the discussions on Part 4 the subject of torture was never the subject of any thought or any allusion. The matter is governed by the principle of legality very clearly explained by my noble and learned friend Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

It trivialises the issue before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer.

52. I accept the broad thrust of the appellants' argument on the common law. The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention. The answer to the central question posed at the outset of this opinion is to be found not in a governmental policy, which may change, but in law.

Inhuman or degrading treatment

53. The appellants broaden their argument to contend that all the principles on which they rely apply to inhuman and degrading treatment, if inflicted by an official with the requisite intention and effect, as to torture within the Torture Convention definition. It is, of course, true that article 3 of the European Convention (and the comparable articles of other human rights instruments) lump torture and inhuman or degrading treatment together, drawing no distinction between them. The European Court did, however, draw a distinction between them in *Ireland v United Kingdom* (1978) 2 EHRR 25, holding that the conduct complained of was inhuman or degrading but fell short of torture, and article 16 of the Torture Convention draws this distinction very expressly:

> "*Article 16*
>
> 1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.
> 2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel,

> inhuman or degrading treatment or punishment or which relate to extradition or expulsion."

Ill-treatment falling short of torture may invite exclusion of evidence as adversely affecting the fairness of a proceeding under section 78 of the 1984 Act, where that section applies. But I do not think the authorities on the Torture Convention justify the assimilation of these two kinds of abusive conduct. Special rules have always been thought to apply to torture, and for the present at least must continue to do so. It would, on the other hand, be wrong to regard as immutable the standard of what amounts to torture. This is a point made by the European Court in *Selmouni v France* (1999) 29 EHRR 403, paras 99-101 (footnotes omitted):

> "99 The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading. In any event, the Court reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.
>
> 100 In other words, it remains to establish in the instant case whether the 'pain or suffering' inflicted on Mr Selmouni can be defined as 'severe' within the meaning of Article 1 of the United Nations Convention. The Court considers that this 'severity' is, like the 'minimum severity' required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.
>
> 101 The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture. However, having regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions', the Court considers that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high

> standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."

It may well be that the conduct complained of in *Ireland v United Kingdom,* or some of the Category II or III techniques detailed in a J2 memorandum dated 11 October 2002 addressed to the Commander, Joint Task Force 170 at Guantanamo Bay, Cuba, (see *The Torture Papers: The Road to Abu Ghraib*, ed K Greenberg and J Dratel, (2005), pp 227-228), would now be held to fall within the definition in article 1 of the Torture Convention.

The burden of proof

54. The appellants contend that it is for a party seeking to adduce evidence to establish its admissibility if this is challenged. The Secretary of State submits that it is for a party seeking to challenge the admissibility of evidence to make good the factual grounds on which he bases his challenge. He supports this approach in the present context by pointing to the reference in article 15 of the Torture Convention to a statement "which is established to have been made as a result of torture." There is accordingly said to be a burden on the appellant in the SIAC proceedings to prove the truth of his assertion.

55. I do not for my part think that a conventional approach to the burden of proof is appropriate in a proceeding where the appellant may not know the name or identity of the author of an adverse statement relied on against him, may not see the statement or know what the statement says, may not be able to discuss the adverse evidence with the special advocate appointed (without responsibility) to represent his interests, and may have no means of knowing what witness he should call to rebut assertions of which he is unaware. It would, on the other hand, render section 25 appeals all but unmanageable if a generalised and unsubstantiated allegation of torture were in all cases to impose a duty on the Secretary of State to prove the absence of torture. It is necessary, in this very unusual forensic setting, to devise a procedure which affords some protection to an appellant without imposing on either party a burden which he cannot ordinarily discharge.

56. The appellant must ordinarily, by himself or his special advocate, advance some plausible reason why evidence may have been procured by torture. This will often be done by showing that evidence has, or is likely to have, come from one of those countries widely known or believed to practise torture (although they may well be parties to the Torture Convention and will, no doubt, disavow the practice publicly). Where such a plausible reason is given, or where SIAC with its knowledge and expertise in this field knows or suspects that evidence may have come from such a country, it is for SIAC to initiate or direct such inquiry as is necessary to enable it to form a fair judgment whether the evidence has, or whether there is a real risk that it may have been, obtained by torture or not. All will depend on the facts and circumstances of a particular case. If SIAC is unable to conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to admit the evidence. Otherwise it should admit it. It should throughout be guided by recognition of the important obligations laid down in articles 3 and 5(4) of the European Convention and, through them, article 15 of the Torture Convention, and also by recognition of the procedural handicaps to which an appellant is necessarily subject in proceedings from which he and his legal representatives are excluded.

57. Since a majority of my noble and learned friends do not agree with the view I have expressed on this point, and since it is of practical importance, I should explain why I do not share their opinion.

58. I agree, of course, that the reference in article 15 to "any statement which is established to have been made as a result of torture" would ordinarily be taken to mean that the truth of such an allegation should be proved. That is what "established" ordinarily means. I would also accept that in any ordinary context the truth of the allegation should be proved by the party who makes it. But the procedural regime with which the House is concerned in this case, described in paragraphs 6-7 and 55 above, is very far from ordinary. A detainee may face the prospect of indefinite years of detention without charge or trial, and without knowing what is said against him or by whom. Lord Woolf CJ was not guilty of overstatement in describing an appellant to SIAC, if denied access to the evidence, as "undoubtedly under a grave disadvantage" *(M v Secretary of State for the Home Department* [2004] EWCA Civ 324, [2004] 2 All ER 863, para 13). The special advocates themselves have publicly explained the difficulties under which they labour in seeking to serve the interests of those they are appointed to represent (Constitutional Affairs Committee of the House of Commons, *The operation of the Special Immigration Appeals Commission (SIAC)*

and the use of Special Advocates, Seventh Report of Session 2004-05, vol II, HC 323-II, Ev 1-12, 53-61).

59. My noble and learned friend Lord Hope proposes, in paragraph 121 of his opinion, the following test: is it *established*, by means of such diligent enquiries into the sources that it is practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State *was* obtained under torture? This is a test which, in the real world, can never be satisfied. The foreign torturer does not boast of his trade. The security services, as the Secretary of State has made clear, do not wish to imperil their relations with regimes where torture is practised. The special advocates have no means or resources to investigate. The detainee is in the dark. It is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet. The result will be that, despite the universal abhorrence expressed for torture and its fruits, evidence procured by torture will be laid before SIAC because its source will not have been "established".

60. The authorities relied on by my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry to support their conclusion are of questionable value at most. In *El Motassadeq*, a decision of the Higher Regional Court of Hamburg of 14 June 2005, the United States Department of Justice supplied the German court, for purposes of a terrorist trial proceeding in Germany with reference to the events of 11 September 2001, with summaries of statements made by three Arab men. There was material suggesting that the statements had been obtained by torture, and the German court sought information on the whereabouts of the witnesses and the circumstances of their examination. The whereabouts of two of the witnesses had been kept secret for several years, but it was believed the American authorities had access to them. The American authorities supplied no information, and said they were not in a position to give any indications as to the circumstances of the examination of these persons. Two American witnesses who attended to give evidence took the same position. One might have supposed that the summaries would, without more, have been excluded. But the German court, although noting that it was the United States, whose agents were accused of torture, which was denying information to the court, proceeded to examine the summaries and found it possible to infer from internal evidence that torture had not been used. This is not a precedent which I would wish to follow. But at least the defendant knew what the evidence was.

61. In *Mamatkulov and Askarov v Turkey* (Application Nos 46827/99 and 46951/99, unreported, 4 February 2005) the applicants had resisted an application by the Republic of Uzbekistan to extradite them from Turkey to stand trial on very serious charges in Uzbekistan. They resisted extradition on the ground, among others, that if returned to Uzbekistan they would be tortured. There was material to show that that was not a fanciful fear. On application made by them to the European Court of Human Rights, it indicated to Turkey under rule 39 of its procedural rules that the extradition should not take place until it had had an opportunity to examine the validity of the applicants' fears. But in breach of this measure, and in violation of article 34 of the Convention, Turkey surrendered the applicants. The Chamber found, in effect, that no findings of fact could be made since the applicants had been denied an opportunity to have inquiries made to obtain evidence in support of their allegations: paragraph 57 of the judgment. The approach of the Grand Chamber appears from paragraphs 68 and 69 of its judgment:

> "68. It would hardly be compatible with the 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a person to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment (*Soering*, cited above, p 35, § 88).
>
> 69. In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*..."

Despite a compelling dissent, from which I have quoted in paragraph 26 above, the Grand Chamber concluded that Turkey had not violated article 3 of the Convention in surrendering the applicants. It did so in reliance on assurances received by Turkey from the Uzbek Government and the Uzbek Public Prosecutor before and after the surrender, and medical reports by doctors at the Uzbek prison where the applicants were being held. These matters were not sufficient to allay the concerns of the minority, and understandably, since Turkey's unlawful conduct prevented the European Court examining the case as it would have wished. But the applicants were able to participate fully in the proceedings in Turkey and were not denied knowledge of the case against them.

62. I regret that the House should lend its authority to a test which will undermine the practical efficacy of the Torture Convention and deny detainees the standard of fairness to which they are entitled under article 5(4) or 6(1) of the European Convention. The matter could not be more clearly put than by my noble and learned friend Lord Nicholls of Birkenhead in the closing paragraph of his opinion.

Disposal

63. The Court of Appeal were unable to conclude that there was no plausible suspicion of torture in these cases. I would accordingly allow the appeals, set aside the orders made by SIAC and the Court of Appeal, and remit all the cases to SIAC for reconsideration in the light of the opinions of the House.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

64. Torture is not acceptable. This is a bedrock moral principle in this country. For centuries the common law has set its face against torture. In early times this did not prevent the use of torture under warrants issued by the King or his Council. But by the middle of the 17th century this practice had ceased. In 1628 John Felton assassinated the Duke of Buckingham. He was pressed to reveal the names of his accomplices. The King's Council debated whether 'by the Law of the Land they could justify the putting him to the Rack'. The King, Charles I, said that before this was done 'let the Advice of the Judges be had therein, whether it be Legal or no'. The King said that if it might not be done by law 'he would not use his Prerogative in this Point'. So the judges were consulted. They assembled at Serjeants' Inn in Fleet Street and agreed unanimously that Felton 'ought not by the Law to be tortured by the Rack, for no such Punishment is known or allowed by our Law': Rushworth, Historical Collections (1721) vol 1, pages 638-639.

65. Doubt has been cast on the historical accuracy of this account: Jardine, 'Use of Torture in the Criminal Law of England', (1837), pages 61-62. The precise detail does not matter. What matters is that never again did the Privy Council issue a torture warrant. Nor, after 1640, did

the king issue a warrant under his own signet: see Professor Langbein, 'Torture and the Law of Proof', pages 134-135. In Scotland prohibition of torture came later, after the union of the two kingdoms, under section 5 of the Treason Act 1708.

66. It is against the background of this long established principle and practice that your Lordships' House must now decide whether an English court can admit as evidence in court proceedings information extracted by torture administered overseas. If an official or agent of the United Kingdom were to use torture, or connive at its use, in order to obtain information this information would not be admissible in court proceedings in this country. That is not in doubt. It would be an abuse of the process of the United Kingdom court for the United Kingdom government to seek to adduce in evidence information so obtained. The court would not for one moment countenance such conduct by the state. But what if agents of *other* countries extract information by use of torture? Is this information admissible in court proceedings in this country?

67. Torture attracts universal condemnation, as amply demonstrated by my noble and learned friend Lord Bingham of Cornhill. No civilised society condones its use. Unhappily, condemnatory words are not always matched by conduct. Information derived from sources where torture is still practised gives rise to the present problem. The context is cross-border terrorism. Countering international terrorism calls for a flow of information between the security services of many countries. Fragments of information, acquired from various sources, can be pieced together to form a valuable picture, enabling governments of threatened countries to take preventative steps. What should the security services and the police and other executive agencies of this country do if they know or suspect information received by them from overseas is the product of torture? Should they discard this information as 'tainted', and decline to use it lest its use by them be regarded as condoning the horrific means by which the information was obtained?

68. The intuitive response to these questions is that if use of such information might save lives it would be absurd to reject it. If the police were to learn of the whereabouts of a ticking bomb it would be ludicrous for them to disregard this information if it had been procured by torture. No one suggests the police should act in this way. Similarly, if tainted information points a finger of suspicion at a particular individual: depending on the circumstances, this information is a matter the police

may properly take into account when considering, for example, whether to make an arrest.

69. In both these instances the executive arm of the state is open to the charge that it is condoning the use of torture. So, in a sense, it is. The government is using information obtained by torture. But in cases such as these the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this.

70. The next step is to consider whether the position is the same regarding the use of this information in legal proceedings and, if not, why not. In my view the position is not the same. The executive and the judiciary have different functions and different responsibilities. It is one thing for tainted information to be used by the executive when making operational decisions or by the police when exercising their investigatory powers, including powers of arrest. These steps do not impinge upon the liberty of individuals or, when they do, they are of an essentially short-term interim character. Often there is an urgent need for action. It is an altogether different matter for the judicial arm of the state to admit such information as evidence when adjudicating definitively upon the guilt or innocence of a person charged with a criminal offence. In the latter case repugnance to torture demands that proof of facts should be found in more acceptable sources than information extracted by torture.

71. Difficulties arise at the interface between the different approaches permitted to the executive on the one hand and demanded of the courts on the other hand. Problems occur where the lawfulness of executive decisions is challenged in court and there is an apparent 'mismatch', as the Secretary of State described it, between the material lawfully available to the executive and the evidence a court will admit in its proceedings. Suppose a case where the police take into account information obtained by torture abroad when arresting a person, and that person subsequently challenges the lawfulness of his arrest. Can the police give evidence of this information in court when seeking to justify the arrest?

72. In my view they can. It would be remarkable if the police could not. That would create a bizarre situation. It would mean the police may rely on this evidence when making an arrest, but not if the lawfulness of the arrest is challenged. That would be a curious

application of a moral principle. That would be to treat a moral principle as giving with one hand and taking away with the other. That makes no sense. Either the police may rely on such information when carrying out their duties, or they may not. If they can properly have regard to such information despite its tainted source, and in the particular case do so, they should not be precluded from referring to this information in court when giving evidence seeking to justify their decisions and actions. Repugnance to the use in court of information procured by torture does not require the police to give an incomplete account of the matters they took into account when making their decisions. (Different considerations apply where, in the interests of national security, there are statutory or other restrictions on the use of certain matters in legal proceedings, such as the contents of intercepted communications or information attracting public interest immunity. In these cases the 'mismatch' arises from a perceived need to preserve confidentiality, not from the application of a broad moral principle.)

73. So far I have noted the distinction between executive decisions of an essentially operational or short-term character and judicial decisions on criminal charges. Tainted information may be taken into account in the former case but not the latter. I have also noted that when reviewing the lawfulness of such executive decisions a court may have regard to all the matters the decision-maker properly took into account.

74. But this categorisation by no means covers the whole ground. Many cases do not conform to this simple division of functions. Executive decisions, such as deportation, may have serious long-term consequences for an individual. And judicial supervision of an executive decision may take different forms. The Anti-terrorism, Crime and Security Act 2001 is a recent instance. Certification of a person as a 'suspected international terrorist' is the responsibility of the Secretary of State. The issue of this certificate authorises the minister to exercise extensive powers, including power under section 23 to detain the certified person indefinitely in certain circumstances. This power of detention, in its adverse impact on an individual, goes far beyond the adverse impact of executive acts such as search and arrest. Detention by order of the executive under the 2001 Act is not a preliminary step leading to a criminal charge.

75. Despite this difference, in the case of this Act the rationale underlying the distinction between the executive's ability to take into account information procured by torture and the court's refusal to admit such evidence holds good. It holds good because the Special

Immigration Appeals Commission, or SIAC in short, is required to review every certificate, by way of appeal or otherwise, and form its own view on whether reasonable grounds currently exist for believing a person's presence is a risk to national security and for suspecting he is a terrorist: sections 25 and 26. If SIAC considers these grounds do not exist the certificate must be cancelled. Thus the certificate issued by the Secretary of State will lead nowhere if SIAC considers reasonable grounds do not exist. The certificate, although a prerequisite to exercise of the Secretary of State's powers under the Act, will be comparatively short-lived in its effect if SIAC considers the necessary reasonable grounds do not exist. In other words, the certificate is in the nature of an essential preliminary step.

76. For its part, in forming its own view on whether reasonable grounds exist SIAC is discharging a judicial function which calls for proof of facts by evidence. The ethical ground on which information obtained by torture is not admissible in court proceedings as proof of facts is applicable in these cases as much as in other judicial proceedings. That is the present case.

77. Similar problems are bound to arise with other counter-terrorism legislation. One instance concerns decisions by the Secretary of State to deport on the ground that deportation is conducive to the public good as being in the interests of national security. An appeal lies to SIAC, which must allow an appeal if the decision involved the exercise of discretion by the minister and SIAC considers the discretion should have been exercised differently: section 2 of the Special Immigration Appeals Commission Act 1997, as substituted by the Nationality, Immigration and Asylum Act 2002. Another instance concerns non-derogating control orders made by the Secretary of State under section 2 of the Prevention of Terrorism Act 2005. Here the role of the court is expressed to be of a different and more limited character than under the 2001 Act. Under the 2005 Act the supervisory role of the court regarding non-derogating control orders is essentially limited to considering whether the relevant decision of the Secretary of State is 'flawed'. In deciding this issue the court must apply the 'principles applicable on an application for judicial review': section 3(11).

78. Whether the Secretary of State may take tainted information into account when making decisions under statutory provisions such as these, and whether SIAC's function requires or permits evidence to be given of all the matters taken into account by the Secretary of State, are questions for another day. They do not call for decision on these appeals, and they

were not the subject of submissions. It would not be right therefore to express any view on these issues.

79. For these reasons, and those stated by my noble and learned friends, I would allow these appeals.

80. In doing so I associate myself with the observations of Lord Bingham of Cornhill on the burden of proof where the admissibility of evidence is challenged before SIAC on the ground it may have been procured by torture. The contrary approach would place on the detainee a burden of proof which, for reasons beyond his control, he can seldom discharge. In practice that would largely nullify the principle, vigorously supported on all sides, that courts will not admit evidence procured by torture. That would be to pay lip-service to the principle. That is not good enough.

LORD HOFFMANN

My Lords,

81. On 23 August 1628 George Villiers, Duke of Buckingham and Lord High Admiral of England, was stabbed to death by John Felton, a naval officer, in a house in Portsmouth. The 35-year-old Duke had been the favourite of King James I and was the intimate friend of the new King Charles I, who asked the judges whether Felton could be put to the rack to discover his accomplices. All the judges met in Serjeants' Inn. Many years later Blackstone recorded their historic decision:

> "The judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England".

82. That word honour, the deep note which Blackstone strikes twice in one sentence, is what underlies the legal technicalities of this appeal. The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it. When judicial torture was routine all over Europe, its rejection by the common law was

a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria. In our own century, many people in the United States, heirs to that common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal "rendition" of suspects to countries where they would be tortured: see Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House* 105 Columbia Law Review 1681-1750 (October, 2005)

83. Just as the writ of habeas corpus is not only a special (and nowadays infrequent) remedy for challenging unlawful detention but also carries a symbolic significance as a touchstone of English liberty which influences the rest of our law, so the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system. Not only that: the abolition of torture, which was used by the state in Elizabethan and Jacobean times to obtain evidence admitted in trials before the court of Star Chamber, was achieved as part of the great constitutional struggle and civil war which made the government subject to the law. Its rejection has a constitutional resonance for the English people which cannot be overestimated.

84. During the last century the idea of torture as a state instrument of special horror came to be accepted all over the world, as is witnessed by the international law materials collected by my noble and learned friend Lord Bingham of Cornhill. Among the many unlawful practices of state officials, torture and genocide are regarded with particular revulsion: crimes against international law which every state is obliged to punish wherever they may have been committed.

85. It is against that background that one must examine the Secretary of State's submission that statements obtained abroad by torture are admissible in appeals to the Special Immigration Appeals Commission ("SIAC") under section 25 of the Anti-terrorism, Crime and Security Act 2001. First, he says that there is no authority to the contrary. He accepts that the common law has long held that confessions obtained by torture are inadmissible against an accused person. Indeed, the common law went a good deal further and by the end of the eighteenth century was refusing to admit confessions which had been obtained by threats or promises of any kind. But nothing was said about statements obtained from third parties. The general rule is that any relevant evidence is admissible. As Lord Goddard said in *Kuruma v The Queen* [1955] AC 197, 203, "the court is not concerned with how the evidence was

obtained". He referred to a remark of Crompton J in *R v Leathem* (1861) 8 Cox CC 498, 501, overruling an objection to production of a letter which had been discovered in consequence of an inadmissible statement made by the accused: "It matters not how you get it; if you steal it even, it would be admissible."

86. It is true that there are no cases in which statements from third parties have been held inadmissible on the ground that they had been obtained by torture. But the reason is not because such statements have been admitted in an ordinary English court. That has never happened. It is because ever since the late 17th century, any statements made by persons not testifying before the court have been excluded, whatever the circumstances in which they were made. There was no need to consider whether they had been obtained by torture. They were simply rejected as hearsay. One must therefore try to imagine what the judges would have said if there had been no hearsay rule. Is it credible that, while rejecting a confession obtained by torture from the accused, they would have admitted a confession incriminating the accused which had been obtained by torturing an accomplice? Such a proceeding was precisely what had been held to be unlawful in the case of Felton. It is absurd to suppose that the judges would have said that the torture was illegal but that a statement so obtained would nevertheless be admissible.

87. As is shown by cases like *Kuruma*, not all evidence unlawfully obtained is inadmissible. Still less is evidence inadmissible only because it was discovered in consequence of statements which would not themselves be admissible, as in *Leathem* and the leading case of *R v Warickshall* (1783) 1 Leach 263, in which evidence that stolen goods were found under the bed of the accused was admitted notwithstanding that the discovery was made in consequence of her inadmissible confession. But the illegalities with which the courts were concerned in *Kuruma* and *Leathem* were fairly technical. Lord Goddard was not considering torture. In any case, since *Kuruma* the law has moved on. English law has developed a principle, illustrated by cases like *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, that the courts will not shut their eyes to the way the accused was brought before the court or the evidence of his guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if the proceedings were to be entertained or the evidence admitted. In such a case the proceedings may be stayed or the evidence rejected on the ground that there would otherwise be an abuse of the processes of the court.

88. As for the rule that we do not necessarily exclude the "fruit of the poisoned tree", but admit relevant evidence discovered in consequence of inadmissible confessions, this is the way we strike a necessary balance between preserving the integrity of the judicial process and the public interest in convicting the guilty. And even when the evidence has been obtained by torture – the accomplice's statement has led to the bomb being found under the bed of the accused – that evidence may be so compelling and so independent that it does not carry enough of the smell of the torture chamber to require its exclusion. But that is not the question in this case. We are concerned with the admissibility of the raw product of interrogation under torture.

89. The curious feature of this case is that although the Secretary of State advances these arguments based on the limited scope of the confession rule and the general principle that all relevant evidence is admissible, he does not contend for what would be the logical consequence if he was right, namely, that evidence obtained from third parties by torture in the United Kingdom would also be admissible. He accepts that it would not. But he submits that the exclusionary rule is confined to cases in which the torture has been used by or with the connivance of agents of the United Kingdom. So the issue is a narrow one: not whether an exclusionary rule exists, but whether it should extend to torture inflicted by foreigners without the assistance or connivance of anyone for whom the United Kingdom is responsible.

90. Furthermore, the Secretary of State has attempted to fend off concern by the International Committee Against Torture over whether his position was in accordance with our obligations under article 15 of the UN Convention Against Torture ("Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings") by saying that he does not intend to "rely upon or present evidence where there is a knowledge or belief that torture has taken place". No doubt he thought that in addition to being an international obligation, that was the least that decency required. But the Secretary of State insists that this is a matter of policy which he is free to change or depart from. So the question remains over whether such evidence is admissible as a matter of English law.

91. The answer to that question depends upon the purpose of the rule excluding evidence obtained by torture, which, as we have seen, the Secretary of State largely admits to exist. Is it to discipline the executive agents of the state by demonstrating that no advantage will

come from torturing witnesses, or is it to preserve the integrity of the judicial process and the honour of English law? If it is the former, then of course we cannot aspire to discipline the agents of foreign governments. Their torturers would probably accept with indifference the possibility that the work of their hands might be rejected by an English court. If it is the latter, then the rule must exclude statements obtained by torture anywhere, since the stain attaching to such evidence will defile an English court whatever the nationality of the torturer. I have no doubt that the purpose of the rule is not to discipline the executive, although this may be an incidental consequence. It is to uphold the integrity of the administration of justice.

92. The Secretary of State's second argument is that while there may be a general rule which excludes all evidence obtained by torture in an ordinary criminal trial, proceedings before SIAC are different. The function of SIAC under section 25 of the 2001 Act is not to convict anyone of an offence but to decide whether there are reasonable grounds for belief or suspicion that a person's presence in the United Kingdom is a risk to national security or that he is a terrorist: subsection (2)(a). There is no restriction upon the information which the Secretary of State may consider in forming such a belief or suspicion. In the exercise of his functions, he may rely upon statements from any source and in some cases it may be foolish of him not to do so. If the Security Services receive apparently credible information from a foreign government that bombs are being made at an address in south London, it would be irresponsible of the Secretary of State not to instigate a search of the premises because he has a strong suspicion that the statement has been obtained by torture. So, it is said, the exclusionary rule would produce a "mismatch" between the evidence upon which the Secretary of State could rely and the evidence upon which SIAC could rely in the exercise of its supervisory jurisdiction over the Secretary of State under the Act. Furthermore, rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034) specifically provides that the Commission "may receive evidence that would not be admissible in a court of law". The purpose of that rule, it is argued, is to allow SIAC to consider any evidence which could have been considered by the Secretary of State.

93. In my opinion the "mismatch" to which counsel for the Secretary of State refers is almost inevitable in any case of judicial supervision of executive action. It is not the function of the courts to place limits upon the information available to the Secretary of State, particularly when he is concerned with national security. Provided that he acts lawfully, he may read whatever he likes. In his dealings with foreign governments,

the type of information that he is willing to receive and the questions that he asks or refrains from asking are his own affair. As I have said, there may be cases in which he is required to act urgently and cannot afford to be too nice in judging the methods by which the information has been obtained, although I suspect that such cases are less common in practice than in seminars on moral philosophy.

94. But the 2001 Act makes the exercise by the Secretary of State of his extraordinary powers subject to judicial supervision. The function of SIAC under section 25 is not to decide whether the Secretary of State at some particular time, perhaps at a moment of emergency, acted reasonably in forming some suspicion or belief. It is to form its own opinion, after calm judicial process, as to whether it considers that there are reasonable grounds for such suspicion or belief. It is exercising a judicial, not an executive function. Indeed, the fact that the exercise of the draconian powers conferred by the Act was subject to review by the judiciary was obviously an important reason why Parliament was willing to confer such powers on the Secretary of State.

95. In my opinion Parliament, in setting up a court to review the question of whether reasonable grounds exist for suspicion or belief, was expecting the court to behave like a court. In the absence of clear express provision to the contrary, that would include the application of the standards of justice which have traditionally characterised the proceedings of English courts. It excludes the use of evidence obtained by torture, whatever might be its source.

96. Rule 44(3) is in my opinion far too general in its terms to justify a departure from such a fundamental principle. It plainly disapplies technical rules of evidence like the hearsay rule. But I cannot for a moment imagine that anyone in Parliament who considered the statutory power to make rules of procedure for SIAC could have thought that it was authorising a rule which allowed the use of evidence obtained by torture or that the Secretary of State who made the regulations thought he was doing so. Such a provision, touching upon the honour of our courts and our country, would have to be expressly provided in primary legislation so that it could be debated in Parliament.

97. In my opinion therefore, there is a general rule that evidence obtained by torture is inadmissible in judicial proceedings. That leaves the question of what counts as evidence obtained by torture. What is torture and who has the burden of proving that it has been used? In

Ireland v United Kingdom (1978) 2 EHRR 25 the European Court delicately refrained from characterising various interrogation techniques used by the British authorities in Northern Ireland as torture but nevertheless held them to be "inhuman treatment". The distinction did not matter because in either case there was a breach of article 3 of the Convention. For my part, I would be content for the common law to accept the definition of torture which Parliament adopted in section 134 of the Criminal Justice Act 1988, namely, the infliction of severe pain or suffering on someone by a public official in the performance or purported performance of his official duties. That would in my opinion include the kind of treatment characterised as inhuman by the European Court of Human Rights in *Ireland v United Kingdom* but would not include all treatment which that court has held to contravene article 3.

98. That leaves the question of the burden of proof, on which I am in agreement with my noble and learned friend Lord Bingham of Cornhill. In proceedings in which the appellant to SIAC may have no knowledge of the evidence against him, it would be absurd to require him to prove that it had been obtained by torture. Article 15 of the Torture Convention, which speaks of the use of torture being "established", could never have contemplated a procedure in which the person against whom the statement was being used had no idea of what it was or who had made it. It must be for SIAC, if there are reasonable grounds for suspecting that to have been the case (for example, because of evidence of the general practices of the authorities in the country concerned) to make its own inquiries and not to admit the evidence unless it is satisfied that such suspicions have been rebutted. One of the difficulties about the Secretary of State's carefully worded statement that it would not be his policy to rely upon evidence "where there is a knowledge or belief that torture has taken place" is that it leaves open the question of how much inquiry the Secretary of State is willing to make. It appears to be the practice of the Security Services, in their dealings with those countries in which torture is most likely to have been used, to refrain, as a matter of diplomatic tact or a preference for not learning the truth, from inquiring into whether this was the case. It may be that in such a case the Secretary of State can say that he has no knowledge or belief that torture has taken place. But a court of law would not regard this as sufficient to rebut real suspicion and in my opinion SIAC should not do so.

99. In view of the great importance of this case for the reputation of English law, I have thought it right to express my opinion in my own words. But I have had the advantage of reading in draft the speech of

my noble and learned friend Lord Bingham of Cornhill and there is nothing in it with which I would wish to disagree.

LORD HOPE OF CRAIGHEAD

My Lords,

100. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. His account of the background to this case is so complete that I hesitate to say anything that might detract from it. But it is one thing to condemn torture, as we all do. It is another to find a solution to the question that this case raises which occupies the moral high ground but at the same time serves the public interest and is practicable. Condemnation is easy. Finding a solution to the question is much more difficult. It requires much more thought. So it is on that aspect of the case in particular, after looking at the history, that I should like to concentrate.

Background

101. Torture, one of most evil practices known to man, is resorted to for a variety of purposes and it may help to identify them to put this case into its historical context. The lesson of history is that, when the law is not there to keep watch over it, the practice is always at risk of being resorted to in one form or another by the executive branch of government. The temptation to use it in times of emergency will be controlled by the law wherever the rule of law is allowed to operate. But where the rule of law is absent, or is reduced to a mere form of words to which those in authority pay no more than lip service, the temptation to use torture is unrestrained. The probability of its use will rise or fall according the scale of the perceived emergency.

102. In the first place, torture may be used on a large scale as an instrument of blatant repression by totalitarian governments. That is what was alleged in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, where the picture presented by the draft charges against Senator Pinochet which had been prepared by the Spanish judicial authorities was of a conspiracy. It was a conspiracy of the most evil kind – to commit

widespread and systematic torture and murder to obtain control of the government and, having done so, to maintain control of government by those means for so long as might be necessary. Or it may be used in totalitarian states as a means of extracting confessions from individuals whom the authorities wish to put on trial so that they can be used against them in evidence.

103. The examples I have just mentioned are of torture as an instrument of power. But the use of torture to obtain confessions was also sanctioned by the judiciary in many civil law jurisdictions, and it remained part of their criminal procedure until the latter part of the 17th century. This was never part of English criminal procedure and, as there was no need for it, its use for this purpose was prohibited by the common law. But warrants for the use of torture were issued from time to time by the Privy Council against prisoners in the Tower under the Royal Prerogative. Four hundred years ago, on 4 November 1605, Guy Fawkes was arrested when he was preparing to blow up the Parliament which was to be opened the next day, together with the King and all the others assembled there. Two days later James I sent orders to the Tower authorising torture to be used to persuade Fawkes to confess and reveal the names of his co-conspirators. His letter stated that "the gentler tortours" were first to be used on him, and that his torturers were then to proceed to the worst until the information was extracted out of him. On 9 November 1605 he signed his confession with a signature that was barely legible and gave the names of his fellow conspirators. On 27 January 1606 he and seven others were tried before a special commission in Westminster Hall. Signed statements in which they had each confessed to treason were shown to them at the trial, acknowledged by them to be their own and then read to the jury: Carswell, *Trial of Guy Fawkes* (1934), pp 90-92.

104. This practice came to an end in 1640 when the Act of 16 Charles I, c 10, abolished the Star Chamber. The jurisdiction of the Privy Council in all matters affecting the liberty of the subject was transferred to the ordinary courts, which until then in matters of State the executive could by-pass. Torture continued to be used in Scotland on the authority of the Privy Council until the end of the 17th century, but the practice was brought to an end there after the Union by section 5 of the Treason Act 1708. That section, which remains in force subject only to one minor amendment (see Statute Law (Repeals) Act 1977, Sch I, Part IV) and applies to England as well as Scotland, declares that no person accused of any crime can be put to torture.

105. We are not concerned in this case with the use of torture for either of the purposes that I have mentioned so far. But they do not exhaust the uses for which torture may be sanctioned by governments. The use with which this case is concerned is the extraction of information from those who are thought to have something that may be of use to them by the security services. Information – the gathering of intelligence – is a crucial weapon in the battle by democracies against international terrorism. Experience has shown from the beginning of time that those who are hostile to the state are reluctant to part with information that might disrupt or inhibit their activities. They usually have to be persuaded to release it. Handled responsibly, the methods that are used fall well short of what could reasonably be described as torture. But in unscrupulous hands the means of persuasion are likely to be violent and intended to inflict severe physical or mental pain or suffering. In the hands of the most unscrupulous the only check on the level of violence is likely to be the need to keep the person alive so that, if he has any information that may be useful, he can communicate it to his interrogators.

106. It was not unknown during the 17th century, while torture was still being practised here, for statements extracted by this means to be used as evidence in criminal proceedings to obtain the conviction of third parties. J H Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (University of Chicago Press, 1977), p 94 has shown that a warrant was issued by the Privy Council in 1551 for the torture of persons committed to the Tower on suspicion of being involved in the alleged treason of the Duke of Somerset. The confession obtained from William Crane was read, in Crane's absence, at the Duke's trial: Heath, *Torture and English Law: An Administrative and Legal History from the Plantagenets to the Stuarts* (1982), p 75.

107. When the jurisdiction of the Star Chamber was abolished in England prisoners were transferred to Scotland so that they could be forced by the Scots Privy Council which still used torture to provide information to the authorities. This is illustrated by the case of Robert Baillie of Jerviswood whose trial took place in Edinburgh in December 1684. A detailed description of the events of that trial can be found in Fountainhall's *Decisions of the Lords of Council and Session*, vol I, 324-326: for a summary, see *Torture* [2004] 53 ICLQ 807, 818-820. Robert Baillie had been named by William Spence, who was suspected of being involved in plotting a rebellion against the government of Charles II, as one of his co-conspirators. Spence gave this information having been arrested in London and taken to Edinburgh, where he was tortured. Baillie in his turn was arrested in England and taken to

Scotland, where he was put on trial before a jury in the High Court of Justiciary in Edinburgh. All objections having been repelled by the trial judge, the statement which Spence had given under torture was read to the jury. Baillie was convicted the next day, and the sentence of death that was passed on him was executed that afternoon. There is a warning here for us. "Extraordinary rendition", as it is known today, is not new. It was being practised in England in the 17th century.

108. Baron Hume, *Commentaries on the Law of Scotland respecting Crimes* (Edinburgh, 1844), vol ii, p 324, described the use of torture for the purpose of discovering transgressors as a barbarous engine. So it was. It had increasingly come to be recognised that there was a level beyond which, however great the threat and however imminent its realisation, resort to this means of extracting information was unacceptable. The need of the authorities to resort to extreme measures for their own protection had, of course, disappeared with the arrival of the period of stability that came with the ending of the Stuart dynasty. But one can detect in Hume's language a revulsion against its use which would have certainly been voiced by the judges of his time, had it been necessary for them to do so.

109. The threat of rebellion and revolution having disappeared, the developing common law did not find it necessary to grapple with the question whether statements obtained by the use of torture should continue to be admissible against third parties in any proceedings as evidence. There is no doubt that they would be caught today by the rule that evidence of the facts referred to in a statement made by a third party, however that statement was obtained, is hearsay: *Teper v The Queen* [1952] AC 480, 486, per Lord Normand. Alison, *Principles and Practice of the Criminal Law of Scotland* (1833), vol ii, 510-11 states that hearsay is in general inadmissible evidence. He bases this proposition on the best evidence rule, and declares that the rule is "firmly established both in the Scotch and English law". But we cannot be absolutely confident that judges in the latter part of the 19th century would have been prepared to rely on the hearsay rule to exclude such evidence. In *R v Birmingham Overseers* (1861) 1 B & S 763, 767, Cockburn CJ said:

> "People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence, and discuss its weight."

If, as this passage indicates, the hearsay objection went only to the weight of the evidence, the judges would have had to face up to the more fundamental question whether at common law it was an abuse of the judicial process to rely on it.

110. I think that it is plain that the barbarity of the practice, as Hume describes it, would have led inevitably to the conclusion that the use against third parties of statements obtained in this way as evidence in any proceedings was unacceptable. This would have been a modest but logical extension of the rule already enshrined in statute by section 5 of the Treason Act 1708, that no person accused of a crime could be put to torture. The effect of that section was to render confession evidence obtained by this means inadmissible. It would have been a small but certain step to apply the same rule to statements obtained in the same way from third parties.

111. This is the background to the ratification by the United Kingdom of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which was adopted by the United Nations General Assembly on 10 December 1984 and entered into force on 26 June 1987. The Convention was designed to provide an international system which denied a safe haven to the official torturer. But long before it was entered into state torture was an international crime in the highest sense, as Lord Browne-Wilkinson pointed out in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, p 198G. The rule set out in article 15 of the Convention about the use of statements obtained by the use of torture must be seen in this light. Article 15 provides:

> "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked in any proceedings, except against a person accused of torture as evidence that the statement was made."

112. This provision has not been incorporated into our domestic law, unlike the declaration that the use of torture is a crime wherever it was committed which was made part of our law by section 134 of the Criminal Justice Act 1988. But I would hold that the formal incorporation of the evidential rule into domestic law was unnecessary, as the same result is reached by an application of common law principles. The rule laid down by article 15 was accepted by the United

Kingdom because it was entirely compatible with our own law. The use of such evidence is excluded not on grounds of its unreliability – if that was the only objection to it, it would go to its weight, not to its admissibility – but on grounds of its barbarism, its illegality and its inhumanity. The law will not lend its support to the use of torture for any purpose whatever. It has no place in the defence of freedom and democracy, whose very existence depends on the denial of the use of such methods to the executive.

113. Once torture has become acclimatised in a legal system it spreads like an infectious disease, hardening and brutalising those who have become accustomed to its use: Holdsworth, *A History of English Law*, vol v, p 194. As Jackson J in his dissenting opinion in *Korematsu v United States*, 323 US 214 (1944), 246 declared, once judicial approval is given to such conduct, it lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. A single instance, if approved to meet the threat of international terrorism, would establish a principle with the power to grow and expand so that everything that falls within it would be regarded as acceptable. Without hesitation I would hold that, subject to the single exception referred to in article 15, the admission of any statements obtained by this means against third parties is absolutely precluded in any proceedings as evidence. I would apply this rule irrespective of where, or by whom, the torture was administered.

The issue for SIAC

114. Rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003 (2003/1034) provides that the Commission may receive evidence that would not be admissible in a court of law. But I consider, in agreement with all your Lordships, that this rule is incompatible with the fundamental nature of the objection to the admission of statements obtained by the use of torture, wherever it was administered, and that it does not extend to them. That being the nature of the objection, the question whether it can be overridden and, if so, in what circumstances must be left to the legislature. This is not a matter that can be left to implication. Nothing short of an express provision will do, to which Parliament has unequivocally committed itself.

115. There are ample grounds for suspecting that the use of torture on detainees suspected of involvement in international terrorism is widespread in countries with whom the security services of the United

Kingdom are in contact. The Secretary of State's position is that he does not rely on information that he *knows* has been obtained by torture, as a matter of principle. But he is willing to accept and act upon information whose origin is obscure and undetectable, in the knowledge that it may have come from countries that use torture. He says that it is for the party who objects to its use on the ground that torture was used to make good his objection. What then is the approach that SIAC should take to this issue?

(a) The burden of proof

116. I agree that a conventional approach to the burden of proof is inappropriate in this context. It would be wholly unrealistic to expect the detainee to prove anything, as he is denied access to so much of the information that is to be used against him. He cannot be expected to identify from where the evidence comes, let alone the persons who have provided it. All he can reasonably be expected to do is to raise the issue by asking that the point be considered by SIAC. There is, of course, so much material in the public domain alleging the use of torture around the world that it will be easy for the detainee to satisfy that simple test. All he needs to do is point to the fact that the information which is to be used against him may have come from one of the many countries around the world that are alleged to practise torture, bearing in mind that even those who say that they do not use torture apply different standards from those that we find acceptable. Once the issue has been raised in this general way the onus will pass to SIAC. It has access to the information and is in a position to look at the facts in detail. It must decide whether there are reasonable grounds to suspect that torture has been used in the individual case that is under scrutiny. If it has such a suspicion, there is then something that it must investigate as it addresses its mind to the information that is put before it which has been obtained from the security services.

(b) The standard of proof

117. Guidance needs to be given on this point too. Do the facts need to be established beyond a reasonable doubt or do they need to be established only on a balance of probabilities? To answer this question we must know what it is that has to be established. It is at the point of defining what SIAC must inquire into that, with the greatest of respect, I begin to differ from Lord Bingham. He says that it is for SIAC to initiate or direct such inquiry as is necessary to enable it to form a fair

judgment whether the evidence has, or whether there is a real risk that it may have been, obtained by torture or not. But it is one thing if what SIAC is to be required to do is to form a fair judgment as to whether the evidence *has*, or may have been, obtained by torture. It is another if what it is to be required to do is to form a fair judgment as to whether it *has not,* or may not, have been obtained by torture.

118. Lord Bingham then says that SIAC should refuse to admit the evidence if it is unable to conclude that there is not a real risk that the evidence has been obtained by torture. My own position, for reasons that I shall explain more fully in the following paragraphs, is that SIAC should refuse to admit the evidence if it concludes that the evidence *was* obtained by torture. I am also firmly of the view that, if it approaches the issue in this way, it should apply the lower standard of proof. The liberty of the subject dictates this. So SIAC should not admit the evidence if it concludes on a balance of probabilities that it was obtained by torture. In other words, if SIAC is left in doubt as to whether the evidence was obtained in this way, it should admit it. But it must bear its doubt in mind when it is evaluating the evidence. Lord Bingham's position, as I understand it, is that if it is left in doubt SIAC should exclude the evidence. That, in short, is the only difference between us.

(c) The test

119. I must now explain why I believe that the question which SIAC must address should be put positively rather than negatively. The effect of rule 44(3) of the Procedure Rules is that sources of all kinds may be relied upon, far removed from what a court of law would regard as the best evidence. SIAC may be required to look at information coming to the attention of the security services at third or fourth hand and from various sources, the significance of which cannot be determined except by looking at the whole picture which it presents. The circumstances in which the information was first obtained may be incapable of being detected at all or at least of being determined without a long and difficult inquiry which would not be practicable. So it would be unrealistic to expect SIAC to demand that each piece of information be traced back to its ultimate source and the circumstances in which it was obtained investigated so that it could be proved piece by piece, that it was *not* obtained under torture. The threshold cannot be put that high. Too often we have seen how the lives of innocent victims and their families are torn apart by terrorist outrages. Our revulsion against torture, and the wish which we all share to be seen to abhor it, must not be allowed to create an insuperable barrier for those who are doing their

honest best to protect us. A balance must be struck between what we would like to achieve and what can actually be achieved in the real world in which we all live. Articles 5(4) and 6(1) of the European Convention, to which Lord Bingham refers in para 62, must be balanced against the right to life that is enshrined in article 2 of the Convention.

120. I would take as the best guide to what is practicable the approach that article 15 of the Torture Convention takes to this issue. The United Nations has adopted it, and it has the support of all the signatories to the Convention. So it deserves to be respected as the best guide that international law has to offer on this issue. First, the exclusionary rule that it lays down applies to statements obtained under torture, not to information that may have been discovered as a result of them. Logic might suggest that the fruits of the poisoned tree should be discarded too. But the law permits evidence to be led however it was obtained, if the evidence is in itself admissible: *Kuruma v The Queen* [1955] AC 197. Secondly, the exclusionary rule applies to "any proceedings". Mr Burnett QC for the Secretary of State suggested that this phrase should be read as extending to criminal proceedings only, but I would not so read it. The word "any" is all-embracing and it is perfectly capable of applying to the proceedings conducted by SIAC.

121. Thirdly, and crucially, the exclusionary rule extends to any statement that "is established" to have been made under torture. The rule does not require it to be shown that the statement was *not* made under torture. It does not say that the statement must be excluded if there is a suspicion of torture and the suspicion has not been rebutted. Nor does it say that it must be excluded if there is a real risk that it was obtained by torture. An evaluation of risk is appropriate if the question at issue relates to the future: see *Mamatkulov and Askarov v Turkey* (Application Nos 46827/99 and 46951/99) 4 February 2005, para 71. The question in that case was whether there was a real risk for the purposes of article 3 of the European Convention at the time of their extradition that the applicants would be tortured. The rule that article 15 lays down looks at what has happened in the past. It applies to a statement that is established *to have been* made under torture. In my opinion the test that it lays down is the test that should be applied by SIAC. It too must direct its inquiry to what has happened in the past. Is it *established*, by means of such diligent inquiries into the sources that it is practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State *was* obtained under torture? If that is the position, article 15 requires that the information must be left out of account in the overall assessment of the question whether there were no reasonable grounds for a belief or suspicion of

the kind referred to in section 21(1) (a) or (b) of the Anti-terrorism, Crime and Security Act 2001. The same rule must be followed in any other judicial process where information of this kind would otherwise be admissible.

122. Support for this approach is to be found in a decision in the case of *El Motassadeq* of the Hanseatisches Oberlandesgericht (the Hanseatic Court of Appeals, Criminal Division), Hamburg of 14 June 2005, NJW 2005, 2326. El Motassadeq had been charged with conspiracy to cause the attacks of 11 September 2001 on the United States of America and with membership of an illegal organisation. The court had been provided by the US Department of Justice with summaries of statements of three witnesses which, subject to certain safeguards, were admissible under its Code of Criminal Procedure as equivalent to written records of statements by these witnesses. The court was, of course, aware from press articles and other reports that there were indications that suspected Al Qaeda members had been subjected to torture within the meaning of article 1 of the Convention, and it was contended that these statements should be excluded under article 15. Repeated requests to the competent US authorities for information about the circumstances of the examination of these witnesses met with no response, and attempts to obtain this information through the German authorities were blocked on the ground that the information had been given to them for intelligence purposes only and that a breach of the limitations of use would jeopardise the security interests of the Federal Republic of Germany. In this situation the court had no option but to base its assessment of the question whether torture had been used on available, publicly accessible sources. On the one hand the White House denied that it used or condoned torture. On the other hand it had admitted that it did not view Al Qaeda prisoners as coming under the protection of international human rights agreements on the treatment of prisoners of war. This was enough to raise the suspicion that torture had been used. There was a question to answer on this point.

123. The court's conclusions are to be found in the following paragraphs of the certified translation:

> "On the whole, the Division does not consider the use of torture within the meaning of Art. 1 of the UN Anti-Torture Convention at the examinations of Binalshibh, Sheikh Mohammend and Ould Slahi as proved according to Art. 15 of this Convention. The fact is not ignored here that it is state agents of the United States, a country

> accused in the press of using torture, who deny the Division access to sources from which might be expected comparatively more reliable and, in particular, verifiable information than that in the available press articles and reports of humanitarian organisations. However, a significant circumstance added to the inadequate evidence situation in this case is the fact that the forwarded summaries of the examinations of Binalshibh, Sheikh Mohammed and Ould Slahi do not exhibit the one-sidedness of a universal incrimination of persons not in custody, which might be expected if torture had been used to extract information incriminating only certain suspected persons.
>
> ...
>
> To the certainly weak evidence for assuming the use of torture is added the fact that the contents of the summaries of statements by Binalshibh, Sheikh Mohammed and Ould Slahi tend to indicate torture not having been used. It is only because of this that the Division has decided here not to consider it proved that Art. 15 of the UN Anti-Torture Convention was violated in a way that would have justified a prohibition of evidence utilisation and would also have precluded the hearing of evidence by the reading of evidence material."

In a concluding paragraph the court said that it was mindful of the problems posed by the possible use of torture and would take this into consideration when assessing the information in the summaries, adding: "This does not imply legitimisation of the use of torture, even in view of the enormous scale of the attacks of 11 September 2001."

124. The significant points that I would draw from that case are these. The court was careful to distinguish between the generalised allegations of torture which were to be found in the press articles and other materials – sufficient, it might well be said, to raise a suspicion of torture – and the position of these three witnesses in particular. What it was looking for was evidence which established that the statements of these three witnesses in particular had been obtained under torture. The test which it was asked to apply was that laid down by the article. The evidence for assuming that torture had been used was said to be weak, and the contents of the statements tended to show that torture had not been used. The court did not go so far as to say that it was unable to conclude that there was not a real risk that the evidence had been obtained by torture. It was left in a state of doubt on this point. If it had

applied the test which Lord Bingham suggests, the result would have been different because it had been denied access to information about the precise circumstances.

125. Article 15 of the Convention does not compel us to adopt the test which Lord Bingham suggests, and there are good reasons – as the case of *El Motassadeq* so clearly demonstrates – for thinking that the terms on which information is passed to the intelligence services would make it impossible for it to be met in practice. Your Lordships were provided with a statement by the Director General of the Security Service which indicates that the problems of obtaining access to the sources of information from foreign intelligence services are just as acute in this country as they appear to have been in Germany. In my opinion the public interest requires us to refrain from setting up a barrier to the use of such information which other nations do not impose on themselves and which is likely in practice to be insuperable. I do not believe that the test which I suggest is one that in the real world can never be satisfied. Nor do I believe that applying the test which the Convention itself lays down in the way I suggest would undermine the practical efficiency of the Convention. I think that we should adhere to what the Convention requires us to do, while making it clear that the issue as to whether torture has been used in the individual case is of the highest importance and that it must, of course, receive the most anxious scrutiny.

126. There is a fourth element in article 15 which ought to be noticed, although the issue has not been focussed by the facts of this case. The exclusionary rule that article 15 of the Torture Convention lays down extends to statements obtained by the use of torture, not to those obtained by the use of cruel, inhuman or degrading treatment or punishment. That is made clear by article 16.1 of the Convention. The borderline between torture and treatment or punishment of that character is not capable of precise definition. As John Cooper, *Cruelty – an analysis of Article 3* (2003), para 1-02 points out, the European Committee for the Prevention of Torture are unwilling to produce a clear and comprehensive interpretation of these terms, their approach being that these are different types of ill-treatment, more or less closely linked. Views as to where the line is to be drawn may differ sharply from state to state. This can be seen from the list of practices authorised for use in Guantanamo Bay by the US authorities, some of which would shock the conscience if they were ever to be authorised for use in our own country. SIAC must exercise its own judgment in addressing this issue, which is ultimately one of fact. It should not be deterred from treating conduct as torture by the fact that other states do not attach the

same label to it. The standard that it should apply is that which we would wish to apply in our own time to our own citizens.

127. For these reasons, although I take a different view from my noble and learned friend Lord Bingham as to the advice that should be given to SIAC, I too would allow the appeals and make the order that he proposes.

LORD RODGER OF EARLSFERRY

My Lords,

128. I have ultimately come to agree with your Lordships that the appeal should be allowed, but, I confess, I have found the issue far from easy. In resolving it, I have derived considerable assistance from the closely reasoned judgments in the Court of Appeal. Unfortunately, outside the courts, the decision of the majority, Pill and Laws LJJ, has been subjected to sweeping criticisms which to a large extent ignore their reasoning and the very factors which led them to their conclusion.

129. It should not be necessary to emphasise that the difficulties which troubled the majority in the Court of Appeal and which have troubled me do not arise from any doubt about the unacceptable nature of torture. That has long been unquestioned in this country. The history of the matter shows that torture has been rejected by English common law for many centuries. In Scotland, torture was used until the end of the seventeenth century. For the most part, when used at all, torture seems to have been employed to extract confessions from political conspirators who might be expected to be more highly motivated to resist ordinary methods of interrogation. Such confessions would often contain damning information about other members of the conspiracy. Eventually, section 5 of the Treason Act 1708 declared that no person accused of any crime can be put to torture. The provision is directed at those accused of crime, but this does not mean that Parliament would have been happy for mere witnesses to crime to be tortured. On the contrary, it is an example of the phenomenon, well known in the history of the law from ancient Rome onwards, of a legislature not bothering with what is obvious and dealing only with the immediate practical problem. By 1708, it went without saying that you did not torture witnesses: now Parliament was making it clear that you were not to torture suspects either. So the prohibition on the torture of both

witnesses and suspects is deeply ingrained in our system. The corollary of the prohibition is that any statements obtained by officials torturing witnesses or suspects are inadmissible. Most of the considerations of public policy which lead courts to reject such statements are equally applicable to torture carried out abroad by foreign officials. The question for the House is whether that general approach applies to proceedings in SIAC under the Anti-terrorism, Crime and Security Act 2001 ("the 2001 Act").

130. Information obtained by torture may be unreliable. But all too often it will be reliable and of value to the torturer and his masters. That is why torturers ply their trade. Sadly, the Gestapo rolled up resistance networks and wiped out their members on the basis of information extracted under torture. Hence operatives sent to occupied countries were given suicide pills to prevent them from succumbing to torture and revealing valuable information about their mission and their contacts. In short, the torturer is abhorred as a hostis humani generis not because the information he produces may be unreliable but because of the barbaric means he uses to extract it.

131. The premise of this appeal is that, despite the United Nations Convention against Torture and any other obligations under international law, some states still practise torture. More than that, those states may supply information based on statements obtained under torture to the British security services who may find it useful in unearthing terrorist plots. Moreover, when issuing a certificate under section 21 of the 2001 Act, the Secretary of State may have to rely on material that includes such statements.

132. Mr Starmer QC, who appeared for Amnesty and a number of other interveners, indicated that, in their view, it would be wrong for the Home Secretary to rely on such statements since it would be tantamount to condoning the torture by which the statements were obtained. That stance has the great virtue of coherence; but the coherence is bought at too dear a price. It would mean that the Home Secretary might have to fail in one of the first duties of government, to protect people in this country from potential attack. Not surprisingly therefore, Mr Emmerson QC for the appellants was at pains to accept that, when deciding whether to issue a certificate, the Home Secretary was not obliged to check the origins of any statement and could take it into account even if he knew, or had reason to suspect, that it had been obtained by torture. But, he submitted, when SIAC came to discharge its functions under section 25 or 26 of the 2001 Act, in any case where the issue was raised, it could

not take account of a statement unless the members were satisfied, beyond reasonable doubt, that it had not been obtained by torture.

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133. On this approach there is a stark disjunction between what the Home Secretary can properly do and what SIAC can properly do. It is, of course, true that, because of public interest immunity or section 17(1) of the Regulation of Investigatory Powers Act 2000, a party to a litigation may not be able to lead evidence of a matter which it was nevertheless legitimate for him to take into account. Such analogies cast little light, however, on a situation where the disjunction arises between sections in the same Act.

134. Parliament gave jurisdiction in proceedings under sections 25 and 26 of the 2001 Act to SIAC, which had been established by the Special Immigration Appeals Act 1997 in order to meet the criticisms of the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413. SIAC is tailor-made to deal with sensitive cases where intelligence material has to be considered. One member of the court will have had experience in handling such material. Section 18(1)(e) of the 2000 Act disapplies section 17(1) and so allows the Commission to consider the content of intercepts. Rule 44(2) of the Special Immigration Appeals Commission (Procedure) Rules 2003 allows the Commission to receive evidence in documentary or any other form, while rule 44(3) allows it to receive evidence that would not be admissible in a court of law. By giving jurisdiction to SIAC, Parliament must have intended that the appeal or review should be considered by a body that was not bound by the ordinary rules of evidence and that was, in general, free to consider all the material that the Home Secretary had taken into account when issuing his certificate. Not surprisingly, therefore, in section 29(1) Parliament provided that any action of the Secretary of State taken wholly or partly in reliance on a section 21 certificate could be questioned only in legal proceedings under section 25 or 26 or under section 2 of the 1997 Act – proceedings in other courts would not be satisfactory since they would not be able to consider the same range of material. Of course, after the certificate was issued, material might often come to hand which strengthened, or even superseded, the material on which the Home Secretary had relied. Conversely, new evidence, or criticism of the existing evidence during the hearing, might undermine the basis for the Home Secretary's decision. SIAC can take account of all that. What is not immediately clear, to me at least, is that Parliament would have contemplated that the specialist tribunal would have to shut its eyes to statements which the Home Secretary was entitled, or perhaps even bound, to take into account. Why should the Secretary of State be entitled to use such a

statement to issue a certificate under section 21 if, in default of any additional information, SIAC is then bound to cancel that certificate under section 25 because the members cannot look at the critical statement?

135. My noble and learned friend, Lord Nicholls of Birkenhead, seeks to resolve the dilemma on the basis that the Secretary of State's certificate is in the nature of an essential preliminary step, which will be short-lived in its effect if SIAC considers that the necessary reasonable grounds do not exist. So the definitive decision is taken by SIAC, which is subject to the ethical rule that information obtained by torture is not admissible in court proceedings as proof of facts. Potentially attractive though such an analysis is, it is rather difficult to square with the fact that, if there is no appeal, SIAC is not required to review the Home Secretary's certificate for six months after it has been issued: section 26(1). A certificate which Parliament regards as sufficient warrant for a suspect's detention for six months is not, in essence, short-lived or a mere preliminary step. And, the appellants concede, such a certificate can properly be based on a statement obtained by torture.

136. According to the appellants, it is an abuse of process for the Home Secretary to produce evidence of a statement obtained by torture in proceedings before SIAC. In my view it is an abuse of language to characterise the Home Secretary's action as an abuse of process. He does not instigate the process before SIAC and seeks no order from the Commission: he merely seeks to resist an appeal brought against his decision or to withstand a review of that decision. It was perfectly proper for him to rely on the statement when issuing his certificate. There is therefore no abuse of executive power in this country for SIAC to punish by rejecting the statement and it is no part of the function of British courts to attempt to discipline officials of a friendly country. Besides anything else, the idea that foreign torturers would pause for a moment because of a decision by SIAC to reject a statement which they had extracted verges on the absurd.

137. One therefore comes back to the centuries-old view that statements obtained by torture are unacceptable. To rely on them is inconsistent with the notion of justice as administered by our courts. The Home Secretary does not defile SIAC by introducing such a statement, but he does ask it to rely on a type of statement which British courts would, ordinarily, reject on broad grounds of public policy. SIAC is, of course, different in many ways, as the relevant legislation and regulations show. Therefore, if there were any sign that Parliament

had considered the point when passing the Special Immigration Appeals Commission Act 1997 or the 2001 Act, there might be a case for holding that the necessary implication of sections 21, 25 and 26 of the 2001 Act was that SIAC should take account of statements obtained by torture in another country. But that particular issue does not arise since Parliament was never asked to consider the question, either when passing these Acts or when approving the 2003 Rules, including the permissive rule 44(3). The point does not appear to have occurred to anyone. In any event, the revulsion against torture is so deeply ingrained in our law that, in my view, a court could receive statements obtained by its use only where this was authorised by express words, or perhaps the plainest possible implication, in a statute. Here, there are no express words and the provisions actually approved by Parliament do not go so far as to show that the officious bystander who asked whether SIAC could rely on a statement obtained by torture would have been testily suppressed with an "Oh, of course!" from the legislature. I therefore hold that SIAC should not take account of statements obtained by torture.

138. The courts' deep-seated objection is to torture and to statements obtained by torture. The rejection of such statements is an exception to the general rule that relevant evidence is admissible even if it has been obtained unlawfully. On the other hand, the public interest does not favour SIAC rejecting statements that have not in fact been obtained by torture. More particularly, the public interest does not favour rejecting statements merely because there is a suspicion or risk that they may have been obtained in that way. Reports from various international bodies may well furnish grounds for suspicion that a country has been in the habit of using torture. That cannot be enough. To trigger the exclusion, it must be shown that the statement in question has been obtained by torture.

139. I draw support for that general approach from the judgment of the Grand Chamber of the European Court of Human Rights in *Mamatkulov and Askarov v Turkey*, 4 February 2005. The court had to consider allegations that Turkey had violated article 3 of the Convention by extraditing the applicants to Uzbekistan where political dissidents, such as the applicants, were tortured in prison. In support of their allegations, the applicants "referred to reports by 'international investigative bodies' in the human rights field denouncing both an administrative practice of torture and other forms of ill-treatment of political dissidents, and the Uzbek régime's repressive policy towards dissidents." The Grand Chamber held that, by itself, such generalised information was not sufficient even to establish that there was a real risk that the applicants

would be subjected to torture in Uzbekistan. The court said this, at paras 71 – 73 (internal cross-reference omitted):

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> "71 For an issue to be raised under Article 3, it must be established that at the time of their extradition there existed a real risk that the applicants would be subjected in Uzbekistan to treatment proscribed by Article 3.
>
> 72 The Court has noted the applicants' representatives' observations on the information in the reports of international human-rights organisations denouncing an administrative practice of torture and other forms of ill-treatment of political dissidents, and the Uzbek régime's repressive policy towards such dissidents. It notes that Amnesty International stated in its report for 2001: 'Reports of ill-treatment and torture by law enforcement officials of alleged supporters of banned Islamist opposition parties and movements ... continued....'
>
> 73 However, although these findings describe the general situation in Uzbekistan, they do not support the specific allegations made by the applicants in the instant case and require corroboration by other evidence."

In fact, there was no further evidence to support the applicants' specific allegations. Rather, the other evidence, led on behalf of Turkey, tended to contradict them and the Grand Chamber was unable to conclude that substantial grounds had existed for believing that the applicants faced a real risk of treatment proscribed by Article 3. If generalised information about a country is not enough to establish that there is a real risk that a given individual will be tortured there in the future, it cannot be sufficient, either, to establish that a given statement has been extracted there by torture in the past.

140. As my noble and learned friend, Lord Hope of Craighead, has explained, the Hanseatic Oberlandesgericht in Hamburg adopted a somewhat similar approach in *El Motassadeq* NJW 2005, 2326. There the court was considering whether article 15 of the Convention against Torture prevented it from using summaries of certain witness statements supplied by the United States. Apparently, the witnesses were members of Al Qa'eda, and the suggestion was that the statements had been obtained by torture. The court asked the German government for information, but the relevant government departments were unable to provide any information from the competent American authorities since it had been supplied to them for intelligence purposes only. In that

situation, the court could only evaluate the considerable volume of publicly available material suggesting that suspects had been subjected to torture. What the court was looking for was proof that the three witnesses in question had been tortured. The available material referred to only one of them and, while there was quite a lot of general information about the treatment of other suspected Al Qa'eda members, the court noted that none of the information was based on verifiable, named sources. Even taking account of the fact that the United States authorities had prevented the court from having access to more reliable sources, the court concluded that it had not been proved that torture had been used in the examination of the three witnesses, especially having regard to certain exculpatory elements in their statements.

141. The reasoning of the court, at pp 2329-2330, is instructive. It was under a duty to discover the truth and so the prohibition on the use of evidence had to remain the exception rather than being elevated into the rule. Therefore, the principle "in dubio pro reo" did not apply and the facts justifying the prohibition had to be established to the court's satisfaction. If substantial doubts remained, the possible violation had not been proved and the relevant statement could be used. The court therefore took the view that it was their duty to consider the summaries so as to investigate the facts of the case as fully as possible, but they would take the allegations into account in evaluating the evidence.

142. In my view the same factors as weighed with the Oberlandesgericht should weigh with the House. Once the House has held that statements obtained by torture must be excluded, the special advocates representing suspects such as the appellants are likely to raise the point whenever information appears to come from a country with a poor record on torture. Special advocates can indeed be expected to ask their clients about possible sources of information against them before they see the closed material. At the hearing the special advocates will present information provided by international organisations or derived from books and articles to paint the picture of conditions in the country concerned. But that cannot be a sufficient basis for SIAC to be satisfied that any particular statement has been obtained by torture. More is required.

143. Of course, the suspects themselves will not be able to assist the special advocate in finding more information during the closed hearing. But that is not so great a disadvantage as may appear at first sight, since it is in any event unlikely that they would be able to cast light on the specific circumstances in which a particular statement had been taken by

the overseas authorities. So, usually at least, any investigation will have to be done by others. On behalf of the Home Secretary, Mr Burnett QC explained how those in the relevant departments who were preparing a case for a SIAC hearing would sift through the material, on the lookout for anything that might suggest that torture had been used. The Home Secretary accepted that he was under a duty to put any such material before the Commission. With the aid of the relevant intelligence services, doubtless as much as possible will be done. And SIAC itself will wish to take an active role in suggesting possible lines of investigation, just as the Hamburg court did.

144. In the nature of the case and with the best will in the world, there is likely to be a limit to what can be discovered about what went on during an investigation by the authorities in another country. Foreign states can be asked, but cannot be forced, to provide information. How far such requests can be pushed without causing damage to international relations must be a matter for the judgment of the Government and not for SIAC or any court.

145. When everything possible has been done, it may turn out that the matter is left in doubt and that, using their expertise, SIAC cannot be satisfied on the balance of probabilities that the statement in question has been obtained by torture. If so, in my view, SIAC can look at the statement but should bear its doubtful origins in mind when evaluating it. My noble and learned friend, Lord Bingham of Cornhill, proposes, however, that the statement should be excluded whenever SIAC is unable to conclude that there is not a real risk that the evidence has been obtained by torture. It respectfully appears to me that this would be to replace the true rule, that statements obtained by torture must be excluded, with a significantly different rule, that statements must be excluded unless there is not a real risk that they have been obtained by torture. In effect, the true rule would be inverted. There is no warrant for Lord Bingham's preferred rule in the common law, in article 15 of the Convention against Torture or elsewhere in international law. Moreover, it would run counter to the approach in the two decisions which I have mentioned. The real objection, however, is that, for all the reasons given by the German court, it would be unsound. If adopted, such an approach would ignore the exceptional nature of the exclusion, which requires that the relevant factual basis be established. It would mean that exclusion would be liable to become the rule rather than the exception. It would encourage objections. It would prevent SIAC from relying on statements which were in fact obtained quite properly. It would impede SIAC in its task of discovering the facts that it needs to form its judgment. I would therefore reject that approach and agree with

my noble and learned friends, Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood, that SIAC should ask itself whether it is established, by means of such diligent inquiries into the sources as it is practicable to carry out, and on the balance of probabilities, that the information relied on by the Secretary of State was obtained under torture.

LORD CARSWELL

My Lords,

146. The abhorrence felt by civilised nations for the use of torture is amply demonstrated by the material comprehensively set out in the opinion of my noble and learned friend Lord Bingham of Cornhill. While it is regrettably still practised by some states, the condemnation expressed in all of the international instruments to which he has referred is universal. Some of these adjure states to do their utmost to ensure that torture does not take place, while others urge them not to admit in evidence in any proceedings statements obtained by the use of torture.

147. The objections to the admission of evidence obtained by the use of torture are twofold, based, first, on its inherent unreliability and, secondly, on the morality of giving any countenance to the practice. The unreliability of such evidence is notorious: in most cases one cannot tell whether correct information has been wrung out of the victim of torture – which undoubtedly occurred distressingly often in Gestapo interrogations in occupied territories in the Second World War – or whether, as is frequently suspected, the victim has told the torturers what they want to hear in the hope of relieving his suffering. Reliable testimony of the latter comes from Senator John McCain of Arizona, who when tortured in Vietnam to provide the names of the members of his flight squadron, listed to his interrogators the offensive line of the Green Bay Packers football team, in his own words, "knowing that providing them false information was sufficient to suspend the abuse": *Newsweek*, November 21, 2005, p 50.

148. The moral issue arises most acutely when it is established from other evidence that the information obtained under torture appears in fact to be true. Should the legal system admit it in evidence in legal proceedings (where as a matter of law such hearsay evidence may be

admitted) or should it refuse on moral grounds to allow it to be used, despite its apparent reliability? On this issue I entirely agree with your Lordships' conclusion that such evidence should not be admitted, reliable or not, even if the price is the loss of the prospect that some pieces of information relevant to the issue of the activities of the person concerned may be given to the tribunal and relied upon by it in reaching its decision.

149. In so holding I am very conscious of the vital importance in the present state of global terrorism of being able to muster all material information in order to prevent the perpetration of violent acts endangering the lives of our citizens. I agree with the frequently expressed view that this imperative is of extremely high importance. I should emphasise that my conclusion relates only to the process of proof before judicial tribunals such as SIAC and is not intended to affect the very necessary ability of the Secretary of State to use a wide spectrum of material in order to take action to prevent danger to life and property. In the sphere of judicial decision-making there is another imperative of extremely high importance, the duty of states not to give any countenance to the use of torture. Recognising this is in no way to be "soft on torture", a gibe too commonly levelled against those who seek to balance the opposing imperatives.

150. I have to conclude, in agreement with your Lordships, that the duty not to countenance the use of torture by admission of evidence so obtained in judicial proceedings must be regarded as paramount and that to allow its admission would shock the conscience, abuse or degrade the proceedings and involve the state in moral defilement (Lord Bingham's opinion, para 39). In particular, I would agree with the statement of Mr Alvaro Gil-Robles (cited, ibid, para 35) that

> "torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose – the former can never be admissible in the latter."

In following this course our state will, as Neuberger LJ observed in the Court of Appeal (para 497), retain the moral high ground which an open democratic society enjoys. It will uphold the values encapsulated in the judgment of the Supreme Court of Israel in *Public Committee Against Torture in Israel v Israel* (1999) 7 BHRC 31, para 39:

> "Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties."

151. It then has to be considered by what means it may be possible to give effect in our law to this moral imperative. It was argued on behalf of the appellants that it may be done by accepting that the principles of the United Nations Convention Against Torture ("UNCAT") form part of our law, by resort to article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") or by regarding it as a valid principle of the common law. I do not find it necessary to explore either of the first two avenues, which are not without their difficulties, for I am satisfied that the common law can accommodate the principles involved.

152. Some of your Lordships have expressed the opinion that the common law as it stands would forbid the reception in evidence of any statement obtained by the use of torture: see the opinions of my noble and learned friends Lord Bingham of Cornhill at para 52 and Lord Hope of Craighead at para 112. This view may well be justified historically, but even if it requires some extension of the common law I am of the clear opinion that the principle can be accommodated. We have long ceased to give credence to the fiction that the common law consists of a number of pre-ordained rules which merely require discovery and judicial enunciation. Two centuries ago Lord Kenyon recognised that in being formed from time to time by the wisdom of man it grew and increased from time to time with the wisdom of mankind: *R v Lord Rusby* (1800) Pea (2) 189 at 192. Sir Frederick Pollock referred in 1890 in his *Oxford Lectures,* p 111 to the "freshly growing fabric of the common law" and McCardie J spoke in *Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 KB 566 at 570 of the demand of an expanding society for an expanding common law. Similarly, in the US Supreme Court 121 years ago Matthews J said in *Hurtado v California* (1884) 110 US 516 at 531 that

> "as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new

> and various experiences of our own situation and system will mould and shape it into new and not less useful forms."

As Peter du Ponceau said of the common law (*A Dissertation on the Nature and Extent of the Jurisdiction of the Courts,* (1824), Preface):

> "Its bounds are unknown, it varies with the successions of ages, and takes its colour from the spirit of the times, the learning of the age, and the temper and disposition of the Judges. It has experienced great changes at different periods, and is destined to experience more. It is by its very nature uncertain and fluctuating, while to vulgar eyes it appears fixed and stationary."

I am satisfied that, whether or not it has ever been affirmatively declared that the common law declines to allow the admission of evidence obtained by the use of torture, it is quite capable now of embracing such a rule. If that is any extension of the existing common law, it is a modest one, a necessary recognition of the conclusions which should be drawn from long established principles. I accordingly agree with your Lordships that such a rule should be declared to represent the common law. It is only right that this should be done in what Tennyson described as

> "A land of settled government,
> A land of just and old renown,
> Where Freedom slowly broadens down
> From precedent to precedent."
>
> *You Ask Me, Why* (1842), iii.

153. The issue on which I have found it most difficult to reach a satisfactory principled conclusion is that of the approach which SIAC should take to deciding when a statement should be rejected, an issue on which your Lordships have not found it possible to speak with one voice. I have been much exercised by the difficulties inherent in the acceptance of either of the views which have been expressed, but I am conscious of the importance of laying down a clearly defined and

workable rule which can be applied by SIAC (or similar bodies which may have to deal with the same problem). 29773

154. Several possible ways of approaching the issue were mooted in the course of argument. Counsel for the appellants advanced the proposition that once the issue has been raised that a statement may have been obtained by the use of torture the onus should rest upon the Secretary of State to prove beyond reasonable doubt that it was not so obtained. I would unhesitatingly reject this proposition as unsustainable. That is confirmed by experience of inordinately long voir dires in terrorist cases in which the admissibility of confessions has been contested. Not only would the process severely disrupt the course of work in SIAC, it would be wholly impossible for the Secretary of State to obtain the evidence of the parade of witnesses commonly called in such voir dires – gaolers, doctors, interviewers etc – to cover in minute detail the time spent in custody by the maker of the statement. The opposite extreme suggested on behalf of the Secretary of State was that the appellant should have to prove on the balance of probabilities that a challenged statement was obtained by the use of torture before it is rejected. The objections in principle and practice to the imposition of such a burden on an appellant are equally conclusive. He may not even know what material has been adduced before SIAC. The special advocate is given the material, but he has little or no means of investigation and is not permitted to dsclose the information to the appellant or his solicitors, so has no one from whom to obtain sufficient instructions.

155. I agree with your Lordships that consideration of this question by the conventional approach to the burden of proof is both unhelpful and inappropriate. It seems to me rather to equate to the process described by Lord Bingham in *R v Lichniak* [2002] UKHL 47, [2003] 1 AC 903 at para 16 as "an administrative process requiring [the board] to consider all the available material and form a judgment"; cf *Re McClean* [2004] NICA 14, para 77, where McCollum LJ said of a similar process that it was "not the establishment of a concrete fact but rather the formulation of an opinion or impression", which was not capable of proof in the manner usually contemplated by the law of evidence. I accordingly agree with the view expressed by Lord Bingham (para 56 of his opinion) and Lord Hope (para 116) that once the appellant has raised in a general way a plausible reason why evidence adduced may have been procured by torture, the onus passes to SIAC to consider the suspicion, investigate it if necessary and so far as practicable and determine by reference to the appropriate test whether the evidence should be admitted and taken into account.

156. What that test should be is the issue on which your Lordships are divided. Lord Bingham is of the opinion (para 56) that if SIAC is unable to conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to admit it. Lord Hope, on the other hand, has propounded a different test, which he describes as putting the question which SIAC has to decide positively rather than negatively. It has to be established on the balance of probabilities that the particular piece of evidence was obtained by the use of torture; and unless it has in SIAC's judgment been so established, after it has completed any investigation carried out and weighed up the material before it, then it must not reject it on that ground.

157. I have found the choice between these tests the most difficult part of this case. Lord Bingham has cogently described the difficulties facing an appellant before SIAC and the potential injustice which he sees as the consequence if the Hope test is adopted. Lord Hope for his part places some emphasis on the severity of the practical problems which would face SIAC in negativing the use of torture to obtain any given statement, and expresses his concern that it would constitute "an insuperable barrier for those who are doing their honest best to protect us". In support of his view Lord Hope points in particular to the terms of article 15 of UNCAT, which requires states to ensure that any statement "which is *established* to have been made as a result of torture" shall not be invoked in any proceedings.

158. After initially favouring the Bingham test, I have been persuaded that the Hope test should be adopted by SIAC in determining whether statements should be admitted when it is claimed that they may have been obtained by the use of torture. Those who oppose the latter test have raised the spectre of the widespread admission of statements coming from countries where it is notorious that torture is regularly practised. This possibility must of course give concern to any civilised person. It may well be, however, that the two tests will produce a different result in only a relatively small number of cases if the members of SIAC use their considerable experience and their discernment wisely in scrutinising the provenance of statements propounded, as I am confident they will. Moreover, as my noble and learned friend Lord Brown of Eaton-under-Heywood points out in para 166 of his opinion, intelligence is commonly made up of pieces of material from a large number of sources, with the consequence that the rejection of one or some pieces will not necessarily be conclusive. While I fully appreciate the force of the considerations advanced by Lord Bingham in paras 58 and 59 of his opinion, I feel compelled to agree with Lord Hope's view in para 118 that the test which he proposes would, as well as involving

fewer practical problems, strike a better balance in the way he there sets out. 29775

159. On this basis I would accordingly allow the appeals and make the order proposed.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

160. Torture is an unqualified evil. It can never be justified. Rather it must always be punished. So much is not in doubt. It is proclaimed by the Convention against Torture and many other international instruments and now too by section134 of the Criminal Justice Act 1988. But torture may on occasion yield up information capable of saving lives, perhaps many lives, and the question then inescapably arises: what use can be made of this information? Unswerving logic might suggest that no use whatever should be made of it: a revulsion against torture and an anxiety to discourage rather than condone it perhaps dictate that it be ignored: the ticking bomb must be allowed to tick on. But there are powerful countervailing arguments too: torture cannot be undone and the greater public good thus lies in making some use at least of the information obtained, whether to avert public danger or to bring the guilty to justice.

161. Several of your Lordships have remarked on the tensions in play and have noted the balances struck by the law, different balances according to whether one is focusing on the executive or the judicial arm of the state. Essentially it comes to this. Two types of information are involved: first, the actual statement extracted from the detainee under torture ("the coerced statement"); second, the further information to which the coerced statement, if followed up, may lead ("the fruit of the poisoned tree" as it is sometimes called). Generally speaking it is accepted that the executive may make use of all information it acquires: both coerced statements and whatever fruits they are found to bear. Not merely, indeed, is the executive *entitled* to make use of this information; to my mind it is *bound* to do so. It has a prime responsibility to safeguard the security of the state and would be failing in its duty if it ignores whatever it may learn or fails to follow it up. Of course it must do nothing to promote torture. It must not enlist torturers to its aid (rendition being perhaps the most extreme example of this). But nor need it sever relations even with those states whose interrogation

practices are of most concern. So far as the courts are concerned, however, the position is different. Generally speaking the court will shut its face against the admission in evidence of any coerced statement (that of a third party is, of course, in any event inadmissible as hearsay); it will, however, admit in evidence the fruit of the poisoned tree. The balance struck here ("a pragmatic compromise" as my noble and learned friend Lord Bingham of Cornhill describes it at para 16 of his opinion) appears plainly from section 76 of the Police and Criminal Evidence Act 1984. There is, moreover, this too to be said: whereas coerced statements may be intrinsically unreliable, the fruits they yield will have independent evidential value.

162. All this is entirely understandable. As several of your Lordships have observed, the functions and responsibilities of the executive and the judiciary are entirely different, a difference reflected indeed in article 15 of the Torture Convention itself. Article 15's concern is with the use of "any statement . . . made as a result of torture . . . as evidence in any proceedings". It creates no bar to the use of coerced statements as a basis for executive action. And, of course, it says nothing whatever about the fruits of the poisoned tree.

163. None of this is contentious. The dispute arising on these appeals concerns only a single, comparatively narrow issue: the use of certain coerced statements on appeals before the Special Immigration Appeals Commission (SIAC) under section 25 of the Anti-terrorism, Crime and Security Act 2001 (the 2001 Act). The statements in question are those made by detainees abroad, coerced by the authorities of a foreign state without the complicity of any British official. It is the Crown's case that strictly speaking these are admissible in evidence before SIAC, a tribunal charged not with adjudicating upon the appellant's guilt but only with deciding whether reasonable grounds exist for suspecting him to be an international terrorist and for believing his presence here to be a risk to national security.

164. In common with the other members of this Committee and essentially for the reasons they give, I too would reject the Crown's contention. In question here is not the power of the executive but rather the integrity of the judicial process. SIAC is a court of law (indeed a superior court of record). And as was pointed out in *M v Secretary of State for the Home Department* [2004] 2 All ER 863, SIAC's function on an appeal under section 25 is not to review the exercise by the Secretary of State of his power of certification under section 21, but rather to decide for itself whether, at the time of the hearing, there are

"reasonable grounds" for the suspicion and belief required under section 21. True it is that the statements in question are sought to be relied upon not to convict the appellant of any offence but rather to found such suspicion and belief as would justify his continued detention under section 23. It is difficult to see, however, why this consideration should strengthen rather than weaken the Crown's argument: no court will readily lend itself to indefinite detention without charge, let alone trial. (Parliament, indeed, has recently demonstrated its own unease in this area by refusing to legislate for up to 90 days detention of arrested terrorist suspects prior to charge.) At all events, for the detention to continue under the 2001 Act, Parliament required that SIAC must independently sanction this deprivation of liberty.

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165. In short, I would hold that SIAC could never properly uphold a section 23 detention order where the sole or decisive evidence supporting it is a statement established to have been coerced by the use of torture. To hold otherwise would be, as several of your Lordships have observed, to bring British justice into disrepute. And this is so notwithstanding that the appellant was properly certified and detained by the Secretary of State in the interests of national security, notwithstanding that the legislation (now, of course, repealed) allowed the appellant's continuing detention solely on the ground of suspicion and belief, notwithstanding that the incriminating coerced statement was made not by the appellant himself but by some third party, and notwithstanding that it was made abroad and without the complicity of any British official.

166. To what extent, it is perhaps worth asking, does such a ruling impede the executive in its vitally important task of safeguarding the country so far as possible against terrorism? To my mind to a very limited extent indeed. In the first place it is noteworthy that the ruling will merely substitute an exclusionary rule of evidence for the Secretary of State's own publicly stated policy not in any event to rely on evidence which he knows or believes to have been obtained by torture abroad. Secondly, the intelligence case against the suspect would, we are told, ordinarily consist of material from a large number of sources—a "mosaic" or "jigsaw" of information as it has been called; it is most unlikely that the sole or decisive evidence will be a coerced statement. It follows, therefore, that the possibility of a detention order under section 23 being discharged on a section 25 appeal to SIAC because of the rejection of a coerced statement is comparatively remote. And certainly there is nothing in SIAC's open determination in relation to *E's* appeal (the first in which Mr Emmerson QC submitted that

information extracted by torture should be excluded by rule of law rather than merely afforded less weight) to suggest the contrary:

> "[T]here is no sufficient material which persuades us that we can conclude either that torture or other treatment contrary to article 3 of the ECHR was used or even that it may have been used..."

167. But theoretically it could happen and in that event, it is suggested, the Secretary of State would be disadvantaged in two distinct ways. Most obviously, perhaps, he would be unable to continue to detain someone whose detention he judged necessary on grounds of national security. To the straightforward response "so be it, the rule of law so requires", I would add this. There is a certain unreality in discussing the discharge of detention orders as the legislation now stands. The power to detain suspected international terrorists under section 23 of the 2001 Act is now a matter of history. In December 2004 your Lordships in *A v Secretary of State for the Home Department* [2005] 2 AC 68, declared section 23 to be incompatible with articles 5 and 14 of the European Convention on Human Rights and with effect from 14 March 2005 the whole of Part 4 of the Act was repealed by section 16 of the Prevention of Terrorism Act 2005 (save only with regard to extant appeal proceedings, preserved by section 16(4) of the 2005 Act).

168. No doubt the effects of your Lordships' judgment will spill over into other court proceedings designed to provide a judicial check on the exercise of other executive powers to place constraints of one sort or another on terrorist suspects in the interests of national security—most notably appeals to SIAC under section 2 of the Special Immigration Appeals Commission Act 1997 against deportation orders, and statutory applications to the Administrative Court challenging control orders under the Prevention of Terrorism Act 2005. For the reasons already given, however, it seems unlikely that the exclusionary rule concerning coerced statements, even assuming that it applies equally in these related contexts (which was not the subject of specific argument before us) will affect many, if any, individual cases.

169. The other way in which it has been suggested that the Secretary of State may be disadvantaged by your Lordships' ruling is in the event that he has to defend himself against a civil claim, for example for false imprisonment. With regard to this possibility I find myself in strong agreement with the view expressed by Lord Nicholls of Birkenhead in

para 72 of his opinion: it would make no sense to allow (indeed encourage) the Secretary of State to make use of all information available to him in deciding how to exercise his executive power in the public interest and then prohibit his reliance upon part of that information (coerced statements) when faced with a claim for false imprisonment. Rather he should be permitted to refer to such statements, not of course, in reliance upon their truth, but merely to explain his state of mind at the time he took the action impugned.

170. Perhaps, however, a better answer to this particular difficulty is after all to be found in section 21(9) of the 2001 Act (although no argument was in fact addressed upon it):

> "An action of the Secretary of State taken wholly or partly in reliance on a certificate under this section may be questioned in legal proceedings only by or in the course of proceedings under - (a) section 25 or 26, or (b) section 2 of the Special Immigration Appeals Commission Act 1997."

A comparable provision with regard to control orders is, one notes, to be found in section 11(1) of the 2005 Act.

171. It follows from all this that your Lordships' decision on these appeals should not be seen as a significant setback to the Secretary of State's necessary efforts to combat terrorism. Rather it confirms the right of the executive to act on whatever information it may receive from around the world, while at the same time preserving the integrity of the judicial process and vindicating the good name of British justice.

172. I turn finally to the burden of proof. I agree with Lord Hope of Craighead (at para 121 of his opinion) that SIAC should ask itself whether it is "*established*, by means of such diligent inquiries into the sources that it is practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State *was* obtained under torture." Only if this *is* established is the statement inadmissible. If, having regard to the evidence of a particular state's general practices and its own inquiries, SIAC were to conclude that there is no more than a *possibility* that the statement was obtained by torture, then in my judgment this would not have been established and the statement would be admissible.

173. The difficulty I have with the "real risk" test espoused by certain of your Lordships, apart from the fact that classically such a test addresses future dangers (as, for example, the risk of torture or other article 3 ill-treatment which the European Court of Human Rights in *Soering v United Kingdom* (1989) 11 EHRR 439 understandably refused to countenance) rather than past uncertainties, is that it would require SIAC to ignore entirely (rather than merely discount to whatever extent it thought appropriate) any statement not proved to have been made voluntarily. That, at least, is how I understand the "real risk" test to apply: if SIAC were left in any substantial (ie other than minimal) doubt as to whether torture had been used, the statement would be shut out, however reliable it appeared to be and notwithstanding that SIAC concluded that it had probably been made voluntarily. That seems to me a surprising and unsatisfactory test. If I have misunderstood the proposed test and if all that it involves is SIAC shutting out a statement whenever they simply cannot decide one way or the other on the balance of probabilities whether it has been extracted by torture (a rare case one would suppose given the expertise of the tribunal) then my difficulty would be substantially lessened although I would still prefer the test favoured by Lord Hope of Craighead and Lord Rodger of Earlsferry.

174. It is one thing to say, as in *Soering*, that someone cannot be deported whilst there exists the possibility that he may be tortured—or, indeed, as the dissentient minority said in *Mamatkulov and Askarov v Turkey* (Application Nos 46827/99 and 46951/99, unreported, 4 February 2005), if they run a real risk of suffering a flagrant denial of justice— quite another to say that the integrity of the court's processes and the good name of British justice requires that evidence be shut out whenever it cannot be positively proved to have been given voluntarily.

175. For these reasons, and for the reasons given by Lord Bingham and others of my noble and learned friends, I too would allow these appeals and make the order proposed.

~~UNCLASSIFIED~~
~~SECRET//NOFORN~~

THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

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APR 16 2003

MEMORANDUM FOR THE COMMANDER, US SOUTHERN COMMAND

SUBJECT: Counter-Resistance Techniques in the War on Terrorism (S)

(U) ~~(S/NF)~~ I have considered the report of the Working Group that I directed be established on January 15, 2003.

(U) ~~(S/NF)~~ I approve the use of specified counter-resistance techniques, subject to the following:

(U) a. The techniques I authorize are those lettered A-X, set out at Tab A.

(U) b. These techniques must be used with all the safeguards described at Tab B.

(U) ~~(S)~~ c. Use of these techniques is limited to interrogations of unlawful combatants held at Guantanamo Bay, Cuba.

(U) ~~(S)~~ d. Prior to the use of these techniques, the Chairman of the Working Group on Detainee Interrogations in the Global War on Terrorism must brief you and your staff.

(U) ~~(S/NF)~~ I reiterate that US Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions. In addition, if you intend to use techniques B, I, O, or X, you must specifically determine that military necessity requires its use and notify me in advance.

(U) ~~(S/NF)~~ If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.

(U) ~~(S)~~ Nothing in this memorandum in any way restricts your existing authority to maintain good order and discipline among detainees.

Attachments:
As stated

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TAB A

INTERROGATION TECHNIQUES

(U) ~~(S//NF)~~ The use of techniques A - X is subject to the general safeguards as provided below as well as specific implementation guidelines to be provided by the appropriate authority. Specific implementation guidance with respect to techniques A - Q is provided in Army Field Manual 34-52. Further implementation guidance with respect to techniques R - X will need to be developed by the appropriate authority.

(U) ~~(S//NF)~~ Of the techniques set forth below, the policy aspects of certain techniques should be considered to the extent those policy aspects reflect the views of other major U.S. partner nations. Where applicable, the description of the technique is annotated to include a summary of the policy issues that should be considered before application of the technique.

(U) A. ~~(S//NF)~~ Direct: Asking straightforward questions.

(U) B. ~~(S//NF)~~ Incentive/Removal of Incentive: Providing a reward or removing a privilege, above and beyond those that are required by the Geneva Convention, from detainees. [Caution: Other nations that believe that detainees are entitled to POW protections may consider that provision and retention of religious items (e.g., the Koran) are protected under international law (see, Geneva III, Article 34). Although the provisions of the Geneva Convention are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

(U) C. ~~(S//NF)~~ Emotional Love: Playing on the love a detainee has for an individual or group.

(U) D. ~~(S//NF)~~ Emotional Hate: Playing on the hatred a detainee has for an individual or group.

(U) E. ~~(S//NF)~~ Fear Up Harsh: Significantly increasing the fear level in a detainee.

(U) F. ~~(S//NF)~~ Fear Up Mild: Moderately increasing the fear level in a detainee.

(U) G. ~~(S//NF)~~ Reduced Fear: Reducing the fear level in a detainee.

(U) H. ~~(S//NF)~~ Pride and Ego Up: Boosting the ego of a detainee.

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Reason: 1.5(a)
Declassify On: 2 April 2013

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I. (U) ~~(S//NF)~~ Pride and Ego Down: Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW. [Caution: Article 17 of Geneva III provides, "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." Other nations that believe that detainees are entitled to POW protections may consider this technique inconsistent with the provisions of Geneva. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

J. (U) ~~(S//NF)~~ Futility: Invoking the feeling of futility of a detainee.

K. (U) ~~(S//NF)~~ We Know All: Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.

L. (U) ~~(S//NF)~~ Establish Your Identity: Convincing the detainee that the interrogator has mistaken the detainee for someone else.

M. (U) ~~(S//NF)~~ Repetition Approach: Continuously repeating the same question to the detainee within interrogation periods of normal duration.

N. (U) ~~(S//NF)~~ File and Dossier: Convincing detainee that the interrogator has a damning and inaccurate file, which must be fixed.

O. (U) ~~(S//NF)~~ Mutt and Jeff: A team consisting of a friendly and harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique. [Caution: Other nations that believe that POW protections apply to detainees may view this technique as inconsistent with Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

P. (U) ~~(S//NF)~~ Rapid Fire: Questioning in rapid succession without allowing detainee to answer.

Q. (U) ~~(S//NF)~~ Silence: Staring at the detainee to encourage discomfort.

R. (U) ~~(S//NF)~~ Change of Scenery Up: Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

S. (U) ~~(S//NF)~~ Change of Scenery Down: Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

T. (U) ~~(S//NF)~~ Dietary Manipulation: Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.

(U)

U. ~~(S//NF)~~ Environmental Manipulation: Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times. [Caution: Based on court cases in other countries, some nations may view application of this technique in certain circumstances to be inhumane. Consideration of these views should be given prior to use of this technique.] 29784

(U)

V. ~~(S//NF)~~ Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.

(U)

W. ~~(S//NF)~~ False Flag: Convincing the detainee that individuals from a country other than the United States are interrogating him.

(U)

X. ~~(S//NF)~~ Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment. [Caution: The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command. This technique is not known to have been generally used for interrogation purposes for longer than 30 days. Those nations that believe detainees are subject to POW protections may view use of this technique as inconsistent with the requirements of Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation; Article 14 which provides that POWs are entitled to respect for their person; Article 34 which prohibits coercion and Article 126 which ensures access and basic standards of treatment. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

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TAB B

GENERAL SAFEGUARDS

(U) ~~(S//NF)~~ Application of these interrogation techniques is subject to the following general safeguards: (i) limited to use only at strategic interrogation facilities; (ii) there is a good basis to believe that the detainee possesses critical intelligence; (iii) the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); (iv) interrogators are specifically trained for the technique(s); (v) a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel) has been developed; (vi) there is appropriate supervision; and, (vii) there is appropriate specified senior approval for use with any specific detainee (after considering the foregoing and receiving legal advice).

(U) The purpose of all interviews and interrogations is to get the most information from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators. Operating instructions must be developed based on command policies to insure uniform, careful, and safe application of any interrogations of detainees.

(U) ~~(S//NF)~~ Interrogations must always be planned, deliberate actions that take into account numerous, often interlocking factors such as a detainee's current and past performance in both detention and interrogation, a detainee's emotional and physical strengths and weaknesses, an assessment of possible approaches that may work on a certain detainee in an effort to gain the trust of the detainee, strengths and weaknesses of interrogators, and augmentation by other personnel for a certain detainee based on other factors.

(U) ~~(S//NF)~~ Interrogation approaches are designed to manipulate the detainee's emotions and weaknesses to gain his willing cooperation. Interrogation operations are never conducted in a vacuum; they are conducted in close cooperation with the units detaining the individuals. The policies established by the detaining units that pertain to searching, silencing, and segregating also play a role in the interrogation of a detainee. Detainee interrogation involves developing a plan tailored to an individual and approved by senior interrogators. Strict adherence to policies/standard operating procedures governing the administration of interrogation techniques and oversight is essential.

Classified By: Secretary of Defense
Reason: 1.5(a)
Declassify On: 2 April 2013

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ANNEX E

Authorities on the right to counsel

2004 WL 2688477 (UN ICT (Trial)(Rwa))

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International Criminal Tribunal for Rwanda
Trial Chamber I

Before: Presiding Judge Erik Mose, Judge Jai Ram Reddy, Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 14 October 2004

THE PROSECUTOR
v.

THÉONESTE BAGOSORA, GRATIEN KABILIGI, ALOYS NTABAKUZE, ANATOLE NSENGIYUMVA

DECISION ON THE PROSECUTOR'S MOTION FOR THE ADMISSION OF CERTAIN MATERIALS UNDER RULE 89 (C)

ICTR-98-41-T

The Office of the Prosecutor: Barbara Mulvaney, Drew White, Christine Graham, Rashid Rashid

Counsel for the Defence: Raphaël Constant, Paul Skolnik, Jean Yaovi Degli, Peter Erlinder, André Tremblay, Kennedy Ogetto, Gershom Otachi Bw'Omanwa

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

SITTING as Trial Chamber I, composed of Judge Erik Mose, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution's "Motion for the Admission of Certain Materials under Rule 89 (C) of the Rules of Procedure and Evidence", filed on 28 April 2004; and the "Prosecutor's 2nd Motion for the Admission of Certain Documents into Evidence under Rule 89 (C) of the Rules of Procedure and Evidence", filed on 25 May 2004;

CONSIDERING the Response of the Bagosora Defence, filed on 6 May 2004; the Response of the Kabiligi Defence, filed on 7 May 2004; the Prosecution Reply thereto, filed on 18 May 2004; the Second Response of the Kabiligi Defence, filed on 4 June 2004; the Response of the Bagosora Defence, filed on 9 June 2004; the "additional arguments" of the Kabiligi Defence filed on 28 June 2004; the Prosecution "Further Reply", filed on 14 July 2004; the Response of the Kabiligi Defence, filed on 20 July 2004; and the further Response of the Kabiligi Defence, filed on 7 September 2004;

HEREBY DECIDES the motions.

INTRODUCTION

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1. The Prosecution seeks to admit the following materials pursuant to Rule 89 (C) of the Rules of Procedure and Evidence ("the Rules"): (i) a recording and transcript of an interview conducted by ICTR investigators with the Accused Ntabakuze on 19 July 1997 (NTABALO-14, NTABALO-15); (ii) a recording and transcript of an interview conducted by ICTR investigators with the Accused Kabiligi on 19 July 1997 (KABIGRA-01, KABIGRA-02); (iii) a written authorisation to purchase arms and ammunition, dated 27 July 1993, purportedly signed by Bagosora in his capacity as Directeur de Cabinet of the Ministry of Defence (BAGOTHE-38); (iv) the Agreement between the United Nations and the Government of the Republic of Rwanda on the status of the United Nations Assistance Mission for Rwanda, signed in New York on 5 November 1993 (UNAMIRZ-04); and (v) documents allegedly signed by the Accused Bagosora regarding the transportation of arms from Seychelles to Zaire (BAGOTHE-25) and a hand-written note by the Accused Bagosora offering to transport General Dallaire to Gitarama (BAGOTHE-26).

SUBMISSIONS

(i) Custodial Interrogation of Ntabakuze and Kabiligi

2. The Prosecution asserts that the Accused Ntabakuze has consented to the admission of his interview by investigators. [FN1] The Defence for Ntabakuze filed no response to the motion.

FN1. Prosecution Motion para. 8, citing Letter from Mr. Tremblay to Messrs. Chile Eboe-Osuji and Drew White, Office of the Prosecutor, dated 22 July 2002, filed with the Registry on 13 August 2002, p. 11166bis.

3. The interview of the Accused Kabiligi has previously been the subject of defence motions which have been rejected; the Defence should, therefore, be precluded from relying on those same arguments to challenge. [FN2] In any event, the Accused Kabiligi voluntarily waived his right to counsel and the interview was otherwise conducted in a proper and legal manner. Defence allegations of coercion during the interview are unsubstantiated.

FN2. Prosecution Motion paras. 9-10, citing Kabiligi, Decision on the Defence Motion to Lodge Complaint and Open Investigations Into Alleged Acts of Torture Under Rule 40 (C) and 73 (A) of the Rules of Procedure and Evidence (TC), 6 October 1998; Kabiligi, Decision Rejecting Notice of Appeal (TC), 18 December 1998; Kabiligi, Decision Rejecting Notice of Appeal (AC), 18 July 1999.

4. The Defence for Kabiligi argues that previous decisions do not preclude raising the alleged involuntariness of the interview, as they concerned remedies other than exclusion or were ruled premature. The interview was oppressive and involuntary and should be excluded pursuant to Rules 89 (C) and 95. The Accused was handcuffed and threatened with return to Rwanda if he did not cooperate, which he perceived to be a death threat. Nor was the Accused informed of the reasons for his arrest, the charges against him, or his rights. The Kabiligi Defence further argues that the Accused did not receive a copy of the tapes and transcripts of the

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interview in a timely manner, and that the original tapes were not sealed in his presence, in violation of Rules 43 (iv) and (v).

(ii) Documents Created Contemporaneous with Events

(a) BAGOTHE-38

5. The Prosecution submits that the Rules and jurisprudence of the Tribunal permit the admission of documents as evidence without identification or other authentication by a witness. The provenance and relevance of the proposed exhibits is either admitted by the Defence, or is self-evident. The documents should, accordingly, be admitted. The Prosecution further contends that the Defence for Bagosora has previously acknowledged the authenticity of BAGOTHE-38, and objects to its admission only because the document, though signed, was not prepared in its entirety by Bagosora. [FN3] The Prosecution argues that such an objection is relevant to the weight, but not the admissibility, of the document. The document is said to be relevant to the form of the Accused Bagosora's signature on official documents. [FN4]

FN3. Prosecution Motion paras. 11-14, citing Letter from Maitre Constant to Messrs. Chile Eboe-Osuji and Drew White, Office of the Prosecutor dated 24 July 2002, filed with the Registry on 29 July 2003, p. 12184.

FN4. Prosecution Reply 18 May 2004, para. 7.

6. The Bagosora Defence argues that the Prosecution has failed to establish either the relevance or the authenticity of the document referred to as BAGOTHE-38. It admits that the signature at the bottom of the document appears to be that of the Accused, but argues that the Prosecution has failed to establish the origin or chain of custody of the document.

(b) BAGOTHE-25 and BAGOTHE-26

7. The Prosecution submits that BAGOTHE-25 and BAGOTHE-26 are admissible without testimony as neither their relevance nor their provenance is disputed. The Defence for Bagosora previously consented to the admission of the documents. [FN5]

FN5. Prosecution Second Motion 25 May 2004, paras. 2-3.

8. The Bagosora Defence indicates that it does not object to the admission of BAGOTHE-25, provided that two other documents disclosed by the Prosecution, BAGOTHE-34 and BELGGVT-2, are also admitted as evidence under Rule 98. The latter documents, an administrative file concerning Bagosora's entries and exits from Seychelles, and a statement from a Belgian judge, are said to provide additional information necessary for understanding BAGOTHE-38.

9. The Bagosora Defence asserts that it has not been shown the original version of document BAGOTHE-26, and argues that there are indications that the document is not authentic. It asks the Chamber to reserve its ruling until the Prosecution has made the original available for inspection, at which time the Defence will make additional submissions.

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10. The Prosecution notes that all Defence teams have agreed to the admission of the Agreement between the United Nations and the Rwandan Government on the Status of UNAMIR. [FN6] There were no submissions in opposition to the admission of this document.

FN6. Prosecution Motion para. 15, fn. 14.

DELIBERATIONS

(i) Custodial Interrogation of Kabiligi and Ntabakuze

11. Article 17 (3) of the Statute, "Investigation and Preparation of the Indictment", provides:

If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.

Article 20 (4)(g) confers on any Accused the right "[n]ot to be compelled to testify against himself or herself or to confess guilt". Rule 42, entitled "Rights of Suspects During Investigation", prescribes that:

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:

(i) The right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it;

(ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and

(iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

Rule 42 (B) prescribes the consequences of the absence of counsel, and provides for the possibility of waiver of the right:

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Rule 40 (C) makes clear that a suspect benefits from the rights enumerated in Rule 42 from the moment of transfer into the custody of the Tribunal. Rule 95 requires the exclusion of evidence "if obtained by methods which cast substantial doubt on

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its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings".

12. The transcript of the custodial interview of the Accused Ntabakuze shows that he unambiguously invoked the right to counsel and refused to answer any questions of substance. However, the Defence for Ntabakuze has made no objection to its admission. On the basis of the absence of objection from the Defence, and noting that the Accused made no statements of substance during the interview, the Chamber finds that no issue arises under Rule 95 and that the statement may be admitted.

13. The admissibility of the Kabiligi statement is, by contrast, contested. As a preliminary matter, the Prosecution contends that the objections raised by the Defence have already been litigated and rejected. This is not the case. A decision dated 6 October 1998 rejected an application for an investigation into allegations of torture, and refused to quash the proceedings against the Accused. Nothing was said about the admissibility of the interview at trial. [FN7] Another pre-trial decision held that a request for a declaration of inadmissibility was premature as the Prosecution had not yet sought to tender the interview. [FN8] The issue of its admissibility is now before the Chamber for the first time.

FN7. Kabiligi, Decision on the Defence Motion to Lodge Complaint and Open an Investigation into Alleged Acts of Torture Under Rules (40) (C) and 73 (A) of the Rules of Procedure and Evidence (TC), 6 October 1998.

FN8. Kabiligi and Ntabakuze, Decision on Kabiligi's Motions to Nullify and Declare Evidence Inadmissible (TC), 2 June 2000, para. 22 ("The Tribunal decides the admissibility of particular evidence at trial, only after a party gives notice or seeks to introduce the particular item ... The Tribunal notes that at this stage of the proceedings it is unknown whether the Prosecutor will seek to introduce any evidence of the questioning at trial. Thus, the Tribunal defers from ruling on the issue of admissibility of the challenged possible evidence").

14. The Prosecution claims that the questioning of the Accused Kabiligi was conducted after he had been advised of his rights by the investigators who interviewed him and made a voluntary waiver of his rights in accordance with Rule 42 (B). During the dialogue which is set forth below, the Accused was handed a form, written in French, entitled "Notice of Suspect's Rights" which substantially recapitulates the rights enumerated in Rule 42 (A) and (B). At the bottom of the form is a declaration indicating that the signatory has read and understands the rights enumerated therein; that he is ready to respond to questions; that he does not wish to have counsel at this time; and that no threats or promises have been made against him to procure his consent. At the end of the dialogue, the Accused signed the declaration.

15. The genuineness of that consent must be considered in the context of the entire conversation preceding his signature.

Investigator: We will now provide you a copy [of the "Notice of Suspect's Rights, which had just been read to the Accused orally] to read, if you wish. Can you tell us what you have decided? Do you understand your rights? Do you have any questions about that?

Kabiligi: Thank you. I do have one question. I am prepared to exercise my rights as soon as I understand the reasons for my arrest and the case brought against me.

Investigator: Can you be more specific? Please clarify what you want?

Kabiligi: I would like to know the reason for my arrest. Am I indicted? By whom, and why? Have I committed any crimes? Where, when and why? And how? That's it. I am prepared as soon as I find out the reasons for my arrest, I will be entitled to request the assistance of counsel provided by the International Tribunal, as I do not have sufficient means to pay for it.

Investigator: So, at this time, you are laying down the condition that we must first inform you of all the charges the Tribunal has against you. Is that what you are requesting?

Kabiligi: Precisely. Before exercising my rights, before requesting the assistance of counsel, I must be informed of the charges against me. At the least the offences I am accused of.

Investigator: Yes. But, of course, that's indeed [?] disclosure is part of the process. In any case, at some point, the Tribunal will have the obligation to disclose in full the case against you. That's part of the standard procedure for your defence procedure. It is obvious that you were not [?]. At some point during your defence, you will be entitled to examine your case file. For the moment, this interview, considered to be the first questioning [?] by Tribunal investigators, what we are requesting is that, if you accept to speak to us. First [?] If you accept to speak to us, we will ask you questions. Should you decide not to speak to us, please tell us what your choice is.

Kabiligi: Personally, I am prepared to talk at this time. But, questioning or preliminary investigation or interview of me, but reserving the right to request the assistance of counsel and exercise the full benefit of the rights that have just been read to me, as soon as I find out the case against me, because I don't know what it is at this time.

Investigator: So, you are saying that before you speak to us, you require that your case file be disclosed to you? That's the condition you seem to be laying down. We are just trying to understand what you are saying. Tell us what you want. Are you saying that you will not talk to us unless your case file is disclosed to you? That's what I understood. You want your case file disclosed to you before we ask you any questions? Is that what you are suggesting? What exactly do you want?

Kabiligi: What I am asking is that at this time, as you explained yesterday, this is a preliminary interview. In case -- once I discover the case against me, I will request the assistance of counsel. I am not insisting on having the presence of counsel during this interview, but once I discover the case against me, I must be able to exercise the full extent of the rights that have just been read to me, that I have just taken cognisance of.

Investigator: [?]

Kabiligi: I'm ready to continue.

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Investigator: At this time, you are prepared to answer our questions?

Kabiligi: I am prepared to answer your questions. Alone, without the assistance of counsel, as I have not yet read my case file. Once I have read my case file, I will request the assistance of counsel.

Investigator: That implies that you have now waived that right. That means that you have now waived [?]. Momentarily. At least for today. Because should you accept to answer our questions, that means that for the moment, you waive that right. For now.

Kabiligi: But, it doesn't mean I waive it?

Investigator: It is not an absolute waiver. In any event, you are entitled to the assistance of counsel for full answer and defence. This is an international tribunal with all the attendant guarantees.

Kabiligi: All right. I accept.

Investigator: Okay. In that case....

Kabiligi: At this time, for this interview, I am not requesting the assistance of counsel. However, once I have read my case file, I will exercise the full extent of my rights.

Investigator: Now, could you sign the waiver?

Kabiligi: During this interview, I have decided to answer all your questions without the presence of counsel. However, in due course, I may stop the interview and request the assistance of counsel. [FN9]

FN9. Prosecution Motion, Appendix "KABIGRA-02", pp. K0232817-20.

16. Article 17 of the Statute and Rule 42 of the Rules state in unconditional terms that a detainee has a right to the immediate assistance of counsel; and, further, that questioning of the suspect "shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel". Not all legal systems confer this right on a detainee, but it is deeply and eloquently inscribed in the annals of many national and international legal systems. [FN10] Along with the right to silence, this right is rooted in the concern that an individual, when detained by officials for interrogation, is often fearful, ignorant and vulnerable; that fear and ignorance can lead to false confessions by the innocent; and that vulnerability can lead to abuse of the innocent and guilty alike, particularly when a suspect is held incommunicado and in isolation.

FN10. Constitution of Canada (1982), s. 10: "Everyone has the right on arrest or detention ... (b) to retain and instruct counsel without delay and to be informed of that right"; New Zealand Bill of Rights Act (1990), s. 23 (1): "Everyone who is arrested or who is detained under any enactment ... [s]hall have the right to consult and instruct a lawyer without delay and to be informed of that right"; Constitution of South Africa (1996), Art. 35 (1): "Everyone who is arrested for allegedly committing an offence has the right (a) to remain silent; (b) to be

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informed promptly of (i) the right to remain silent; and (ii) the consequences of not remaining silent; (c) not to be compelled to make any confession or admission that could be used in evidence against that person"; Art. 35 (2): "Everyone who is detained ... has the right ... (b) to choose, and to consult with, a legal practitioner and to be informed of this right"; Fiji Constitution (Amendment) Act 1997, s. 27: "Every person who is arrested or detained has the right: (c) to consult with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly ...''; Statute of the International Criminal Court, Art. 55 (2): "Where there are grounds to believe that a person has committed a crime ... that person shall also have the following rights of which he or she shall be informed prior to being questioned: ... (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel"; Miranda v. Arizona 384 U.S. 346 (1966) ("Miranda''); Dickerson v. United States 530 US 428 (2000) (reaffirming that the rules announced in Miranda were constitutional rules). See also Imbriosca v. Switzerland, A 275 1993 (E Ct HR), para. 36 (finding that Article 6 of the European Convention of Human Rights, including the right to the assistance of counsel, applies in principle to preliminary investigations).

17. The importance of the right to counsel, and the precariousness of its exercise by a suspect in detention, is reflected in the stringent requirement in Rule 42 (B) that a suspect has "voluntarily waived his right to counsel" before a custodial interrogation can take place. The heavy burden of the words "voluntarily waived" were interpreted by a Chamber of the ICTY in Delalic:

> The burden of proof of voluntariness or absence of oppressive conduct in obtaining a statement is on the Prosecution. Since these are essential elements of proof fundamental to the admissibility of a statement, the Trial Chamber is of the opinion that the nature of the issue demands for admissibility the most exacting standard consistent with the allegation. Thus, the Prosecution claiming voluntariness on the part of the Accused/suspect, or absence of oppressive conduct, is required to prove it convincingly and beyond reasonable doubt. [FN11]

FN11. Prosecutor v. Delalic et al., Decision on Zdravko Mucic's Motion For the Exclusion of Evidence (TC), 2 September 1997 ("Delalic Exclusion Decision"), para. 42.

National courts in which the **right** to **counsel** is recognized have elaborated that a **waiver** cannot be **voluntary** unless a detainee knows of the right to which he is entitled. [FN12] To be so informed, the suspect must be informed that the right includes the right to the prompt assistance of counsel, prior to and during any questioning. Any implication that the right is conditional, or that the presence of counsel may be delayed until after the questioning, renders any waiver defective. [FN13] These rights, and the practical mechanisms for their exercise, must be communicated in a manner that is reasonably understandable to the detainee, and not "simply by some incantation which a detainee may not

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understand". [FN14] Generally, a suspect may be taken to comprehend what a reasonable person would understand; but where there are indications that a witness is confused, steps must be taken to ensure that the suspect does actually understand the nature of his or her rights. [FN15]

FN12. Miranda p. 475 (right to counsel must be "knowingly and intelligently waived"); R. v. Cullen 1992 NZLR LEXIS 689 (CA) ("Cullen'') p. 10 ("[t]he purpose of making the suspect aware of his rights is so that he may make a decision whether to exercise them and plainly he cannot do that if he does not understand what those rights are");R v. Evans [1991] 1 SCR 869 ("Evans''), p. 891 ("[A] person who does not understand his or her right cannot be expected to assert it").

FN13. Miranda p. 479 ("[The detainee] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be sued against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot an attorney one will be appointed for him prior to any questioning if he so desires."); R v. Bartle, [1994] 3 S.C.R. 173 ("Bartle''), p. 191 ("[A] person who is "detained" within the meaning of s. 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty .... a detainee is entitled as of right to seek such legal advice 'without delay' and upon request").

FN14. Cullen p. 10 ("[t]the fundamental rights conferred or confirmed by the New Zealand Bill of Rights Act 1990 are not to be regarded as satisfied simply by some incantation which a detainee may not understand. The purpose of making the suspect aware of his rights is so that he make a decision whether to exercise them and plainly he cannot do that if he does not understand what those rights are"); S v. Melani and others 1995 SACLR LEXIS 290 pp. 47-48 (Sup. Ct., Eastern Cape) ("[i]n order to give effect to an accused's right in terms of section 25 (1)(c) he or she must be informed of his or her right to consult in manner that it can reasonably be supposed that he or she has understood the content of that right").

FN15. Evans pp. 890-91 ("In most cases, one can infer from the circumstances that the accused understands what he has been told. In such cases, the police are required to go no further ... But where, as here, there is a positive indication that the accused does no understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding ... It is true that [the police] informed the appellant of his right to counsel. But they did not explain that right when he indicated that he did not understand it").

18. Once the detainee has been fully apprised of his right to the assistance of counsel, he or she is in a position to voluntarily waive the right. The waiver must be shown "convincingly and beyond reasonable doubt". It must be express and unequivocal, and must clearly relate to the interview in which the statement in question is taken. [FN16]

FN16. Delalic Exclusion Decision, para. 42. See Pfeifer and Plankl v. Austria, A 227 1992 (E Ct HR), para. 37 ("the waiver of a right guaranteed by the Convention -- insofar as it is permissible -- must be established in an unequivocal manner"); Bartle para. 39 (must be "clear and unequivocal that the person is waiving the

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procedural safeguard");Miranda p. 475 ("An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver").

19. Relying on these principles, the Chamber is of the view that the Prosecution has not discharged its burden of showing that the Accused Kabiligi voluntarily waived his right to the assistance of counsel, as required by Rule 42 (B). At the beginning of his interview with the investigators, the Accused demonstrated that he did not understand that he had an immediate right to the assistance of counsel. He asked repeatedly to be informed of the charges against him, and seems to have believed that "as soon as I find out the reasons for my arrest, I will be entitled to request the assistance of counsel", and that "before exercising my rights, before requesting the assistance of counsel, I must be informed of the charges against me". Rather than correcting the Accused's misperception that his right to counsel was conditional upon being informed of the case against him, the investigators responded that "standard procedure" is that disclosure would happen later. The Accused then attempted to reserve the right to request the assistance of counsel "as soon as I find out the case against me, because I don't know what it is at this time". This again should have demonstrated to the investigators that the Accused was still confused, and probably did not understand that he had the right to assistance of counsel immediately. Nothing in the remainder of the interview indicates that the Accused's misunderstanding was ever corrected, and at no time did the investigators advise the Accused that he had an immediate right to the assistance of counsel during questioning. Under these circumstances, the Prosecution has not proven that there was a waiver of the right to counsel, as required by Rule 42 (B).

20. The Chamber is further of the view that the Accused actually did invoke the right to counsel at the beginning of his interview. The Accused states three times that as soon as he is informed of the case against him, he would then "exercise" the right of, or "be entitled" to, the assistance of counsel. He also purports to "exercise the full benefit of the rights that have just been read to me, as soon as I find out the case against me". The investigators should have recognized that this was a confused attempt to invoke the right to counsel, and ceased their questioning immediately. Rule 42 (B) expressly states that questioning "shall not proceed" in the absence of a voluntary waiver. It was improper for the investigators to have explained that "standard procedure" was that disclosure occurred at a later time, thereby possibly implying that the right to counsel was also only available at a later time. The Accused was under the impression that the interview was "preliminary", but the investigators proceeded to ask important questions of substance. The questioning of the Accused after his attempted invocation of the right to counsel, including the apparent waiver of that right, violated Rule 42 (B).

21. The right to counsel during a custodial interrogation is closely intertwined with the exercise of the right to silence; the right to be cautioned that any statement made may be used against the detainee in evidence at trial; and the right in Article 20 (4)(g) of the Statute "[n]ot to be compelled to testify against himself or herself or to confess guilt". Without at least the opportunity to choose whether to consult with counsel, there is a possibility that an accused will answer the questions of investigators in ignorance of the other rights to which he or she is entitled. For this reason, the consequence of non-waiver of the

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right is expressly set forth in the Rule 42 (B): questioning "shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel". As stated by the ICTY Chamber in Delalic, it is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95 as being "antithetical to, and would seriously damage, the integrity of the proceedings". [FN17] In any event, no circumstances have been raised by the Prosecution to suggest that exclusion is not the appropriate response to the violation of the right. The interview of the Accused Kabiligi is excluded.

FN17. Delalic Exclusion Decision, para. 43.

(ii) Documents Created Contemporaneous with Events

(a) BAGOTHE-38

22. Rule 89 (C) provides the Chamber with the discretion to admit any relevant evidence which it deems to have probative value. Conversely, this rule imposes an obligation to refuse evidence which is not relevant or does not have probative value. [FN18] At the admissibility stage, the moving party need only make a prima facie showing that the document is relevant and has probative value. [FN19] This Chamber recently discussed in detail the conditions for admission of documentary evidence:

FN18. Bagasora, et. al., Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 8.

FN19. Bagosora et al., Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 7; Musema, Judgement, TC, paras. 35-38.

In offering a document for admission as evidence, the moving party must as an initial matter explain what the document is. The moving party must further provide indications that the document is authentic -- that is, that the document is actually what the moving party purports it to be. There are no technical rules or preconditions for authentication of a document, but there must be "sufficient indicia of reliability" to justify its admission. Indicia of reliability which have justified admission of documents in the jurisprudence of the ad hoc Tribunals include: the place in which the document was seized, in conjunction with testimony describing the chain of custody since the seizure of the document; corroboration of the contents of the document with other evidence; and the nature of the document itself, such as signatures, stamps, or even the form of the handwriting. [FN20] Authenticity and reliability are overlapping concepts: the fact that the document is what it purports to be enhances the likely truth of the contents thereof. On the other hand, if the document is not what the moving party purports it to be, the contents of the document cannot be considered reliable, or as having probative value. [FN21]

FN20. Delalic, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 18; Kordic and Cerkez, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential

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Transcripts (TC), 1 December 2000, paras. 43-44; Brdanin and Talic, Order on the Standards Governing the Admission of Evidence (TC), 15 February 2002, para. 20.

FN21. Bagosora et al., Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 8.

23. The Prosecution asserts that the written authorisation to purchase arms and ammunition, dated 27 July 1993, purportedly signed by Bagosora in his official capacity as Directeur de Cabinet of the Ministry of Defence (BAGOTHE-38), is relevant to the manner in which Bagosora signed authorisations, given that the Defence for Bagosora challenged this in its cross-examination of Prosecution Witness KJ. The Chamber notes that the Defence has not conceded the authenticity of the document and only admits that the signature appears to be that of Bagosora. The document is relevant and will be admitted. Its authenticity and evidentiary weight will be assessed in the context of all available evidence.

(b) BAGOTHE-25 and BAGOTHE-26

24. The Defence for Bagosora agrees to the admission of BAGOTHE-25 on condition that two other documents produced by the Prosecution, BAGOTHE-34 and BELGGVT-2, also be admitted into evidence to provide additional context. This is not a valid objection to the admission of the document. There is no need to condition the admission of one document upon the introduction of a second document which may provide additional information on a matter discussed in the first. The Defence may itself introduce any relevant and admissible evidence at the time of its choosing. Accordingly, BAGOTHE-25 is admissible.

25. The Defence for Bagosora asks the Chamber to refrain from any decision on the admissibility of BAGOTHE-26 until such time as an original of the document is produced for inspection by the Prosecution. The Prosecution has not indicated whether it is in possession of an original of the document. While an original of a document is not a precondition for admissibility, the Chamber would expect that, when available, an original of a document should be provided for inspection to assist the parties in assessing the authenticity of the document. Without further clarification concerning the availability of an original of the document, the Chamber declines to admit the document at the present stage.

(c) UNAMIRZ-04

26. The Defence made no objection to the admission of the agreement between the United Nations and Rwanda on the status of UNAMIR forces in Rwanda in 1994. The Chamber considers the document admissible.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution motions to admit into evidence the records of interviews of the Accused Ntabakuze, identified as NTABALO-14 and -15; the written authorisation to purchase arms (BAGOTHE-38); the documents relating to transport of arms (BAGOTHE-25); the Agreement between the United Nations and Rwanda on the Status of UNAMIR (UNAMIRZ-04);

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DIRECTS the Registry to mark each of the admitted documents as a Prosecution exhibit; and

DENIES the Prosecution motion in respect of KABIGRA-01 and -02 and BAGOTHE-26.

Arusha, 14 October 2004

Erik Mose, Presiding Judge

Jai Ram Reddy, Judge

Sergei Alekseevich Egorov, Judge

Seal of the Tribunal

END OF DOCUMENT

IN THE TRIAL CHAMBER

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Before: Judge Adolphus G. Karibi-Whyte, Presiding

Judge Elizabeth Odio Benito

Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 2 September 1997

THE PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC a/k/a "PAVO"
HAZIM DELIC
ESAD LANDZO a/k/a 'ZENGA"

DECISION ON ZDRAVKO MUCIC'S MOTION FOR THE EXCLUSION OF EVIDENCE

The Office of the Prosecutor:

Mr. Grant Niemann

Ms. Teresa McHenry

Mr. Giuliano Turone

Counsel for the Accused:

Ms. Edina Residovic, Mr. Ekrem Galijatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic

Mr. Zeljko Olujic, Mr. Michael Greaves for Zdravko Mucic

Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic

Mr. John Ackerman, Ms. Cynthia McMurrey, for Esad Landzo

I. PROCEDURAL AND FACTUAL BACKGROUND

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On 8 May 1997, the defence for the accused, Zdravko Mucic ("Defence") presented two related applications pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules") for determination by this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("International Tribunal"). The first application is for leave to file an out-of-time-application to exclude the transcripts of certain pre-trial interviews held between Zdravko Mucic and officials of the Austrian Police Force on 18 March 1996 and with officials of the Prosecution on 19, 20 and 21 March 1996 ("Statements") from evidence (Official Record at Registry Page ("RP") D 3956 - D 3958). The second application is the substantive application to exclude the Statements ("Application") and it is the one which is the subject matter of this Decision (RP D 3587 - D 3595).

On the same date, the Trial Chamber heard oral arguments from both the Defence and the Office of the Prosecutor ("Prosecution") on the first application. It ruled in favour of the Defence, thereby granting the Defence leave to present the Application. However, the Trial Chamber deferred hearing oral arguments on the Application until after the examination of the witnesses through whom the Prosecution will seek to tender the Statements into evidence. Shortly thereafter, the Prosecution filed an undated response to the Application ("Response") (RP D 3766 - D 3790).

The Trial Chamber heard the examination of the Prosecution witnesses relating to the Statements and on 12 June 1997, heard oral arguments on the Application from both the Prosecution and the Defence. Thereafter, the Trial Chamber delivered an oral ruling granting the Application in part and denying it in part. It reserved its written decision to a later date.

THE TRIAL CHAMBER HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

A. Applicable Provisions

1. The following provisions of the Statute of the International Tribunal and the Rules are relevant to the determination of the Motion.

Article 18

Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay

for it, as well as to necessary translation into and from a language he speaks and understands.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19

Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21

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Rights of the Accused

. . . .

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

(g) not to be compelled to testify against himself or to confess guilt.

Rule 5

Non-compliance with Rules

Any objection by a party to an act of another party on the ground of non-compliance with the Rules or Regulations shall be raised at the earliest opportunity; it shall be upheld, and the act declared null, only if the act was inconsistent with the fundamental principles of fairness and has occasioned a miscarriage of justice.

Rule 42

Rights of Suspects during Investigation

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:

(i) the right to be assisted by counsel of his choice or to have legal assistance

assigned to him without payment if he does not have sufficient means to pay for it;

(ii) the right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and

(iii) the right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Rule 63

Questioning of Accused

(A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.

(B) . . . .

Rule 89

General Provisions

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

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Rule 95

Evidence Obtained by Means Contrary to Internationally Protected Human Rights

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

2. Also of relevance to this Application is Article 6(3) of the European Convention on Human Rights.

Article 6

. . . .

3. Everyone charged with a criminal offence has the following minimum rights:

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

. . . .

B. General Considerations

3. Before the Prosecution sought to tender the Statements into evidence, Defence Counsel objected to their admissibility on various grounds and submitted that the Statements should be excluded. The grounds relied upon are briefly stated as follows:

A. Zdravko Mucic ("the Accused") was not at the interview of 18 March 1996 at 19.30 hours on the face of the evidence offered or advised of his right to Counsel or any of his rights as a suspect before questioning.

B. Analysis of the rights accorded to the Accused by the Austrian Police were unfair to him and violated his rights.

C. The differences in the rights accorded to the suspect by the Austrian Police and those of the Prosecution were confusing to him.

D. The Prosecution was aware of the cultural differences and therefore owed the Accused a duty to explain his rights more clearly rather than merely reading the rights to him.

E. The activities of the Prosecution were oppressive to the Accused.

4. In the Response, the Prosecution denied the allegations made in their entirety. It was submitted that the ground of *prima facie* oppressive conduct on which the waiver to bring the Motion is founded is unfair both to the Prosecution and to other accused persons. The Prosecution argued as follows:

It would be unfair to other accused who, because their allegations were not so

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serious have (quite properly) not been permitted leave to challenge the admissibility of their statements. That an accused would be able to bring up all issues merely because he raises one serious issue would be an encouragement for all accused in this case and future cases to raise unfounded and serious allegations.

(Response at para. 23)

5. The Prosecution's answer to the challenge of the waiver of the Accused of his right to Counsel is that the waiver was voluntary and that he maintained this position throughout the interview with the Prosecution. The Prosecution denied the accusation of oppression of the Accused and submitted that no promises were made or threats held out to the Accused to waive the right. The possible "confusing distinction" between the Austrian approach and the Prosecution approach cannot be regarded as oppression and cannot now be raised. The representatives of the Prosecution did everything to ensure that the Accused understood the rights he is entitled to, and was afforded all the rights he is entitled to under the Rules. The Prosecution replied in detail to the accusation that the Austrian procedure was in violation of the human rights of the Accused.

. On 12 June 1997, when Counsel for the Prosecution sought to tender the statements of the Accused, Defence Counsel objected to the admissibility of the statements relying on all the grounds raised in the Application and elaborating on them in the oral address. Concisely stated the objections were based essentially on the violation of the human rights of the suspect, founded on the violation of Rules 42 and 43.

C. Arguments

I. The Defence

7. Mr. Greaves, for the Defence, regarded the interviews on 18 March 1996 by the Austrian Police and those conducted on 19, 20 and 21 March 1996 by the Investigators of the Prosecution in Vienna as one. Counsel submitted that the two interviews cannot be separated and placed in separate compartments; each isolated and standing and relying on its own procedure for its validity or legality. The interviews must be seen simply as a continuing part of an entire process which took place over a period of about four days. Counsel's reasons why the statements are inadmissible is because they offend against Rule 95.

8. Criticising the Austrian interview, Counsel submitted that the Accused was denied right to Counsel, to remain silent, and was induced to make a confession. It was submitted that the interview which lasted 4 3/4 hours in total and conducted by five different officers was oppressive of the Accused.

Rights of the Accused

Right to Counsel

9. Counsel referred to paragraph 4 of the sheet for arrested persons served on the Accused, the English translation of which states that "[iCf you want your legal Counsel to come and see you as soon as possible, make it known. You may not have legal counsel present when you are questioned for a criminal offence." Counsel submitted that under the Austrian procedure, an accused person is allowed to speak to his lawyer only after being questioned and if it has been determined that the accused person would be transferred to the Court prison and that there is sufficient time remaining until then. It was

submitted that consultation with a lawyer in the Austrian procedure is subject to there being no risk of prejudice to the course of justice.

10. Contrasting these with the right to counsel under Rule 42 which confers an unfettered right to counsel to give advice during the course of an interview, with the conditional Austrian rights to counsel only after questioning, and if it has been determined that the Accused would be transferred to the Court prison subject to the availability of time. It was submitted that such consultation with a lawyer will be considered only if there is no risk of prejudicing the course of justice.

11. The Austrian rules, it was submitted, offend against Rule 42. Any system which allows the Accused to see his lawyer only with the approval of the Police smacks of a Police State.

Right to Silence

12. According to the Austrian Rules, the exercise of the right to remain silent, is an effective removal of the exercise of the right to defend oneself. This, it is submitted, is against the spirit of the Rules. The Accused is encouraged to speak because the statements may also help to clear up a mistake. The Accused need not speak about the case. The exercise of the right to remain silent deprives the suspect of he possibility to give an account of things from his own perspective and help to clear up a mistake.

Confession

13. The nature of the advice of the Austrian Police is such that the Accused was told that if he confessed or contributed to the elucidation of the truth through the statement he makes, this would be taken into account as grounds for mitigation, if convicted. Counsel submitted that this is an inducement to confess. He referred to Section 76 of the United Kingdom Police and Criminal Evidence Act 1984 which deals with Confessions. After referring to Section 76(2) of that Act, Counsel pointed out that the mischief aimed at by that legislation is to prevent people in authority (police officers, customs officers) making persons confess by improper means.

14. It was submitted that to admit the interview with the Austrian Police into evidence would offend against Rules 89(D) and 95 of the Rules of Procedure and Evidence.

Oppressive Questioning

.5. The second part of the objection to the admission of the Statement made to the Austrian Police is that the interview was neither audio-taped nor video-taped in compliance with Rule 43, and was conducted with a man who on the evidence of Mr. Moerbauer must have been desperately tired. Counsel referred to the evidence of Mr. Moerbauer that he, as one of the interviewers, was very tired at the end. Counsel therefore inferred that a man interviewed for a period of over four and three quarter hours, by a total of some five different officers being in and out of the room must have been desperately tired. It was accordingly submitted that to have an interview of that duration is in itself oppressive.

Right to Counsel and Waiver: Cross-Cultural Element

16. In its submission on the waiver of the Accused's right to Counsel, the Defence contended that the cross-cultural aspect of the procedure should be taken into account. Counsel referred to the fact that the Accused is a citizen of the former Yugoslavia who has lived in Austria for some time and who is thus, probably somewhat familiar with Austrian procedure. However, during this period of four days, he was subjected to two quite different cultures, involving different civil rights and obligations opposed to each

other.

17. The bone of contention here is the question of why the Accused had suddenly to change his mind and waive his right to Counsel, he had earlier insisted on exercising. Mr. Greaves traced the change of mind to a conversation with Mr. Regis Abribat, the leader of the Prosecution investigating team which took place in the space of one or two minutes on 18 March 1996. He doubted whether it was possible to communicate with the Accused by interpreting the Rules to the Accused within one or two minutes, as claimed by Mr. Abribat. Counsel described the claim as ludicrous.

18. After criticising the procedure adopted by the investigators during the questioning of the suspect, Mr. Greaves came to his own conclusions and submitted that Mr. Abribat did know that the Accused did not want a lawyer because he had had a conversation with him about the matter in the twenty minute period after the hearing before Judge Seda and before the interview began. That was why it did not occur to him to ask the Accused whether he wanted a lawyer. Counsel regards this as a crucial piece of evidence and urged the Trial Chamber to reject the evidence of the Prosecution on what happened in those twenty minutes before the beginning of the interview.

19. It was submitted that Mr. Abribat should have informed himself properly and fully of what was being said by the learned Judge and to make sure he was properly aware of what was being said to the suspect and to make sure he was properly aware as to whether the Accused wanted a lawyer before he interviewed him.

20. Finally it was submitted that the Prosecution has not proved beyond reasonable doubt that the interview with the Austrian Police was free and fair, and if that is right the only proper course is to exclude the evidence because it is in breach of Rules 89(D) and 95.

II. The Prosecution

21. In its reply to the submission of the Defence, the Prosecution like the Defence, adopted the arguments in its written Response. The Prosecution disagreed with the Defence submission that the burden of proof on the Prosecution in the instant case is proof beyond reasonable doubt. Counsel relied on the rules of the Tribunal and certain Decisions in the case of The Prosecutor v Dusko Tadic (IT-94-1-T) for this submission. It was submitted that even if that were the standard required, the Prosecutor has met the standard.

22. On the admissibility of the interview, Counsel denied that Rule 42 is the test for the regularity of interviews taken by non-Tribunals, that is persons other than the Office of the Prosecutor, and it is not the appropriate standard for evaluating statements taken from other systems. Rule 95 is the appropriate standard. Counsel submitted that national standards differ and that is why Rule 95 is adopted. It was submitted that there may be evidence, including statements of an Accused, which do not meet the requirements of Rule 42 and yet may be fundamentally fair.

23. Since in many cases before the International Tribunal, people are arrested in places where different systems of law operate. It was submitted that what is required before the International Tribunal is fundamental fairness in accordance with Rule 95. However Rules 42 and 43 apply to all interviews conducted by the Prosecution.

24. On the Austrian interview, Counsel submitted that there is nothing offensive about anything which happened therein. The Accused was advised that he could consult a lawyer, including before deciding whether or not to give an interview. Austrian law provides and the Accused was advised that he had the

right to consult with an Attorney and he chose not to do so. Under the law of Austria, and the Accused was informed of this, there is no right to Counsel during questioning. This is the position in many countries including European countries. It is in accordance with fundamental human rights and the European convention of human rights.

25. The right to silence as explained by the Austrian instruction did not constitute a breach of the right of the Accused.

26. The Prosecution submitted that the warning on the question of confession is absolutely fair to the Accused. All the warning amounts to is that if the Accused told the truth, on conviction of the offence, it might constitute a mitigating factor toward sentence. The advice is not improper nor an inducement to make the Accused to confess.

Oppressive Questioning

27. The Prosecution concedes that the evidence supports the submission that the Accused was tired by the end of the interview. It however denied that that meant there was anything improper in continuing the interview. The Accused was free to stop the interview when he wanted. The issue was whether the Accused was able to make rational decisions or unable to think. There is no evidence that this was the case. A review of his statement discloses that he was in full control of his faculties at all times. If the Trial Chamber finds the Accused was tired, this fact goes to the weight rather than to the admissibility of the statement.

Office of the Prosecutor Interview

28. This interview is separate from the Austrian Police Interview. The two interviews were treated separately and the Accused understood this. The Austrian Police were not present at the Prosecution interview. Similarly, the Prosecution interviewers were not present during the Austrian Police interviews. The proceedings were different. They were different persons, at different places, at different times. The procedure for each was clearly explained to the Accused.

29. The Accused was told on six different occasions, all tape recorded, of his rights under the Rules. The Prosecution believes the evidence is clear that he did understand that the two proceedings were different. The Prosecution submits that the Accused was not confused because there were two different interviews. He clearly understood what was told to him of his rights.

Alleged Wrongdoings of Mr. Abribat

30. On 18 March 1996, Mr. Abribat, the leader of the Prosecution team of investigators, met for a few minutes with the Accused to introduce the Accused and to give him an overview of the Rules on the interviews and to see if he wanted to give an interview. This was a reasonable thing to do in the circumstances.

31. Mr. Gschwendt, who was present at the interview, gave evidence that nothing improper or any kind of oppression occurred. The two witnesses have explained convincingly what happened. There is absolutely no evidence in support of the allegation. The allegation is made over a year later and is irrelevant.

32. Mr. Abribat and Mr. d'Hooge testified that during the twenty minutes the Accused was taken away by the guards for a rest and that they set up equipment in another room in the Accused's absence. When

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the Accused returned about twenty minutes later, he was asked if he agreed that the interview be recorded. He agreed. It is clear that the Accused was fairly treated and was accorded his rights. Counsel pointed out that during the three days of the interview, the periods were punctuated at least six times by questions to the Accused if he wanted to continue without an attorney, and he was told he did not have to continue if he did not wish to. On each occasion, the Accused indicated his wish to continue. The Accused had every opportunity to ask for clarification in respect of areas confusing to him.

33. It was submitted that the Accused was confused about his desire for an attorney and that he really wanted one but that this was dispelled when he, after private discussion with him, discharged Dr. Manfred Anedter, an attorney assigned to him to assist him during the interrogation. The Accused might well have wanted and did request for a lawyer in respect of the extradition proceedings. He did not want one for the Prosecution interview as the evidence disclosed. It was submitted that under Rules 42 and 89 this Court shall admit relevant evidence unless it is substantially outweighed by the need to have a fair trial and under Rule 95 it is very clear that this Prosecution interview must be admitted into evidence.

C. Findings

Introduction

34. The Trial Chamber is guided in the application of its rules of evidence by the provisions of Rules 89-98 of the Rules of Procedure and Evidence. Particularly relevant in this regard are the provisions of Rules 89 and 95. Whereas Sub-rule 89(A) expressly states the Rules of evidence governing proceedings before the Trial Chambers, and that the Chambers shall not be bound by national rules of evidence, implicit in Sub-rule 89(B) is the application of national rules of evidence by the Trial Chamber. This is because Sub-rule 89(B) permits the application of any rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

35. The general rule is that any evidence which is relevant to the subject matter before the Trial Chamber and has probative value may be admitted - Sub-rule 89(C). However, where the probative value of such evidence is substantially outweighed by the need to ensure a fair trial, it ought to be excluded - Sub-rule 89(D). Also to be excluded by Rule 95, is evidence obtained by means contrary to internationally protected human rights.

36. By Article 18(3) of the Statute, the suspect shall have rights to counsel of his own choice, including provision of free legal assistance if he has no means to pay. A suspect is also entitled to translation into and from a language he speaks and understands. This right has been elaborated in Rule 42 and establishes a procedural pre-condition to be observed and satisfied during the questioning of the suspect.

37. It is important to bear in mind the provisions of Rule 5 which are set out in the Applicable Provisions Section of this Decision.

Analysis

38. Arguments of Counsel in the Application seeking to exclude the Statements taken while the Accused was still a suspect, may be considered under the general heading of the Violation of the Rights of the suspect, under Article 18 of the Statute and Rule 42.

39. The Trial Chamber considers it convenient to decide the fundamental issue raised by the Defence but disputed by the Prosecution, that there is but one single interview covering the period of the Austrian

Police and Prosecution. It was argued that the interviews cannot be separated into compartments as if they stand isolated each on its own. On its part, the Prosecution argues that there are two interviews, each separate from the other, and was so understood by the Accused. It was pointed out that neither of the interviews was conducted jointly by the parties. The Austrian Police were not present at the interview by the Prosecution, similarly absent were members of the Prosecution at the interview by the Austrian Police. The proceedings were different and the persons were different, held at different times and at different places. 29811

40. It is clear on the evidence before the Trial Chamber that there were two interviews of the suspect. The one conducted by members of the Austrian Police on 18 March, and the other from 19-21 March conducted by the Office of the Prosecution. There is evidence that the Austrian Police conducted their investigation and gave the caution and rights of the suspect under Austrian law. The interview with the Prosecution was conducted in accordance with the Rules. There is no doubt, as pointed out by Counsel for the Prosecution, that different teams conducted each interview. We therefore accept the submission by the Prosecution that there were two interviews. The contiguity of time and the environment around which they took place should not obscure the fact that there were two independent and separate interviews of the suspect. The interview by the Prosecution cannot be regarded as a continuation of the interview of the Austrian Police. The interview of the Austrian Police was directed towards the extradition of the Accused. That of the Prosecution towards establishing substantive offences within the jurisdiction of the International Tribunal. The purposes are distinct and different.

41. The Trial Chamber now adverts to the required burden of proof in respect of the admissibility of evidence sought to be excluded on the grounds of the voluntariness or not of the Statements or its legality or illegality on which issue has been joined. The Rules insist that all evidence which are reliable and have probative value are admissible. For evidence to be reliable it must be related to the subject matter of the dispute and be obtained under circumstances which should cast no doubt on its nature and character, and the fact that no rules of the fundamental rights have been breached. This can be done if the evidence is obtained in accordance with Rule 95, by methods which are not antithetical to and would not seriously damage, the integrity of the proceedings. There is no doubt statements obtained from suspects which are not voluntary, or which seem to be voluntary but are obtained by oppressive conduct, cannot pass the test under Rule 95.

42. The burden of proof of voluntariness or absence of oppressive conduct in obtaining a statement is on the Prosecution. Since these are essential elements of proof fundamental to the admissibility of a statement, the Trial Chamber is of the opinion that the nature of the issue demands for admissibility the most exacting standard consistent with the allegation. Thus, the Prosecution claiming voluntariness on the part of the Accused/suspect, or absence of oppressive conduct, is required to prove it convincingly and beyond reasonable doubt. We agree with the Defence that this is the required standard.

43. The Prosecution has challenged the submission of the Defence that Rule 42 contains the test for the admissibility of evidence taken before persons other than investigators of the Prosecution and that it is not the appropriate standard for evaluating statements from other systems. The appropriate standard is to be found in Rule 95. The Trial Chamber is not satisfied that this is a correct analysis of the provisions, and does not accept the Prosecution's position. Rule 42 embodies the essential provisions of the right to a fair hearing as enshrined in Article 14(3) of the International Covenant on Civil and Political Rights and Article 6(3)(c) of the European Convention on Human Rights. These are the internationally accepted basic and fundamental rights accorded to the individual to enable the enjoyment of a right to a fair hearing during trial. It seems to us extremely difficult for a statement taken in violation of Rule 42 to fall within Rule 95 which protects the integrity of the proceedings by the non-admissibility of evidence obtained by methods which cast substantial doubts on its reliability.

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44. The Trial Chamber is of the opinion that the surest way to protect the integrity of the proceedings is to read both Rules 42 and 95 together. We read Rule 95 as a summary of the provisions in the Rules, which enable the exclusion of evidence antithetical to and damaging, and thereby protecting the integrity of the proceedings. We regard it as a residual exclusionary provision.

45. The Application will be considered separately in accordance with these two interviews. The Trial Chamber shall take first the Austrian interview.

The Austrian Police Interview

46. Arguing the motion, Mr. Greaves, learned Counsel for the Defence, criticised the rights accorded to an accused person under Austrian law. It was argued that the rights of the Accused, such as silence under Rule 42, were violated. In addition, there was inducement for him to confess. Counsel for the Prosecution argued that there was nothing offensive in the Austrian provisions challenged. The Accused was advised that he could consult a lawyer, but the Accused voluntarily waived the right. The Austrian law does not provide for a right to counsel during questioning which is not strange and not in violation of fundamental human rights or the European Convention on human rights.

47. Whilst the Trial Chamber accepts the submission of the Prosecutor that any relevant evidence which falls within the parameters of fundamental fairness will be admissible and admitted by the Trial Chamber because such evidence will pass the test of Rule 95, the litmus test of the right of the suspect is clearly laid down in Article 18 of the Statute as elaborated in Rule 42. However, non-compliance with these provisions will render the act null under Rule 5.

48. The Trial Chamber is governed by its Rules. Accordingly any evidence to be admissible in proceedings before it must satisfy the law as provided in the Statute and Rules. The Tribunal is established for the trial of criminal offences of the most serious kind. Hence nothing less than the most exacting standard of proof is required. It is universally accepted that the burden of proof lies on the Prosecution. The standard of proof on the Prosecution is proof beyond reasonable doubt.

49. The Trial Chamber is not bound by national rules of evidence - Sub-rule 89(A). However, where the interest of justice demands and the matter before it can be better determined by the application of national rules of evidence, the Trial Chamber may apply such rules. To determine the admissibility of the Austrian rules governing the rights of the suspect, they must be considered within the context of Rules 42 and 95.

50. The Austrian procedure rules do not recognise the right of the suspect to counsel during questioning. The provisions of paragraph 4 actually precludes such right. It states "if you want your legal Counsel to come and see you as soon as possible, make it known. You may not have legal Counsel present when you are questioned for a criminal offence". This is in direct contradiction to the provisions of Article 18 of the Statute and Rule 42 of the Rules of Procedure and Evidence which provide for Counsel prior to questioning. Indeed the European Court of Human Rights ("Court") decided in *Imbrioscia v. Switzerland* (1993) 17 EHRR 441 that Article 6(3)(C), which is equivalent to Article 18 of the Statute, applies to pre-trial proceedings. In this case, during the stage of the proceedings before it, the European Commission of Human Rights stated that

> Article 6(3)(C) gives the Accused the right to assistance and support by a lawyer throughout the proceedings. To curtail this right during investigation proceedings may influence the material position of the defence at the trial and therefore also the outcome of the proceedings.

(See the Court's opinion at para. 60)

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51. The Commission by majority cited and relied upon *Artico v Italy* (1980) 3 EHRR 1. It went on to state that "in the absence of an express provision it cannot be maintained that the rights guaranteed by Article 6(3)(C) of the European Convention are not susceptible to any restrictions" (see the Court's opinion at para. 61) what is important is that, in the proceedings taken as a whole, an accused person effectively had the benefit of "legal assistance" as required by Article 6(3)(C) of the Convention. However, in *Campbell and Fell v. UK* (1984) 7 EHRR 163 the Commission held that the failure by the United Kingdom Prison Board of Visitors to afford legal advice and assistance to the accused/applicant, Mr. Campbell, before, or legal representation at the Board's proceedings at the hearing before the Court was a failure to comply with the requirements of Article 6(3)(C). Even if it is conceded that the Austrian provision restricting the right to counsel is within Article 6(3)(C) as interpreted, there is no doubt it is inconsistent with the unfettered right to counsel in Article 18(3) and Sub-rule 42(A)(i).

52. It is also important to state that the other conditions in the Austrian provision, namely, the right to speak to a lawyer only after being questioned, and if it has been determined that the Accused would be transferred to the Court prison, and that there is sufficient time remaining, to be decided by some other authority or person, are fetters to the exercise of the right to counsel absent in Article 18 and Rule 42. The Trial Chamber is satisfied that the Austrian rights of the suspect are so fundamentally different from the rights under the International Tribunal's Statute and Rules as to render the statement made under it inadmissible.

53. Under the Austrian Rules, the suspect is encouraged to speak rather than remain silent. It is said that exercising the right to remain silent deprives the Accused of the possibility of giving account of the incident and helps to clear up mistakes. Defence submitted that it was in contradiction of the right of the Accused. The Trial Chamber agrees with the Prosecution that no right of the Accused was being violated in putting to him the benefit of an alternative to silence. It is a choice open to the Accused which he is not bound to accept.

54. The nature of the advice on confession, though undesirable and would seem to the Trial Chamber a suggestion to the Accused to make a confession, it does not amount to such conduct as would qualify for inducement. This is because telling a suspect that a confession would on conviction assist in mitigation of punishment is not so strong as to induce a confession. No threats of danger to the suspect, nor promise of favour has been held out to the Accused except to the extent that a possible conviction, if the suspect did not confess, may be inferred.

55. The question is whether the interview is one which can pass the test of Article 18 and Rule 42. The allegation of the Defence of inducement to confess did not go beyond reading the rules of the Austrian Police procedure to the suspect. This being the only offensive conduct, the Trial Chamber is not satisfied that this by itself was sufficient. This is because though the rules relating to silence and confession are contradictory to the relevant rules in Rule 42, they do not fall below fundamental fairness and such as to render admission antithetical to or to seriously damage the integrity of the proceedings. However violation of Sub-rules 42A(i) and 42(B) by themselves would be sufficient by virtue of Rule 5 to render the statements before the Austrian Police null and inadmissible in proceedings before us and to be excluded.

56. The Trial Chamber will now consider the admissibility of the interview before the investigators of the Office of the Prosecution.

Interview by the Prosecution Investigators

57. Analysis of the arguments urged for and against the exclusion of the interview with the investigators of the Prosecution discloses that the Defence relied on the following. 29814

a. Imperfect understanding by the suspect of the meaning and scope of his rights as read to him because of the differences in the cultures of the different legal systems.

b. Defence also vigorously challenged the exercise by the Accused of his waiver of the right to counsel during the questioning, by raising a missing link in the evidence.

c. Finally, the Defence relied on what it described as the oppressive nature of the questioning which, it was submitted, was sufficient to exclude the statement.

58. The Defence relied on the cultural background of the suspect for the contention that he was unable to appreciate the scope and meaning of his right to counsel when the right was read to him. It was argued that the investigators had a duty to explain to the suspect what was involved in the right and its waiver. The investigators who merely read the right to him were in violation of Rule 42. The suspect was very much a part of former Yugoslavia, unfamiliar with the background of Rule 42. He had some familiarity with the Austrian culture where he has lived for several years. But within four days the suspect was subjected to two different systems opposed to each other in terms of the kinds of rights they provide. The Trial Chamber does not accept the argument that the investigators had a duty to explain the provisions of Rule 42. We are satisfied that the duty is only to interpret to the suspect the rules in a language he or she understands.

59. The Trial Chamber finds the cultural argument difficult to accept as a basis for considering the interpretation of the application of the human rights provisions. The suspect had the facility of interpretation of the rights involved in a language which he understands. Hence, whether he was familiar with some other systems will not concern the new rights interpreted to him. If we were to accept the cultural argument, it would be tantamount to every person interpreting the rights read to him subject to his personal or contemporary cultural environment. The provision should be objectively construed.

60. Rule 42 is an adaptation *mutatis mutandi* of Article 6(3) of the European Convention on Human Rights and Article 14(3) of the International Covenant on Civil and Political Rights ("ICCPR"). These are supranational conventions based on the most elementary and fundamental provisions for the protection of individual human rights. The former Yugoslavia was a party to the ICCPR. It will, therefore, be anomalous to rely on cultural differences for their interpretation.

61. The argument of the Defence about a cumulative application of the two rights as confusing lacks substantial merit. The differences in the Austrian provisions and Rule 42 are so clear in terms of their application as to render exercise of choice quite easy. Whereas the Austrian provision denied a right of Counsel during questioning Rule 42 provided one before questioning. The Austrian provision gives reason why the suspect should not keep silent but should talk to the Prosecution. Rule 42 merely tells you that you are not obliged to talk. The Austrian provision encourages confession in anticipation of a lesser sentence on a possible conviction. Rule 42 does not speak of confession, unless volunteered by the suspect. In this circumstance, there is nothing in our view to confuse the suspect.

62. The challenge by the Defence of the waiver of the right to counsel is based on speculation of what might have transpired between Mr. Abribat and the Accused in an unrecorded part of the interview. Defence Counsel has not suggested exactly what was said, but infers that the exercise of the right to counsel must have been discussed at the meeting. This is inferred from the expression "in accordance with our previous conversation" on the first day of questioning. The Prosecution denies that they entered

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into any such discussion. Mr. Abribat, who is alleged to have held the unrecorded discussion, has denied such discussion. His evidence was that he merely asked the suspect through an interpreter whether the Accused would agree to the recording of the interview by both audio and video. The Trial Chamber does not accept that he could do this within the one or two minutes claimed by him. But this does not raise the inference suggested by the Defence. The interview was started at 15:30 hours. There is evidence from the recording that several times during the interview, the suspect was asked whether he was prepared to carry on without counsel, and on each occasion he unequivocally answered in the affirmative. Even when counsel, Dr. Manfred Anedtser, assigned to him appeared to assist him, the Accused indicated he did not need his assistance, and he left.

63. There is no doubt the Accused understood that he had a right to counsel during the interview. It was obvious also that he was aware of his right to waive the exercise of the right to Counsel. It appears to us obvious that the suspect voluntarily waived the exercise of the right to counsel. The Defence has not established to the satisfaction of the Trial Chamber that the discussion on the unrecorded portion of the interview was responsible for the exercise by the suspect of his right to waive the exercise of his right to counsel. It would be dangerous to act on the several ingenious speculations of Defence Counsel as to what could have transpired.

64. The Trial Chamber now adverts to the contention that the interview be rejected on the ground that it was oppressive of the suspect. The evidence relied upon in support of the argument is that the interview was conducted for more than four and three-quarter hours, by a total of about five interrogators inter-changing. Counsel for the Defence referred to the evidence of Mr. Moerbauer, one of the interrogators, who admitted being very tired at the end of the exercise.

65. The question of "oppressive conduct" is the most recent addition to English law of evidence of grounds enabling the exclusion of statements on the grounds that it might be unreliable. The traditional reason for exclusion is based on involuntary confession.

66. Similar to an involuntary confession, statements induced by coercion, force or fraud, or oppressive conduct which saps the concentration and has sapped the free will of the suspect through various acts and weakens resistance rendering it impossible for the suspect to think, clearly may constitute such conduct oppressive and the statement resulting from its exercise unreliable. This, however, is a question of fact. Whether or not conduct is oppressive in each case will depend upon many factors, the categories of which cannot be exhausted.

67. Some of the factors to be considered may be the characteristics of the person making the statement, the duration of the questioning and the manner of the exercise of the questioning. The facilities provided such as refreshments or rests between periods of questioning are material considerations. What may be regarded as oppressive with respect to a child, old man or invalid or someone inexperienced in the ways of the administration of justice may not be oppressive with a mature person, familiar with the police or judicial process. The effect is, therefore, relative.

68. In *R v. Prager* (1972) 56 Cr. App. R. 151, the English Court of Appeal adopted and applied the definition proffered by Lord MacDermott, which states:

> Oppressive questioning is questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent.

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69. The Trial Chamber accepts the submission of the Prosecution that even if the Accused was tired at the end of the interview, that was no evidence of oppressive questioning, to deprive him of the ability to make rational decisions. There is evidence that, notwithstanding the inordinate duration of the interview, there was nothing oppressive. The Accused was given refreshments during the exercise and he had opportunity to rest at intervals. There was no evidence that the duration of the interview excited in him hopes of release or any fears which made his will crumble thereby prompting statements he otherwise would not have made. From all the evidence, it seems clear that the Accused was in complete control and was master of the situation.

70. The Trial Chamber is satisfied that considering his mental and physical fitness, age, experience and his comportment and surrounding circumstances, there was no evidence that the interview was oppressive of the Accused.

III. DISPOSITION

For the foregoing reasons, the **TRIAL CHAMBER,** being seised of the Motions filed by the Defence,

PURSUANT TO RULE 73,

HEREBY:

1. **EXCLUDES** the statements made on 18 March 1996 by the Accused to officers of the Austrian Police Force in Vienna from evidence.

2. **ADMITS** the statements made on 19, 20 and 21 March 1996 by the Accused to Prosecution investigators in Vienna into evidence.

Done in both English and French, the English text being authoritative.

Adolphus
Godwin
Karibi
-
Whyte

Presiding
Judge

Dated this second day of September 1997

At The Hague,

The Netherlands.

[Seal
of
the
Tribunal]

Case No. IT-01-48-T

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IN TRIAL CHAMBER I, SECTION A

Before:
Judge Liu Daqun, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Amin El Mahdi

Registrar:
Mr. Hans Holthuis

Decision of:
20 June 2005

PROSECUTOR

v.

SEFER HALILOVIC

DECISION ON ADMISSION INTO EVIDENCE OF INTERVIEW OF THE ACCUSED

The Office of the Prosecutor:

Mr. Philip Weiner
Ms. Sureta Chana
Mr. David Re
Mr. Manoj Sachdeva

Counsel for the Accused:

Mr. Peter Morrissey
Mr. Guénaël Mettraux

I. INTRODUCTION

1. **TRIAL CHAMBER I, SECTION A** ("Trial Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seised of the Defence "Response to Prosecution Motion to Tender Record of Interview Obtained in Violation of Statute and Rules", filed on 9 May 2005 with confidential annexes ("Objection"), whereby the Defence objects to the tendering and admission of the record of an interview of Sefer Halilovic ("the Accused ") with representatives of the Office of the Prosecutor ("Prosecution"). The Prosecution filed its "Response to Defence Motion Opposing the Introduction into Evidence of the Record of Interview with the Accused Obtained in Accordance with the Statute and Rules" on 19

May 2005 ("Response").

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2. After his surrender to the custody of the Tribunal and his transfer to the Detention Unit, the Accused was interviewed by representatives of the Prosecution from 11 October 2001 to 12 December 2001 ("interview"). During the Status Conference on 28 April 2005, the Prosecution sought to tender from the bar table the record of the interview.[1]

3. The arguments of the Defence in support of the Objection are, *inter alia* , that:

   The record of interview is not tendered in a permissible manner. Such a record should be tendered through a witness who could give evidence upon the circumstances in which the interview was taken, and cannot be tendered before the Accused testifies himself, if he decides to do so,[2]

   The interview was not obtained voluntarily as required by the Rules of Procedure and Evidence ("Rules"). The Accused agreed to give this interview under the inducement offered by the Prosecution of a promise that cooperation would promote his chance of provisional release and/or withdrawal of the indictment,[3]

   The "voluntariness" of the interview was also affected by the length of the interview and the fact that the Accused was in detention at the time.[4] Moreover, it is alleged that the Accused was not "effectively represented" at the time of the interview.[5] The admission of evidence obtained in such circumstances would be in breach of the Accused's privilege against self-incrimination, his right to remain silent and generally his right to a fair trial,[6]

4. The Defence therefore submits that the record of the interview should be excluded by the Trial Chamber pursuant to Rules 89(D) and 95 of the Rules.[7]

5. The Defence further submits that should the Trial Chamber consider that a *prima facie* case of voluntariness has been established by the Prosecution, the Defence would request that a *voir dire* hearing take place concerning the admissibility of the record of the interview.[8]

6. Finally the Defence requests the Trial Chamber that the Prosecution be ordered to disclose to the Defence all records of the meetings between representatives of the Prosecution, including Ms Del Ponte, and former counsel for the Accused, Mr. Balijagic, "in particular records of meetings during which the provisional release , withdrawing of charges and interviewing of Mr. Halilovic were discussed", or, should such records not exist, "the Prosecution should be ordered to provide an explanation for its failure to keep such records."[9]

7. The Prosecution's arguments in its Response in support of tendering the interview into evidence are, *inter alia*, that:

   The manner of tendering the record of interview of an accused from the bar table is by no means "novel" or "impermissible", but, on the contrary, it has been used in other trials before the Tribunal,[10]

   The record of interview of the Accused is admissible as it is in compliance with Rules 42, 43 and 63 of the Rules and does not infringe upon either Rule 89(D) or Rule 95 of the Rules.[11] Once the Prosecution has established beyond reasonable doubt that the interview was given voluntarily , it

is the Defence that must bear a shifting evidentiary burden to demonstrate otherwise.[12] In the present case, the Prosecution has provided all available and relevant information showing that : (1) "?agt its highest it is that 'a full cooperation' *could* have a positive influence on *her* ?the Prosecutor'sg position in relation to ?the Accused'sg provisional release" and "?tghis cannot amount at law to an impermissible inducement to an Accused person to incriminate himself";[13] and (2) the Prosecutor has repeatedly made clear to the Defence Counsel that no promise or agreement was made to Defence Counsel to withdraw the indictment in exchange for an agreement by the Accused to be interviewed.[14] The Defence did not produce any evidence to support the suggestion of the existence of any threat, promise or inducement,[15]

The manner in which the interview was conducted and the duration of the interview cannot be viewed as oppressing or violating any safeguards afforded to the Accused under the Statute or the Rules. [16]

8. During the trial hearing on 2 June 2005, the Trial Chamber requested the Prosecution "to indicate the parts of the interview which are relevant to the present case ? andg which they seek to have admitted into evidence"; and, "to the extent possible , to indicate which paragraphs of the Indictment those parts are in support of." [17] The Prosecution was requested to submit the above-mentioned information by 9 June 2005.[18]

9. On 10 June 2005, the Prosecution filed the "Most Relevant Portions of Prosecution Interview with Sefer Halilovic in 2001", wherein, while emphasising that the interview has to be read and considered in its entirety, the Prosecution indicated those parts of the interview which it considers most relevant to the case against the Accused .[19]

II. DISCUSSION

10. According to the jurisprudence of the Tribunal "a pre-requisite for admission of evidence must be compliance by the moving party with any relevant safeguards and procedural protections and that it must be shown that the relevant evidence is reliable."[20] In light of this, the Trial Chamber finds that there is no prohibition for a record of an interview with an accused to be tendered from the bar table and subsequently admitted into evidence if the Trial Chamber establishes that the interview was obtained voluntarily , that it was conducted in compliance with the requirements set out in the Rules and that is relevant and has probative value.[21]

11. As for the voluntariness, the Trial Chamber finds that there is no evidence in support of the Defence's allegations that any promises in relation to the Accused's application for provisional release and/or as to a withdrawal of the indictment were offered by the Prosecution to induce the Accused to give the interview.

12. Both the Accused and his counsel repeatedly stated that the Accused agreed to be interviewed in order to establish the truth. From the time of his initial appearance on 27 September 2001 the Accused expressed his intention to "fully co -operate with the Tribunal", because, as Mr. Balijagic explained, "?both him and his client attachedg the greatest importance to the establishment of the truth, whatever it ?would turng out to be".[22] In this respect, the Trial Chamber also notes the counsel's comment during the interview : "?wge would like to know the truth to reach the truth whatever it is even if it would lead to life sentence for Sefer Halilovic".[23]

13. Concerning the Prosecution's alleged promise of favourable consideration of the Accused's application for provisional release, the Trial Chamber notes that the position of the Prosecution at the time was, as indicated in the letter from the Prosecutor to the Defence counsel dated 12 January 2004, that "a full cooperation of Mr. Halilovic could have a positive influence on the Prosecution's position in respect to a potential application for provisional release".[24] The Trial Chamber notes that the Prosecution did not offer any "promise of provisional release", but only indicated to the Accused that in case of full cooperation the Prosecution would favourably support a potential application for provisional release , which may ultimately be granted only by a Trial Chamber, pursuant to Rule 65 of the Rules. In this respect, the Trial Chamber notes that amongst the factors that a Trial Chamber must take into account before granting provisional release, the Appeals Chamber in the *Šainovic and Ojdanic* case listed the fact that the accused had provisionally accepted to be interviewed by the Office of the Prosecutor , thereby showing some degree of cooperation with the Prosecution.[25] However, the Appeals Chamber also stated that "an accused person may, if he decides to do so, cooperate with the Office of the Prosecutor, *inter alia*, by accepting to be interviewed by the Prosecution, but he does not have to do so and his provisional release is not conditioned, all other conditions being met, upon his giving such an interview while still in custody."[26] The Trial Chamber notes that the Accused was represented by a defence counsel, who must have been aware of the requirements and the procedure to obtain provisional release according to Rule 65 of the Rules.

14. The Trial Chamber also notes that the position of the Prosecution was not such as to induce the Accused to make an admission or, in other words, to incriminate himself in return for the Prosecution' support for his application for provisional release. As mentioned above, the Accused from the very beginning voluntarily agreed to "fully cooperate with the Tribunal", in order for the truth to be established . Furthermore, the Trial Chamber notes that at the end of the interview the Accused stated that no "threat, promise or inducement" had been made to him in order to convince him to give the answers and that the interview had been "fair and correct ".[27] The Trial Chamber therefore finds that the position of the Prosecution at the time in relation to the Accused's application for provisional release did not amount to an inducement that affected the voluntariness of the interview.

15. As far as the alleged promise to withdraw the indictment is concerned, the Trial Chamber notes that at one point during the time period of the interview, the Accused and his Defence counsel asked for a break in order to clarify with representatives from the Prosecution, or the Prosecutor herself, whether the so-called "reached agreements", the nature and content of which the Defence did not specify, were still valid and why they were not respected.[28] After the break, the interview continued with no mention from the Defence counsel or the Accused of whether any meeting took place or whether any clarification in relation to the alleged agreements had been offered. The Trial Chamber also notes that, during the Status Conference on 10 February 2003, Mr. Caglar, the then-Defence counsel of Mr. Halilovic, stated in open court that Mr. Balijagic had informed him that he had not objected to the indictment because of the existence of an agreement between the Prosecutor herself and the Defence, according to which the indictment would be withdrawn at a given moment in time.[29] On that occasion, the Prosecution counsel, Mr. Withopf, replied that the Prosecution "never intended" to withdraw the indictment against the Accused.[30] The Trial Chamber further notes that the Prosecutor herself, in her letter to the Defence dated 12 January 2004, stated that at the meeting with Mr. Balijagic which took place on 11 October 2001, "?tghe issue of a potential withdrawal of the indictment against Mr. Halilovic was not even touched upon."[31] The Prosecutor also concurred with Mr. Withopf' statement in his letter to the Defence dated 22 October 2003, that "at no point in time has any agreement between the Prosecutor and

Mr. Balijagic to withdraw the indictment against Mr. Halilovic been made. The Prosecution emphasises again that it never intended nor does it intend to withdraw the indictment."[32]

16. With regard to the meaning of the above-mentioned "agreements", the Trial Chamber notes that the Defence stated in its Objection that "promises were made to Mr. Halilovic that, should he fully cooperate with the prosecution, ?...g and ?...g should he be *able to convince the prosecution of his innocence, the indictment would be withdrawn* ."[33] Moreover in a letter to the Disciplinary Panel of the Tribunal, Mr. Balijagic wrote that: "?tghe representatives of the prosecution ?had informed himg that ?...g *if Mr. Halilovic proves that he was not the commanding officer of Operation "Neretva 93" the prosecution shall withdraw the indictment.*"[34] The Trial Chamber finds that the alleged statements made by the Prosecution could not in any case amount to "agreements" that could induce the Accused to give information that might contain self-incriminating evidence, but merely indicate the Prosecution's intent to conditionally withdraw the indictment should the evidence appear insufficient to support its case.[35]

17. In light of the evidence discussed above, the Trial Chamber does not deem a *voir dire* hearing necessary and finds that the interview was given voluntarily .

18. The Trial Chamber finds that the Accused's interview was conducted in accordance with Rules 42,[36] 43 [37] and 63[38] of the Rules. In particular , the Trial Chamber notes that the Accused was assisted by a defence counsel, Mr . Balijagic, chosen by the Accused and assigned by the Registrar,[39] during the entirety of the interview. The Accused was questioned and could answer in his own language, through the presence of an interpreter. He was clearly informed of his rights in the presence of his Defence counsel, at the very beginning of the interview as well as on several occasions throughout the interview,[40] in full respect of the voluntariness of the interview, of his right to remain silent , and with the Accused's understanding that any statements he makes shall be recorded and may be used in evidence.[41] The Trial Chamber further notes that the interview was audio-recorded, in accordance with the procedure set out in Rule 43. The record of the interview shows that the Accused was effectively represented by his Defence counsel, and that there were regular breaks throughout the interview. At any time the Accused or his Defence counsel could ask, if need be, for further suspensions or for interruptions of the interview, and the record shows that they occasionally did so.

19. In light of the circumstances in which the interview was conducted, and after having examined the content of the interview, the Trial Chamber finds that the admission into evidence of the record of the interview cannot be considered contrary to the demands of a fair trial. The Trial Chamber further finds that the record of the interview is relevant and has probative value. Although the record contains portions of the interview which are not strictly relevant to the case against the Accused , the Trial Chamber finds that in order to best assess the portions of the interview relevant to the present case, the interview needs to be considered in its entirety . The Trial Chamber also notes that the record of the interview contains portions in which the word "inaudible" is very recurrent and that a clearer version of the record of those portions would facilitate the Trial Chamber's assessment of the information included therein. The Prosecution might, at a later stage, be requested to provide, if possible, the Trial Chamber and the Defence with a clearer version of those portions of the interview. The Trial Chamber will assess the weight to give to this evidence at the appropriate time, as indicated in the Guidelines on the Standards Governing the Admission of Evidence, issued by the Trial Chamber on 16 February 2005.

III. DISPOSITION

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20. For the foregoing reasons, pursuant to Rule 42, 43, 63 and 54 of the Rules, this Trial Chamber **DISMISSES** the Objection, and **ADMITS** the record of the interview of the Accused into evidence in its entirety.

Done in English and French, the English version being authoritative.

Judge Liu Daqun
Presiding Judge

Dated this twentieth day of June 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

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1 - Status Conference, 28 April 2005, T. 26.
2 - Objection, paras 1(i) and 22-29.
3 - Objection, paras 1(ii) and 30-43.
4 - Objection, paras 1(iii) and 53.
5 - Objection, paras 1(iv) 62-74.
6 - Objection, paras 55-61.
7 - Objection, paras 46-74.
8 - Objection, para. 1(v) and 45.
9 - Objection, para. 77.
10 - Response, paras 8-10.
11 - Response, para. 13.
12 - Response, para. 13.
13 - Response, paras 30.
14 - Response, para. 36.
15 - Response, para. 14. See also paras 26-41.
16 - Response, paras 42-46.
17 - Trial Hearing, 2 June 2005, T. 30.
18 - *Ibid.*
19 - *See* "Most Relevant Portions of Prosecution Interview with Sefer Halilovic in 2001", paras 1-2.
20 - *Kvocka* Appeals Chamber Judgement, 28 February 2005, para. 128, citing *Celebici*Appeal Judgement, para. 533.
21 - *See* for example *Kvocka*Appeal Judgement, 28 February 2005, paras 122-128. The Trial Chamber also notes that in other cases before the Tribunal, such as Simic et al. and Krstic, the Prosecution tendered into evidence the record of the interview of the accused during the Prosecution case, and the Trial Chamber admitted them without knowing that the accused would testify during the Defence case.
22 - Initial Appearance, 27 September 2001, T. 4-5. *See* also Status Conference, 8 January 2002, T. 13-14.
23 - *See* V000-3480 Tape 19, Part 2, p.17.
24 - Objection, Annex B.
25 - *Prosecutor v. Nikola Sainovic and Dragoljub Ojdanic*, Case No. IT-99-37- AR65, Decision on Provisional Release, 30 October 2002, para. 6.
26 - *Ibid.*, para. 8. The Appeals Chamber recently referred to this passage in *Prosecutor v. Ivan Cermak and Mladen Markac*, Case No. IT-03-73-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, para. 22.
27 - V000-3480 Tape 25, Part 2, p.28.
28 - Tape 22, Part 1, p. 14-15.
29 - Status Conference, 10 February 2003, T. 89.
30 - Status Conference, 10 February 2003, T. 92.
31 - Objection, Annex B.
32 - Objection, Annexes A and B.
33 - Objection, para. 2.
34 - Objection, para. 43.
35 - The Prosecution may withdraw an indictment in accordance with Rule 51 of the Rules.

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36 - Rule 42 (Rights of Suspects during Investigation) provides: (A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect speaks and understands: (i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it; (ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and (iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence. (B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

37 - Rule 43 (Recording Questioning of Suspects) provides: Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure: (i) the suspect shall be informed in a language the suspect speaks and understands that the questioning is being audio-recorded or video-recorded; (ii) in the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded; (iii) at the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything the suspect has said, and to add anything the suspect may wish, and the time of conclusion shall be recorded; (iv) a copy of the recorded tape will be supplied to the suspect or, if multiple recording apparatus was used, one of the original recorded tapes; (v) after a copy has been made, if necessary, of the recorded tape, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect; and (vi) the tape shall be transcribed if the suspect becomes an accused.

38 - Rule 63 (Questioning of Accused) provides: Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present. The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42 (A) (iii).

39 - *See* Registrar's Decision assigning Mr. Balijagic as counsel to the Accused on the basis of Article 11 (A) of the Directive on Assignment of Defence Counsel, dated 11 February 2002.

40 - *See* for example, V000-3480 Tape 1, Side A p.1-5; V000-3480 Tape 3, Part 1, p. 1; V000-3480 Tape 4, Part 1, p. 17; V000-3480 Tape 5, Part 2, p.3; V000-3480 Tape 21, Part 1, p.10; V000-3480 Tape 25, Part 1, p.11.

41 - Rule 42 of the Rules. *See*also Decision on the Admission of the Record of the Interview of the Accused Kvocka, 16 March 2001; and *Kvocka* Appeal Judgement, 28 February 2005, para. 128.

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Case: IT-0[illegible]-48-AR73.2

IN THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar:
Mr. Hans Holthuis

Decision of:
19 August 2005

THE PROSECUTOR

v.

SEFER HALILOVIC

DECISION ON INTERLOCUTORY APPEAL CONCERNING ADMISSION OF RECORD OF INTERVIEW OF THE ACCUSED FROM THE BAR TABLE

Counsel for the Prosecution:

Mr. Phillip Weiner
Ms. Sureta Chana
Mr. David Re
Mr. Manoj Sachdeva

Counsel for the Defence:

Mr. Peter Morrisey
Mr. Guénaël Mettraux

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal ", respectively) is seized of an interlocutory appeal in the case of *Prosecutor v. Sefer Halilovic,* which is currently pending in Trial Chamber I of the Tribunal. On 20 June 2005, the Trial Chamber issued the "Decision on Admission into Evidence of Interview of the Accused" admitting into evidence from the bar table the record of the Prosecution's interview of Mr. Halilovic ("Appellant").[1] On 30 June, the Trial Chamber granted the Appellant's

request for certification to appeal the Impugned Decision.[2] On 6 July 2005, the Appellant filed his appeal brief,[3] and on 18 July 2005, the Prosecution filed its response.[4]

2. Prior to the filing of its Response,[5] the Prosecution filed a motion requesting the Appeals Chamber to order the Appellant to re-file his Appeal brief on grounds that the Appellant's Brief exceeded the limits described in the Practice Direction on the Lengths of Briefs and Motions ("Practice Direction").[6]

3. The Appellant responded to that Motion to Re-File on 11 July 2005.[7] He argues that the Appeal Brief falls within the Practice Direction limits, and that the annex includes an up-to-date procedural background and "re-prints" of relevant paragraphs of the Defence Response filed at trial, which are consistent with the Practice Direction.[8]

4. The Appeals Chamber did not find it necessary to dispose of the Prosecution's Motion to Re-File prior to the due date of the Prosecution's filing of its Response to the Appellant's Brief. The brief filed by the Appellant is in fact 30 pages and therefore conforms to the Practice Direction in terms of length of briefs. However, parts of the annexes include factual and legal arguments, contrary to Clause (C) 6 of the Practice Direction. Consequently, the Appeals Court will disregard any factual or legal arguments in the annexes and will not deem them relevant in deciding the outcome of this Appeal.

Standard of Review

5. It is well established in the jurisprudence of the Tribunal that an interlocutory appeal challenging the exercise of discretion by a Trial Chamber is not a hearing *de novo*. In reviewing the exercise of a Trial Chamber's discretion, the issue is not whether the Appeals Chamber agrees with the decision of the Trial Chamber but whether the Trial Chamber has abused its discretion in reaching that decision. For the Appeals Chamber to intervene in a Trial Chamber's exercise of discretion, the Appellant must demonstrate that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion or that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion, or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[9]

Grounds for Appeal

6. In this Appeal, the Appellant claims that the Trial Chamber erred in the means by which it permitted the record of interview to be received into evidence in an unqualified manner; by failing to find that the Appellant's participation in the interview was rendered involuntary on the basis of inducements offered by the Prosecution; by failing to consider that the circumstances in which the interview was conducted rendered the interview unreliable; and by failing to take into account the fact that at the time of the interview the Appellant was not represented by competent counsel. The Appellant argues that the Trial Chamber should have held that the record of interview was inadmissible or exercised its discretion pursuant to Rule 89(D) and excluded the record of interview to ensure the fair trial of the Appellant.

(i) Manner of Tendering the Record of Interview

7. The Appellant claims that the Trial Chamber erred by, over the Defence's objection, permitting the record of interview to be tendered from the bar table-that is, by allowing it to be submitted directly by counsel into evidence, rather than introducing it during a witness's testimony so that the witness could

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identify it and testify as to its foundation, and so that the opposing party could contest its foundation and admissibility.[10] The Appellant contends that it was improper to permit his prior statements to be introduced in this manner when he had chosen not to testify in his own defence.[11]

8. The Appellant concedes, however, that tender from the bar table may be permitted if in compliance with Rule 89(B). That Rule provides that:

> in cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law.

9. However, the Appellant says that application of this Rule would make the record of interview inadmissible due to the alleged conduct of the Prosecution in persuading the Appellant to agree to give the interview. He says that the failure of the Prosecution to adduce evidence to rebut his allegations was a breach by the Prosecution of the best evidence rule as laid out in the Trial Chamber's guidelines on the conduct of the Trial.[12] The Appellant argues that the Trial Chamber erred when it failed to take this factor into account.[13]

10. The Appellant claims further that the admission of the record of interview conflicts with the principle supporting the orality of debates which underpins the procedure of the Tribunal. He argues that while the principle is not absolute, it is the guiding principle in determining the admissibility of evidence and that exceptions to that principle in the Rules have been interpreted narrowly.[14] He says that the admission of the record of interview from the bar table deprived him of an opportunity to challenge its reliability and to elicit evidence relevant to the conditions of its admissibility and thus violated his right to confront the evidence presented against him.[15]

11. The Appellant also claims that the Trial Chamber's reliance upon the *Kvocka* Appeals Chamber Judgement as precedent for the proposition that a party can tender a record of interview or statement of an accused person from the bar table regardless of whether that accused has given evidence and or agreed to that record being tendered, is erroneous.[16] He argues that it has been the general practice of the Tribunal not to admit prior statements of an accused where he or she has chosen not to testify, unless the accused agrees to that admission. Furthermore, the Appellant claims that the understanding of the Senior Trial Attorney in *Kvocka* to tender the record was the same point made by the Pre-Trial Judge in this case, Judge Kwon, who stated that he did not think the Appellant's statement could be used as evidence unless the Appellant testified.[17]

12. The Appellant claims further that the Trial Chamber's reliance upon the *Simic* and *Krstic* cases as supporting authority is also erroneous. In both cases, the accused agreed to the record of interview being tendered by the Prosecution, and in the *Krstic* case, the record of interview was used by the Prosecution to elicit evidence from witnesses, including the accused Krstic. This has not been the situation in the present case.[18] The Appellant claims that his position is consistent with the practice of the Tribunal in other cases.[19]

13. In Response, the Prosecution argues that the Appellant fails to specify how the Trial Chamber erred. It says that the Trial Chamber applied the relevant principles enunciated by the Appeals Chamber *Kvocka* in determining that the "relevant safeguards and procedural protections had been applied and that the evidence was reliable". It argues that this is consistent with Rule 89(B) of the Rules and as such no legal error has been shown.[20] The Prosecution refutes the Appellant's arguments concerning the principle of orality, stating that oral debate is not necessarily required in admitting documents into

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evidence and that the Trial Chamber did not err in finding that orality was not required upon it being satisfied that the interview was voluntary and the evidence reliable.[21] It further argues that the Trial Chamber's reliance on the *Kvocka*, *Simic* and *Krstic* precedents was solely for the purpose of establishing that there was no prohibition on admitting into evidence records of interview from the bar table as asserted by the Appellant. Accordingly, the Prosecution claims that no legal error has been established by the Appellant. [22]

Analysis

14. With respect to the Appellant's first argument, that the Rules do not permit a record of an interview with the accused to be tendered into evidence unless the accused has chosen to testify or has consented to the tender, the Appeals Chamber does not agree that the Rules impose such a categorical restriction. The Rules instead grant Trial Chambers considerable discretion on evidentiary matters; in particular Rule 89(C) states that a "Chamber may admit any relevant evidence which it deems to have probative value". Here the Trial Chamber was satisfied that the record of interview was relevant and probative, and the Appellant does not dispute these points. The Trial Chamber therefore had the discretion to admit the record, at least so long as doing so did not violate any of the specific restrictions outlined in the remainder of the Rules, nor the general principle of Rule 89(B) requiring application of " rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".

15. The Appeals Chamber does not find that fairness or the "spirit of the Statute and general principles of law" require that the admissibility of an accused's prior statements turn on whether he has agreed to testify or consented to the admission. The Appellant's argument to the contrary rests implicitly on the right of an accused against self-incrimination. An accused has the right to refuse to give statements incriminating himself prior to trial, and he had the right to refuse to testify at trial. But where the accused has freely and voluntarily made statements prior to trial, he cannot later on choose to invoke his right against self-incrimination retroactively to shield those statements[23] from being introduced, provided he was informed about his right to remain silent before giving this statement; there is, however, a presumption that he knows about this right if he is assisted by counsel. Nor does the Appellant point to any provision of the Rules or rules of customary international law that specifically imposes such a restriction on the admission of an accused's prior statements. The Appeals Chamber therefore concludes that no such rules exists.

16. The Appellant's second complaint, that the method of introducing the evidence (via tender from the bar table) breached the principle of orality, is misplaced. There is to be sure, a general principle that witnesses before the Tribunal should give their evidence orally rather than have their statement entered into the record. The principle has its origin in the Roman law requirement that parties before a tribunal make submissions orally rather than in writing, and exists in various forms in common and civil law traditions today. The principle of orality and its complement, the principle of immediacy, act as analogues to common law hearsay rules and are meant to ensure the adversarial nature of criminal trials, and the right of the accused to confront witnesses against him.

17. However, the principle of orality, as reflected in the Rules, is not an absolute restriction, but instead simply constitutes a preference for the oral introduction of evidence. Rule 89(F) states that a "Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.[24] The Tribunal's jurisprudence recognises that the interests of justice may often allow for the admission of prior statements of the accused. The principle of orality is weaker in application to the accused's own statements than to the testimony of other witnesses. As the Appeals Chamber explained in the *Kvocka* case, the rules of evidence applicable to witness testimony do not always apply to the statements of an

accused: "StChere is a fundamental difference between an accused, who might testify as a witness if he so chooses, and a witness". [25] The principle of orality is intended principally to ensure the accused's right to confront the witnesses against him, and in this respect its logic is not applicable to the accused's own statements. Moreover, to the extent that the principle of orality ensures that in-court witness testimony (generally understood to be more reliable) is used instead of those witnesses' out-of-court statements where possible, that logic is also less applicable to the accused's statements, for the accused may, as the Appellant did, refuse to testify.

18. Finally, the Appellant argues that the Trial Chamber breached its own guidelines for the application of the best evidence Rule by admitting the statement without first requiring the Prosecution to call witnesses to rebut the allegations of the Appellant regarding the circumstances surrounding the taking of the record of interview. In the guidelines issued on the conduct of the trial the Trial Chamber stated that:

19. The "best evidence rule" will be applied in the determination of matters before this Trial Chamber. This means that the Trial Chamber will rely on the best evidence available in the circumstances of the case and parties are directed to regulate the production of their evidence along these lines. What is the best evidence will depend on the particular circumstances attached to each document and to the complexity of this case and the investigations that proceeded it.[26]

19. The Appeals Chamber is not satisfied that the Trial Chamber breached its own guidelines for application of the best evidence Rule that witnesses must always be called. The Guidelines reflect the large measure of discretion that the Trial Chamber has to determine under the Rule whether or not it is necessary, in the particular circumstances of a case, to call witnesses to establish the authenticity of a document as the best evidence. Where that document is a record of interview with an accused, and the Trial Chamber is satisfied that the interview has been conducted in compliance with Rule 63, which includes application of the recording procedure of Rule 43, and adherence to the caution requirements of Rule 42(A) (iii), it is well within the discretion of the Trial Chamber not to require further evidence of the circumstances of that interview to establish its authenticity.

(ii) Voluntariness of the Interview

20. Next, the Appellant argues that prior to admitting the record of interview of an accused, the Trial Chamber had an obligation to ensure that it was obtained voluntarily. The Appellant contends that the Defence had argued at trial that the record of interview was obtained by impermissible inducement and cannot be said to have been obtained voluntarily as required by the Rules. He claims that the Trial Chamber erred in several respects in finding that there had been no inducement on the part of the Prosecution, which vitiated the voluntariness of the interview, rendering it inadmissible.

21. The Appellant argues that the Appeals Chamber has made clear that "a pre-requisite for admission of evidence must be compliance by the moving party with any relevant safeguards and procedural protections and that it must be shown that the evidence is reliable".[27] He says that the argument of the Prosecution that viewing the interview and reading the transcript "provide proof beyond reasonable doubt that it was voluntary" is incorrect. His claim is that the inducement took place prior to the interview. The Appellant argues further that contrary to the claim of the Prosecution, the burden of proof that the statements were made voluntarily rests squarely on the Prosecution at all times.[28]

22. The Appellant claims that the actual content of the interview is irrelevant to this issue and that the Trial Chamber erred by stating that to vitiate consent the inducement must be shown to have led the accused "to make an admission, or in other words, to incriminate himself".[29] He says that this

proposition is wrong in law and that, in any event, "the Trial Chamber had to be satisfied that at least some of the evidence contained in the record of interview was incriminatory – and thus relevant to the charges – lest the record of interview would become irrelevant and therefore un-admissible pursuant to Rule 89(C)." [30]

23. The Appellant argues that the promise of provisional release in exchange for an accused's full cooperation or giving of an interview has been considered in national jurisdictions to be a typical inducement that would lead to the exclusion of the statement.[31] The same applies to the inducement that prosecution might be avoided if an accused gives the Prosecution the information it seeks. He claims that both of these inducements were offered to him in this case.[32] The Appellant argues that it is not a requirement that the inducement is agreed to by the parties. All that needs to be shown is the communication of an inducement and the understanding of it by the accused. He claims that the Trial Chamber "erred when suggesting that only where an "agreement" has been reached between the prosecution and the Defence could there be said to be an impermissible inducement".[33]

24. The Appellant says that he is on record as claiming that an inducement was offered and that the Prosecutor herself recognised this. In a letter to the Defence, the Prosecutor stated that:

> I met Mr Balijagic and told him that a full cooperation of Mr Halilovic could have a positive influence on the Prosecution's position in respect to a potential application for provisional release.

The Appellant says that while the Prosecutor denies that the issue of withdrawal of the indictment had been discussed, she does not address the issue of whether that matter was raised at another time or by others in her office in her letter. He says that the Prosecution failed to provide his Defence team with records of conversations between the Office of the Prosecutor and Mr Balijagic despite repeated requests by the Defence. The Prosecution's response was that no such records had been kept.[34] However, the Appellant claims that the fact that such an offer was made by the Prosecution is supported and confirmed by the statements made by him in his letter of 11 August 2004 to the Disciplinary Panel of the ICTY.[35]

25. The Appellant further claims that there is clear evidence of an inducement having been offered in the form of a conditional promise to withdraw charges, set out in the record of interview itself. The Appellant refers to the following exchange:

> (Mr Halilovic): I would like to ask Mr Nikolai, I was actually told by my attorney that an agreement was reached with Ms Prosecutor, Carla Del Ponte concerning our, that is my, cooperation with the Prosecutor, that is with the prosecution and that in relation to that certain agreements had been made.
>
> However, obviously those agreements are not being respected and before the continuation that a break be taken so that my lawyer can have conversation in the Office of the Prosecutor so that we confirm or deny what we have agreed upon so that after that we could take a decision on how to proceed.
>
> I want to continue the cooperation with the ICTY and that this in no way means the cessation of the cooperation, but I would like to ask that a break be given so that my lawyer can resolve this matter. We have, and I have absolutely fulfilled all the requests that were made to me by the prosecution and of course I am ready to fulfil all the requests that the Prosecutor sets to me with the aim of establishing the truth, whatever it may be. But I wish to get an answer to the question on the reached agreement so that we know how to proceed.
>
> (Mr Balijagic): Mr Investigator, I have had four official meetings with Ms Carla Del Ponte. We have made certain agreements. Let me stress that I did not arrange the meetings with Ms Del Ponte through the Registry but I came upon her call. I had felt that one group of the Prosecutor's associates is influenced by Ms Vasvija

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> Vidovic. That's why I asked Ms Del Ponte whether her subordinates obey her, in realisation of certain agreements with Ms Del Ponte who is the Chief Prosecutor of this Court, so a person whose word ought to be respected. I would ask you for a shorter break, so that you can inform your superiors so that we can clarify these matters. Will the word of Ms Del Ponte be respected or not?! That's why I would like to ask you for a short break, until we resolve this matter, and I would like to ask you to inform Ms Del Ponte or the person who replaces here, or Mr Patrick who is familiar with this situation, or Mr Bob who also knows about this situation and with whom I have had very correct contacts, thanks you kindly.

The Appellant claims that none of the staff present during the interview reacted to these comments, and that in place of a denial, "which would have been required of the prosecution had no such promise been made, Mr Mikhailov, prosecution investigator, called for a break in the interview. He did not discuss this matter when the interview started again awhile later. There is no record of what was discussed, if anything, during the break between Mr Balijagic and OTP members".[36]

26. The Appellant argues that while the Trial Chamber acknowledged the incident in the Impugned Decision it dealt with it inadequately. It noted that "after the break the interview continued with no mention from the Defence Counsel or the Accused of whether any meeting took place or whether any clarification in relation to the alleged agreements has been offered", and in so doing, the Appellant contends that it committed two errors. It allegedly reversed the burden of proof in that it reasoned that unless the Defence was able to establish that its understanding of the promise thought to have been made by the Prosecution had not been clarified during the break, it should not be presumed to have occurred. And "insofar as it would have been for the prosecution to establish that the matter was indeed clarified during the break and that, despite that clarification, the accused agreed to continue with the interview" no such inference could be drawn on the evidence.[37] The second error alleged by the Appellant is that, regardless of what happened during the break in the interview, the only inference available to the Trial Chamber was that, at least up until that point in the interview, the Appellant was participating in that interview on the understanding that the charges against him might be withdrawn. The Appellant argues that at the very least the Trial Chamber should have excluded the interview up until that point.[38]

27. The Appellant argues further that the only evidence available to the Trial Chamber indicated that the whole of the interview was affected by the indictment. At an earlier stage of the interview Mr Balijagic had indicated his understanding that the interview was proceeding on the basis that the Prosecution offered to withdraw the indictment should certain circumstances be established by the interview. The Appellant claims that at no time did the OTP staff present react to that suggestion or deny that such a promise had been made.[39]

28. The Appellant says that on 10 February 2003, the matter was discussed again in open court. New counsel for the Appellant, Mr Caglar, stated in open court that the Appellant's previous counsel Mr Balijagic had informed him about the existence of an agreement between the Prosecution and the Defence that under certain circumstances, the indictment against the Appellant would be withdrawn. [40]

29. The Appellant says that at the same Status Conference he also made it clear that the actions of Mr Balijagic had been dictated by what he understood to be an agreement with the Prosecution regarding the withdrawal of the charges against him :

> Before coming to this Status Conference I spoke with Mr Balijagic I asked him why he didn't object – why he hadn't objected to the indictment because I wanted to state something about it here and ask the Trial Chamber to ensure that I didn't suffer because of what the lawyers failed to do.
>
> His explanation was that he didn't object to the indictment, as he said, because of operations which were in course with the Prosecution, and also because he had reached an agreement with the Prosecution according to which the indictment would be withdrawn at a given moment in time. And this agreement, Balijagic said, is an

> agreement he reached with the chief Prosecutor, Carla Del Ponte. This is something he stated in front of witnesses on several occasions.

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The Appellant claims further that the existence of such a promise was also acknowledged by Mr Balijagic in a letter to the Disciplinary Panel:

> The representatives of the prosecution said that, that is also a possibility and if Mr Halilovic proves that he was not the commanding officer of operation "Neretva 93" the prosecution shall withdraw the indictment.

The Appellant argues that it was only after these promises of conditional support for provisional release and withdrawal of charges had been made that he agreed to be interviewed. The Appellant submits that it was up to the Prosecution to establish that these promises had no effect on his decision to be interviewed and that it failed to do so.[41]

30. The Appellant also argues that the Trial Chamber erred in denying his request for a *voir dire* hearing on the basis that it was not necessary. He says that that finding could be considered a breach of the fair trial guarantee in that it denied the Defence a fair opportunity to access evidence which might have been relevant to its case in this matter. He argues that not only did the Trial Chamber erroneously place the burden of proof on him, but also disregarded clear evidence of an absence of voluntariness and prevented the Defence from obtaining further evidence of that absence. The Appellant says that the voluntariness of the interview was presumed by the Trial Chamber and not proved by the Prosecution and that evidence to the contrary was dismissed by the Trial Chamber as irrelevant or insufficient, further evidencing error on the part of the Trial Chamber.[42]

31. In Response, the Prosecution argues that the finding of the Trial Chamber at paragraph 11 of the Impugned Decision, that there is no evidence in support of the Defence's allegations of promises offered by the Prosecution in relation to the Accused's release and/or as to a withdrawal of the indictment to induce the Accused to give the interview, is plainly correct.[43] It says that the evidence before the Trial Chamber was uncontradicted, showing that the interview had been taken in accordance with Rule 63 and that there was no evidence from which it could find that the interview was other than voluntary and taken in accordance with the Rules. As such, it says that no error has been established by the Appellant.[44]

32. With respect to the Appellant's claim of error on the part of the Trial Chamber in shifting the burden of proof to the Appellant regarding the voluntariness of the interview, the Prosecution says that the burden always rested on it. However, it says that Rule 92 provides for a shifting evidentiary burden to the Appellant once it is established that the requirements of Rule 63 were complied with. It argues that there was no evidence before the Trial Chamber to establish that the interview was other than voluntary.[45] It argues further that allegations of inducement made by the Appellant were refuted by the Prosecution evidence, and "from the mouth of Mr Halilovic himself, on tape, at the very end of the interview".[46] It further claims that at the status conference Mr Halilovic stated that when he asked his lawyer why he had not challenged the indictment he was told that this was because discussions were being held with the Prosecution by which the indictment could be withdrawn at anytime. The Prosecution claims that this shows that he was not aware of that alleged inducement until some fourteen months after the interview had been concluded.[47]

33. The Prosecution further refutes the arguments of the Appellant that the Trial Chamber erred by suggesting that only where an agreement had been reached between the Prosecution and Defence could there be said to be an impermissible inducement. It claims that the Appellant misreads paragraph 16 of the Impugned Decision which only finds "that the alleged statements made by the Prosecution could not

amount to inducements that could induce the Accused to give information that might contain self incriminating evidence". Accordingly, it claims that no error has been established by the Appellant.[48] 29832

Analysis

34. In the Impugned Decision, the Trial Chamber accepted that the Prosecution had represented to the Appellant that "a full cooperation of Mr Halilovic could have a positive influence on the Prosecution's position in respect of an application for provisional release".[49] However, the Trial Chamber reasoned that that statement could not be considered an inducement because the Prosecution did not offer a "promise of provisional release, but only indicated to the Accused that in case of full cooperation the Prosecution would favourably support a potential application for provisional release", which may only actually be granted by a Trial Chamber.[50] The Trial Chamber bolstered this view by noting that the Appellant was represented by Defence Counsel who must have known that cooperation by an accused with the Prosecution was not a necessary requirement to a grant of provisional release.[51]

35. The Appeals Chamber does not agree that the Prosecution's inability to grant the Appellant provisional release means that the Prosecution's statement that full cooperation by the Appellant "could have a positive influence on the Prosecution's position in respect of a potential application for provisional release" did not amount to an inducement to the Appellant. Such a statement is clearly an inducement because it provides the incentive of a possible reward for cooperation. While cooperation with the Prosecution is not a condition of provisional release, non-cooperation is often cited by the Prosecution as a ground of opposition to an application for provisional release before the Chambers at this Tribunal. Decisions of the Appeals Chamber have made it abundantly clear that a first principle of this Tribunal is that "an accused is not required to assist the Prosecution in proving its case against them"[52] by agreeing to be interviewed by it. Nevertheless as this case shows, the Prosecution has continued to use its influence over an application for provisional release, e.g. by not opposing or even supporting it- provided that the accused is informed in advance that such support is never binding on the competent Chamber -, to persuade accused that it is in their interest to cooperate.

36. Accused at this Tribunal are charged with particularly serious crimes. If convicted they can expect lengthy sentences. Their trials are long and complex, and it is generally to be expected that an accused person will spend a number of years waiting for their trial to commence. Detained at The Hague, accused are often denied frequent contact with their families and friends who are financially prevented from making frequent visits from the former Yugoslavia. Taking into account the context of this Tribunal, a statement by the Prosecutor that it may not oppose an accused's application for provisional release can be a powerful incentive for an accused to speak when he may otherwise have chosen to remain silent. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that the statement of the Prosecution was not an inducement to the Appellant to be interviewed.

37. However, whether the Prosecution's inducement was of an impermissible nature, i.e., whether it rendered the participation of the Appellant in the record of interview involuntary, is another issue. In the Impugned Decision, the Trial Chamber found that the statement of the Prosecution "was not such as to induce the Accused to make an admission, or in other words, to incriminate himself in return for the Prosecution support for his application for provisional release".[53] The Trial Chamber based this finding on the fact that from the time of his initial appearance on 27 September 2001, the Appellant made clear his intention to cooperate fully with the Tribunal regardless of the impact of that cooperation on findings against him.[54] The Trial Chamber also referred to the fact that in the record of interview, the Accused stated at the end that "no threat, promise or inducement" had been made to him in order to convince him to give the answers and the interview had been fair and correct.[55] On the basis of this evidence, the Trial

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Chamber found "that the position of the Prosecution at the time in relation to the Accused's application for provisional release did not amount to an inducement that affected the voluntariness of the interview ".[56]

38. Prosecutorial offers that serve as inducements to the accused's cooperation may, if the inducement is sufficiently powerful, render statements made pursuant to that cooperation involuntary. In other cases, however, the inducement is simply an incentive; the fact that the accused may have taken this incentive into account when deciding whether to cooperate does not mean that the defendant was not acting voluntarily. Under the circumstances of this case, the Appeals Chamber is not satisfied that the Trial Chamber erred in finding that the statement of the Prosecution that the Appellant's cooperation "could have a positive influence on the Prosecution's position in respect of an application for provisional release" did not have the effect of rendering the Appellant's participation in the interview involuntary. While that statement may have provided an incentive to the Appellant to cooperate, it is not unreasonable to conclude that it did not have the effect of rendering that participation involuntary.

39. However, although the Prosecution's statement may not have been of such a nature as to coerce the Appellant into cooperating with the Prosecution, it does not undermine its nature as an inducement understood as an incentive to cooperate. This was a relevant factor to be considered by the Trial Chamber in considering whether to permit the tender of the record of interview from the bar table, and the Trial Chamber erred in failing to take it into consideration when exercising its discretion to admit the record of interview.

40. Further, the Appeals Chamber is not satisfied that the Trial Chamber adequately dealt with the Appellant's claim that, prior to giving the interview, a statement was given by the Prosecution that the indictment might be withdrawn if the Appellant provided information showing that that course was warranted. In dealing with this allegation, the Trial Chamber noted that at one point in the interview the Appellant and his Defence counsel raised the issue of certain agreements reached with the Prosecutor and asked for a break in the interview in order to clarify whether those agreements reached with the Prosecution were to be respected.[57] After the break the interview continued without any clarification on the record of what those alleged agreements were. The Trial Chamber placed no emphasis upon this break in the interview and the Appeals Chamber finds that it erred in failing to do so. The break in the record of interview indicated that the Appellant's cooperation was conditioned on his understanding that certain agreements had been reached. This break in the record and the statements made by the Appellant and his counsel prior to that break provide some support to the Appellant's argument that he would not have cooperated absent those agreements. The Appeals Chamber is satisfied that the Trial Chamber erred in failing to take this factor into account in its assessment of the voluntariness of the interview.

41. The purpose of requiring that an interview with an accused be recorded is to ensure that the accused's rights are respected at all times. Rule 43(ii) provides that, in the event of a break in the course of questioning, the fact and time of the break shall be recorded. While the Rules do not explicitly require, when an interview is stopped to address an on-the-record question of the Appellant that clearly implicates the potential non-voluntariness of the interview, that the parties " get an answer to the question on reached agreement so that we know how to proceed ", the interview should recommence with a full explanation of what has occurred in the break and what understanding had been reached by the parties. It is only in this way that the Chamber can be satisfied that the rights of accused are in fact protected.

42. In determining that there was nothing improper about what occurred in the interview, the Trial Chamber relied upon statements made by the Prosecution at a Status Conference to the effect that it had never intended to withdraw the indictment, and a letter from the Prosecutor that at her meeting with Mr

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Halilovic on 11 October 2001, "the issue of a potential withdrawal of the indictment against Mr Halilovic was not even touched upon".[58] However, these statements made after the fact cannot remedy the failure of the Prosecution to ensure at the time of the interview that the Appellant and his Counsel were not labouring under the misapprehension that should the Appellant cooperate and clear himself of the charges, there was a possibility of a withdrawal of the Indictment by the Prosecutor. Whether or not the Prosecution did give such a statement is not clear; however, on the evidence of the record of interview there is a reasonable possibility that the Appellant was labouring under that misapprehension, and the Prosecution failed to avail itself of the opportunity to make it abundantly clear in the record of interview that this was not the case.

43. In the Impugned Decision, the Trial Chamber found that the alleged statements made to the Appellant "could not in any case amount to 'agreements' that could induce the Accused to give information that might contain self-incriminating evidence, but merely indicate the Prosecution's intent to conditionally withdraw the indictment should the evidence appear insufficient to support its case".[59] In making this finding, the Trial Chamber referred to the statements made by the Defence that "promises were made to Mr Halilovic that, should he fully cooperate with the prosecution, (...) and (...) should he be able to convince the prosecution of his innocence, the indictment would be withdrawn," and statements made by Mr Balijagic in a letter to the Disciplinary Panel of the Tribunal that "(t)he representatives of the prosecution (had informed him) that (...) if Mr Halilovic proves that he was not the commanding officer of the 'Operation Neretva 93' the prosecution shall withdraw the indictment".[60]

44. When a suspect is detained by police, it is quite usual for the police in seeking to interview that suspect to represent that should he or she be able to provide evidence capable of casting doubt on the suspicions of the police about his or her involvement in an alleged crime, then the matter could be closed. In that situation, there is nothing improper about the police attempting to persuade a suspect to cooperate, provided that the suspect is fully apprised of his or her rights. However, when a person moves from being a suspect to an accused, in most instances the possibility of charges not being pressed is lost. The indictment seeks to establish a *prima facie* case, and the accused will be required to meet that case at trial. This same situation applies to accused charged at this Tribunal. The confirmation of an indictment by a confirming Judge pursuant to Rule 47 means that the Prosecution has established a *prima facie* case against an accused to the satisfaction of one of the Judges at this Tribunal. Once that process has occurred, for an indictment against an accused to be withdrawn, the Prosecution must make application pursuant to Rule 51 to the conforming Judge or a Judge assigned by the President. It is not to be assumed that such a withdrawal would be granted by a Judge without that Judge being satisfied that continuation of that prosecution is no longer warranted. In this circumstance, it is not entirely clear whether the Prosecution should be able to induce an accused to cooperate by an offer of withdrawal of an indictment without full explanation to the accused of what that process entails. In any event, it is also not clear whether such a statement could be said to have the effect of rendering an accused's participation in a record of interview involuntary. In this case, the Appellant claims that that was indeed the effect of the Prosecution's statement.

45. The Prosecution strongly denies having offered such an inducement and the Trial Chamber accepted those denials. However, the Appeals Chamber has already expressed its discomfort with the break in the interview and lack of clarification following the break in the interview. Upon this basis alone, the Appeals Chamber is satisfied that the Trial Chamber erred in failing to consider that the break in interview did raise the reasonable possibility that the Appellant, in giving the interview, was labouring under the misapprehension that his cooperation could lead to the withdrawal of the indictment against him. This factor is relevant in considering whether it was fair to the Appellant to allow the record of interview to be admitted from the bar table. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to take this factor into account in determining whether or not to admit the

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record of interview.

46. Further, in light of the evidence raised by the Appellant in relation to the voluntariness of the interview, it was incumbent on the Trial Chamber to fully explore the circumstances surrounding the taking of that interview. While the Trial Chamber itself did not refer to Rule 92 of the Rules[61] it appears that the Trial Chamber was applying the principle underlying that Rule in reaching its decision. That Rule does permit the Trial Chamber to accept that a duly recorded interview with an accused is voluntary, moving the burden to establish otherwise to the accused. In this case, however, the requested break in the interview itself should have been sufficient to raise the concern of the Chamber to explore more fully the voluntariness of that interview. This does not necessarily require the holding of a *voir dire*, although there may be certain advantages in doing so.

(iii) Reliability of the Interview

47. The Appellant claims that the Trial Chamber failed to make a finding as to whether the record of interview was sufficiently reliable to be admitted and that in failing to do so, the Trial Chamber erred.[62] The Appellant argues that the Trial Chamber's error seems to be based upon the erroneous view that the reliability of an exhibit is relevant only to its weight and not to its admissibility.[63] The Appellant says that precedent of the Appeals Chamber make clear that this is not correct. Before admitting the record of interview, the Trial Chamber must be satisfied that the evidence is reliable and in considering its reliability, it may consider both the content of the evidence and the circumstances in which it arose.[64]

48. The Appellant says that if the Trial Chamber had considered reliability, it would have found that the record was not sufficiently reliable to be admitted. He argues that such a finding would have necessarily followed consideration of the circumstances in which the interview was taken: (i) the inducement offered to Mr Halilovic, (ii) length of the interview, (iii) the fact that Mr Halilovic was imprisoned at all times during the interview and was under the apprehension that his release depended upon full cooperation with the prosecution, including his being interviewed, (iv) the fact that the prosecution did not keep any records of meetings between members of the OTP and counsel for the accused, and (v) lack of effective representation on the part of counsel (see below). The Appellant argues therefore that the Trial Chamber erred in admitting the record of interview.[65]

49. The Appellant also claims that the Trial Chamber erred when "after having examined the content of the interview", it found that "the admission into evidence of the record of interview cannot be considered contrary to the demands of a fair trial ".[66] The Appellant claims that the Trial Chamber should have excluded the record of interview pursuant to Rule 89(D) as being unfair to him. The Appellant says that "not being able to explain, qualify or otherwise comment on the evidence contained in the record where necessary, short of renouncing his right to silence, Mr Halilovic is being gravely prejudiced ".[67]

50. Taking account of all these circumstances, the Appellant says that the Trial Chamber should have exercised its discretion pursuant to Rules 89(D) and 95 and excluded the record of interview, "both to ensure a fair trial for the accused and to prevent the admission of evidence obtained by methods which cast substantial doubt on its reliability and damage the integrity of the proceedings".[68] The Appellant says that the Trial Chamber erred in failing to do so and that the Appeals Chamber can exercise those powers for itself and should do so in this case.[69]

51. In Response, the Prosecution argues that the complaint of the Appellant is a failure on the part of the Trial Chamber to explicitly state that it found the interview to be reliable before admitting it into

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evidence. It argues that it is implicit in the Impugned Decision that the Trial Chamber did consider the interview, once it determined it to be voluntary to also be reliable. It says that no error has been demonstrated by the Appellant.[70] With respect to the argument of the Appellant that the Trial Chamber erred in failing to exercise its discretion to exclude the interview pursuant to Rules 89(D) and 95, the Prosecution argues that this is a discretionary exclusion whereby an otherwise relevant and probative piece of evidence may be excluded "if its probative value is substantially outweighed by the need to ensure a fair trial".[71] It says that the Appellant has failed to identify how the Trial Chamber erred in failing to exclude the interview on discretionary grounds once it had determined that it was voluntary and thus relevant and probative.[72]

Analysis

52. In the Impugned Decision, the Trial Chamber found that the record of interview was admissible because it had been conducted in full accordance with the relevant Rules and that no inducement had been offered to undermine the voluntariness of the interview.[73] As such, the Trial Chamber was satisfied that the interview was sufficiently reliable for it to be admissible.

53. Further, in light of the circumstances found by the Trial Chamber, Rule 95, which provides: "no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings," was inapplicable as a basis to exclude the record of interview.

54. However, the Appeals Chamber has found that the Trial Chamber erred in failing to consider that the statement to the Appellant by the Prosecution that his cooperation with it could have a positive influence on the Prosecution's position regarding any application he may make for provisional release did constitute an inducement and that it erred in failing to take into account the break in the interview as establishing the reasonable possibility that the Appellant was labouring under some misapprehension as to the possible outcome of his agreeing to be interviewed. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to take into account relevant considerations when exercising its discretion to admit the record of interview.

(iv) Ineffective Representation by Counsel

55. Finally, the Appellant argues that the Trial Chamber erred in finding that the Accused was effectively represented by his Defence Counsel at the time of the interview. The Appellant says that the Trial Chamber failed to consider any of the evidence presented by it concerning the incompetence of Mr Balijagic and that the Trial Chamber erred when failing to consider that evidence and attach weight to it.[74] He claims further that the Trial Chamber erred in concluding that he was effectively represented at the time of giving the interview. He says that the general incompetence of Mr Balijagic is duly recorded. On 29 October 2002, Prosecution lead counsel stated that:

> On the Defence side, as you know, Your Honour, nothing, literally nothing happened other than what can be described as a total mess caused by the accused and his previous Defence counsel, Mr Balijagic.[75]

The Registrar's decision to withdraw Mr Balijagic as counsel for the Appellant stated that:

> **CONSIDERING** that in view of the incoherent and partly conflicting statements of Mr Balijagic regarding his representation, and the other available information which seems to put in doubt the quality of the representation of the accused by Mr Balijagic, it does not appear that the accused is adequately represented at this time and that this situation could have adverse consequences for the accused;[76]

The Appellant says that Mr Balijagic asked to withdraw from the case on 12 April 2002, due to his difficulty in representing the Appellant's interests.[77]

56. The Appellant claims that Mr Balijagic failed to file any motion on the form of the indictment on the basis that the indictment would be withdrawn and took no other steps to make the case trial ready. He argues that the few steps he did take proved to be contrary to his interests and gives the example of an agreement concluded by Mr Balijagic with the Prosecution in relation to "agreed facts" which was declared void by the Trial Chamber at the pre-trial stage on the basis that the Appellant had not been effectively represented at the time.[78]

57. The Appellant claims further that the participation of Mr Balijagic during the record of interview was "inappropriate and ineffective" and that his interventions "were for the most part unprofessional and incoherent, at times verging on the irrational ".[79] Accordingly, he says that contrary to the findings of the Trial Chamber the representation of Mr Balijagic "was in fact destructive and contrary to his clients best interests".[80] The Appellant says that the Trial Chamber failed to consider all the evidence showing the incompetence of Mr Balijagic and erred in concluding that he was effectively represented at the time of the interview. He argues that the Appeals Chamber should exercise its discretion and exclude the record of interview.[81]

58. The Appellant further claims that the Trial Chamber erred in failing to render a reasoned opinion on the issue of his representation by Mr Balijagic and that this failure breached his entitlement to a reasoned opinion under the Statute of the Tribunal and international law in general.[82]

59. The Appellant argues that in determining whether the record of interview was voluntary, the Trial Chamber should also have considered the absence of effective representation. The Appellant claims had it done so, it could not have admitted the record of interview. He refers to an analogous situation in *Blagojevic et al* in which doubts were raised about the effectiveness of the representation of Mr Jokic at the time he was interviewed by the OTP. The Appellant says that the Trial Chamber properly found in that case that:

> it is unable to rely on the interviews with Dragan Jokic as an indisputably reliable source of information upon which to determine issues in this case and has concerns in relation to Mr Jokic's legal representation at the interviews, the Trial Chamber declines to admit the statements into evidence at this stage.[83]

The Appellant says that the Trial Chamber should have made the same finding in his case and erred by not doing so.[84]

60. In Response, the Prosecution says that the Appellant actually produced no evidence to establish that Mr Balijagic provided incompetent representation during the interview.[85] It argues that the Registrar's decision withdrawing Mr Balijagic's representation contains nothing of relevance to the Appellant's representation during the interview. It says that there is no error in the Trial Chamber's finding that the record of interview "shows that the Accused was effectively represented by Defence counsel".[86] The Prosecution argues further that the pre-trial record shows effective representation by Mr Balijagic in making his provisional release application.[87]

Analysis

61. In finding that the Appellant was sufficiently represented by Defence Counsel, the Trial Chamber noted that at the time of the interview, the Appellant was assisted by a Defence Counsel of his own

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choosing and assigned by the Registrar.[88] It found that he was informed of his rights in the presence of his Counsel and understood that any statements that he made may be used in evidence against him and that he was effectively represented throughout the interview.[89] However, while making these findings, the Trial Chamber did not address the issue of Mr Balijagic's actual competence to adequately represent the interests of the Appellant or explain why it did not consider that the evidence adduced by the Defence of Mr Balijagic incompetence was insufficient to establish that fact.

62. On the evidence placed before the Trial Chamber, the Appeals Chamber is not satisfied that the Trial Chamber gave sufficient weight to the evidence showing Mr Balilagic to be incompetent to represent the interests of the Appellant. Both the statements of the Prosecution and the decision of the Registrar to withdraw Mr Baliljagic as assigned Counsel to the Appellant clearly indicate that Mr Balijagic was incompetent to provide effective representation to the Appellant. Indeed, the Registrar's Order explicitly states that the withdrawal is based upon "available information which seems to put in doubt the quality of the representation of the accused" and states that "it does not appear that the accused is adequately represented ". It cannot be reasonably assumed, as it appears that the Trial Chamber did presume, Mr Baliljagic developed his incompetence at some time after the interview. Accordingly, the Appeals Chamber is satisfied that the Trial Chamber erred in failing to take this factor into account in exercising its discretion to admit the record of interview.

Conclusion

63. The Appeals Chamber finds that the Trial Chamber erred in failing to take into account three relevant considerations. The Trial Chamber failed to take into account that the Prosecution's statement regarding its possible position concerning a future application for provisional release was an inducement, even though it was not of such a nature that coerced or overbore the will of the Appellant but acted as an incentive only. The Trial Chamber also failed to take into account the lack of clarification of the discussion that occurred regarding "agreements" with the Prosecution during the break in the record of interview and the reasonable possibility that the Appellant was labouring under the misapprehension that the indictment may be withdrawn should he cooperate. And the Trial Chamber failed to take into account the inadequate representation of the Appellant by Defence Counsel at the time of the record of interview.

64. Where the Appeals Chamber is satisfied that a Trial Chamber has erred, the Appeals Chamber may substitute the exercise of its own discretion for that of the Trial Chamber if it considers it appropriate to do so. In the ordinary case involving an evidentiary question before a Trial Chamber, the Appeals Chamber may consider sending the matter back to the Trial Chamber with an order that it consider the factors identified as relevant by the Appeals Chamber and exercise its discretion afresh. In this case, however, the parties are awaiting the Appeals Chamber decision so that they may file their final submissions and close the trial. Accordingly, the Appeals Chamber has determined that it is more appropriate in this instance for it to substitute its discretion for that of the Trial Chamber.

65. Taking into account all of the circumstances, and considering the relevant factors identified above that the Trial Chamber failed to properly consider, the Appeals Chamber has determined to exercise its discretion pursuant to Rule 89(D) and exclude the record of interview from the Trial record in the interests of fairness to the Appellant. The Trial Chamber is therefore ordered to expunge the record of interview from the trial record.

Disposition

66. The Appeal is allowed and the record of interview rendered inadmissible in the trial of the

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Appellant.

Done in English and French, the English text being authoritative.

Dated this 19th day of August 2005,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding

[Seal of the Tribunal]

1 - Decision on Admission into Evidence of Interview of the Accused, 20 June 2005 ("Impugned Decision").
2 - Decision on Motion for Certification, 30 June 2005.
3 - Defence Appeal Concerning Admission of Record of Interview of the Accused From the Bar Table, 6 July 2005 ("Appeal").
4 - Response to "Defence Appeal Concerning Admission of Record of Interview of the Accused From the Bar Table", 18 July 2005 ("Response").
5 - Motion for the Appellant to Re-File an Oversized Appeal Brief, 8 July 2005 ("Motion to Re-File").
6 - IT/184 Rev.1
7 - Response to Prosecution Motion for Re-Filing of Defence Appeal, 11 July 2005 ("Defence Response").
8 - Defence Response, para. 4.
9 - *Prosecutor v Milosevic*, Case No: IT-00-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, at paras. 9-10.
10 - Appeal, para. 6; Impugned Decision, para. 10.
11 - Appeal, para. 9.
12 - Guidelines on the Standards Governing The Admission of Evidence, 16 February 2005 ("Guidelines").
13 - Appeal, para. 9.
14 - *Ibid*, para.11.
15 - *Ibid*, para. 13.
16 - *Ibid*, para. 14.
17 - *Ibid*, para. 17.
18 - *Ibid*, paras. 18,19.
19 - *Ibid*, para. 20.
20 - Response, para.7.
21 - *Ibid*, para. 13.
22 - *Ibid*, paras. 15-16.
23 - *Cf. Niyitegeka v Prosecutor*, ICTR-96-14-A, Judgement, 9 July 2004, paras. 30-36.
24 - In addition Rules 92 bis specifically authorises and provides procedures for the admission of written witness statements under certain circumstances not applicable here (involving witness statements that go "to proof of a matter other than the acts and conducts of the accused as charged in the indictment").
25 - *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, paras. 122-126 ("*Kvocka* Appeals Judgement").
26 - Guidelines, Annex, para. 8.
27 - Appeal, para. 25.
28 - *Ibid*, para. 27.
29 - *Ibid*, para. 28.
30 - *Ibid*.
31 - *Ibid*, para. 29.
32 - *Ibid*.
33 - *Ibid*, para. 30.
34 - *Ibid*, para. 33.
35 - *Ibid*, para. 34 ("Mr Balijagic explained to me that the main condition for the defence from freedom (i.e. provisional release) is giving an interview to the Hague investigators. Since I was in temporary arrest, I agreed to fulfil that condition so that I could defend myself from freedom. Of course, only later, I realised that there are few conditions for the defence from

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freedom, from which the crucial one is the Prosecution's estimation that the person will not present a threat for the witnesses and (or) victims. In any case, after the previous guarantees of the Government of Federation (of Bosnia and Herzegovina) (were given), the Prosecution agreed right away and the Court Council (i.e. the Trial Chamber) gave a possibility for the defence from freedom, which, now it is clear, could have been done even without the mentioned interview.")
36 - *Ibid*, para. 35.
37 - *Ibid*, para. 36.
38 - *Ibid*, para 37.
39 - *Ibid*, para.38.
40 - *Ibid*, para. 39.
41 - *Ibid*, para. 40.
42 - *Ibid*, paras. 48-49.
43 - Response, para.18.
44 - *Ibid*, para. 20.
45 - *Ibid*, paras. 21-22.
46 - *Ibid*, paras. 27-28.
47 - *Ibid*, paras. 29-30.
48 - *Ibid*, para. 32.
49 - Impugned Decision, para. 13.
50 - *Ibid.*
51 - *Ibid.*
52 - *Prosecutor v Franko Simatovic*, Case No: IT-03-39-AR65.2, Decision on Prosecution's Appeal Against Decision on Provisional Release, 3 December 2004, para. 9.
53 - Impugned Decision, para.14.
54 - *Ibid*, para.12.
55 - *Ibid*, para. 14.
56 - *Ibid.*
57 - *Ibid*, para. 15.
58 - *Ibid*, para. 15.
59 - *Ibid*, para. 16.
60 - *Ibid.*
61 - A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.
62 - Appeal, para. 51.
63 - *Ibid*, para. 52.
64 - *Ibid*, para. 53.
65 - *Ibid*, para. 54.
66 - *Ibid*, para.55.
67 - *Ibid*, para. 57.
68 - *Ibid*, para. 58.
69 - *Ibid*, para. 58.
70 - Response, para. 41.
71 - *Ibid*, para. 44.
72 - *Ibid*, para. 45.
73 - Impugned Decision, para. 18.
74 - Appeal, para. 65.
75 - *Ibid*, para. 67.
76 - *Ibid*, para. 68.
77 - *Ibid*, para. 69.
78 - *Ibid*, para. 70.
79 - *Ibid*, para. 71.
80 - *Ibid*, para. 71.
81 - *Ibid*, para. 72.
82 - *Ibid*, para. 73.
83 - *Ibid*, para. 78.
84 - *Ibid.*
85 - Response, paras. 49-50.
86 - *Ibid*, para. 51.
87 - Response, paras. 55-58.
88 - Impugned Decision, para. 18.
89 - *Ibid*, para. 18.

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R. *v.* Evans, [1991] 1 S.C.R. 869

Wesley Gareth Evans *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v.* Evans

File No.: 21375.

1991: January 21; 1991: April 18.

Present: Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Charter of Rights -- Right to be advised of reason for detention -- Right to counsel -- Accused not understanding right -- Police initially investigating drug offence -- Investigation changing to murder investigation -- Accused initially waived right to counsel -- Accused not formally informed of change of nature of investigation -- Accused not informed of right to counsel when nature of investigation changed -- Incriminating statements made during investigation -- Whether or not infringement of accused's right to be informed of reason for detention -- Whether or not infringement of accused's right to counsel -- Whether or not statements should be

excluded for bringing administration of justice into disrepute -- Canadian Charter of Rights and Freedoms, ss. 10(a), (b), 24(2).

Evidence -- Admissibility -- Charter of Rights -- Right to be advised of reason for detention -- Right to counsel -- Accused not understanding right -- Police initially investigating drug offence -- Investigation changing to murder investigation -- Accused initially waived right to counsel -- Accused not formally informed of change of nature of investigation -- Accused not informed of right to counsel when nature of investigation changed -- Incriminating statements made during investigation -- Whether or not infringement of accused's right to be informed of reason for detention -- Whether or not infringement of accused's right to counsel -- Whether or not statements should be excluded for bringing administration of justice into disrepute -- Canadian Charter of Rights and Freedoms, ss. 10(a), (b), 24(2).

Appellant, a youth of subnormal mental capacity, was convicted of first degree murder in the brutal killings of two women. Initially, the police thought his brother had committed the murders and arrested the appellant on a marijuana charge in the hope that he would be able to provide evidence against his brother. The police informed Evans of his right to counsel but were given a negative answer when asked if he understood his rights. Any understanding that the accused may have had of his rights was confined to a garbled version based on American television. No attempt was made to communicate the meaning of his right to counsel to him. During the course of the interrogation that followed, Evans became the prime suspect in the two murders. The police did not formally advise the appellant that he was then being detained for murder, nor did they reiterate his right to counsel. The police

investigation was aggressive and marked by their lying about finding the appellant's fingerprint at one of the murder scenes. Eventually incriminating statements were obtained from the appellant. These statements formed virtually the entire basis of his conviction for the two murders. An appeal to the Court of Appeal was dismissed. At issue here is whether appellant's rights under ss. 7, 10(*a*) and 10(*b*) of the *Canadian Charter of Rights and Freedoms* were violated so that the resultant confessions should have been excluded pursuant to s. 24(2) of the *Charter*.

Held: The appeal should be allowed.

Per Gonthier, Cory and McLachlin JJ.: The right to be promptly advised of the reason for one's detention embodied in s. 10(*a*) of the *Charter* is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it. A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(*b*) of the *Charter*. In interpreting s. 10(*a*) in a purposive manner, regard must be had to the double rationale underlying the right.

When considering whether there has been a breach of s. 10(*a*) of the *Charter*, the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, must govern. What the accused was told, viewed reasonably in all the circumstances of the case, must be sufficient to permit him to make a reasonable decision to decline to submit to arrest or, alternatively, to undermine his right to counsel under s. 10(*b*).

The police indicated that they were investigating the appellant for murder shortly after he became the prime suspect in the killings and the appellant in turn seemed to recognize that the nature of the questioning had altered. The appellant therefore was given the facts relevant to determining whether he should continue to submit to the detention. Any failure to comply with s. 10(*b*) cannot be attributed to failure to advise the accused of the reasons why his detention and questioning was continuing.

The police did not comply with s. 10(*b*) at the time of the initial arrest. Although they informed the appellant of his right to counsel, they did not explain that right when he indicated that he did not understand it. A person who does not understand his or her right cannot be expected to assert it. The purpose of s. 10(*b*) is to require the police to communicate the right to counsel to the detainee. In most cases one can infer from the circumstances that the accused understands what he has been told. But where, as here, there is a positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding.

A second violation of the appellant's s. 10(*b*) right occurred when the police failed to reiterate the appellant's right to counsel after the nature of their investigation changed and the appellant became a suspect in the two killings. The police have a duty to advise the accused of his or her right to counsel a second time when new circumstances arise indicating that the accused is a suspect for a different, more serious crime than was the case at the time of the first warning. The accused's decision as to whether to obtain a lawyer may well be affected by the seriousness of

the charge. The new circumstances may require reconsideration of an initial waiver of the right to counsel. The police in the course of an exploratory investigation, however, need not reiterate the right to counsel every time that the investigation touches on a different offence.

The reception of the appellant's statements would tend to bring the administration of justice into disrepute. Three broad categories of factors bear on a s. 24(2) determination: (a) the effect of the admission of the evidence on the fairness of the trial; (b) the seriousness of the *Charter* violation; and, (c) the effect of exclusion on the repute of the administration of justice.

The admission of appellant's statements, which were essential to his conviction, worked an unfairness against him. Using an incriminating statement, obtained from an accused in violation of his rights, generally results in unfairness because it infringes his privilege against self-incrimination and does so in a most prejudicial way -- by supplying evidence which would not be otherwise available. There can be no greater unfairness to an accused than to convict him or her by use of unreliable evidence. Here the appellant's deficient mental state, combined with the circumstances in which the statements were taken, cast significant doubt on their reliability.

The violation of the accused's right to counsel was very serious. The police, despite knowledge of the appellant's deficient mental status and despite his statement to them that he did not understand his right to counsel, proceeded to subject him to a series of interviews and other investigative techniques. Moreover,

they lied to him in the course of the interviews, falsely suggesting that his fingerprint had been found. The pressure the police were under to find a suspect did not justify their conducting repeated and dishonest interrogations of a weak person in violation of his *Charter* rights. The seriousness of this *Charter* violation was not mitigated by appellant's notion of his rights. This "understanding" was confined to a garbled version based on American television. The appellant had, moreover, initially asserted to the police that he did not understand what his right to counsel entailed.

The exclusion of this evidence would not bring the administration of justice into disrepute. Its admission was not required in order to avoid the disrepute that would follow the acquittal of a self-confessed killer on the basis of *Charter* infringement. Such reasoning was flawed because it rests on the questionable assumption that the confessions were reliable and true. More fundamentally, it rests on the assumption that the appellant is guilty. The appellant was entitled not to be found guilty except upon a fair trial. To justify the unfairness of his trial by presuming his guilt is to stand matters on their head and violate that most fundamental of rights, the presumption of innocence. Few things could be more calculated to bring the administration of justice into disrepute than to permit the imprisonment of a man without a fair trial. As a practical matter, it cannot be said that such imprisonment would prevent further murders by the killer. Only a conviction after a fair trial based on reliable evidence could give the public that assurance.

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Per Sopinka J.: The conclusions of McLachlin J. with respect to ss. 10(*b*) and 24(2) of the *Canadian Charter of Rights and Freedoms* were agreed with. Section 10(*a*) was violated as well.

Section 10(*a*) requires that a person be informed of the reasons for the arrest or detention so that he or she can immediately undertake his or her defence, including a decision as to what response, if any, to make to the accusation. This information should therefore be conveyed prior to questioning and obtaining a response from the person under arrest or detention.

The initial questions put before an incriminatory response is obtained can, but did not here, disclose the true ground for an arrest. The appellant, whose mental development was equated to that of a 14-year-old, should not have been required to deduce from the content of questions that the initial explicit reason for his arrest had shifted to a far more serious ground. The arresting officers had advised him that he was in jeopardy for trafficking in narcotics and were obliged to disabuse him of this false information before seeking to elicit incriminatory evidence from him. This could only be accomplished by an equally explicit statement of the true ground for his arrest.

Per Stevenson J.: The police violated s. 10(*b*) of the *Charter* in failing to make a reasonable effort to explain to the accused his right to counsel and the appeal should be allowed solely on this ground. This was not a case in which to decide whether there is an obligation to reiterate the right to counsel when the course of the investigation takes some change.

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Section 10 does not apply to police investigations or questioning in the absence of detention. The object of the section is to provide safeguards in the circumstances of detention. On one hand, the police may be found to have detained someone on one charge with the object of questioning on another charge. On the other extreme, there can be cases in which an accused under detention fortuitously discloses information relating to other activities. These raise fact issues not dependent on the nature or seriousness of the other activities. One extreme would be readily characterized as an abuse of the detention and a violation of s. 10(*a*) and (*b*), while the other does not appear to violate the section.

McLachlin J.'s analysis and application of s. 24 of the *Charter* was agreed with.

Cases Cited

By McLachlin J.

Referred to: *R. v. Kelly* (1985), 17 C.C.C. (3d) 419; *R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. Ross*, [1989] 1 S.C.R. 3; *R. v. Anderson* (1984), 10 C.C.C. (3d) 417; *R. v. Nelson* (1982), 32 C.R. (3d) 256; *R. v. Broyles* (1987), 82 A.R. 238; *Clarkson v. The Queen*, [1986] 1 S.C.R. 383; *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41; *R. v. Collins*, [1987] 1 S.C.R. 265.

By Sopinka J.

Referred to: *Christie v. Leachinsky*, [1947] A.C. 573.

By Stevenson J.

Distinguished: *R. v. Broyles* (1987), 82 A.R. 238; **referred to**: *R. v. Black*, [1989] 2 S.C.R. 138.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 10(*a*), (*b*), 24(2).

Criminal Code, R.S.C. 1970, c. C-34, s. 218.

APPEAL from a judgment of the British Columbia Court of Appeal (1988), 45 C.C.C. (3d) 523, dismissing an appeal from conviction by Callaghan J. sitting with jury. Appeal allowed.

Glen Orris, Q.C., for the appellant.

John E. Hall, Q.C., for the respondent.

//Sopinka J.//

The following are the reasons delivered by

SOPINKA J. -- I agree with the conclusion reached by Justice McLachlin with respect to s. 10(*b*) of the *Canadian Charter of Rights and Freedoms* and that the admission of the statements would bring the administration of justice into disrepute. I also agree with her disposition of the appeal. As was Southin J.A., however, I am of the opinion that s. 10(*a*) was violated as well.

Section 10(*a*) and (*b*) set out very fundamental rights of a person arrested or detained. The instructions to the authorities which they contain are relatively simple. In each case, the detainee is to be "informed". In the case of s. 10(*a*), the right is to be informed of the reasons for the arrest or detention. The right to be informed of the true grounds for the arrest or detention is firmly rooted in the common law which required that the detainee be informed in sufficient detail that he or she "knows in substance the reason why it is claimed that this restraint should be imposed" (*Christie v. Leachinsky*, [1947] A.C. 573, at pp. 587-88). When an arrest is made pursuant to a warrant, this is set out in writing in the warrant. An arrest without warrant is only lawful if the type of information which would have been contained in the warrant is conveyed orally. The purpose of communicating this information to the accused in either case is, *inter alia*, to enable the person under arrest or detention to immediately undertake his or her defence, including a decision as to what response, if any, to make to the accusation. It seems axiomatic, therefore, that this information should be conveyed prior to questioning and obtaining a response from the person under arrest or detention. These basic and important values are included in s. 10(*a*) of the *Charter*.

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In this case, the arresting officers were forewarned that they were dealing with a person of subnormal intelligence. In these circumstances, it was incumbent on them to be scrupulous in ensuring that his rights were respected. Instead, they concocted a ground for the arrest in order to question him about the involvement of his brother in the murders. In my opinion, having explicitly advised the appellant that he was in jeopardy for trafficking in narcotics, the arresting officers were obliged to disabuse him of this false information before seeking to elicit incriminatory evidence from him. This could only be accomplished by an equally explicit statement of the true ground for his arrest.

While in some circumstances the initial questions, which are put before an incriminatory response is obtained, may disclose the true ground for an arrest, in my opinion this is not such a case. The appellant, whose mental development was equated to that of a 14-year-old, should not have been required to deduce from the content of questions that the initial explicit reason for his arrest had shifted to a far more serious ground.

I have agreed that the statements referred to in the reasons of McLachlin J. should be excluded by reason of the violation of s. 10(*b*). The violation of s. 10(*a*) gives added support to the reasons for such exclusion.

//McLachlin J.//

The judgment of Gonthier, Cory and McLachlin JJ. was delivered by

MCLACHLIN J. --

Introduction

The appellant Evans, a youth of subnormal mental capacity, was convicted of first degree murder in the brutal killings of two women. Initially, the police thought his brother had committed the murders, and arrested the appellant on a marijuana charge in the hope that he would be able to provide evidence against his brother. The police informed Evans of his right to counsel, but when asked if he understood his rights he replied: "No". During the course of the interrogation that followed, Evans became the prime suspect in the two murders. The police did not formally advise the appellant that he was then being detained for murder, nor did they reiterate his right to counsel. Eventually incriminating statements were obtained from the appellant. These statements formed virtually the entire basis of his conviction for the two murders.

The appellant appeals his conviction to this Court both as of right and by leave. He argues, *inter alia*, that his rights under ss. 7, 10(*a*) and 10(*b*) of the *Canadian Charter of Rights and Freedoms* were violated and that the resultant confessions should have been excluded pursuant to s. 24(2) of the *Charter*.

I have concluded that the appeal should be allowed on the basis that the statements were obtained in violation of the appellant's right to counsel, as guaranteed by s. 10(*b*) of the *Charter*, and that the repute of the administration of justice requires their exclusion under s. 24(2) of the *Charter*.

Facts

The appellant was convicted by a jury of first degree murder contrary to s. 218 (now s. 235) of the *Criminal Code*, R.S.C. 1970, c. C-34, in relation to the deaths of Lavonne Cheryl Willems and Beverley Mary-Ann Seto. The British Columbia Court of Appeal (Hutcheon J.A. dissenting) dismissed an appeal from that verdict.

The body of Ms. Willems was discovered on November 24, 1984 in a home in Matsqui. She had been in the home alone, house sitting while the residents were away on vacation. In addition to having received some minor bruises, her body had been stabbed 25 times. Some months later on March 31, 1985, the body of Ms. Seto was discovered in the bedroom of a newly constructed house in Abbotsford. Ms. Seto was a real estate agent and had been conducting an open house at the home. She, too, died as a result of multiple stab wounds as well as a severe cutting wound to the front of the neck.

The appellant Evans was born on July 7, 1964. At the age of 9 he was hit by a truck at a cross-walk and suffered brain injuries. Two years later as a result of an accident with a cigarette lighter he suffered extensive third degree burns to the upper part of his body. He has undergone numerous skin grafts to his torso in order to repair the burn damage and remains heavily scarred. He has attained a grade 5 or 6 equivalency in education and spent many years in rehabilitation for "the brain-injured victim" to improve his coordination, speech and living skills. A psychiatrist and a psychologist, who examined him after he was charged, concluded that he has

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an IQ between 60 and 80 (borderline retardation) and functions at an emotional level of a 14-year-old.

The appellant was arrested on August 1, 1985 along with his older brother, Ron Evans. At the time, Ron Evans was the principal suspect in the murders of Ms. Willems and Ms. Seto. The appellant was ostensibly brought in on a charge of trafficking in narcotics (the police, in the course of their investigation of Ron Evans, had obtained some wiretap evidence indicating that the appellant may have been involved in the sale of a small amount of marijuana), but the police acknowledge that a collateral purpose in arresting the appellant was to try to obtain evidence against Ron Evans, with whom the appellant lived, in relation to the murders of Ms. Willems and Ms. Seto. Some time during the course of the police's first interview with the appellant, police suspicion turned to the appellant and he became the prime suspect in the murders of Ms. Willems and Ms. Seto.

Prior to arresting the appellant, the arresting officers, Detectives Brian Metzgner and John Spring, had been informed of the appellant's mental deficiency and were cautioned to make sure that the appellant understood the warnings given to him. The arrest took place at 9:52 a.m., shortly after the appellant's brother, Ron Evans, had been arrested and taken from the house. Detective Metzgner informed the appellant that: "I am arresting you for trafficking in narcotics". He then gave the appellant the *Charter* warning and the standard police warning in the following terms: "It is my duty to inform you that you have the right to retain and instruct counsel without delay. You are not obliged to say anything but anything you do say may be given in evidence. Do you understand?". To the question: "Do you

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understand?", the appellant replied: "No". Detective Metzgner then instructed the appellant that, "You have to come down to the police office with us now for trafficking in narcotics". No attempt was made to explain the *Charter* or police warning to the appellant.

While the appellant was in custody, the following events occurred: Detectives Metzgner and Spring interviewed the appellant on three occasions; an undercover officer was placed in the same cell as the appellant (the "cell plant interviews"); the detectives took the appellant to the scenes of the crimes (the "show and tell expedition"); a police physician interviewed the appellant; and a telephone conversation between the appellant and his oldest brother, Tim Evans, was recorded.

At the commencement of the first interview (10:59 a.m. -- 12:11 p.m.), the following exchange took place:

JS: Okay Wesley, you understand why you're here, eh?

WE: Yes sir, I do.

JS: I think that to explain the prior, that um . . . . you are not obliged to say anything unless you wish to do so, but anything you do say, may be given in evidence. And ah . . . . I'll also add, we'd like to cancel the delay which was explained to you earlier. You're on a charge of trafficking in soft drugs . . . . . .

WE: . . . . . Yes sir.

JS: . . . . . and ah . . . . it's um . . . . marijuana. Do you know what marijuana is?

WE: Yes sir, I do.

JS: And ah . . . . you've heard the allegations and anything you'd like to say to us with regards to the allegations being made to you.

WE: No sir. [Emphasis added.]

The emphasized portion was the subject of a dispute at trial. Detective Metzgner testified on the *voir dire* at trial that the sentence should read: "I'd like to say you have the right to counsel without delay which was explained to you earlier". However, Crown counsel, Mr. Gillen, stated that he didn't "come close to" sharing Detective Metzgner's interpretation of the sentence and stated that in his view the sentence was correctly transcribed. The trial judge, after listening to the tape himself, ultimately accepted Detective Metzgner's version.

During this first interview, the appellant admitted to involvement in a plan to sell marijuana to a girl known to him. Toward the end of the interview the police's focus began to shift, as the following excerpt demonstrates:

WE: Are you saying that I killed that lady?

BM: Did you Wes?

WE: Nuts . . . . no.

BM: Do you know who did?

WE: No. I don't know. I don't even know why I'm here.

JS: Well, we already explained to you about that earlier on when you were here.

WE: Yeah but . . . . . .

JS: . . . . . This is quite a serious offence (we're talking about).

WE: (Why me)?

JS: (LONG PAUSE) To traffic marijuana, that was originally why we're here. But now that things have taken quite a change.

WE: Yeah but . . . . why are you asking me this? I never killed no one . . . . I don't know who did. It's none of my business.

The second interview (1:32 p.m. -- 2:27 p.m.) began with Detective Metzgner informing the appellant that he was not compelled to say anything. Referring to a search of the appellant's residence that had occurred between the first and the second interviews, Detective Spring also stated the following at the outset of the second interview:

JS: And we've come up with a few little things which ah . . . . I feel are um . . . . important in this case and that um . . . . ah . . . . they also um . . . . point to . . . . towards you as possibly being the person who committed that crime that night that we were discussing.

During the interview, the following exchange also took place:

BM: (LONG PAUSE) Why . . . . can you not explain, or can you give us an explanation as to why your fingerprint would be found inside the house?

WE: (LONG PAUSE) I can't give you an explanation.

BM: No?

WE: Although, all's I can say is I wasn't inside that house. (LONG PAUSE) You said tell the truth right? I'm tellin' the truth.

In suggesting that the appellant's fingerprints were found in the home where Ms. Seto was killed, Detective Metzgner lied to the appellant; none of the fingerprints found matched those of the appellant. Nevertheless, by the end of the second interview the appellant had confessed to the killing of Ms. Seto.

By the end of the third interview (3:14 p.m. -- 4:02 p.m.) the appellant had also confessed to the killing of Ms. Willems. With the possible exception of the disputed passage at the commencement of the first interview, at no time during the three interviews was the appellant informed of his right to counsel.

After the interviews, the appellant was placed in a cell where his conversations with an undercover police officer in the cell next to his were recorded. The appellant had two conversations with the undercover officer, Constable Lee Ryan. The first took place between 4:20 p.m. and 5:25 p.m., while the second lasted from 7:30 p.m. to 8:32 p.m. During these conversations, the following exchanges took place:

LR: You confessed?

WE: Yeah.

LR: Did you do it?

WE: No.

LR: Well why did you confess.

WE: Well they, they wouldn't give me a rest until I confessed.

LR: Oh.

WE: So what else, what else was I gonna do . . . .

. . .

WE: I wonder if they'd give me a chance and let me talk to a lawyer? I hope so. Cause with a lawyer maybe things could go a little better with me, or for me I should say.

. . .

WE: You know it's funny, I don't remember killing them.

LR: No?

WE: Um-um.

LR: Yeah that is funny.

WE: Yeah. Usually I won't forget somein [*sic*] like that.

Prior to the third exchange reproduced above, the appellant had told the undercover officer that he had killed Ms. Willems and Ms. Seto.

Between the two conversations with the undercover officer, Detectives Metzgner and Spring took the appellant to the scenes of the two killings. No evidence was found on this "show and tell expedition", but at one point the appellant did tell the detectives that: "I was going to kill again but I didn't have anyone picked out though".

At approximately 8:30 p.m. that evening the appellant was taken from his cell and asked to provide a written statement. Prior to the writing of the statement the appellant was asked if he wanted to speak to a lawyer. He stated that he did. He was directed to a telephone and provided with a phone book but returned a minute later stating that he was unable to reach a lawyer; he had been advised on the telephone that his lawyer was on vacation and could not be reached at that time. Detective Metzgner then told the appellant that he could either contact his lawyer later or continue with the written statement. The appellant stated that he would proceed with the written statement. During the next hour the appellant then wrote a two-paragraph statement in which he confessed to the two killings.

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Later that evening, the appellant was introduced to Dr. Swanney, a general practitioner who had come to take hair and blood samples from him. During this interview, the appellant told Dr. Swanney that he had killed the two women because of his frustration with women in general. This, incidentally, is consistent with a suggestion put to the appellant by Detectives Metzgner and Spring during their interrogation of him. The appellant also informed Dr. Swanney that he expected to receive 25 years in jail for the crimes.

The following morning, the appellant spoke with his brother, Tim Evans, on the telephone. The conversation was recorded, and the following exchanges occurred:

TE: Your rights? Do you know what your rights are?

WE: Yeah, the right to remain silent, I know.

TE: Well tell me. Let, let me hear it. Wha-, what kinda rights do you have?

WE: I have the right to remain silent, if I give up the right to remain silent, anything I can and say will be used against me in a court of law. I have a right to speak with an attorney, or to have an attorney present during questioning.

TE: Yeah?

WE: I know that.

TE: How many times did they say that to ya? How many times? Once?

WE: More than once, a couple.

TE: Yeah?

WE: They didn't ask me if I wanted a lawyer until just before I filled out the ass- the assessment, or statement I mean.

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TE: Did you know that you had, you were entitled to a lawyer or?

WE: Oh yeah, I know, I watch T.V. man, I know what's goin' on.

. . .

TE: Are you guilty?

WE: No.

Judgments

At trial, a *voir dire* was held to determine the admissibility of the oral and written statements made by the appellant while in custody. The appellant argued the statements were not freely and voluntarily made and had been obtained in violation of ss. 10(*a*) and (*b*) of the *Charter* and ought to be excluded from evidence pursuant to s. 24(2) of the *Charter*. Callaghan J. rejected these arguments and held that the statements were admissible. In his view, the statements were voluntary, and the appellant's rights under the *Charter* had not been violated. At the time of his arrest, he had been properly advised of the reasons for his arrest and his right to counsel. Moreover, he had offered his knowledge of these rights in the telephone conversation with his brother.

Finally, even if there had been a breach of the *Charter*, Callaghan J. was of the view that admission of the evidence in these circumstances would not bring the administration of justice into disrepute under s. 24(2) of the *Charter*, since the officers had acted in good faith.

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The majority of the British Columbia Court of Appeal dismissed the appeal. Southin J.A. wrote the principal judgment of the Court of Appeal. She agreed that the statements were voluntary. While she concluded there had been a breach of s. 10(*a*) of the *Charter* by reason of the failure of the police to advise Evans at the critical juncture that he was under arrest for murder, she found no breach of his s. 10(*b*) right to be advised of his right to counsel. On the assumption, however, that both ss. 10(*a*) and 10(*b*) had been breached, Southin J. concluded that the evidence should be admitted under s. 24(2) since nothing could bring the administration of justice into greater disrepute than freeing a confessed murderer to kill again, notwithstanding a violation of the *Charter*.

Craig J.A. agreed that the appeal should be dismissed and added comments with respect to the voluntariness of statements made by the appellant and the *Charter* issues. He was of the view there had been no breach of s. 10(*b*) and was doubtful whether s. 10(*a*) had been violated. Even if there had been a breach of s. 10(*a*) by virtue of the failure of the police to inform the appellant during the second interview that he was being detained as a suspect in the killings of the two women, Craig J.A. would not have excluded the evidence under s. 24(2), in view of the seriousness of the charges and Evans' statement on the "show and tell" expedition that he would have killed again.

Hutcheon J.A. dissented. He held that the appellant's s. 10(*b*) right had been infringed and that the four statements made by the appellant on the day of his arrest ought to have been excluded under s. 24(2) of the *Charter*, in view of the

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serious and deceptive nature of the police violations of the *Charter* and the suspected reliability of the statements, given Evans' immaturity and defective mental capacity.

Relevant Legislation

Canadian Charter of Rights and Freedoms

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **10.** Everyone has the right on arrest or detention
>
> (*a*) to be informed promptly of the reasons therefor;
>
> (*b*) to retain and instruct counsel without delay and to be informed of that right; . . .
>
> **24.** . . .
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Issues

(1) Were the appellant's s. 10(*a*) rights infringed or denied and if so should the evidence obtained be excluded pursuant to s. 24(2) of the *Charter*?

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(2) Were the appellant's s. 10(*b*) rights infringed or denied and if so should the evidence obtained be excluded pursuant to s. 24(2) of the *Charter*?

(3) Were the undercover cell plant statements obtained in a manner that infringed the appellant's s. 7 rights and if so, should the evidence be excluded pursuant to s. 24(2) of the *Charter*?

(4) Were the statements made by the appellant to the police voluntarily made and hence admissible into evidence?

(5) Did the trial judge err by failing to adequately review for the jury the defence and the evidence in support thereof?

Analysis

1. *Section 10(a) of the Charter*

The right to be promptly advised of the reason for one's detention embodied in s. 10(*a*) of the *Charter* is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it: *R. v. Kelly* (1985), 17 C.C.C. (3d) 419 (Ont. C.A.), at p. 424. A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(*b*) of the *Charter*. As Wilson J. stated for the Court in *R. v. Black*, [1989] 2 S.C.R. 138, at pp. 152-53, "[a]n individual can only exercise his s. 10(*b*) right in a meaningful way

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if he knows the extent of his jeopardy". In interpreting s. 10(*a*) in a purposive manner, regard must be had to the double rationale underlying the right.

The majority of the Court of Appeal inclined to the view that the accused's right to be advised of the reasons for his detention was violated by the failure of the police to advise him when the focus of the investigation changed that he was then suspected of murder.

While serious issue was not taken with this conclusion, I am hesitant to let it pass without comment lest the inference be drawn that police conduct, such as that found in this case, necessarily results in a breach of s. 10(*a*). In fact the police informed the appellant that he was a suspect in the killings shortly after their suspicion of him formed, as the following portion of the interview discloses:

> JS: (LONG PAUSE) To traffic marijuana, that was originally why we're here. But now that things have taken quite a change.
>
> WE: Yeah but . . . . why are you asking me this? I never killed no one . . . . I don't know who did. It's none of my business.

This passage suggests to me that both parties, the police and the appellant, were aware that the appellant was at that point under investigation for murder. Any doubt about that fact is resolved at the beginning of the second interview when Detective Spring states the following:

> JS: And we've come up with a few little things which ah . . . . I feel are um . . . . important in this case and that um . . . . ah . . . . they also um . . . . point to . . . . towards you as possibly being the person who committed that crime that night that we were discussing.

Thus, very shortly after the point where the appellant became the prime suspect in the killings, the police indicated that they were investigating the appellant for that purpose, and the appellant in turn seemed to recognize that the nature of the questioning had altered.

When considering whether there has been a breach of s. 10(*a*) of the *Charter*, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to undermine his right to counsel under s. 10(*b*).

The appellant's response to the officer's statement that, while he had originally been arrested on marijuana charges, things had now taken "quite a change", indicates that the appellant was aware that the focus of the questioning had changed and that he was then being questioned with respect to the killings. It might, therefore, be argued that he was given the facts relevant to determining whether he should continue to submit to the detention. Nor can any failure to comply with s. 10(*b*) be attributed to failure to advise the accused of the reasons why his detention and questioning was continuing.

These considerations suggest that the requirements of s. 10(*a*) were met in the case at bar.

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2. *Section 10(b)* of the *Canadian Charter of Rights and Freedoms*

The police, on arresting the accused in connection with the marijuana charges, properly advised him that he had the right to retain counsel without delay. When they asked him whether he understood, he answered in the negative. Nevertheless, no attempt was made to clarify his appreciation of his right to counsel. The police proceeded to take him into custody and question him in the absence of counsel. Depending on how a disputed portion of the transcript is read, there may have been a further attempt at the beginning of the first interview to repeat the advice regarding counsel, but again no attempt was made to explain it to the accused. At a certain point, the police became suspicious that the appellant might have committed the two killings. The focus of the investigation changed from a drug offence to murder. Nothing more, however, was said about counsel. Two more police interviews followed, as well as a cell interview by an undercover agent, a "show and tell" expedition to the scenes of the crimes, and an interview by a police physician -- all without the benefit of counsel. In the course of his conversation with the undercover police officer, the appellant, after telling the officer he confessed because "they wouldn't give me a rest until I confessed . . . . So what else, what else was I gonna do . . .", stated:

> I wonder if they'd give me a chance and let me talk to a lawyer? I hope so. Cause with a lawyer maybe things could go a little better with me, or for me I should say.

The next mention of a lawyer by the police came with the request to provide a written statement at approximately 8:39 p.m. The appellant was asked if he wanted to speak with a lawyer. He stated that he did. He was directed to a

telephone and provided with a phone book but returned about one minute later stating that he was unable to reach a lawyer; he had been told on the telephone that his lawyer was on vacation and could not be reached at that time. Detective Metzgner then told the appellant that he could either contact his lawyer later or continue with the written statement. The appellant stated that he would proceed with the written statement. During the next hour the appellant wrote a two- paragraph statement in which he confessed to the two killings. Later, in a telephone conversation with his brother the accused recited a version of his rights suggestive of the United States and to the question of whether he knew he was entitled to a lawyer, said: "Oh yeah, I know, I watch T.V. man, I know what's goin' on."

This evidence must be viewed against the background that the police from the outset were aware that the accused was hampered by a mental deficiency bordering on retardation and that they should take special care to make sure that he understood the warnings required to be given to him. Psychiatric evidence also established that the accused was easily influenceable.

The trial judge rejected the submission that the accused's s. 10(*b*) right had been violated on the ground that the accused had told his brother he understood that he was entitled to a lawyer. The majority in the Court of Appeal declined to interfere with the conclusion of the trial judge.

The jurisprudence establishes that the duty on the police to inform a detained person of his or her right to counsel encompasses three subsidiary duties: (1) the duty to inform the detainee of his right to counsel; (2) the duty to give the

detainee who so wishes a reasonable opportunity to exercise the right to retain and instruct counsel without delay; and (3) the duty to refrain from eliciting evidence from the detainee until the detainee has had a reasonable opportunity to retain and instruct counsel: *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. Ross*, [1989] 1 S.C.R. 3; *R. v. Black*, *supra*. In *Black*, the rider was added that the accused must be reasonably diligent in attempting to obtain counsel if he wishes to do so, otherwise the correlative duty on the police to refrain from questioning him is suspended.

The right to be advised of the right to counsel arguably arises at three points in the dealings of the police with the appellant. The first is the failure of the police upon arresting the appellant to take steps to assist him in understanding his right after he indicated he did not. The second is the failure of the police to reaffirm the appellant's right to counsel when the nature of the investigation changed. The third is the taking of a written statement after the appellant indicated that he would like to speak to a lawyer.

Dealing first with the initial arrest, I am satisfied that the police did not comply with s. 10(*b*). It is true that they informed the appellant of his right to counsel. But they did not explain that right when he indicated that he did not understand it. A person who does not understand his or her right cannot be expected to assert it. The purpose of s. 10(*b*) is to require the police to communicate the right to counsel to the detainee. In most cases one can infer from the circumstances that the accused understands what he has been told. In such cases, the police are required to go no further (unless the detainee indicates a desire to retain counsel, in which case they must comply with the second and third duties set out above). But where,

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as here, there is a positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding.

This is recognized in *R. v. Anderson* (1984), 10 C.C.C. (3d) 417 (Ont. C.A.), where the Court, *per* Tarnopolsky J.A., stated at p. 431:

> . . . I am of the view that, absent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it. No such evidence was put forth in this case. [Emphasis added.]

The question is whether the circumstances here indicated that the accused did not understand his right to retain counsel. In my view, they did. Asked whether he understood his rights, he replied in the negative. The police had no reason to assume otherwise, given their knowledge of his limited mental capacity. The only question is whether his subsequent statement to his brother that he was aware of his right to counsel can be reasonably seen as indicating that the appellant, despite his initial indication to the contrary, in fact understood his right. In my view, it cannot. While the appellant had some idea -- based on U.S. television -- that he was allowed to speak to a lawyer, it is far from clear that the appellant understood from the outset when he was entitled to exercise his right to counsel and how he was permitted to do so. In these circumstances, the failure of the police to make a reasonable effort to explain to the accused his right to counsel violated s. 10(*b*) of the *Charter*.

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A second violation of the appellant's s. 10(*b*) right occurred when the police failed to reiterate the appellant's right to counsel after the nature of their investigation changed and the appellant became a suspect in the two killings. This Court's judgment in *R. v. Black*, *supra*, per Wilson J., makes it clear that there is a duty on the police to advise the accused of his or her right to counsel a second time when new circumstances arise indicating that the accused is a suspect for a different, more serious crime than was the case at the time of the first warning. This is because the accused's decision as to whether to obtain a lawyer may well be affected by the seriousness of the charge he or she faces. The new circumstances give rise to a new and different situation, one requiring reconsideration of an initial waiver of the right to counsel. On this point I prefer the judgment of *R. v. Nelson* (1982), 32 C.R. (3d) 256 (Man. Q.B.), to the decision in *R. v. Broyles* (1987), 82 A.R. 238 (C.A.). I add that to hold otherwise leaves open the possibility of police manipulation, whereby the police -- hoping to question a suspect in a serious crime without the suspect's lawyer present -- bring in the suspect on a relatively minor offence, one for which a person may not consider it necessary to have a lawyer immediately present, in order to question him or her on the more serious crime.

I should not be taken as suggesting that the police, in the course of an exploratory investigation, must reiterate the right to counsel every time that the investigation touches on a different offence. I do, however, affirm that in order to comply with the first of the three duties set out above, the police must restate the accused's right to counsel when there is a fundamental and discrete change in the purpose of the investigation, one involving a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the warning.

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It remains to consider the appellant's decision to provide a written statement after an unsuccessful attempt to contact his lawyer. Prior to preparation of the written statement, the appellant was asked in terms he could understand whether he wanted to speak to a lawyer. The appellant was then given the choice of contacting his lawyer later or proceeding with the written statement, and he apparently agreed to continue with the written statement. At this point, the appellant both understood that he had a right to counsel and knew that he faced a charge of murder. The Crown argues that this "cured" the earlier s. 10(*b*) violations, with the result that the written confession was obtained in conformity with s. 10(*b*) of the *Charter*.

Such an argument could only succeed if it were concluded that by making the written confession the appellant had waived his s. 10(*b*) right. In *Manninen*, *supra*, this Court held that a person may implicitly, by words or conduct, waive his or her rights under s. 10(*b*). The Court cautioned, however, that "the standard will be very high" (at p. 1244) and referred to its judgment in *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, where it was held that for a voluntary waiver to be valid and effective it must be premised on a true appreciation of the consequences of giving up the right. In view of the appellant's subnormal mental capacity and the circumstances surrounding his arrest -- the fact that no attempt was made to explain his rights to him after he indicated that he did not understand them, as well as the fact that he was subjected to a day of aggressive and at times deceptive interrogation which apparently left him feeling as if he had "no choice" but to confess -- I am not satisfied that he appreciated the consequences of making the written statement and thereby waiving his right to counsel or, to put it another way, that he waived his right

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"with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process": *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41, at p. 49, as cited in *Clarkson v. The Queen*, *supra*, at p. 395 (emphasis deleted). Accordingly, I am of the view that the written statement was also taken in violation of the appellant's s. 10(*b*) right.

3. *Other Charter Violations*

In view of the fact that the statements made to an undercover policeman were not put in evidence, it is unnecessary to consider whether they constituted a violation of s. 7 of the *Charter* or whether they were voluntary.

4. *Section 24(2) of the Charter*

I have concluded that the statements of the accused were obtained in a manner that infringed the appellant's right to counsel. Section 24(2) provides that where this is the case, "the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

The majority of the Court of Appeal concluded that admitting the statements in evidence at the appellant's trial would not bring the administration of justice into disrepute. Southin J.A. considered the matter on the basis that both ss. 10(*a*) and 10(*b*) had been violated, and assumed further that had the appellant had access to counsel, he would have been advised to remain, and in fact remained silent.

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In her view, it was necessary to weigh the appellant's right to "adjudicative fairness" against the s. 7 right to life of possible future victims. Concluding, at p. 563, that something had to be done "to prevent another young woman who has never done Evans any harm [from] being killed by him without a fair trial", Southin J.A. held that the statements should not be excluded. She concluded with the following peroration at p. 564:

> If there be anything more likely, by every rational community standard, to bring the administration of justice into disrepute than letting the accused, a self-confessed killer, go free to kill again on the basis of such infringements, I do not know what it is.
>
> Seventy-five years ago, Wesley Evans would have been hanged for these murders. Twenty-five years ago he would probably have had his death sentence commuted to life imprisonment.
>
> I cannot think that the framers of the Charter intended that today in the name of adjudicative fairness he should by the application of the Charter be let free to kill again. Such a result would not be the act of a civilized, but of an uncivilized, society.

Craig J.A. found that reception of the statements would not bring the administration of justice into disrepute on the ground that the appellant knew about his right to counsel and was likely, if released, to kill again, in view of his statement after the "show and tell" expedition.

Hutcheon J.A., dissenting, held that the evidence should have been excluded in view of the following considerations: (i) the confessions came into existence following a serious breach of the right to counsel; (ii) the police officers lied to the appellant concerning the discovery of his fingerprints in the house; and

(iii) the statements were those of a person who is immature and borderline mentally retarded and there is evidence to cast doubt upon their reliability.

I share the view of Hutcheon J.A. that reception of the written statements would tend to bring the administration of justice into disrepute. In *R. v. Collins*, [1987] 1 S.C.R. 265, this Court identified three broad categories of factors bearing on a s. 24(2) determination:

(a) the effect of the admission of the evidence on the fairness of the trial;

(b) the seriousness of the *Charter* violation; and

(c) the effect of exclusion on the repute of the administration of justice.

The effect of the reception of this evidence on the fairness of the trial is the first matter which must be considered. There can be little doubt that the use of these statements at trial worked an unfairness against the accused. Generally speaking, the use of an incriminating statement, obtained from an accused in violation of his rights, results in unfairness because it infringes his privilege against self-incrimination and does so in a most prejudicial way -- by supplying evidence which would not be otherwise available: *Collins*, *supra*; *Black*, *supra*. For these reasons, Lamer J. (as he then was) stated in *Collins*, at pp. 284-85, that "[t]he use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded."

Admission of the statements taken from the appellant is unfair for the reasons enunciated in *Collins* and *Black*. The statements were obtained in violation of the appellant's rights. They were highly incriminatory. And they provide evidence which was not otherwise available. The Crown concedes that without the confessions, it has no case against the appellant.

This suggests a further reason why it would be unfair to use the statements against the accused. There can be no greater unfairness to an accused than to convict him or her by use of unreliable evidence. Here the appellant's deficient mental state, combined with the circumstances in which the statements were taken, cast significant doubt on their reliability. Consider the record. A young man, borderline mentally retarded, emotionally immature and by his nature subject to suggestion, after being denied his right to counsel, is interviewed at length. The police falsely suggest to him that they have real evidence linking him to the murders. They tell him that his fingerprints place him at the house where one of the victims was killed, when none of his fingerprints has been found there. Asked why he cannot explain why his fingerprints were found inside the house, his response is simple: "... all's I can say is I wasn't inside that house." Nevertheless, by the end of the second interview he has admitted to killing Ms. Seto and by the end of the third interview, to killing Ms. Willems. A little while later in the cells, he denies his involvement to the undercover officer. Asked why he had confessed, he alludes to police pressure -- ". . . they wouldn't give me a rest until I confessed . . . So what else, what else was I gonna do . . . ." And then, most significantly, the following exchange occurs, suggesting that the accused has no memory of the matters he has just confessed to:

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WE: You know it's funny, I don't remember killing them.

LR: No?

WE: Um-um.

LR: Yeah that is funny.

WE: Yeah. Usually I won't forget somein [*sic*] like that.

Later, in a taped telephone call to his brother, the appellant once more denies his guilt.

In all the circumstances, the appellant's statements must be regarded as highly unreliable. It would be most unfair to convict him entirely on their strength. I note in passing that significant portions of the evidence which undermines the reliability of the statements was not before the jury.

The second factor relevant to a s. 24(2) determination is the seriousness of the *Charter* violation. In my view, the violation of the accused's right to counsel in this case was highly serious. The police, despite knowledge of the appellant's deficient mental status and despite his statement to them that he did not understand his right to counsel, proceeded to subject him to a series of interviews and other investigative techniques. Moreover, they lied to him in the course of the interviews, falsely suggesting that his fingerprints had been found in the house where Ms. Seto died. One can appreciate the pressure the police were under to find a suspect in these two terrible killings. But that did not justify their conducting repeated and dishonest interrogations of a weak person in violation of his *Charter* rights.

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It is argued that the police conduct should not be considered serious since the accused himself stated in his conversation with his brother after the interviews that he knew he had a right to counsel. The strength of this argument is undercut, however, by the fact that the same conversation reveals that the appellant's notion of his rights was confined to a garbled version based on American television. The argument is also weakened by the appellant's initial assertion to the police that he did not understand what his right to counsel entailed.

I turn finally to the third factor outlined in *Collins* -- the effect of exclusion on the repute of the administration of justice. To Southin J.A.'s mind, the admission of the statement would not bring the administration of justice into disrepute; on the contrary, its admission was required since nothing could be more detrimental to the repute of the administration of justice "than letting the accused, a self-confessed killer, go free to kill again on the basis of such infringements . . . ."

The fallacy in this reasoning, with the greatest respect, is that it rests on the questionable assumption that the confessions were reliable and true. More fundamentally, it rests on the assumption that the appellant is guilty. But the very question before the Court of Appeal was whether the appellant was, in fact, guilty -- that is, whether the jury, after a trial conducted in accordance with the law, had properly found him guilty. The appellant was entitled not to be found guilty except upon a fair trial. To justify the unfairness of his trial by presuming his guilt is to stand matters on their head and violate that most fundamental of rights, the presumption of innocence. Few things could be more calculated to bring the administration of justice into disrepute than to permit the imprisonment of a man

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without a fair trial. Nor, as a practical matter, can it be said that such imprisonment would achieve the end sought by Southin J.A., namely, the prevention of further murders by the killer of Ms. Seto and Ms. Willems. Only a conviction after a fair trial based on reliable evidence could give the public that assurance.

I conclude that the admission of the accused's statements obtained in violation of his *Charter* rights would bring the administration of justice into disrepute.

5. *Other Issues*

The appellant contends that the charge to the jury failed to sufficiently emphasize the unreliability of the statements put in evidence. In view of my conclusion that the statements should never have been admitted, nothing turns on this allegation, and I need not consider it further. For the same reason, it is unnecessary for me to consider the appellant's argument concerning the voluntariness of the statements made to the police.

Conclusion

I would allow the appeal. The conviction should be set aside and an acquittal entered.

//Stevenson J.//

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The following are the reasons delivered by

STEVENSON J. -- I have had the advantage of reading the judgment of my colleague, Justice McLachlin, and agree with her disposition of the appeal.

I restrict my agreement to the principal ground, namely that the police violated s. 10(*b*) of the *Canadian Charter of Rights and Freedoms* in failing to make a reasonable effort to explain to the accused his right to counsel. In my view, this is not a case in which to decide whether there is an obligation to reiterate the right to counsel when the course of the investigation takes some change.

Counsel for the accused properly distinguished *R. v. Broyles* (1987), 82 A.R. 238, a decision I gave for the Alberta Court of Appeal. He correctly distinguished it on the basis that it was "not dealing with somebody who did not understand his rights". Counsel thus staked his position on the "understanding" question and we did not, therefore, have the benefit of full argument on the reiteration question.

In *R. v. Black*, [1989] 2 S.C.R. 138, this Court considered the applicability of s. 10(*b*) of the *Charter* to a situation in which the accused, having first been detained for attempted murder was subsequently charged with first degree murder and then gave inculpatory statements. The accused was at that point detained for the purposes of that second charge. These statements were obtained notwithstanding the accused's request to speak to the lawyer she had consulted in relation to the first charge. This Court held that the accused had not fully exercised her *Charter* right to

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counsel when she spoke to her lawyer about the first charge. Any waiver in relation to the first charge did not extend to the reiteration of the request for counsel in relation to the second charge.

Section 10 does not apply to police investigations or questioning in the absence of detention. The object of the section is to provide safeguards in the circumstances of detention. On one hand, the police may be found to have detained someone on one charge with the object of questioning on another charge. On the other extreme, there can be cases in which an accused under detention fortuitously discloses information relating to other activities. These raise fact issues not dependent on the nature or seriousness of the other activities. One extreme would be readily characterized as an abuse of the detention and a violation of s. 10(*a*) and (*b*), while the other does not appear to violate the section.

We do not, of course, lay down rules that determine facts and I am not persuaded that this is a case in which we should attempt to formulate rules that will indelibly characterize some changes in the purpose of an investigation as imposing specific new duties, the breach of which are *Charter* violations.

I agree with McLachlin J.'s analysis and application of s. 24 and would allow the appeal.

Appeal allowed.

Solicitors for the appellant: Orris Burns, Vancouver.

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Solicitors for the respondent: DuMoulin, Black, Vancouver.

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ANNEX F

Authorities on the inadmissibility of involuntary statements or confessions

*47 Wong Kam-Ming v. R.

[Privy Council]

PC (HK)

Lord Diplock, Lord Hailsham of St. Marylebone, Lord Salmon, Lord Edmund-Davies and Lord Keith of Kinkel

October 17, 18, 19, December 20, 1978

Evidence--Confession--Admissibility--Voir Dire--Accused Cross--Examined as to Truth of Statement and Participation in Offence--Whether Permissible--Statement Ruled Inadmissible--Crown Subsequently Adducing Evidence of and Cross-- Examination of Accused's Admission in Voir Dire--Whether Such Evidence Admissible.

The appellant was charged with others with murdering the manager of a massage parlour and wounding two other persons. The only evidence connecting him with the offences was a signed statement he had given to the police in which he admitted to being at the scene of the crime and had chopped someone with a knife. At his trial the defence challenged that statement on the ground that it had not been made voluntarily. The trial judge dealt with the issue in the jury's absence by way of a *voir dire* . The appellant then gave evidence on the *voir dire*, admitted making the statement, but said that he had not been cautioned and that he had been offered inducements by the police and had been forced to make and sign that statement. In cross-examination he admitted that he had been at the scene of the crime and involved in it. The statement was ruled inadmissible by the trial judge and the appellant's trial on the general issue continued. To establish that the appellant had been present at the scene of the crime, Crown counsel was permitted to call evidence by two shorthand writers who had recorded the *voir dire* to testify that the appellant had admitted in that proceeding to being present. A defence objection was overruled as was a submission of no case to answer. The appellant then gave evidence and was cross-examined as to discrepancies between his evidence and that given at the *voir dire*. He was convicted of the offences charged and appealed. The Court of Appeal dismissed his appeal. On appeal therefrom to the Judicial Committee of the Privy Council.

Held, that

(1) (Lord Hailsham of St. Marylebone dissenting) on a *voir dire* during the cross-examination of a defendant as to the admissibility of his challenged statement questions may not be put to him as to its truth; thus the Crown's cross-examination in the instant case was improper.

Hammond (1941) 28 Cr.App.R. 84; [1941] 3 All E.R. 318 overruled . Dictum of Hall C.J. in Hnedish (1958) 26 W.W.R. 685, 688 approved.

(2) as the appellant's statement on the *voir dire* had been ruled inadmissible, ***48** the calling of the shorthand writers and the Crown's cross-examination of him on the basis of what he had said in that statement was wrongly placed before the jury and resulted in substantial irregularities in the trial; thus, as the jury could not have convicted without that evidence, the appeal would be allowed and the appellant's convictions would be quashed.

Treacy (1944) 30 Cr.App.R. 93; [1944] 2 All E.R. 228 applied.

Per curiam: Where a *voir dire* results in the impugned confession being *admitted* and the accused later elects to give evidence and later testifies to matter relating, *e.g.*to the *reliability* of the confession (as opposed to its *voluntariness* which, ex hypothesi, is no longer in issue) and in so doing gives answers which are markedly different from his testimony given in the *voir dire*, there is no justification in legal principle or on any other ground which renders cross-examination as to the discrepancies impermissible.

Decision of the Court of Appeal, Hong Kong, reversed.

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[For *voir dire*, see Archbold (39th ed.), para. 1378.]
Appeal by the defendant against the dismissal of his appeal against conviction by the Court of Appeal of Hong Kong.
This was an appeal by the appellant, Wong Kam-ming against a judgment of the Court of Appeal of Hong Kong (Briggs C.J., and Huggins J.A.; McMullin J. dissenting) dated July 12, 1977, whereby that Court dismissed his appeal against conviction on October 1, 1976, before Commissioner Garcia and a jury on the murder of one Lam Shing alias Lam Chung and malicious wounding on December 28, 1975.
The facts appear in the majority opinion of the Board. The appeal was argued on October 17, 18 and 19, 1978 when the following cases were cited in argument in addition to those referred to in the judgments: Harris v. Director of Public Prosecutions (1952) 36 Cr.App.R. 39; [1952] A.C. 694; Jeffrey v. Black (1978) 66 Cr.App.R. 81; [1978] Q.B. 490; Abbott (1955) 39 Cr.App.R. 141; [1955] 2 Q.B. 497; Erdheim [1896] 2 Q.B. 260; Garside (1967) 52 Cr.App.R. 85; Gauthier (1975) 27 C.C.C. (2d) 14; Commissioners of Customs and Excise v. Harz and Power (1967) 51 Cr.App.R. 123; [1967] 1 A.C. 760; McGregor (1967) 51 Cr.App.R. 338; [1968] 1 Q.B. 371; Murphy [1965] N.I. 138; Rice (1963) 47 Cr.App.R. 79; [1968] 1 Q.B. 857; Roberts (1953) 37 Cr.App.R. 86; Van Dangen (1975) 26 C.C.C. 22; Wray [1970] 4 C.C.C. 1; Power (1919) 14 Cr.App.R. 17; [1919] 1 K.B. 572 and Wan v. United States (1924) 266 U.S. 1.
Charles Fletcher-Cooke, Q.C., William Glossop and *George Warr* for the appellant. *John Marriage, Q.C.* and *Daniel Marash* (Crown counsel, Hong Kong) for the Crown.
Cur. adv. vult.
December 20.

Lord Edmund-Davies
delivered the majority judgment.
This is an appeal by special leave granted by this Board from a judgment of the Court of Appeal of Hong Kong, dismissing the appeal of Wong Kam-ming against his conviction in October 1976 of murder by the Supreme Court (Commissioner Garcia and a jury). The indictment charged the appellant and five other males upon counts of murdering one man and of maliciously wounding two others. The case for the Crown was that the accused men were part of a gang who went to a ***49** massage parlour in Kowloon and there fatally attacked the manager and wounded others in retaliation for an earlier attack on one of their number. Four of the accused were acquitted on all charges, while the other two (including the present appellant) were convicted on each.
When the trial opened, the only evidence implicating Wong Kam-ming consisted of a signed statement which he had given to the police. In this he admitted being one of those present in the massage parlour, that at one stage he had a knife in his hand, and that he had "chopped" one of those present. Defending counsel having intimated to the Court that he challenged the admissibility of this statement on the ground that it was not voluntary, before the Crown opened its case the learned judge (in the absence of the jury) proceeded to deal with the issue of admissibility on the *voir dire*. After two police witnesses had testified to its making, the accused gave evidence that he was never cautioned, that he was questioned at length while in custody, that he was grabbed by the shirt and shaken, that an inducement was offered that if he confessed his "sworn brother" would not be arrested, and that he had been forced to copy out and sign a statement drafted by the police. Under cross-examination he was asked a series of questions based on the detailed contents of the statement, and directed at establishing its truth. At this stage it is sufficient to say that, at the conclusion of the *voir dire*, the trial judge excluded the statement.
This ruling placed the Crown in dire difficulty, for it is common ground that without it they could not establish even that the appellant was present in the massage parlour at any material time. Finding themselves in that situation, they resorted to a course of action which none of their Lordships had hitherto ever heard of. Prosecuting counsel indicated to the trial judge (in the absence of the jury) that he proposed to establish, by reference to what had transpired in the *voir dire* , that the appellant had, "in circumstances where there is no question of involuntariness, admitted he was present and involved in the incident with which we are concerned." As authority for submitting that he should be allowed to prove such admission by calling the shorthand writer present during the *voir dire* he cited Wright (1969) S.A.S.R. 256, to which reference must later be made. Defending counsel's objection was overruled, the trial judge holding that Wright (*supra*) was good law, and expressly refusing to exercise in favour of the accused any discretion he might have to exclude the proffered new evidence. Two shorthand writers were then called to produce extracts from their transcripts of what the accused

had said during the *voir dire*, and this despite a renewed objection by defending counsel. 29986
A submission of "No case" was likewise overruled, the trial judge saying: "The main point here is presence at the scene at the relevant time." Defending counsel thereupon called the appellant. Following his evidence in chief, he was closely cross-examined by reference to the shorthand transcript of what he had said on the *voir dire*, prosecuting counsel repeatedly pointing out discrepancies and observing at one stage: "*That* is extraordinarily different from the evidence you have given *this* time." And in the course of summing-up the judge told the jury that the appellant "... in certain proceedings held on the 25th and 26th August this year gave answers to certain questions put to him in cross-examination by ... Crown counsel, and such answers indicate that he was present in the premises of the massage parlour on the night of the 28th December 1975. A copy of those questions and answers is also in your hands."
***50** Following upon these proceedings which, it will be seen, had taken several unusual turns, the jury, as already indicated, convicted the accused upon all three charges, and he was sentenced to death on the murder charge. The conduct of the trial has been attacked in several respects, and these were conveniently summarised by counsel for the appellant in framing the following questions:
1. During the cross-examination of an accused in the *voir dire* as to the admissibility of his challenged statement, may questions be put as to its truth?
2. If "Yes," has the Court a discretion to exclude such cross-examination, and (if so) was it properly exercised in the present case?
3. Where, although the confession is held inadmissible, the answers to Questions 1 and 2 are nevertheless in favour of the Crown, is the prosecution permitted, on resumption of the trial of the main issue, to adduce evidence of what the accused said during the *voir dire*?
4. If "Yes," is there a discretion to exclude such evidence, and (if so) was it properly exercised here?
5. Even although it be held that the answer to Question 3 is "No," may the accused nevertheless be cross-examined upon what he said during the *voir dire*? Their Lordships proceed to consider these questions.

Questions 1 and 2: Relevance of truth of extra-judicial statements

In Hammond (1941) 28 Cr.App.R. 84; [1941] 3 All E.R. 318prosecuting counsel was held entitled to ask the accused, when cross-examining him during the *voir dire*, whether a police statement which the accused alleged had been extorted by gross maltreatment was in fact true, and elicited the answer that it was. Upholding the propriety of putting the question, Humphreys J. said in the Court of Criminal Appeal (at pp. 87 and 321): "In our view ... [the question] clearly was not inadmissible. It was a perfectly natural question to put and was relevant to the issue whether the story which the appellant was then telling of being attacked and ill-used by the police was true or false ... it surely must be admissible because it went to the credit of the person who was giving evidence. If a man says, 'I was forced to tell the story. I was made to say this, that and the other,' it must be relevant to know whether he was made to tell the truth, or whether he was made to say a number of things which were untrue. In other words, in our view, the contents of the statement which he admittedly made and signed were relevant to the question of how he came to make and sign that statement, and, therefore, the questions which were put were properly put."
Although much criticised, that decision has frequently been followed in England and Wales and in many other jurisdictions, though it would serve little purpose to refer to more than a few of the many decisions cited by learned counsel. Mention must, however, be made of De Clercq v. R. (1968) 70 D.L.R. 2d 530, a majority decision of the Supreme Court of Canada following Hammond (*supra*), where Martland J. said (at p. 537): "... it does not follow that the truth or falsity of the statement must be irrelevant ... An accused person, who alleged that he had been forced to admit responsibility for a crime committed by another, could properly testify that the statement obtained from him was false. Similarly, where the judge conducting the *voir dire* was in some doubt on the evidence as to whether the accused had willingly made a statement, or whether, as he contended, he had done so because of pressure exerted by a person in authority, the admitted truth or the alleged falsity of the statement could be a relevant factor in deciding ***51** whether or not he would accept the evidence of the accused regarding such pressure."
Their Lordships were told by learned counsel that in England and Wales it has become common practice for prosecuting counsel to ask the accused in the *voir dire* whether his challenged statement was in fact true. It is difficult to understand why this practice is permitted, and impossible to justify it by claiming that in some unspecified way it goes to "credit." As McMullin J. said in his dissenting

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judgment in the instant case: "... I cannot see that the answer to this question has any material relevance even to the issue of credibility. Where the answer to the question 'Is this confession the truth?' is 'No' the inquiry is no further advanced. The credibility of the defendant in relation to the alleged improprieties can scarcely be enhanced or impaired by an answer which favours his own interests in opposing the admission of the statement. On its own, demeanour apart, it is neutral."
The cogency of these observations may be respectfully contrasted with those of Huggins J.A. who said, in delivering the majority judgment: "Although questions may be put to the defendant as to the truth of his extrajudicial confession that does not make the truth or falsehood of that confession relevant to the issue of voluntariness: what is relevant--because it goes to the credibility of the defendant--is that the defendant asserts that the extrajudicial confession is true or false."
But the basis of this assertion is unclear. If the accused denies the truth of the confession or some self-incriminating admission contained in it, the question whether his denial is itself true or false cannot be ascertained until after the *voir dire* is over and the accused's guilt or innocence has been determined by the jury--an issue which the judge has no jurisdiction to decide. If, on the other hand, the accused made a self-incriminating admission that the statement is true, then, as one critic has expressed it, "If the confession is true, this presumably shows that the accused tends to tell the truth, which suggests that he is telling the truth in saying the police were violent." Heydon, Cases and Materials on Evidence, (1975), p. 181.)
The sole object of the *voir dire* was to determine the voluntariness of the alleged confession in accordance with principles long established by such cases as Ibrahim v. R. [1914] A.C. 599; 24 Cox C.C. 174. This was emphasised by this Board in Chan Wei Keung v. R. (1966) 51 Cr.App.R. 257; [1967] 2 A.C. 160 while the startling consequences of adopting the Hammond (*supra*) approach were well illustrated in the Canadian case of Hnedish (1958) 26 W.W.R. 685, where Hall C.J. said (p. 688): "Having regard to all the implications involved in accepting the full impact of the Hammond (*supra*) decision which can, I think, be summarized by saying that regardless of how much physical or mental torture or abuse has been inflicted on an accused to coerce him into telling what is true, the confession is admitted because it is in fact true regardless of how it is obtained, I cannot believe that the Hammond (*supra*) decision does reflect the final judicial reasoning of the English courts.... I do not see how under the guise of 'credibility' the court can transmute what is initially an inquiry as to the 'admissibility' of the confession into an inquisition of an accused. That would be repugnant to our accepted standards and principles of justice; it would invite and encourage brutality in the handling of persons suspected of having committed offences."
It is right to point out that learned counsel for the Crown did not seek to ***52** submit that the prosecution could in *every* case properly cross-examine the accused during the *voir dire* regarding the truth of his challenged statement. Indeed, he went so far as to concede that in many cases it would be wrong to do anything of the sort. But he was unable to formulate an acceptable test of its propriety, and their Lordships have been driven to the conclusion that none exists. In other words, in their Lordship's view, Hammond (*ante*) was wrongly decided, and any decisions in Hong Kong which purported to follow it should be treated as over-ruled. The answer to *Question 1* is therefore "No," and it follows that *Question 2* does not fall to be considered.
Their Lordships turn to *Questions 3 and 4*. As part of its case on the main issue, may the prosecution lead evidence regarding the testimony given by the accused on the *voir dire*? As already related, the trial judge originally thought that this question required a negative answer, but he was led to change his mind by the decision in Wright (1969) S.A.S.R. 256, where the Supreme Court of South Australia held that the Crown was entitled to lead such evidence, subject to the discretion of the trial judge to disallow it. But the weight of judicial authority is against such a conclusion. The earliest relevant decision appears to be that of the Federal Supreme Court of Southern Rhodesia in Chitambala v. R. [1961] R. & N. 166, where Clayden A.C.J. said (p. 169): "In any criminal trial the accused has the right to elect not to give evidence at the conclusion of the Crown case. To regard evidence given by him on the question of admissibility as evidence in the trial itself would mean either that he must be deprived of that right if he wishes properly to contest the admissibility of a statement, or that, to preserve that right, he must abandon another right in a fair trial, the right to prevent inadmissible statements being led in evidence against him.... To me it seems clear that deprivation of rights in this manner, and the changing of a trial of admissibility into a full investigation of the merits, cannot be part of a fair criminal trial".
This decision was followed in Hong Kong in Li Kim-hung v. R. [1969] H.K.L.R. 84 and in Ng Chun-kwan v. R. [1974] H.K.L.R. 319. In the latter McMullin J. (who dissented in the instant case) said, in giving the judgment of the Full Court (p. 328): "... What the accused said on the *voir dire* may not be

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used as substantive evidence against him or his co-accused.... In this respect evidence on the *voir dire* is distinguishable from an extra-judicial confession and the basis for the distinction lies in the accused's right to remain silent upon the trial of the general issue even though he has elected to give evidence on the *voir dire*."

Yet in the instant appeal counsel for the Crown felt constrained to submit that, even were the trial judge to exclude a confession on the ground that torture had been used to extort it, any damaging statements made by the accused on the *voir dire* could nevertheless properly be adduced as part of the prosecution's case. Boldness could go no further.

Fortunately for justice, their Lordships have concluded that, where the confession has been excluded, the argument against ever admitting such evidence as part of the Crown case must prevail. But what if the confession is held *admissible*? In such circumstances, it is unlikely that the prosecution will need to do more than rely upon the confession itself. Nevertheless, in principle should they be prevented from proving in addition any admission made by the accused on the *voir dire*? This question has exercised their Lordships a great deal, but even in the circumstances predicated it is preferable to maintain a clear distinction between ***53** the issue of voluntariness, which is alone relevant to the *voir dire*, and the issue of guilt falling to be decided in the main trial. To blur this distinction can lead, as has already been shown, to unfortunate consequences, and their Lordships have therefore concluded that the same exclusion of evidence regarding the *voir dire* proceedings from the main trial must be observed, regardless of whether the challenged confession be excluded or admitted.

It follows that *Question 3* must be answered in the negative, and *Question 4* accordingly does not arise.

*Question 5*remains for consideration by their Lordships. Notwithstanding the answer to *Question 3*, in the event of the accused giving evidence in the main trial, may he be cross-examined in respect of statements made by him during the *voir dire*? In the instant case the majority of the Court held that he could, and McMullin J. (who dissented) had earlier been of the same view, having said in Ng Chun-kwan v. R. (*ante*) at p. 328: "The only way in which evidence of an admission made by the accused on the *voir dire* may be adduced in evidence is by way of rebuttal if he gives evidence on the general issue and if that evidence is inconsistent with what he has said on the *voir dire* ... We cannot see any warrant for the contention ... that everything which transpires in the course of a *voir dire* is to be regarded as having acquired an indefeasible immunity from all further resort for any purpose whatsoever."

The problem is best approached in stages. In Treacy (1944) 30 Cr.App.R. 93; [1944] 2 All E.R. 228, where an accused's answers under police interrogation were held inadmissible, it was held that he could not be cross-examined to elicit that he had in fact given those answers, Humphreys J. saying (p. 96 and p. 236): "In our view, a statement made by a prisoner under arrest is either admissible or not admissible. If it is admissible, the proper course for the prosecution is to prove it.... If it is not admissible, nothing more ought to be heard of it. It is a complete mistake to think that a document which is otherwise inadmissible can be made admissible in evidence simply because it is put to an accused person in cross-examination."

In their Lordship's judgment, Treacy (*supra*) was undoubtedly correct in prohibiting cross-examination as to the *contents* of confessions which the Court has ruled inadmissible. But what if during the *voir dire* the accused has made self-incriminating statements not strictly related to the confession itself but which nevertheless have relevance to the issue of guilt or innocence of the charge preferred? May the accused be cross-examined so as to elicit those matters? In the light of their Lordship's earlier conclusion that the Crown may not adduce as part of its case evidence of what the accused said during a *voir dire*culminating in the exclusion of an impugned confession, can a different approach here be permitted from that condemned in Treacy?

Subject to what was said to be the Court's discretion to exclude it in proper circumstances, respondent's counsel submitted that it can be, citing in support section 13 of the Hong Kong Evidence Ordinance (C.8), which was based on the familiar provision in section 4 of the Criminal Procedure Act 1865 of the United Kingdom, relating to the confrontation of a witness with his previous inconsistent statements. But these statutory provisions have no relevance if the earlier statements cannot be put in evidence. And, having already concluded that the *voir dire* statements of the accused are not admissible during the presentation of the prosecution's case, their Lordships find it impossible in principle to distinguish between such ***54** cross-examination of the accused on the basis of the *voir dire* as was permitted in the instant case by trial judge and upheld by the majority of the Court of Appeal and that cross-examination based on the contents of an excluded confession which, it is common ground, was rightly condemned in Treacy (*supra*).

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But what if the *voire dire*resulted in the impugned confession being *admitted* , and the accused later elects to give evidence? If he then testifies to matters relating, for example, to the *reliability* of the confession (as opposed to its *voluntariness*, which *ex hypothesi*, is no longer in issue) and in so doing gives answers which are markedly different from his testimony given during the *voir dire*, may he be cross-examined so as to establish that at the earlier stage of the trial he had told a different story? Great injustice could well result from the exclusion of such cross-examination, and their Lordships can see no justification in legal principle or on any other ground which renders it impermissible. As has already been observed, an accused seeking to challenge the admissibility of a confession may for all practical purposes be *obliged* to testify in the *voir dire* if his challenge is to have any chance of succeeding, and his evidence is then (or certainly should be) restricted strictly to the issue of admissibility of the confession. But the situation is quite different where the confession having been *admitted* despite his challenge, the accused later elects to give evidence during the main trial and, in doing so, departs materially from the testimony he gave in the *voir dire*. Having so chosen to testify, why should the discrepancies not be elicited and demonstrated by cross-examination? In their Lordship's view, his earlier statements made in the *voir dire* provide as acceptable a basis for his cross- examination to that end as any other earlier statements made by him--including, of course, his confession which, though challenged, had been ruled admissible. Indeed, for such purpose and in such circumstances, his *voir dire* statements stand on no different basis than, for example, the sworn testimony given by an accused in a previous trial where the jury had disagreed.

No doubt the trial judge has a discretion and, indeed, a duty to ensure that the right of the prosecution to cross-examine or rebut is not used in a manner unfair or oppressive to the accused, and no doubt the judge is under an obligation to see to it that any statutory provisions bearing on the situation (such as those earlier referred to) are strictly complied with. But, subject thereto, their Lordships hold that cross-examination in the circumstances predicated which is directed to testing the credibility of the accused by establishing the inconsistencies in his evidence is wholly permissible.

In the instant case, however, the challenged confession was excluded. It therefore follows that in the judgment of their Lordships no less than three substantial irregularities occurred in the trial:

(1) in the *voir dire*the accused was cross-examined with a view to establishing that his extra-judicial statement was true;

(2) in the trial proper, the Crown was permitted to call as part of its case evidence regarding answers by the accused during the *voir dire*; and

(3) the accused was permitted to be cross-examined so as to demonstrate that what he had said in chief was inconsistent with his statement in the *voir dire*.

As a result, evidence was wrongly placed before the jury that the accused was one of those present in the massage parlour at the material time and that he had then been in possession of a weapon. But for that evidence, it is common ***55** ground that the submission of "No case" made by defending counsel must have succeeded.

It follows that their Lordships will humbly advise Her Majesty that this appeal should be allowed and the conviction quashed.

Lord Hailsham of Saint Marylebone

delivered the following dissenting judgment.

I regret that for the reasons which follow there is a substantial portion of the advice of the majority in this case from which I must respectfully record my dissent.

I wish to begin, however, by making it plain that I entirely endorse the result proposed. This is because I entirely agree with the proposed answer to the third of the questions posed by counsel for the appellant and referred to in the advice of the majority, and this is sufficient to dispose of the whole appeal. I also agree with both parts of the proposed answer to the fifth question. Once a statement has been excluded I consider that, to adapt the words of Humphreys J. in Treacy (1944) 30 Cr.App.R. 93; [1944] 2 All E.R. 228, nothing more should be heard of the *voir dire* unless it gives rise to a prosecution for perjury.

I have stated elsewhere (D.P.P. v. Lin (1975) 62 Cr.App.R. 14; [1975] A.C. 574) that the rule, common to the law of Hong Kong and that of England, relating to the admissibility of extra-judicial confessions is in many ways unsatisfactory, but any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with

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offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the Courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary. For this reason it is necessary that the accused should be able and feel free either by his own testimony or by other means to challenge the voluntary character of the tendered statement. If, as happened in the instant appeal, the prosecution were to be permitted to introduce into the trial the evidence of the accused given in the course of the *voir dire* when the statement to which it relates has been excluded whether in order to supplement the evidence otherwise available as part of the prosecution case, or by way of cross-examination of the accused, the important principles of public policy to which I have referred would certainly become eroded, possibly even to a vanishing point.

I also agree with the opinion of the majority that when and if the statement has been admitted as voluntary and the prosecution attempt to cross-examine an accused on discrepancies between his sworn testimony on the *voir dire* and his evidence on the general issue at the trial, rather different considerations apply. By the time that evidence is given the statement will have been admitted on the ground that the prosecution has succeeded in establishing to the satisfaction of the judge beyond reasonable doubt that it was properly obtained, and the whole evidence relating to the statement will have to be rehearsed once more, this time in front of the jury (where there is one) in order that they may form a conclusion ***56** not as to its admissibility but as to the reliability of the admissions made. It seems to me that in those circumstances the statements on oath made by the defendant on the *voir dire* as material for cross-examination do not, from the point of view of public policy, stand in any other situation than any other statements made by him, including the statement which has been admitted. For this purpose the true analogy is the position of his sworn testimony in a previous trial where the jury have disagreed. No doubt the trial judge has a discretion to see that the right of the prosecution to cross-examine or rebut is not used in a manner unfair or oppressive to the accused, and no doubt the judge is under a strict obligation to see that any statutory provisions (for instance those in the Criminal Evidence Act 1898 or its Hong Kong equivalent) are rigorously complied with. But, in my view, once the substantive statement is admitted on the *voir dire*, the fewer the artificial rules limiting the admissibility of evidence which may be logically probative the better. I therefore agree with both parts of the advice tendered by the majority to the fifth of the questions propounded by counsel in argument.

The reservations I feel about the opinion of the majority in this case are therefore confined to the views they express in relation to questions (1) and (2). In order to avoid prejudice to the accused the *voir dire* normally takes place in the absence of a jury. It is therefore a trial on an issue of fact before a judge alone. It is open to the accused (presumably under the provisions of the Criminal Evidence Act 1898 or its Hong Kong equivalent) to give evidence and there are limits imposed by that Act or the equivalent Ordinance on what may be asked him in cross-examination. Subject to these limitations, and to any other general rules of evidence (such as those relating to hearsay) it seems to me that the only general limitations on what may be asked or tendered ought to be relevance to the issue to be tried, as in any other case in which an issue of fact is to be tried by a judge alone, and as to this, subject to appeal, the judge is himself the arbiter on the same principles as in any other case in which he is the judge of fact. It appears to be the opinion of the majority that it is possible to say *a priori* that in no circumstances is the truth or falsity of the alleged confession relevant to the question at issue on the *voir dire* or admissible as to credibility of either the prosecution or defence witnesses. I disagree. It is common ground that the question at issue on the *voir dire* is the voluntary character of the statement. This is the *factum probandum*, and, since the burden is on the prosecution, the prosecution evidence is taken before that of the defence. The *voir dire* may take place, as in the instant appeal, at the beginning of the trial, when all that is known of the facts must be derived from the depositions, or from counsel's opening. More frequently, however, the *voir dire* takes place at a later stage in the trial when the prosecution tenders the evidence, usually of the police, in support of the voluntary character of the statement. By that time many facts are known and much of the evidence has been heard. I can conceive of many cases in which it is of the essence of the defence case on the *voir dire* that the confession, whose voluntary character is in issue, is in whole or in part untrue, and, it may be, contrary to admitted fact. If the defence can succeed in establishing this or even raising a serious question about it either as the result of cross-examining the prosecution witnesses, or by evidence led by the defence itself, serious doubt can be raised as to the voluntary nature of the confession. How can it be said, counsel for the defence might wish to argue, that the

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accused can have provided so much inaccurate information to his own detriment, unless he was forced to do so by some improper means? If ***57** the defence can be allowed to make the point, which seems to me to be a valid one, it must be open to the prosecution to cross-examine upon it when it is the turn of the defence witnesses to be scrutinised. It must be remembered that it is frequently the case that the alleged confession is not always, as in the instant appeal, a written statement copied out in the writing of the accused, though the point can arise even in such a case. Often, perhaps more often, the statement in question may have been oral, and the case on the *voir dire*for the defence may be that it was obtained only after a long period in custody, perhaps without rest, food, or drink, as the result of a long and harassing interrogation at which either no caution was administered or improper pressures were brought to bear. In such circumstances it seems to me inevitable that the truth or otherwise of what is alleged to have been said, and what was actually said in response to what questions or the accuracy of what is alleged to have been copied down in the police notebooks (and the questions though logically separate are often difficult to separate in practice) must be investigated in order to establish, or cast doubt upon, the voluntary character of the confession. I am the first to deprecate what counsel for the respondent, who has a wide experience of current practice at the Central Criminal Court and elsewhere, admitted without justifying, to be a growing habit of counsel for the prosecution, namely to begin his cross-examination on the *voir dire* in every case with a question directed to the truth or otherwise of the confession. Though I tend to regard the use made in the advice of the majority of the passage in Heydon, Cases and Materials on Evidence (1975) at p. 181, as an example of the fallacy known as *ignorantia elenchi*, I agree with them that it is no answer when the admissibility of an alleged confession has been challenged on the grounds that it was improperly obtained, that it was a confession of the truth and not the reverse. But counsel for the prosecution may be entitled to know the exact limits of the case he has to meet. Has he to answer the suggestion that the confession is more likely to be involuntary because it was so contrary to fact? Can he himself rely on the argument that it is inconceivable that a detailed albeit admittedly truthful confession of a really serious crime, as for instance murder, was elicited as the result of a relatively trivial inducement such for instance as being allowed to see a close relative for a short time? I am wholly unable to see that these are not questions and arguments which can in particular cases have a bearing on the voluntary or involuntary character of statements tendered in evidence by the prosecution and therefore, in suitable cases, investigated at the *voir dire*. Disputes not infrequently occur on the *voir dire* not merely as to the *facta probanda* but as to what was said and at what stage (*e.g.* before or after a caution) and though a *voir dire* is not required at all when the defence case is that no statement of any sort was made, the more usual situation at the *voir dire* is that what is in dispute between the parties is not merely whether what was said was voluntary (the *factum probandum* on the *voir dire*) or whether anything was said (a question for the jury, and not the judge) but exactly what was said and in what circumstances and at what point of time, and as the result of what inducement if any (*facta probantia* or *reprobantia*, but not *probanda*). For these questions, which must be investigated before a judge admits a statement on the *voir dire*, it seems to me impossible to say *a priori* that every question of the truth or falsity of the statements must be excluded, and although I agree that in the ultimate resort the questions will be for the jury if the statement is admitted, the judge may often be in a position when he is compelled to form an opinion ***58** as to the relative reliability of rival versions of what took place in order to form an opinion as to whether what was said was said voluntarily or as the consequence of inducement. An example of another kind is where the prosecution case is that a statement was originally volunteered orally and subsequently signed voluntarily by the accused, and the case for the accused is that the statement was concocted by the police, written down by the police and then signed by the accused under improper pressures. In this case the prosecution may wish to say that details in the alleged concoction could only have come from the accused and were accurate facts not otherwise known at the time, and the accused may wish to point to inaccuracies in the statement as pointing to concoctions. In each case, although not directly affecting the allegation of signature under pressure, the accuracy or otherwise the contents of the confession must be open to some inquiry on the *voir dire*. Obviously the judge must be allowed a discretion in the matter. He must not permit counsel to pursue the matter of the truth or falsity of items in a confession for an ulterior reason or in an oppressive manner, or at undue length, but I am not able to say *a priori* that all must necessarily be irrelevant. I am somewhat fortified in this view by the reflection that if the *voir dire* is decided in favour of the prosecution, almost all of the evidence given is repeated at the trial of the general issue, where the *factum probandum* is guilt or innocence and not the voluntary or involuntary character of the statement admitted. Contrary, I believe, to what is suggested at one point in the majority

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opinion, the jury are absolutely free to form their own view of the circumstances in which the statement was obtained irrespective of the opinion of the judge (as to which in theory at least they are wholly ignorant) in order to form their own opinion as to the facts relied on by the prosecution or the defence on the general issue. Though the judge has found the confession to be voluntary, and therefore admissible, the jury is perfectly entitled to act on the contrary belief and therefore to disregard it as unreliable. It is of course not logically necessary that the converse of this position is also true, namely that the judge can be assisted by his view of the truth or otherwise of the material contained in an alleged statement in order to determine whether the statement is wholly voluntary or not. In many cases no doubt (Hammond (1941) 28 Cr.App.R. 84; [1941] 3 All E.R. 318 was one), the judge will be wholly uninfluenced in his decision by whether the confession contained accurate or inaccurate material and in such a case either the question is improper, or the answer irrelevant. But I am not prepared to say *a priori* that in all cases it must always be so. In my opinion questions of relevance or otherwise can only seldom be decided *a priori*, as in my view the opinion of the majority purports to do, but are far better left to the logical faculties of the trial judge in the context of the concrete case which he has to try. For these reasons I would give different answers to questions (1) and (2) to those proposed by the majority. I agree with their answers to questions (3) and (4) and to both aspects of (5) and that the appeal must in consequence be allowed.

Representation

Solicitors: Hatchett, Jones & Kidgell, for the appellant. Charles Russell & Co., for the Crown.

Appeal allowed. Convictions quashed.

(1979) 69 Cr. App. R. 47

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(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

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R. c. G. (B.)

Her Majesty the Queen, Appellant v. B.G., Respondent

Supreme Court of Canada

Lamer C.J.C., Bastarache, Binnie, Cory, Gonthier, Iacobucci, L'Heureux-Dubé, Major, McLachlin JJ.

Heard: January 29, 1999
Judgment: June 10, 1999
Docket: 26226

Proceedings: affirming (1997), 119 C.C.C. (3d) 276, 10 C.R. (5th) 235, [1997] Q.J. No. 2267 (Que. C.A.)

Counsel: *Maurice Galarneau* and *Caroline Vallières* , for Appellant.

Robert Malo , for Respondent.

Subject: Evidence; Criminal; Constitutional

Evidence --- Confessions -- Use at trial -- Introduction by Crown on cross-examination -- Where confession previously held inadmissible

Accused made incriminating statements to police and psychiatrist conducting assessment -- Trial judge allowed cross-examination on "protected statement" to psychatrist to challenge accused's credibility -- Accused convicted -- Appeal by Crown from order for new trial dismissed -- Confessions rule precludes any use at trial of statement contaminated by prior involuntary confession -- Use of protected statement to challenge accused's credibility under

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

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s. 672.21(3)(f) of Criminal Code violated s. 7 of Charter -- Trial judge erred in admitting statement -- Order for new trial affirmed -- Criminal Code, R.S.C. 1985, c. C-46, ss. 672.21, 672.21(3)(f) -- Canadian Charter of Rights and Freedoms, s. 7.

Evidence --- Cogency -- Credibility -- Practice and procedure on attacking credibility

Accused made incriminating statements to police and psychiatrist conducting assessment -- Trial judge allowed cross-examination on statement to psychatrist to challenge accused's credibility -- Accused convicted -- Appeal by Crown from order for new trial dismissed -- "Protected statement" to psychiatrist was contaminated by prior involuntary confession -- Use of protected statement to challenge accused's credibility under s. 672.21(3)(f) of Criminal Code violated s. 7 of Charter -- Trial judge erred in admitting statement -- Order for new trial affirmed -- Criminal Code, R.S.C. 1985, c. C-46, ss. 672.21, 672.21(3)(f) -- Canadian Charter of Rights and Freedoms, s. 7.

Evidence --- Déclarations extra-judiciaires -- Utilisation au procès -- Présentation par la Couronne lors du contre-interrogatoire -- Déclaration extra-judiciaire déclarée auparavant inadmissible

Accusé a fait des déclarations incriminantes aux policiers et au psychiatre procédant à son évaluation -- Juge du procès a permis le contre-interrogatoire portant sur la "déclaration protégée" faite au psychiatre pour mettre en doute la crédibilité de l'accusé -- Accusé a été condamné -- Pourvoi de la Couronne à l'encontre de l'ordonnance de nouveau procès rejeté -- Règle des confessions empêche toute utilisation au procès d'une déclaration contaminé e par une confession antérieure involontaire -- Utilisation de la déclaration protégée pour mettre en doute la cré dibilité de l'accusé en vertu de l'al. 672.21(3)f) du Code criminel contrevenait à l'art. 7 de la Charte -- Juge du proc ès a commis une erreur en admettant en preuve la déclaration extra-judiciaire -- Ordonnance d'un nouveau procès confirmée -- Code criminel, L.R.C. 1985, c. C-46, art. 672.21, 672.21(3)f) -- Charte canadienne des droits et libert és, art. 7.

Evidence --- Force probante -- Crédibilité -- Règles de pratique et procédure pour attaquer la crédibilité

Accusé a fait des déclarations incriminantes aux policiers et au psychiatre procédant à son évaluation -- Juge du procès a permis le contre-interrogatoire portant sur la "déclaration protégée" faite au psychiatre pour mettre en doute la crédibilité de l'accusé -- Accusé a été condamné -- Pourvoi de la Couronne à l'encontre de l'ordonnance de nouveau procès rejeté -- "Déclaration protégée" faite au psychiatre était comtaminée par la confession anté rieure involontaire -- Utilisation de la déclaration protégée pour mettre en doute la crédibilité de l'accusé en vertu de l'al. 672.21(3)f) du Code criminel contrevenait à l'art. 7 de la Charte -- Juge du procès a commis une erreur en admettant en preuve la déclaration extra-judiciaire -- Ordonnance d'un nouveau procès confirmée -- Code criminel, L.R.C. 1985, c. C-46, art. 672.21, 672.21(3)f) -- Charte canadienne des droits et libertés, art. 7.

The accused attended a police station where, after being cautioned and read his constitutional rights, he admitted to engaging in various acts of a sexual nature with his young cousin over a seven-year period. During an assessment of his fitness to stand trial, the accused made an incriminating admission to a psychiatrist. The defence requested a second assessment. After noting the accused's limited mental capacity, lack of education, and state of dependence, both psychiatrists concluded that he was fit to stand trial. Their reports also emphasized that the accused was very accommodating toward those in authority, and that his answers were unreliable in an anxiety-producing situation.

At trial, the Crown sought to introduce the statement to the psychiatrist into evidence. After a voir dire, the trial judge ruled that the statement was inadmissible, based on the psychiatric assessments. The accused subsequently testified and denied committing the sexual acts. Given the inconsistency between his statement to the psychiatrist and his testimony, the Crown cross-examined him on the statement pursuant to s. 672.21(3)(f) of the *Criminal Code*

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(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

. Faced with conflicting evidence, the trial judge stated that the case turned entirely on the credibility of the witnesses. Based on his lack of credibility, the accused was found guilty. He appealed.

The Court of Appeal held that the trial judge erred in permitting the statement to the psychiatrist to be used to challenge the accused's credibility because it was obtained illegally . The appeal was allowed and a new trial ordered. The Crown appealed.

Held: The appeal was dismissed.

Per Bastarache J. (Lamer C.J.C., Binnie, Cory, Iacobucci, and Major JJ. concurring): Section 672.21 of the *Criminal Code* provides that statements made by an accused during the assessment of his or her mental capacity are "protected statements" and inadmissible in evidence at trial. Subsection 672.21(3)(f) recognizes an exception to this rule by permitting admissibility to challenge the accused's credibility where his or her testimony is inconsistent with the protected statement.

The common law "derived confessions rule" applies where the court is satisfied that the degree of connection between two statements, the first of which is an involuntary confession, is sufficient for the second statement to have been contaminated by the first. Under the test for evaluating the degree of connection between them, the second statement must be excluded from evidence where it arises out of the first, or where the two statements are "one and the same". A confession which is inadmissible cannot be introduced indirectly without affecting the right to silence and the principle against self-incrimination guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* . In the present case, the protected statement resulted directly from the accused being confronted by the psychiatrist with his prior inadmissible statement. No additional information was obtained; the second admission was merely an assertion of the truth of the first, which the trial judge declared inadmissible because of his doubt as to the accused's ability to understand its legal consequences and its possible use at trial, and the unreliability of his answers in an anxiety-producing situation. The second statement was inadmissible because it was derived from the first.

The principles governing the admissibility of a statement made by an accused to a person in authority are essential to the integrity of the judicial process. The voluntariness of a statement is established solely on the basis of the circumstances at the time it was made. The use of an involuntary confession at trial for any purpose, even to undermine the accused's credibility, would offend the most fundamental aspect of trial fairness and lead to abuse and serious injustice. This is particularly so where, as here, guilt or innocence depends solely on the credibility of the accused and other witnesses.

A statutory provision cannot be interpreted in a contextual vacuum. Legislation which overrides the common law must be strictly interpreted. The object of s. 672.21(3)(f), as revealed by its parliamentary history, is to strike a balance between the need to learn the truth, and the protection of accused persons ordered to undergo psychiatric assessments. This balance would be difficult to achieve if s. 672.21(3)(f) were interpreted to allow for the indirect admission of previously excluded evidence, since accused persons would refuse to answer a psychiatrist's questions for fear of this evidence being introduced at trial.

The conclusive argument, however, is the presumption of validity. Legislation which is open to more than one interpretation should not be interpreted so as to make it inconsistent with the *Charter* . The confessions rule has acquired constitutional status under s. 7 of the *Charter* . Since the protected statement was inadmissible because of its degree of connection with the prior inadmissible confession, it could not be made admissible for any purpose without violating s. 7. The application of the presumption of validity was sufficient to dispose of the appeal.

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(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

The rules of evidence do not affect a psychiatrist's assessment of the mental capacity of an accused. The accused's confession to police could still be used to make a psychiatric assessment, since the determination of mental capacity does not raise the same considerations of procedural fairness as the trial itself. Nor did the failure of the defence to object to the use of the protected statement during cross-examination constitute a waiver or consent to the introduction of the report. The determination of whether a protected statement is admissible must be made in light of its degree of connection with the prior confession which was inadmissible. This degree of connection can only be assessed during a voir dire, which was accordingly mandatory. Mere silence or lack of objection does not constitute a lawful waiver.

The trial judge erred in admitting the protected statement into evidence. Since there was other evidence which might be used against the accused, the Court of Appeal properly ordered a new trial rather than a stay of proceedings. The Crown did not seek the application of the remedial provision in s. 686(1)(b)(iii) to uphold the conviction. The appeal should be dismissed and the order for a new trial affirmed.

Per McLachlin J. (dissenting) (Gonthier and L'Heureux-Dubé JJ. concurring): The accused's statement to the psychiatrist was a "protected statement" within the meaning of s. 672.21(1) of the *Criminal Code* . As such, it could be used to challenge his credibility when he gave an inconsistent statement at trial. The trial judge properly used the statement for the limited purpose of assessing the accused's credibility, which he clearly stated was the central issue before him .

The test for inadmissibility by derivation is whether the first inadmissible confession effectively deprives an accused of the choice of whether or not to make the subsequent confession, rendering it involuntary and hence inadmissible. There was no evidence to support the accused's position that the statement to the psychiatrist was an involuntary confession made to a person in authority. Even if the psychiatrist could be considered a person in authority, there was no suggestion that the statement was involuntary. The accused was never deprived of the choice of whether or not to speak, and the second statement was not a continuation of the first. To assert that every statement similar to or derived from an inadmissible statement is inadmissible is to undermine the rationale of choice at the heart of the confessions rule. It would make virtually all second confessions inadmissible, regardless of the circumstances, and would disadvantage the search for the truth and the proper administration of justice. The substantial connection between the two statements required by the law to establish involuntariness was not established.

Even if the protected statement were inadmissible, it could be used to challenge the accused's credibility under s. 672.21(3)(f). The wording of s. 672.21(3)(f) is clear and conforms to the documented intentions of Parliament. A statute must be interpreted in a way that gives effect to the intentions of Parliament. Where two interpretations are possible and one of them raises constitutional difficulty, the interpretation that more closely accords with the constitution should be preferred. In enacting s. 672.21, Parliament wanted to facilitate court-ordered assessments by providing accused persons with a guarantee of confidentiality, and to uphold and protect the search for truth. Section 672.21(3)(f) effects a compromise between these two purposes. To protect confidentiality, it affirms that statements in court-ordered assessments are inadmissible in evidence, subject to certain exceptions. To uphold and protect the search for truth, it creates a limited use exception for such statements to challenge the accused's credibility, where he or she takes the stand and gives a different version of events. Given its lack of ambiguity and the absence of a constitutional challenge, s. 672.21(3)(f) should be read as its words suggest, and not be read down on constitutional grounds as incorporating the common law confessions rule .

An interpretation that extends the limited use exception in s. 672.21(3)(f) to otherwise inadmissible confessions is consistent with Parliament's intentions by furthering the search for truth. The common law distinguishes between tendering evidence for the purpose of incrimination, and referring it for the purpose of challenging credibility. The

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(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

Crown is prohibited from using any statement in a court-ordered assessment as incriminating evidence. When an accused puts his or her credibility in issue by taking the stand and telling a different story, however, otherwise inadmissible evidence is admissible to impeach that credibility. This is neither unfair nor unjust.

There is a distinction between a right which has been "constitutionalized" and the consequences that flow from a breach of that right. The aspect of the confessions rule that is constitutionally protected is the right under s. 7 of the *Charter* not to incriminate oneself. This has been interpreted as the right to choose whether or not to make a statement to authorities. The consequences of a breach of that right must be decided under s. 24(2) *Charter* . However, there is no constitutional right to be sheltered from all possible uses of inadmissible confessions. The fact that a statement is obtained in breach of s. 7 does not automatically render its subsequent use to challenge the accused's credibility unconstitutional. The limited use exception in s. 672.21(3)(f) is properly interpreted as applying to all "protected statements", including inadmissible confessions. The trial judge did not err in using the statement for purposes of credibility. The appeal should be dismissed and the conviction reinstated.

L'accusé s'est présenté à un poste de police et, après avoir reçu une mise en garde et obtenu lecture de ses droits constitutionnels, il a admis s'être livré à divers actes à caractère sexuel sur sa jeune cousine au cours d'une période de sept ans. Au cours d'une évaluation visant à déterminer son aptitude à subir un procès, l'accusé a fait une dé claration incriminante au psychiatre. La défense a demandé une deuxième évaluation. Après avoir observé la capacité mentale limitée, le manque d'éducation et l'état de dépendance de l'accusé, les deux psychiatres ont conclu qu'il était apte à subir son procès. Dans leurs rapports, ils ont également souligné la complaisance de l'accusé envers l'autorité et que l'on ne pouvait se fier à ses réponses lorsqu'il était dans une situation lui causant de l'anxiété.

Lors du procès, le ministère public a voulu déposer en preuve la déclaration faite au psychiatre. À la suite d'un voir dire, le juge du procès a statué que la déclaration était inadmissible et ce, sur la base des expertises psychiatriques. L'accusé a ensuite témoigné et a nié avoir commis les actes sexuels. Compte tenu de l'incompatibilité entre la dé claration faite par l'accusé au psychiatre et son témoignage lors du procès, le ministère public l'a contre-interrogé sur sa déclaration en vertu de l'art. 672.21(3)f) du *Code criminel* . Face à la preuve contradictoire, le juge du procè s a estimé que la cause reposait entièrement sur la crédibilité des témoins. Compte tenu de son absence de crédibilit é, l'accusé a été déclaré coupable. Il a porté cette déclaration de culpabilité en appel.

La Cour d'appel a statué que le juge du procès avait commis une erreur en acceptant que la déclaration faite au psychiatre soit utilisée pour mettre en doute la crédibilité de l'accusé, compte tenu que la déclaration avait été obtenue illégalement. L'appel a été accueilli et la tenue d'un nouveau procès a été ordonnée. Le ministère public a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Le juge Bastarache (le juge en chef Lamer, et les juges Binnie, Cory, Iacobucci et Major y souscrivant) : L'article 672.21 du *Code criminel* énonce que les déclarations faites par un accusé dans le cadre de l'évaluation de son aptitude mentale constituent des « déclarations protégées » qui ne sont pas admissibles en preuve lors du procès. L'alinéa 672.21(3)f) reconnaît toutefois une exception à ce principe en prévoyant l'admissibilité de telles dé clarations dans le but de mettre en doute la crédibilité de l'accusé lorsque celui-ci rend un témoignage incompatible avec la déclaration protégée.

La « règle des confessions dérivées » de common law s'applique lorsque le tribunal est convaincu que le degré de connexité existant entre deux déclarations, la première de celles-ci constituant une confession non volontaire, est suffisant pour que la deuxième déclaration ait été contaminée par la première. En vertu du critère servant à dé terminer le degré de connexité existant entre elles, la deuxième déclaration doit être exclue de la preuve lorsqu'elle

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

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découle de la première ou lorsqu'elle ne fait qu'un avec la première. Une confession qui est inadmissible ne saurait être produite indirectement en preuve sans mettre en cause le droit au silence et le principe interdisant l'auto-incrimination qui est garanti par l'art. 7 de la *Charte canadienne des droits et libertés* . En l'espèce, la déclaration protégée résultait directement de la confrontation de l'accusé par le psychiatre avec la déclaration inadmissible qu'il avait faite antérieurement. Aucune information supplémentaire n'avait été obtenue. La deuxième confession ne constituait qu'une confirmation de la véracité de la première. Cette dernière avait été déclarée irrecevable par le judge du procès au motif qu'il entretenait un doute quant à la capacité de l'accusé de comprendre les conséquences juridiques de sa confession et de sa possible utilisation lors du procès, et en raison du manque de fiabilité des réponses de l'accusé dans une situation engendrant de l'anxiété chez lui. La deuxième déclaration était irrecevable parce qu'elle découlait de la première.

Les principes qui régissent l'admissibilité d'une déclaration faite par un accusé à une personne en situation d'autorité sont nécessaires à l'intégrité du système judiciaire. Le caractère volontaire d'une déclaration est établi uniquement en fonction des circonstances qui existaient au moment où elle a été faite. L'utilisation d'une confession non volontaire lors d'un procès dans quelque but que ce soit, même celui d'attaquer la crédibilité de l'accusé, irait à l'encontre de l'équité la plus élémentaire du procès et constituerait une grave injustice. Ceci est particulièrement vrai lorsque, comme dans la présente affaire, la culpabilité ou l'innocence de l'accusé repose uniquement sur sa crédibilité et celle des autres témoins.

L'interprétation d'une disposition législative ne peut être faite dans un vide contextuel. Les lois qui dérogent au droit commun doivent être interprétées restrictivement. Selon les travaux préparatoires, le but de l'art. 672.21(3)f) consiste à trouver un équilibre entre la nécessité de découvrir la vérité et la protection des personnes qui sont accusées et qui font l'objet d'une ordonnance d'évaluation psychiatrique. Un tel équilibre serait difficilement atteignable si l'art. 672.21(3)f) était interprété de façon à permettre l'admission indirecte d'une preuve par ailleurs exclue, puisque les personnes sous le coup d'une inculpation refuserait de répondre aux questions du psychiatre de crainte que cette preuve ne soit déposée lors du procès. L'argument décisif constitue toutefois la présomption de validité. Une loi qui est sujette à plus d'une interprétation ne devrait pas être interprétée d'une manière qui la rende incompatible avec les dispositions de la Charte. La règle relative aux confessions a acquis un statut constitutionnel en vertu de l'art. 7 de la Charte. Compte tenu que la déclaration protégée était inadmissible en raison de son degré de connexité avec la confession inadmissible antérieure, elle ne pouvait dès lors devenir admissible pour quelque fin que ce soit sans violer l'art. 7 de la Charte. L'application de la présomption de validité était suffisante pour disposer de l'appel.

Les règles de preuve n'affectent en rien l'évaluation de la capacité mentale d'un accusé faite par le psychiatre. Il était toujours possible d'utiliser la confession faite aux policiers par l'accusé aux fins de son évaluation psychiatrique puisque la détermination de la capacité mentale ne soulève pas les mêmes considérations d'équité procédurale que le procès lui-même. Le fait que la défense ne se soit pas objectée à la production de la déclaration protégée dans le cadre du contre-interrogatoire de l'accusé ne constitue pas davantage une renonciation ou un consentement à l'introduction du rapport. La question de savoir si une déclaration protégée est admissible doit être décidée à la lumière du degré de connexité entre cette déclaration et la confession antérieure, laquelle était inadmissible. Le degré de connexité ne peut être établi que dans le cadre d'un voir-dire dont la tenue était, pour cette raison, obligatoire. Le silence ou la simple absence d'objection ne constitue pas une renonciation valide.

Le juge du procès a commis une erreur en admettant la déclaration protégée en preuve. Compte tenu que d'autres preuves étaient susceptibles d'être retenues contre l'accusé, c'est à bon droit que la Cour d'appel a ordonné la tenue d'un nouveau procès plutôt que l'arrêt des procédures. Le ministère public n'a pas demandé l'application de la disposition réparatrice de l'art. 686(1)b)(iii) en vue de maintenir le verdict de culpabilité. Le pourvoi devrait être rejeté et l'ordonnance relative à la tenue d'un nouveau procès confirmée.

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Le juge McLachlin (dissident) (les juges Gonthier et L'Heureux-Dubé y souscrivant) : La déclaration faite par l'accusé au psychiatre constituait une « déclaration protégée » au sens de l'art. 672.21(1) du *Code criminel* . À ce titre, elle pouvait être utilisée dans le but de mettre en doute la crédibilité de l'accusé après que celui-ci eût fait une déclaration contradictoire lors du procès. C'est à bon droit que le juge de première instance a admis l'utilisation de la déclaration aux seules fins de mettre en doute la crédibilité de l'accusé, laquelle constituait, ainsi que le juge l'a clairement indiqué, la question centrale dont il était saisi.

En matière d'inadmissibilité par dérivation, le critère porte sur la question de savoir si la première confession inadmissible prive l'accusé de son droit de choisir s'il doit faire ou non la deuxième confession et par conséquent, si elle rend celle-ci involontaire et inadmissible. Il n'existait aucune preuve pour étayer la prétention de l'accusé selon laquelle la déclaration faite au psychiatre constituait une confession involontaire faite à une personne en situation d'autorité. Même si l'on pouvait considérer le psychiatre comme une personne en situation d'autorité, rien ne tendait à démontrer que la déclaration était involontaire. L'accusé n'a jamais été privé de son droit de choisir de parler ou non, et la deuxième déclaration ne constituait pas la continuité de la première. Affirmer que toute déclaration similaire ou dérivée d'une déclaration inadmissible est elle-même inadmissible aurait pour effet de miner la raison d' être du choix qui est au coeur de la règle des confessions. Une telle affirmation rendrait à toute fin pratique toute seconde confession inadmissible, sans égard aux circonstances, et nuirait à la recherche de la vérité de même qu'à la bonne administration de la justice. La connexité importante entre les deux déclarations exigée par la loi pour qu'une déclaration soit jugée involontaire n'a pas été démontrée.

Même si la déclaration protégée était inadmissible, elle pouvait néanmoins être utilisée pour mettre en doute la cré dibilité de l'accusé en vertu de l'art. 672.21(3)f). Le texte de l'art. 672.21(3)f) est clair et conforme à l'intention documentée du législateur. Un texte de loi doit recevoir une interprétation qui donne effet à l'intention du lé gislateur. Lorsqu'une disposition est susceptible de deux interprétations et que l'une d'elles soulève des difficultés du point de vue constitutionnel, le tribunal devrait préférer l'interprétation qui est la plus conforme à la Constitution. En adoptant l'art. 672.21, le Parlement voulait faciliter les évaluations psychiatriques ordonnées par les tribunaux en accordant aux accusés une garantie de confidentialité, et soutenir et protéger la recherche de la vé rité. L'arti cle 672.21(3)f) effectue un compromis entre ces deux objectifs. Afin de protéger la confidentialité, il consacre l'inadmissibilité en preuve des déclarations faites dans le cadre des évaluations ordonnées par le tribunal, sous réserve de certaines exceptions. Pour soutenir et protéger la recherche de la vérité, il crée une exception relativement à l'utilisation limitée de telles déclarations en vue de mettre en doute la crédibilité de l'accusé lorsque celui-ci se présente à la barre et fournit une version différente des événements. Compte tenu de l'absence d'ambiguïté du texte de l'art. 672.21(3)f) et de difficulté d'ordre constitutionnel, cette disposition devrait recevoir l'interpré tation qui ressort de son texte. Ce dernier ne devrait pas recevoir une interprétation atténuée pour des motifs d'ordre constitutionnel en y incorporant la règle des confessions dérivées de common law.

Une interprétation qui étend l'exception limitée en matière d'utilisation prévue par l'art. 672.21(3)f) à des confessions par ailleurs inadmissibles est conforme aux intentions du Parlement quant à la poursuite de la recherche de la vérité. La common law établit une distinction entre la présentation d'une preuve pour fins d'incrimination et la référence à cette preuve aux fins de la mise en doute de la crédibilité. Il est interdit au ministè re public d'utiliser une déclaration faite dans le cadre d'une évaluation ordonnée par un tribunal comme preuve incriminante. Cependant, lorsqu'un accusé met sa crédibilité en cause en se présentant à la barre et en racontant une histoire différente, une preuve par ailleurs inadmissible est dès lors admissible en vue d'attaquer cette crédibilité. Cette situation n'est ni inéquitable ni injuste.

Il existe une distinction entre un droit qui a été reconnu du point de vue constitutionnel et les conséquences qui dé coulent d'une atteinte à ce droit. L'aspect de la règle de common law relative aux confessions qui bénéficie d'une protection constitutionnelle est le droit de ne pas s'incriminer consacré par l'art. 7 de la Charte. Ce droit a été interpr

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été comme celui de choisir de faire ou non une déclaration à des personnes en situation d'autorité. Les consé quences d'une atteinte à ce droit doivent être déterminées en vertu de l'art. 24(2) de la Charte. Il n'existe toutefois aucun droit constitutionnel protégeant les accusés contre tous les usages possibles de confessions inadmissibles. Le fait qu'une déclaration ait été obtenue en violation de l'art. 7 ne rend pas automatiquement inconstitutionnelle son utilisation ultérieure aux fins de mettre en doute la crédibilité de l'accusé. Le fait de considérer que l'exception limit ée en matière d'utilisation prévue par l'art. 672.21(3)f) s'applique à toutes les « déclarations protégées », y compris les confessions inadmissibles, est bien fondé. Il s'ensuit que le juge du procès n'a pas commis d'erreur en utilisant la déclaration afin d'apprécier la crédibilité de l'accusé. Le pourvoi devrait être rejeté, et la déclaration de culpabilité r établie.

Cases considered by/Jurisprudence citée par *Bastarache J.* (*Lamer C.J.C., Cory, Iacobucci, Major, Binnie JJ.* concurring):

Erven v. R. (1978), [1979] 1 S.C.R. 926, 25 N.R. 49, 6 C.R. (3d) 97, *(*sub nom. *R. v. Erven)* 30 N.S.R. (2d) 89, *(*sub nom. *R. v. Erven)* 49 A.P.R. 89, 44 C.C.C. (2d) 76, 92 D.L.R. (3d) 507 (S.C.C.) -- referred to

Hébert v. R. (1954), *(*sub nom. *R. v. Hebert)* [1955] S.C.R. 120, 20 C.R. 79, 113 C.C.C. 97 (S.C.C.) -- considered

McNaughten's Case, Re (1843), 8 E.R. 718, 4 State Tr. N.S. 847, 1 State Tr. 314, 1 Car. & K. 130n, 8 Scott N.R. 595, 10 Cl. & Fin. 200, [1843-1860] All E.R. Rep. 229 (U.K. H.L.) -- referred to

R. v. B. (K.G.), 19 C.R. (4th) 1, [1993] 1 S.C.R. 740, 61 O.A.C. 1, 148 N.R. 241, 79 C.C.C. (3d) 257 (S.C.C.) -- referred to

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 13 C.R.R. 64 (S.C.C.) -- considered

R. v. Calder, 46 C.R. (4th) 133, 27 O.R. (3d) 258 (note), 105 C.C.C. (3d) 1, 132 D.L.R. (4th) 577, 194 N.R. 52, 34 C.R.R. (2d) 189, [1996] 1 S.C.R. 660, 90 O.A.C. 18 (S.C.C.) -- considered

R. v. Cook, 230 N.R. 83, 128 C.C.C. (3d) 1, 164 D.L.R. (4th) 1, 19 C.R. (5th) 1, 112 B.C.A.C. 1, 182 W.A.C. 1, 55 C.R.R. (2d) 189, [1998] 2 S.C.R. 597, 57 B.C.L.R. (3d) 215, [1999] 5 W.W.R. 582 (S.C.C.) -- considered

R. v. Dietrich, [1970] 3 O.R. 725, 1 C.C.C. (2d) 49, 11 C.R.N.S. 22 (Ont. C.A.) -- referred to

R. v. I. (L.R.), 26 C.R. (4th) 119, 37 B.C.A.C. 48, 60 W.A.C. 48, *(*sub nom. *R. v. I. (E.))* 86 C.C.C. (3d) 289, 159 N.R. 363, 109 D.L.R. (4th) 140, [1993] 4 S.C.R. 504, 19 C.R.R. (2d) 156 (S.C.C.) -- applied

R. v. Kuldip, 1 C.R. (4th) 285, 1 C.R.R. (2d) 110, 43 O.A.C. 340, 61 C.C.C. (3d) 385, 114 N.R. 284, [1990] 3 S.C.R. 618 (S.C.C.) -- referred to

R. v. Mannion, [1986] 6 W.W.R. 525, [1986] 2 S.C.R. 272, 31 D.L.R. (4th) 712, 69 N.R. 189, 47 Alta. L.R. (2d) 177, 75 A.R. 16, 28 C.C.C. (3d) 544, 53 C.R. (3d) 193, 25 C.R.R. 182 (S.C.C.) -- referred to

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

R. v. Monette, [1956] S.C.R. 400, 23 C.R. 244, 114 C.C.C. 363 (S.C.C.) -- considered

R. v. Park, [1981] 2 S.C.R. 64, 37 N.R. 501, 21 C.R. (3d) 182 (Eng.), 26 C.R. (3d) 164 (Fr.), 59 C.C.C. (2d) 385, 122 D.L.R. (3d) 1 (S.C.C.) -- considered

R. v. Pelletier (1986), 29 C.C.C. (3d) 533 (B.C. C.A.) -- referred to

R. v. Swain, 63 C.C.C. (3d) 481, 125 N.R. 1, 3 C.R.R. (2d) 1, 47 O.A.C. 81, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253 (S.C.C.) -- referred to

R. v. Whittle, 32 C.R. (4th) 1, 170 N.R. 16, 73 O.A.C. 201, 92 C.C.C. (3d) 11, [1994] 2 S.C.R. 914, 23 C.R.R. (2d) 6, 116 D.L.R. (4th) 416 (S.C.C.) -- applied

Slaight Communications Inc. v. Davidson, 26 C.C.E.L. 85, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, (sub nom. *Davidson v. Slaight Communications Inc.)* 93 N.R. 183, 89 C.L.L.C. 14,031, 40 C.R.R. 100 (S.C.C.) -- applied

Thompson v. Goold & Co., [1910] A.C. 409 (U.K. H.L.) -- referred to

Cases considered by/Jurisprudence citée par *McLachlin J.* (*L'Heureux-Dubé* and *Gonthier JJ.* concurring) (dissenting):

R. v. Hebert, 47 B.C.L.R. (2d) 1, [1990] 2 S.C.R. 151, 77 C.R. (3d) 145, [1990] 5 W.W.R. 1, 57 C.C.C. (3d) 1, 110 N.R. 1, 49 C.R.R. 114 (S.C.C.) -- considered

R. v. I. (L.R.), 26 C.R. (4th) 119, 37 B.C.A.C. 48, 60 W.A.C. 48, (sub nom. *R. v. T. (E.))* 86 C.C.C. (3d) 289, 159 N.R. 363, 109 D.L.R. (4th) 140, [1993] 4 S.C.R. 504, 19 C.R.R. (2d) 156 (S.C.C.) -- considered

R. v. Kuldip, 1 C.R. (4th) 285, 1 C.R.R. (2d) 110, 43 O.A.C. 340, 61 C.C.C. (3d) 385, 114 N.R. 284, [1990] 3 S.C.R. 618 (S.C.C.) -- considered

R. v. White (June 10, 1999), 26473 (S.C.C.) -- considered

R. v. Whittle, 32 C.R. (4th) 1, 170 N.R. 16, 73 O.A.C. 201, 92 C.C.C. (3d) 11, [1994] 2 S.C.R. 914, 23 C.R.R. (2d) 6, 116 D.L.R. (4th) 416 (S.C.C.) -- considered

R. v. Zundel, 16 C.R. (4th) 1, 75 C.C.C. (3d) 449, 10 C.R.R. (2d) 193, (sub nom. *R. v. Zundel (No. 2))* 56 O.A.C. 161, [1992] 2 S.C.R. 731, (sub nom. *R. v. Zundel (No. 2))* 140 N.R. 1, 95 D.L.R. (4th) 202 (S.C.C.) -- considered

Rizzo & Rizzo Shoes Ltd., Re, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) -- considered

Slaight Communications Inc. v. Davidson, 26 C.C.E.L. 85, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, (

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

sub nom. *Davidson v. Slaight Communications Inc.)* 93 N.R. 183, 89 C.L.L.C. 14,031, 40 C.R.R. 100 (S.C.C.) -- considered

Statutes considered by/Législation citée par *Bastarache J.* (*Lamer C.J.C., Cory, Iacobucci, Major, Binnie JJ.* concurring):

Canadian Charter of Rights and Freedoms/Charte canadienne des droits et libertés, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act1982 (U.K.), 1982, c. 11/Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

Generally/en général -- considered

s. 1 -- referred to

s. 7 -- considered

s. 13 -- considered

s. 24(2) -- considered

Criminal Code/Code criminel, R.S.C./L.R.C. 1985, c. C-46

Pt. XX.1 [en./ad. 1991, c. 43, s. 4] -- considered

s. 672.11 [en./ad. 1991, c. 43, s. 4] -- referred to

s. 672.11(a) [en./ad. 1991, c. 43, s. 4] -- referred to

s. 672.11(b) [en./ad. 1991, c. 43, s. 4] -- referred to

s. 672.21 [en./ad. 1991, c. 43, s. 4] -- considered

s. 672.21(2) [en./ad. 1991, c. 43, s. 4] -- considered

s. 672.21(3) [en./ad. 1991, c. 43, s. 4] -- referred to

s. 672.21(3)(f) [en./ad. 1991, c. 43, s. 4] -- considered

s. 686(1)(b)(iii) [am. R.S.C. 1985, c. 27 (1st Supp.), s. 145(1)] -- referred to

Statutes considered by/Législation citée par *McLachlin J.* (*L'Heureux-Dubé* and *Gonthier JJ.* concurring) **(dissenting):**

Canadian Charter of Rights and Freedoms/Charte canadienne des droits et libertés, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act1982 (U.K.), 1982, c. 11/Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

Generally/en général -- considered

s. 7 -- considered

s. 11(c) -- referred to

s. 24 -- referred to

s. 24(2) -- considered

Criminal Code/Code criminel, R.S.C./L.R.C. 1985, c. C-46

s. 672.11(a) [en./ad. 1991, c. 43, s. 4] -- referred to

s. 672.11(b) [en./ad. 1991, c. 43, s. 4] -- referred to

s. 672.21 [en./ad. 1991, c. 43, s. 4] -- considered

s. 672.21(1) [en./ad. 1991, c. 43, s. 4] -- considered

s. 672.21(2) [en./ad. 1991, c. 43, s. 4] -- considered

s. 672.21(3)(f) [en./ad. 1991, c. 43, s. 4] -- considered

APPEAL by Crown from judgment reported at (1997), *(*sub nom. *R. v. G. (B.))* 119 C.C.C. (3d) 276, 10 C.R. (5th) 235 (Que. C.A.) , allowing accused's appeal from conviction and ordering new trial.

POURVOI par la Couronne du jugement publié à (1997), *(*sub nom. *R. v. G. (B.))* 119 C.C.C. (3d) 276, 10 C.R. (5th) 235 (C.A. Qué.) , accueillant l'appel de l'accusé d'un verdict de culpabilité et ordonnant la tenue d'un nouveau procès.

Bastarache J. **(*Lamer C.J.C., Cory, Iacobucci, Major, Binnie JJ.* concurring):**

I. Introduction

1 The interpretation of a statutory provision is often problematic when the extent to which it must be consistent with traditional common law rules and the constitutional values of the *Canadian Charter of Rights and Freedoms* is to be determined. That is what must be done in the case at bar with respect to s. 672.21(3)(*f*) of the *Criminal Code*, R.S.C., 1985, c. C-46, which deals with the circumstances in which a "protected statement" made by an accused to a psychiatrist who is assessing his or her fitness to stand trial is admissible.

II. Facts

2 The respondent B.G. is charged with engaging in various acts of a sexual nature with his young cousin D.C. over a seven-year period. The alleged incidents began in 1983 when the respondent was nineteen and the victim five years old.

3 On March 18, 1993, at the request of the police, the respondent went to a Sûreté du Québec police station,

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

accompanied by his older brother. After he was cautioned and his constitutional rights were read, the respondent made an inculpatory statement which was taken down in writing by the police, in which he admitted and explained in detail the alleged sexual assaults. The respondent was subsequently charged with a summary conviction offence.

4 In February 1994, during the *pro forma* hearing, the court, with the consent of the parties, directed psychiatrist John Wolwertz to assess the respondent's fitness to stand trial and his capacity for criminal responsibility under ss. 672.11(*a*) and (*b*) of the *Criminal Code*. During this assessment, the respondent made an incriminating admission (hereafter the "protected statement") to Dr. Wolwertz when the latter asked him to explain the out-of-court statement he had made to the police the year before.

5 The defence requested a second assessment, to be made by psychiatrist Paul-André Lafleur. After noting the respondent's limited mental capacity, lack of education and state of dependence, Dr. Lafleur and Dr. Wolwertz nevertheless concluded in their respective reports that he was fit to stand trial and should be considered to be of sound mind at the time of commission of the alleged acts. The reports also emphasized that the respondent was very accommodating toward those in authority and that his answers were unreliable in an anxiety-producing situation.

6 At trial, following the victim's testimony, the Crown sought to introduce the respondent's out-of-court statement. After a *voir dire*, Judge Lamoureux, sitting without a jury, ruled the statement inadmissible based on the psychiatric assessments which called into question the accused's ability to understand the consequences of his statement and its possible use in court, and on the unreliability of the accused's answers in an anxiety-producing situation.

7 The respondent later testified for the defence and denied any sexual activity with the victim. The Crown then cross-examined him on his "protected statement" under s. 672.21(3)(*f*) of the *Criminal Code*, in view of its inconsistency with his testimony. The defence did not object to these questions. Finally, before closing the case, counsel for both parties agreed to file the testimony given by the two psychiatrists during the *voir dire*, as well as their respective reports.

III. Relevant Statutory Provisions

8 Section 672.21 of the *Criminal Code* provides as follows:

> **672.21** (1) In this section, "protected statement" means a statement made by the accused during the course and for the purposes of an assessment or treatment directed by a disposition, to the person specified in the assessment order or the disposition, or to anyone acting under that person's direction.
>
> (2) No protected statement or reference to a protected statement made by an accused is admissible in evidence, without the consent of the accused, in any proceeding before a court, tribunal, body or person with jurisdiction to compel the production of evidence.
>
> (3) Notwithstanding subsection (2), evidence of a protected statement is admissible for the purpose of
>
> (*a*) determining whether the accused is unfit to stand trial;
>
> (*b*) making a disposition or placement decision respecting the accused;
>
> (*c*) finding whether the accused is a dangerous mentally disordered accused under section 672.65;

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

> (*d*) determining whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child;
>
> (*e*) determining whether the accused was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), if the accused puts his or her mental capacity for criminal intent into issue, or if the prosecutor raises the issue after verdict;
>
> (*f*) challenging the credibility of an accused in any proceeding where the testimony of the accused is inconsistent in a material particular with a protected statement that the accused made previously; or
>
> (*g*) establishing the perjury of an accused who is charged with perjury in respect of a statement made in any proceeding.

IV. Judicial History

A. Court of Québec (February 14, 1996)

9 Faced with contradictory versions of the facts, Judge Lamoureux stated that the debate turned entirely on the credibility of the witnesses. It was because of the accused's lack of credibility, due *inter alia* to his admission of guilt to Dr. Wolwertz and subsequent denial before the court, that Judge Lamoureux found the accused guilty, preferring the victim's version of the facts, which was the Crown's only evidence. He stated the following in this regard:

> [TRANSLATION] The accused gave, invented two scenarios for the crime with which he was charged. What credibility must I give to the testimony of the accused, who admitted to Dr. Wolwertz that he sexually assaulted the victim and who, under oath, before the Court, denied this statement? That the accused says to the Court that he was intimidated, I cannot accept this defence which was the only one put forward by the accused, his state of mind. I understand that the accused may have certain problems, but not to the point of not ... in any event, he proved during his meeting with Dr. Wolwertz that he could understand the questions put to him reasonably well. I therefore accept what he said to Dr. Wolwertz.
>
> The second part, the grounds which led me to a decision, is that I was not particularly impressed by the accused's testimony. I understand that the accused has certain problems, they are discussed in the reports by Dr. Wolwertz and Dr. Paul-André Lafleur, but neither of them can satisfy me that the accused did not know or could not understand the admissions he made. It is a question of credibility, and if, for the purposes of the authorities I refer to [sic] to the Supreme Court's directions in W.B.C. on credibility with regard to the accused's behaviour during the trial, I cannot accept his testimony or his denial of the actions, the sexual assaults he committed.

B. Quebec Court of Appeal (1997), 10 C.R. (5th) 235 (Que. C.A.)

10 Proulx J.A., for the court, first examined the legislative provisions concerning the use of a protected statement, namely s. 672.21 of the *Criminal Code* . He noted that the admissibility of an out-of-court statement of this type depends on the purpose for which it was introduced. He added that subs. (3)(*f*), which applies in the case at bar, was a codification of the principles set out by the Supreme Court in *R. v. Mannion*, [1986] 2 S.C.R. 272

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

(S.C.C.) , and *R. v. Kuldip*, [1990] 3 S.C.R. 618 (S.C.C.) .

11 After noting that the respondent's admission to Dr. Wolwertz was indeed a "protected statement" within the meaning of s. 672.21 of the *Criminal Code* , Proulx J.A. stated that this admission could normally be put to the respondent in cross-examination to challenge his credibility, but that the source of the problem in the instant case was that the statement itself was obtained illegally. At p. 242 he states:

> [TRANSLATION] To read s. 672.21(3)(*f*) so to authorize the use of any "protected statement" of an accused, without regard to the means used to obtain it, would contravene the most basic principles of fundamental justice which are entrenched in the *Canadian Charter of Rights and Freedoms* and which also govern the exercise of the Court's discretionary power to exclude evidence where the prejudice which would result from its admission would outweigh its probative value.
>
> In the case before us, the evidence of the admission was obtained by Dr. Wolwertz by confronting the [respondent] with his statement to the police which was later held inadmissible by the trial judge because it was not given freely and voluntarily. It seems difficult to imagine a clearer case for the application of the rule that "involuntary statements may not be used", as the Supreme Court recently reiterated in *R. v. Calder*, [1996] 1 S.C.R. 660 , p. 674. Furthermore, in that case, the Court adopted what had been stated in *Monette v. The Queen*, [1956] S.C.R. 400 , that is, that "nothing more ought to be heard of it" once a statement by the accused has been held inadmissible. Consequently, the admission obtained by Dr. Wolwertz was also inadmissible and the trial judge erred in using it against the [respondent].

12 The Court of Appeal was of the view that in his evaluation of the protected statement, Judge Lamoureux should have considered the same grounds which justified the exclusion of the first statement to the police, namely the lack of reliability of the respondent's answers in an unusual and anxiety-producing situation.

13 The issue of consent by the defence to the use of the admission, which was raised by the Crown, was also examined by the Court of Appeal, which dealt with it as follows at p. 243:

> [TRANSLATION] ...I find it difficult to believe that after successfully challenging the admissibility of the admissions made by the appellant [the respondent in this appeal] to the police, counsel for the appellant nevertheless wanted these admissions used against his client, through Dr. Wolwertz's report: the consent to the production of the report therefore cannot have this result.

V. Issues

14 On February 12, 1998, this Court granted the appellant leave to appeal the judgment of the Quebec Court of Appeal on the following issue:

> [TRANSLATION] Did the Court of Appeal err in law in unanimously deciding that the trial judge had erred in law in interpreting s. 672.21(3)(f) of the *Criminal Code* as allowing him to use the respondent's "protected statement" against him?

The appellant has also formulated the following issue:

> [TRANSLATION] May a "protected statement" be used for the purposes prescribed by the Act if it was obtained through the use of evidence, in this case an out-of-court statement, which was subsequently found to be inadmissible?

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

VI. Analysis

15 Part XX.1 of the *Criminal Code* is the result of a consolidation of all of the criminal law principles concerning persons with mental disorders. This consolidation occurred in February 1992, following much consultation and lengthy reflection on this issue which took into account the principles established by the House of Lords, in the nineteenth century, in *McNaughten's Case, Re* (1843), 10 Cl. & Fin. 200, 8 E.R. 718 (U.K. H.L.) , and the recommendations of the Archambault Commission in 1938, the Fauteux Committee in 1956, the Ouimet Committee in 1969, and the Law Reform Commission of Canada in 1976. The key to these amendments, however, was this Court's decision in *R. v. Swain*, [1991] 1 S.C.R. 933 (S.C.C.) .

16 Section 672.21 of the *Code* deals specifically with protected statements made by an accused during the assessment of his or her mental capacity and sets out the general principle that they are inadmissible in evidence at trial. Subsection (3) recognizes several exceptions to this principle, however, in particular in para. (*f*), which provides for admissibility to challenge the credibility of the accused where his or her testimony is inconsistent with the protected statement.

A. The Nature of the "Protected Statement"

17 In order to determine whether s. 672.21(3)(*f*) permitted the use at trial of the admission made by the accused to Dr. Wolwertz in the case at bar, we must first examine the contents of the statement. In view of its importance, I shall reproduce in full the passage from the psychiatrist's report that gave rise to the controversy:

> [TRANSLATION] When he was confronted with the statement made to the police, he said to us: "Since I didn't know what to say, I told a story and since it was the first time I had dealings with the police, I was a bit uncomfortable since it is because of my aunt...". When he was asked why [D.C.] or his aunt ... would have spoken to the police, he gave me the following answer: "I don't know why they are doing it, it may be that my aunt is angry with me because I let them down even though I was always with them, I helped them, I always looked after [D.]!" and added: "I don't know why they are doing that when we were always good friends ... I said what I did because I was uncomfortable, I was afraid!". He later added: "Someone who hadn't done that would find it hard to talk about it in detail and I said it like it was!". He is also aware that what he is alleged to have done is wrong because he said: "I know that assaulting a child, that it's not done and that it can have serious consequences. If I am found guilty, I can be sent to prison ... but I regret having said that!". When I went over the details of his statement with him and pointed out that it explains fairly well what happened between him and [D.C.], he replied: "Yes, I know", and hastened to add "maybe the police misunderstood!".
>
> However, it was especially when I compared his statement with that of [D.C.] and showed him that there were remarks or phrases which were similar that he expressed astonishment, immediately searching for a way out, and said: "I made up a story. It's a lie[.] I had copied my story." But finally, when faced with the evidence that [D.C.]'s statement was made before his, he was confounded and caught off guard, he said to me: "Now that doesn't make sense. I've just learned something. The story I made up, it's the same." He then became very tense, worried: "I was nervous when I spoke to the police and I didn't know what to say." Then I asked him the following question: "Were you so nervous with the police that you told the truth?". That was when he agreed, answering in the affirmative.

18 There is no doubt, and no one disputes, that the admission made to the psychiatrist is indeed a protected statement within the meaning of s. 672.21 of the *Code* . The respondent submits, however, that it is a statement derived from a prior inadmissible statement, which would make it inadmissible.

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

19 With respect to that first statement, it is not clear, from reading Judge Lamoureux's reasons, whether he found that the accused was unable to understand the police officers' caution, in which case the statement was indeed inadmissible, or whether he was of the view that the accused was able to understand the meaning of the statement, but unable to grasp the full seriousness of its consequences. If the trial judge arrived at the latter conclusion, then there is every reason to believe that the first confession should have been admitted, and its weight left to be assessed by him as trier of the facts. That can be seen from *R. v. Whittle*, [1994] 2 S.C.R. 914 (S.C.C.) at pp. 941 and 947, concerning the "operating mind" test for confessions:

> The operating mind test, which is an aspect of the confessions rule, includes a limited mental component which requires that the accused have sufficient cognitive capacity to understand what he or she is saying and what is said. This includes the ability to understand a caution that the evidence can be used against the accused.
>
> In exercising the right ... the accused must possess the limited cognitive capacity that is required for fitness to stand trial....
>
> The decision by the trial judge to exclude the statements was on an erroneous view that the evidence which he accepted did not satisfy a separate awareness of the consequences test . [Emphasis added.]

20 As that issue is not before the Court, and the Court is not in a position to decide it, I must proceed with my analysis on the basis that the first confession was in fact inadmissible. The question is important, however, and the trial judge will have to re-examine it should there be a new trial.

21 The leading case on the question of the common law "derived confessions rule" is *R. v. I. (L.R.)*, [1993] 4 S.C.R. 504 (S.C.C.) , in which this Court, *inter alia* , set out the test for evaluating the degree of connection between the statements, in order to determine when the second statement must be excluded. According to that decision, the second statement must be excluded when it arose out of the first or when they are one and the same. Speaking for the Court, Sopinka J. summarized the state of the authorities on the issue, at p. 526:

> Under the rules relating to confessions at common law, the admissibility of a confession which had been preceded by an involuntary confession involved a factual determination based on factors designed to ascertain the degree of connection between the two statements. These included the time span between the statements, advertence to the previous statement during questioning, the discovery of additional incriminating evidence subsequent to the first statement, the presence of the same police officers at both interrogations and other similarities between the two circumstances . See *Boudreau v. The King* , [1949] S.C.R. 262 ; *Horvath v. The Queen*, [1979] 2 S.C.R. 376 ; and *Hobbins v. The Queen*, [1982] 1 S.C.R. 553 . No general rule excluded subsequent statements on the ground that they were tainted irrespective of the degree of connection to the initial admissible statement. In this regard I adopt the language of Laskin C.J. in *Hobbins* , supra, at p. 558, when he states:
>
> > There can be no hard and fast rule that merely because a prior statement is ruled inadmissible a second statement taken by the same interrogating officers must be equally vulnerable. Factual considerations must govern, including similarity of circumstances and of police conduct and the lapse of time between the obtaining of the two statements. [Emphasis added.]

Sopinka J. then concluded his discussion of the derived confessions rule by stating:

> In applying these factors, a subsequent confession would be involuntary if either the tainting features

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

which disqualified the first confession continued to be present or if the fact that the first statement was made was a substantial factor contributing to the making of the second statement.

22 In my view, it is not necessary here to analyse *R. v. I. (L.R.)* , where Sopinka J. was dealing with a situation in which two confessions are made to persons in authority. It is sufficient to retain from it that the derived confessions rule applies where there is a sufficient connection between the two statements. This follows from the rationale for the rule. The Quebec Court of Appeal cited *R. v. Monette*, [1956] S.C.R. 400 (S.C.C.) , in this regard, where the Court said of an inadmissible statement: "nothing more ought to be heard of it". The second statement is inadmissible because the first confession contaminated it. Therefore, it is not necessary to decide whether the second statement is a confession made to a person in authority in the present case. This interpretation also meets the requirements of the *Charter* , which entrenched certain aspects of the confessions rule in s. 7. A confession found to be inadmissible could not be introduced indirectly without affecting the right to silence and the principle against self-incrimination, which is what we would be doing by admitting a statement that was "contaminated" by an inadmissible confession.

23 Sopinka J. states clearly that the continued presence of the tainting features *or* the substantial contribution of the first statement to the making of the second may establish that the second statement was derived from the first. While that is true in the clearest cases, it will generally be easier to establish this when both conditions are present to some extent. Ultimately, what matters is that the court is satisfied that the degree of connection between the two statements is sufficient for the second to have been contaminated by the first.

24 In the case at bar, the admission made to Dr. Wolwertz resulted *directly* from the confrontation of the accused with his previous statement. No additional information which was not already included in the inadmissible prior statement was obtained during the meeting; the second admission is merely an assertion of the truth of the first statement. It is interesting to note in this regard that at common law, an admission by an accused during a *voir dire* confirming the truth of a prior confession is inadmissible at trial: *Erven v. R.* (1978), [1979] 1 S.C.R. 926 (S.C.C.) . As the respondent states, Dr. Wolwertz in fact cross-examined the accused on his first statement.

25 Given that the second statement in the case at bar exists only because of the first, it is unnecessary to consider here whether the factors for exclusion continued to exist, although it might be helpful to make a brief comment in this regard. Subject to the doubts expressed in paras. 19 and 20, the confession made to the police was declared inadmissible by Judge Lamoureux apparently for two reasons: the first was the doubt as to the accused's ability to understand the legal consequences of his statement; the second was the unreliability of the accused's answers when he was in an anxiety-producing situation. It seems that these two factors were still present to some extent when the admission was made to Dr. Wolwertz. An interview conducted by a psychiatrist pursuant to an order under s. 672.11 of the *Criminal Code* certainly gives rise to an anxiety-producing situation. Confirmation of the truth of the previous admission was therefore no more reliable than the admission itself. There is also no reason to conclude that the respondent was better able to understand the legal consequences of his statement to Dr. Wolwertz than those of his confession to the police. On the contrary, an accused is generally somewhat mistrustful of the police whereas he might be less mistrustful as to the possible use of any statements he may make to a psychiatrist who is assessing his mental capacity.

26 It matters little that the declaration of inadmissibility was made after Dr. Wolwertz had used the original confession. This confession did not *become* inadmissible at that moment; it was inadmissible as soon as it was made. Knowledge of this inadmissibility by the person who obtains the second confession is not relevant. The second confession is inadmissible because it was derived from the first, not because it was used in bad faith by the person conducting the examination.

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

27 Since s. 672.21(3)(*f*) of the *Code* makes the protected statement admissible for the purpose of challenging the credibility of the accused, there is an apparent conflict here between two rules. To resolve the matter properly, we must first examine the scope of the exclusion of evidence under the confessions rule.

B. The Scope of the Confessions Rule

28 The principles which govern the admissibility of a statement made by an accused to a person in authority are essential to the integrity of the judicial process. As Sopinka J. stated in *Whittle* supra, at p. 931:

> While the confession rule and the right to silence originate in the common law, as principles of fundamental justice they have acquired constitutional status under s. 7 of the *Charter* .

29 As the exception in s. 672.21(3)(*f*) allows a statement to be used solely to challenge an accused's credibility, and not as proof of its contents, it is important to know whether, notwithstanding the confessions rule, it is possible to use a statement whose voluntariness has not been established for this purpose. That is the first step, before arriving at the question of using a statement found to be inadmissible in order to challenge the credibility of an accused.

30 This question has been examined by Canadian courts on a number of occasions, and in particular by this Court in *Hébert v. R.* (1954), [1955] S.C.R. 120 (S.C.C.) , as early as 1954. In that case, the Crown had sought to cross-examine the accused on a statement he had made to the police, without a *voir dire* being held, to establish its voluntariness. With regard to this practice, Estey J. stated at p. 134:

> A cross-examination upon such a statement, by the great weight of authority in our provincial courts, as well as in the court of criminal appeal in England, has been condemned.

His colleague, Fauteux J., dealt specifically with the issue of credibility as follows at p. 147:

> [TRANSLATION] Moreover, did the Crown not seek to justify the introduction of this evidence in the record both at trial and in this Court merely through the provisions of sections 10 and 11 of the *Evidence Act* , which permit the credibility of witnesses to be challenged by cross-examining them on their prior statements which are inconsistent with their testimony. The issue of whether, during the cross-examination of an accused heard as a witness, the Crown may refer to statements made by him or her to the police, before it is determined whether the statements were made freely and voluntarily, has been considered in several cases. My colleague Cartwright J. referred to these decisions in his reasons and, like him, I am of the view that in the instant case, the Crown cannot further justify the position it has taken at trial and before this Court on this basis. The tendering of this evidence was therefore completely unlawful such that in my view it would have warranted, if not required, the declaration of a mistrial.

31 More recently, this Court again dealt with the issue, although incidentally, in *R. v. Calder*, [1996] 1 S.C.R. 660 (S.C.C.) . In that case Sopinka J. considered the admissibility of evidence under s. 24(2) of the *Charter* , drawing an analogy with the confessions rule. He put the question with regard to an involuntary confession, at para. 26:

> Is the distinction between use of a statement for all purposes rather than for the limited purpose of impeaching credibility a valid one in the application of s. 24(2)? The respondent draws an analogy with

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

> the practice relating to confessions. An involuntary confession could not be used for any purpose . [Emphasis added.]

Citing *Monette* , *supra* , he added, at para. 26:

> The authority of this case has not been questioned. Moreover, it is acknowledged by the appellant that involuntary statements may not be used by the Crown for any purpose . [Emphasis added.]

32 I do not believe that there can now be any doubt about the state of the law on this issue in Canada. Although it is possible, in certain circumstances, to distinguish between the use of evidence to challenge the credibility of an accused and its use on the merits, that is not the case with the confessions rule. The voluntariness of a statement, unlike the effect of evidence on the administration of justice, which may theoretically depend on the use made of it, is established only on the basis of the circumstances at the time the statement was made. A confession cannot suddenly become voluntary at the time of cross-examination.

33 To reintroduce an involuntary statement in this way would run counter to the most fundamental aspect of trial fairness. In many cases, as here, the guilt of the accused will depend solely on his or her credibility and on that of the other witnesses. To allow the statement to be used, even for the limited purpose of undermining the credibility of the accused, could lead to abuse and serious injustice. That is why the traditional rule, which is still in force in Canadian law, must be interpreted in such a way that no use may be made of an inadmissible statement at any stage whatsoever of the trial.

34 This principle must not be confused with the rule applicable *to witnesses* , which allows a prior inconsistent statement to be introduced in cross-examination only to impeach the credibility of a witness (see in this regard *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.)), or with the rule concerning s. 13 of the *Charter* , which also permits the cross-examination of accused persons on their prior *testimony* , but only to challenge their credibility (see *Kuldip* supra). There may also be an exception in the case of the cross-examination of a co-accused (see *R. v. Pelletier* (1986), 29 C.C.C. (3d) 533 (B.C. C.A.)).

35 In the instant case, the confessions rule excludes the protected statement because it is derived from the prior inadmissible confession. We must, however, examine s. 672.21 of the *Code* to determine whether there is a real conflict between this provision and the confessions rule, or whether it is possible to reconcile them.

C. Interpretation of Section 672.21(3)(f) of the Criminal Code

36 A statutory provision such as s. 672.21 of the *Criminal Code* cannot be interpreted in a contextual vacuum. As I mentioned earlier, this section is the result of a lengthy consultation process and of the slow evolution of the law respecting criminal liability where the accused suffers from a mental disorder.

37 The object of this provision is to provide a guarantee of confidentiality to accused persons in order to facilitate the assessment of their mental capacity. Parliament was also concerned with respect for the essential principle of every criminal trial -- the search for truth. The parliamentary history is instructive in this regard. In fact, it is settled that when courts are called upon to consider the constitutionality of an enactment, they may take into account the parliamentary history, which is generally not the case for the ordinary interpretation of an enactment. As Professor P.-A. Côté states in *The Interpretation of Legislation in Canada* (2nd ed. 1991), at p. 363:

> The parliamentary history of the enactments whose constitutionality is being challenged may also be consulted, not with a view to interpreting the enactments, but in order to appreciate their validity, either

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

from the standpoint of the division of powers, or of the *Charter of Rights and Freedoms* .

The same is true when the issue is whether the interpretation of a given enactment is consistent with the values of the *Charter* .

38 In a speech in the House of Commons on October 4, 1991 (during second reading of the bill), the then Minister of Justice, the Honourable Kim Campbell, identified the interests the legislation was seeking to reconcile. She said:

> At present there is a risk that incriminating statements made to a doctor during a court-ordered psychiatric assessment may be used as evidence against the accused. As a result, many defence counsels advise their clients to refuse to answer questions during such assessment. This deprives the doctor of a very important source of information about the accused and undermines the effectiveness of the court order.
>
> At the same time, concern has been expressed by prosecutors that completely prohibiting the use of this evidence would deprive the court of important information needed to learn the truth about the accused and the offence.
>
> (*House of Commons Debates* , vol. III, 3rd sess., 34th Parl., at p. 3296.)

Parliament thus sought a balance between the need to learn the truth and the protection of accused persons ordered to undergo an assessment of their mental capacity.

39 The appellant maintains that there is no reason to take the interpretation any further. The wording of s. 672.21(3)(*f*) clearly allows a protected statement to be used to challenge the credibility of an accused, and that is what the Crown has done in this case. According to the appellant, if Parliament had wished the admissibility of this statement to be subject to the rules of evidence applicable to criminal matters, it would certainly have said so. This argument cannot succeed. While the presumption against adding or deleting terms in interpreting legislation is certainly a long-established principle at common law (see *Thompson v. Goold & Co.*, [1910] A.C. 409 (U.K. H.L.) at p. 420), it is not the only principle to be considered.

40 First, the principle that legislation that overrides the common law must be strictly interpreted prevailed for a long time in Canada. Under this principle, it would have to be concluded that s. 672.21 does not in any way proscribe the use of the common law rules of evidence since it does not expressly provide for this. The application of this rule is not, however, conclusive.

41 Second, the rule *cessante ratione legis, cessat ipsa lex* , derived from the purposive method, which was adopted by this Court to interpret the Charter in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.) , also supports a strict construction of the exception in s. 672.21(3)(*f*). According to this rule:

> General words, however broad, in the absence of compelling reasons to the contrary, must be limited to the objects of the Act.
>
> (See *Motel Pierre Inc. v. Cité de Saint-Laurent*, [1967] Que. Q.B. 239 , at p. 240.)

The object of the legislation in this case is to strike a balance between ascertaining the truth and facilitating an effective psychiatric assessment. This balance would be difficult to achieve if the rules of evidence which provide for the exclusion of otherwise inadmissible evidence were set aside. If the exception does in fact allow previously

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excluded evidence to be reintroduced indirectly, accused persons will refuse to answer some of their psychiatrist's questions for fear this evidence may be reintroduced at trial. The *cessante ratione legis* rule thus stands in opposition to the appellant's interpretation since that interpretation is contrary to one of the objects of the Act.

42 The conclusive argument, however, is the presumption of validity. That principle was recognized by this Court in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.) , and has been applied on numerous occasions since. Lamer C.J. described it as follows, at p. 1078:

> Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter* , there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect.

43 As I stated earlier, the confessions rule does not allow for any use of an involuntary statement. Now that *Whittle* supra, has given constitutional expression to this rule, it must be concluded based on the historical definition of the confessions rule that both obtaining and using evidence contrary to this rule infringe s. 7 of the *Charter* . This is made apparent by the very existence of the "operating mind" test, which implies no police conduct that infringes the accused's rights. In that respect, the rule is similar to s. 13 of the *Charter* , which may be violated by using testimony rather than by obtaining it. I do not agree with McLachlin J. that this entails a consideration of the constitutionality of an Act. In my view, that question has already been settled in *Whittle* supra; the issue here is simply to determine the scope of that decision. Also, contrary to the appellant's contention, the actual wording of s. 672.21 is not inconsistent with the application of the confessions rule. In fact, nothing in the wording indicates that Parliament was trying to abolish it, especially if the section is read with the above-mentioned principles of interpretation in mind. Moreover, the opposite conclusion would require this Court to declare s. 672.21(3)(*f*) unconstitutional, which would be inconsistent not only with the legislative intent, but also with the appellant's position, as no provision would permit the introduction of the protected statement.

44 Since the protected statement in the instant case was inadmissible because of its degree of connection with the prior inadmissible confession, Parliament could not make it admissible for any purpose whatsoever without violating s. 7 of the *Charter* . It was argued that s. 24(2) of the *Charter* could allow this evidence to be used; however, I very much doubt this to be the case, in light of *Calder* , *supra* , where this Court ruled that a statement obtained in violation of the right to counsel was admissible for the purpose of challenging the accused's credibility, but only in some "very limited" and "very special" circumstances. This is confirmed in *R. v. Cook*, [1998] 2 S.C.R. 597 (S.C.C.) , where Cory and Iacobucci JJ. stated for the majority, at para. 76:

> It is not necessary to speculate what "special circumstances" would be required to allow the admission of evidence for a limited purpose that was not otherwise admissible. In our view those circumstances would be very rare indeed. In this case, there are no special circumstances which would justify such a finding. Rather, we find that there should be no difference, for the purposes of deciding whether to exclude the evidence under s. 24(2), between the admission of evidence generally and admission for the limited purpose of challenging the credibility of the accused.

45 It is also clear that s. 24(2) itself cannot guarantee the constitutional validity of s. 672.21(3)(*f*) of the *Criminal Code* . That is the role of s. 1. Therefore, notwithstanding s. 24(2), the appellant's interpretation would be contrary to the *Charter* . In my view, applying the presumption of validity, we must prefer the interpretation that does not make the provision of no force or effect -- if that interpretation is at all plausible -- even if justification under s. 1 would be possible. This is sufficient to dispose of the appeal.

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46 It is unnecessary to rule on the application of the various rules of evidence to the admissibility of a protected statement. The issue of whether the confessions rule applies directly to a psychiatric assessment ordered under s. 672.11, and whether the psychiatrist is a person in authority in this regard, will have to be decided when a suitable case presents itself.

47 Whatever the eventual number of rules of evidence that will have to be consistent with s. 672.21(3)(*f*), it should be noted that their application will affect only the admissibility of protected statements for trial purposes. The rules of evidence do not affect the psychiatrist's work in assessing the mental capacity of the accused in any way. In the instant case, Dr. Wolwertz could use the confession to the police to make the psychiatric assessment of the accused. Only the admissibility for trial purposes of the statement thus obtained was compromised. The determination of mental capacity does not raise the same considerations of procedural fairness as the trial itself. The psychiatrist merely makes a recommendation to the court and the defence may always introduce its own psychiatric assessment if it believes that the first assessment was not made in accordance with the rules provided for in the section. Trial fairness is simply not in issue. What is important is to obtain the most accurate assessment possible of the accused's mental capacity.

D. Waiver

48 The appellant argues that even though the statement was inadmissible, the defence waived the exercise of its right and accepted the introduction in evidence of the psychiatrist's report and the statement it contained. The appellant also points out that neither did the respondent object ot the use of this evidence by the Crown during cross-examination of the accused.

49 First, this waiver must be placed in context. It was after the defence had filed the report of its expert, Dr. Lafleur, whose opinion had been used by Judge Lamoureux during the *voir dire* on the admissibility of the confession to the police, that the Crown sought to file the report of Dr. Wolwertz, to which the defence did not object. When Crown counsel later questioned the accused about his admission to Dr. Wolwertz, she was careful not to identify the document she was brandishing as the inadmissible confession. On neither occasion was the inadmissible confession the central issue and it could in a sense go unnoticed. As Proulx J.A. stated (at p. 243):

> [TRANSLATION] ... I find it difficult to believe that after successfully challenging the admissibility of the admissions made by the appellant to the police, counsel for the appellant nevertheless wanted these admissions used against his client, through Dr. Wolwertz's report....

50 The law on the question is clear. Despite s. 672.21(2) and (3), it had to be determined whether the protected statement was admissible in light of its degree of connection with the prior confession which was found to be inadmissible. This degree of connection can only be assessed during a *voir dire*, which was accordingly mandatory (see *Erven*, *supra*). By this I do not mean that there must be a *voir dire* on the voluntariness of the protected statement in every case; once again, this is a question that will have to be determined in another case. I am merely confirming that there must be a *voir dire* where, as here, the issue of whether the admission was derived from a prior inadmissible confession arises.

51 Whether the possibility of waiving the *voir dire* or consenting to the use of the protected statement is based on s. 672.21(2) or whether it has a more general foundation (see in this regard *R. v. Dietrich* (1970), 1 C.C.C. (2d) 49 (Ont. C.A.)), it is well established that "[s]ilence or mere lack of objection does not constitute a lawful waiver" (see *R. v. Park*, [1981] 2 S.C.R. 64 (S.C.C.) at p. 74). In the circumstances, the Crown cannot argue that the situation was otherwise. I therefore adopt the position of the Court of Appeal and find that there was no valid waiver or consent to the use of the protected statement in the case at bar.

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

E. Appropriate Remedy

52 Although I have found that Judge Lamoureux erred in admitting the accused's admission, that is not sufficient to dispose of the appeal. It is also important to consider how it was used in his reasons. There is no doubt in the instant case that the protected statement played a significant role in the trial judge's conviction of B.G. He defended his verdict by saying:

> [TRANSLATION] With regard to credibility, certain seemingly insignificant facts which become exceedingly important in the decision I have to make must be considered. The accused denies he ever sexually assaulted the victim. However, he met with Dr. John Wolwertz and (inaudible) with the latter. And in his report, Dr. Wolwertz recounts the made-up story, that the accused made admissions to Dr. Wolwertz concerning his sexual behaviour ... the accused gave, invented two scenarios for the crime with which he was charged. What credibility must I give to the testimony of the accused, who admitted to Dr. Wolwertz that he sexually assaulted the victim and who, under oath, before the Court, denied this statement? ... I therefore accept what he said to Dr. Wolwertz.

Since there is other evidence which might stand against the accused, the Court of Appeal properly ordered a new trial rather than a stay of proceedings. The Crown did not seek the application of the remedial provision in s. 686(1)(*b*) (iii) to uphold the verdict of guilty despite the error in law on the ground that no substantial wrong or miscarriage of justice occurred. In fact, the Crown specifically refused to invoke the provision despite the Quebec Court of Appeal's express inquiry.

VII. Conclusion and Disposition

53 For these reasons, I would dismiss the appeal and affirm the judgment of the Quebec Court of Appeal ordering a new trial.

***McLachlin J.* (*L'Heureux-Dubé* and *Gonthier JJ.* concurring) (dissenting):**

54 The accused was charged with several counts of sexual assault. He made a statement to the police admitting guilt. Later, he confirmed the validity of that statement to a psychiatrist in the course of a court-ordered assessment of his mental condition pursuant to s. 672.11(*a*) and (*b*) of the *Criminal Code*, R.S.C., 1985, c. C-46. At his trial, he took the stand in his defence and denied that he committed the offences in question, giving a different version of events from the one he had provided to the police and confirmed to the psychiatrist.

55 Section 672.21 of the *Criminal Code* provides that statements made by the accused in the course of a court-ordered assessment of his or her mental condition are "protected statements" inadmissible in evidence without the consent of the accused, subject to certain exceptions. One exception allows protected statements to be used to challenge the credibility of the accused if his or her testimony at a later proceeding is inconsistent with the previously made protected statements. The issue before us on this appeal is whether the trial judge erred in considering the statement the accused made to the psychiatrist when assessing his credibility at trial, pursuant to s. 672.21(3)(*f*) of the *Criminal Code*.

56 The statement the accused made to the psychiatrist is a "protected statement" defined by Parliament, under s. 672.21(1), as follows:

> **672.21** (1) In this section, "protected statement" means a statement made by the accused during the course and for the purposes of an assessment or treatment directed by a disposition, to the person specified in the

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assessment order or the disposition, or to anyone acting under that person's direction.

A protected statement cannot be used at trial, subject to certain exceptions, one of which is to challenge the credibility of the accused where he or she gives a different statement in evidence:

> (2) No protected statement or reference to a protected statement made by an accused is admissible in evidence, without the consent of the accused, in any proceeding before a court, tribunal, body or person with jurisdiction to compel the production of evidence.
>
> (3) Notwithstanding subsection (2), evidence of a protected statement is admissible for the purpose of
>
> (*f*) challenging the credibility of an accused in any proceeding where the testimony of the accused is inconsistent in a material particular with a protected statement that the accused made previously;

57 The accused contends that the trial judge erred in considering the statement the accused made to the psychiatrist when assessing his credibility at trial, notwithstanding s. 672.21(3)(*f*) of the *Criminal Code* , which on its face authorizes this. He argues: (1) that the statement to the psychiatrist is inadmissible as an involuntary confession made to a person in authority; (2) in the alternative, that the statement is inadmissible because it is the product of an earlier inadmissible confession; and (3) that in either case, s. 672.21(3)(*f*) does not permit its use, even to assess credibility. I cannot accept these arguments. I shall discuss each in turn.

58 I proceed on the basis that the trial judge used the accused's statement only to assess his credibility. The trial judge began and ended his reasons with clear affirmations that the central issue before him was that of the accused's credibility. Indeed, the case fell to be decided on the basis of the evidence of the complainant versus the evidence of the accused.

(1) The Argument that the Accused's Statement to the Psychiatrist is an Involuntary Confession

59 The first argument is that the accused's statement to the psychiatrist is an inadmissible confession, quite apart from the earlier inadmissible confession to the police. The argument depends upon the defence establishing that the psychiatrist was a person in authority and that he improperly obtained the confession from the accused by using threats or promises, or otherwise effectively depriving the accused of his right to choose whether to confess or not. At the very least, the defence argues, the trial judge should have held a *voir dire* to determine these matters. It seems clear that even if the psychiatrist could be considered a person in authority, there is no suggestion that he used threats, promises, or other techniques to deprive the accused of his choice. There is also no suggestion that the accused did not know his rights or that he did not possess an operating mind. The trial judge, having considered the reports of both the court-appointed and defence psychiatrists, concluded that the accused understood and appreciated the admissions he gave. The appeal was therefore quite properly advanced mainly on the basis that the statement to the psychiatrist is involuntary because of its connection to the accused's earlier confession to the police which the trial judge had ruled inadmissible.

(2) The Argument that the Statement to the Psychiatrist is Inadmissible Because of its Links to the Earlier Inadmissible Confession to the Police

60 The second argument is that the accused's statement to the psychiatrist is an inadmissible confession because of its links to the earlier police confession which the trial judge ruled inadmissible. In my view, the connection between the statement to the psychiatrist and the earlier statement to the police does not meet the test established

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by this Court for inadmissibility by derivation.

61 A preliminary issue arises of whether statements derived from an involuntary confession may be excluded whether or not such statements are made to a person in authority. I can find no case where the common law doctrine of derivative exclusion has been applied to exclude a secondary statement not made to a person in authority. The common law doctrine of derivative exclusion is concerned with voluntariness, a concern which arises only in the case of confessions made to persons in authority.

62 Assuming, without deciding, that the person in authority requirement is met, the issue becomes whether the statement to the psychiatrist is rendered involuntary by the preceding statement to the police. The test was set by Sopinka J. in *R. v. I. (L.R.)*, [1993] 4 S.C.R. 504 (S.C.C.) at p. 526:

> ...a subsequent confession would be involuntary if either the tainting features which disqualified the first confession continued to be present or if the fact that the first statement was made was a substantial factor contributing to the making of the second statement . [Emphasis added.]

As this statement makes clear, the issue is whether the second confession has been rendered *involuntary* . It if is not involuntary, it stands as an admissible confession.

63 On the first branch of the test, Sopinka J. held that "a subsequent confession would be involuntary if ... the tainting features which disqualified the first confession continued to be present". Sopinka J. identified the following as potentially "tainting features": the time span between the statements, advertence to the previous statement during questioning; the discovery of additional incriminating evidence subsequent to the first statement; the presence of the same police officers at both interrogations; and other similarities between the two circumstances (*R. v. I. (L.R.)* supr, at p. 526). On the second branch of the test, more apposite here, Sopinka J. stated that "a subsequent confession would be involuntary ... if the fact that the first statement was made was a substantial factor contributing to the making of the second statement". This might occur where the fact of the first statement produces a "strong urge to explain away incriminating matters in a prior statement" (p. 527); or the second statement was a "continuation of the first" (p. 531); or where, in light of the first statement, "the rationale for further restraint in self-incrimination was gone" (p. 532). In short, the inquiry is whether the first inadmissible confession effectively deprived the accused of the choice of whether to make the subsequent confession, rendering it involuntary and hence inadmissible.

64 To assert that every statement similar to or derived from an inadmissible statement thereby becomes inadmissible is to undermine the rationale of choice that lies at the heart of the confessions rule: *R. v. Hebert*, [1990] 2 S.C.R. 151 (S.C.C.) at p. 173. It would make virtually all second confessions inadmissible, regardless of the circumstances, since second statements almost always will have reference in some derivative way to prior statements. It would prevent an accused who has made an inadmissible first statement from making an admissible second statement, even where this is to his or her advantage. And it would disadvantage the search for the truth and the proper administration of justice, all in the absence of the self-incrimination and abuse rationales that underlie the rule that involuntary confessions should be excluded.

65 For these reasons, I respectfully dissent from my colleague Bastarache J.'s view that a subsequent statement is inadmissible if the second statement "arose out of the first" or where the first and the second statements "are one and the same". The fact that the second statement contained no additional information, and that the second admission was merely an assertion of the truth of the first statement does not suffice, without more, to render a second confession inadmissible. Nor is a second confession rendered inadmissible because it is "contaminated" by or "exists only because of", the prior inadmissible confession. Connectedness or similarity between a prior

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inadmissible confession and a subsequent statement renders the subsequent statement inadmissible only if it rises to the level of showing that the connection may have rendered the second statement involuntary.

66 Applying the doctrine of derivative exclusion set out in *R. v. I. (L.R.)* to the facts here, and bearing in mind the protection against involuntary self-incrimination that lies at the heart of it, I conclude that the statement to the psychiatrist, assuming it to be a confession falling under the reach of this doctrine, is not inadmissible on either branch of the test. The time span between the first and second statements was long -- about one year, during which time the accused consulted with a lawyer. There was no mass of subsequently discovered evidence acting as a practical compulsion to confess. The circumstances and personnel involved in the two situations were entirely different. The accused's mother had explained to the accused the purpose and nature of the meeting with the psychiatrist. While the psychiatrist adverted to the first statement in questioning the accused, he did not do so in a deceptive or coercive way. The accused was never deprived of his right to choose whether to make the statement or not. These circumstances do not bring the case within the situations described by Sopinka J. where a second statement might be inadmissible on the basis of a prior inadmissible confession. The substantial connection between the two statements required by the law to establish involuntariness is not established, and the doctrine of derivative exclusion does not apply to exclude the statement at issue.

(3) The Argument that Section 672.21(3)(f) of the Criminal Code Does not Permit the Use of Inadmissible Confessions

67 In the event the accused was able to establish that the statement to the psychiatrist was an inadmissible confession, which I reject, he would face the further hurdle of showing that the inadmissibility of the statement took it out of the reach of s. 672.21(3)(*f*). To this end, the accused submits that the common law confessions rule and s. 11(*c*) of the *Canadian Charter of Rights and Freedoms* prohibit any subsequent use of an involuntary confession. He argues that, in order to conform with the requirements of the *Charter*, s. 672.21(3)(*f*) must be read down or interpreted as incorporating the common law confessions rule and excluding inadmissible confessions. On this view, the "protected statements" referred to in s. 672.21(3)(*f*), would have to be read as "protected statements, except inadmissible confessions". Bastarache J. applies similar reasoning and concludes that the exception created under s. 672.21(3)(*f*) does not allow statements derived from inadmissible confessions to be used to challenge an accused's credibility, because to do so would render the section unconstitutional in light of the "constitutionalized" confessions rule.

68 In my opinion, the statement to the psychiatrist, even if an inadmissible confession, could be used to challenge the accused's credibility pursuant to s. 672.21(3)(*f*). The wording of s. 672.21(3)(*f*) is clear and conforms to the documented intention of Parliament. Given the lack of ambiguity in s. 672.21(3)(*f*) and the absence of a constitutional challenge of this section, I take the view that it cannot be read down on constitutional grounds. I also note that even if the constitutionality of the section were considered, there is every indication that it would pass constitutional muster.

69 The cardinal principle of interpretation is that a statute must be interpreted in a way that gives effect to the intention of Parliament. While various considerations and rules aid in ascertaining this intention, the words chosen by Parliament are the prime indicators of its purpose. Absent ambiguity, one can reasonably assume that Parliament said what it intended to say. The courts are not, however, the slave of the text. The words must be read with the object of the statute and the intention of Parliament in mind. A related rule is that the statute should be read in a way that avoids absurdity and assigns a meaning to all of the words Parliament has used. See generally: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] S.C.R. 27 (S.C.C.), *per* Iacobucci J. Yet another rule is that where two interpretations of a provision are possible, and one raises constitutional difficulty, the court should prefer the interpretation that more closely accords with the Constitution: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

(S.C.C.) at p. 1078, *per* Lamer J. (as he then was); *R. v. Zundel*, [1992] 2 S.C.R. 731 (S.C.C.) at p. 771, *per* McLachlin J. This follows from the common-sense presumption that Parliament intends to respect the constitutional limits on its jurisdiction, *Driedger on the Construction of Statutes* (3rd ed.1994), by R. Sullivan, at pp. 322-23.

70 In my view, the application of these principles to s. 672.21(3)(*f*) does not lead to the conclusion that it should be read as inapplicable to inadmissible confessions. I agree with Bastarache J. that Parliament had two purposes in passing s. 672.21. Parliament wished to facilitate court-ordered assessments of accused persons by providing them with a guarantee of confidentiality. Parliament, however, also wanted to uphold and protect the search for truth. The Minister of Justice indicated in introducing the provisions that she had received representations from the defence bar that lawyers were advising their clients to refuse to answer questions during such assessments to avoid the risk of incriminating statements. She noted that this practice threatened to undermine the effectiveness of court-ordered assessments. At the same time, the Minister indicated that she was alive to representations from those concerned with law enforcement that a complete interdiction on the use of such statements would deprive the courts of important information that might cast light on the accused's situation and the crime. Section 672.21(3)(*f*) effects a compromise between these two Parliamentary purposes. To protect the confidentiality of the accused, s. 672.21 affirms that communications in court-ordered assessments or treatments are inadmissible in evidence absent consent, subject to certain exceptions. To uphold and protect the search for truth, s. 672.21(3)(*f*) creates a limited exception providing for the use of such statements to challenge the accused's credibility where he or she takes the stand and testifies in a manner inconsistent with these statements.

71 An interpretation of s. 672.21(3)(*f*) that extends its limited use exception to otherwise inadmissible confessions is consistent with Parliament's intentions. The common law distinguishes between tendering evidence for the purpose of incrimination and referring to evidence for the purpose of challenging credibility. It has long recognized that when an accused puts his or her credibility in issue by taking the stand, a range of otherwise inadmissible evidence is admissible to impeach that credibility. This is neither unfair nor unjust. The accused has chosen, under oath, to put a certain version of events before the court and ask the court to believe it. In so doing, the accused has opened the door to having the trustworthiness of the evidence he or she offers challenged on the basis of contrary statements. Getting at the truth is an important value in criminal trials. Permitting the Crown to cross-examine a witness by reference to other versions of the events he or she has presented furthers that goal. As stated by Lamer C.J. in *R. v. Kuldip*, [1990] 3 S.C.R. 618 (S.C.C.) at pp. 635-36:

> An accused has the right to remain silent during his or her trial. However, if an accused chooses to take the stand, that accused is implicitly vouching for his or her credibility. Such an accused, like any other witness, has therefore opened the door to having the trustworthiness of his/her evidence challenged. An interpretation of s.13 which insulates such an accused from having previous inconsistent statements put to him/her on cross-examination where the only purpose of doing so is to challenge that accused's credibility, would, in my view, "attack the desk" too highly in favour of the accused.

This logic applies to all previously-made inconsistent statements of an accused, including inadmissible confessions. While the common law confessions rule has developed in a way that does not permit inadmissible confessions to be used to impeach credibility, Parliament has the power to alter the common law. It was therefore open to Parliament, absent constitutional impermissibility, to enact that all "protected statements" under s. 672.21, including inadmissible confessions, can be used to challenge the accused's credibility if he or she takes the stand to tell a different story.

72 I conclude that reading s. 672.21(3)(*f*) as including inadmissible confessions, far from conflicting with

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

Parliament's goals, furthers them. The Crown is prohibited from using any statement in a court-ordered assessment as incriminating evidence against the accused. It cannot tender it as a confession. It cannot put it in as part of its case against the accused. At the same time, if the accused chooses to take the stand in his or her defence and tell a different story than that he or she told during his or her assessment, the Crown can use the statement to challenge his or her credibility. The statement, unless affirmed by the accused, does not become evidence against the accused. The judge cannot use it as part of the material upon which he or she bases a conviction. But the judge can use it to assist in assessing the accused's credibility if the accused testifies in an inconsistent manner at trial.

73 The rules of statutory interpretation that each part of an enactment must be given full credit and that absurdity be avoided, also support this interpretation. In s. 672.21 Parliament has set up a general rule and carefully enunciated exceptions to it. In order to accept the position of the defence and Bastarache J., it is necessary to conclude that Parliament intended to enact yet another exception -- the inadmissible confessions exception -- but neglected to do so. The argument seems to be that Parliament saw no need to explicitly expound this exception, as it already existed at common law. It does not seem reasonable to me that Parliament, having carefully considered the need for a general rule and what exceptions there should be to that rule, should be assumed to have overlooked the confessions rule that bulks so large in criminal law in crafting its clearly articulated exception in s. 672.21(3)(*f*).

74 The argument is also advanced that to interpret s. 672.21(3)(*f*) as permitting the statement to be used to challenge the accused's credibility violates the accused's constitutional rights. Applying the principle of interpretation that where an ambiguous statute permits two meanings, one constitutional and the other not, the court should choose the constitutional meaning, it is argued that s. 672.21(3)(*f*) should be read as not applying to inadmissible confessions.

75 I find this principle of little assistance in the case at bar. It applies only where the statutory provision is ambiguous, in the sense of being capable of being read in two ways. It cannot apply in the case at bar since s. 672.21(3)(*f*), considered on its words and in light of Parliament's stated intention, is not ambiguous. The section is quite clear -- protected statements cannot be used in evidence against the accused but can, exceptionally, be used to challenge the accused's credibility where the accused takes the stand and tells a different story. It seems to me the *Slaight* rule of interpretation does not go so far as to entitle the court to rewrite an unchallenged and unambiguous statutory provision under the guise of statutory interpretation.

76 In my view, this is sufficient to resolve this point. Absent ambiguity or a constitutional challenge, s. 672.21(3)(*f*) should be read as its words, confirmed by Parliament's purpose, suggest. However, as Bastarache J. suggests that this result would be unconstitutional, it may be appropriate to point out some of the problems I see with my colleague's assertion.

77 Bastarache J.'s reasoning appears to follow these lines: (1) the common law confessions rule does not permit inadmissible confessions or statements derived therefrom to be used to impeach an accused's credibility; (2) certain aspects of the common law confessions rule have been "constitutionalized"; (3) to permit inadmissible confessions or statements derived therefrom to be used to challenge credibility runs counter to these aspects and is therefore unconstitutional.

78 The first premise in this syllogism is correct: the common law confessions rule does not permit inadmissible confessions to be used to impeach credibility. If the accused's statement was found to be an inadmissible confession, a finding I reject, outside of the impugned statutory regime, it could not be used to challenge the accused's credibility.

79 I cannot, however, concur in the second premise of this argument. While aspects of the common law

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

confessions rule have been "constitutionalized" (if that is an appropriate term), we must be clear on what this means. There is a distinction between a *right* which is "constitutionalized", and the *consequences that flow from a breach of that right* . The fact that a statement was obtained in breach of a constitutional right, specifically the right not to incriminate oneself, does not automatically render any subsequent use of the statement unconstitutional. Such a proposition would run counter to the *Charter* , which excludes evidence obtained in violation of *Charter* rights only "if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute": s. 24(2). For this reason, the Court in *Hebert* , *supra* , considering a confession obtained in violation of s. 7, went on to consider whether the constitutional breach rendered the statement inadmissible under s. 24(2). In that case, the statement was sought to be tendered as Crown evidence against the accused. The Court concluded that the statement at issue had been taken in violation of the accused's right not to incriminate himself because the accused had been denied his right to choose whether to make the statement or not. Going on to s. 24(2), it held that the statement could not be used as evidence against the accused for the truth of its contents. But this does not mean that all uses of the statement would necessarily have been unconstitutional. While *Hebert* supra, and *R. v. Whittle*, [1994] 2 S.C.R. 914 (S.C.C.) , constitutionalized aspects of the common law confessions rule, they did not endorse a constitutional right to be completely sheltered from all possible uses of inadmissible confessions as an inexorable remedy. Put in terms of this case, we cannot infer from the fact the accused holds a constitutional right to choose not to incriminate himself, that it is necessarily unconstitutional for Parliament to enact legislation that permits the use of such statements for the limited purpose of challenging credibility where the accused chooses to take the stand and ask the trier of fact to believe a different version of the events.

80 The aspect of the confessions rule that is constitutionally protected is the right under s. 7 of the *Charter* not to incriminate oneself. This right has been interpreted as being the right to choose whether to make a statement to authorities or not. The consequences of a breach of that right fall to be decided under s. 24 of the *Charter* by assessing whether the use of the statement will bring the administration of justice into disrepute. If situations arise where such use requires exclusion under s. 24(2) they may be addressed on the facts of the case at issue. This does not support the conclusion that Parliament is generally prohibited from permitting the use of protected statements, including inadmissible confessions, to challenge the accused's credibility.

81 The comments of Iacobucci J. in *R. v. White* (June 10, 1999), Doc. 26473 (S.C.C.) at para. 45, underscore this point:

> That the principle against self-incrimination does have the status as an overarching principle does not imply that the principle provides absolute protection for an accused against all uses of information that has been compelled by statute or otherwise. The residual protections provided by the principle against self-incrimination as contained in s. 7 are specific, and contextually-sensitive. This point was made in *Jones, supra* , at p. 257, *per* Lamer C.J., and in *S. (R.J.*), *supra* , at paras. 96-100, *per* Iacobucci J., where it was explained that the parameters of the right to liberty can be affected by the context in which the right is asserted. The principle against self-incrimination demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue. See also *R. v. Lyons*, [1987] 2 S.C.R. 309 , at p. 361, *per* La Forest J.

82 We cannot therefore infer from the fact that a confession is obtained in breach of the accused's right not to incriminate himself, that it is unconstitutional to use the confession to impeach the accused's credibility. On the contrary, the use of statements otherwise inadmissible for purpose of challenging credibility was upheld as constitutional in *Kuldip* supra. There is no reason to assume that the use of statements derived from confessions for the same purpose under s. 672.21(3)(*f*) would be unconstitutional. It follows that there is no basis for suggesting that s. 672.21(3)(*f*), read exhaustively, is constitutionally suspect. Accordingly, even if the provision were

(sub nom. R. v. G. (B.)), 240 N.R. 260, 24 C.R. (5th) 266, (sub nom. R. v. G. (B.)) 135 C.C.C. (3d) 303, (sub nom. R. v. G. (B.)) 174 D.L.R. (4th) 301, (sub nom. R. v. G. (B.)) 63 C.R.R. (2d) 272, [1999] 2 S.C.R. 475, 1999 CarswellQue 1205, [1999] S.C.J. No. 29, 7 B.H.R.C. 97

ambiguous, I would find the presumption of validity embodied in *Slaight* supra, of no application.

83 I readily acknowledge that this argument requires us to accept that the common law may not be perfectly congruent with *Charter* protection. I see nothing anomalous in this. Common law principles, even those that reflect *Charter* values, may in their details offer more protection than the *Charter* guarantees. The *Charter* sets out minimum standards to which the common law and statute law must conform. It does not preclude the common law and statute law from offering additional protection. There is therefore nothing exceptional in the fact that the common law confessions rule offers protection against uses of involuntary confessions that is not incorporated in s. 7 of the *Charter*.

84 I conclude that the limited use exception set out in s. 672.21(3)(*f*) is properly interpreted as applying to all "protected statements", including inadmissible confessions. It follows that the trial judge did not err in using the statement for purposes of credibility.

85 I would allow the appeal and reinstate the conviction.

Appeal dismissed.

Pourvoi rejeté.

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169 F. 47, 94 C.C.A. 415, 17 Am.Ann.Cas. 868

Circuit Court of Appeals, Eighth Circuit.
HARROLD
v.
TERRITORY OF OKLAHOMA.
No. 2,600.
March 26, 1909.

In Error to the Supreme Court of the Territory of Oklahoma.
For opinion below, see 18 Okl. 395, 89 Pac. 202.

West Headnotes

KeyCite Notes

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k736 Preliminary or Introductory Questions of Fact
110k736(2) k. Confessions, Admissions, and Declarations. Most Cited Cases

It is the duty of the court to determine whether an alleged confession was voluntary or involuntary, and it is error to allow evidence on that question to go to the jury.

KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170.5 Witnesses
110k1170.5(5) k. Cross-Examination. Most Cited Cases
(Formerly 110k11701/2(5))

Failure to restrict a cross-examination to the subject of the direct examination is reversible error.

KeyCite Notes

410 Witnesses
410III Examination
410III(B) Cross-Examination
410k266 k. Right to Cross-Examine and Re-Examine in General. Most Cited Cases

The party against whom a witness is called has a right to a full examination on the subjects of the direct examination.

KeyCite Notes

29924

410 Witnesses
410III Examination
410III(B) Cross-Examination
410k269 Limitation of Cross-Examination to Subjects of Direct Examination
410k269(1) k. In General. Most Cited Cases

The party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination.

KeyCite Notes

410 Witnesses
410III Examination
410III(D) Privilege of Witness
410k305 Waiver of Privilege
410k305(2) k. Waiver by Accused in Criminal Prosecutions. Most Cited Cases

The waiver of an accused, testifying in his own behalf, of his guaranty against being compelled to testify against himself, does not extend beyond a legal cross-examination.

KeyCite Notes

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k387 k. Cross-Examination as to Inconsistent Statements. Most Cited Cases

An involuntary confession, incompetent to prove the case of the prosecutor in chief, is incompetent to impeach accused after he has testified as to other subjects only.

KeyCite Notes

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k387 k. Cross-Examination as to Inconsistent Statements. Most Cited Cases

Impeaching questions as to an involuntary confession not raised in the direct examination and its introduction to contradict the answers to such questions are erroneous.

KeyCite Notes

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k390 Competency of Evidence of Inconsistent Statements in General
410k390.1 k. In General. Most Cited Cases
(Formerly 410k390)

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Involuntary confession incompetent to prove case of prosecutor in chief, is incompetent to impeach accused who has testified as to other subjects only, and impeaching questions as to involuntary confession not raised in direct examination are inadmissible.

(Syllabus by the Court.)

An involuntary confession of an accused person, incompetent to prove the case of the prosecutor in chief, is incompetent to impeach the accused after he has testified in his own behalf relative to other subjects only, (1) because such a confession is unworthy of belief, and (2) because its introduction would violate the constitutional guaranty that the accused shall not be compelled to testify against himself.
The waiver by an accused person testifying in his own behalf of his constitutional guaranty against being compelled to testify against himself does not extend beyond a legal cross-examination upon the subjects of his direct examination.
Impeaching questions relative to the involuntary confession not treated in the direct examination of the accused, and the introduction of such a confession to contradict the answers to such questions, violate the constitutional guaranty.
The party against whom a witness is called has the right to a full and fair cross-examination of him upon the subjects of his direct examination.
The party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination.
The violation of these rights is not discretionary with the courts, but is reversible error.
It is only beyond the limits of the exercise of these rights that the extent of the cross-examination of witnesses is within the discretion of the courts.
It is the duty of the court to determine whether or not an alleged confession by an accused person was voluntary or involuntary, and it is error to permit the introduction of the evidence upon that question before the jury.

***48** S. H. Harris, W. F. Wilson, and Claude Nowlin, for plaintiff in error.
Charles West and W. C. Reeves, for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and RINER, District Judge.

SANBORN, Circuit Judge.
The defendant below was indicted, tried, and convicted of stealing two steers. Many errors in the trial are assigned, and, among others: (1) That over the timely objection and exception of the accused the court permitted evidence upon the question whether or not a confession he was alleged to have made was free and voluntary to be introduced before the jury; (2) that after the court had decided that it was involuntary and had excluded it from the evidence, and after the accused had testified in his own behalf, wherein he said nothing relative to the alleged confession, it allowed the prosecutor to ask him on cross-examination whether or not he had made the statements in the alleged confession to the county attorney and others; and (3) that after he had denied that he made them the court permitted the introduction in evidence of proof of the confession.

These rulings question two established principles of criminal jurisprudence: First, a confession by the accused of his guilt or of facts tending to establish it, obtained by the compulsion or inspiration of hope, fear, or any other sort of inducement, is incompetent evidence against him because it is not worthy of belief (1 Wigmore on Evidence, Sec. 822, and cases cited at pages 932, 933); and, second, no person 'shall be compelled in any criminal case to be a witness against himself' (5th Amend. Const. U.S.; Wilson's Ann. St. Okl. Sec. 5157; Bram v. United States, 168 U.S. 532, 542, 557, 558, 559, 565, 18 Sup.Ct. 183, 42 L.Ed. 568; Sorenson v. United States, 143 Fed. 820, 823, 824, 74 C.C.A. 468, 471, 472). The existence of these rules is not denied, but it is contended that they are limited in their effect to the evidence for the prosecution in chief, and that they have no application to that offered during the cross-examination of the accused or in rebuttal of his answers to impeaching questions. The two rules are not coextensive in effect, for an accused person may waive his constitutional privilege under the second rule and submit to examination without making hearsay or

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other incompetent evidence admissible to convict or to impeach him.

Let it, therefore, be conceded, for the purpose of the consideration of ***49** the effect and extent of the first rule, that when the defendant testified in his own behalf he waived his privilege to decline to be a witness against himself under the second rule.

Did that waiver make his incompetent confession admissible evidence against him under the first rule? The reason for the first rule is that confessions induced by hope or fear inspired by promises, threats, or surrounding circumstances are likely to be untrue, are unreliable, incredible, and, therefore, not evidence of the truth.

In 2 Hawkins, Pleas of the Crown (8th Ed.) p. 595, Sec. 34, there is an admirable statement of the law upon this subject, which seems to have been copied from a note to the sixth edition of that work, and which reads in this way:

'And as the human mind under the pressure of calamity is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.'

In Warickshall's Case, 1 Leach, Cr. C. (3d Ed.) 298, the court said, in 1783:

'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 evidence of guilt that no credit ought to be given to it, and therefore it is rejected.'

In Reg. v. Doyle, 12 Ont. 354, Wilson, C.J., in delivering the opinion of the court, said:

'The reason the confession in such a case is not admissible is that in law it cannot be depended upon as true; for one in such a case may say, and is likely to say, that which is not the truth if he thinks it to his advantage to do so.'

In Commonwealth v. Morey, 1 Gray (Mass.) 462, Shaw, C.J., said:

'The ground on which confessions made by a party accused, under promises of favor or threats of injury, are excluded as incompetent is, not because any wrong is done to the accused in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him without regard to their truth, in order to obtain the promised relief or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted.'

In State v. Novak, 109 Iowa, 717, 79 N.W. 465, the opinion reads:

'The reason for the rule excluding involuntary confession is not based on the thought that truth thus obtained would not be acceptable, but because confessions thus obtained are unreliable. The rule is in the interest of safe and reliable evidence. * * * The essence of the rule is that when the confessions are made the conditions as to hope or fear are such as to make them unsafe as evidence.'

The Statutes of Oklahoma (Wilson's Rev. & Ann. St. 1903) provide (section 5494):

***50** 'That a person charged with crime, shall at his own request, but not otherwise, be a competent witness and his failure to make such request shall not create any presumption against him nor be mentioned at the trial.'

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Now the confession of this defendant was incompetent evidence against him. Did the fact that he availed himself of the privilege accorded to him by this statute make it competent? If so, did that fact make all incompetent evidence admissible against him? Did it make the confession and all other facts tending to establish his guilt provable against him by hearsay? Did it make his disclosure regarding his guilt if any, to his attorney for the purpose of his defense, admissible in evidence against him? All these questions must be answered in the negative, because the reason of the rule, and, therefore, the rule itself, apply with at least as much force to an involuntary confession after, as before, it is denied by the testimony of the accused. When it is offered by the prosecutor in chief, it is incompetent evidence to overcome the simple presumption of the defendant's innocence, because it is unworthy of belief. It cannot be more worthy of belief, or more competent to overcome both that presumption and the testimony of the defendant, after he has denied that he ever made it. Shephard v. State, 88 Wis. 185, 59 N.W. 449; Morales v. State, 36 Tex.Cr.R. 234, 36 S.W. 435, 846; Wright v. State, 36 Tex.Cr.R. 427, 37 S.W. 732, 734; Walton v. State, 41 Tex.Cr.R. 454, 55 S.W. 566.

The privilege granted to an accused person of testifying on his own behalf would be a poor and useless one indeed if he could exercise it only on condition that every incompetent confession induced by the promises, or wrung from him by the unlawful secret inquisitions and criminating suggestions, of arresting or holding officers, should become evidence against him.

The opinions of the courts in Commonwealth v. Tolliver, 119 Mass. 312, 315, Hicks v. State, 99 Ala. 169, 13 South. 375, State v. Broadbent, 27 Mont. 342, 71 Pac. 1, Quintana v. State, 29 Tex.App. 401, 16 S.W. 258, 25 Am.St.Rep. 730, Phillips v. State, 35 Tex.Cr.R. 480, 34 S.W. 272, in which the opposite conclusion has been reached, have been read and thoughtfully considered, but they present no argument which persuades that the general rule and the reason for it which have been stated are not sound. And the cases from Texas have been overruled by the later decisions of the Court of Criminal Appeals of that state which have been cited above.

Many authorities in which no question of the introduction of an involuntary confession or of other incompetent evidence was presented have been cited to the conceded general rule that an accused person who takes the stand in his own behalf waives his privilege of silence and subjects himself to cross-examination and impeachment to the same extent as any other witness. Fitzpatrick v. United States, 178 U.S. 304, 315, 20 Sup.Ct. 944, 44 L.Ed. 1078; Sawyer v. United States, 202 U.S. 150, 165, 166, 26 Sup.Ct. 575, 50 L.Ed. 972; State v. Ober, 52 N.H. 459, 13 Am.Rep. 88; Yanke v. State, 51 Wis. 464, 8 N.W. 276; Mitchell v. State, 94 Ala. 68, 10 South. 518; Rains v. State, 88 Ala. 91, 7 South. 315; Cotton v. State, 87 Ala. 103, 6 South. 372; Norris v. State, 87 Ala. 85, 6 South. 371; ***51** Clarke v. State, 78 Ala. 474, 56 Am.Rep. 45; Clarke v. State, 87 Ala. 71, 6 South. 368. But neither this rule, nor the opinions cited in support of it, are in conflict with the conclusion which has been reached. None of them maintains that any witness may be impeached or contradicted by incompetent evidence. They illustrate the familiar and lawful practice of impeaching witnesses by competent proof of contradictory statements regarding material facts, but not by incompetent proof of contradictory statements, such as hearsay, nor by proof of incompetent contradictory statements, such as proof of privileged communications containing such statements. Involuntary confessions of accused persons are inadmissible to impeach them as witnesses on the same ground that hearsay and all other incompetent evidence is inadmissible to impeach other witnesses, because they are unworthy of belief.

And right here is the limitation of the waiver by an accused person of his constitutional privilege under the second rule by testifying, and here is the evidence of the violation of that rule in this case. He may not 'be compelled in any criminal case to be a witness against himself.' When he testifies as a witness he waives this privilege of silence and subjects himself to cross-examination and impeachment to the same extent as any other witness would subject himself thereto in the same situation, but no farther. He may be cross-examined upon the subjects of his direct examination, but not upon other subjects; impeaching questions relative to facts not collateral to the issue-that is to say, relative to facts which the prosecutor is entitled to prove as a part of his case- may be lawfully propounded to him (Wharton's Criminal Evidence (6th Ed.) Sec. 484), but such questions relative to facts that may not be so proved may not be asked him; and he may be impeached by competent proof of statements made by him contradictory of his answers to such lawful questions, but not by proof of answers contradicting unlawful questions. For these are the limits of the cross-examination

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and of the lawful evidence of impeachment of other witnesses. An accused person who testifies to the single fact that a bill of sale or a deed was signed by the grantor does not thereby waive his privilege to refuse to testify upon every other material issue in his case. He waives his privilege of silence upon the subjects relative to which he testifies, but upon no other.

Statements in the opinions of courts are called to our attention to the effect that the limit of cross-examination is discretionary with the trial court, but it is only discretionary without the limits of the right of the party against whom a witness is called to a full and fair cross-examination of him upon the subjects of his direct examination, and the right of the party in whose behalf he testifies to restrict his cross-examination to the subjects of his direct examination. This question has repeatedly received the studious and thoughtful consideration of this court (Mine & Smelter Supply Co. v. Parke & Lacey Co., 107 Fed. 881, 884, 47 C.C.A. 34, 36; Sauntry v. United States, 117 Fed. 132, 135, 55 C.C.A. 148, 151; Kansas City Star Co. v. Carlisle, 108 Fed. 344, 364, 47 C.C.A. 384, 404), and it adheres to the conclusion that the true rules and the reasons for them are stated in ***52** Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 Fed. 668, 674, 64 C.C.A. 180, 186, in substantially these words:

A fair and full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, and not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. It is only after this right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary with the trial court. Gilmer v. Higley, 110 U.S. 47, 50, 3 Sup.Ct. 471, 28 L.Ed. 62; Chandler v. Allison, 10 Mich. 460, 473; Heath v. Waters, 40 Mich. 457, 471; Sperry v. Moore's Estate, 42 Mich. 353, 361 4 N.W. 13; Martin v. Elden, 32 Ohio St. 282, 287; Wilson v. Wagar, 26 Mich. 452, 456, 458; Reeve v. Dennett, 141 Mass. 207, 6 N.E. 378; Taggart v. Bosch (Cal.) 48 Pac. 1092, 1096; New York Iron Mine v. Negaunee Bank, 39 Mich. 644, 660; Jackson v. Feather River W. Co., 14 Cal. 19, 24; Wendt v. Chicago, St. P., M. & O. Ry. Co., 4 S.D. 476, 484, 57 N.W. 226.

The converse of this rule is equally controlling. The party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error. If the cross-examiner would inquire of the witness concerning matters not opened on the direct examination, he must call him on his own behalf. Railroad Company v. Stimpson, 14 Pet. 448, 460, 10 L.Ed. 535; Houghton v. Jones, 1 Wall. 702, 706, 17 L.Ed. 503; O'Connell v. Pennsylvania Co., 118 Fed. 989, 991, 55 C.C.A. 483; Moxie Nerve Food Co. v. Beach (C.C.) 35 Fed. 466; Woods v. Faurot, 14 Okl. 171, 175, 77 Pac. 346; Montgomery v. AEtna Life Ins. Co., 97 Fed. 913, 916, 38 C.C.A. 553, 557; Safter v. United States, 87 Fed. 329, 330, 31 C.C.A. 1, 2; Mine & Smelter Supply Co. v. Parke & Lacey Co., 107 Fed. 881, 884, 47 C.C.A. 34, 36; McCrea v. Parsons, 112 Fed. 917, 919, 50 C.C.A. 612, 614; Merchants' Life Ass'n v. Yoakum, 98 Fed. 251, 260, 39 C.C.A. 56, 65; Sauntry v. United States, 117 Fed. 132, 135, 55 C.C.A. 148, 151; Goddard v. Crefield Mills, 75 Fed. 818, 820, 21 C.C.A. 530, 532; 1 Greenleaf, Ev. Sec. 445; 8 Enc.of Pl. & Prac. 104; Hopkinson v. Leads, 78 Pa. 396; Fulton v. Bank, 92 Pa. 112, 115; People v. Edwards, 139 Cal. 527, 73 Pac. 416; People v. Keith, 136 Cal. xix, 68 Pac. 816; Stevens v. Walton, 17 Colo.App. 440, 68 Pac. 834, 835; People v. McLean, 135 Cal. 306, 67 Pac. 770, 771; Acklin v. McCalmont Oil Co., 201 Pa. 257, 50 Atl. 955, 956; State v. Hawkins, 27 Wash. 375, 67 Pac. 814; Bowsher v. Chicago, B. & Q.R. Co., 113 Iowa, 16, 84 N.W. 958, 960; Missouri Pac. R. Co. v. Fox, 60 Neb. 531, 83 N.W. 744, 752; Boucher v. Clark Pub. Co., 14 S.D. 72, 84 N.W. 237, 240; Stubbings v. Curtis, 109 Wis. 307, 85 N.W. 325, 327; Lake Erie & W.R. Co. v. Miller, 24 Ind.App. 662, 57 N.E. 596, 598; State v. Savage, 36 Or. 191, 60 Pac. 610, 615, 61 Pac. 1128; Baker v. Sherman, 71 Vt. 439, 46 Atl. 57, 62; Pennsylvania Co. v. Kennard Glass & Paint Co., 59 Neb. 435, 81 N.W. 372, 376, 377; Posch v. Southern Electric R. Co., 76 Mo.App. 601; People v. Dole, 122 Cal. 486, 55 Pac. 581, 585, 68 Am.St.Rep. 50; State v. Ballou, 20 R.I. 607, 40 Atl. 861, 862; Fisher v. Porter, 11 S.D. 311, 77 N.W. 112, 114; State Bank v. Waterhouse, 70 Conn. 76, 38 Atl. 904, 908, 66 Am.St.Rep. 82; ***53** East Dubuque v. Burhyte, 173 Ill. 553, 50 N.E. 1077, 1078; Ernst v. Estey Wireworks Co., 21 Misc.Rep. 68, 46 N.Y.Supp. 918, 920; Thalheim v. State, 38 Fla. 169, 20 South. 938, 946; Devine v. Railway Co., 100 Iowa, 692, 69 N.W. 1042; Crenshaw v. Johnson, 120 N.C. 270, 26 S.E. 810.

The reason of the rule is that a witness during his cross-examination is the witness of the party who calls him, and not the witness of the party who cross-examines him. Wilson v. Wagar, 26 Mich. 457,

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458; Campau v. Dewey, 9 Mich. 417, 418. The cross-examiner has the right to bind his opponent by the testimony of the witness upon cross-examination relative to every subject concerning which his opponent examined him in the direct examination, but he has no right to bind his opponent by the testimony of the witness during the cross-examination upon subjects relative to which his opponent did not inquire. If the cross-examiner would investigate these subjects by the testimony of the witness, he may, and he must, make him his own witness and stand sponsor for the truth of his testimony. It is discretionary with the court to permit the cross-examiner to do this at the time he is conducting the cross-examination, because the time and the manner of the trial are within the discretion of the court. It is discretionary with the trial court to permit leading questions to be put to a hostile witness upon his direct examination. But the line of demarcation which limits a rightful cross-examination is clear and well defined, and it rests upon the reason to which attention has been called. It is the line between subjects relative to which the witness was examined upon the direct examination and those concerning which he was not required to testify. It exists because within that line the party who calls the witness stands sponsor for the truth of his testimony, while without that line he does not. It does not vary, at the discretion of the court, with any convenience or necessity of court or counsel, because no convenience or necessity can be conceived of which would not enable the cross-examiner to make the witness his own, and because to subject the rule to the discretion of court or counsel is to abrogate it.

The impeaching questions asked the defendant, and the involuntary confession introduced to contradict his answers, were beyond the limits of legal cross-examination of him, or of any other witness in his situation, because they did not relate to the subjects of his direct examination, and because they were not germane to any fact which the prosecutor was entitled to prove as a part of his case. Hence the defendant did not waive his constitutional and statutory right to refuse to testify concerning the statements in his confession, and the propounding of the questions concerning them, and the introduction of the involuntary confession, were violations of that right.

Was it error for the trial court to permit the introduction before the jury in the prosecutor's case of the testimony upon the question whether or not the confession was free and voluntary? It was not the province of the jury to consider or determine that issue. It was the duty of the court alone to hear and decide it. The burden was upon the prosecutor to prove to the court that the confession was voluntary, that it was not influenced by compulsion, hope, fear, or other inducement of any sort, and, if the evidence failed to establish that fact beyond a ***54** reasonable doubt, it was the duty of the court to reject the confession.

Bram v. United States, 168 U.S. 532, 555, 565, 18 Sup.Ct. 183, 42 L.Ed. 568; Reg. v. Warringham, 2 Den. C.C. 447n; Reg. v. Thompson, 2 Q.B. 12. Every accused person has the right to the exclusion of his confession until this proof and decision are made. It is clear that the proof upon the question whether the confession is voluntary or involuntary, which generally consists of the examination and cross-examination of witnesses, cannot be presented without detailing much of the substance and some of the contents of the confession, or, if the confession is in fact incompetent, without the practical introduction of the incompetent confession in evidence before the jury in order to determine its incompetency. This was done in the case in hand. Such a practice is nothing but a farcical evasion of the rule of evidence and of the constitutional guaranty which exclude an involuntary confession. A decision that such a confession is incompetent and inadmissible is of little avail to a defendant after officers of the law have testified to the method of its procurement and to much of its contents, and the only rational way to protect and enforce the rights of the accused is to exclude from the jury all the evidence relative to the competency of the confession, at least until the court has found it competent.

Many other errors are alleged, but sufficient has been said to show that the case must be again tried, and it is useless to consider other questions.

The conclusions are, an involuntary confession of an accused person, incompetent to prove the case of the prosecution in chief, is incompetent to impeach the accused after he has testified in his own behalf upon other subjects only: First, because such a confession is unworthy of belief; and, second, because its introduction would violate the constitutional guaranty that the accused shall not be compelled to testify against himself.

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The question whether or not the accused made the confession, or any part of it, asked him on cross-examination, to lay the foundation for impeachment by proof of contradictory statements in the confession, is not competent cross-examination where the accused has not testified regarding it, because it is not germane to the subjects of his direct examination, and because the prosecutor could not prove the statements in the confession as a part of his case in chief. It is the duty of the court to determine whether or not an alleged confession was voluntary or involuntary, and it is error to permit the introduction of the evidence upon that question before the jury.

The judgments below must be reversed, and the case must be remanded to the proper court with instructions to grant a new trial, and it is so ordered.

ADAMS, Circuit Judge (specially concurring). The question discussed in the foregoing opinion concerning the limitation upon the right of cross-examination of a witness is not new to this court. In the cases of Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668, 64 C.C.A. 180, and Balliet v. United States, 129 Fed. 689, 64 C.C.A. 201, the judges then sitting entertained and expressed different opinions***55*** concerning it.

The writer of the main opinion in the first-mentioned case declared that:

'The party on whose behalf the witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error.'

The majority of the sitting judges in separate opinions showing careful research and consideration disapproved of that pronouncement, and particularly of that portion of it underscored to the effect that to violate the right 'is reversible error.' It is only that part of the foregoing opinion which repeats and reaffirms that declaration to which I am unable to give my assent. I am unwilling to overrule the judgment of the majority on that question, for two reasons: First, because I think, for the reasons stated by them, they were right in holding that in the matter of cross-examining a witness a reasonable discretion should, in the interest of a practical and effective administration of justice, be accorded to the trial judge, and should be reviewable and reversible only in case of its prejudicial abuse; and, second, because the question is at best a matter of practice, which, having been once settled, should not be disturbed except for some commanding reason which does not now appear.

C.A.8 1909.
HARROLD V. TERRITORY OF OKLAHOMA
169 F. 47, 94 C.C.A. 415, 17 Am.Ann.Cas. 868

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150 F.2d 236

Circuit Court of Appeals, Eighth Circuit.
BAYLESS
v.
UNITED STATES.
No. 12683.
July 2, 1945.

Appeal from the District Court of the United States for the Western District of Missouri; Albert L. Reeves, Judge.
On rehearing.
Judgment of conviction reversed, and cause remanded for a new trial.

West Headnotes

[1] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k705 Presentation of Evidence
110k706 For Prosecution
110k706(4) k. Cross-Examination and Impeachment of Accused. Most Cited Cases
(Formerly 110k706)

410 Witnesses KeyCite Notes
410III Examination
410III(D) Privilege of Witness
410k299 Privilege of Accused in Criminal Prosecution
410k301 k. Cross-Examination. Most Cited Cases

In prosecution for bank robbery, where it had been previously adjudicated that accused was denied his constitutional right of counsel and that his statement in nature of a confession in connection with consent to transfer of his case so that plea of guilty might be entered and plea of guilty itself were nullities as coerced, cross-examination of accused for manifest purpose of placing statement and plea of guilty before jury as evidence of guilt to aid conviction was error, notwithstanding testimony of accused that he was not in city where bank was located during month of robbery. U.S.C.A.Const. Amends. 6, 14.

[2] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k517.1 Voluntary Character of Confession
110k517.1(3) k. Exclusion If Involuntary. Most Cited Cases
(Formerly 110k517(1))

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110 Criminal Law KeyCite Notes
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.12 k. Acts, Admissions, Declarations, and Confessions of Accused. Most Cited Cases
(Formerly 110k1169(12))

Confession may not be used to convict a defendant where attendant circumstances indicate that confession was coerced or compelled, and when such confession is introduced at the trial, conviction will be set aside even though evidence, apart from the confession, might have been sufficient to sustain conviction.

***236** Donald H. Latshaw, of Kansas City, Mo., for appellant.
Otto Schmid, Asst. U.S. Atty., of Kansas City, Mo. (Maurice M. Milligan, U.S. Atty., of Kansas City, Mo., on the brief), for appellee.

Before GARDNER, WOODROUGH, and THOMAS, Circuit Judges.

GARDNER, Circuit Judge.
This is an appeal by the defendant from a judgment and sentence entered on a verdict of guilty on each of two counts of an indictment, the first count charging him with bank robbery by force and violence, or putting in fear, contrary to the provisions of Section 588b(a), 12 U.S.C.A., and the second count charging him with assault, or putting life in jeopardy in connection with bank robbery by force and violence, or putting in fear, contrary to the provisions of Section 588b(b), Title 12 U.S.C.A.

As originally presented to this court, defendant sought reversal on the following grounds: (1) that defendant was denied his constitutional right to a speedy trial; (2) that he was twice put in jeopardy for the same offense; (3) that the indictment was defective; (4) that requested instruction number 2 was improperly refused; (5) that incompetent evidence was admitted; (6) that defendant was compelled to be a witness against himself. We affirmed (Bayless v. United States, 147 F.2d 169). On motion we granted a rehearing, limited to the question whether it was prejudicial error to permit defendant to be cross-examined relative to his former plea of guilty and whether it was prejudicial error to permit proof of his former plea of guilty as a part of his cross-examination. Additional briefs were thereupon filed and the case has been re-argued and is now before us for reconsideration of the one question.

The robbery of the bank with which defendant, with others, was charged, occurred shortly after noon on November 2, 1937, at Mansfield, Missouri. Defendant was arrested at Wichita, Kansas, about midnight of November 4, 1937. The arrest was made in the apartment of Orville E. Simms on the second floor of a two story house. Simms and his wife were present when the arrest was made. Simms was indicted jointly with defendant, pleaded guilty, and is not in confinement. At the police station in Wichita, Kansas, on the night following his arrest, defendant was questioned by detective Harley Riggs and a special agent of the Federal Bureau of Investigation, J. M. O'Leary. Some of the answers made by defendant were written down and the statement was signed by him. There was evidence that the substance of his answers was incorporated in the statement which he signed. It was offered and received in evidence over objection of defendant. In defendant's testimony, referring to this confession, he said 'that the statement or confession signed by him was an involuntary statement.' On November 8, 1937, defendant was taken before a United States Commissioner at Kansas City, Missouri, for arraignment and was there ***237** bound over. On January 31, 1938, defendant signed the following document:

'Waiver.

'In the District Court of the United States of America for the Western District of Missouri.

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'United States of America, Plaintiff

No. 4685

vs

John Richard Bayless, Defendant

'Comes now John Richard Bayless, alias John A. Taylor, alias Richard Bayless, above named defendant, and states to the Court that he desires to plead guilty to robbing the Farmers & Merchants Bank of Mansfield, Missouri, as charged herein, as he has no defense to offer in said case.

'That he hereby waives the right to be tried in Springfield, Missouri, and consents that said case may be transferred to the Western Division of the Western District of Missouri at Kansas City, Missouri, so that a plea of guilty may be entered by the undersigned in said case.

'Dated at Kansas City, Missouri, this 31st day of January, 1938.

'(Signed) John Richard Bayless 'The above named defendant,

'Filed Jan. 31, 1938.'

He was accordingly arraigned and pleaded guilty and on this plea a judgment of conviction was entered. While confined in Federal prison at Alcatraz Island, California, pursuant to this conviction, he on three different occasions made application for writ of habeas corpus in the United States District Court for the Northern District of California. His first application was made April 17, 1939, the second was made January 28, 1942, and the third was made September 18, 1942. On the third application the court found that defendant had not intelligently waived his right to counsel when he pleaded guilty. His application was accordingly granted and the court held that his plea of guilty entered on January 31, 1938, was null and void, and he was released from confinement in the Federal prison at Alcatraz but returned to the United States District Court for the Western District of Missouri, for further proceedings upon the indictment. It has already been observed that on this second trial he was found guilty and again sentenced to imprisonment, the term of which has not yet expired.

On this second trial defendant took the witness stand and testified that he was not in Mansfield, Missouri, in September, 1937, nor in November, 1937, the latter being the month of the robbery. He was cross-examined by counsel for the government with reference to the above statement signed by him under date January 31, 1938. He was also asked on cross-examination, over objection, whether he had not pleaded guilty to the offense charged in the indictment herein on January 31, 1938. As to the written statement or confession signed by him on January 31, 1938, he stated that he had had no counsel to advise him and that it was involuntary, and that he was forced to plead guilty because threatened by officers. This testimony as to the statement and the plea of guilty stands in this record without dispute. In addition to the proof on cross-examination that he had pleaded guilty, the written statement signed by him on January 31, 1938 was offered and received in evidence over his objection. Being impecunious, defendant was represented at the trial by counsel appointed by the court and counsel so appointed appears for him in this court, the appeal having been perfected in forma pauperis.

In our opinion we expressed the view that the question as to whether he had signed the written consent to transfer his case to Kansas City so that he might enter a plea of guilty, 'went directly to the matter of his being in Mansfield (Missouri) at the time of the robbery about which he testified upon his direct examination,' (147 F.2d 169, 171) and was therefore admissible. On rehearing, certain recent authorities bearing on this question were brought sharply to our attention. The decision of the Supreme Court in Morris Malinski v. People of the State of New York, 65 S.Ct. 781, 783, was handed down March 26, 1945, after our decision in this case. That decision, reviewing as it does, other recent decisions of the Supreme Court, indicates an ever-increasing vigilance on the part of the Federal courts to protect the rights of a defendant in a criminal case guaranteed him by the

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Constitution, and has largely influenced us in changing our views on this question.

[1] [2] In the instant case it had been determined in a habeas corpus proceeding that defendant had not intelligently waived his right to counsel in the cause; that he had not had assistance of counsel in his defense, and that he had been denied his personal ***238*** rights in violation of the Sixth Amendment. The statement of January 31, 1938, and the plea of guilty were therefore in effect coerced and compelled. We need not go into the facts relative to the plea of guilty because that plea had already been adjudged to be a nullity by the court releasing the defendant in the habeas corpus proceeding. The written statement was, according to the undisputed testimony of the defendant involuntary, and it seems to have been so related to and linked up with the plea of guilty as to be a part of it. The manifest purpose of the cross-examination was to get this statement and plea of guilty before the jury as evidence of guilt and to aid in his conviction. In Malinski v. People of the State of New York, supra, the court considered certain confessions which were offered in evidence in the State court during the trial of Malinski. It had not, as here, been adjudged that the confessions were coerced or compelled, but what is there said would seem to be applicable here. There the question was whether or not the guaranties of the Fourteenth Amendment had been violated, whereas here the question arises under the Sixth Amendment. The rule, however, we think must be the same. In the Malinski case, the court, among other things, said: 'If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. Ashcraft v. Tennessee, supra, page 154, of 322 U.S., page 926, of 64 S.Ct., 88 L.Ed. 1192. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. Lyons v. Oklahoma, 322 U.S. 596, 597, 64 S.Ct. 1208, 1210, 88 L.Ed. 1481.'

Again the court said:

'We must consider the case, therefore, as one in which a coerced confession was employed to obtain a conviction. Coerced confessions would find a way of corrupting the trial if we sanctioned the use made of the October 23rd confession in this case. Constitutional rights may suffer as much from subtle intrusions as from direct disregard.

'It is thus apparent that the judgment before us rests in part on a confession obtained as a result of coercion. Accordingly a majority of the Court do not come to the question whether the subsequent confessions were free from the infirmities of the first one.'

In the instant case it stands admitted that a coerced confession was employed to obtain a conviction. In Waley v. Johnston, 316 U.S. 101, 62 S.Ct. 964, 966, 86 L.Ed. 1302, in a per curiam but unanimous opinion, it is, among other things, said: 'If the allegations are found to be true, petitioner's constitutional rights were infringed. For a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession. Bram v. United States, 168 U.S. 532, 543, 18 S.Ct. 183, 187, 42 L.Ed. 568; Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716. And if his plea were so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of validity as a waiver of his right to assail the conviction.'

In Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 927, 88 L.Ed. 1192, the court said: 'The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession.'

In Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 583, 71 L.Ed. 1009, the court had permitted defendant to withdraw his plea of guilty. It was subsequently used as evidence against him. In the course of the opinion by Mr. Justice Butler it is, among other things, said: 'The effect of the court's order permitting the withdrawal was to adjudge that the plea of guilty be held for naught. Its subsequent use as evidence against petitioner was in direct conflict with that determination. When the plea was annulled it ceased to be evidence. By permitting it to be given weight the court reinstated it pro tanto. Heim v. United States (47 App.D.C. 485, L.R.A. 1918E, 87.)'

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See, also: Wood v. United States, 75 U.S.App.D.C. 274, 128 F.2d 265, 141 A.L.R. 1318.

The fact that this tainted evidence was offered as part of the cross-examination of defendant, is, we think, quite immaterial. The coerced confession and plea were used to convict the defendant, and as said in Malinski v. People of the State of New York, supra, 'Constitutional rights may suffer as much from subtle intrusions as from direct disregard.'

***239** We again point out that here the confession and plea of guilty have been adjudged to be no escape from the conclusion that the conviction based, we must assume, in part at least upon this tainted evidence can not stand. The judgment appealed from is therefore reversed and the cause remanded with directions to grant defendant a new trial.

C.A.8 1945.
Bayless v. United States,
150 F.2d 236

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75 Cal. 415, 17 P. 544

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Supreme Court of California.
PEOPLE
v.
YEATON.
No. 20,348.
March 29, 1888.

In bank. Appeal from superior court, Shasta county; AARON BELL, Judge.

West Headnotes

KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k517 Admissibility in General
110k517(7) k. Circumstances Affecting Admissibility; Trustworthiness. Most Cited Cases

Defendant, upon cross-examination, testified that a certain letter offered as a confession was written by request of her mother who visited her at the jail with A., and told her that she had consulted an attorney, who had advised the writing of the letter. In connection with this matter defendant offered to prove, by her mother and A., that at that conference she told them she was innocent of the alleged crime. Held that, under the circumstances, this conference and the writing of the letter should be considered one transaction, and should all go to the jury.

KeyCite Notes

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k380 Witnesses Who May Be Impeached by Inconsistent Statements
410k380(2) k. Accused in Criminal Prosecution. Most Cited Cases

A defendant cannot be compelled upon cross-examination to testify to statements, made out of court, amounting to a confession of the crime, upon the theory of showing contradictory statements to impeach him, unless it is first shown that such confession was voluntary.

***544 *416** *Jackson Hatch*, for appellant.
Atty. Gen. Geo. A. Johnson, Edward Sweeny, and *Clay W. Taylor*, for the People.

McFARLAND, J.
The defendant, a young girl about 15 years old, was convicted of the crime of an attempt to commit arson. When the prosecution had closed its case in chief, the only evidence against the defendant was circumstantial; and it was of such a character that the jury might well have considered it insufficient to warrant a verdict of guilty. The defendant then took the stand as a witness for herself. She testified to some circumstances connected with her residence as a servant with Mrs. Ludwig, (whose house ***545** she was charged with the attempt to burn,) and denied that she had anything to do with the

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alleged crime, or knew anything about the origin of the fire. She was then subjected to a cross-examination, which, even in its general features, went to the utmost bounds of, if it did not exceed the limits to which, under section 1323 of the Penal Code, and *People* v. *O'Brien*, 66 Cal. 602, 6 Pac. Rep. 695, the cross-examination of a defendant in a criminal case should be ***417** allowed to go. But, in addition to other things, she was compelled on the cross-examination, against the objections of her counsel, to testify to statements, made by her out of court, which were not merely admissions of facts which tended to prove her guilt, but absolute confessions of the commission of the crime. And this was done without any pretense on the part of the prosecution to show, preliminarily, that the confessions were voluntary. It is true that these confessions were admitted upon the asserted theory that they were not introduced as confessions, but merely as contradictory statements for the purpose of impeaching the defendant as a witness, and upon the apparently innocent belief that the jury would not consider them at all except for the special purpose indicated. But we think that under such a guise, the prosecution cannot be allowed to introduce confessions without the proper preliminary proof required by well-settled rules of evidence. The defendant was arrested the morning after the fire, and taken to jail. She saw no attorney, or other person capable of giving her advice. She swears that Mrs. Ludwig, and the constable, and her mother, and, in fact, every one who had access to her, told her that she would certainly be found guilty, and that the best thing she could so would be to confess, and thus try to gain the kindness and mercy of her prosecutor; and that she was also offered money and other inducements to confess. The prosecution in making out its case did not offer these confessions, presumably because it could not prove that they were made voluntarily. Therefore, at the close of the evidence in chief of the prosecution, the defendant was in this condition: She either had to forego the privilege of testifying in her own behalf, and denying the charge under oath, or, if she did testify, then, upon the theory of the prosecution, it could get in the confessions, on cross-examination, ***418** without the preliminary proof. We do not think this to be the fair meaning of the law; and we think that the admission of the confessions was a material error.

One of the confessions introduced was a letter written by defendant, when in jail, to Mrs. Ludwig. Defendant testified that this letter was written at the request, and on the advice, of her mother, who visited her at the jail with one Mr. Oxendine, and told her that she (her mother) had consulted an attorney, who had advised the writing of the letter. In connection with this matter defendant offered to prove by her own testimony, and by the testimony of her mother and said Oxendine, whom she called to the witness stand for that purpose, that at that conference she told her mother and Oxendine that she was entirely innocent of the alleged crime. This testimony was rejected, and, we think, erroneously. Under the circumstances this conference and the writing of the letter should be considered as one transaction, and should all have gone to the jury.

We are not prepared to say that the appointment of an elisor to summon the jury was erroneous, or that it was a matter that can be reviewed on this record. In such matters, however, courts should follow the statutes as closely as possible. The instructions to the jury were very voluminous; but we do not see any material error in them, except as they may be inconsistent with the views hereinbefore expressed. Judgment reversed, and new trial ordered.

We concur: SEARLS, C. J.; TEMPLE, J.; THORNTON, J.; PATERSON, J.; SHARPSTEIN, J.

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58 Cal.App.2d 415, 136 P.2d 626

District Court of Appeal, Second District, Division 3, California.

PEOPLE
v.
RODRIGUEZ.

Cr. 3646.

April 28, 1943.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Isidro E. Rodriguez was convicted of robbery which at time of sentence was reduced by court to grand theft from the person, and defendant appeals.

Reversed and remanded for retrial.

West Headnotes

[1] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k684 k. Admission in Rebuttal of Evidence Proper in Chief. Most Cited Cases

Where a defendant has confessed, proof of the confession is a part of the case of the prosecution and it is duty of district attorney to offer it before resting his case, when the evidence is then available and there is no reason for not offering it in chief.

[2] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k683 Scope of Evidence in Rebuttal
110k683(1) k. In General. Most Cited Cases

Where case of prosecution is closed and the defense is in, the remainder of the prosecution's case is limited to evidence in rebuttal of that produced by the defense and should be so limited by the court except where a proper showing is made for reopening the case in chief for the receipt of further evidence.

[3] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k684 k. Admission in Rebuttal of Evidence Proper in Chief. Most Cited Cases

The prosecution has no right to withhold a material part of its evidence which is admissible in chief for

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sole purpose of using it in rebuttal.

[4] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412 In General
110k412(1) k. In General. Most Cited Cases

Evidence regarding statements of accused tending to show his guilt is admissible to establish the truth of facts stated.

[5] KeyCite Notes

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k397 k. Effect of Impeachment by Inconsistent Statements. Most Cited Cases

Evidence offered to show contradictory statements of a witness or to otherwise impeach him is received because it bears on the credibility of the witness, and not for purpose of proving truth of statements which are contradictory of the witness' sworn testimony.

[6] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k684 k. Admission in Rebuttal of Evidence Proper in Chief. Most Cited Cases

The practice of allowing district attorney to withhold a part of his case in chief and offer it after defense has closed is improper.

[7] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k517.1 Voluntary Character of Confession
110k517.1(3) k. Exclusion If Involuntary. Most Cited Cases

A confession of one charged with a crime cannot be used against him if it was not made voluntary.

[8] KeyCite Notes

110 Criminal Law
110XVII Evidence

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110XVII(T) Confessions
110k520 Promises or Other Inducements
110k520(1) k. In General. Most Cited Cases

110 Criminal Law KeyCite Notes
110XVII Evidence
110XVII(T) Confessions
110k522 Threats and Fear
110k522(1) k. In General. Most Cited Cases

The use of external means of pressure, whether by threats, intimidation, or the promise or holding out of the hope of immunity or reward or by any like means tending to induce the accused to admit guilt, is opposed to "public policy".

[9] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633 Regulation in General
110k633(1) k. In General. Most Cited Cases

110 Criminal Law KeyCite Notes
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 k. Rights and Duties of Prosecuting Attorney. Most Cited Cases

Both the district attorney and the court have an affirmative duty to use their respective authority to make certain that through no fault or omission on their part may a defendant be deprived of his guaranteed right to a legal, fair, and impartial trial.

[10] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 k. Rights and Duties of Prosecuting Attorney. Most Cited Cases

It is duty of district attorney not to make use of an alleged confession until he has satisfied himself through his own investigation that it was made voluntarily.

[11] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k517.1 Voluntary Character of Confession
110k517.1(2) k. Necessity for Showing Voluntary Character. Most Cited Cases

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It is duty of court to require satisfactory proof of voluntary character of a confession before allowing it to be placed in evidence.

[12] KeyCite Notes

- 110 Criminal Law
  - 110XXIV Review
    - 110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
      - 110XXIV(E)1 In General
        - 110k1036 Evidence
          - 110k1036.1 In General
            - 110k1036.1(3) Particular Evidence
              - 110k1036.1(5) k. Confessions, Declarations, and Admissions. Most Cited Cases

The failure to make a timely and sufficient objection to confession on ground that there was no showing that it was voluntary did not preclude consideration of question of admissibility of confession in view of fact that a grave matter of public policy was involved.

[13] KeyCite Notes

- 110 Criminal Law
  - 110XXIV Review
    - 110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
      - 110XXIV(E)1 In General
        - 110k1030 Necessity of Objections in General
          - 110k1030(2) k. Constitutional Questions. Most Cited Cases

Where constitutional rights of an accused have been invaded and opportunity arises on appeal to undo the wrong, the failure to register an objection does not preclude court from granting proper relief.

[14] KeyCite Notes

- 110 Criminal Law
  - 110XX Trial
    - 110XX(D) Procedures for Excluding Evidence
      - 110k698 Effect of Failure to Object or Except
        - 110k698(1) k. In General. Most Cited Cases

A defendant can "waive" a constitutional right, but, where the alleged waiver is of right to exclude confession obtained by illegal means, a waiver arising from mistake and inadvertence cannot be accepted.

[15] KeyCite Notes

- 92 Constitutional Law
  - 92XXVII Due Process
    - 92XXVII(H) Criminal Law
      - 92XXVII(H)5 Evidence and Witnesses
        - 92k4661 Statements, Confessions, and Admissions

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92k4664 Circumstances Under Which Made; Interrogation
92k4664(1) k. In General. Most Cited Cases
(Formerly 92k266.1(4), 92k266)

One who has been convicted of a crime upon evidence which consists wholly or in substantial part of his confession which has been procured by officers by means of force or violence, has been convicted without "due process of law".

[16] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k517.1 Voluntary Character of Confession
110k517.1(2) k. Necessity for Showing Voluntary Character. Most Cited Cases

110 Criminal Law KeyCite Notes
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1185 Reversal
110k1186.4 Technical, Formal or Trivial Defects or Errors
110k1186.4(5) k. Admission of Evidence. Most Cited Cases

Where defendant testified that he had been beaten by officers shortly after his arrest, that officer was questioning him in jail building at time of beating, and that he promised to confess to any crime if they would cease beating him, evidence of alleged confession to such officer was inadmissible without proof that it was made voluntarily notwithstanding evidence regarding the confession was offered in rebuttal by way of impeachment, and the fact that defendant denied having made the confession did not cure the error but use of confession under such circumstances resulted in a "miscarriage of justice" requiring reversal of conviction.

KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1185 Reversal
110k1186.4 Technical, Formal or Trivial Defects or Errors
110k1186.4(1) k. In General. Most Cited Cases

Under constitutional provision that no judgment shall be set aside or new trial granted because of improper admission or rejection of evidence unless error has resulted in "miscarriage of justice", phrase "miscarriage of justice" has no hard or fast definition and does not mean that a guilty man has escaped or that an innocent man has been convicted, and is equally applicable where acquittal or conviction has resulted from some form of trial in which essential rights of people or of accused were disregarded or denied. West's Ann.Const. art. 6, § 4 1/2.

***627 *416** Ben Van Tress, of Los Angeles, for appellant.
Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.
Defendant was tried by the court without a jury, convicted of robbery, which at the time of sentence

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was reduced by the court to grand theft from the person, was sentenced to the state prison, and appeals. He raises no question as to the sufficiency of the evidence to support the verdict. The conviction rests in part upon a confession of the defendant allegedly made to a police officer. Evidence of the confession was received without any effort to prove that it was made voluntarily, and in disregard of the ***417** defendant's testimony that he was beaten by police officers in an effort to make him confess. For this reason the judgment must be reversed.

Before discussing the use of the confession under these circumstances, we shall give attention to an irregularity in the presentation of the case of the People which should not be allowed to pass unnoticed, even though it may not of itself necessitate a reversal.

A brief statement of the case will suffice for an examination of the legal questions involved, if, indeed, they could be so denominated.

The prosecuting witness, Dellinger, frequently referred to in the evidence as "the old man," testified that after he and defendant, aged 21, had been drinking together at a "beer joint" on Valley Boulevard near the town of Puente, he undertook to drive the defendant to the latter's home; that as they were driving through the San Gabriel wash in brushy country, defendant asked that the car be stopped so he could alight, told him that he had a "bunch of glass" in his tires, asked him to get out and look at it, and attacked him with his fists, blacking his eyes, cutting his face and head, breaking his glasses and knocking him down and out; that defendant abstracted a wallet from his pocket, containing $200 and a "21-year life membership" card in the Elks Lodge, and disappeared in the brush; that the Elks card was never returned to him, but the following day a deputy sheriff returned to him $190.90, which had been found upon the person of the defendant when he was arrested.

Defendant's version of the occurrence was that he had been shooting dice with Dellinger during their drinking; that Dellinger started to drive him home; that they stopped in the wash in order to resume their dice game; that he won all of Dellinger's money; that the latter accused him of cheating and attacked him, and that he used upon Dellinger only the force necessary to defend himself against the attack. He testified that he won altogether from defendant about $90; that he had $120 ****628** when he left home that morning. Defendant, his mother and sister testified that he had received $100 from his mother in cash to deposit in bank, and defendant testified that this was the money that was taken from him by the officer. There was some evidence that while the parties were drinking, defendant had paid for drinks with a $20 bill. It appears that Dellinger was rather thoroughly intoxicated.

***418** In the People's case in chief, one Bletcher, a deputy sheriff, testified that defendant had accompanied officers to the wash, identified the location as the one where the altercation had taken place, had directed a search for the wallet, had reached into a hole during the search but that the wallet had not been found. All of this took place after the officer had stated to defendant that it would do no one any harm if the Elks card were returned to Dellinger, that the card meant a lot to him and that Dellinger "wasn't going to harm nobody." The testimony was objected to upon the ground that defendant's statements under the circumstances would not have been voluntary, permission was requested to place defendant upon the stand to prove that any statements he made were involuntary; this permission was denied and the objection was overruled. Because of a more serious error, to be presently discussed, we find it unnecessary to consider whether defendant's statements upon the occasion of the visit to the wash amounted to a confession or, if they did, whether the previous statements of the officer to him were such as would have rendered involuntary any confession which they may have induced.

In the cross-examination of defendant he was asked whether he had not given to officer Story a complete account of having beaten and robbed Dellinger as the latter claimed, and he denied having made any such statements. After the defense had rested, officer Story was called and testified to a complete and detailed confession made by defendant shortly after he had been "booked" following his arrest.

Defendant had testified repeatedly that he had been beaten by the officers shortly after his arrest; that officer Story was questioning him in room 338 of the jail building at the time of the beating; that he promised to take the officers to the scene of the alleged robbery and to confess "to any crime in

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the United States" if they would cease beating him. He was asked by his counsel to name the other officers who were present at the beating, the District Attorney objected to the question and, although the court appears not to have ruled on the objection, the question was not answered. Defendant again denied having made any of the statements to which Story testified.

[1] [2] [3] [4] [5] [6] The alleged confession to officer Story was not offered as a part of the People's case in chief. It was held back, to be offered in rebuttal and in the guise of impeachment of defendant after his denials upon cross-examination. Apparently both counsel and the court considered this to be a proper ***419** procedure. Not only that, but it appears to have been assumed that a confession elicited by way of impeachment was admissible without proof that it had been given voluntarily. The procedure was entirely wrong. If the defendant had confessed, proof of the confession was a part of the case of the People and it was the duty of the District Attorney to offer it before resting his case, when the testimony was then available and there was no reason for not offering it in chief. When the case of the People is closed and the defense is in, the remainder of the People's case is limited to evidence in rebuttal of that produced by the defense and should be so limited by the court, except where a proper showing is made for reopening the case in chief for the receipt of further evidence. The People have no right to withhold a material part of their evidence which could as well be used in their case in chief, for the sole purpose of using it in rebuttal. Evidence as to statements of the accused tending to show his guilt was admissible to establish the truth of the facts stated. Evidence offered to show contradictory statements of a witness or to otherwise impeach him is received because it bears upon the credibility of the witness and not for the purpose of proving the truth of the statements which are contradictory of the witness' sworn testimony. The alleged confession was offered to establish facts constituting guilt; the impeachment feature was incidental and comparatively unimportant. It was no more proper for the District Attorney to offer the evidence as rebuttal after defendant's denial of the alleged statements, under the pretense that it was offered to impeach the defendant, than it would have been to offer it in rebuttal if the defendant had not been questioned about it at all. It makes no difference here that the testimony***629** as to the confession, aside from being evidence of the fact of guilt, also tended to impeach the defendant. People v. Yeaton, 1888, 75 Cal. 415, 17 P. 544. The practice of allowing the District Attorney to withhold a part of his case in chief and to offer it after the defense has closed cannot be approved, but the obvious error in permitting that procedure does not appear to have been prejudicial in this instance and is not the vital one involved.

[7] [8] [9] [10] [11] The error which demands a reversal is that the defendant's conviction rests in part upon evidence of his confession which was received under circumstances which rendered it inadmissible. The principle that a confession of one charged with crime cannot be used against him if it was ***420** not made voluntarily is as firmly established and as jealously upheld by the courts as any rule or principle of criminal law or procedure. It is axiomatic that the use of external means of pressure, whether by threats, intimidation or the promise or holding out of the hope of immunity or reward or by any like means tending to induce the accused to admit guilt, is opposed to public policy. Such means of coercion or persuasion cast such doubt upon the voluntary nature of the confession as to condemn it altogether. Both the District Attorney and the court have an affirmative duty to so use their respective authority and power as to make certain that through no fault or omission on their part may a defendant be deprived of his guaranteed right to a legal, fair, and impartial trial. It is the duty of the District Attorney not to make use of an alleged confession until he has satisfied himself through his own investigation that it was made voluntarily. It is the duty of the court to require satisfactory proof of the voluntary character of a confession before allowing it to be placed in evidence. These principles are elementary. There is always an opportunity for an inquiry as to whether unlawful means have been employed to obtain a confession when it is sought to use it in court and whenever the voluntary nature of the alleged confession is subject to reasonable doubt, the matter should be made the subject of a fearless and thorough investigation by the District Attorney or, if he fails in his duty, by the court. It is within their power to do more toward suppressing the use of third-degree methods and all forms of brutality upon prisoners than all other agencies combined can do.

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The testimony of the defendant, a young Mexican laborer, that he had been beaten by the officers during his interrogation and before he was taken to the scene of the alleged crime appears to have aroused no interest upon the part of the District Attorney or the court. In fact, the former by his objection disclosed that he thought it to be out of order to ascertain the names of the officers who administered the alleged beating. Neither officer Story nor any other witness was questioned as to the truth of defendant's testimony regarding the beatings, nor was any effort whatever made to prove that the alleged confession was voluntary.

Defendant's testimony as to mistreatment by the officers made so little impression upon the District Attorney that he was not even cross-examined upon the subject. Perhaps such ***421** complaints have become so frequent that it would be a great burden to investigate all of them; but if they are so frequent, may that not be because they are often true? This we cannot know, but we do know that the uncovering of a single case of the beating of a prisoner would compensate for many unsuccessful efforts in that direction.

[12] [13] [14] Counsel for defendant did not object to the testimony of officer Story as to the confession upon the ground that there was no showing that it was voluntary, but on the grounds that it was incompetent, irrelevant and immaterial and no foundation laid (for impeachment). The failure to make a timely and sufficient objection is of no moment where a grave matter of public policy is involved. Counsel for the defense do not bear the entire burden of protecting the constitutional rights of their client. Where those have been invaded, as they appear to have been here, and the opportunity arises on appeal to undo the wrong, the court cannot allow itself to be hampered by the failure of counsel to register an objection. Undoubtedly a defendant can waive a constitutional right, but where the alleged waiver is of the right to exclude a confession obtained by illegal means, we are not willing to accept less than an express waiver, at least not one arising from mistake and inadvertence.

In what we have to say as to the gravity of the failure to observe the rights of a defendant whose confession is used against him, it will be necessary to consider also whether the use of a confession which has been obtained by police officers through ***630** illegal means is of itself a miscarriage of justice which requires a reversal of the conviction. In the early case of People v. Barric, 1874, 49 Cal. 342, in condemning the use of a confession induced by a statement made to the defendant by or in the presence of the sheriff, "It will be better for you to make a full disclosure," the court said (49 Cal. at page 345): "The rule is without exception that such a promise made by one in authority will exclude a confession. Public policy absolutely requires the rejection of confessions obtained by means of inducements held out by such persons."

In White v. Texas, 1940, 310 U.S. 530, 60 S.Ct. 1032, 1033, 84 L.Ed. 1342, it was held that the use of a confession obtained by force and fear, and "upon which the State's case substantially rests," was a deprivation of due process.

In Chambers v. Florida, 1940, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, the court, in denouncing the use of a confession ***422** obtained by illegal means, said: (309 U.S. at page 241, 60 S.Ct. at page 479, 84 L.Ed. at page 724): "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution--of whatever race, creed or persuasion."

In Brown v. Mississippi, 1936, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682, it was held that the use of a confession obtained by force and fear was a clear denial of due process. The court, speaking through Mr. Chief Justice Hughes, then said (297 U.S. at page 286, 56 S.Ct. at page 465, 80 L.Ed. at page 687): "It is in this view that the further contention of the State must be considered. That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners'

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complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. Moore v. Dempsey, [261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543], supra. We are not concerned with a mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient."

[15] The foregoing cases are authority for the statement that one who has been convicted of a crime upon evidence which consists wholly or in substantial part of his confession which has been procured by officers of the law by means of force or violence has been convicted without due process of law.

[16] Defendant was not questioned at all as to the circumstances or details of the alleged beatings and it cannot be determined to what extent, if at all, force was used upon the defendant by the officers or whether he was put in fear by their treatment to which he testified. The record is silent on the subject except for the testimony of the defendant and we do not see how the trial judge could have known more than is disclosed by the record. In summing up the case before finding defendant guilty, the judge said: "As far as the confessions are concerned, this man denies everything that he ever ***423** told these officers, anything which incriminated him or gave them any information as to the location of this purse or anything of the kind, so as far as the beatings, which he received, if he did receive them, they had no effect on him whatever to produce results." And yet if the officer was to be believed, defendant confessed to the crime at the time when, as he testified without contradiction, he was being subjected to beatings. Without any testimony from the defendant it would have been error to admit the confession. If his testimony was disbelieved, it was still error to admit it without affirmative proof that it was voluntary. If defendant was to be believed, then the confession testified to by officer Story was obtained illegally and was not admissible at all. The fact that defendant denied having made the confession does not cure or mitigate the error in allowing it to be used and has no bearing upon the questions of legality and public policy that are involved. White v. Texas, supra, 310 U.S. 530, 60 S.Ct. 1032, 84 L.Ed. 1342.

The uncertainty as to the facts surrounding the interrogation of defendant by the officers results from the failure of the District Attorney and of the court to inquire***631** into the truth of defendant's charges. Had such inquiry been made, and had the confession then been received, we would have the benefit of the court's implied finding that defendant's testimony was untrue and there no doubt would be some evidence in the record tending to show that it was made voluntarily. But we have no such record.

[17] The question before us is not the one decided by the Supreme Court of the United States in the cases cited above, namely, whether defendant was denied due process. The confessions which had been used in those cases were clearly shown to have been extorted from the respective defendants. The evidence here does not go that far. But we are not in a position to say, and we think the trial court could not have said, from all that transpired at the trial, that defendant had not been so grievously mistreated by the officers as to render the use of a confession obtained thereby a denial of the constitutional right of due process. The case is one where the constitutional right of the defendant may have been violated and where it was the manifest duty of the trial court to determine whether there had been such violation. This brings us to the question whether the use of the confession under the circumstances resulted in a miscarriage of justice. We are definitely ***424** of the opinion that it did. The inquiry is not as to whether the guilt of the defendant was established but as to the methods by which the finding of guilt was reached. As was said by Mr. Presiding Justice Conrey in People v. Wilson, 1913, 23 Cal.App. 513, at 524, 138 P. 971, at 975: "The phrase 'miscarriage of justice' does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. 'It is an essential part of justice that the question of guilt

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or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.' Opinion written by Mr. Justice Sloss in People v. O'Bryan [165 Cal. 55,] 130 P. 1042."

The record before us illustrates how easily departure from established procedure may lead to the impairment of substantial rights.

We find particularly appropriate in this connection remarks of former Chief Justice Bleckley of the Supreme Court of Georgia, delivered to the Georgia Bar Association and printed in its annual report (1886) as follows: "Some meritorious cases, indeed many, are lost in passing through the justice of procedure; but they are all justly lost, provided the rules of procedure have been correctly applied to them. That a just debt is unrecognized, a just title defeated, or a guilty man acquitted, is no evidence that justice has not been done by the Court or the jury. It may be the highest evidence that justice has been done, for it is perfectly just not to enforce payment of a just debt, not to uphold a just title, not to convict a guilty man, if the debt, or the title, or the guilt be not verified. It is unjust to do justice by doing injustice. A just discovery cannot be made by an unjust search. An end not attainable by just means is not attainable at all; ethically, it is an impossible end. Courts cannot do justice of substance except by and through justice of procedure. They must not reach justice of substance by violating justice of procedure. They must realize both, if they can, but if either has to fail, it must be justice of substance, for without justice ***425** of procedure Courts cannot know, nor be made to know, what justice of substance is, or which party ought to prevail. As well might a man put out his eyes in order to see better, as for a Court to stray from justice of procedure in order to administer justice of substance."

It cannot be doubted for a moment that a conviction which rests in substantial part upon the use of a confession obtained illegally by police officers is a miscarriage of justice. A conviction also results in a miscarriage of justice where a defendant's alleged confession is used against him without any evidence to prove that it was made voluntarily, where the defendant has testified without contradiction that he was beaten by police officers during his interrogation and where the District Attorney and the court have made no inquiry as to the truth of the defendant's charges or as to the circumstances under which or the ****632** means by which the confession was obtained.

The judgment and order are reversed, and the cause is remanded for retrial.

PARKER WOOD, J., and SHAW, Justice pro tem., concur.

Cal.App. 2 Dist. 1943.
PEOPLE v. RODRIGUEZ.
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C
PEOPLE v. HILLER
Ill. 1954

Supreme Court of Illinois.
PEOPLE
v.
HILLER et al.
No. 33008.

March 17, 1954.

Defendants were convicted and sentenced by the Criminal Court, Cook County, Frank R. Leonard, J., for rape, and they brought writ of error. The Supreme Court, Daily, J., held that state could not, on cross examination of a defendant, attempt to impeach his testimony by use of statement allegedly signed by defendant but claimed by defendant to have been given under duress.

Reversed and remanded.
West Headnotes
[1] Criminal Law 110 ⚿406(3)

110 Criminal Law
110XVII Evidence
110XVII(L) Admissions
110k405 Admissions by Accused
110k406 In General
110k406(3) k. Voluntary Character of Admissions. Most Cited Cases
Admissions by a defendant in a criminal case are not admissible in evidence unless freely and voluntarily given by the defendant.

[2] Criminal Law 110 ⚿412(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412 In General
110k412(4) k. Circumstances Affecting Admissibility in General. Most Cited Cases
(Formerly 110k412(1))

Witnesses 410 ⚿380(2)

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k380 Witnesses Who May Be Impeached by Inconsistent Statements
410k380(2) k. Accused in Criminal Prosecution. Most Cited Cases
In prosecution for rape, defendant's testimony that he signed coerced statement did not make the statement competent to impeach his testimony at trial, or for any other purpose.

[3] Witnesses 410 ⚿387

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k387 k. Cross-Examination as to Inconsistent Statements. Most Cited Cases
In prosecution for rape, cross-examination of defendant from a statement which was not introduced in evidence and which defendant claimed had been made under coercion, was improper.

[4] Witnesses 410 ⚿388(7.1)

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k388 Laying Foundation for Proof of Inconsistent Statements
410k388(7) Foundation for Impeachment by Written Statements
410k388(7.1) k. In General. Most Cited Cases
(Formerly 410k388(7))
In prosecution for rape, defendant's undetermined

claim that he signed coerced statement made the statement incompetent to impeach his testimony at trial.

*324 **12 Joseph B. Quinn, Chicago, for plaintiffs in error.
Latham Castle, Atty. Gen., and John Gutknecht, State's Atty, Chicago (John T. Gallagher, Rudolph L. Janega, and Arthur F. Manning, Chicago, of counsel), for the people.
DAILY, Justice.
An indictment returned to the criminal court of Cook County charged Harold Hiller, age 20, and Ralph Liljeblad, age 19, with the forcible rape of a young woman 18 years of age. After a trial before the court, without a jury, they were found guilty and each was sentenced to the penitentiary for a twenty-five-year term. This writ of error is prosecuted to review the judgment and sentences, with defendants assigning as error that they were not proved guilty beyond all resonable doubt, that the prosecutor made prejudicial and inflammatory remarks in his closing argument, and that the court erred in admitting evidence of a purported confession.

Although the view we take on this appeal requires no consideration of the facts relating to the alleged crime, it should be noted, as all too often recurs, that the scene for its occurrence was set when the prosecutrix, in a tavern and at 2:00 o'clock in the morning, accepted a ride home with two young men completely unknown to her. It is not denied that the car was driven to a lonely road, that *325 each defendant had sexual intercourse with her in the front seat and that the prosecutrix was not otherwise injured or harmed. The theory of the defense was that the prosecutrix submitted willingly to both men without complaint or resistance, while that of the prosecution was that she was violated by means of force and threats under circumstances where greater resistance on her part would have been useless or dangerous. After the occurrence the prosecutrix was driven to the vicinity of her home and, upon arriving there, immediately telephoned the police who came to investigate her complaint at about 4:00 A.M. Subsequently the defendants were apprehended, were identified by the prosecutrix and, the record indicates, Liljeblad gave a written statement consisting of questions and answers to the police.

The statement taken by the police was not introduced into evidence nor was the officer to whom it was given called as a witness; however, when Liljeblad was cross-examined, the State's Attorney was permitted to read certain of the questions and answers from the statement and to ask the defendant if the questions had been put to him and if he had made the answers. When this mode of cross-examination was first pursued, and several times thereafter, defendants' counsel objected to any reading from the statement on the ground that it had been given under duress. In response to one question and answer read to him, Liljeblad made this reply: 'I did make that answer but it was a forced statement. I did not want to make that statement,' and in another instance he stated: 'I had to submit to that answer.' The court, however, overruled counsel's objections and admitted the passages from the statement in evidence without inquiring into its voluntary or involuntary nature. Defendants now contend that this action of the court constitutes reversible error.

[1] While the People admit the established rule relating to a hearing on the admissibility of an alleged confession into *326 evidence, they say that the questions asked on cross-examination were not based on a confession, which implies that the matter confessed constitutes a crime, and, drawing upon **13 language in People v. Okopske, 321 Ill. 32, at page 37, 151 N.E. 507, dealing with exculpatory admissions freely given, seem to imply the statement here was merely an acknowledgement of incriminating facts tending to establish guilt, given without any intention of confessing guilt, and could, therefore, properly be used for impeachment purposes without a preliminary hearing as to its admissibility. The weakness of such an argument is, first, that the statement, or confession as defendants term it, was not into evidence and is therefore no part of the case or of the record before us, and, second, the distinction between a statement and confession contended for would seem to imply that an incriminating statement, even though coerced, would be admissible in evidence. Such an

implication finds no support in the law or justification in the facts of this case. Indeed, this court held in People v. Spranger, 314 Ill. 602, 145 N.E. 706, that a written statement given to the police, though not a confession, was not admissible in evidence until it was shown to have been voluntarily given. Again, in People v. Santucci, 374 Ill. 395, 29 N.E.2d 508, and People v. Colvin, 294 Ill. 196, 128 N.E. 396, it is established that admissions by a defendant in a criminal case are not admissible in evidence unless freely and voluntarily given by the defendant.

The situation here is closely akin to that considered by this court in the recent case of People v. Adams, 1 Ill.2d 446, 115 N.E.2d 774. There, as here, the prosecution was allowed to cross-examine the defendant from a statement which was not introduced into evidence and which defendant claimed had been made under coercion. After pointing out that defendant's testimony that he had signed a statement did not constitute testimony as to its contents so as to make the statement a part of the case, we said, 1 Ill.2d at page 451, 115 N.E.2d at page 777: 'It cannot be contended that defendant's testimony that he signed a ***327** coerced statement makes such statement competent for any purpose. The tenor of such testimony is that the statement is not the statement of the defendant and he certainly cannot be impeached by statements which the law refuses to recognize as his voluntary statements.' Again, in People v. Sweeney, 304 Ill. 502, 136 N.E. 687, and People v. Maggio, 324 Ill. 516, 155 N.E. 373, where the impropriety of such cross-examination from allegedly coerced statements not in evidence was considered under almost the same circumstances, we held that since the supposed confessions themselves were of no probative value and incompetent as evidence, it was equally incompetent to permit the introduction of a part of them indirectly by reading from the written statements and compelling the defendants to answer whether they had made those statements.

[2][3] Here, as in the cited cases, the alleged statement or confession is no part of the case, and all the record shows is that Liljeblad admitted making a statement, which he testified was forced. If defendant's testimony is true, and there is no denial of it, his statement was not made freely and voluntarily but was obtained by force and the answers put down were not those that he wished to give. With the record in this state, the statement, or confession, of the defendant was not competent for any purpose unless and until its voluntary nature was established. It was, therefore, error for the court to permit the prosecution to cross-examine from the statement and thereby achieve indirectly what it could not do directly.

[4] Relying upon People v. Smith, 391 Ill. 172, 62 N.E.2d 669, the People further seek to justify the cross-examination of Liljeblad, by asserting that it is always competent to show, for impeachment, that a witness, even though he be the defendant, has made statements concerning material matters at another time, inconsistent with his testimony on the stand. A similar contention was unsuccessfully made in People v. Adams, 1 Ill.2d 446, 115 N.E.2d 774, and under the circumstances of this ***328** case we must also hold that the rule has no application where there is an undetermined claim that the prior statements or admissions of a defendant were given under force and duress. To hold otherwise would ****14** destroy the guarantees of due process of law which protect an accused from the use of confessions, statements or admissions obtained by force, coercion or violence.

For the error discussed, the judgment of the criminal court of Cook County is reversed and the cause remanded for a new trial.

Reversed and remanded.

Ill. 1954
People v. Hiller
2 Ill.2d 323, 118 N.E.2d 11

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19 Ill.2d 156, 166 N.E.2d 54

Supreme Court of Illinois.
PEOPLE of the State of Illinois, Defendant in Error,
v.
Reid PELKOLA, Plaintiff in Error.
No. 35536.
March 31, 1960.

Defendant was convicted of robbery and to review a judgment in the Criminal Court, Cook County, Harold P. O'Connell, J., the defendant brings error. The Supreme Court, Daily, J., held that error in admitting evidence of the oral confession made by defendant to an officer did not require a reversal where there was sufficient evidence to establish defendant's guilt beyond a reasonable doubt without regard to the testimony of the officer.
Judgment affirmed.

West Headnotes

[1] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k517 Admissibility in General
110k517(8) k. List of Witnesses to Confession; Copy. Most Cited Cases
(Formerly 110k517(1))

Statute providing that when an oral confession shall have been made to a law enforcement officer, a list of the names and addresses of all persons present shall be furnished to the defendant is mandatory. S.H.A. ch. 38, § 729.

[2] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k517 Admissibility in General
110k517(8) k. List of Witnesses to Confession; Copy. Most Cited Cases
(Formerly 110k517(1))

Where it did not appear in the record that prior to arraignment defense counsel was given a list of witnesses present when the defendant made oral statement in nature of a confession to an officer, evidence of the oral confession made to the officer was inadmissible when the prosecution was presenting its case in chief. S.H.A. ch. 38, § 729.

[3] KeyCite Notes

410 Witnesses
410IV Credibility and Impeachment

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410IV(D) Inconsistent Statements by Witness
410k380 Witnesses Who May Be Impeached by Inconsistent Statements
410k380(2) k. Accused in Criminal Prosecution. Most Cited Cases

It is competent to show, as a matter of impeachment, that a witness, even if he be the accused, made a statement outside of court concerning material matters which was inconsistent with his testimony on the witness stand.

[4] KeyCite Notes

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k390 Competency of Evidence of Inconsistent Statements in General
410k390.1 k. In General. Most Cited Cases
(Formerly 410k390)

Where evidence of the oral confession made to officer was inadmissible in chief for the failure of the prosecution to supply the officer's name and address to the defendant, permitting the same evidence to be used in rebuttal for the purposes of impeachment was error. S.H.A. ch. 38, § 729.

[5] KeyCite Notes

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k379 Inconsistency of Statements as Ground of Impeachment in General
410k379(2) k. Nature of Statement in General. Most Cited Cases

410 Witnesses KeyCite Notes
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k380 Witnesses Who May Be Impeached by Inconsistent Statements
410k380(2) k. Accused in Criminal Prosecution. Most Cited Cases

When dealing with use of confessions for impeachment purposes, fundamental justice will not countenance accomplishment, by indirection, of that which it will not permit directly, and confessions otherwise incompetent do not become competent when offered to impeach either a witness or an accused.

[6] KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.2 Curing Error by Facts Established Otherwise
110k1169.2(1) k. In General. Most Cited Cases
(Formerly 110k1169(2))

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Error in admission of evidence is harmless where facts involved are established by other competent evidence, particularly where such other evidence is conclusive on the guilt of accused.

[7] KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(7) k. Immaterial or Incompetent Evidence in General. Most Cited Cases
(Formerly 110k1169(1))

Whether admission of incompetent evidence is sufficient ground to require reversal depends upon facts of each case.

[8] KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(1) k. Evidence in General. Most Cited Cases
(Formerly 110k1169(1))

Where record contains sufficient competent evidence to establish guilt of defendant beyond a reasonable doubt, judgment will not be reversed for error in admitting evidence unless it can be seen that error is prejudicial.

[9] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k741 Weight and Sufficiency of Evidence in General
110k741(2) k. Identity and Presence of Accused. Most Cited Cases

342 Robbery KeyCite Notes
342k24 Weight and Sufficiency of Evidence
342k24.40 k. Identity of Accused. Most Cited Cases
(Formerly 342k24.3, 342k24(3))

In robbery prosecution, identification need not be positive to support a conviction, its weight being a question for the jury or the court, to be determined in connection with other circumstances.

[10] KeyCite Notes

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110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.12 k. Acts, Admissions, Declarations, and Confessions of Accused. Most Cited Cases
(Formerly 110k1169(12))

In robbery prosecution, error in admitting evidence of an oral confession made by defendant to an officer did not require a reversal where there was sufficient evidence to establish defendant's guilt beyond a reasonable doubt without regard to improper testimony of officer. S.H.A. ch. 38, § 729.

[11] KeyCite Notes

110 Criminal Law
110XIII Nonjury or Bench Trial and Conviction
110k260 Appeal and Trial De Novo
110k260.11 Review
110k260.11(3) Questions of Fact
110k260.11(5) k. Particular Cases and Questions. Most Cited Cases
(Formerly 110k260(11))

In robbery prosecution where defendant and his companion sought to explain their presence in the area for an innocent purpose, choice of which witnesses were telling the truth rested with the trial court.

***157 **55** Julius Lucius Echeles, and Barry Goodman, Chicago, for plaintiff in error.
Grenville Beardsley, Atty. Gen., Springfield, and Benjamin S. Adamowski, State's Atty., Chicago (Fred G. Leach, Asst. Atty. Gen., and Francis X. Riley and William W. Winterhoff, Asst. State's Attys., Chicago, of counsel), for the People.

DAILY, Justice.
Defendant, Reid Pelkola, together with one Noble Lutrell, was found guilty of robbery after a bench trial in the criminal court of Cook County and was sentenced **56 to the penitentiary for a term of not less than one nor more than five years. He prosecutes this writ of error contending that the proof failed to establish his guilt beyond a reasonable doubt and that the court erred in permitting testimony of an oral confession into evidence.

At about 1:30 P.M. on January 13, 1959, two men wearing handkerchiefs over their faces entered a beauty shop operated by Linda Soupos at 2519 N. Clark Street in the city of Chicago, announced that it was a holdup, and took $4.20 from a cash register after forcing Mrs. Soupos and a customer to sit on the floor in a back room. The men had no visible weapons and both were clad in jackets, one copper colored, the other gray. After the robbers left the shop Mrs. Soupos hurried to the street in time to see them run north on Clark Street and turn east on Deming Avenue. She located a police squad car nearby, described *158 the robbers to the officers, then accompanied the latter as the police car was driven through the neighborhood. About fifteen minutes after the robbery, and while the car was being driven down Hampton Court, Mrs. Soupos recognized one of the men (Lutrell) by his clothing and pointed him out to officers Dennehy, Kilroy and Cullerton with whom she was riding. The officers apprehended him, put him in the car and, according to testimony of officer Dennehy, Lutrell then admitted his participation in the robbery.

Shortly thereafter defendant was apprehended by officer Kilroy who had proceeded on foot through an areaway leading off Hampton Court to the vicinity of St. James Street and Lakeview Avenue. He was brought to the squad car containing Lutrell and Mrs. Soupos and it was Dennehy's testimony that Lutrell then stated defendant had been his accomplice, that defendant 'didn't say much' when accused, and that the two men were then taken to the police station in separate squad cars. On

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cross-examination the officer related that Mrs. Soupos, in front of all present, had also identified defendant as one of the men who held her up. When the complaining witness testified, she conceded that her identification of both men had been based on their clothing and explained she had not seen their faces because of the handkerchiefs they wore.

After the complaining witness and officer Dennehy had testified to the foregoing facts, the prosecution called as its next witness Robert Krause, who identified himself as a police detective and stated he had engaged in a conversation with Lutrell and defendant at the police station on the day of their arrest. However, when defense counsel objected that they had been given no notice of an oral admission or confession before the witness, the assistant State's Attorney agreed that such was the case and voluntarily refrained from questioning the witness further.

[1] [2] To digress from the facts for a moment, section 1 of division XIII of the Criminal Code (***159** Ill.Rev.Stat.1957, chap. 38, par. 729) as amended by the legislature in 1957, provides that whenever an oral confession shall have been made before any law enforcement officer or agency in this State, a list of the names and addresses of all persons present at the time of the confession shall be furnished to the defendant or his counsel prior to arraignment, or at such later time as the court, in its discretion, may direct upon motion of either the prosecution or defense at the time of arraignment. Emphasizing that this provision is mandatory, the legislature concluded by providing: 'No confession shall be admitted as evidence in any case unless the confession and/or list of names and addresses of persons present at the time the confession was made is furnished as required by this Section.' See Laws of 1957, vol. 1, p. 1116. In the present case it does appear in the record that, prior to arraignment, defense counsel was given a list of witnesses 'present when Reid Pelkola made oral statements,' but no copy of such list itself has been made a part of the record. However,***57** any doubt as to whether the name and address of detective Krause was included is completely removed by the admission of the prosecutor that they were not. From this circumstance, and from the concluding provision of the statute, it would appear that evidence of the oral confession made to Krause was inadmissible when the prosecution was presenting its case in chief.

Defendant testified in his own behalf and admitted that he and Lutrell had been drinking together on the morning of the day in question, and that they were running short of funds, but denied that he had committed the robbery. Accounting for his presence at the place of arrest, he explained that Lutrell had left the bar where they had been drinking to see about borrowing some money from a former landlady who lived on Hampton Court, that he was to follow and meet Lutrell, and that, in doing so, he had taken a wrong turn and was going through an alley to get to ***160** Deming Avenue when apprehended. Defendant recalled seeing Mrs. Soupos in the policer car but stated he could not remember if she had identified him because he had been drinking heavily at the time. He did, however, expressly deny that Lutrell had implicated him at the squad car and testified he had not seen Lutrell until they were brought together at the police station. Continuing, defendant testified he had been employed in a grocery warehouse for a period of three years and that, prior to such employment he had served a term in the penitentiary for the crime of burglary. When cross-examined defendant stated he could remember having a conversation with Krause at the police station, and gave some of its details, but denied telling the officer that he had committed the robbery.

Noble Lutrell took the stand and testified that he had gone to Hampton Court to borrow some money from a former landlady, that he found she no longer lived there, and that he was arrested as he emerged from an adjoining building where he had gone to inquire of the landlady's whereabouts. He denied committing the robbery but admitted Mrs. Soupos had identified him by his clothing when he was brought to the squad car. Lutrell testified he made some denial of his guilt but did not persist, and more or less agreed to the charges against him, because he became afraid he would be beaten after one of the officers threatened him with a club and told him to shut up. Similarly, when asked on cross-examination if he had confessed to Krause at the station, Lutrell replied that, if he had done so, it was because he was afraid of the police. In this respect, he testified he had been beaten for three days and nights on the occasion of an arrest eight years before and, although defendant made no mention of force or brutality, that he became further apprehensive at the station when a policeman he could not identify struck defendant in the stomach. Upon motion of defendant's counsel, Lutrell's

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testimony was ruled inadmissible as to defendant.

***161** The People next called detective Krause as a witness in rebuttal. When defense counsel again pointed out that Krause's name did not appear on the list of witnesses to an oral confession and objected that the prosecution was trying to get the confession into evidence by indirection, the trial court overruled the objection indicating he was receiving the testimony for purposes of rebuttal only. Thereafter, Krause testified to a conversation with Lutrell and defendant wherein both men admitted their participation in the robbery. When cross-examined in some detail, the witness stated he had not attempted to get signed statements in writing, as was customary, because, in his opinion, the men were too intoxicated to read or write.

[3] [4] While it has been held on numerous occasions that it is always competent to show, as a matter of impeachment, that a witness, even if he be the accused, made a statement outside of court concerning material matters which was inconsistent***58** with his testimony on the witness stand (People v. Gleitsmann, 361 Ill. 165, 197 N.E. 557; People v. Romano, 337 Ill. 300, 169 N.E. 182; People v. Graves, 331 Ill. 268, 162 N.E. 839; People v. Popovich, 295 Ill. 491, 129 N.E. 161), we agree with defendant, under the circumstances of this case, that evidence of the oral confession made to detective Krause was inadmissible for any purpose. This is not a case where the trial court, in the exercise of its discretionary powers, admitted evidence in rebuttal which could and properly should have been introduced in chief (cf. People v. Leach, 398 Ill. 515, 76 N.E.2d 425; People v. Crump, 5 Ill.2d 251, 125 N.E.2d 615, 52 A.L.R.2d 834), but one in which, by virtue of section 1 of division XIII of the Criminal Code (Ill.Rev.Stat.1957, chap. 38, par. 729) evidence of an oral confession was inadmissible as evidence of guilt. This being the case, it is our opinion, again by force of the statute, that the evidence was likewise inadmissible for purposes of impeachment.

[5] When called upon to deal with use of confessions for impeachment purposes, we have held that fundamental ***162** justice will not countenance accomplishment, by indirection, of that which it will not permit directly, and have held that confessions otherwise incompetent do not become competent when offered to impeach either a witness or an accused. People v. Tunstall, 17 Ill.2d 160, 161 N.E.2d 300; People v. Childress, 1 Ill.2d 431, 115 N.E.2d 794; People v. Barragan, 337 Ill. 531, 169 N.E. 180. Here, by the express direction of section 1 of division XIII of the Criminal Code, evidence of the oral confession made to Krause was inadmissible in chief for the failure of the prosecution to supply Krause's name and address to defendant or his counsel. Indeed, the assistant State's Attorney conducting the trial conceded that this was so. To permit the same evidence to be used in rebuttal for purposes of impeachment is to circumvent the legislative intent and to deny to an accused the protection against surprise, unfairness and inadequate preparation the statute was designed to provide. In short, it is our opinion that the statute leaves no area of discretion to a trial court and that the legislature intended compliance with the notice provisions before an oral confession could be admitted in evidence for any purpose. Accordingly, it is our opinion that the evidence of the oral confession made to Krause was improperly received in this case.

[6] [7] [8] We are of the further opinion, however, that the error of the trial court does not justify a reversal of the judgment of conviction. Error in the admission of evidence is harmless where the facts involved are established by other competent evidence (People v. Grundeis, 413 Ill. 145, 108 N.E.2d 483; People v. Crowe, 390 Ill. 294, 61 N.E.2d 348), particularly where such other evidence is conclusive on the issue of the guilt of the accused. People v. Montgomery, 271 Ill. 580, 111 N.E. 578; People v. Burger, 259 Ill. 284, 102 N.E. 751. Again, we have said that whether the admission of incompetent evidence is sufficient ground to require reversal depends on the facts in each case (People v. Bureca, 355 Ill. 202, 188 N.E. 915; People v. Slattery, 312 Ill. 202, 143 N.E. 395), and have held that where the record contains sufficient***163** competent evidence to establish the guilt of a defendant beyond reasonable doubt, the judgment will not be reversed for error in admitting evidence unless it can be seen that the error was prejudicial. People v. Baker, 365 Ill. 328, 6 N.E.2d 665; People v. Reeves, 360 Ill. 55, 195 N.E. 443; People v. Perrello, 350 Ill. 231, 182 N.E.

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748; People v. Guilfoyle, 321 Ill. 93, 151 N.E. 596; People v. Raymond, 296 Ill. 599, 130 N.E. 329.

[9] [10] Here, there is sufficient evidence to establish defendant's guilt beyond a reasonable doubt without regard to the improper testimony of Krause and, under the circumstances of the case, we are of **59 the opinion that such testimony was not prejudicial to defendant. As to the proof itself, exclusive of Krause's testimony, it shows that defendant and his companion were identified by the victim as the men who held her up. It is true she could not identify the robbers by face, and that her identification was not positive to that extent, however, we have held that identification need not be positive to support a conviction, its weight being a question for the jury or the court, as the case may be, to be determined in connection with the other circumstances in the case. People v. Maciejewski, 294 Ill. 390, 395, 128 N.E. 489; People v. Jennings, 252 Ill. 534, 545, 96 N.E. 1077, 43 L.R.A.,N.S., 1206. The circumstances of this case show that Mrs. Soupos had ample opportunity, under favorable conditions, to observe the men who robbed her, even though the extent of her observation was limited by the masks they wore on their faces, that she described the clothing of the robbers to the police, that men wearing such clothing were found in the area, and that, to the extent possible, the prosecuting witness unhesitatingly identified the men once they were apprehended. Persuasive corroboration for her identification is found in the fact that the men were arrested a few blocks from the scene of the crime within minutes after its commission, and in the testimony of both men, particularly when it is remembered that Mrs. Soupos identified them separately, that they had been in each other's company for many hours just prior to the *164 crime and that they had run out of funds with which to continue their drinking.

[11] Although defendant and his companion sought to explain their presence in the area for an innocent purpose, the choice of which witnesses were telling the truth rested with the court and we see no basis for substituting our judgment in such respect. In view of the foregoing evidence, we are unable to see how the trial court could have reached any other result than it did, even if the incompetent rebuttal evidence had not been admitted. Cf. People v. Harris, 391 Ill. 358, 63 N.E.2d 398.

The judgment of the criminal court of Cook County is affirmed.

Judgment affirmed.

Ill. 1960
PEOPLE v. PELKOLA
19 Ill.2d 156, 166 N.E.2d 54

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304 Ill. 502, 136 N.E. 687

Supreme Court of Illinois.
PEOPLE
v.
SWEENEY et al.
No. 14707.
Oct. 21, 1922.

Error to Criminal Court, Cook County; M. L. McKinley, Judge.
James Sweeney and Harry Bartlett were convicted of procuring explosive compounds with intent that they should be used for the destruction of life and property, and they bring error.
Reversed and remanded.

West Headnotes

[1] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k517.1 Voluntary Character of Confession
110k517.1(1) k. In General. Most Cited Cases

A confession, unless freely and voluntarily made is inadmissible.

[2] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k531 Preliminary Evidence as to Voluntary Character
110k531(4) k. Right of Accused to Introduce Evidence. Most Cited Cases

Where a confession is offered in evidence, defendant has a right to introduce evidence himself as to the admissibility of the confession.

[2] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k532 Determination of Question of Admissibility
110k532(1) k. Time of Determining Admissibility. Most Cited Cases

Where a confession is offered in evidence, defendant is entitled to a preliminary ruling by the court as to the admissibility of the confession.

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[2] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k671 k. Presence of Jury During Inquiry as to Admissibility. Most Cited Cases

Where a confession is offered in evidence, defendant is entitled to have the evidence of the circumstances under which it was made heard by the court out of the presence of the jury, and has a right to cross-examine the witnesses for the prosecution and to introduce evidence himself, and has a right to a preliminary ruling by the court as to the admissibility of the confession.

[2] KeyCite Notes

410 Witnesses
410III Examination
410III(B) Cross-Examination
410k266 k. Right to Cross-Examine and Re-Examine in General. Most Cited Cases

Where a confession is offered in evidence, defendant has a right to cross-examine the witnesses for the prosecution.

[3] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k531 Preliminary Evidence as to Voluntary Character
110k531(3) k. Weight and Sufficiency of Evidence. Most Cited Cases

In a prosecution under Smith-Hurd Stats. c. 38, §§ 229-235 for the improper use of explosives, evidence held to show that confessions of defendants were not voluntarily made.

[4] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k528 k. Codefendants and Accomplices. Most Cited Cases

In a prosecution against two defendants, a confession by one defendant was not competent against the other.

[4] KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence

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110k1169.5 Curing Error by Withdrawal, Striking Out, or Instructions to Jury
110k1169.5(2) k. Particular Evidence or Prosecutions. Most Cited Cases

In a prosecution against two defendants, a confession by one defendant was not competent against the other, and the error in its admission was not cured by oral instruction to disregard it.

[5] KeyCite Notes

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k397 k. Effect of Impeachment by Inconsistent Statements. Most Cited Cases

A confession which is incompetent in chief because made under such circumstances as to be without probative value is equally without probative value in rebuttal by way of impeachment.

[6] KeyCite Notes

164 Explosives
164k5 k. Criminal Prosecutions. Most Cited Cases

In prosecution under S.H.A. ch. 38, §§ 229-236, for the improper use of explosives, evidence held to show that defendants procured explosive compound with intent that it should be used for the destruction of life and property.

[7] KeyCite Notes

410 Witnesses
410III Examination
410III(B) Cross-Examination
410k277 Cross-Examination of Accused in Criminal Prosecutions
410k277(2) Particular Subjects of Inquiry
410k277(2.1) k. In General. Most Cited Cases
(Formerly 410k277(2))

In a prosecution under S.H.A. ch. 38, §§ 229-236, for the improper use of explosives, permitting cross-examination of defendant as to whether he had been known as "Soup," which is a slang expression for nitro-glycerine, was error.

[8] KeyCite Notes

164 Explosives
164k5 k. Criminal Prosecutions. Most Cited Cases

In a prosecution under S.H.A. ch. 38, §§ 229-236, for the improper use of explosives, evidence that defendant produced a newspaper with headlines, "2 Bombs Rock West Side; Laundries Wrecked in Labor War; Police Guard Area; Mysterious Third Blast is Heard"-was admissible, where there was testimony that newspaper reports were to constitute proof to defendant's employers that instructions as to blowing up buildings had been carried out.

[9] KeyCite Notes

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110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(19) k. Principals and Accessories. Most Cited Cases

In a prosecution under Smith-Hurd Stats. c. 38, § 229, the giving of an instruction that any person abetting or in any way assisting in the procuring and use of explosive compound either by furnishing materials or labor or by acting as agent, knowing or having reason to believe that the explosive is intended to be used unlawfully, shall be deemed a principal and subject to the same punishment, was improper, where not applicable to either count of the indictment or based on the evidence.

***503** O'Brien, Prystalski & Owen, of Chicago, for plaintiffs in error.
Edward J. Brundage, Atty. Gen., Robert E. Crowe, State's Atty., of Chicago, and Edward C. Fitch, Asst. Atty. Gen. (Edward E. Wilson and Clyde C. Fisher, both of Chicago, of counsel), for the People.

DUNN, J.
James Sweeney and Harry Bartlett were indicted in the criminal court of Cook county, together with Albert Peterson, Samuel Gibson, Thomas Corcoran, Jene Coleman, Andrew Kerr, Joseph Bangora, Charles Borigan, and one Sullivan, whose first name was unknown. The indictment in two counts charged a violation of 'An act to regulate the manufacture, transportation, use and sale of explosives, and to punish an improper use of the same,' approved June 16, 1887 (Hurd's Stat. 1921, p. 1072). The first count charged that the defendants did make, manufacture, compound, buy, and procure dynamite, nitrochlorate, and other explosive compounds with intent that the same should be used for the destruction of life and property. The second count charged the defendants with having dynamite, nitrochlorate, and other explosive compounds with intent that the same should be used to injure and destroy a building of the Beehive Laundry Company. On motion of the state's attorney, a separate trial was ordered for Sweeney and Bartlett, they were found guilty and sentenced to the penitentiary for an indeterminate period, and they prosecute this writ of error to secure a reversal of the judgment.

It was shown by the watchman at the Beehive laundry that he went to work the night of February 19, 1921, about 7 o'clock, and about 1 o'clock he was near the engine room when there was an explosion, which caused a loud noise and blew in the large back door, together with a big ***504** cloud of smoke and dirt. This was the only evidence of the use of an explosive. The only evidence connecting the plaintiffs in error with the crime was the testimony of Andrew Kerr, who was indicted with them, and their confessions. Kerr's testimony was substantially as follows: He was a stationary engineer employed in the latter part of 1920 by the Mechanics' Laundry & Supply Company and a member of Local 401 of the Stationary Engineers' Union, which on November 22, 1920, called a strike against the laundries. He first met Sweeney outside Engineers' Hall, 814 West Harrison street, the last week of November, 1920. On February 16, 1921, in the hallway outside of Engineers' Hall, Kerr, Sweeney, Bartlett, Turner, an engineer at the Beehive laundry who was on strike, Gibson, who was organizer for Local 402, Peterson, who was business agent of Local 401, and Corcoran, met, and Sweeney said the stuff was all ready to plant some bombs when they were ready to get them planted. Bartlett said it was real stuff. Turner said he wanted Beehive done. Peterson said, 'No; Mechanics' and Schriver's laundries.' Turner reminded Peterson of his promise that Beehive should be done first, and Peterson said, 'All right; I will keep my promise; we will do Beehive and Mechanics'.' Sweeney said, 'Give us three addresses; in case we miss Mechanics' and Beehive we can get the third one. Turner said, 'Make sure you give him the Beehive.' Peterson gave Sweeney addresses of the Beehive, Schriver's and Mechanics' laundries and said two were to be done that night. Turner said, 'Will you see us to-morrow? that will be Thursday, and I will give you a drawing of the rear of the Beehive laundry, where you can place the bomb.' Sweeney and Bartlett both assented and said that they would be back at the hall Thursday after they got the third party, to find out if they could work Friday night. Thursday at 1 o'clock there was another meeting of the same persons at the same place.

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Sweeney said, 'Everything is all set for ***505*** to-morrow night.' Gibson took $300 from his pocket and gave it to Kerr, to be paid to Sweeney and Bartlett when the jobs were done. Turner furnished the drawing to Sweeney and Bartlett, who said they would try to put it in the coal chute to demolish the engine room. Gibson wanted a receipt, and Sweeney said no receipts were going to be passed in this thing; that he would have to read the newspapers. That same afternoon Corcoran, Gibson, and Kerr were leaving the hall and met Sweeney and Bartlett at Van Buren and Halsted streets. Corcoran asked Sweeney if everything was all set for to-morrow night. Sweeney said, yes; that he was waiting for the other party that was to furnish the dynamite and throw the bombs to come around in an automobile. Corcoran and Gibson left, and at 10 minutes after 3 o'clock Bangora and Borigan came along in a touring car and stopped, and Sweeney went over and talked with them about 10 feet from Kerr and Bartlett. Kerr heard Bangora say: 'Yes, it is all set for to-morrow night; I have got the stuff and the two bombs are made; we will plant them to-morrow night; if I do not see you in the meantime I will meet you at the other corner at 7:30 to-morrow night; don't forget.' The car moved on and Sweeney came back to Kerr and Bartlett, and Kerr asked, 'Is that the party that you have been waiting for-that plants the stuff?' Sweeney said, 'Yes; that is him; everything is all set for to-morrow night; now, you better stay home to-morrow night and have an alibi, and tell Turner to do the same thing.' Kerr asked, 'Why does he want $25, instead of $10, in advance for the stuff?' Sweeney said, 'Well, because there are two bombs going; but what do you care? He has got the twenty-five anyhow.' Kerr said, 'Yes, it is not coming out of my pocket,' and asked, 'Where did you get the stuff?' Sweeney said, 'You can find out to-morrow night where the stuff is got; no, he gets it somewhere else and plants it, and when he takes us up he takes us out and we pick it up; that is the only trouble-***506*** he won't let us know where he gets it.' At 7:30 the next (Friday) night Kerr saw Sweeney and Bartlett standing at the corner of Van Buren and Halsted streets. Bangora and Borigan came up in a car, Sweeney and Bartlett got in, and they drove west. On the following Saturday Sweeney and Bartlett went to Kerr's house. Sweeney had a newspaper and showed the headlines to Kerr, saying, 'How does that look for advertising? 'Two Bombs Rock the West Side.' Look what they done! $25,000 Beehive, $10,000 to Mechanics'.' Sweeney told Kerr not to go near the hall that day, saying, 'They may make some arrests.' Kerr paid them the $300, taking Sweeney's receipt. The receipt read:

'Saturday, Febr. 19th, 1921.

'Received from Kerr $300.00 for Beehive Ldy. & Mechanics' Supply Co. Jobs.

J. Sweeney.'

Part of the body of the receipt was written with one pencil and the last line with another. Kerr testified that the first pencil broke and he used another to finish. Sweeney, as a witness, testified that he signed it in blank, along with several others, because Kerr asked him to do so, telling him that he had been spending some money and he wanted to make it all right with his wife.

Kerr testified that Sweeney told him how the bombs were set off, and this testimony appears in the abstract as follows:

'I asked Sweeney why they done the Mechanics' laundry. I did not think it ought to be done because they had the address of Schriver's and Beehive. Sweeney says: 'There was two coppers on the corner of Hoyne avenue and Van Buren, at the call box, and there was one at the call box at Van Buren and Robey, the next block, and Beehive is situated in between, so we could not come out that way from the alley entrance and we had to drive over to Congress street, and we always lit the fuse for the bombs in the car. We got confused with Turner's sketch. The orders were not to kill anybody on that Beehive job, and we did not want to kill any one on it, so we started looking for ***507*** the coal chute, and just as we were going to drop it in there the night watchman in the Beehive laundry came back and started shoveling coal in the boiler. We could not drop it in the boiler and demolish the boiler room or we would kill him. We had to be quick. The fuse was burning 2 1/2 minutes then. We had to run over across the street to get to the car. By the time we got 2 1/2 blocks north of there to go to Schriver's the bomb let go, so we figures we would run on over to Mechanics', and we drove there, and it was easy sailing there, and we planted the bomb in the back, like we had instructions to do.

Figuring that job, Siebert was sleeping in the engine room at the Mechanics' and they wanted to kill him. So we went over and planted it in the rear of Mechanics' laundry, got in the automobile again, and we would up at Fulton and Leavitt streets before the bomb exploded. From there we went on home. And here is the headline in the paper. Now maybe they will be satisfied. It is good advertising and they are getting off cheap. How is it there is only $300?' I told him, 'I don't know, but I will see them about the other $100.' He said, 'We want it and want it quick or I will use our own means to get it, and you know what our means is. We will set two bombs like that every two weeks. That will bring them to time."

Kerr also testified that Sweeney said he used two sticks of dynamite on each of those laundries, and that he gave Sweeney the balance of the $400, then amounting to $70, in a saloon at the corner of Jackson boulevard and California street on February 26th or 28th, and took from him a receipt which was in evidence, as follows:

'Mar. 1st.

'Received from Kerr $100.00 final payment of $400.00 for Beehive Ldy. & Mechanics' Supply Co.

J. Sweeney.'

Kerr had previously paid $30, taking no receipt. Sweeney testified that he signed this receipt also, but the words following, $100.00,' were afterwards added. Kerr ***508** testified that he had worked two years at the Mechanics' laundry and had not known Siebert before; that he knew that the explosion at the Mechanics' laundry was going to occur and it was the intention to kill Siebert; that he had not worked for the five months prior to the giving of his testimony, but had been living at the Brevoort Hotel with a policeman, paying no bills, and he expected nothing-neither reward nor punishment.

This testimony, if believed, was sufficient to require a verdict of guilty, but not only was the witness who gave the testimony an accomplice in the crime charged, but he displayed himself to be of such base, depraved, and vicious character-so free from any recognition of moral or legal obligation-that the jury might well have refused to base their verdict on his testimony alone. It was therefore of the utmost importance to a fair trial of the plaintiffs in error that no incompetent evidence should be admitted to corroborate Kerr's testimony.

The people offered in evidence a statement of Sweeney, made at detective headquarters on the night of May 22, 1921, in the presence of Charles Wharton and Milton Smith, assistant state's attorneys, Police Lieutenant Michael Hughes, Police Sergeant Charles E. Egan, and other police officers, and taken down in shorthand by Louis W. Temple. It was objected to and evidence was heard out of the presence of the jury as to the circumstances under which it was made. The only witnesses examined by the people were Egan and Temple. Egan was uncertain about the day of Sweeney's arrest, but said that he was taken from the place where he was arrested to detective headquarters. He was brought in in the afternoon, and Egan was called to headquarters at 7 o'clock in the evening by Chief Hughes. He saw Sweeney there go down into the cellroom. He next saw him about seven or eight hours afterwards upstairs in Chief Hughes' office, about 1 o'clock in the morning. There were present Hughes, Lieutenant O'Connor,***509** Egan, and Officers Gasperik and Paulding. Egan was in and out for two hours and Sweeney was being questioned. During that time he denied participation in the crime. He was being questioned from 1 o'clock in the morning until 3. Chief Hughes was questioning him in regard to bombs, in regard to his connection with Kerr, and his employment-getting his general history. Sweeney protested that he had nothing to do with the crime. Egan left after 3 o'clock. Everybody was getting ready to go when Egan left. Sweeney was still talking to Hughes. This was 3 o'clock in the morning, and Egan did not see Sweeney again until afternoon, when Sweeney was taken over to the state's attorney's office, where he was from 2 o'clock until 11 o'clock that night. Sweeney, Bartlett, Bangora, Borigan, Chief Hughes, Smith, Officers Paulding, Burke, and Egan, were there. They were in different rooms in the state's attorney's office. Egan was in Day's room and was in and out, and Sweeney was on a bench in the hall. During that time Egan says there were no threats or abuses shown to Sweeney, and as far as he knows no immunities or reward offered to Sweeney or any promise made to him if he would talk. Sweeney was taken from the state's attorney's

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office to the detective bureau. Different people were talking to him, among them Assistant State's Attorneys Smith and Wharton. Sweeney was there until 3 o'clock in the morning. The next afternoon Wharton, Smith, and Chief Hughes talked to Sweeney in Hughes' office. That conversation lasted until about half past 7 or 8 o'clock. Sweeney was being questioned with reference to his participation in the crime and denied it. Smith was questioning him. Wharton would interrupt once in a while and Hughes sometimes. Sweeney did not admit any participation in the crime. All went out to supper about 7 o'clock and Sweeney was put downstairs. Egan does not know what was done with him. After they came back, about 9 o'clock, he saw Sweeney in Hughes' ***510** office. Smith, Wharton, the stenographer, and Hughes were present. Egan was in and out there until 1 o'clock, when Sweeney made the statement. During the evening when he was there, no one, that he knew of, abused or mistreated Sweeney. Egan did not see anybody mistreat him or hear anybody make him any promise of immunity or reward or evasion of punishment if he would make a confession. Sweeney was being questioned again until 11 o'clock or later, when Kerr was brought in, and the questioning then went right on until 3 o'clock in the morning. Kerr did not participate in the questioning, but he spoke to Sweeney when he came in, saying, 'You might as well tell the truth; I have told everything;' and Sweeney said, 'I will tell all, but you will come along with me; you won't get out of it as easy as you think you will.' About half past 1 o'clock in the morning Sweeney started to make his statement. Hughes, Wharton, Smith, Egan, Sweeney, and Temple, the stenographer, were present.

Temple testified that he reported to the room on the second floor of detective headquarters about 8 o'clock in the evening; that he remained at the headquarters until morning, and at 1:30, when Sweeney made his statement, Temple took it down. There were present Chief of Detectives Hughes, Assistant State's Attorneys Wharton and Smith, Sergeant Egan, Officers Gasperik and O'Connor, and several other officers. Temple took stenographic notes of the questions asked by Wharton and Smith and one or two questions by the officers and of the answers made by Sweeney. The statement closed with this statement, made in answer to questions asked:

'This statement I have made is free and voluntary, of my own free will and accord. There have been no promises made or threats made. I do not expect any reward. I do not expect anything. There was no force used. I have been treated all right. The police have treated me fairly. Everything that happened here is the truth, the whole truth, all I know. I know ***511** Mr. Smith is an assistant state's attorney and Mr. Charles S. Wharton also an assistant state's attorney. I have made this statement in the presence of Charles Egan, William E. O'Connor and Chief of Detectives Michael Hughes. I realize that the statement can be used against me, if you want to use it against me, as to anything that is against me.'

Sweeney testified that he was arrested on Thursday, May 19th, at 1:30 or 2:00 o'clock, and kept at Brighton Park station until about noon the next day, at which time he was taken to Chief Fitzmorris' office in the city hall and kept there about an hour. He was then taken to the state's attorney's office and questioned for three or four hours by Smith, Wharton, and Chief Hughes, of the detective bureau. He remained in the state's attorney's office until early Saturday morning, when he was taken to a cell and remained there about 15 or 20 minutes, and then taken across the street to the central station by three officers. He was kept there about 15 or 20 minutes and was then taken to Chief Hughes' office. The three officers said, as they took him across the street, that they would show him the goldfish. They showed him the goldfish, which was a beating. They dragged him around by his hair and started beating him with a rubber hose. He said that Chief Hughes beat him, and two or three other officers whom he did not know by name; that Egan was there at the time and used his fist; that he could recognize the other two officers and had seen one of them in the courtroom since the trial started-that is, one besides Egan. He said that they told him at the time that he would either make a statement and come clean and tell everything he knew, and plenty besides, or be found out in some prairie. Wharton and Smith were not there at the time, but Chief Hughes told him he would be found out on the prairie. He was then taken downstairs to a cell for about three-quarters of an hour and then back to Hughes' office and again beaten. The police officers kept telling him to make a statement, and then he ***512** was dragged downstairs to a cell again for an hour or an hour and a half and was then taken upstairs and beaten again. From the time he was taken from the Brighton Park station he did not get any sleep, and he was given one sandwich to eat at the state's attorney's office and had one cup of coffee. After this final beating he made the statement which was admitted in evidence as his confession. The only contradiction of his testimony was Egan's statement which has

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been mentioned-that he did not see any ill treatment or abuse during the time he was present.

Bartlett testified that he was arrested about 1 o'clock Wednesday afternoon and taken to the Hudson avenue station until Friday afternoon, when he was taken to the office of the chief of police for about two hours. He was then taken to the state's attorney's office, where he was kept until about 2 o'clock in the morning, and during that time questioned by Smith, Wharton, and Hughes. He was then taken to the central station and kept there about two hours and then taken to Hughes' office. Hughes, O'Connor, Gasperik, and others, were there. They were hitting him. He did not talk. Saturday he was questioned 10 or 15 times. There was more violence on Sunday morning, when he was brought up the last time. He did not remember making any statement. While at Hudson avenue he got a sandwich now and then. On Friday he got one sandwich at the state's attorney's office, but he got nothing to eat Saturday and no sleep Saturday night.

[1] [2] [3] Confessions are competent evidence only when they are voluntarily made. People v. Buckminster, 274 Ill. 435, 113 N. E. 713. Whenever a confession is offered in evidence the defendant is entitled to have the evidence of the circumstances under which it was made heard by the court out of the presence of the jury for the purpose of determining whether the confession is admissible. On such hearing the defendant has the right to cross-examine the witnesses for the prosecution and to introduce evidence himself as to the circumstances ***513** of the confession, and after the hearing has a right to a preliminary ruling by the court as to the admissibility of the confession. Zuckerman v. People, 213 Ill. 114, 72 N. E. 741; Bartley v. People, 156 Ill. 234, 40 N. E. 831; People v. Rogers, 192 N. Y. 331, 85 N. E. 135, 15 Ann. Cas. 177; People v. Brasch, 193 N. Y. 46, 85 N. E. 809. This course was pursued in the present case, but there was no denial of the charge that these men, from the time of their arrest until the time that the statements were made, were continuously subjected by the state's attorneys and the officers having them in custody to prolonged questioning at unusual and unreasonable hours; that they were not allowed to sleep; that they were not given necessary food; and that they were beaten. The extent of Egan's testimony was that he did not know of any ill treatment, threats, or promises when he was present, but the specific facts stated in the testimony of the defendants were not met by any denial.

The duty of the prosecution in regard to confessions is indicated in the case of People v. Rogers, 303 Ill. 578, 136 N. E. 470, in which the state's attorney contented himself with examining the one man who knew the least about what had taken place, and it is said that the court was warranted in excluding the confession unless all the police department men engaged or present at the sweating of the defendant were called as witnesses and satisfied the court in good faith that the confession had not been so obtained by them. The court, in conducting this investigation for the purpose of determining whether the confessions were admissible in evidence, had no right to disregard the testimony of the plaintiffs in error that the confessions were forced from them by the torture of deprivation of food and sleep, by beating and physical violence, without even a denial of the facts to which they testified. The statements at the end of Sweeney's confession are of no weight, because they are a part of the confession procured by the same means at the same time and subject to the same infirmities. It was error to permit these confessions to go to the jury.

***514** It is argued that proper objection was not made to the introduction of these confessions; that at no time was an objection made on the ground that the confessions were not voluntary. When the state's attorney began an examination of Egan as to the statements of the defendants they objected, and thereupon the jury was withdrawn and evidence was introduced in regard to the circumstances under which the statements were made. The court and the state's attorney understood that the objection was that the confessions were not voluntary. The only object of the introduction of this testimony was to show that the statements were made under such circumstances that they were competent. The question was not however, left to stand on the general objection. After the preliminary evidence was heard, counsel for the defendant stated, 'My point is that they are proving the corpus delicti by a confession,' and the court overruled that objection; but before the matter was submitted to the jury an objection was made on behalf of Bartlett that the introduction of any statement by Sweeney was not permissible on the ground that his statement made out of the presence of Bartlett was not competent against him. The court overruled that objection, and

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thereupon the defendants made the further objection that no foundation had been laid for the introduction of Sweeney's statement. That is the objection that is presented here. The court overruled it, but he should have sustained it.

[4] Bartlett's confession was not offered in chief, but on cross-examination each question and answer contained in it was read to him, and he was asked if he had not made the answers contained in the statement to each one of the questions asked. He denied doing so, and in rebuttal his statement was introduced by way of impeachment. A general objection was made to the impeaching questions asked Bartlett on cross-examination, and after about half the questions and answers had been read to the witness an objection ***515*** was made that the cross-examination was not competent against Sweeney, whom the statement had implicated from the beginning. The court instructed the jury, orally, that nothing contained in the statement should be taken as evidence against Sweeney. This statement was not competent against Sweeney, and the error in its admission against him was not cured by the instruction. People v. Buckminster, supra. Though some of the questions had been permitted without the making of this objection, when the objection was made to other questions it should have been sustained.

[5] The objection made to the introduction of the statement in rebuttal by both the plaintiffs in error should have been sustained, because, since the statement was incompetent in chief because made under such circumstances as to be without probative value, it was equally without probative value in rebuttal by way of impeachment. Shephard v. State, 88 Wis. 185, 59 N. W. 449; People v. Yeaton, 75 Cal. 415, 17 Pac. 544; Harrold v. Territory of Oklahoma, 169 Fed. 47, 94 C. C. A. 415, 17 Ann. Cas. 868; Morales v. State, 36 Tex. Cr. R. 234, 36 S. W. 435, 846; Brown v. State, 55 Tex. Cr. R. 572, 118 S. W. 139.

[6] [7] The plaintiffs in error contend that there was no proof of the corpus delicti except by the confessions. There was evidence that a conspiracy existed, to which all the defendants were parties, to injure the property of the Beehive laundry and other laundries by the explosion of bombs; that the plaintiffs in error agreed to procure the bombs and cause them to be exploded at a certain time at the Beehive laundry and other places; that they said that they had made an appointment with the two conspirators who they said were to furnish the explosives and throw the bombs at a certain time and place; that at that time and place plaintiffs in error met the other two and they went away together in an automobile and soon afterward the explosion occurred at the time and place agreed upon; and this evidence tended to prove the charge that the defendants procured some explosive compound with intent that it should be used for the destruction of life and property, and that ***516*** they had some explosive compound with the intent that the same should be used to injure and destroy a building of the Beehive Laundry Company. On the cross-examination of Bartlett he was asked, and required to answer over objection, if he had ever been known as 'Soup' Bartlett. It is argued because the term 'soup' is a slang expression for nitroglycerine, that the question implied that the defendant was known by that name because of his habit of handling nitroglycerine. The question, under ordinary circumstances, might be harmless. There was no legitimate reason for asking it, and in a trial upon this charge it ought not to have been asked, for it was an intimation that the activities of Bartlett in connection with nitroglycerine had procured him the sobriquet.

[8] Kerr testified that in the morning after the explosion Sweeney produced a newspaper having these headlines over an account of the explosion and referred to it as a good advertisement: '2 Bombs Rock West Side; Laundries Wrecked in Labor War; Police Guard Area; Mysterious Third Blast is Heard.' It is claimed that the headlines were inadmissible because the article was mutilated and that the words themselves were prejudicial. The articles were produced by Sweeney as evidence of the fact that the plaintiffs in error had rendered the services for which they were employed, and it was not error to admit them.

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[9] It is insisted that it was error to give the following instruction:

'The court instructs the jury that any person abetting or in any way assisting in making, manufacturing, compounding, buying, selling, procuring, disposing of, storing, removing, or transporting any dynamite, nitrochlorate or other explosive compound as above named, either by furnishing the materials, ingredients, skill, means, or labor, or by acting as agent of in any manner acting as accessory before the fact, knowing or having reason to believe that the same is intended to be used by any person or persons in ***517** any way for the unlawful injury to or destruction of life or property, shall be deemed a principal and, upon conviction, shall be subject to the same punishment as provided in section 1 of this act.'

This instruction is a copy of section 2 of the act under section 1 of which the defendants are indicted. It is not applicable to either count of the indictment against plaintiffs in error or based on the evidence. It ought not to have been given.

The plaintiffs in error were sentenced under the Parole Law and argue that it is unconstitutional. It has often been held constitutional. People v. Doras, 290Ill. 188, 125 N. E. 2; People v. Connors, 291 Ill. 614, 126 N. E. 595; People v. Martin, 303 Ill. 233, 135 N. E. 404.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

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PEOPLE v. SWEENEY
304 Ill. 502, 136 N.E. 687

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88 Wis. 185, 59 N.W. 449

Supreme Court of Wisconsin.
STATE
v.
SHEPARD ET AL.
May 25, 1894.

Error to circuit court, Ashland county; J. K. Parish, Judge.
Joseph Shepard and others were convicted of robbery and stealing from the person, and bring error. Reversed.

West Headnotes

KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.5 Curing Error by Withdrawal, Striking Out, or Instructions to Jury
110k1169.5(5) k. Admissions, Declarations, and Hearsay; Confessions. Most Cited Cases

Error in admitting a confession, incompetent because made under duress, is not cured by a subsequent exclusion thereof.

KeyCite Notes

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k390 Competency of Evidence of Inconsistent Statements in General
410k390.1 k. In General. Most Cited Cases
(Formerly 410k390)

Where a confession has been improperly admitted, and excluded, and defendant offers himself as a witness, it is error to permit him to be asked whether he made such confession, and, on his denial, to allow evidence that he did make such confession, and the particulars thereof, for the purpose of contradicting the witness.

***449** A. R. Mead, for plaintiffs in error.
J. L. O'Connor, Atty. Gen., and J. M. Clancey, Asst. Atty. Gen., for the State.

ORTON, C. J.
The defendants were in formed against, tried, convicted, and sentenced to imprisonment in the state prison for the crime of robbery and stealing from the person of one Joseph Preedon the sum of $20. As we understand the record, there are but two assignments of error: (1) The court admitted in evidence the confession of the defendant Joseph Shepard to the police officers while he was in custody in the common jail, and the evidence had its effect on the jury, and then the court excluded it as being a confession made under duress, and extorted by threats, promises, and by falsehood. The

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court should have determined whether the confession was admissible before it was given in evidence. (2) That the court, after having excluded the confession as incompetent, allowed the district attorney to cross-examine the defendant Shepard, who had offered himself as a witness, as to whether he made such confession, and, he having denied it, allowed evidence on behalf of the state to contradict the testimony of Shepard by evidence that he did make such confession, and the particulars thereof.

1. We are of the opinion that said first error is well assigned. The testimony was before the court as to the manner in which the confession had been obtained, and the court should have decided it as a preliminary question before admitting the whole confession in evidence. Every word of the confession was fastened on the mind of the jury, and had made its impression there against the accused. Its subsequent rejection by the court would not erase or remove that impression. It had produced its lasting effect upon the jury, and must have affected their verdict. The remarks of the learned judge in ruling upon the objections to the evidence were well calculated to deepen the impression already made by the evidence upon the minds of the jury. We cannot but think that this was a material error, and prejudicial to the accused.

2. The method here adopted to get the confession of Joseph Shepard in evidence, after it had been excluded by the court as being incompetent and inadmissible by reason of its having been extorted by promises of immunity and threats of injury and by falsehood, was certainly very ingenious and plausible. ***450** It would seem as if it was made to fit the case of Com. v. Tollifer, 119 Mass. 313. It was this case that induced the court to admit the evidence. That was also a case of robbery, and by more than one defendant, and one of them made a confession to the officers in the jail. The testimony of the officer was first taken as to the manner in which the confession was obtained (and the manner was about the same as in this case), and the court ruled that the confession was incompetent, and should not be introduced in evidence. About the only difference from this case is that the jury did not hear the confession. It is to be regretted that the court did not follow that case in this respect. The case is not very fully reported, but the principle established seems to be that although the testimony of the confession was incompetent, yet, where the accused offered himself as a witness, he became such, as any other witness, and might be asked whether he made the confession, and, if he denies it, the confession itself might be proved to contradict him by way of impeachment. No other reason is given. The case is unsatisfactory, and we cannot follow it. The confession was rejected because it was extorted. It was unfair to the accused, and should not be proved against him, and is condemned by the court and ruled out. When the defendant was asked if he made that confession, and denied it, the same witnesses who extorted the confession, and whose testimony was disallowed on that account, are allowed to testify to the confession, however wickedly or wrongly it was obtained, on the exceedingly narrow theory that it is not admitted as a confession, but merely to contradict the witness. The confession is allowed to go to the jury, and have its effect in convicting the defendant, and override the ruling of the court that it was inadmissible as evidence against him, and for such a petty reason. The confession is just as objectionable as evidence, and as incompetent and hurtful, when offered in one way as in another. If no other evidence on the ground of contradicting the defendant as a witness could be found, he had better have gone uncontradicted than that his legal rights as a prisoner should be so violated, and his conviction obtained by such unlawful testimony. The object is to get the confession in evidence. It cannot be done directly, but it can be done indirectly. It cannot be used to convict, but it can be used to contradict, the defendant, and in that way it is used to convict him all the same. We cannot adopt such a principle or practice in the administration of criminal law. It is unreasonable as well as unjust. This evidence was inadmissible on the familiar ground that a witness cannot be cross-examined and contradicted in respect to matters not admissible in evidence as part of the case. Whart. Cr. Ev. 484. That confession first went to the jury, and produced its effect as evidence, before it was excluded by the court, and finally goes to the jury as competent evidence by way of contradicting the defendant. It seemed impossible to keep it out, however objectionable or incompetent it was as evidence against the accused. That it was incompetent is not an open question in the case. The court so decided in favor of the defendants.

For the above errors the judgment must be reversed, and a new trial ordered. The judgment of the circuit court is reversed, and the cause remanded for a new trial. The warden of the state prison at Waupun is hereby ordered to deliver the defendants into the custody of the sheriff of the county of Ashland, to be held by him until they are discharged from his custody according to law.

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344 F.2d 163, 120 U.S.App.D.C. 69

United States Court of Appeals District of Columbia Circuit.
Tommie A. JOHNSON, Appellant,
v.
UNITED STATES of America, Appellee.
Leon STEWART, Appellant,
v.
UNITED STATES of America, Appellee.
Nos. 18243, 18244.
Argued June 16, 1964.
Decided Oct. 15, 1964.
As Amended Nov. 13, 1964.FN*

FN* Senior Circuit Judge WILBUR K. MILLER not participating.

The defendants were convicted of an offense. The United States District Court for the District of Columbia, Warren E. Burger, J., entered judgment, and the defendants appealed. The Court of Appeals held that confession, which was obtained from one of the defendants under such circumstances as to render it inadmissible as part of the government's case in chief, was not admissible because defendant testified in his own behalf, where that defendant did not of his own accord exceed bounds of testimony necessary to his defense by making sweeping claims, and he merely offered his own version of the events charged in the indictment.
Judgments reversed for new trial as to both defendants.
Wilbur K. Miller, Circuit Judge, dissented.
See also, 120 U.S.App.D.C. , 344 F.2d 161.

West Headnotes

[1] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(3) k. Confessions While in Custody in General. Most Cited Cases

Confession obtained by police from one of the defendants who was not represented by counsel on May 26, 19 days after his preliminary hearing had been continued until May 28 to allow defendants to obtain and consult counsel, and while he was in jail, was inadmissible as part of government's case in chief.

[2] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k683 Scope of Evidence in Rebuttal
110k683(1) k. In General. Most Cited Cases

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Generally, evidence which is inadmissible to prove case in chief against defendant is inadmissible for all purposes, unless defendant himself introduces evidence or is in some manner estopped from objecting to its use.

[3] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(D) Procedures for Excluding Evidence
110k690 Right to Object
110k692 k. Estoppel or Waiver. Most Cited Cases

Evidence, which is inadmissible to prove case in chief against defendant, is not rendered admissible merely because defendant testified in his own behalf.

[4] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k683 Scope of Evidence in Rebuttal
110k683(1) k. In General. Most Cited Cases

Confession, which was obtained from one of defendants under such circumstances as to render it inadmissible as part of government's case in chief, was not admissible because defendant testified in his own behalf where that defendant did not of his own accord exceed bounds of testimony necessary to his defense by making sweeping claims, and he merely offered his own version of events charged in indictment.

***164 **70** Mr. Henry T. Rathbun (appointed by this court), Washington, D.C., for appellant in No. 18243, argued for both appellants.
Mr. Jack Marshall Stark (appointed by this court), Washington, D.C., was on the brief for appellant in No. 18244.
Mr. John A. Terry, Asst. U.S. Atty., with whom Messrs. David C. Acheson, U.S. Atty., Frank Q. Nebeker and Gerald A. Messerman, Asst. U.S. Attys., were on the brief, for appellee.

Before BAZELON, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

PER CURIAM:
Johnson and Stewart were interrogated by the police on May 26, 1963, 19 days after their preliminary hearing had been continued until May 28, to allow each defendant to obtain and consult counsel. At the time of the interrogation, which produced a confession by Johnson, appellants were not represented by counsel. They were then confined in the District of Columbia Jail, and were interviewed together there by a police officer.

[1] There is no longer any doubt that the confession obtained from Johnson, under such circumstances, was inadmissible as part of the Government's case in chief. Ricks v. United States, 118 U.S.App.D.C. 216, 334 F.2d 964, decided June 9, 1964. See also, Queen v. United States, 118 U.S.App.D.C. 262, 335 F.2d 297, decided June 29, 1964, Cf. Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

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The principal question in this appeal is whether the Government's use of the confession in rebuttal to Johnson's testimony fell within the limited exception to inadmissibility approved in Walder v. United States, 347 U.S. 62, 65, 74 S.Ct. 354, 98 L.Ed. 503 (1954).

Johnson testified that the complaining witness- Mr. R.- had paid him and his co-defendant twenty dollars to engage in unnatural sexual activities, and that, at the conclusion of those activities, the complaining witness and the two defendants engaged in a brief skirmish, during which each of the defendants struck Mr. R. once, and left the latter's office. Johnson denied the charge that he and Stewart had robbed Mr. R.

On cross-examination, the prosecutor asked Johnson whether he had admitted to a police officer, on May 26, 1963, that he and Stewart had forcibly taken two twenty dollar bills from Mr. R. after Mr. R. had changed his mind about having sexual relations and paying them twenty dollars apiece. Johnson denied making such a statement. The Government then called the police officer, who testified that such a statement was in fact made to him.

[2] [3] In general, evidence which is inadmissible to prove the case in chief is inadmissible for all purposes, unless the defendant himself introduces the evidence or is in some manner estopped from objecting to its use. The evidence ***165 **71** is not rendered admissible merely because the defendant testifies in his own behalf.[FN1] He 'must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief.' Walder v. United States, 347 U.S. 62, 65, 74 S.Ct. 354, 356, 98 L.Ed. 503 (1954).[FN2] Thus, in Agnello v. United States, 269 U.S. 20, 29, 46 S.Ct. 4, 5, 70 L.Ed. 145 (1925), the defendant, charged with conspiring to sell narcotics, 'testified on direct examination that he received the packages * * * (alleged to contain narcotics) but that he did not know their contents, and that he would not have carried them, if he had known that they contained * * * narcotics.' On cross-examination he replied in the negative to the question whether he had ever seen narcotics. Notwithstanding the breadth of the denial on direct and the negative reply on cross, the Supreme Court ruled that neither provided a basis for the introduction of narcotics illegally seized from his house.

> FN1. Cf. Harrold v. Territory of Oklahoma, 169 F. 47, 50 (8th Cir. 1909): 'The privilege granted to an accused person of testifying on his own behalf would be a poor and useless one indeed if he could exercise it only on condition that every incompetent confession induced by the promises, or wrung from him by the unlawful secret inquisitions and criminating suggestions, of arresting or holding officers, should become evidence against him.'
>
> FN2. But cf. discussion in Bailey v. United States, 117 U.S.App.D.C. 241, 328 F.2d 542 (1964). We do not regard our disposition of the present case as being in conflict with the actual holding of the majority in Bailey. Our own views, however, are more closely in accord with those which appear in the dissenting opinion of Judge Wright. Cf. White v. United States, No. 18355, decided Sept. 17, 1964.

In Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), the Court recognized an exception to the rule which forbids the admission of ill-gotten evidence. There, the defendant testified on direct that he had 'never sold any narcotics to anyone in my life' and had never possessed narcotics. Id. at 63, 74 S.Ct. at 355. On cross-examination the Government asked whether he had been in possession of certain narcotics on an occasion unconnected with the indictment being tried. When he denied this, the Government was allowed to impeach him by introducing evidence of the unconnected incident despite the fact that the narcotics in question had been seized illegally. The Supreme Court affirmed this action on the ground that the defendant had voluntarily made sweeping claims which 'went beyond a mere denial of complicity in the crimes of which he was charged,' and that the Government was entitled to protect itself by 'contradiction of his untruths.' 347 U.S. at 65, 74 S.Ct. 354. The Court quoted Michelson v. United States, 335 U.S. 469, 479, 69 S.Ct. 213, 93 L.Ed.

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168 (1948): 'The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.' Thus in choosing to do more than 'meet the accusation against him' (347 U.S. at 65, 74 S.Ct. 354) by putting in issue matters independent of the offense charged, Walder had opened himself to impeachment by evidence relating to such independent matters, [FN3] although that evidence would have been inadmissible on a trial concerned directly with the unconnected events.

FN3. The current editor of WIGMORE ON EVIDENCE criticizes Walder both on constitutional grounds and for violating 'the rule prohibiting contradiction on a collateral matter.' WIGMORE, EVIDENCE 15, p. 65 (3d ed. Supp.1962). Apparently the question of collateralness was not considered by the Court.

[4] In the present case, Johnson did not 'of his own accord' exceed the ***166 **72** bounds of testimony necessary to his defense by making 'sweeping claims.' He merely offered his own version of the events charged in the indictment. Moreover, the evidence used purportedly to impeach him was a confession of the very charge on trial, raising a clear likelihood of prejudice not present when, as in Walder, the impeaching evidence is unrelated to the indictment.[FN4] Thus the Walder exception does not allow the testimony regarding Johnson's confession. 'The Government could no more work in this evidence on cross-examination than it could on its case in chief.'[FN5] The officer's testimony directly challenged the innocence, not merely the credibility, of the defendants. To permit the Government to introduce illegally obtained statements which bear directly on a defendant's guilt or innocence in the name of 'impeachment' would seriously jeopardize the important substantive policies and functions underlying the established exclusionary rules.[FN6]

FN4. Cf. Lockley v. United States, 106 U.S.App.D.C. 163, 166-68, 270 F.2d 915, 919-921 (1959) (Burger, J., dissenting); Tate v. United States, 109 U.S.App.D.C. 13, 283 F.2d 377 (1960). And see Bailey v. United States, 117 U.S.App.D.C. 241, 328 F.2d 542, 546 n. 3 (1964) (Wright, J., dissenting).

FN5. Walder v. United States, 347 U.S. at 66, 74 S.Ct. at 356, describing the holding in Agnello.

FN6. See concurring opinion of Judge Washington in Tate v. United States, 109 U.S.App.D.C. 13, 18, 283 F.2d 377, 382 (1960).

Since Johnson's confession also explicitly implicated Stewart, the judgments below must be reversed for a new trial as to both defendants.[FN7]

FN7. In fact the police officer's testimony revealed that both Johnson and Stewart had confessed on the same occasion. Since Stewart did not take the stand, there was no foundation at all for introduction of his confession. His conviction would therefore appear to be reversible on this ground as well.

We reject appellants' allegations concerning the insufficiency of the Government's case; and since we order a new trial, it is unnecessary to consider appellants' objections to the trial court's instructions to the jury, not raised below. Nor do we consider the validity of the arrests, since the record upon that issue is presently inadequate and may be expanded upon remand.

So ordered.

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WILBUR K. MILLER, Circuit Judge, dissents. He would affirm.
C.A.D.C. 1964.
Johnson v. U. S.,
344 F.2d 163, 120 U.S.App.D.C. 69

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74 W.W.R. 674, [1971] S.C.R. 23, 12 C.R.N.S. 222, **11 D.L.R. (3d) 700,** [1970] 4 C.C.C. 27

1970 CarswellMan 62

R. v. Piche

Piche v. Reginam

Supreme Court of Canada

Cartwright, C.J., Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon, JJ.

Judgment: June 26, 1970

Counsel: S. M. Froomkin, for appellant.

H. E. Wolch, for Crown, respondent.

Subject: Criminal; Evidence

Evidence --- Confessions -- Distinguishing inculpatory and exculpatory statements.

Criminal Law -- Admissibility of Statement Given to Person in Authority -- No Distinction between Inculpatory and Exculpatory Statements.

Appeal from the judgment of the Court of Appeal for Manitoba (1969) 69 W.W.R. 336, 9 C.R.NS 311, [1970] 1 C.C.C. 57, quashing a jury's verdict of acquittal and directing a new trial.

The important issue on the present appeal was whether, in considering the admissibility of a statement given by an accused to a person in authority, any distinction was to be made between a statement that was inculpatory and one that was exculpatory.

It was held, per Hall, J., Cartwright, C.J., Abbott, Martland, Ritchie, Spence and Pigeon, JJ. concurring, Judson and Fauteux, JJ. dissenting, that notwithstanding the rule, as laid down in some of the authorities, that a distinction was to be drawn between inculpatory and exculpatory statements given to persons in authority, both kinds of

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statements were governed by the same rule as laid down in Ibrahim v. Reg., [1914] A.C. 599, at 609-10, 83 LJPC 185, and their admissibility was to be determined by reference to the question whether they were given voluntarily, in the sense that they had not been obtained from the accused either by fear of prejudice or hope of advantage exercised or held out by a person in authority, the proof of which lay upon the Crown.

Cartwright, C.J.:

1 The relevant facts and the course of the proceedings in the Courts below are set out in the reasons of my brothers Judson and Hall which I have had the advantage of reading.

2 I agree with the conclusion of my brother Hall that we are free to say and should say that no statement made by an accused to persons in authority should be admitted in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense stated by Lord Sumner in the passage from his reasons in *Ibrahim v. Reg.*, [1914] A.C. 599, 83 L.J.P.C. 185, quoted by my brother Hall, and that this rule applies whether the statement sought to be admitted is inculpatory or exculpatory.

3 I agree with the reasons of my brother Hall but wish to add a few words as to why, in principle, an involuntary exculpatory statement should be inadmissible.

4 The main reason assigned for the rule that an involuntary confession is to be excluded is the danger that it may be untrue but, as has been recently reasserted by this Court in *DeClercq v. Reg.*, [1968] S.C.R. 902, 4 C.R.NS 205, [1969] 1 C.C.C. 197, 70 D.L.R. (2d) 530, affirming [1966] 1 O.R. 674, [1966] 2 C.C.C. 190, the answer to the question whether such a confession should be admitted depends on whether or not it was voluntary, not on whether or not it was true.

5 It appears to me to involve a strange method of reasoning to say that an involuntary statement harmful to the accused's defence shall be excluded because of the danger of its being untrue, but that a harmful involuntary statement, of which there is not merely a danger of its being false but which the prosecution asserts to be false, should be admitted merely because, considered in isolation, it is on its face exculpatory.

6 If, on the other hand, one regards the rule against the admission of an involuntary statement as being based in part on the maxim *nemo tenetur seipsum accusare*, the right of an accused to remain silent is equally violated whether, when he is coerced into making a statement against his will, what he says is on its face inculpatory or exculpatory. I find it difficult to see how the prosecution can consistently urge that a statement forced from an accused is in reality exculpatory while at the same time asserting that its exclusion has resulted in the acquittal of the accused and that its admission might well have resulted in conviction.

7 In *Best v. Samuel Fox & Co.*, [1952] A.C. 716, 96 Sol J 494, [1952] 2 All E.R. 394, Lord Porter said at p. 727:

> ... The common law is a historical development rather than a logical whole, and the fact that a particular doctrine does not logically accord with another or others is no ground for its rejection.

8 In the same case Lord Goddard, who agreed in the result, said at p. 733:

> ... but English law is free neither of some anomalies nor of everything illogical, but this is no reason for extending them.

9 In my view, the supposed rule that an involuntary statement relative to the offence with which an accused is charged is admissible against him if on its face it is exculpatory is an anomaly which should be rejected from our law.

74 W.W.R. 674, [1971] S.C.R. 23, 12 C.R.N.S. 222, **11 D.L.R. (3d) 700,** [1970] 4 C.C.C. 27

10 While somewhat different considerations enter into some of the decisions of the courts of the United States, in my opinion, the law of Canada is correctly stated in the following passage from the reasons of Traynor, J., as he then was, in *People of State of California v. Atchley* (1959) 346 P 2d 764, at 769, 53 Cal 2d 160, quoted by Freedman, J.A. in the case at bar:

> Accordingly, any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily.

11 I would dispose of the appeal as proposed by my brother Hall.

***Fauteux, J.* concurs with Judson, J.:**

***Abbott* and *Martland, JJ.* concur with Hall, J.:**

***Judson, J.* (dissenting):**

12 The appellant, Ruth Thelma Piche, was charged with the non-capital murder of Leslie Pascoe in the early morning of November 1, 1968. She had been living with Pascoe since 1964. The two had had an evening of drinking on October 31, 1968, along with others. They returned home about midnight. There was evidence of quarrelling during the evening and also on their return home, and of more and heavier drinking, particularly on the part of Pascoe. At 2:30 a.m. on November 1, 1968 the appellant called a taxi, which took her and her infant child to her mother's apartment. At 10:30 a.m. on November 1, Pascoe's body was found in his apartment. He had been shot by a gun which was found on a gun-rack in the bathroom. The police interviewed the appellant on the morning of November 2. She was tried and acquitted on the charge of non-capital murder in February, 1969. In April, 1969, the full Court of Appeal, with one dissent, set aside the acquittal (1969) 69 W.W.R. 336, 9 C.R.NS 311, [1970] 1 C.C.C. 257, and ordered a new trial on the ground that there was error in law in the ruling of the trial Judge that a certain statement was inculpatory and had not been proved to be free and voluntary within the rules prescribed in *Boudreau v. Reg.*, [1949] S.C.R. 262, 7 C.R. 427, 94 C.C.C. 1, [1949] 3 D.L.R. 81, affirming 6 C.R. 394, 93 C.C.C. 55, 224. The majority in the Court of Appeal was clearly of the opinion that the statement was exculpatory and that it was not subject to these rules. On appeal to this Court, the same point is in issue.

13 The statement in question was given to the police by the appellant on November 2, 1968. It describes the events of the evening -- the drinking, the quarrelling, the return home and more drinking and quarrelling after the return home. Then she says that she decided to go to her mother's apartment with the child. She puts the time of the call for the taxi at 1:50 a.m. She says that when she left the apartment at 1:50 am., Pascoe was asleep on the chesterfield.

14 I agree with the majority opinion of the Court of Appeal that this statement is exculpatory and that no admission of guilt or of any essential element in the charge of non-capital murder can be found in it, and that the ruling of the trial Judge was erroneous when he made it subject to the rules relating to confessions. His reason for finding that the statement was inculpatory was that it contained statements which went to the questions of both opportunity and motive.

15 At the trial, the accused gave evidence that she took the rifle from the rack with the intention of committing suicide, that it accidentally discharged, with the bullet striking the deceased, and that she then left the apartment.

16 I cannot accept the trial Judge's reasoning in this case that the statement was inculpatory because it went to the question of both opportunity and motive. This particular statement denied guilt. It was an assertion by the accused that she had not shot the man. A statement denying guilt cannot be a confession. As *Wigmore on Evidence*, 3rd ed., vol. 3, said at p. 240: "This ought to be plain enough, if legal terms are to have any meaning and if the

spirit of the general principle is to be obeyed."

17 The problem we have here has been repeatedly before the courts since 1913, beginning with *Rex v. Hurd* (1913) 4 W.W.R. 185, 6 Alta. L.R. 112, 23 W.L.R. 812, 21 C.C.C. 98, 10 D.L.R. 475, in the Alberta Court of Appeal. The cases are all reviewed by Monnin, J.A. in the present case and by MacKay, J.A. in *Reg. v. Black and Mackie*, [1966] 1 O.R. 683, 49 C.R. 357, [1966] 3 C.C.C. 187, 54 D.L.R. (2d) 674 (C.A.).

18 The Courts of Appeal in Alberta, British Columbia, Manitoba and Ontario have all held that a statement denying guilt is not subject to the confession rule. The only possible exception to this line of authority is to be found in the judgment of the Saskatchewan Court of Appeal in *Rex v. Scory*, [1945] 1 W.W.R. 15, 83 C.C.C. 306, [1945] 2 D.L.R. 248. The British Columbia Court of Appeal refused to follow this decision. In so doing I think they were right. *Rex v. Scory* is out of line with all other authority in this country. In that case the charge was "rape" and the defence at trial was "consent". The accused was asked on cross-examination whether when questioned by the police he had not given another innocent explanation, namely, that he was not there at all. This line of cross-examination to me is clearly permissible but it was stopped. It may well be that the foundation for the decision in the *Scory* case was an adherence to what was thought to be the principle in *Gach v. Reg.*, [1943] S.C.R. 250, 79 C.C.C. 221, [1943] 2 D.L.R. 417, to the effect that incriminating statements made by a person under detention as a result of questions put to him by a person in authority were not admissible in evidence unless a proper warning had been given him. It was stated in *Boudreau v. Reg., supra*, that this dictum in the *Gach* case was *obiter*. The *Boudreau* case expresses the true rule in this country, that the test for the admissibility of a confession is voluntariness.

19 Two statements were involved in the *Boudreau* case. The first was the result of questioning before a warning had been given. The first statement was essentially an alibi. The second statement after the warning had been given admitted the murder. With one exception all the members of the Court held that the statements were voluntary. As to the first statement, the majority held that it was incriminating and not exculpatory. Rinfret, C.J. and Taschereau, J. dissented on this point. They would have held that in any event the confession rule did not apply.

20 The dissenting reasons in the Manitoba Court of Appeal in the present case refer to recent developments in the United States which indicate that there is no difference between a confession and an exculpatory statement. The matter seems to be summed up on this point in an article entitled "Developments In The Law -- Confessions", Harvard Law Review, vol. 79, 1965-66, P. 935, as follows at pp. 1032-3:

> Since *Bram v. U.S.* (1897) 168 US 532, 18 S Ct 183, 42 L ed 568, the federal courts have generally applied the rules for confessions to admissions and exculpatory statements, although there have been occasional dicta to the contrary. In *Bram*, the defendant had been told that another suspect had seen him commit the crime, to which he replied 'he could not see me from there.' Although the statement was intended as a denial of the accusation, the prosecution offered it on the theory that the accused had tacitly admitted that the suspect might have seen the crime from some other place. The Supreme Court, in requiring the application of voluntariness rules, seemed unconcerned by the exculpatory nature of the statement.
>
> There is a certain trend in recent years to adopt this liberal viewpoint. In *People of State of California v. Atchley* [*supra*], the Supreme Court of California ruled that 'any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily.' In doing so, the court that had once been so quick to distinguish between confessions and admissions in the application of the voluntariness rules pointed out that the rationale for exclusion was equally persuasive for both kinds of statements. In Oregon, a 1957 amendment to the Criminal Code extended the rules for confessions to cover admissions. And Rule 63 (6) of the Uniform Rules of Evidence, which is in effect in Kansas, requires a showing of

> voluntariness for any statement 'relative to the offense charged.' But in spite of this trend, probably most states still accept Wigmore's view that admissions are not subject to the rules of voluntariness.

21 The test which has led to this development seems to be that a confession must be the result of a free and reasoned choice, and that no distinctions among the categories of out-of-court statements can constitutionally be made, and that the test for admissibility must be the same for confessions, admissions and exculpatory statements.

22 Turning now to the position in England, the starting point must be *Ibrahim v. Reg.*, [1914] A.C. 599, 83 L.J.P.C. 185. The *Ibrahim* case was concerned with a confession. The statement was brief. It was this: In answer to the question why he had done such a senseless act, the accused said (p. 602): "Some three or four days he has been abusing me; without a doubt I killed him." The case was not concerned with an admission falling short of a confession. Nothing, in my opinion, turns upon the use of the word "statement" rather than "confession". Nor did it in *Boudreau v. Reg.*, which adopted the *Ibrahim* case as the standard to be followed in this country.

23 *Commnrs. of Customs & Excise v. Harz and Power*, [1967] 1 A.C. 760, [1967] 2 W.L.R. 297, 51 Cr. App. R. 123, [1967] 1 All E.R. 177, involves what are called admissions which were the result of prolonged questioning. The accused were charged with defrauding the revenue. Customs officers seized whatever books were available and then began to ask questions. One of the accused, Harz, said "We are not talking", but the officers told him that he would be prosecuted if he did not answer and he did give certain answers on that occasion. On subsequent occasions there was further questioning and he made certain incriminating admissions. The conclusion of the House of Lords was that these admissions would not have been made unless there had been a threat of prosecution for refusal to answer, that there was no right to require Harz to submit to this prolonged interrogation and that he could not have been prosecuted for refusal to answer. These are the facts of the case and I do not think that the case is authority for anything more than this, that there is no distinction in principle between a man being induced by a threat to make a full confession and a man similarly induced making merely one or more incriminating admissions.

24 This is the extent of the case and it is so stated in *Phipson on Evidence*, 11th ed., par. 791. It can have no application to a case where there is a complete denial of commission of the crime as there is here.

25 The practical importance of the case under review is obvious. It is an essential part of the work of the police to ask questions of suspects. It is only when the stage of confession is reached that the confession rules apply. If a person chooses to give the police an innocent explanation of his conduct and then at the trial goes into the witness box and gives another innocent explanation inconsistent with the first, it is entirely appropriate for Crown counsel to cross-examine on this discrepancy and the reasons for it. This is particularly needed when an alibi is set up as a defence. There is no legislation in this country corresponding to the English legislation, sec. 11 of the *Criminal Justice Act, 1967* (Imp.), 15 & 16 Eliz. II, ch. 80, which requires the early and complete disclosure of the evidence in support of an abili. There should be no recognition of any right on the part of an accused person to tell the police one innocent story and then tell another innocent story in the witness box without the jury knowing anything about the conflict between the two.

26 I would adopt the review of the problem contained in the reasons of Monnin, J.A. in this case and of MacKay, J.A. in *Reg. v. Black and Mackie, supra.* I would dismiss the appeal.

***Ritchie, J.* concurs with Hall, J.:**

***Hall, J.*:**

27 The appellant was tried before Hunt, J. and a jury on an indictment charging:

> That she the said Ruth Thelma Piche on or about the 1st day of November, A.D. 1968 at the City of St.

74 W.W.R. 674, [1971] S.C.R. 23, 12 C.R.N.S. 222, **11 D.L.R. (3d) 700,** [1970] 4 C.C.C. 27

> Vital in the Eastern Judicial District in the Province of Manitoba did unlawfully murder Leslie Harrison Pascoe and thereby committed non-capital murder.

28 She was acquitted. The Crown appealed to the Court of Appeal for Manitoba which Court (Freedman, J.A. dissenting) quashed the verdict of acquittal and directed a new trial (1969) 69 W.W.R. 336, 9 C.R.NS 311, [1970] 1 C.C.C. 257.

29 The issue in the Court of Appeal involved the rejection by the learned trial Judge of a statement made by the appellant to the police when she was questioned shortly after the discovery of Pascoe's body, whose death was said to have occurred between 1:22 a.m. and 4:22 a.m. on November 1, 1968. The appellant had been cohabiting with the deceased for some considerable time prior to his death. After a lengthy *voir dire* Hunt, J. held that the statement had not been made voluntarily and did not receive it in evidence.

30 The Court of Appeal was asked to decide whether or not the statement was "inculpatory" or "exculpatory". The Crown's position was and is that if the statement was inculpatory, the ruling by Hunt, J. was not, in the circumstances of this case, subject to review; if exculpatory, the *voir dire* was unnecessary and the statement should have been admitted when tendered by the Crown.

31 In the statement given to the police the appellant said that she had not heard of Pascoe's death until after she arrived at her mother's home, having left the deceased fast asleep in the apartment they both occupied at or about 1:50 a.m. the same morning. The important portion of the statement read:

> I lay there about five or ten minutes and couldn't go to sleep so I got up and telephoned my mother, she was home so I told her I was coming over to her place. I then 'phoned for a taxi, Duffy's, then went and dressed Lisa. I put a coat, a sweater, shoes and socks on her and I too got dressed. Les. was still asleep. I left the house at 1.50 in the morning I think. After I arrived at my mother's I slept on the chesterfield with Lisa. When I got there my mother was up and so was her boarder Maurice Laliberty. I told them we'd had a fight and that I wanted to stay with my mom.

32 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. In her statement to the police she had admitted that she knew where the rifles and the pistol were kept in the bathroom and that she knew how to open them and had taken them from the rack a week before.

33 In dealing with the opposite contentions Monnin, J.A., for the majority, said at p. 351:

> The only point in issue, as far as I am able to see, is whether this statement was exculpatory or inculpatory. The matter is not free from doubt; it has caused great difficulty to the profession and the bench over the years. With respect, the conflicting decisions have added to the confusion rather than helped to solve the problem. *Clear and easily understandable guidelines are necessary.* (Emphasis added.)

34 He proceeded to a full review of the relevant authorities as he saw them, and concluded (p. 365):

> Without difficulty I hold that in this case the statement was exculpatory and that consequently the rule as to confessions does not apply. It ought to have been ruled admissible without a *voir dire.* With respect for those who hold a contrary view, I have no hesitation in concluding that the learned trial judge was in error

74 W.W.R. 674, [1971] S.C.R. 23, 12 C.R.N.S. 222, **11 D.L.R. (3d) 700,** [1970] 4 C.C.C. 27

in proceeding with a trial within a trial and in ruling that the statement was inculpatory.

35 Freedman, J.A. in his dissent, said at p. 341:

> We should be clear on what the crown's submission involves. The crown asks for the introduction in evidence of a statement which the learned trial judge has, with justification, found to have been induced by persons in authority and which therefore could not qualify as voluntary. The finding of the court against voluntariness makes no difference, says the crown. Voluntary or involuntary, the statement was admissible, because it was exculpatory. So we are being invited to set aside the jury's verdict of acquittal in order that on a new trial this involuntary, induced statement should be placed before the jury. Unless clearly obliged by law to do so a court, in my view, should be slow to accede to such a course.

36 And concluded on this aspect of the case that the Court was without jurisdiction to hear the Crown's appeal, being of the view that the appeal did not raise a question of law in the strict sense. However, having so expressed himself, he continued at p. 344:

> This lends weight to the conclusion I have reached that the present appeal goes beyond a mere question of law. In the light of that conclusion I could end here by dismissing this appeal for lack of jurisdiction. But if I should be wrong in this -- and the fact that the other members of the Court take an opposing view makes this a distinct possibility -- it might be desirable for me to add some observations on issues that become applicable if jurisdiction to hear this appeal exists.

37 And came to the conclusion that in his opinion Hunt, J. was right in holding the statement to be inculpatory. He then continues at p. 346:

> I move to another issue. Assuming, contrary to the learned judge's ruling, that the statement was wholly exculpatory, is it then outside the rule? Does it become admissible without any proof that it was voluntary? Yes, say most Canadian judges. No, say a few dissenters. The jurisprudence on the subject is referred to in the judgment of my brother Monnin. But, somewhat surprisingly, till now there has been no express majority opinion on the point by the Supreme Court of Canada. Hence the question may still be regarded as open. That certainly appeared to be the view of the court of appeal of Ontario when, in the relatively recent case of *Reg. v. Black and Mackie*, [1966] 1 O.R. 683, 49 C.R. 357, [1966] 3 C.C.C. 187, 54 D.L.R. (2d) 674 , the majority could write thus at p. 708:
>
> 'It is quite clear that the rules which govern the admission of the confession relate generally to what may be called inculpatory statements; if the statement is totally exculpatory in its nature other considerations may or may not apply. The cases are in conflict on this point.'

38 Having researched all the relevant decisions of this Court on the subject of inculpatory *vis-à-vis* exculpatory statements, I have concluded that Freedman, J.A. was right when he said: "*But, somewhat surprisingly, till now there has been no express majority opinion on the point by the Supreme Court of Canada. Hence the question may still be regarded as open.*" (Emphasis added.)

39 The leading authority in this Court is *Boudreau v. Reg.*, [1949] S.C.R. 262, 7 C.R. 427, 94 C.C.C. 1, [1949] 3 D.L.R. 81, affirming 6 C.R. 394, 93 C.C.C. 55, 224. This case was heard by Rinfret, C.J. and Kerwin, Taschereau, Rand, Kellock, Estey and Locke, JJ. Rinfret, C.J. and Taschereau, J. (as he then was) expressly drew a distinction between inculpatory and exculpatory statements while Kerwin, J. (as he then was) and Kellock, J. implicitly accepted such a distinction. The other three members of the Court did not discuss the issue of inculpatory versus exculpatory statements.

74 W.W.R. 674, [1971] S.C.R. 23, 12 C.R.N.S. 222, **11 D.L.R. (3d) 700,** [1970] 4 C.C.C. 27

40 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 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.

41 The classic case upon which virtually all recent decisions on the subject are based is *Ibrahim v. Reg.*, [1914] A.C. 599, 83 L.J.P.C. 185, in which Lord Sumner said at pp. 609-10:

> 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, 62 L.J.M.C. 93. (Emphasis added.)

42 It is of importance to note that in this passage Lord Sumner does not qualify the word "statement" in any way, but says that *no* statement by an accused is admissible. In the *Boudreau* case Rand, J. said at pp. 269-70:

> The cases of *Ibrahim v. Reg.* [*supra*], *Rex v. Voisin*, [1918] 1 K.B. 531, 87 L.J.K.B. 574, and *Rex v. Prosko* (1922) 63 S.C.R. 226, 37 C.C.C. 199, 66 D.L.R. 340, affirming 33 Que. K.B. 497, 40 C.C.C. 109, 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*? (Emphasis added.)

43 A rule that exculpatory statements made to a person in authority by an accused shall be subject on a *voir dire* to the same requirements as inculpatory statements will not handicap the Crown. If the statement was given voluntarily, it will be admitted; if not given voluntarily and the trial judge so rules, it will not be admitted. The confusion which appears to have plagued trial judges and appeal courts on the issue of inculpatory or exculpatory statements being admissible with or without a *voir dire* appears to stem from a passage in *Wigmore on Evidence*, 3rd ed., vol. 3. *Wigmore* concludes his discussion of the matter by saying at p. 243:

> ... Confessions are thus only one species of admissions; and all other admissions than those which directly touch the fact of guilt are without the scope of the peculiar rules affecting the use of confessions.

44 Although *Wigmore* is an American author, the courts of the United States have not followed his view on this important aspect of the law of evidence. In *Opper v. U.S.* (1954) 348 US 84, 75 S Ct 158, 99 L ed 101, Reed, J., delivering the judgment of the Supreme Court, after referring to the passage from *Wigmore*, said at p. 91:

> It is urged by the Government, however, that such requirement should not apply to exculpatory statements, that is, those that explain actions rather than admit guilt. It is thought that exculpatory statements do not have behind them the pressure of coercion or the inducement of escaping the consequences of crime. This accords with Professor Wigmore's view. The statements here are exculpatory. There is no opinion of this Court declaring or declining such an exception. We conclude that exculpatory statements, however, may not differ from other admissions of incriminating facts. Given when

74 W.W.R. 674, [1971] S.C.R. 23, 12 C.R.N.S. 222, **11 D.L.R. (3d) 700,** [1970] 4 C.C.C. 27

> the accused is under suspicion, they become questionable just as testimony by witnesses to other extrajudicial statements of the accused.

45 The same position was taken by Brennan, J. in the Supreme Court in *Wong Sun v. U.S.* (1963) 371 US 471, 83 S Ct 407, when he said at p. 487:

> The Government also contends that Toy's declarations should be admissible because they were ostensibly exculpatory rather than incriminating. There are two answers to this argument. First, the statements soon turned out to be incriminating, for they led directly to the evidence which implicated Toy. Second, when circumstances are shown such as those which induced these declarations, it is immaterial whether the declarations be termed 'exculpatory.' Thus we find no substantial reason to omit Toy's declarations from the protection of the exclusionary rule.

46 Of greater significance is the very recent decision in the House of Lords in *Commnrs. of Customs & Excise v. Harz and Power*, [1967] 1 A.C. 760, [1967] 2 W.L.R. 297, 51 Cr. App. R. 123, [1967] 1 All E.R. 177. In that case, Harz was the central figure of an alleged conspiracy involving an agreement to defraud the Department of Revenue by covering up the real amount of trading in goods which were subject to purchase tax. The Crown wished to put in as evidence statements made to customs officers as well as data extracted from their books. The House of Lords held that under the statute involved the officers had no right to submit the trader to interrogation. However, there were very strong dicta concerning the common-law position. Lord Reid said at pp. 817-8:

> Then it was argued that there is a difference between confessions and admissions which fall short of a full con fession. ... 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. In similar circumstances one man induced by a threat makes a full confession and another induced by the same threat makes one or more incriminating admissions. Unless the law is to be reduced to a mere collection of unrelated rules, I see no distinction between these cases. And it is noteworthy that the new Judges' Rules published in 1964 (Home Office Circular No. 31/1964, p. 5) make no such distinction. They are clear and emphatic:
>
> '... (*e*) That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer, or of *any statement* (my italics) made by that person that it shall have been voluntary in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority or by oppression. The principle set out in paragraph (*e*) above is overriding and applicable in all cases.'

47 The above par. (*e*), taken from the Judges' Rules, is quoted *verbatim* in *Phipson on Evidence*, 11th ed., par. 791, and the learned author continues by saying:

> The classic formulation of the principle applicable to the admissibility of confessions appears in Lord Sumner's speech in *Ibrahim v. Reg.* [*supra*], at pp. 609-10. '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 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 Hale.'

48 Lord Reid also discussed the landmark case of *Ibrahim v. Reg., supra*, and noted that it made no distinction between confessions and admissions. That case held that *no* statement is admissible unless made voluntarily. *Phipson* emphasizes this fact in footnote 5 on p. 349 where he says: "Note, too, the principle formulated by Lord

74 W.W.R. 674, [1971] S.C.R. 23, 12 C.R.N.S. 222, **11 D.L.R. (3d) 700,** [1970] 4 C.C.C. 27

Sumner commences with the words 'no statement ....'"

49 On the basis that there is no distinction to be drawn between inculpatory and exculpatory statements as such in so far as their admissibility in evidence when tendered by the Crown is concerned, I would allow the appeal and restore the verdict of acquittal rendered by the jury.

***Spence, J.* concurs with Cartwright, C.J. and Hall, J.:**

***Pigeon, J.* concurs with Hall, J.:**

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ANNEX G

Authorities on the need for a full hearing regarding the entirety of the circumstances surrounding a defendant's statements or confessions

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2005 WL 2484702 (UN ICT (Trial)(Yug))

International Criminal Tribunal for the Former Yugoslavia
In the Trial Chamber

Decision

PROSECUTOR
v.

SLOBODAN MILOSEVIC

Case No. IT-02-54-T

Decision: 9 June 2005

DECISION ON PROSECUTION MOTION FOR VOIR DIRE PROCEEDING

Office of the Prosecutor: Ms. Carla Del Ponte, Mr. Geoffrey Nice

The Accused: Mr. Slobodan Milosevic

Court Assigned Counsel: Mr. Steven Kay, QC, Ms. Gillian Higgins

Amicus Curiae: Prof. Timothy McCormack

Before: Presiding Judge Patrick Robinson, Judge O-Gon Kwon, Judge Iain Bonomy
Registrar: Mr. Hans Holthuis

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal"), is seised of a "Prosecution Motion for a Voir Dire Proceeding", filed 2 June 2005 ("Motion"), and hereby renders its decision thereon,

Procedural history

NOTING the following:

(1) after Prosecution challenges to the evidence of Defence Witness Dragan Jasovic ("witness"), the Trial Chamber issued its "Decision on Testimony of Defence Witness Dragan Jasovic", on 15 April 2005, wherein it ordered as follows: (a) the witness may be examined in connection with statements he had taken from declarants in Kosovo ("statements"); (b) the statements the Accused sought to tender into evidence through the witness were admissible, if they were found to have sufficient indicia of reliability; (c) determination of the admissibility of a statement would only be made after it had been translated and the evidence of the witness had been concluded; and (d) the Trial Chamber would make further orders in respect of the witness and the statements as necessary;

(2) the witness testified on direct-examination on 25-27 April 2005;

(3) the Trial Chamber decided that the witness should return for cross-examination at a later date in order to afford the Prosecution adequate time to prepare; [FN1]

1. See "Order Rescheduling Cross-Examination of Defence Witness Dragan Jasovic", issued 11 May 2005.

(4) at the hearing held on 27 May 2005, the Prosecution requested that the Trial Chamber conduct a voir dire proceeding to enable the Prosecution to challenge the reliability of the witness' proposed

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evidence; and

(5) the Trial Chamber instructed the Prosecution to file its submissions in writing, [FN2]

2. T. 40066 (27 May 2005).

CONSIDERING that, although arguments of the parties during the hearing on 27 May 2005 were initially conducted in private session at the request of the Prosecution, [FN3] the stated reason for the requested private session no longer exists, [FN4] and the subsequent filings of the parties were filed publicly; the Trial Chamber thus will request the Registry of the International Tribunal to make this material public,

3. T. 40041-40054 (27 May 2005).

4. See T. 40041-40042 (27 May 2005).

Arguments of the parties

NOTING the following:

(1) the Prosecution's request, set forth in the Motion, that the Trial Chamber grant the Prosecution's request to conduct a voir dire (or "trial within a trial") to determine whether evidence prepared by the witness should be excluded pursuant to Rule 95 of the Rules of Procedure and Evidence ("Rules"); [FN5] and

5. Motion, at para. 6.

(2) the following arguments, inter alia, set forth in the Motion: [FN6] (a) in order for Rule 95 of the Rules to have any effect, the Trial Chamber must permit a party challenging the reliability of evidence produced by an opposing party to present evidence, in certain circumstances, demonstrating the unreliability of the material offered for admission; [FN7] and (b) admission of the proposed evidence would seriously damage the integrity of the proceedings pursuant to Rule 95 of the Rules, [FN8]

6. The Trial Chamber has also considered the arguments set forth in the "Prosecution's Submissions Concerning a 'Voir Dire' Proceeding to Establish the Reliability of Defence Evidence", filed 30 May 2005.

7. Motion, at para. 2.

8. Motion, at para. 3.

NOTING the "Assigned Counsel Reply to Prosecution's Submission Concerning a 'Voir Dire' Proceeding to Establish the Reliability of Defence Evidence", filed 3 June 2005 ("Response"), in which Assigned Counsel, inter alia,

(1) submit that the voir dire proceeding proposed by the Prosecution is not the appropriate means by which to challenge the admissibility of the proposed evidence in the circumstances of this case; [FN9]

9. Response, at para. 19.

(2) argue that, (a) although there is scope pursuant to Rule 54 of the Rules for a voir dire proceeding by which a party may challenge the admissibility of evidence pursuant to Rule 95 of the Rules, [FN10] (b) the Prosecution must fulfil the stringent requirements of Rule 95 of the Rules beyond reasonable doubt in order to exclude the proposed evidence, and (c) the proposed evidence that the Prosecution seeks to call during the voir dire proceeding would not fulfil either of the Rule 95 limbs, namely that there is substantial doubt as to the reliability of the evidence or that it is antithetical to and would seriously damage the integrity of the proceedings; [FN11]

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10. Response, at paras 5, 10-12.

11. Response, at paras 5-6, 13-14.

(3) remind the Trial Chamber of frequent attempts by the Prosecution to adopt strategies for the introduction of material in cross-examination which the Prosecution objected to during its own case-in-chief; [FN12] and

12. Response, at para. 17.

(4) submit that, in the circumstances where statements have been prepared for current litigation before this Tribunal, such statements are admissible only if tendered pursuant to Rules 89(F) and 92bis of the Rules, [FN13]

13. Response, at para. 16.

NOTING the "Prosecution's Reply to 'Assigned Counsel Reply to Prosecution's Submissions Concerning a "Voir Dire" Proceeding to Establish the Reliability of Defence Evidence"', filed 6 June 2005 ("Reply"), in which the Prosecution requests further oral argument on this matter ("Request for Further Oral Argument") and argues, inter alia, the following:

(1) the proposed voir dire proceeding fits squarely within the scope of Rules 95 of the Rules;

(2) the Motion does advance the correct legal standard of Rule 95 of the Rules, i.e., a "balance of the probabilities";

(3) Assigned Counsel's argument that the burden of proof that the Prosecution must meet under Rule 95 of the Rules is unsupported and would render Rule 95 of the Rules a "dead letter"; and

(4) although Assigned Counsel assert that the voir dire proceeding proposed by the Prosecution is not the appropriate means by which to challenge the admissibility of the proposed evidence in the circumstances of this case, they provide no explanation of what may ever be an appropriate method of establishing the unreliability of a party's evidence, [FN14]

14. Reply, at paras 4-12.

Discussion

NOTING the provisions of Rules 89 and 95 of the Rules,

CONSIDERING the following:

(1) the voir dire is a procedure that may be used in trials at ICTY; [FN15]

15. Prosecutor v. Delalic, et al., Case No. IT-96-21-A, "Judgement", 20 February 2001, at para. 543 (stating that "this procedure is not expressly provided for in the Rules. However, this does not mean that it would be unsuitable for a Trial Chamber to utilise it if in a particular case it thought it appropriate").

(2) in determining whether that procedure is to be used, account is to be taken of its origin in common law jurisdictions, where, generally, it is a preliminary examination to test the admissibility of evidence in the absence of the jury, the purpose being to avoid contaminating the minds of the jury with material that might never become evidence in the case; [FN16]

16. Examples of circumstances in which the voir dire procedure may be used include determining the admissibility of the defendant's previous guilty plea to the offence for which he is currently on trial, the admissibility of a confession by the Accused, the admissibility of identification evidence, the admissibility of res gestae statements, the competence of witnesses, questioning by a judge of an

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unwilling witness, and whether the jury should be directed that they may draw inferences against a defendant who fails to give evidence. See Archbold 2003, at paras 4-288 to 4-291.

(3) there being no jury in trials before the International Tribunal, there is less need for the procedure of a voir dire than in a common law jurisdiction; a challenge to the reliability of evidence through Rule 95 of the Rules can be dealt with through the normal procedure for the adduction of evidence; the matter is thus one for the exercise of the Trial Chamber's discretion in the light of the particular circumstances of each case; although the procedure may be applicable both to statements of witnesses and confessions by the Accused, the Trial Chamber is of the view that there is a stronger case to utilise it in respect of statements such as a confession by an Accused; [FN17]

17. An example is the procedure to be followed in England and Wales under section 76 of the Police and Criminal Evidence Act 1984, where the reliability of a **confession** is challenged in court. Under that Act, where the prosecution proposes to give evidence of a **confession**, the court can require the prosecution to prove that the **confession** was not obtained as mentioned above as a pre-condition to it being admitted into evidence, which must be done in a voir dire.

(4) the issue to be addressed in the exercise of discretion in this case is whether it is necessary and appropriate that the Trial Chamber should, during the Defence case, hear additional evidence from Prosecution witnesses as to the reliability of the proposed evidence;

(5) the Prosecution has carried out extensive inquiries to enable it to conduct an effective **cross-examination** of the witness with a view to demonstrating that the circumstances justify exclusion of the evidence under Rule 95 of the Rules, and the Prosecution may, if it considers its case to be unfairly prejudiced by admission of the material, apply at the rebuttal phase to lead evidence to justify the exclusion of the evidence; and

(6) the Trial Chamber has been composed of experienced Judges and thus is able to deal with all issues in the trial affecting the evidence, including those arising under Rule 95 of the Rules,

Disposition

PURSUANT to Rules 54, 89, 95, and 126bis the Rules,

HEREBY ORDERS as follows:

REQUESTS that the Registry alter the status of the procedural hearing on 27 May 2005 (transcript pages 40041-40054) from private to open;

GRANTS the Prosecution leave to file the Reply;

DENIES the Request for Further Oral Argument; and

DENIES the Motion.

Done in both English and French, the English text being authoritative.

Judge Robinson, Presiding

Dated this ninth day of June 2005, At The Hague, The Netherlands

Seal of the Tribunal

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IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding

Judge Elizabeth Odio Benito

Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 25 September 1997

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON THE MOTIONS FOR THE EXCLUSION OF EVIDENCE BY THE ACCUSED, ZEJNIL DELALIC

The Office of the Prosecutor:

Mr. Grant Niemann

Ms. Teresa McHenry

Mr. Giuliano Turone

Counsel for the Accused:

Ms. Edina Residovic, Mr. Ekrem Galijatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic

Mr. Zeljko Olujic, Mr. Michael Greaves, for Zdravko Mucic

Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic

Mr. John Ackerman, Ms. Cynthia McMurrey, for Esad Landzo

I. INTRODUCTION

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On 8 May 1997, this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("International Tribunal") ruled that the transcripts of certain pre-trial interviews held between the accused, Zejnil Delalic ("Accused"), and investigators of the Office of the Prosecutor ("Prosecution") on 18 - 19 March and 22 - 23 August 1996 (jointly referred to as "Statements") were admissible into evidence. In addition, the Trial Chamber admitted into evidence two addenda made on 22 July and 10 August 1996 to the statements of 18 - 19 March 1996 ("Addenda"). The interviews of 18 - 19 March 1996 were held at the Office of the Bavarian Police in Munich, Germany ("Munich Statements") where the Accused was unrepresented by counsel. The interviews of 22 - 23 August 1996 were held at the United Nations Detention Centre in Scheveningen, The Hague ("Scheveningen Statements"). The Addenda were also made in Scheveningen. The Accused was represented by counsel at all times when he was interviewed in Scheveningen.

Following its oral ruling, the Trial Chamber reserved a written decision to a later date.

THE TRIAL CHAMBER HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

1. The question of admissibility into evidence of the pre-trial statements taken from each of the four accused persons has been an issue before the Trial Chamber for a considerable period of time. In regard to the Accused, the question dates back to May 1996. Considering the importance of the issue and the length of time during which it has been before the Trial Chamber, it is necessary to examine in considerable detail some background matters before dealing with the substance of this Decision.

A. Background to the Munich Statements

2. On 9 October 1996, the Trial Chamber (Judges McDonald, presiding, Stephen and Vohrah) issued the *Decision on the Motion on the Exclusion and Restitution of Evidence and Other Material Seized From the Accused Zejnil Delalic* (Official Record at Registry page ("RP") D1612 - D1621) ("Exclusion Decision"). The Exclusion Decision addresses, in part, a motion dated 28 May 1996 (RP D1/403 *bis* - 4/403 *bis*) filed by the Defence on behalf of the Accused ("Defence") under Sub-rule 73(A)(iii) of the International Tribunal's Rules of Procedure and Evidence ("Rules"). Pursuant to Sub-rule 73(A)(iii), which states that "[p]reliminary motions by the accused shall include applications for the exclusion of evidence obtained from the accused or having belonged to him", the Defence sought to exclude the Munich Statements from evidence on the ground that they were obtained in violation of Rules 42 and 43, the provisions of which are set out below.

Rule 42

Rights of Suspects during Investigation

> (A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:
>
> (i) the right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay

for it;

(ii) the right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and

(iii) the right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Rule 43

Recording Questioning of Suspects

Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure:

(i) the suspect shall be informed in a language he speaks and understands that the questioning is being audio-recorded or video-recorded;

(ii) in the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;

(iii) at the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything he has said, and to add anything he may wish, and the time of conclusion shall be recorded;

(iv) the tape shall then be transcribed as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to the suspect, together with a copy of the recorded tape or, if multiple recording apparatus was used, one of the original recorded tapes; and

(v) after a copy has been made, if necessary, of the recorded tape for purposes of transcription, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect.

3. With regard to Rule 42, the Trial Chamber found that there had been no violation of the Accused's rights prescribed by either of Sub-rules 42(A) or (B). In particular, the Trial Chamber found that, at the time of the interview, the Accused was aware of his status as a person suspected of having committed crimes within the jurisdiction of the International Tribunal and of the rights thereby accruing to him. Further, it found that the Accused had waived his right to counsel "explicitly and voluntarily in conformity with his right to do so under Sub-rule 42(B)" (Exclusion Decision at paragraph 13).

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4. The Defence had alleged that there was a lack of continuity in the recording of the interviews in Munich contrary to Rule 43. In this respect, the Trial Chamber declared that if the facts alleged by the Defence were correct, this would amount to an irregularity in the procedure for questioning suspects established by Rule 43. However, the Trial Chamber went on to state that if indeed such an irregularity had occurred, the Defence would be required to make a showing that the irregularity had led to a violation of the rights of the Accused and that such a violation warrants the exclusion of the Munich Statements (Exclusion Decision at paragraph 15). Further, the Trial Chamber held that the appropriate time for the Defence to make such a showing is when the Prosecution seeks to tender the Munich Statements in evidence. The Trial Chamber ruled that the Defence may object at that stage to the admissibility of the Munich Statements, under Rule 89 or Rule 95. The provisions of Rules 89 and 95 are set out below.

Rule 89

General Provisions

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

Rule 95

Evidence Obtained by Means Contrary to Internationally

Protected Human Rights

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

5. Thus, in sum, three things are discernible from the Exclusion Decision. The first is that, when the Munich Statements were made, there were no violations of the Accused's rights to counsel, an interpreter or silence as guaranteed by Rule 42. Secondly, the Accused voluntarily waived his right to counsel. Thirdly, an avenue was opened for the Defence to object to the admissibility of the Munich Statements at trial if, and only if, it was able to prove that the irregularities it alleged had occurred in the recording of the interview had led to a violation of the Accused's rights and that this warranted the

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exclusion of the Munich Statements under Rule 89 or Rule 95.

6. By a letter dated 5 December 1996 (RP 3655 - 3660), the Prosecution informed Counsel for each of the four accused persons of its intention to use the pre-trial statements of the accused persons as evidence during the trial. Acting in response to this, on 16 January 1997, the Defence filed "The Request for Exclusion of the Transcript and the Audio and Video Recordings of the Conversation Handed Over to the Prosecutor on March 18 and 19 1996 in Munich by Zejnil Delalic as Inadmissible Evidence" ("Request"), (RP D2415 - D2424) by which it again sought the exclusion of the Munich Statements.

7. As a basis for the Request, the Defence again relied on alleged infractions of Rule 42. It argued that the Accused was not sufficiently well informed of his right to counsel under Rule 42 and that as such, he did not realise the consequences of a waiver of the right at the time of the interviews. The Defence, therefore, submitted that there had been a violation of the right to counsel which ought to lead the Trial Chamber to exclude the Munich Statements. Further, the Defence submitted that the interview had not been recorded in accordance with Rule 43 and that it should be excluded from evidence.

8. The Prosecution did not file a written response to the Request. However, at a Status Conference held before the Trial Chamber, as presently composed, on 17 January 1997, Ms. Teresa McHenry spoke to the issues raised in the Request on behalf of the Prosecution. Ms. Edina Residovic and Mr. Eugene O'Sullivan, Counsel for the Accused, also spoke to the Request on the same day. Defence Counsel expatiated on the arguments in the Request. They argued that the Accused's Yugoslavian socio-cultural background should be a deciding factor in evaluating whether his rights under Rule 42 had been violated. They contended that a simple bold reading out of Rule 42 did not suffice to inform the Accused of his rights because, as a result of his civil law system background, he was unable to understand the consequences of waiving his rights to counsel and to silence. For the Prosecution, Ms. McHenry argued that the issue of any alleged violation of Rule 42 had already been addressed in the Exclusion Decision, where the Trial Chamber found that there had been no violation. She stated that the Prosecution had no objection to the Trial Chamber hearing arguments on alleged violations of Rule 43. She then proceeded to explain that any gaps in the recording of the interviews were as a result of the excessive caution of the Prosecution in using both audio and video tapes which stopped at different times. She stated that the Prosecution intended to ensure that the transcripts submitted at trial are a true reflection of everything recorded on both the audio and video tapes.

9. Having heard the submissions during the Status Conference, the Trial Chamber stated that the issues raised in the arguments had already been decided in the Exclusion Decision and, as such, it lacked jurisdiction to go over them again. Stating that the only issue outstanding was the tendering of the Munich Statements at trial, the Trial Chamber ruled that the Defence may make its opposition at such time during the trial as the Prosecution seeks to tender them into evidence.

10. On 1 April 1997, the Prosecution filed a "Response Regarding the Admissibility of the Statements of the Accused" ("Response"), (RP D3203 - D3211). The Response, in fact, addressed the arguments made on separate occasions by counsel on behalf of all four accused persons regarding statements made by the accused. In regard to the Accused, the Prosecution indicated that it intended to tender into evidence the Munich and the Scheveningen Statements. It submitted that they are admissible in the light of its compliance with Rules 42 and 43 as well as its timely disclosure of its intention to tender them in evidence, as required by Rule 66. With respect to the Munich Statements, the Prosecution reasserted its position that the issue of any alleged violation of Rule 42 had been settled in its favour by the Exclusion Decision.

11. The Prosecution conceded in the Response that the Defence may object to the admissibility of the

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Munich Statements under Rule 43, but it took the view that its provisions had been fully satisfied. It admitted that there were difficulties with the recording of the interviews because they were not conducted at the seat of the International Tribunal in The Hague. It claimed that the apparent problem with the recording was as a result of its use of tapes of different lengths for the audio and video recordings. The result was that the video tapes ended at different times from the audio tapes so that it is impossible to have a full record of the interviews without using both recordings. It averred that it had checked both recordings exhaustively against the transcripts and that the transcripts contain a full account of the recordings. In these circumstances, the Prosecution maintained that no reason existed for the Trial Chamber to exclude the Munich Statements under Rule 43, especially since the Defence had presented no evidence that the difficulties had resulted by design of the Prosecution or that the Prosecution had conducted itself improperly during any alleged unrecorded part of the interview and that there was no attempt to introduce any unrecorded portion of the interview into evidence.

12. In a "Reply to the Prosecution Response Regarding the Admissibility of Statements of the Defence" (RP D3293 - D3301), dated 15 April 1997, the Defence, *inter alia*, repeated its plea that the Trial Chamber should exclude the Munich Statements from evidence. This time, the Defence made the plea pursuant to Rule 54 which states that "[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial." The Defence stated that for an out-of-court statement to be admitted into evidence there must be strict compliance with Rule 43. It stated that this compliance was absent when the Munich Statements were made because of several gaps in the audio and video recordings and disparities between them and the transcripts. It declared that, as the Accused was unrepresented by counsel, strict compliance with Rule 43 was even more crucial in order to ensure the trustworthiness of the Munich Statements. Therefore, it urged the Trial Chamber to declare the Munich Statements inadmissible under Rule 95 because they were obtained by methods which cast substantial doubts on their reliability and their admission into evidence would be antithetical to, and seriously damage the integrity of, the present proceedings. The Defence made no submissions relating to the admissibility or otherwise of the Scheveningen Statements or the Addenda.

B. Request for a Proceeding Akin to a *Voir Dire*

13. On 7 May 1997, the Defence filed a "Request for a Hearing to Exclude Evidence by Defendant Delalic" (RP D3582 - D3585). In that request, the Defence prayed the Trial Chamber to hold a hearing akin to a common law *voir dire* or trial within a trial in order to determine the admissibility of the Munich and the Scheveningen Statements.

14. The Defence submitted that, since the Rules do not prescribe the procedure to be followed in order to determine the admissibility of statements made by accused persons in the circumstances it alleges in this case, a procedure akin to the common law procedure of the *voir dire*, which is also recognised under the European Convention of Human Rights, is the appropriate procedure to follow. The Defence found support for this submission in Sub-rule 89(B) which provides that in the case of *lacuna* in the International Tribunal's evidentiary provisions set out in Rules 89 to 99, the Trial Chamber shall apply "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law."

15. Implying that the contents of the Statements are confessions, the Defence declared that when a confession on which the Prosecution proposes to rely was or may have been obtained in circumstances which may render it inadmissible in evidence, the Trial Chamber should not allow the confession to be given in evidence unless the Prosecution proves beyond a reasonable doubt that the confession was not so obtained. Thus, the Defence submitted that the Trial Chamber should not admit the confession into

evidence unless the Prosecution establishes beyond a reasonable doubt, in a proceeding akin to a *voir dire*, that it was not so obtained. In the alternative, the Defence declared that the Trial Chamber may *proprio motu*, require that the Prosecution, as a condition precedent to admitting the confession into evidence, prove that it was not obtained in such a manner as to render it inadmissible. The Defence maintained that the appropriate time to hold such a hearing is just before the evidence in dispute is to be tendered into evidence.

16. The Prosecution did not file a written response to the request.

C. Oral Arguments

17. On 8 May 1997, the Prosecution announced its intention to call Ms. Sabine Manke, an investigator in its office who had been involved in the taking of the Statements, as its next witness. Further, the Prosecution stated its intention to tender the Statements into evidence through Ms. Manke. At this point, Counsel for each of the four accused persons voiced their objections to Ms. Manke's testimony and to the introduction of the Statements. A summary of these objections is beyond the scope of this Decision. However, Counsel for the Accused, Mr. O'Sullivan, urged the Trial Chamber to hold the proceeding akin to a *voir dire* before hearing Ms. Manke. He submitted that the Defence wished to call a number of witnesses in this proceeding in order to show that the Statements are inadmissible. The Trial Chamber, having heard this submission, ruled that the Defence had not shown that such a proceeding was necessary at that stage. It determined that it would first hear Ms. Manke so as to be appraised of the manner in which the Statements were taken and then it would listen to substantive oral submissions on the holding of a proceeding akin to a *voir dire* before determining the question of the admissibility of the Statements.

(i). Applicable Provisions

18. It is appropriate to set out in full certain provisions of the Statute and the Rules which were cited to the Trial Chamber in the oral arguments following the testimony of Ms. Manke before proceeding to the substance of those arguments.

Article 21

Rights of the accused

. . . .

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal

assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

(g) not to be compelled to testify against himself or to confess guilt.

Rule 37

Functions of the Prosecutor

(A) The Prosecutor shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by him. Any alleged inconsistency in the Regulations shall be brought to the attention of the Bureau to whose opinion the Prosecutor shall defer.

(B) His powers under Parts Four to Eight of the Rules may be exercised by staff members of the Office of the Prosecutor authorised by him, or by any person acting under his direction.

Rule 40

Provisional Measures

In case of urgency, the Prosecutor may request any State:

(i) to arrest a suspect provisionally;

(ii) to seize physical evidence;

(iii) to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

The State concerned shall comply forthwith, in accordance with Article 29 of the Statute.

Rule 55

Execution of Arrest Warrants

(A) A warrant of arrest shall be signed by a Judge and shall bear the seal of the Tribunal. It shall be accompanied by a copy of the indictment, and a statement of the rights of the accused. These rights include those set forth in Article 21 of the Statute,

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and in Rules 42 and 43 *mutatis mutandis*, together with the right of the accused to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

(B) A warrant for the arrest of the accused and an order for his surrender to the Tribunal shall be transmitted by the Registrar to the national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, or is believed by the Registrar to be likely to be found, together with instructions that at the time of arrest the indictment and the statement of the rights of the accused be read to him in a language he understands and that he be cautioned in that language.

(C) When an arrest warrant issued by the Tribunal is executed, a member of the Prosecutor's Office may be present as from the time of arrest.

Rule 92

Confessions

A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.

(ii). Pleadings

(a). The Defence

19. The Defence supplied the details of those events which it alleges may render the Munich Statements inadmissible in evidence. First, the Defence submitted that the right of the Accused to counsel under Article 21(4)(d) of the Statute was violated because, prior to the commencement of the interviews, the Prosecution investigators simply read out the provisions of Rule 42 to him, without further explanation. Counsel contended that the essence of the protection provided by Article 21(4)(d) is that an accused person should be informed of his rights in a way that will be understandable to an ordinary person who is not a trained lawyer. The mere reading of the Rule to the Accused did not meet the requirements of Article 21(4)(d). Further, Counsel drew the attention of the Trial Chamber to the admission of Ms. Manke, during cross-examination, that she did not herself have a full understanding of the meaning of the right to counsel. Secondly, the Defence stated that Rule 43 was not strictly complied with during the questioning of the Accused in Munich. It asserted that there were numerous flaws in the recording of the Munich Statements which taint them and render them inadmissible in evidence.

20. In addition, the Defence submitted that, since the Accused was arrested by the German authorities pursuant to a request of the Prosecutor under Rule 40, the Prosecution investigators had no right to be present and to interrogate the Accused in Munich. This is because, unlike Sub-rule 55(C), Rule 40 makes no provision for the presence of members of the Office of the Prosecutor during a provisional arrest. The Defence maintains that, because Rules 42 and 43 only make mention of prosecutors questioning accused persons, the investigators who are not prosecuting attorneys, had no authority to question the Accused.

21. Relying on Rule 92, the Defence averred that Ms. Manke had shown during cross-examination that the questioning of the Accused in Munich was neither correct nor fair and that his fundamental rights

guaranteed by Article 21 were not respected. The Defence argued that, throughout the interviews, the measures taken against the Accused, including provisional arrest, were completely unfair and the admission of the statement would amount to legalising the unlawful arrest and the taking of statements at a time when the Accused clearly did not understand what was read out to him. In particular, the Defence submitted that the provisional arrest was unlawful because it was effected for means other than the collection of evidence or for preventing the Accused's escape in violation of Rule 40. In sum, the Munich Statements should not be admitted because the rights of the Accused provided by the Statute were not respected.

22. The Defence did not make any specific assertions with respect to the Scheveningen Statements, but at the close of its argument, it requested that the Trial Chamber hold a proceeding akin to a *voir dire* on both the Scheveningen Statements and the Munich Statements.

(b). The Prosecution

23. The Prosecution submitted that the investigators and everyone who participated in the interviews of the Accused from its office complied with the Rules of the International Tribunal relating to fair trial. It contended that all of the Defence arguments alleging violations of the Rules were raised and decided against the Defence in the Exclusion Decision, where the Trial Chamber correctly found that the Prosecution had complied with the requirements for a fair trial during the Munich interviews. The Trial Chamber also held that the Accused had voluntarily waived his right to counsel. The Defence is, therefore, in the view of the Prosecution, not entitled to be re-heard on these issues.

24. The Prosecution conceded that the Defence is permitted to challenge the admissibility of the evidence based on whether or not the Munich Statements were fully recorded, as required by Rule 43. However, it submitted that there was no part of the questioning that was unrecorded. Further, it asserted that the Munich Statements, as presented for admission into evidence, are a full transcription of the whole interview as recorded on audio and video tapes. It declared that there had been no suggestion, allegation or evidence that anything improper happened.

25. The Prosecution submitted that its investigators in Munich ensured that the Accused understood his rights. At several points during the interview these rights were read to him, he was asked whether he understood them and if he was sure he wished to waive his right to counsel. Rule 42 was also read out to him. The Prosecution maintained that it, in fact, did more than it was required to do and it would be a miscarriage of justice for the Trial Chamber not to admit the Munich Statements under these circumstances.

26. The Prosecution, in answer to the Defence contention that the investigators questioned the Accused without authority, relied on Sub-rule 37(B), which provides that the powers of the Prosecutor under Parts Four to Eight of the Rules may be exercised by staff members of her office authorised by her or by persons acting under her direction. The Prosecution, therefore, contended that by virtue of the Sub-rule, an investigator can validly exercise the powers of the Prosecutor.

27. The Prosecution made no specific submissions relating to the Scheveningen Statements.

III. FINDINGS

(A). The Request for a Proceeding Akin to a *voir dire*

28. Concisely stated, the issue before the Trial Chamber is whether a proceeding akin to the common

law procedure of "a trial within a trial", also referred to by the Norman French expression, *voir dire*, should be employed in order to ascertain if the Statements should be excluded from evidence. The possibility of employing the common law procedure of *voir dire* before the International Tribunal, which has its own procedural rules, is created by the provisions of Sub-rule 89(B). Those provisions make it clear that the Trial Chamber can borrow this procedure in appropriate circumstances, namely, where employing the procedure would best favour a fair determination of the matter before it - in this case whether to admit the Statements into evidence or not - and the procedure is consonant with the spirit of the Statute and the general principles of law. Sub-rule 89(B) provides a necessary escape route in the administration of justice before the International Tribunal in situations which are not covered by the evidentiary provisions set out in Rules 89 to 99.

29. Generally, in common law systems, the *voir dire* procedure is employed in cases where the admissibility of a confession is disputed on the ground that it was not made voluntarily. This common law principle is stated in the well known English case of *Ibrahim v R (1914) A.C. 609*, in which the court declared the following.

> 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 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 Hale. (Emphasis added.)

30. This statement was approved by the House of Lords in *Commissioners of Customs and Excise v Harz and Power* (1967) 51 Cr.App.R. 123 at p. 155. This is the classic formulation of the rule, the clarity of which has never been in dispute or doubt. The rule is that where the admissibility of a statement is challenged on the ground that it is not made voluntarily, it is for the judge to determine whether or not the prosecution has established that it was made voluntarily. This is done by hearing evidence called by the parties. The rule has also been extended to cases of oppression (see *Callis v Gunn* (1963) 48 Cr.App.R. 36). This rule is adopted in Australia (see *Cases and Materials on Evidence* 2nd ed., Wright, P.K. and Williams, C. R. at pps. 774 - 776 and *Litigation Evidence and Procedure* 5th ed., Aronson, M. And Hunter, J at pps. 371 - 389) and in federal courts in the United States of America (see 18 USC § 3501).

31. The enactment, in 1984, of the Police and Criminal Evidence Act ("PACE") in the United Kingdom, has codified and widened the ambit of circumstances under which a *voir dire* may be held in England and Wales. Pursuant to Section 76(2) of PACE, a *voir dire* may be held on the admissibility of a confession if the Defence represents to the court that the confession was or may have been obtained by oppression of the person who made it, or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof. If the defence is able to satisfy the court that any of the alternative situations exist, the court will hold a *voir dire* and will not admit the confession into evidence unless the prosecution proves beyond a reasonable doubt that it was not so obtained.

32. In the common law system, the burden of proof rests on the prosecution to show beyond a reasonable doubt that statements of an accused person were made voluntarily, and that they were not obtained either by fear of prejudice or hope of advantage held out by interrogators. It is not sufficient for the prosecution to show that there was no intention to extract a confession or that there was no impropriety in the inducement held out. Where there is an implicit threat, promise or inducement, the consequence is the same and the statement obtained thereby will be inadmissible.

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33. Having stated above the conditions precedent to holding a *voir dire* in common law systems, the Trial Chamber will now consider if, on the strength of the submissions of the Defence, it should hold a proceeding akin to a *voir dire* to determine the admissibility of the Statements.

(i). The Munich Statements

34. Ms. Residovic, Counsel for the Accused, during her oral submissions, went into considerable detail on the purported violation of the Accused's right to counsel under Rule 42 and Article 21(4)(d) of the Statute, the unlawfulness of the arrest of the Accused, and the status of the investigators who interviewed him. Counsel submitted that the Accused cannot be regarded as having had a fair trial if the Munich Statements are admitted in spite of these violations. Accordingly, she submitted, that these allegations should be addressed in a *voir dire* proceeding in order to determine the admissibility of the Statements.

35. The Trial Chamber accepts the submission of the Prosecution that the issue of violations of Rule 42, in particular violations of the right to counsel, were previously decided in the Exclusion Decision. The alleged violations are, therefore, not matters to be revisited.

36. With regard to Article 21(4)(d), the rights thereby guaranteed are the rights of an accused person, not the rights of a suspect during questioning by the Prosecution. The Accused cannot claim the benefit of Article 21(4)(d) - benefit due to an accused - at a time when he was still a suspect. The right of a suspect to legal assistance which is guaranteed in Article 18(3) finds expression in Rule 42, a rule which the Exclusion Decision declares was not violated in relation to the Accused.

37. The Trial Chamber is also in complete agreement with the construction of Sub-rule 37(B) propounded by the Prosecution, that investigators authorised by and acting on behalf of the Prosecutor are, for such purposes, performing her functions in accordance with Sub-rule 37(A). Such investigators, once authorised, are competent to carry out interrogation as Prosecutors may do. Thus, the allegation of the Defence that the Munich Statements were taken without authority is totally unfounded.

38. Also unpersuasive is the very restricted interpretation of Rule 40 proposed by the Defence. There is nothing in Rule 40 which can lead to the inference that the Prosecutor can request the provisional arrest of a suspect only for the purpose of collecting evidence or to prevent a suspect's escape. Clearly, these are obvious grounds upon which the Prosecutor may make the decision to make a Rule 40 arrest request to a State, but they are not necessarily the only grounds. The Prosecutor is charged with investigating the crimes within the jurisdiction of the International Tribunal and in the course of her investigations, she may, in good faith, take a decision to request the arrest of a suspect provisionally. It would be an unwarranted fetter on her ability to perform her duties effectively to limit the exercise of her discretionary powers in the manner proposed. Rule 40 does not state the reasons why a request may be made, it only states the type of requests that may be made.

39. Furthermore, the Trial Chamber rejects the submission that the Prosecutor cannot interrogate a suspect arrested pursuant to Rule 40 and that the only possibility for the presence of the Prosecutor or her representative is when a warrant of arrest is being served under Sub-rule 55(d). Rules 42 and 43, which regulate the manner in which the Prosecutor deals with suspects during interrogation, are of general application to all suspects. They make no distinction between suspects arrested pursuant to Rule 40 and other suspects, so there is no reason to suppose that there is a special class of suspects to whom the Prosecutor's powers of interrogation do not extend. The fact that no specific mention is made of the presence of the Prosecutor at the time of a Rule 40 arrest cannot be taken to mean that the Prosecution is prevented from carrying on with its investigations in any lawful manner it deems fit by interrogating the

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suspect.

40. It appears that the Defence has misunderstood the application of the *voir dire* procedure. The procedure, as has been outlined above, is called in aid only where a statement is challenged on the ground that it is involuntary. That is, where it is alleged to have been obtained either from fear of prejudice or hope of advantage held out by a person in authority over the Accused, or when various indices of unreliability clearly exist, as is the case in England and Wales where the PACE applies. None of the grounds which have been represented to the Trial Chamber by the Defence fall into these categories. The Defence has not brought its request within the purview of the common law and it has not made out a case for the allegations it makes regarding the Munich Statements to be tried in a proceeding akin to a *voir dire*.

(ii) The Scheveningen Statements and the Addenda

41. The Trial Chamber finds no reasons why a proceeding akin to a *voir dire* should be held on these Statements and the Defence has not presented it with any.

B. The Admissibility of the Statements

(i). The Munich Statements

42. The Trial Chamber has decided to admit the Munich Statements into evidence because it is not persuaded by any of the submissions made by the Defence at the different stages during which the matter has been pending.

43. Despite the clear and unambiguous language of the Exclusion Decision that there was no violation of Rule 42, the Defence has repeatedly raised its allegations of violations of the Accused's rights under Rule 42, in particular the right to counsel. The Trial Chamber is not an appellate or review entity. The Trial Chamber is *functus officio* once a matter has been decided and no measure of repetition or recloaking of an argument can authorise it to act in excess of its jurisdiction. The Trial Chamber declines the exercise of a jurisdiction it does not possess and has, therefore, not considered any of the arguments based on violations of Rule 42. The finding of non-violation in the Exclusion Decision is binding on all Parties and the Trial Chamber: it, therefore, stands.

44. With regard to Rule 43, the filings of the Defence all allege a violation in the recordings which ought to lead the Trial Chamber to exclude the Munich Statements. The Prosecution has not denied that there was some difficulty with the recording equipment because it made recordings in two media, audio and video, rather than in one of these, as required by Rule 43. However, to obtain the relief sought, namely the exclusion of the Munich Statements on the grounds of a violation of Rule 43, the Defence has to satisfy the conditions laid down in the Exclusion Decision. It has, first, to prove that as a result of these difficulties, an irregularity occurred because some unrecorded information was obtained from the Accused and secondly, that this irregularity has led to a violation of his rights. Despite the fact that it focused, in all its filings on the matter under consideration, and in oral argument, on non compliance with Rule 43, it did not prove to the satisfaction of the Trial Chamber that any of the Accused's rights were violated as a result of any difficulty or irregularity. Also significant is that the Defence did not deny the Prosecution's statement that the whole of the interview was recorded either on video or audio cassettes and that the final transcript is a complete representation of these two recordings. Rather, it continually drew the attention of the Trial Chamber to the problems with the recording, problems which the Prosecution did not deny. The Trial Chamber is satisfied that these problems were caused by a difference in the recording time of the audio and video tapes and, sadly, by the Prosecution's initially

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inefficient transcription of the interviews.

45. In the light of the above, it is difficult to accept the Defence argument that there has been such a violation of Rule 43 that renders the Munich Statements inadmissible in evidence under Rule 95. It cannot be said that the difficulties in recording the Statements cast a "substantial doubt on . . . [their] reliability" or that admitting them into evidence will be "antithetical to, and would seriously damage, the integrity of the [present] proceedings." The existence of these difficulties is relevant to the weight the Trial Chamber will attach to the Munich Statements during its deliberations.

46. If, however, the Defence wishes to object to the admissibility of the audio or video recordings of the Munich interviews, the Defence may do so whenever the Prosecution seeks to tender them into evidence. The Decision of the Trial Chamber is limited to the Munich Statements, that is, the transcripts of the Munich interviews and does not extend to the recordings.

(ii). The Scheveningen Statements and the Addenda

47. The Defence has presented no reasons why the Trial Chamber should not admit these Statements. For this reason, and because the Trial Chamber finds, *prima facie*, that there was no violation of the rights of the Accused when these Statements were taken, the Trial Chamber admits them into evidence.

IV. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seised of the filings of the Defence relating to the admissibility of the Statements of the Accused,

Having considered each of the Rules and statutory provisions hereinbefore cited,

PURSUANT TO RULE 54,

HEREBY:

1. **REJECTS** the Defence request for a proceeding akin to a *voir dire* to determine whether to exclude the Statements of the Accused.

2. **ADMITS** the Munich Statements into evidence.

3. **ADMITS** the Scheveningen Statements into evidence.

4. **ADMITS** the Addenda into evidence.

5. **PERMITS** the Defence to make objections to the admissibility of the video and/or audio recordings of the Munich interviews at such time during the present proceedings as the Prosecution seeks to tender them into evidence.

Done in English and French, the English text being authoritative.

30004

Adolphus
Godwin
Karibi
-
Whyte

Presiding
Judge

Dated this twenty-fifth day of September 1997

At The Hague

The Netherlands.

[Seal
of
the
Tribunal]

30005

1956 CarswellQue 2
23 C.R. 244, [1956] S.C.R. 400, 114 C.C.C. 363

Monette v. R.

Monette v. The **Queen**

Supreme Court of Canada

Kerwin C.J.C., Taschereau, Cartwright, Fauteux and Abbott JJ.

Judgment: March 6, 1956

Counsel: Alexandre Chevalier, Q.C., for accused.
George Hill, Q.C., for the Crown.

Subject: Criminal; Evidence

Evidence --- Confessions.

Evidence --- Confessions -- Use at trial -- Introduction by Crown on cross-examination -- General.

Rape -- Accused questioned by police at time of his arrest -- Use of accused's answers at his trial -- Crown required to prove that statement made to police was a voluntary statement -- Use of statement in cross-examination of accused by Crown counsel -- No previous inquiry on the voir dire -- Question whether cross-examination was irregular -- Principles underlying use of accused's statement by the Crown in a criminal trial considered -- New trial ordered.

Accused was charged with rape. During the course of the cross-examination of accused Crown counsel raised the question of conversations between accused and the police at the time of his arrest. Accused testified that he had said nothing to the police indicating any knowledge of the facts of the charge. In his examination in chief accused denied having ever seen the victim of the alleged offence and Crown counsel sought to rebut this evidence. The method which the Crown counsel adopted was to call, in rebuttal, one of the police officers who had had a conversation with accused at the time of his arrest. Defence counsel objected to this procedure as there had been no examination on the voir dire to determine whether or not his statements to the police were voluntary. The objection of defence counsel was overruled by the judge and the Crown was permitted to call the police officer in rebuttal. Accused was convicted and he appealed. His appeal to the Court of Appeal for the Province of Quebec was dismissed and he then appealed to the Supreme Court of Canada, by leave, on the ground that his answers to the questions put to him by the police were inadmissible in the absence of any voir dire as to the free and voluntary character of these answers.

Held, there must be a new trial.

1. The answers given to the police by accused were incriminatory and had they been proved to have been freely and voluntarily given would undoubtedly have been proper evidence as part of the case for the Crown.

2. While the propriety of introducing such evidence on rebuttal might be open to question, this particular aspect of the case was not raised by accused, his counsel being content to rest the appeal on the major question flowing from the lack of affirmative proof of the free and voluntary character of these answers.

3. Under all the circumstances of the case the Court was unanimously of opinion that in the absence

of such affirmative proof the impeached evidence was illegally admitted before the jury and it could not be said that the verdict would have been the same without such illegal evidence. Review of authorities.

Practice Note:

"Cross-examination of accused on statements made to police at time of arrest". The Monette case should be contrasted with Hébert v. The Queen, 20 C.R. 79, [1955] S.C.R. 120, 1955 Can. Abr. 351. In the Hébert case Estey J. said: "A cross-examination upon such a statement, by the great weight of authority in our provincial courts as well as in the Court of Criminal Appeal in England, has been condemned. However, it is unnecessary to determine this point here, as, upon the assumption that this was an improper exam ination it would appear that, having regard to the facts and the circumstances of this case, there has been no miscarriage of justice within the meaning of s. 1014 (2)". In the Monette case the Supreme Court of Canada was unanimous that under all the circumstances of this case it could not be said that the verdict would have been the same without such legal evidence and a new trial was ordered. Generally as to the subject of cross-examination of accused in a criminal trial see Annotations "Accused as a witness", 2 C.R. 255; "Cross-examination of accused on inadmissible confessions", 5 C.R. 494.

Appeal by accused, by leave, to the Supreme Court of Canada against the unanimous dismissal of his appeal by the Quebec Court of Appeal on a charge of rape.

The judgment of the Court was delivered by: *Fauteux J.*:

1 By a unanimous judgment, the Court of Appeal for the Province of Quebec maintained, without written reasons, the conviction of the appellant on a charge of rape.

2 The grounds upon which leave to appeal to this Court was granted involved, amongst others, the point whether answers given by the accused, while under arrest for the offence, to questions put to him by a detective in authority, were admissible to contradict his testimony at trial, in the absence of any *voir dire* as to the free and voluntary character of these answers.

3 Examined in chief, on his defence, the accused denied having ever seen the victim of the offence. In cross-examination, he admitted that the police had several conversations with him but, when referred to the substance of the latter, he testified having said nothing indicating any knowledge of the facts of the charge, declaring rather, in the occurrence, that he thought his failure to inform the authorities of a change of address, with respect to the registration of his automobile, was the reason for his arrest.

4 To contradict this testimony, the Crown, in rebuttal, called Detective Joyal who, notwithstanding the objection made by counsel for the defence, was allowed to refer to these conversations and give the following evidence, unpreceded by any examination on *voir-dire*:

> Q. Est-ce qu'il a dit qu'il la connaissait? R. Non. Il n'a pas dit qu'il la connaissait non plus.
>
> Q. Est-ce qu'il a dit qu'il avait été en automobile avec elle? R. Non. Je peux rapporter les paroles: 'Je peux pas raconter ce qui s'est passé, vous allez me donner dix ans de pénitencier'.
>
> Q. Il a dit simplement: 'Je peux pas raconter ce qui s'est passé, vous allez me donner dix ans de pénitencier'? R. C'est cela.
>
> Q. Est-ce qu'il a dit qu'il était ailleurs ce soir-là? R. Non plus.

5 In *Sankey v. The King*, [1927] S.C.R. 436, 48 C.C.C. 97, [1927] 4 D.L.R. 245, 18 Can. Abr. 879, and in *Thiffault v. The King*, [1933] S.C.R. 509, 60 C.C.C. 97, [1933] 3 D.L.R. 591, 18 Can. Abr. 880, this Court made it very clear that 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

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voluntary always rests with the Crown; and that such a 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.

6 The phases of trial at which the Court seeks to introduce such statements, whether it be as part of its case in chief, or upon cross-examination of an accused heard in defence, or in rebuttal of evidence adduced by the defence, is foreign to and in no way affects the *ratio* of the principle confirmed under these authorities. As stated by Humphreys J. delivering the judgment of the Court of Appeal in England, in *Rex v. Treacy* (1934), 60 T.L.R. 544 at 545, a statement made by a prisoner under arrest is either admissible or not; if it is admissible, the proper course for the prosecution is to prove it, and, if it is not admissible, nothing more ought to be heard of it; and it is wrong to think that a document can be made admissible in evidence which is otherwise inadmissible simply because it is put to a person in cross-examination.

7 In *Hébert v. The Queen*, 20 C.R. 79, [1955] S.C.R. 120, 1955 Can. Abr. 351, Cartwright J., at pp. 99-100, refers to the Canadian jurisprudence in the matter. In the latter case, the Crown, upon cross-examination of the accused, made use of such statements. Kellock, Locke, Cartwright and Fauteux JJ. decided that such evidence was inadmissible, and Estey J., without determining the matter, said that "a cross-examination upon such a statement, by the great weight of authority in our provincial Courts, as well as in the Court of Criminal Appeal in England has been condemned". The other members of the Court, who refrained from expressing their views in the matter, did so because, being of the opinion that the application of the provisions of s. 1014(2) was warranted on the evidence, it was unnecessary to determine the question.

8 In the present case, there was no serious attempt, on behalf of the Crown, at the hearing of this appeal, either to justify the admissibility of such evidence or an application of s. 1014(2). The answers given to the police by the appellant were incriminatory and, had they been proved to have been freely and voluntarily given, would undoubtedly have been proper evidence as part of the case for the Crown; and while the propriety of introducing such evidence on rebuttal might be open to question, this particular aspect of the case was not raised by the appellant; counsel for the latter being content to rest the appeal on the major question flowing from the lack of affirmative proof of the free and voluntary character of these answers.

9 Under all the circumstances of this case, the Court being unanimously of opinion that, in the absence of such affirmative proof, the impeached evidence was illegally admitted before the jury and that it could not be said that the verdict would have been the same without such illegal evidence, the appeal is maintained and a new trial ordered.

New trial ordered.

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372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922

Supreme Court of the United States
Beatrice LYNUMN, Petitioner,
v.
STATE OF ILLINOIS.
No. 9.
Argued Feb. 19, 1963.
Decided March 25, 1963.

Prosecution for unlawful possession and sale of marijuana. The Criminal Court of Cook County, Illinois, entered judgment of conviction and defendant appealed. The Supreme Court of Illinois, 21 Ill.2d 63, 171 N.E.2d 17, affirmed the conviction and certiorari was granted. The United States Supreme Court, Mr. Justice Stewart, held that where the defendant's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not cooperate, the threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly 'set her up,' and defendant had no previous experience with the criminal law and had no reason not to believe that the police had ample power to carry out their threats, defendant's confession was not voluntary but coerced.
Judgment set aside and case remanded to Illinois Supreme Court for further proceedings.

West Headnotes

[1] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k522 Threats and Fear
110k522(1) k. In General. Most Cited Cases

Where defendant's oral confession to unlawful possession and sale of marijuana was made only after police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not "cooperate," the threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly "set her up," and defendant had no previous experience with the criminal law and had no reason not to believe that police had ample power to carry out their threats, defendant's confession was not voluntary but coerced.

[2] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(1) k. What Confessions Are Voluntary. Most Cited Cases

In determining whether a confession was voluntary or coerced, the question is whether defendant's will was overborne at time that he confessed, and if so, the confession cannot be deemed the product of rational intellect and a free will.

[3] KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(G) Record and Proceedings Not in Record
110XXIV(G)13 Conclusiveness and Effect
110k1111 In General
110k1111(4) k. Conclusiveness of Certificate. Most Cited Cases
(Formerly 110k11(4))

Where state supreme court had certified that decision as to defendant's claim that coerced confession violated her federal constitutional rights was necessary to the judgment of state supreme court affirming defendant's conviction for unlawful possession and sale of marijuana, United States Supreme Court on certiorari would decline to search behind certificate of state supreme court and no determination would be made as to whether or not defendant properly asserted or preserved her federal constitutional claim and whether her conviction rested upon an adequate and independent foundation of state law.

[4] KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(G) Record and Proceedings Not in Record
110XXIV(G)15 Questions Presented for Review
110k1113 Questions Presented for Review
110k1120 Admissibility of Evidence
110k1120(1) k. In General. Most Cited Cases

On certiorari in United States Supreme Court from state court conviction for unlawful possession and sale of marijuana, the record affirmatively showed that evidence of defendant's coerced oral confession was admitted and considered by trial court.

[5] KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(1) k. In General. Most Cited Cases
(Formerly 110k1159(2))

The Supreme Court of Illinois has power independently to assess evidence of guilt in a criminal case.

[6] KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error

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110k1169 Admission of Evidence
110k1169.12 k. Acts, Admissions, Declarations, and Confessions of Accused. Most Cited Cases

Even though there may have been sufficient evidence, apart from coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of coerced confession vitiates judgment because it violates due process clause of Fourteenth Amendment.

***918 *528** Mrs. Jewel Rogers Lafontant, Chicago, Ill., for petitioner.
William C. Wines, Chicago, Ill., for respondent.

***529** Mr. Justice STEWART delivered the opinion of the Court.
The petitioner was tried in the Criminal Court of Cook County, Illinois, on an indictment charging her with the unlawful possession and sale of marijuana. She was convicted and sentenced to the penitentiary for 'not less than ten nor more than eleven years.' The judgment of conviction was affirmed on appeal by the Illinois Supreme Court. 21 Ill.2d 63, 171 N.E.2d 17. We granted certiorari 370 U.S. 933, 82 S.Ct. 1576, 8 L.Ed.2d 805. For the reasons stated in this opinion, we hold that the petitioner's trial did not meet the demands of due process of law, and we accordingly set aside the judgment before us.

On January 17, 1959, three Chicago police officers arrested James Zeno for unlawful possession of narcotics. They took him to a district police station. There they told him that if he 'would set somebody up for them, they would go light' on him. He agreed to 'cooperate' and telephoned the petitioner, telling her that he was coming over to her apartment. The officers and Zeno then went to the petitioner's apartment house, and Zeno went upstairs to the third floor while the officers waited below. Some time later, variously estimated as from five to 20 minutes, Zeno emerged from the petitioner's third floor apartment with a package containing a substance later determined to be marijuana. The officers took the package and told Zeno to return to the petitioner's apartment on the pretext that he had left his glasses there. When the petitioner walked out into the hallway in response to Zeno's call, one of the officers seized her and placed her under arrest.[FN1] The officers and ***530** Zeno then entered the petitioner's apartment.[FN2] The petitioner at first denied she had sold the marijuana to Zeno, insisting that while he was in her apartment Zeno had merely repaid a loan. After further conversations with the officers, however, she told them that she had sold the marijuana to Zeno.

FN1. Officer Sims testified as follows: 'He called Beatrice and said he had left his glasses in the apartment; she opened the door and as she came out into the hall, I was standing in the common hall, in the vestibule part with the door partly closed. As she walked down the hallway toward Zeno, I opened the door and stepped into the hallway. I told her she was under arrest and I grabbed her by her hands, both hands. At this point, I told her that she had been set up, that she had just made a sale and I showed her the package.'

FN2. Officer Sims testified: 'I had complete physical possession of her two hands. I had turned her hands loose when we went into the apartment. I went in ahead of her. The door was still open. The apartment door was still ajar and I walked into the apartment and she followed me in. We were together but I was beside her. I believe Bryson and Zeno were behind her. She was between two police officers. We proceeded in that fashion to enter her apartment.'

The officers testified to this oral confession at the petitioner's trial, and it is this testimony which, we now hold, fatally infected the petitioner's conviction. The petitioner testified at the trial that she had not in fact sold any marijuana to Zeno, that Zeno had merely repaid a long-standing loan. [FN3] She also testified, however, that she ***531** had told the officers on ***919** the day of her arrest that she had sold Zeno marijuana, describing the circumstances under which this statement was made as follows:

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FN3. Her testimony on this subject was as follows: 'On January 17th Zeno called me. He owed me money, $23.00. I had loaned him this money about three months previously. He said he was being evicted and had money en route from his sister and if I could lend him the money, he could pay his rent; and I haven't seen him since. That was three months previously. On this day he told me on the phone he was sorry he had not been around to pay the money but he had been in pretty bad shape. But now he had come into some money and would come and pay me.

'* * * On that day I did not give to Zeno, nor did Mr. Zeno ask me in the telephone conversation in which he said he was going to pay me the money he owed me, he did not say anything about having a can ready for him or anything like that.

'He said here is the money I owe you. He owed me $23.00. When he gave me the money, he gave me $28.00. I asked him what the $5.00 was for and he said it was because I had it so long. I did not say to Mr. Zeno let's go into the kitchen. Nothing like that. I did not have any transaction with him in the kitchen nothing even like that.'

'I told him (Officer Sims) I hadn't sold Zeno; I didn't know anything about narcotics and I had no source of supply. He kept insisting I had a source of supply and had been dealing in narcotics. I kept telling him I did not and that I knew nothing about it. Then he started telling me I could get 10 years and the children could be taken away, and after I got out they would be taken away and strangers would have them, and if I could cooperate he would see they weren't; and he would recommend leniency and I had better do what they told me if I wanted to see my kids again. The two children are three and four years old. Their father is dead; they live with me. I love my children very much. I have never been arrested for anything in my whole life before. I did not know how much power a policeman had in a recommendation to the State's Attorney or to the Court. I did not know that a Court and a State's Attorney are not bound by a police officer's recommendations. I did not know anything about it. All the officers talked to me about my children and the time I could get for not cooperating. All three officers did. After that conversation I believed that if I cooperated with them and answered the questions the way they wanted me to answer, I believed that I would not be prosecuted. They had said I had better say what they wanted me to, or I would lose the kids. I said I would say anything they wanted me to say. I asked what I was to say. I was told to ***532*** say 'You must admit you gave Zeno the package' so I said, 'Yes, I gave it to him.'

'* * * The only reason I had for admitting it to the police was the hope of saving myself from going to jail and being taken away from my children. The statement I made to the police after they promised that they would intercede for me, the statements admitting the crime, were false.

'* * * My statement to the police officers that I sold the marijuana to Zeno was false. I lied to the police at that time. I lied because the police told me they were going to send me to jail for 10 years and take my children, and I would never see them again; so I agreed to say whatever they wanted me to say.'

The police officers did not deny that these were the circumstances under which the petitioner told them that she had sold marijuana to Zeno. To the contrary, their testimony largely corroborated the petitioner's testimony. Officer Sims testified:

'I told her then that Zeno had been trapped and we asked him to cooperate; that he had made a phone call to her and subsequently had purchased the evidence from her. I told her then if she wished to cooperate, we would be willing to recommend to the State leniency in her case. At that time, she said, 'Yes, I did sell it to him.'

'* * * While I was talking to her in the bedroom, she told me that she ***920*** had children and she had taken the children over to her mother-in-law, to keep her children.

533 'Q. Did you or anybody in your presence indicate or suggest or say to her that her children would be taken away from her if she didn't do what you asked her to do?

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'Witness: I believe there was some mention of her children being taken away from her if she was arrested.

'The Court: By whom? Who made mention of it?

'The Witness: I believe Officer Bryson made that statement and I think I made the statement at some time during the course of our discussion that her children could be taken from her. We did not say if she cooperated they wouldn't be taken. I don't know whether Kobar said that to her or not. I don't recall if Kobar said that to her or not.

'I asked her who the clothing belonged to. She said they were her children's. I asked how many she had and she said 2. I asked her where they were or who took care of them. She said the children were over at the mother's or mother-in-law. I asked her how did she take care of herself and she said she was on ADC. I told her that if we took her into the station and charged her with the offense, that the ADC would probably be cut off and also that she would probably lose custody of her children. That was not before I said if she cooperated, it would go light on her. It was during the same conversation.

'* * * I made the statement to her more than once; but I don't know how many times, that she had been set up and if she cooperated we would go light with her.'

***534** Officer Bryson testified:

'Miss Lynumn said she was thinking about her children and she didn't want to go to jail. I was present and heard something pertaining to her being promised leniency if she would cooperate. I don't know exactly who said it. I could have, myself, or Sims.'

[1] It is thus abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.' These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly 'set her up.' There was no friend or adviser to whom she might turn. She had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats.

[2] We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases. We have said that the question in each case is whether the defendant's will was overborne at the time he confessed. Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716; Watts v. Indiana, 338 U.S. 49, 52, 53, 69 S.Ct. 1347, 1348, 1349, 93 L.Ed. 1801; Leyra v. Denno, 347 U.S. 556, 558, 74 S.Ct. 716, 717, 98 L.Ed. 948. If so, the confession cannot be deemed 'the product of a rational intellect and a free will.' Blackburn v. Alabama, 361 U.S. 199, 208, 80 S.Ct. 274, 280, 4 L.Ed.2d 242. See also Spano v. People of State of New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265; Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192; and see particularly, harris v. South Carolina, 338 U.S. 68, 70, 69 S.Ct. 1354, 1355, 93 L.Ed. 1815.

In this case counsel for the State of Illinois has conceded, at least for purposes ****921** of argument, that the totality of the circumstances disclosed by the record must be deemed to have combined to produce an impellingly coercive***535** effect upon the petitioner at the time she told the officers she had sold marijuana to Zeno. But counsel for the State argues that we should nonetheless affirm the judgment before us upon either of two alternative grounds. It is contended first that the petitioner did not properly assert or preserve her federal constitutional claim in accord with established rules of Illinois procedure, and that her conviction therefore rests upon an adequate and independent foundation of state law. Secondly, it is urged that the petitioner's conviction 'does not rest in whole or in any part upon petitioner's confession.' We find both of these contentions without validity.

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[3] It is true that the record in this case does not show that the petitioner explicitly asserted her federal constitutional claim in the trial court. And it is said that in Illinois the procedural rule is settled that where a constitutional claim which is based not upon the alleged unconstitutionality of a statute, but upon the facts of a particular case, is not clearly and appropriately raised in the trial court, the claim will not be considered on appeal by the Supreme Court of Illinois. In other words, such a claim of constitutional right, it is said, must be asserted in the trial court or it will be deemed upon appellate review to have been waived. People v. Touhy, 397 Ill. 19, 72 N.E.2d 827.

If all we had to go on were the record in the Illinois trial and appellate courts, there would indeed be color to the claim of counsel for the State, and we would be squarely faced with the necessity of determining what the Illinois procedural rule actually is, and whether the rule constituted an adequate independent ground in support of the judgment affirming the petitioner's conviction. But that is not necessary in this case. For there is here a short and complete answer to the respondent's argument. Before acting upon the petition for certiorari, we entered an order directed to this very problem. The order ***536** accorded counsel for the petitioner 'opportunity to secure a certificate from the Supreme Court of Illinois as to whether the judgment herein was intended to rest on an adequate and independent state ground, or whether decision of the federal claim * * * was necessary to the judgment rendered.' 368 U.S. 908, 82 S.Ct. 190, 7 L.Ed.2d 128. The answer of the Supreme Court of Illinois was unambiguous. On June 8, 1962, that court issued the following 'Response to Request for Certificate':

'In response to a request by counsel for the plaintiff in error we hereby certify that decision of the federal claim referred to in the order of the United States Supreme Court dated November 13, 1961, was necessary to our judgment in this case.'

We decline to search behind this certificate of the Supreme Court of Illinois.

[4] The State's contention that the petitioner's conviction did not rest in any part upon her confession is quite without merit. The case was tried by the court without a jury. The record shows that twice during the trial the petitioner's counsel moved to strike the testimony of the police officers as to the petitioner's oral statement to them. On the first occasion the trial judge reserved a ruling on the motion 'until the close of the State's case.' When the motion was renewed, the record states that '(t)he motion to strike was denied.' Thus the record affirmatively shows that the evidence of the petitioner's confession was admitted and considered by the trial court.

[5] On appeal, the Supreme Court of Illinois, which has power independently to assess the evidence of guilt in a criminal case, People v. Ware, 23 Ill.2d 59, 177 N.E.2d 362, included in its summary of ***922** the prosecution's evidence in this case the statement that '(t)he police officers also testified to certain admissions of guilt made to them by ***537** defendant on January 17, 1959.' 21 Ill.2d, at 67, 171 N.E.2d, at 19. Later in its opinion, the court stated:

'A review of the record does indicate, however, that strong suggestions of leniency were made to defendant subsequent to her arrest and prior to her admissions. Even in the absence of defendant's statements, there is clear proof by Zeno and the police officers that defendant gave Zeno a package containing marijuana. Upon a review of the entire record, we are convinced that the evidence fully supports the judgment of the trial court. * * *' 21 Ill.2d, at 68, 171 N.E.2d, at 20.

[6] While this statement is not free from ambiguity, we take it to express the view that even if the testimony as to the petitioner's confession was erroneously admitted, the error was a harmless one in the light of other evidence of the petitioner's guilt.[FN4] That is an impermissible doctrine. As was said in Payne v. Arkansas, 'this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the

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admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.' 356 U.S. 560, at 568, 78 S.Ct. 844, 850, 2 L.Ed.2d 975. ***538** See Spano v. People of State of New York, 360 U.S. 315, 324, 79 S.Ct. 1202, 1207, 3 L.Ed.2d 1265; Watts v. Indiana, 338 U.S. 49, 50, n. 2, 69 S.Ct. 1347, 1348, 93 L.Ed. 1801; Haley v. Ohio, 332 U.S. 596, 599, 68 S.Ct. 302, 303, 92 L.Ed. 224.

> FN4. It is difficult, however, to perceive how the admission of evidence of the confession could be considered harmless. The only other evidence of substance against the petitioner was that given by Zeno, a twice convicted felon who testified that he was eager in his own self-interest to cooperate with the police by 'setting up' someone. While it was undisputed that Zeno was in possession of the package of marijuana when he emerged from the petitioner's apartment, it was far from clear that Zeno obtained the marijuana from the petitioner. Zeno was out of the police officers' sight for a period of from five to 20 minutes, and there were other apartments in the building where Zeno might have obtained the package.

The judgment is set aside, and the case is remanded to the Supreme Court of Illinois for further proceedings not inconsistent with this opinion.

It is so ordered.

Judgment set aside and case remanded with directions.

U.S.Ill. 1963.
Lynumn v. State of Ill.,
372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922

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378 U.S. 368, 84 S.Ct. 1774, 1 A.L.R.3d 1205, 12 L.Ed.2d 908, 28 O.O.2d 177
(Cite as: 378 U.S. 368, 84 S.Ct. 1774)

▷
Jackson v. Denno,
U.S.N.Y. 1964.

Supreme Court of the United States
Nathan JACKSON, Petitioner,
v.
Wilfred DENNO, Warden.
No. 62.

Argued Dec. 9 and 10, 1963.
Decided June 22, 1964.

New York prisoner's proceeding for a writ of habeas corpus. The United States District Court for the Southern District of New York, 206 F.Supp. 759, denied the application, and the petitioner appealed. The United States Court of Appeals for the Second Circuit, 309 F.2d 573, affirmed. Certiorari was granted. The Supreme Court, Mr. Justice White, held that New York procedure whereby trial court submitted to jury along with other issues in case question as to voluntariness of confession on which evidence was in conflict, telling jury that if confession was involuntary it was to disregard it entirely and to determine question of guilt from other evidence and that, alternatively, if it found confession voluntary, to determine truth and reliability and to afford it weight accordingly, did not afford reliable determination of voluntariness of confession, did not adequately protect defendant's right to be free of conviction based on coerced confession, and could not withstand constitutional attack under due process clause of Fourteenth Amendment, and that the petitioner was entitled to a state hearing on the question of voluntariness of the confession but was not, unless the confession was found involuntary, necessarily entitled to a new trial on the question of guilt.

Reversed.

Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Stewart dissented. Mr. Justice Black dissented in part.

West Headnotes

[1] Federal Courts 170B ⚿506

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk504 Nature of Decisions or Questions Involved
170Bk506 k. Criminal Matters; Habeas Corpus. Most Cited Cases
(Formerly 106k3971/2)

Certiorari was granted to consider fundamental questions about constitutionality of New York procedure governing admissibility of confessions alleged to be involuntary. U.S.C.A.Const. Amend. 14.

[2] Habeas Corpus 197 ⚿339

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)2 Particular Errors and Proceedings
197k332 Criminal Prosecutions
197k339 k. Evidence and Witnesses; Arrest and Search. Most Cited Cases
(Formerly 197k45.3(9))

Exhaustion requirements were satisfied so as to permit federal court to rule on constitutionality of state procedure governing admissibility of confession, though issue had not been seasonably tendered in state courts, where there was no claim that petitioner, after consultation with competent counsel or otherwise, understandingly and knowingly forewent privilege of seeking to vindicate federal claims in state courts, whether for strategic, tactical or any other reasons that could fairly be described as deliberate by-passing of state procedures.

[3] Habeas Corpus 197 ⚿313.1

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)1 In General
197k313 Forfeiture, Waiver, Bypass, Procedural Default, or Failure to Object
197k313.1 k. In General. Most Cited Cases
(Formerly 197k313, 197k45.2(2))
Federal habeas corpus jurisdiction is conferred by allegation of unconstitutional restraint and is not defeated by anything that may occur in state proceedings, and state procedural rules must yield to this overriding federal policy. U.S.C.A.Const. Amend. 14.

[4] Habeas Corpus 197 ⚿316

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)1 In General
197k313 Forfeiture, Waiver, Bypass, Procedural Default, or Failure to Object
197k316 k. Tactical Decisions; Deliberate Bypass. Most Cited Cases
(Formerly 197k45.3(9))
The deliberate by-passing of state procedures is the only ground for which relief may be denied in federal habeas corpus for failure to raise a federal constitutional claim in state courts. U.S.C.A.Const. Amend. 14.

[5] Constitutional Law 92 ⚿4663

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4661 Statements, Confessions, and Admissions
92k4663 k. Voluntariness, Compulsory Testimony, and Self-Incrimination in General. Most Cited Cases
(Formerly 92k266.1(1), 92k266)
Defendant in criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard to truth or falsity of confession, and even though there is ample evidence aside from confession to support conviction. U.S.C.A.Const. Amend. 14.

[6] Constitutional Law 92 ⚿4667

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4661 Statements, Confessions, and Admissions
92k4667 k. Determination of Admissibility; Suppression. Most Cited Cases
(Formerly 92k266.1(5), 92k266)
Defendant had constitutional right at some stage in proceedings to object to use of confession and to have fair hearing and reliable determination on issue of voluntariness, determination uninfluenced by truth or falsity of confession. U.S.C.A.Const. Amend. 14.

[7] Constitutional Law 92 ⚿4667

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4661 Statements, Confessions, and Admissions
92k4667 k. Determination of Admissibility; Suppression. Most Cited Cases
(Formerly 92k266.1(5), 92k266)
New York procedure whereby trial court submitted to jury along with other issues in case, for single verdict, question as to voluntariness of confession on which evidence was in conflict, telling jury that if confession was involuntary, it was to disregard it entirely and to determine question of guilt from other evidence and that, alternatively, if it found confession voluntary, to determine truth and reliability and to afford it weight accordingly, did not afford reliable determination of voluntariness, and could not withstand constitutional attack under due process clause of Fourteenth Amendment.

U.S.C.A.Const. Amend. 14.

[8] Criminal Law 110 ⚿736(2)

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k736 Preliminary or Introductory Questions of Fact
110k736(2) k. Confessions, Admissions, and Declarations. Most Cited Cases
Massachusetts procedure under which jury passes on voluntariness of confession only after judge has fully and independently resolved issue against accused does not pose hazard to rights of accused, given integrity of preliminary proceedings before judge. U.S.C.A.Const. Amend. 14.

[9] Constitutional Law 92 ⚿4667

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4661 Statements, Confessions, and Admissions
92k4667 k. Determination of Admissibility; Suppression. Most Cited Cases
(Formerly 92k266.1(5), 92k266)
Defendant objecting to admission of confession is entitled to fair hearing in which both underlying factual issues and voluntariness of confession are actually and reliably determined. U.S.C.A.Const. Amend. 14.

[10] Constitutional Law 92 ⚿4663

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4661 Statements, Confessions, and Admissions
92k4663 k. Voluntariness, Compulsory Testimony, and Self-Incrimination in General. Most Cited Cases
(Formerly 92k266.1(1), 92k266)
The Fourteenth Amendment forbids use of involuntary confession not only because of probable unreliability but also because of attitude that important human values are sacrificed where agency of government, in course of securing conviction, wrings confession out of accused against his will and because of deep rooted feeling that police must obey law while enforcing law; that, in the end, life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from criminals themselves. U.S.C.A.Const. Amend. 14.

[11] Criminal Law 110 ⚿1169.12

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.12 k. Acts, Admissions, Declarations, and Confessions of Accused. Most Cited Cases
(Formerly 110k1169(12))
Reversal follows if confession admitted in evidence is found to be involuntary in United States Supreme Court, regardless of possibility that jury correctly followed instructions and determined confession to be involuntary. U.S.C.A.Const.Amend. 14.

[12] Criminal Law 110 ⚿532(.5)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k532 Determination of Question of Admissibility
110k532(.5) k. In General. Most Cited Cases
(Formerly 110k532)
Admixture of reliability and voluntariness of confession in considerations of jury under New York procedure would itself entitle defendant to further proceedings in any case in which essential facts were disputed. U.S.C.A.Const. Amend. 14.

[13] Criminal Law 110 ⚿532(.5)

110 Criminal Law
110XVII Evidence

110XVII(T) Confessions
110k532 Determination of Question of Admissibility
110k532(.5) k. In General. Most Cited Cases
(Formerly 110k532)
State procedures with respect to confessions must be fully adequate to insure reasonable and clear cut determination of voluntariness, including resolution of disputed facts upon which issue may depend. U.S.C.A.Const. Amend. 14.

[14] Criminal Law 110 ⚿736(2)

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k736 Preliminary or Introductory Questions of Fact
110k736(2) k. Confessions, Admissions, and Declarations. Most Cited Cases
States are free to allocate functions between judge and jury as they see fit with respect to determination of voluntariness of confessions. U.S.C.A.Const. Amend. 14.

[15] Criminal Law 110 ⚿1144.12

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.12 k. Reception of Evidence. Most Cited Cases
(Formerly 110k1144(12))
Even if case were before Supreme Court on direct review of conviction rather than on federal habeas corpus, court would not proceed on assumption that disputes with respect to voluntariness of confession had been resolved by jury in favor of state, where, because single verdict was returned, court was unable to tell how jury resolved such matters and even if it did resolve them against defendant, findings were infected with impermissible considerations. U.S.C.A.Const. Amend. 14.

[16] Habeas Corpus 197 ⚿775(2)

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k775 Admissibility of Evidence; Arrest and Search
197k775(2) k. Adequacy or Effectiveness of State Proceeding; Full and Fair Litigation. Most Cited Cases
(Formerly 197k90)
Federal habeas corpus court, in face of unreliable state court procedure with respect to determination of voluntariness of confession, would not be justified in disposing of petition solely on basis of undisputed portions of record, but at very least would require full evidentiary hearing to determine factual context in which confession was given. U.S.C.A.Const. Amend. 14.

[17] Habeas Corpus 197 ⚿795(1)

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)5 Determination and Disposition; Relief
197k794 Proceedings by State Prisoners in Federal Courts
197k795 Conditional Relief; New Trial or Other Proceeding
197k795(1) k. In General. Most Cited Cases
(Formerly 197k109)
Further proceedings to which state prisoner was entitled, by virtue of fact that procedure employed to determine admissibility of confession alleged to be involuntary denied him due process, was to occur initially in state courts rather than in federal habeas corpus court. U.S.C.A.Const. Amend. 14.

[18] Habeas Corpus 197 ⚿795(1)

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings
197III(C)5 Determination and Disposition; Relief
197k794 Proceedings by State Prisoners in Federal Courts
197k795 Conditional Relief; New Trial or Other Proceeding
197k795(1) k. In General. Most Cited Cases
(Formerly 197k109)
State prisoner was not automatically entitled to new trial, including retrial of issue of guilt, from fact that procedure whereby question of voluntariness of confession had been left to jury returning single verdict was violative of due process, but he was entitled to a separate hearing in state court on question of voluntariness of confession and, if at conclusion thereof, it was determined that confession was voluntary, there was no constitutional necessity for new trial on issue of guilt, but if confession were determined involuntary, new trial would be required without the confession in evidence. U.S.C.A.Const. Amend. 14.

[19] Habeas Corpus 197 ⚿795(1)

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)5 Determination and Disposition; Relief
197k794 Proceedings by State Prisoners in Federal Courts
197k795 Conditional Relief; New Trial or Other Proceeding
197k795(1) k. In General. Most Cited Cases
(Formerly 197k109)
State was free to give defendant new trial on issue of guilt as well as issue of voluntariness of confession following Supreme Court's direction of habeas corpus because procedures governing admissibility of confession were found violative of due process, but Supreme Court would not impose such requirements before outcome of new hearing on voluntariness was known. U.S.C.A.Const. Amend. 14.

[20] Criminal Law 110 ⚿532(.5)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k532 Determination of Question of Admissibility
110k532(.5) k. In General. Most Cited Cases
(Formerly 110k532)
It is desirable that in state cases proper determination of voluntariness of confession be made prior to admission of confession to jury adjudicating guilt or innocence. U.S.C.A.Const. Amend. 14.

***369** Daniel G. Collins, New York City, for petitioner.
William I. Siegel, Brooklyn, for respondent.
Mr. Justice WHITE delivered the opinion of the Court.
[1][2][3][4] Petitioner, Jackson, has filed a petition for habeas corpus in the Federal District Court asserting that his conviction for murder in the New York courts is invalid because it was founded upon a confession not properly ***370** determined to be voluntary. The writ was denied, 206 F.Supp. 759 (D.C.S.D.N.Y.), the Court of Appeals affirmed, 309 F.2d 573 (C.A.2d Cir.), and we granted certiorari to consider fundamental questions about the constitutionality of the New York procedure governing the admissibility of a confession alleged to be involuntary.[FN1] 371 U.S. 967, 83 S.Ct. 553, 9 L.Ed.2d 538.

FN1. There is no claim in this Court that the constitutionality of the New York procedural rule governing admission of confessions is not properly before us. Although it appears that this issue was not seasonably tendered to the New York courts, exhaustion requirements were satisfied and the Federal District Court ruled on the merits of the issue, as our decision last Term in Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837, clearly requires:
'(W)e have consistently held that federal court jurisdiction is conferred by the allegation of an

unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy.' Id., 372 U.S. at 426-427, 83 S.Ct. at 842.
No one suggests that the petitioner, Jackson, 'after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures,' the only ground for which relief may be denied in federal habeas corpus for failure to raise a federal constitutional claim in the state courts. Fay v. Noia, 372 U.S. 391, 439, 83 S.Ct. 822, 849. See also Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461.

I.

On June 14, 1960, at about 1 a.m., petitioner, Jackson, and Nora Elliott entered a Brooklyn hotel where Miss Elliott registered for both of them. After telling Miss Elliott to leave, which she did, Jackson drew a gun and took money from the room clerk. He ordered the clerk and several other people into an upstairs room and left the hotel, only to encounter Miss Elliott and later a policeman on the street. A struggle with the latter followed, in the course of which both men drew guns. The ***371** policeman was fatally wounded and petitioner was shot twice in the body. He managed to hail a cab, however, which took him to the hospital.

A detective questioned Jackson at about 2 a.m., soon after his arrival at the hospital. Jackson, when asked for his name, said, 'Nathan Jackson, I shot ****1778** the colored cop. I got the drop on him.' He also admitted the robbery at the hotel. According to the detective, Jackson was in 'strong' condition despite his wounds.

Jackson was given 50 milligrams of demerol and 1/50 of a grain of scopolamine at 3:55 a.m. Immediately thereafter an Assistant District Attorney, in the presence of police officers and hospital personnel, questioned Jackson, the interrogation being recorded by a stenographer. Jackson, who had been shot in the liver and lung, had by this time lost about 500 cc. of blood. Jackson again admitted the robbery in the hotel, and then said, 'Look, I can't go on.' But in response to further questions he admitted shooting the policeman and having fired the first shot.[FN2] The interview was completed at 4 a.m. An ***372** operation upon petitioner was begun at 5 a.m. and completed at 8 a.m.

FN2. The confession reads in pertinent part as follows:
'Q. Where did you meet the officer? A. On the street.
'Q. What happened when you met him? A. I said, ' There was a fight upstairs.'
'Q. Then what? A. He insisted I go with him so I got the best of him.
'Q. How did you get the best of him? A. I know Judo.
'Q. You threw him over? A. Yeah.
'Q. Where was your gun while you were giving him the Judo? A. In my holster.
'Q. After you threw him to the ground, did you pull your gun? Where was the holster? A. On my shoulder.
'Q. After you threw him to the ground, what did you do about your gun? A. He went for his gun.
'Q. What did you do? A. I got mine out first.
'Q. Did you point the gun at him? A. Yeah.
'Q. What did you say to him? A. Told him not to be a hero.
'Q. How many shots did you fire at the officer? A. I don't know.
'Q. Was it more than one? A. Yeah.
'Q. Who fired first, you or the police officer? A. I beat him to it.
'Q. How many times did you fire at him? A. I don't know; twice probably.
'Q. Did he go down? Did he fall down? A. Yeah.
'Q. What did you do? A. I shot. I didn't know. I knew I was shot. While I was on the ground he fired the gun.'

Jackson and Miss Elliott were indicted for murder in the first degree and were tried together. The statements made by Jackson, both at 2 and 3:55 a.m., were introduced in evidence without objection

by Jackson's counsel. Jackson took the stand in his own defense. His account of the robbery and of the shooting of the policeman differed in some important respects from his confession. According to Jackson's testimony, there was a substantial interval of time between his leaving the hotel and the shooting, and the policeman attempted to draw his gun first and fired the first shot. As to the questioning at the hospital, Jackson recalled that he was in pain and gasping for breath at the time and was refused water and told he would not be let alone until the police had the answers they wanted. He knew that he had been interrogated but could remember neither the questions nor the answers.

To counter Jackson's suggestion that he had been pressured into answering questions, the State offered the testimony of the attending physician and of several other persons. They agreed that Jackson was refused water, but because of the impending operation rather than his refusal to answer questions. On cross-examination of the doctor, Jackson's counsel, with the help of the hospital ***373** records, elicited the fact that demerol and scopolamine were administered to Jackson immediately before his interrogation. But any effect of these drugs on Jackson during the interrogation was denied.[FN3]

FN3. The properties of these medications were described in this way: 'By Mr. Healy:
'Q. Could you tell us what time demerol was prescribed for him? A. From our records it was stated here. It was given at 3:55 a.m.
'Q. 3:55. Well, will that put you to sleep, demerol, Doctor? A. Well, it will make you-
'Q. Dopey? A. It will make you dopey.
'Q. And what was the other one, atropine-
'The Court: Atropine, a-t-r-o-p-i-n-e-.
'By Mr. Healy:
'Q. Atropine, what is that' A. Oh, it is not atropine. It is scopolamine.
'Q. What is that, Doctor? A. It dries up the secretion.
'The Court: It dries up the secretion?
'The Witness: Of the throat and the pharynges and the upper respiratory tract.
'Redirect Examination by Mr. Schor:
'Q. Doctor, you just told us that demerol makes a person dopey; right? A. Yes, sir.
'Q. How long does it take from the time it is administered until the patient feels the effect? A. Well, it manifests its action about fifteen minutes after it is injected.
'Q. Fifteen minutes later? A. About fifteen minutes later.
'By Mr. Healy:
'Q. So if a person was in good health and took demerol, the effect wouldn't be any different? A. Not much different.
'Q. How about a person who, for instance, has been shot through the liver, as your report shows there? Would that be the same time as for a healthy person? Do you mean that, Doctor? A. Yes, sir.
'Q. The report-the record shows that he had lost 500 cc's of blood. Now, I am asking you, would that make any difference in the time that this-A. I don't think so.'

****1779 *374** Although Jackson's counsel did not specifically object to the admission of the confession initially, the trial court indicated its awareness that Jackson's counsel was questioning the circumstances under which Jackson was interrogated. [FN4]

FN4. 'The Court: Judge Healy raised the point in cross-examination that sedation of a kind was administered to the patient.
'Mr. Healy: Some kind.
'The Court: And therefore he is going to contend and he does now that the confession hasn't the weight the law requires. Is that your purpose?
'Mr. Healy: That's correct. There are two, one statement and another statement. One statement to the police and one statement to the District Attorney.
'Mr. Healy: Mr. Lentini being the hearing reporter. That was taken at 3:55.
'The Court: That's the time that you say he was in no mental condition to make the statement?
'Mr. Healy: That's correct.
'The Court: Is that correct?
'Mr. Healy: That's correct.'

In his closing argument, Jackson's counsel did not ask for an acquittal but for a verdict of

second-degree murder or manslaughter. Counsel's main effort was to negative the premeditation and intent necessary to first-degree murder and to separate the robbery felony from the killing. He made much of the testimony tending to show a substantial interval between leaving the hotel and the beginning of the struggle with the policeman. The details of that struggle and the testimony indicating the policeman fired the first shot were also stressed.

Consistent with the New York practice where a question has been raised about the voluntariness of a confession, the trial court submitted that issue to the jury along with the other issues in the case. The jury was told that if it found the confession involuntary, it was to disregard it entirely, and determine guilt or innocence ***375** solely from the other evidence in the case; alternatively, if it found the confession voluntary, it was to determine its truth or reliability and afford it weight accordingly. FN5

> FN5. 'If you determine that it was a confession, the statement offered here, and if you determine that Jackson made it, and if you determine that it is true; if you determine that it is accurate, before you may use it, the law still says you must find that it is voluntary, and the prosecution has the burden of proving that it was a voluntary confession. The defendant merely comes forward with the suggestion that it was involuntary, but the burden is upon the prosecution to show that it was voluntary.

'Under our law, a confession, even if true and accurate, if involuntary, is not admissible, and if it is left for the jury to determine whether or not it was voluntary, its decision is final. If you say it was involuntarily obtained, it goes out of the case. If you say it was voluntarily made, the weight of it is for you. So I am submitting to you as a question of fact to determine whether or not (a) this statement was made by Jackson, or allegedly made by Jackson, whether it was a voluntary confession, and whether it was true and accurate. That decision is yours.
'Should you decide under the rules that I gave you that it is voluntary, true and accurate, you may use it, and give it the weight you feel that you should give it. If you should decide that it is involuntary, exclude it from the case. Do not consider it at all. In that event, you must go to the other evidence in the case to see whether or not the guilt of Jackson was established to your satisfaction outside of the confession, beyond a reasonable doubt.
'If you should determine that Jackson made this confession, and that it was a true confession, and you have so determined from the evidence, then if you should decide that it was gotten by influence, of fear produced by threats, and if that is your decision, then reject it.
'I repeat to you again, the burden of proving the accuracy, truth, and the voluntariness of the confession always rests upon the prosecution.'
There is no issue raised as to whether these instructions stated an adequate and correct federal standard for determining the voluntariness of Jackson's confession.

****1780** The jury found Jackson guilty of murder in the first degree, Miss Elliott of manslaughter in the first degree. Jackson was sentenced to death, Miss Elliott to a prison ***376** term. Jackson's conviction was affirmed by the New York Court of Appeals, People v. Jackson, 10 N.Y.2d 780, 219 N.Y.S.2d 621, 177 N.E.2d 59, its remittitur being amended to show that it had necessarily passed upon the voluntariness of the confession and had found that Jackson's constitutional rights had not been violated. 10 N.Y.2d 816, 221 N.Y.S.2d 521, 178 N.E.2d 234. Certiorari was denied here. 368 U.S. 949, 82 S.Ct. 390, 7 L.Ed.2d 344. Jackson then filed a petition for habeas corpus claiming that the New York procedure for determining the voluntariness of a confession was unconstitutional and that in any event his confession was involuntary. After hearing argument and examining the state court record the District Court denied the petition without holding an evidentiary hearing. Indicating that it is the trier of fact who must determine the truth of the testimony of prisoner and official alike and resolve conflicts in the testimony, the court found 'no clear and conclusive proof that these statements were extorted from him, or that they were given involuntarily.' Nor was any constitutional infirmity found in the New York

procedure. 206 F.Supp. 759 (D.C.S.D.N.Y.). The Court of Appeals, after noting the conflicting testimony concerning the coercion issue and apparently accepting the State's version of the facts, affirmed the conviction. 309 F.2d 573 (C.A.2d Cir.).

II.

[5][6][7] It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760, and even though there is ample evidence aside from the confession to support the conviction. Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029; Stroble v. California, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872; Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975. Equally clear is the defendant's constitutional right at some stage in the proceedings ***377** to object to ****1781** the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. Rogers v. Richmond, supra. In our view, the New York procedure employed in this case did not afford a reliable determination of the voluntariness of the confession offered in evidence at the trial, did not adequately protect Jackson's right to be free of a conviction based upon a coerced confession and therefore cannot withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment. We therefore reverse the judgment below denying the writ of habeas corpus.

III.

Under the New York rule, the trial judge must make a preliminary determination regarding a confession offered by the prosecution and exclude it if in no circumstances could the confession be deemed voluntary.[FN6] But if the evidence presents a fair question as to its voluntariness, as where certain facts bearing on the issue are in dispute or where reasonable men could differ over the inferences to be drawn from undisputed facts, the judge 'must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness.'[FN7] Stein v. New York, 346 U.S. 156, 172, 73 S.Ct. 1077, 1086, 97 L.Ed. 1522. If an issue of coercion is presented, the judge may not resolve conflicting evidence or arrive at his independent appraisal of the voluntariness ***378** of the confession, one way or the other. These matters he must leave to the jury.

FN6. See People v. Weiner, 248 N.Y. 118, 161 N.E. 441; People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553.

FN7. People v. Doran, 246 N.Y. 409, 416-417, 159 N.E. 379, 381-382; People v. Leyra, supra. Under the New York rule the judge is not required to exclude the jury while he hears evidence as to voluntariness and perhaps is not allowed to do so. People v. Brasch, 193 N.Y. 46, 85 N.E. 809; People v. Randazzio, 194 N.Y. 147, 87 N.E. 112.

[8] This procedure has a significant impact upon the defendant's Fourteenth Amendment rights. In jurisdictions following the orthodox rule, under which the judge himself solely and finally determines the voluntariness of the confession, or those following the Massachusetts procedure,[FN8] under which the jury passes on voluntariness only after the judge has fully and independently ****1782** resolved the issue against the accused,[FN9] the judge's conclusions***379** are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary. Moreover, his findings upon disputed issues of fact are expressly stated or may be ascertainable from the record. In contrast, the New York jury returns only a general verdict upon the ultimate question of guilt or innocence. It is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it. Nor is there any indication of how the jury resolved disputes in the evidence concerning the critical facts underlying the coercion issue. Indeed, there is nothing ***380** to show that these

matters were resolved at all, one way or the other.

> FN8. We raise no question here concerning the Massachusetts procedure. In jurisdictions following this rule, the judge hears the confession evidence, himself resolves evidentiary conflicts and gives his own answer to the coercion issue, rejecting confessions he deems involuntary and admitting only those he believes voluntary. It is only the latter confessions that are heard by the jury, which may then, under this procedure, disagree with the judge, find the confession involuntary and ignore it. Given the integrity of the preliminary proceedings before the judge, the Massachusetts procedure does not, in our opinion, pose hazards to the rights of a defendant. While no more will be known about the views of the jury than under the New York rule, the jury does not hear all confessions where there is a fair question of voluntariness, but only those which a judge actually and independently determines to be voluntary, based upon all of the evidence. The judge's consideration of voluntariness is carried out separate and aside from issues of the reliability of the confession and the guilt or innocence of the accused and without regard to the fact the issue may again be raised before the jury if decided against the defendant. The record will show the judge's conclusions in this regard and his findings upon the underlying facts may be express or ascertainable from the record.

Once the confession is properly found to be voluntary by the judge, reconsideration of this issue by the jury does not, of course, improperly affect the jury's determination of the credibility or probativeness of the confession or its ultimate determination of guilt or innocence.

> FN9. Not all the States and federal judicial circuits can be neatly classified in accordance with the above three procedures. In many cases it is difficult to ascertain from published appellate court opinions whether the New York or Massachusetts procedure, or some variant of either, is being followed. Some jurisdictions apparently leave the matter entirely to the discretion of the trial court; others state the rule differently on different occasions; and still others deal with voluntariness in terms of trustworthiness, which is said to be a matter for the jury, an approach which, in the light of this Court's recent decision in Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, may make these cases of doubtful authority.

Because of the above-described difficulties, annotators and commentators have not attempted definitive classifications of jurisdictions following the Massachusetts procedure separate from those following the New York practice. See 170 A.L.R. 568; 85 A.L.R. 870; Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U.Chi.L.Rev. 317 (1954); 3 Wigmore, Evidence (3d ed. 1940), s 861, n. 3.

'The formal distinction between the New York and Massachusetts procedures is often blurred in appellate opinions. Under either procedure, the trial court faced with an objection to the admissibility of a confession must rule on that objection, i.e., must determine whether the jury is to hear the challenged confession. But the controlling question is different under the two procedures. * * * Since courts which require the ultimate submission of the voluntariness issue to the jury refer to the necessity of a judicial determination without specifying its character, it is sometimes difficult to determine which of two procedures is being approved * * *.' Meltzer, supra, at 323-324.

'Those jurisdictions where it appears unclear from appellate court opinions whether the Massachusetts or New York procedure is used in the trial court are listed in the Appendix.

These uncertainties inherent in the New York procedure were aptly described by the Court in Stein v. New York, 346 U.S. 156, 177-178, 73 S.Ct. 1077, 1089:

'Petitioners suffer a disadvantage inseparable from the issues they raise in that this procedure does not produce any definite, open and separate decision of

the confession issue. Being cloaked by the general verdict, petitioners do not know what result they really are attacking here. * * *
'This method of trying the coercion issue to a jury is not informative as to its disposition. Sometimes the record permits a guess or inference, but where other evidence of guilt is strong a reviewing court cannot learn whether the final result was to receive or to reject the confessions as evidence of guilt. Perhaps a more serious, practical cause of dissatisfaction is the absence of any assurance that the confessions did not serve as makeweights in a compromise verdict, some jurors accepting the confessions to overcome lingering doubt of guilt, others rejecting them but finding their doubts satisfied by other evidence, and yet others or perhaps all never reaching a separate and definite conclusion as to the confessions but returning an unanalytical and impressionistic verdict based on all they had heard.'

**1783 [9] A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined. But did the jury in Jackson's case make these critical determinations, and if it did, what were these determinations?

Notwithstanding these acknowledged difficulties inherent in the New York procedure, the Court in Stein found ***381** no constitutional deprivation to the defendant. The Court proceeded to this conclusion on the basis of alternative assumptions regarding the manner in which the jury might have resolved the coercion issue. Either the jury determined the disputed issues of fact against the accused, found the confession voluntary and therefore properly relied upon it; or it found the contested facts in favor of the accused and deemed the confession involuntary, in which event it disregarded the confession in accordance with its instructions and adjudicated guilt based solely on the other evidence. On either assumption the Court found no error in the judgment of the state court.

We disagree with the Court in Stein; for in addition to sweeping aside its own express doubts that the jury acted at all in the confession matter the Court, we think, failed to take proper account of the dangers to an accused's rights under either of the alternative assumptions.

On the assumption that the jury found the confession voluntary, the Court concluded that it could properly do so. But this judgment was arrived at only on the further assumptions that the jury had actually found the disputed issues of fact against the accused and that these findings were reliably arrived at in accordance with considerations that are permissible and proper under federal law. These additional assumptions, in our view, were unsound.

The New York jury is at once given both the evidence going to voluntariness and all of the corroborating evidence showing that the confession is true and that the defendant committed the crime. The jury may therefore believe the confession and believe that the defendant has committed the very act with which he is charged, a circumstance which may seriously distort judgment of the credibility of the accused and assessment of the testimony concerning the critical facts surrounding his confession.

***382** In those cases where without the confession the evidence is insufficient, the defendant should not be convicted if the jury believes the confession but finds it to be involuntary. The jury, however, may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession, a policy which has divided this Court in the past, see Stein v. New York, supra, and an issue which may be reargued in the jury room. That a trustworthy confession must also be voluntary if it is to be used at all, generates natural and potent pressure to find it voluntary. Otherwise the guilty defendant goes free. Objective consideration of the conflicting evidence concerning the circumstances of the confession becomes difficult and the implicit findings become suspect.[FN10]

FN10. 'It may be urged that the commitment of our system to jury trial presupposes the acceptance of the assumptions that the jury follows its

> instructions, that it will make a separate determination of the voluntariness issue, and that it will disregard what it is supposed to disregard. But that commitment generally presupposes that the judge will apply the exclusionary rules before permitting evidence to be submitted to the jury.' Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U.Chi.L.Rev. 317, 327 (1954). See also 9 Wigmore, Evidence (3d ed. 1940), s 2550.

'The case of a confession induced by physical or mental coercion deserves special mention. The protection which the orthodox rule or the Massachusetts doctrine affords the accused is of major value to him. A fair consideration of the evidence upon the preliminary question is essential; in this consideration the truth or untruth of the confession is immaterial. Due process of law requires that a coerced confession be excluded from consideration by the jury. It also requires that the issue of coercion be tried by an unprejudiced trier, and, regardless of the pious fictions indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it. * * * The rule excluding a coerced confession is more than a rule excluding hearsay. Whatever may be said about the orthodox reasoning that its exclusion is on the ground of its probable falsity, the fact is that the considerations which call for the exclusion of a coerced confession are those which call for the protection of every citizen, whether he be in fact guilty or not guilty. And the rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every judge and lawyer knows, cannot be obeyed.' Morgan, Some Problems of Proof Under the Anglo-American System of Litigation (1956), 104-105.

****1784 *383** The danger that matters pertaining to the defendant's guilt will infect the jury's findings of fact bearing upon voluntariness, as well as its conclusion upon that issue itself, is sufficiently serious to preclude their unqualified acceptance upon review in this Court, regardless of whether there is or is not sufficient other evidence to sustain a finding of guilt. In Jackson's case, he confessed to having fired the first shot, a matter very relevant to the charge of first degree murder. The jury also heard the evidence of eyewitnesses to the shooting. Jackson's testimony going to his physical and mental condition when he confessed and to the events which took place at that time, bearing upon the issue of voluntariness, was disputed by the prosecution. The obvious and serious danger is that the jury disregarded or disbelieved Jackson's testimony pertaining to the confession because it believed he had done precisely what he was charged with doing.

The failure to inquire into the reliability of the jury's resolution of disputed factual considerations underlying its conclusion as to voluntariness-findings which were afforded decisive weight by the Court in Stein-was not a mere oversight but stemmed from the premise underlying the Stein opinion that the exclusion of involuntary confessions is constitutionally required solely because of the inherent untrustworthiness of a coerced confession. It followed from this premise that a reliable or true confession need not be rejected as involuntary and that evidence corroborating the truth or falsity of the confession and the guilt or innocence of the accused is indeed pertinent to ***384** the determination of the coercion issue.[FN11] This approach in Stein drew a sharp dissent from Mr. Justice Frankfurter, who admonished ****1785** that considerations of truth or falsity of the admissions are to be put aside in determining the question of coercion:

> FN11. '(R)eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A beaten confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire-tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void state convictions while forced confessions will do so.' 346 U.S., at 192, 73 S.Ct., at

1097. The Court further noted in Stein that the detailed confessions were ' corroborated throughout by other evidence, ' 346 U.S., at 168, 73 S.Ct., at 1084, and felt it necessary to recount the context in which the confessions were obtained only from 'a summary of the whole testimony,' 346 U.S., at 162, 73 S.Ct., at 1081. The premise that the veracity of the confession is highly pertinent to its voluntariness can also be gleaned from other statements in the opinion. In response to an objection that the New York procedure deterred testimony from a defendant on the facts surrounding the obtaining of the confession, the Court stated: 'If in open court, free from violence or threat of it, defendants had been obliged to admit incriminating facts, it might bear on the credibility of their claim that the same facts were admitted to the police only in response to beating.' Id., 346 U.S. at 175, 73 S.Ct. at 1088.

'This issue must be decided without regard to the confirmation of details in the confession by reliable other evidence. The determination must not be influenced by an irrelevant feeling of certitude that the accused is guilty of the crime to which he confessed.' 346 U.S., at 200, 73 S.Ct., at 1100.
This underpinning of Stein proved to be a short-lived departure from prior views of the Court, see Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781; Lyons v. Oklahoma, 322 U.S. 596, 597, 64 S.Ct. 1208, 1210, 88 L.Ed. 1481; Gallegos v. Nebraska, 342 U.S. 55, 63, 72 S.Ct. 141, 146, 96 L.Ed. 86, and was unequivocally put to rest in Rogers v. Richmond, supra, where it was held that the reliability of a confession has ***385** nothing to do with its voluntariness-proof that a defendant committed the act with which he is charged and to which he has confessed is not to be considered when deciding whether a defendant's will has been overborne. Reflecting his dissent in Stein, Mr. Justice Frankfurter wrote for a unanimous Court on this issue in Rogers, supra:
'(T)he weight attributed to the impermissible consideration of truth and falsity * * * entering into the Connecticut trial court's deliberations concerning the admissibility of the confessions, may well have distorted, by putting in improper perspective, even its findings of historical fact. Any consideration of this 'reliability' element was constitutionally precluded, precisely because the force which it carried with the trial judge cannot be known.' 365 U.S., at 545, 81 S.Ct. at 742.[FN12]

FN12. Rogers dealt with the situation where the state trial judge and the State Supreme Court applied a legal standard of voluntariness which incorporated reliability of the confession as a relevant determinant of voluntariness, whereas there is no issue here that the jury was explicitly instructed to consider reliability in deciding whether Jackson's confession was admissible, although it should be noted that the jury was not clearly told not to consider this element. The jury is indeed told to and necessarily does consider this element in determining the weight to be given the confession. The issues of probativeness and voluntariness are discrete and have different policy underpinnings, but are often confused. See note 13, infra. Regardless of explicit instructions, however, we think the likelihood that these forbidden considerations enter the jury's deliberations too great for us to ignore. Under the New York procedure the jury is not asked to resolve the issue of voluntariness until after the State has carried its burden of proof on the issue of a defendant's guilt and thus not until after matters pertaining to the defendant's guilt, including matters corroborative of the confession itself, are fully explored at trial. See Morgan, note 10, supra.

[10] It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only ***386** because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the ' strongly felt attitude of our society that important

human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,' Blackburn v. Alabama, 361 U.S. 199, 206-207, 80 S.Ct. 274, 280, 4 L.Ed.2d 242, and because of 'the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.' Spano v. New York, 360 U.S. 315, 320-321, 79 S.Ct. 1202, 1205-1206, 3 L.Ed.2d 1265. Because it did **1786 not recognize this ' complex of values,' Blackburn, supra, underlying the exclusion of involuntary confessions, Stein also ignored the pitfalls in giving decisive weight to the jury's assumed determination of the facts surrounding the disputed confession.

[11][12] Under the New York procedure, the evidence given the jury inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness. Indeed the jury is told to determine the truthfulness of the confession in assessing its probative value. [FN13] As a consequence, it cannot be *387 assumed, as the Stein Court assumed, that the jury reliably found the facts against the accused. [FN14] This unsound assumption undermines Stein's authority as a precedent and its view on the constitutionality of the New York procedure. The admixture of reliability and voluntariness in the considerations of the jury would itself entitle a defendant to further proceedings in any case in which the essential facts are disputed, for we cannot determine how the jury resolved these issues and will not assume that they were reliably and properly resolved against the accused. And it is only a reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant and which would permit the jury to consider the confession in adjudicating guilt or innocence.

FN13. The question of the credibility of a confession, as distinguished from its admissibility, is submitted to the jury in jurisdictions following the orthodox Massachusetts, or New York procedure. Since the evidence surrounding the making of a confession bears on its credibility, such evidence is presented to the jury under the orthodox rule not on the issue of voluntariness or competency of the confession, but on the issue of its weight. Just as questions of admissibility of evidence are traditionally for the court, questions of credibility, whether of a witness or a confession, are for the jury. This is so because trial courts do not direct a verdict against the defendant on issues involving credibility. Nothing in this opinion, of course, touches upon these ordinary rules of evidence relating to impeachment.

A finding that the confession is voluntary prior to admission no more affects the instructions on or the jury's view of the reliability of the confession than a finding in a preliminary hearing that evidence was not obtained by an illegal search affects the instructions on or the jury's view of the probativeness of this evidence.

The failure to distinguish between the discrete issues of voluntariness and credibility is frequently reflected in opinions which declare that it is the province of the court to resolve questions of admissibility of confessions, as with all other questions of admissibility of evidence, the province of the jury to determine issues of credibility, but which then approve the trial court's submission of the voluntariness question to the jury. Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U.Chi.L.Rev. 317, 320-321 (1954).

FN14. Another assumption of Stein-that a criminal conviction can stand despite the introduction of a coerced confession if there is sufficient other evidence to sustain a finding of guilt and if the confession is only tentatively submitted to the jury-an assumption also related to the view that the use of involuntary confessions is constitutionally proscribed solely because of their illusory trustworthiness, has also been rejected in the decisions of this Court. It is now clear that reversal follows if the

confession admitted in evidence is found to be involuntary in this Court regardless of the possibility that the jury correctly followed instructions and determined the confession, to be involuntary. Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513; Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202; Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844; Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948.

***388** But we do not rest on this ground alone, for the other alternative hypothesized in Stein-that the jury found the confession involuntary and disregarded it-is equally unacceptable. Under the New York procedure, the fact of a defendant's confession is solidly implanted in the jury's mind, for it has not only ****1787** heard the confession, but it has been instructed to consider and judge its voluntariness and is in position to assess whether it is true or false. If it finds the confession involuntary, does the jury-indeed, can it-then disregard the confession in accordance with its instructions' If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?[FN15]

FN15. See Rideau v. Louisiana, 373 U.S. 723, 727, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663: 'But we do not hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'' See also Delli Paoli v. United States, 352 U.S. 232, 248, 77 S.Ct. 294, 303, 1 L.Ed.2d 278: 'The Government should not have the windfall of having the jury be influenced be evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' (Dissenting opinion of Mr. Justice Frankfurter relating to use of a confession of a co-defendant under limiting instructions.) Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. United States, 332 U.S. 535 (539), 559, 68 S.Ct. 248, 257 (92 L.Ed. 154), all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore & Ohio R. Co., 2 Cir., 167 F.2d 54.' (Concurring opinion of Mr. Justice Jackson relating to limiting instructions concerning use of declarations of co-conspirators.) Shepard v. United States, 290 U.S. 96, 104, 54 S.Ct. 22, 25, 78 L.Ed. 196; United States v. Leviton, 193 F.2d 848, 865 (C.A.2d Cir.) , certiorari denied, 343 U.S. 946, 72 S.Ct. 860, 96 L.Ed. 1350; Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv.L.Rev. 165, 168-169 (1929); Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U.Chi.L.Rev. 317, 326 (1954).

***389** It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its finding of voluntariness, if this is the course it took, was affected by the other evidence showing the confession was true. But the New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore.[FN16]

FN16. Further obstacles to a reliable and fair determination of voluntariness under the New York procedure result from the ordinary rules relating to cross-examination and impeachment.

> Although not the case here, an accused may well be deterred from testifying on the voluntariness issue when the jury is present because of his vulnerability to impeachment by proof of prior convictions and broad cross-examination, both of whose prejudicial effects are familiar. The fear of such impeachment and extensive cross-examination in the presence of the jury that is to pass on guilt or innocence as well as voluntariness may induce a defendant to remain silent, although he is perhaps the only source of testimony on the facts underlying the claim of coercion. Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence. Cf. United States v. Carignan, 342 U.S. 36, 72 S.Ct. 97, 96 L.Ed. 48.

[13][14] As reflected in the cases in this Court, police conduct requiring exclusion of a confession has evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will.

'(T)his Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, ****1788** if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated***390** modes of ' persuasion." Blackburn v. Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 279. [FN17]

> FN17. Also see Gallegos v. Colorado, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325; Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037; Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202; Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246; Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801; Turner v. Pennsylvania, 338 U.S. 62, 69 S.Ct. 1352, 93 L.Ed. 1810; Harris v. South Carolina, 338 U.S. 68, 69 S.Ct. 1354, 93 L.Ed. 1815.

Expanded concepts of fairness in obtaining confessions have been accompanied by a correspondingly greater complexity in determining whether an accused's will has been overborne-facts are frequently disputed, questions of credibility are often crucial, and inferences to be drawn from established facts are often determinative. The overall determination of the voluntariness of a confession has thus become an exceedingly sensitive task, one that requires facing the issue squarely, in illuminating isolation and unbeclouded by other issues and the effect of extraneous but prejudicial evidence. See Wilson v. United States, 162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090; United States v. Carignan, 342 U.S. 36, 72 S.Ct. 97; Smith v. United States, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192.[FN18] Where pure ***391** factual considerations are an important ingredient, which is true in the usual case, appellate review in this Court is, as a practical matter, an inadequate substitute for a full and reliable determination of the voluntariness issue in the trial court and the trial court's determination, pro tanto, takes on an increasing finality. The procedures used in the trial court to arrive at its conclusions on the coercion issue progressively take on added significance as the actual measure of the protection afforded a defendant under the Due Process Clause of the Fourteenth Amendment against the use of involuntary confessions. These procedures must, therefore, be fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend.[FN19] In our view, the New York procedure falls short of satisfying these constitutional requirements. Stein v. New York is overruled.

> FN18. In Wilson v. United States, 162 U.S. 613, 16 S.Ct. 895, an early confession case in this Court, where the trial judge first ruled on the voluntariness of the confession before submitting the issue to the jury, the procedure governing admissibility in the federal courts was stated as follows:

'When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury, with the direction that they should reject the confession if, upon the whole evidence, they are satisfied it was not the voluntary act of the defendant. Comm. v. Preece, 140 Mass. 276, 5 N.E. 494.' Id., 162 U.S. at 624, 16 S.Ct. at 900.

The Court held in United States v. Carignan, 342 U.S. 36, 38, 72 S.Ct. 97, 98, that it was reversible error for a federal court to refuse a defendant the opportunity to testify before the judge and out of the presence of the jury on the facts surrounding the obtaining of a confession claimed to be involuntary. The Court explicitly followed this holding in Smith v. United States, 348 U.S. 147, 151, 75 S.Ct. 194, 196, when a defendant's asserted deprivation of a preliminary hearing on admissibility before the judge during the trial was rejected solely because ' the trial judge had already held a hearing on this issue in passing on the pretrial motion to suppress evidence.'

> FN19. Whether the trial judge, another judge, or another jury, but not the convicting jury, fully resolves the issue of voluntariness is not a matter of concern here. To this extent we agree with Stein that the States are free to allocate functions between judge and jury as they see fit.

IV.

We turn to consideration of the disposition of this case. Since Jackson has not been given an adequate hearing upon **1789 the voluntariness of his confession he must be given one, the remaining inquiry being the scope of that hearing and the court which should provide it.

This is not a case where the facts concerning the circumstances surrounding the confession are undisputed and the task is only to judge the voluntariness of the confession based upon the clearly established facts and in accordance with proper constitutional standards. Here there are substantial facts in dispute: Jackson said that he was in pain from his wounds, gasping for breath and unable to talk long. A state witness described Jackson *392 as in strong condition despite his wounds. According to Jackson, the police told him he could have no water and would not be left alone until he gave the answers the authorities desired. These verbal threats were denied by the State. Whereas Jackson claimed his will was affected by the drugs administered to him, the State's evidence was that the drugs neither had nor could have had any effect upon him at all. Whether Jackson is entitled to relief depends upon how these facts are resolved, for if the State is to be believed we cannot say that Jackson's confession was involuntary, whereas if Jackson's version of the facts is accepted the confession was involuntary and inadmissible. [FN20]

> FN20. We reject Jackson's alternative claim that even the undisputed evidence in this record shows his confession to have been involuntary. If the State's version of the facts is accepted, we have only Jackson's ready and coherent responses to brief questioning by the police unaffected by drugs or threats or coercive behavior on the part of the police; and his apparently strong condition at the time despite his two bullet wounds.

[15][16] As we have already said, Jackson is entitled to a reliable resolution of these evidentiary conflicts. If this case were here upon direct review of Jackson's conviction, we could not proceed with review on the assumption that these disputes had been resolved in favor of the State for as we have held we are not only unable to tell how the jury resolved these matters but, even if the jury did resolve them against Jackson, its findings were infected with impermissible considerations and accordingly cannot be controlling here. Cf. Rogers v. Richmond, supra. Likewise, a federal habeas corpus court, in the face of the unreliable state court procedure, would not be justified in disposing of the petition solely upon the basis of the undisputed portions of the record. At the very least, Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770, would require a full evidentiary hearing to determine the factual context in which Jackson's confession was given.

*393 [17] However, we think that the further proceedings to which Jackson is entitled should occur initially in the state courts rather than in the federal habeas corpus court. Jackson's trial did not comport with constitutional standards and he is entitled to a determination of the voluntariness of his confession in the state courts in accordance with valid state procedures; the State is also entitled to make this determination before this Court considers the case on direct review or a petition for habeas corpus is filed in a Federal District Court. This was the disposition in Rogers v. Richmond, supra, where, in a case coming to this Court from a denial of a habeas corpus the Court ascertained a trial error of constitutional dimension: [FN21]

> FN21. Compare Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, with Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735.

'A state defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a state judge or a state jury under appropriate state procedures which conform to the requirements of the Fourteenth **1790 Amendment. * * * (T)he State, too, has a weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts and juries. To require a federal judge exercising habeas corpus jurisdiction to attempt to combine within himself the proper functions of judge and jury in a state trial-to ask him to approximate the sympathies of the defendant's peers or to make the rulings which the state trial judge might make * * *-is potentially to prejudice state defendants claiming federal rights and to pre-empt functions that belong to state machinery in the administration of state criminal law.' 365 U.S., at 547-548, 81 S.Ct., at 743.

[18] It is New York, therefore, not the federal habeas corpus court, which should first provide Jackson with that which *394 he has not yet had and to which he is constitutionally entitled-an adequate evidentiary hearing productive of reliable results concerning the voluntariness of his confession. It does not follow, however, that Jackson is automatically entitled to a complete new trial including a retrial of the issue of guilt or innocence. Jackson's position before the District Court, and here, is that the issue of his confession should not have been decided by the convicting jury but should have been determined in a proceeding separate and apart from the body trying guilt or innocence. So far we agree and hold that he is now entitled to such a hearing in the state court. But if at the conclusion of such an evidentiary hearing in the state court on the coercion issue, it is determined that Jackson's confession was voluntarily given, admissible in evidence, and properly to be considered by the jury, we see no constitutional necessity at that point for proceeding with a new trial, for Jackson has already been tried by a jury with the confession placed before it and has been found guilty. True, the jury in the first trial was permitted to deal with the issue of voluntariness and we do not know whether the conviction rested upon the confession; but if it did, there is no constitutional prejudice to Jackson from the New York procedure if the confession is now properly found to be voluntary and therefore admissible. If the jury relied upon it, it was entitled to do so. Of course, if the state court, at an evidentiary hearing, redetermines the facts and decides that Jackson's confession was involuntary, there must be a new trial on guilt or innocence without the confession's being admitted in evidence.[FN22]

> FN22. In Rogers v. Richmond, supra, the Court, upon finding that the state trial judge applied a wholly erroneous standard of voluntariness, ordered a new trial. But the alternative disposition urged and rejected in that case was an evidentiary hearing in the Federal District Court. It does not appear that the Court considered the possibility of a more limited initial hearing in the state court with a new trial dependent upon the outcome of the hearing.

*395 [19][20] Obviously, the State is free to give Jackson a new trial if it so chooses, but for us to impose this requirement before the outcome of the new hearing on voluntariness is known would not comport with the interests of sound judicial administration and the proper relationship between

federal and state courts. We cannot assume that New York will not now afford Jackson a hearing that is consistent with the requirements of due process. Indeed, New York thought it was affording Jackson such a hearing, and not without support in the decisions of this Court,[FN23] when it submitted the issue of voluntariness**1791 to the same jury that adjudicated guilt. It is both practical and desirable that in cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence. But as to Jackson, who has already been convicted and now seeks collateral relief, we cannot say that the Constitution requires a new trial if in a soundly conducted collateral proceeding, the confession which was admitted at the trial is fairly determined*396 to be voluntary. Accordingly, the judgment denying petitioner's writ of habeas corpus is reversed and the case is remanded to the District Court to allow the State a reasonable time to afford Jackson a hearing or a new trial, failing which Jackson is entitled to his release.

FN23. Except for Stein v. New York, supra, the procedure invalidated herein was not questioned in confession cases decided by this Court. In Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, the Court read Stein as holding that 'when a confession is not found by this Court to be involuntary, this Court will not reverse on the ground that the jury might have found it involuntary and might have relied on it.' Also see Thomas v. Arizona, 356 U.S. 390, 78 S.Ct. 885, 2 L.Ed.2d 863; Lyons v. Oklahoma, 322 U.S. 596, 64 S.Ct. 1208; Wilson v. United States, 162 U.S. 613, 16 S.Ct. 895. But, cf. United States v. Carignan, 342 U.S. 36, 38, 72 S.Ct. 97, 99: 'We think it clear that this defendant was entitled to such an opportunity to testify (in the absence of the jury as to the facts surrounding the confession). An involuntary confession is inadmissible. Wilson v. United States, 162 U.S. 613, 623, 16 S.Ct. 895, 899. Such evidence would be pertinent to the inquiry on admissibility and might be material and determinative. The refusal to admit the testimony was reversible error.'

Reversed and remanded.

APPENDIX A.

ARIZONA: State v. Preis, 89 Ariz. 336, 362 P.2d 660, 661-662, cert. denied, 368 U.S. 934, 82 S.Ct. 372, 7 L.Ed.2d 196 (conflicts in the evidence for the jury but 'it must appear to the reasonable satisfaction of the trial court that the confession was not obtained by threats, coercion, or promises of immunity'). State v. Hudson, 89 Ariz. 103, 358 P.2d 332, states the Arizona practice more clearly. If the judge finds that the confession is voluntary, he may admit it into evidence; if it appears the confession was not voluntary, he must not let the confession go before the jury. See also State v. Pulliam, 87 Ariz. 216, 349 P.2d 781.

GEORGIA: Downs v. State, 208 Ga. 619, 68 S.E.2d 568 (admissible where no evidence of involuntariness offered at preliminary examination); Garrett v. State, 203 Ga. 756, 48 S.E.2d 377 (before admission prima facie showing of voluntariness is required; showing is satisfied where testimony as to voluntariness is not contradicted) Coker v. State, 199 Ga. 20, 33 S.E.2d 171 (confession should have been excluded by trial judge even though there was testimony that the defendant was not coerced).

IDAHO: State v. Van Vlack, 57 Idaho 316, 65 P.2d 736 (primarily for the trial court to determine the admissibility of a confession). State v. Dowell, 47 Idaho 457, 276 P. 39, 68 A.L.R. 1061; State v. Andreason, 44 Idaho 396, 257 P. 370 (the question of voluntariness primarily for the determination of the trial court). *397State v. Nolan, 31 Idaho 71, 169 P. 295 (judge must determine if freely and voluntarily made before admission.

MICHIGAN: People v. Crow, 304 Mich. 529, 8 N.W.2d 164 (question of voluntariness for the jury). People v. Preston, 299 Mich. 484, 300 N.W. 853 (confession first ruled voluntary in preliminary examination; at trial the question is for the jury). People v. Cleveland, 251 Mich. 542, 232 N.W. 384 (involuntariness issue should be carefully

scrutinized and confession excluded if involuntary; if conflict in evidence, matter for jury).

MINNESOTA: State v. Schabert, 218 Minn. 1, 15 N.W.2d 585 (if evidence creates issue of fact as to trustworthiness, that issue should be submitted to the jury on proper instructions, citing ****1792** Wilson v. United States, 162 U.S. 613, 16 S.Ct. 895, and New York, Pennsylvania and Massachusetts cases). State v. Nelson, 199 Minn. 86, 271 N.W. 114 (if judge finds confession admissible, the jury should also be allowed to pass on the question of voluntariness).

MISSOURI: State v. Statler, Mo., 331 S.W.2d 526 (if the evidence is conflicting and issue close in preliminary hearing, the issue should be tried again at trial so that both trial judge and jury may pass upon it with additional evidence adduced at trial). State v. Phillips, Mo., 324 S.W.2d 693. State v. Bradford, Mo., 262 S.W.2d 584 (trial court not obliged to submit question to jury because there is substantial evidence showing the confession is voluntary; where the issue is close, the trial court may decide the question after additional evidence adduced at trial is in).

OHIO: Burdge v. State, 53 Ohio St. 512, 42 N.E. 594 (matters preliminary to the admission of evidence for the court but where court is in doubt about the matter, it may leave the question to the jury, relying on Massachusetts case). State v. Powell, 105 Ohio App. 529, 148 N.E.2d 230, appeal dismissed, 167 Ohio St. 319, 148 N.E.2d 232, cert. denied, 359 U.S. 964, 79 S.Ct. 882, 3 L.Ed.2d 843 (where the trial judge disbelieves***398** the defendant's testimony as to voluntariness, he may leave the issue to the jury; preliminary hearing in presence of jury is discretionary).

OREGON: State v. Bodi, 223 Or. 486, 354 P.2d 831 (judge in his discretion may determine voluntariness or allow jury to decide whether the confession is voluntary and trustworthy). State v. Nunn, 212 Or. 546, 321 P.2d 356 (trial judge is not finally to determine whether a confession is voluntary but is to determine whether the State's proof warrants a finding of voluntariness; if so, the jury can consider voluntariness in determining the weight to be afforded the confession).

PENNSYLVANIA: Commonwealth v. Senk, 412 Pa. 184, 194 A.2d 221 (confession determined to be conditionally admissible after preliminary hearing). Commonwealth v. Ross, 403 Pa. 358, 365, 169 A.2d 780, 784, cert. denied, 368 U.S. 904, 82 S.Ct. 182, 7 L.Ed.2d 98 (both trial court in preliminary hearing and jury applied the proper standard in determining the confession to be voluntary; trial court added that the question was one of fact for the jury). Commonwealth v. Spardute, 278 Pa. 37, 122 A. 161 (where State's evidence shows confession is voluntary, matter is for the jury; only coercive practices inducing a false confession render it inadmissible).

SOUTH CAROLINA: State v. Bullock, 235 S.C. 356, 111 S.E.2d 657, appeal dismissed, 365 U.S. 292, 81 S.Ct. 686, 5 L.Ed.2d 570 (after trial judge decides the confession is admissible, jury may pass on the question of voluntariness). State v. Livingston, 223 S.C. 1, 73 S.E.2d 850, cert. denied, 345 U.S. 959, 73 S.Ct. 944, 97 L.Ed. 1379. State v. Scott, 209 S.C. 61, 38 S.E.2d 902 (question is for the judge in first instance, but if the judge is doubtful or evidence is conflicting, the jury is necessarily the final arbiter).

SOUTH DAKOTA: State v. Hinz, 78 S.D. 442, 103 N.W.2d 656 (court may resolve the question one way or the ***399** other, or, if very doubtful, leave it to the jury). State v. Nicholas, 62 S.D. 511, 253 N.W. 737 (procedure is discretionary with the trial judge, but the more frequent practice is for the trial judge to decide the question of voluntariness). State v. Montgomery, 26 S.D. 539, 128 N.W. 718 (question of voluntariness may be submitted to the jury where the evidence is conflicting).

TEXAS: Marrufo v. State, 172 Tex.Cr.R. 398, 357 S.W.2d 761 (confession not inadmissible as a matter of law). Odis v. State, 171 Tex.Cr.R. 107, 345 S.W.2d 529 (proper for trial judge to find confession admissible as a matter of law and recognize an issue in regard to voluntariness****1793** for jury's consideration). Bingham v. State, 97 Tex.Cr.R. 594, 262 S.W. 747 (reversible error for the court to fail to pass on the admissibility of a

confession since defendant entitled to the court's judgment on the matter; only if trial judge disbelieves evidence going to involuntariness should the confession be admitted).

WISCONSIN: State v. Bronston, 7 Wis.2d 627, 97 N.W.2d 504 (issue of trustworthiness of a confession for the jury). Pollack v. State, 215 Wis. 200, 253 N.W. 560 (unless the confession is wholly untrustworthy, it is to be submitted to the jury).

WYOMING: The only expression of the Wyoming court is found in Clay v. State, 15 Wyo. 42, 86 P. 17, where, in dictum, it is said that the jury may pass on the question if the admissions appear to be voluntary or the evidence is conflicting.

The same difficulty of classification exists in the federal judicial circuits. The cases in which the New York practice is said to be followed are generally instances where the defendant declines to offer any evidence in a preliminary examination after the Government has shown the confession to be voluntary. See Hayes v. United States, 296 F.2d 657 (C.A.8th Cir.), cert. denied, 369 U.S. 867, 82 S.Ct. 1033, 8 L.Ed.2d 85. United States v. Echeles, 222 F.2d 144 (C.A.7th Cir.), ***400** cert. denied, 350 U.S. 828, 76 S.Ct. 58, 100 L.Ed. 739; United States v. Leviton, 193 F.2d 848 (C.A.2d Cir.); or where the trial judge finds the confession to be voluntary, United States v. Anthony, 145 F.Supp. 323 (D.C.M.D.Pa.).

Other opinions from the United States Courts of Appeals for the various circuits indicate that they follow the Massachusetts or orthodox procedure. See United States v. Gottfried, 165 F.2d 360, 367 (C.A.2d Cir.), cert. denied, 333 U.S. 860, 68 S.Ct. 738, 92 L.Ed. 1139; United States v. Lustig, 163 F.2d 85, 88-89 (C.A.2d Cir.), cert. denied, 332 U.S. 775, 68 S.Ct. 88, 92 L.Ed. 360; McHenry v. United States, 308 F.2d 700 (C.A.10th Cir.); Andrews v. United States, 309 F.2d 127 (C.A.5th Cir.), cert. denied, 372 U.S. 946, 83 S.Ct. 939, 9 L.Ed.2d 970; Leonard v. United States, 278 F.2d 418 (C.A.9th Cir.); Smith v. United States, 268 F.2d 416 (C.A.9th Cir.); Shores v. United States, 174 F.2d 838 (C.A.8th Cir.); Denny v. United States, 151 F.2d 828 (C.A.4th Cir.), cert. denied, 327 U.S. 777, 66 S.Ct. 521, 90 L.Ed. 1005; Kemler v. United States, 133 F.2d 235 (C.A.1st Cir.); Murphy v. United States, 285 F. 801 (C.A.7th Cir.), cert. denied, 261 U.S. 617, 43 S.Ct. 362, 67 L.Ed. 829.

The Court of Appeals for the District of Columbia, however, does seem to sanction a variation of the New York practice, with the requirement that the judge hold a full preliminary hearing, at which the defendant may testify, outside the presence of the jury. It is not clear what the trial judge must find before admitting the confession and submitting the issue of voluntariness to the jury. Sawyer v. United States, 112 U.S.App.D.C. 381, 303 F.2d 392; Wright v. United States, 102 U.S.App.D.C. 36, 250 F.2d 4 (where the confession could be found voluntary, the issue is for the jury). Although there apparently are no recent cases, the Court of Appeals for the Sixth Circuit appears to follow the New York practice. Anderson v. United States, 6 Cir., 124 F.2d 58, rev'd 318 U.S. 350, 63 S.Ct. 599, 87 L.Ed. 829; McBryde v. United States, 6 Cir., 7 F.2d 466.

***401** Mr. Justice BLACK, with whom Mr. Justice CLARK joins as to Part I of this opinion, dissenting in part and concurring in part.

I.

In Stein v. New York, 346 U.S. 156, 177-179, 73 S.Ct. 1077, 1089-1090, this Court sustained the constitutionality of New York's procedure under which the jury, rather than the trial judge, resolves ****1794** disputed questions of fact as to the voluntariness of confessions offered against defendants charged with crime. I think this holding was correct and would adhere to it. While I dissented from affirmance of the convictions in Stein, my dissent went to other points; I most assuredly did not dissent because of any doubts about a State's constitutional power in a criminal case to let the jury, as it does in New York, decide the question of a confession's voluntariness. In fact, I would be far more troubled about constitutionality should either a State or the Federal Government declare that a jury in trying a defendant charged with crime is compelled to accept without question a trial court's factual finding that a confession was voluntarily given. Whatever might be a judge's view

of the voluntariness of a confession, the jury in passing on a defendant's guilt or innocence is, in my judgment, entitled to hear and determine voluntariness of a confession along with other factual issues on which its verdict must rest.

The Court rests its challenge to the reliability of jury verdicts in this field on its belief that it is unfair to a defendant, and therefore unconstitutional,[FN1] to have the question of voluntariness of a confession submitted to a jury until the trial judge has first canvassed the matter completely and made a final decision that the confession ***402** is voluntary. New York does not do this, although, as pointed out in Stein, supra, 346 U.S., at 174, 73 S.Ct. at 1087, the trial judge does have much power to consider this question both before and after a jury's final verdict is entered.[FN2] If a rule like that which the Court now holds to be constitutionally required would in actual practice reduce the number of confessions submitted to juries, this would obviously be an advantage for a defendant whose alleged confession was for this reason excluded. Even assuming this Court's power to fashion this rule, I am still unable to conclude that this possible advantage to some defendants is reason enough to create a new constitutional rule striking down the New York trial-by-jury practice.

> FN1. I am by no means suggesting that I believe that it is within this Court's power to treat as unconstitutional every state law or procedure that the Court believes to be ' unfair.'
>
> FN2. The trial judge may set aside a verdict if he believes it to be 'against the weight of the evidence.' The state appellate courts exercise the same power and may set verdicts aside if for any reason they believe that 'justice requires' them to do so. See N.Y.Code Crim.Proc. ss 465, 528.

Another reason given by the Court for invalidating the New York rule is that it is inherently unfair and therefore unconstitutional to permit the jury to pass on voluntariness, since the jury, even though finding a confession to have been coerced, may nevertheless be unwilling to follow the court's instruction to disregard it, because it may also believe the confession is true, the defendant is guilty, and a guilty person ought not be allowed to escape punishment. This is a possibility, of a nature that is inherent in any confession fact-finding by human fact-finders-a possibility present perhaps as much in judges as in jurors. There are, of course, no statistics available, and probably none could be gathered, accurately reporting whether and to what extent fact-finders (judges or juries) are affected as the Court says they may be.

Though able to cite as support for its holding no prior cases suggesting that the New York practice is so unfair to defendants that it must be held unconstitutional, the ***403** Court does refer to commentators who have made the suggestion.[FN3] ****1795** None of these commentators appears to have gathered factual data to support his thesis, nor does it appear that their arguments are at all rooted in the actual trial of criminal cases. Theoretical contemplation is a highly valuable means of moving toward improved techniques in many fields, but it cannot wholly displace the knowledge that comes from the hard facts of everyday experience. With this in mind it is not amiss to recall that the New York method of submitting the question of voluntariness to the jury without first having a definitive ruling by the judge not only has more than a century of history behind it but appears from the cases to be the procedure used in 15 States, the District of Columbia, and Puerto Rico, has been approved by this Court as a federal practice, see Smith v. United States, 348 U.S. 147, 150-151, 75 S.Ct. 194, 196; compare Wilson v. United States, 162 U.S. 613, 624, 16 S.Ct. 895, 900, and has been approved in six of the 11 United States Court of Appeals Circuits.[FN4] Fourteen other States appear to require full-scale determinations as to voluntariness both by the trial court and the jury.[FN5] Another 20 States require the trial judge first to decide the question of voluntariness for purposes of 'admissibility' but have him then submit that question for the jury to consider in determining ' credibility' or 'weight.'[FN6] Yet no matter what label a particular State gives its rule and no matter what the purpose for which the rule says the jury

may consider the confession's voluntariness, it is clear that all the States, in the end, do let the jury pass on ***404** the question of voluntariness for itself, whether in deciding 'admissibility' or 'credibility.'

FN3. Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv.L.Rev. 165, 168-169 (1929); Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U.Chi.L.Rev. 317, 325-326 (1954).

FN4. For a survey of the rule in the various States and in the Federal Judicial Circuits, see Appendices A and B.

FN5. See Appendix A.

FN6. See Appendix A.

The Court in note 8 of its opinion indicates that a State may still, under the new constitutional rule announced today, permit a trial jury to determine voluntariness if first the trial judge has 'fully and independently resolved the issue against the accused. ' Ante, p. 1781. In other words, the Constitution now requires the judge to make this finding, and the jury's power to pass on voluntariness is a mere matter of grace, not something constitutionally required. If, as the Court assumes, allowing the jury to pass on the voluntariness of a confession before the judge has done so will 'seriously distort' the jury's judgment, I fail to understand why its judgment would not be similarly distorted by its being allowed to pass on voluntariness after the judge has decided that question. Yet, of course, the jury passing on guilt or innocence must, under any fair system of criminal procedure, be allowed to consider and decide whether an offered confession is voluntary in order to pass on its credibility. But it should be obvious that, under the Court's new rule, when a confession does come before a jury it will have the judge's explicit or implicit stamp of approval on it. This Court will find it hard to say that the jury will not be greatly influenced, if not actually coerced, when what the trial judge does is the same as saying 'I am convinced that this confession is voluntary, but, of course, you may decide otherwise if you like.'[FN7]

FN7. The Court's opinion indicates that the judge will not make any such statement to the jury. If the Court here is holding that it is constitutionally impermissible for the judge to tell the jury that he himself has decided that the confession is voluntary, that is one thing. As I read the decisions in this field, however, I am far from persuaded that there are not many States in which the judge does admit the confession along with his statement that it is voluntary.

Another disadvantage to the defendant under the Court's new rule is the failure to say anything about the ***405** burden of proving voluntariness. The New York rule does now and apparently always has put on the State the burden of convincing the jury beyond a reasonable doubt ****1796** that a confession is voluntary. See Stein v. New York, supra, 346 U.S., at 173 and n. 17, 73 S.Ct., at 1087; People v. Valletutti, 297 N.Y. 226, 229, 78 N.E.2d 485, 486. The Court has not said that its new constitutional rule, which requires the judge to decide voluntariness, also imposes on the State the burden of proving this fact beyond a reasonable doubt. Does the Court's new rule allow the judge to decide voluntariness merely on a preponderance of the evidence? If so, this is a distinct disadvantage to the defendant. In fashioning its new constitutional rule, the Court should not leave this important question in doubt.

Finally, and even more important, the Court's new constitutional doctrine is, it seems to me, a strange one when we consider that both the United States Constitution and the New York Constitution (Art. I, s 2) establish trial by jury of criminal charges as a bedrock safeguard of the people's liberties. [FN8] The reasons given by the Court for this downgrading of trial by jury appear to me to challenge the soundness of the Founders' great faith in jury trials. Implicit in these constitutional requirements of jury trial is a belief that juries can be trusted to decide factual issues. Stating the obvious fact that 'it is only a reliable determination

on the voluntariness issue which satisfies the constitutional rights of the defendant * * *,' ante, p. 1786 (emphasis supplied), the Court concludes, however, that a jury's finding on this question is tainted by inherent unreliability. In making this judgment about the unreliability of juries, the Court, I believe, overlooks the fact that the Constitution itself long ago made the decision that juries are to be trusted.

> FN8. New York Const., Art. I, s 2, also provides that a defendant may not waive trial by jury if the crime with which he is charged may be punishable by death.

***406** Today's holding means that hundreds of prisoners in the State of New York have been convicted after the kind of trial which the Court now says is unconstitutional. The same can fairly be said about state prisoners convicted in at least 14 other States listed in Appendix A-II to this opinion and federal prisoners convicted in 6 federal judicial circuits listed in Appendix B-II. Certainly if having the voluntariness of their confessions passed on only by a jury is a violation of the Fourteenth Amendment, as the Court says it is, then not only Jackson but all other state and federal prisoners already convicted under this procedure are, under our holding in Fay v. Noia 372 U.S. 391, 83 S.Ct. 822, entitled to release unless the States and Federal Government are still willing and able to prosecute and convict them. Cf. Doughty v. Maxwell, 376 U.S. 202, 84 S.Ct. 702, 11 L.Ed.2d 650; Pickelsimer v. Wainwright, 375 U.S. 2, 84 S.Ct. 80, 11 L.Ed.2d 41. The disruptive effect which today's decision will have on the administration of criminal justice throughout the country will undoubtedly be great. Before today's holding is even a day old the Court has relied on it to vacate convictions in 11 cases from Arizona, Pennsylvania, Texas, New York, and the District of Columbia. [FN9] Nevertheless, if I thought that submitting the issue of voluntariness to the jury really denied the kind of trial commanded by the Constitution, I would not hesitate to reverse on that ground even if it meant overturning convictions all the States, instead of in just about one-third of them. But for the reasons ****1797** already stated it is ***407** impossible for me to believe that permitting the jury alone to pass on factual issues of voluntariness violates the United States Constitution, which attempts in two different places to guarantee trial by jury. My wide difference with the Court is in its apparent holding that it has constitutional power to change state trial procedures because of its belief that they are not fair. There is no constitutional provision which gives this Court any such lawmaking power. I assume, although the Court's opinion is not clear on this point, that the basis for its holding is the 'due process of law' clause of the Fourteenth Amendment. The Court appears to follow a judicial philosophy which has relied on that clause to strike down laws and procedures in many fields because of a judicial belief that they are 'unfair,' are contrary to 'the concept of ordered liberty,' 'shock the conscience,' or come within various other vague but appealing catch phrases. See, e.g. Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595; Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183; Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288; see also cases collected in Adamson v. California, 332 U.S. 46, 83, n. 12, 67 S.Ct. 1672, 1692, 91 L.Ed. 1903 (dissenting opinion). I have repeatedly objected to the use of the Due Process Clause to give judges such a wide and unbounded power, whether in cases involving criminal procedure, see, e.g., Betts v. Brady, supra, 316 U.S., at 474, 62 S.Ct., at 1262 (dissenting opinion); cf. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, or economic legislation, see Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93. I believe that 'due process of law' as it applies to trials means, as this Court held in Chambers v. Florida, 309 U.S. 227, 235-238, 60 S.Ct. 472, 476-477, 84 L.Ed. 716, a trial according to the 'law of the land,' including all constitutional guarantees, both explicit and necessarily implied from explicit language, and all valid laws enacted pursuant to constitutionally granted powers. See also Adamson v. California, supra, 332 U.S., at 68, 67 S.Ct., at 1684 (dissenting opinion). I think that the New York law here held invalid is ***408** in full accord with all the guarantees of the Federal Constitution and that it should not be held invalid by this Court because of a belief that the Court can improve on the Constitution.

FN9. McNerlin v. Denno, 378 U.S. 575, 84 S.Ct. 1933 (trial in New York court); Muschette v. United States, 378 U.S. 569, 84 S.Ct. 1927 (C.A.D.C.Cir); Pea v. United States, 378 U.S. 578, 84 S.Ct. 1929 (C.A.D.C.Cir.); Owen v. Arizona, 378 U.S. 574, 84 S.Ct. 1932; Catanzaro v. New York, 378 U.S. 573, 84 S.Ct. 1931; Del Hoyo v. New York, 378 U.S. 570, 84 S.Ct. 1928; Lathan v. New York, 378 U.S. 566, 84 S.Ct. 1923; Oister v. Pennsylvania, 378 U.S. 568, 84 S.Ct. 1926; Senk v. Pennsylvania, 378 U.S. 562, 84 S.Ct. 1928; Harris v. Texas, 378 U.S. 572, 84 S.Ct. 1930; Lopez v. Texas, 378 U.S. 567, 84 S.Ct. 1924. See also Berman v. United States, 378 U.S. 530, at 532, n., 84 S.Ct. 1895, at 1896 (dissenting opinion).

II.

The Fifth Amendment provides that no person shall in any criminal case be compelled to be a witness against himself. We have held in Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, that the Fourteenth Amendment makes this provision applicable to the States. And we have held that this provision means that coerced confessions cannot be used as evidence to convict a defendant charged with crime. See, e.g., Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336; Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472; Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682. It is our duty when a conviction for crime comes to us based in part on a confession to review the record to decide for ourselves whether that confession was freely and voluntarily given. In so doing we must reexamine the facts to be certain that there has been no constitutional violation, and our inquiry to determine the facts on which constitutional rights depend cannot be cut off by factfindings at the trial, whether by judge or by jury. Blackburn v. Alabama, 361 U.S. 199, 205, n. 5, 80 S.Ct. 274, 279; Payne v. Arkansas, 356 U.S. 560, 561-562, 78 S.Ct. 844, 846-847; cf. United States ex rel. Toth v. Quarles, 350 U.S. 11, 18-19, 76 S.Ct. 1, 5-6, 100 L.Ed. 8. In the present case the undisputed evidence showed:

Petitioner committed a robbery in a hotel in New York. He ran from the place to get away, was accosted by a policeman, and after some words each shot the other. The policeman died. Petitioner caught a cab and went directly to a hospital, arriving ****1798** there about 2 a.m. In response to a question he admitted that he had shot the policeman. By 3:35 a.m. he had lost a considerable amount of blood from serious gunshot wounds in his liver and one lung and was awaiting an operation which began ***409** about an hour later and lasted about two hours. At 3:55 he was given doses of demerol and scopolamine, which are sedative and relaxing in their effects. During all the time he was in the hospital policemen were there. He had no counsel present and no friends. Immediately after the demerol and scopolamine were given him the assistant district attorney and a stenographer arrived. At the time he was questioned by the assistant district attorney he was thirsty and asked for water which was denied him either because, as he testified, he could get no water until he confessed, or because, as the State's witnesses testified, it was the hospital's rule not to give water to preoperative patients. While in this situation and condition he gave in answer to questions the confession that was used against him.

This last confession (but not the first statement, given at 2 a.m.) was, I think shown by the above evidence without more to have been given under circumstances that were 'inherently coercive,' see Ashcraft v. Tennessee, 322 U.S. 143, 154, 64 S.Ct. 921, 926, 88 L.Ed. 1192, and therefore was not constitutionally admissible under the Fifth and Fourteenth Amendments. For this reason I would reverse the judgment below and remand the case to the District Court with directions to grant the petitioner's application for habeas corpus and to release him from custody unless the State within a reasonable time sets aside his former conviction and grants him a new trial.

III.

The Court, instead of reversing for an entire new trial, gives New York a reasonable time for a judge to hold a new hearing, including the taking of new testimony, to determine whether the confession was

voluntary. Even were I to accept the Court's holding that the New York rule is unconstitutional, I should agree with my Brother ***410** CLARK that what Jackson is entitled to is a complete new trial. The Court's action makes use of the technique recently invented in United States v. Shotwell Mfg. Co., 355 U.S. 233, 78 S.Ct. 245, 2 L.Ed.2d 234, under which a defendant is subjected to 'piecemeal prosecution.' 355 U.S., at 250, 78 S.Ct., at 255 (dissenting opinion). I think, as I said in Shotwell, that such a fragmentizing process violates the spirit of the constitutional protection against double jeopardy, even if it does not infringe it technically. In Shotwell the use of the piecemeal procedure was justified by what were called the 'peculiar circumstances' of that case. 355 U.S., at 243, 78 S.Ct., at 251. But, as this case demonstrates, the availability and usefulness of the Shotwell device in sustaining convictions and denying defendants a new trial where all the facts are heard together are too apparent for its use to be confined to exceptional cases. I think Shotwell was wrong and should be overruled, not extended as the Court is doing.

APPENDIX A TO OPINION OF MR. JUSTICE BLACK.

RULES FOLLOWED IN THE STATES TO DETERMINE VOLUNTARINESS OF CONFESSIONS.

The decisions cited below are leading cases or cases illustrating the rules followed in the respective States; the listings are not exhaustive. This classification does not take account of such variables as burden of proof, whether a preliminary hearing is held, whether the jury is present at such a hearing, etc. A few States have two or more lines of cases suggesting approval of two or more ****1799** conflicting rules; in such situations the State is listed under the view which in light of most recent cases appears the dominant one, and decisions seemingly inconsistent are pointed out. Where a court clearly has changed from one rule to another, even though without specifically overruling its earlier decisions, those earlier decisions***411** are not cited. E.g., Commonwealth v. Knapp, 10 Pick. (27 Mass.) 477, 495-496 (1830), approved the ' orthodox' rule, which, since Commonwealth v. Preece, 140 Mass. 276, 277, 5 N.E. 494, 495 (1885) , is no longer followed in Massachusetts. [FN1]

FN1. The law in Nevada on this point apparently has not been settled. Although State v. Williams, 31 Nev. 360, 375-376, 102 P. 974, 980-981 (1909), appeared to establish the 'orthodox' rule, the Supreme Court of Nevada in State v. Fouquette, 67 Nev. 505, 533-534, 221 P.2d 404, 419 (1950), cert. denied, 341 U.S. 932, 71 S.Ct. 799, 95 L.Ed. 1361 (1951), stated that the question was still open and that the Williams case had not decided it. The trial judge in the Fouquette case applied the Massachusetts rule.

As the Court, my Brother HARLAN, and commentators in this field have aptly pointed out, the rules stated in the decisions are not always clear, so that in some cases there may be room for doubt as to precisely what procedure a State follows. I believe, however, that a full and fair reading of the cases listed below as following the New York rule will show that there is every reason to believe that many people have been convicted of crimes in those States with cases so classified after trials in which judges did not resolve factual issues and determine the question of voluntariness.

I. Wigmore[FN2] or 'Orthodox' Rule.

FN2. See 3 Wigmore, Evidence (3d ed. 1940), s 861.

Judge hears all the evidence and then rules on voluntariness for purpose of admissibility of confession; jury considers voluntariness as affecting weight or credibility of confession.
ALABAMA: Phillips v. State, 248 Ala. 510, 520, 28 So.2d 542, 550 (1946); Blackburn v. State, 38 Ala.App. 143, 149, 88 So.2d 199, 204 (1954), cert. denied, 264 Ala. 694, 88 So.2d 205 (1956), vacated

and remanded on another point sub nom. ***412** Blackburn v. Alabama, 354 U.S. 393, 77 S.Ct. 1098, 1 L.Ed.2d 1423 (1957), aff'd, 40 Ala.App. 116, 109 So.2d 736 (1958), cert. denied, 268 Ala. 699, 109 So.2d 738 (1959), rev'd on another point sub nom. Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274 (1960).

COLORADO: Read v. People, 122 Colo. 308, 318-319, 221 P.2d 1070, 1076 (1950); Downey v. People, 121 Colo. 307, 317, 215 P.2d 892, 897 (1950); Osborn v. People, 83 Colo. 4, 29-30, 262 P. 892, 901 (1927); Fincher v. People, 26 Colo. 169, 173, 56 P. 902, 904 (1899). But see Bruner v. People, 113 Colo. 194, 217-218, 156 P.2d 111, 122 (1945) (seems to state Massachusetts rule). And see Roper v. People, 116 Colo. 493, 497-499, 179 P.2d 232, 234-235 (1947) (approves Bruner but also quotes from Osborn v. People, supra, a case clearly stating the 'orthodox' rule).

CONNECTICUT: State v. Buteau, 136 Conn. 113, 124, 68 A.2d 681, 686 (1949), cert. denied, 339 U.S. 903, 70 S.Ct. 516, 94 L.Ed. 1332 (1950); State v. McCarthy, 133 Conn. 171, 177, 49 A.2d 594, 597 (1946).

FLORIDA: Leach v. State, 132 So.2d 329, 333 (Fla.1961), cert. denied, 368 U.S. 1005, 82 S.Ct. 639, 7 L.Ed.2d 543 (1962); Graham v. State, 91 So.2d 662, 663-664 (1956); Bates v. State, 78 Fla. 672, 676, 84 So. 373, 374-375 (1919).

ILLINOIS: People v. Miller, 13 Ill.2d 84, 97, 148 N.E.2d 455, 462, cert. denied, 357 U.S. 943, 78 S.Ct. 1394, 2 L.Ed.2d 1556 (1958); ****1800**People v. Fox, 319 Ill. 606, 616-619, 150 N.E. 347, 351-352 (1926).

INDIANA: Caudill v. State, 224 Ind. 531, 538, 69 N.E.2d 549, 552 (1946).

KANSAS: State v. Seward, 163 Kan. 136, 144-146, 181 P.2d 478, 484-485 (1947); State v. Curtis, 93 Kan. 743, 750-751, 145 P. 858, 861 (1915).

KENTUCKY: Ky.Rev.Stat. s 422.110; Cooper v. Commonwealth, Ky., 374 S.W.2d 481, 482-483 (1964); Bass v. Commonwealth, 296 Ky. 426, 431, 177 S.W.2d 386, 388, ***413** cert. denied, 323 U.S. 745, 65 S.Ct. 64, 89 L.Ed. 596 (1944); Herd v. Commonwealth, 294 Ky. 154, 156-157, 171 S.W.2d 32, 33 (1943).

LOUISIANA: State v. Freeman, 245 La. 665, 670-671, 160 So.2d 571, 573 (1964); State v. Kennedy, 232 La. 755, 762-763, 95 So.2d 301, 303 (1957); State v. Wilson, 217 La. 470, 486, 46 So.2d 738, 743-744 (1950), aff'd, 341 U.S. 901, 71 S.Ct. 611, 95 L.Ed. 1341 (1951).

MISSISSIPPI: Jones v. State, 228 Miss. 458, 474-475, 88 So.2d 91, 98 (1956); Brooks v. State, 178 Miss. 575, 581-582, 173 So. 409, 411 (1937); Ellis v. State, 65 Miss. 44, 47-48, 3 So. 188, 189-190 (1887).

MONTANA: State v. Rossell, 113 Mont. 457, 466, 127 P.2d 379, 383 (1942); State v. Dixson, 80 Mont. 181, 196, 260 P. 138, 144 (1927); State v. Sherman, 35 Mont. 512, 518-519, 90 P. 981, 982 (1907).

NEW MEXICO: State v. Armijo, 64 N.M. 431, 434-435, 329 P.2d 785, 787-788 (1958); State v. Ascarate, 21 N.M. 191, 201-202, 153 P. 1036, 1039 (1915), appeal dismissed, 245 U.S. 625, 38 S.Ct. 8, 62 L.Ed. 517 (1917). But cf. State v. Armijo, 18 N.M. 262, 268, 135 P. 555, 556-557 (1913) (dictum that trial judge may in his discretion follow Massachusetts rule).

NORTH CAROLINA: State v. Outing, 255 N.C. 468, 472, 121 S.E.2d 847, 849 (1961); State v. Davis, 253 N.C. 86, 94-95, 116 S.E.2d 365, 370 (1960), cert. denied, 365 U.S. 855, 81 S.Ct. 816, 5 L.Ed.2d 819 (1961).

NORTH DAKOTA: State v. English, N.D., 85 N.W.2d 427, 430 (1957); State v. Nagel, 75 N.D. 495, 515-516, 28 N.W.2d 665, 677 (1947); State v. Kerns, 50 N.D. 927, 935-939, 198 N.W. 698, 700 (1924).

TENNESSEE: Tines v. State, 203 Tenn. 612, 619, 315 S.W.2d 111, 114 (1958), cert. denied, 358 U.S. 889, 79 S.Ct. 134, 3 L.Ed.2d 117 (1958); Wynn v. State, 181 Tenn. 325, 328-329, 181 S.W.2d 332, 333 (1944); cf. Boyd v. State, 2 Humph. (21 Tenn.) 39, 40-41 (1840).

***414** UTAH: State v. Braasch, 119 Utah 450, 455, 229 P.2d 289, 291 (1951), cert. denied, 342 U.S. 910, 72 S.Ct. 304, 96 L.Ed. 681 (1952); State v. Mares, 113 Utah 225, 243-244, 192 P.2d 861, 870 (1948); State v. Crank, 105 Utah 332, 346-355, 142 P.2d 178, 184-188, 170 A.L.R. 542 (1943).

VERMONT: State v. Blair, 118 Vt. 81, 85, 99 A.2d 677, 680 (1953); State v. Watson, 114 Vt. 543, 548, 49 A.2d 174, 177 (1946); State v. Long, 95 Vt. 485, 490, 115 A. 734, 737 (1922).

VIRGINIA: Durrette v. Commonwealth, 201 Va. 735, 744, 113 S.E.2d 842, 849 (1960); Campbell v.

Commonwealth, 194 Va. 825, 830, 75 S.E.2d 468, 471 (1953); Jackson v. Commonwealth, 193 Va. 664, 673, 70 S.E.2d 322, 327 (1952).
WASHINGTON: State v. Moore, 60 Wash.2d 144, 146-147, 372 P.2d 536, 538 (1962); State v. Holman, 58 Wash.2d 754, 756-757, 364 P.2d 921, 922-923 (1961).
WEST VIRGINIA: State v. Vance, 146 W.Va. 925, 934, 124 S.E.2d 252, 257 (1962); State v. Brady, 104 W.Va. 523, 529-530, 140 S.E. 546, 549 (1927).

****1801** II. 'New York' Rule.*

If there is a factual conflict in the evidence as to voluntariness over which reasonable men could differ, the judge leaves the question of voluntariness to the jury.
ARKANSAS: Monts v. State, 233 Ark. 816, 823, 349 S.W.2d 350, 355 (1961); Burton v. State, 204 Ark. 548, 550-551, 163 S.W.2d 160, 162 (1942); McClellan v. State, 203 Ark. 386, 393-394, 156 S.W.2d 800, 803 (1941).
DISTRICT OF COLUMBIA: Wright v. United States, 102 U.S.App.D.C. 36, 45, 250 F.,2d 4, 13 (1957); Catoe v. United States, 76 U.S.App.D.C. 292, 295, 131 F.2d 16, 19 (1942); ***415**McAffee v. United States, 70 App.D.C. 142, 145, 105 F.2d 21, 24 (1939), 72 App.D.C. 60, 65, 111 F.2d 199, 204, cert. denied, 310 U.S. 643, 60 S.Ct. 1094, 84 L.Ed. 1410 (1940); cf. Sawyer v. United States, 112 U.S.App.D.C. 381, 303 F.2d 392, 393 (1962).
GEORGIA: Downs v. State, 208 Ga. 619, 621, 68 S.E.2d 568, 569-570 (1952); Garrett v. State, 203 Ga. 756, 762-763, 48 S.E.2d 377, 382 (1948); Coker v. State, 199 Ga. 20, 23-25, 33 S.E.2d 171, 173-174 (1945); Bryant v. State, 191 Ga. 686, 710-711, 13 S.E.2d 820, 836-837 (1941).
IOWA: State v. Jones, 253 Iowa 829, 834-835, 113 N.W.2d 303, 307 (1962); State v. Hofer, 238 Iowa 820, 828, 829, 28 N.W.2d 475, 480 (1947); State v. Johnson, 210 Iowa 167, 171, 230 N.W. 513, 515 (1930).
MICHIGAN: People v. Crow, 304 Mich. 529, 531, 8 N.W.2d 164, 165 (1943); People v. Preston, 299 Mich. 484, 493-494, 300 N.W. 853, 857 (1941).
MINNESOTA: State v. Schabert, 218 Minn. 1, 7-9, 15 N.W.2d 585, 588 (1944) (states New York rule although also cites both New York rule and Massachusetts rule cases).
MISSOURI: State v. Goacher, Mo., 376 s.W.2d 97, 103 (1964); State v. Bridges, Mo., 349 S.W.2d 214, 219 (1961); State v. Laster, 365 Mo. 1076, 1081-1082, 293 S.W.2d 300, 303-304, cert. denied, 352 U.S. 936, 77 S.Ct 237, 1 L.Ed.2d 167 (1956). Cf. State v. Statler, Mo., 331 S.W.2d 526, 530 (1960) (question of voluntariness of confession should be submitted to jury 'if there is substantial conflicting evidence on the issue and if the issue is close'); accord, State v. Phillips, Mo., 324 S.W.2d 693, 696-697 (1959); State v. Gibilterra, 342 Mo. 577, 584-585, 116 S.W.2d 88, 93-94 (1938).
NEW YORK: People v. Pignataro, 263 N.Y. 229, 240-241, 188 N.E. 720, 724 (1934); People v. Weiner, 248 N.Y. 118, 122, 161 N.E. 441, 443 (1928); People v. Doran, 246 N.Y. 409, 416-418, 159 N.E. 379, 381-382 (1927).
***416** OHIO: If the evidence as to voluntariness is conflicting, the trial judge may in his discretion follow the New York rule; otherwise he may follow the 'orthodox' rule. Burdge v. State, 53 Ohio St. 512, 516-518, 42 N.E. 594, 595-596 (1895); State v. Powell, 105 Ohio App. 529, 530-531, 148 N.E.2d 230, 231 (1957), appeal dismissed, 167 Ohio St. 319, 148 N.E.2d 232 (1958), cert, denied, 359 U.S. 964, 79 S.Ct. 882 (1959); State v. Hensley, 31 Ohio Law Abst. 348, 349, 350 (1939).
OREGON: State v. Bodi, 223 Or. 486, 491, 354 P.2d 831, 833-834 (1960); State v. Nunn, 212 Or. 546, 554, 321 P.2d 356, 360 (1958).
PENNSYLVANIA: Commonwealth v. Senk, 412 Pa. 184, 194, 194 A.2d 221, 226 (1963), vacated and remanded on authority of the present case sub nom. Senk v. Pennsylvania, 378 U.S. 562, 84 S.Ct. 1928; Commonwealth v. Oister, 201 Pa.Super. 251, 257-258, 191 A.2d 851, 854 (1963), vacated and remanded on authority of the present case sub nom. ****1802**Oister v. Pennsylvania, 378 U.S. 568, 84 S.Ct. 1926; Commonwealth v. Ross, 403 Pa. 358, 365, 169 A.2d 780, 784, cert. denied, 368 U.S. 904, 82 S.Ct. 182 (1961); Commonwealth v. Spardute, 278 Pa. 37, 48, 122 A. 161, 165 (1923).
PUERTO RICO: People v. Fournier, 77 P.R.R. 208, 243-244 (1954); People v. Declet, 65 P.R.R. 22, 25 (1945).
SOUTH CAROLINA: State v. Bullock, 235 S.C. 356, 366-367, 111 S.E.2d 657, 662 (1959), appeal

dismissed, 365 U.S. 292, 81 S.Ct. 686 (1961); State v. Livingston, 223 S.C. 1, 6, 73 S.E.2d 850, 852 (1952), cert. denied, 345 U.S. 959, 73 S.Ct. 944 (1953); State v. Scott, 209 S.C. 61, 64, 38 S.E.2d 902, 903 (1946).

SOUTH DAKOTA: State v. Nicholas, 62 S.D. 511, 515, 253 N.W. 737, 738-739 (1934); State v. Montgomery, 26 S.D. 539, 542, 128 N.W. 718, 719 (1910) (question of voluntariness of confession should be submitted to jury '(i)f the evidence submitted to the court should ***417** be conflicting, leaving in the mind of the court any question as to the competency of such confession'); cf. State v. Hinz, 78 S.D. 442, 449-450, 103 N.W.2d 656, 660 (1960).

TEXAS: Harris v. State, Tex.Cr.App., 370 S.W.2d 886, 887 (1963), vacated and remanded on authority of the present case sub nom. Harris v. Texas, 378 U.S. 572, 84 S.Ct. 1930; Lopez v. State, Tex.Cr.App., 366 S.W.2d 587 (1963), vacated and remanded on authority of the present case sub nom. Lopez v. Texas, 378 U.S. 567, 84 S.Ct. 1924; Marrufo v. State, 172 Tex.Cr.R. 398, 402, 357 S.W.2d 761, 764 (1962); Odis v. State, 171 Tex.Cr.R. 107, 109, 345 S.W.2d 529, 530-531 (1961); Newman v. State, 148 Tex.Cr.R. 645, 649-650, 187 S.W.2d 559, 561-562 (1945), cert. denied, 326 U.S. 772, 66 S.Ct. 174, 90 L.Ed. 466 (1945); Gipson v. State, 147 Tex.Cr.R. 428, 429, 181 S.W.2d 76, 77 (1944); Ward v. State, 144 Tex.Cr.R. 444, 449, 158 S.W.2d 516, 518 (1941), rev'd on another point sub nom. Ward v. Texas, 316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663 (1942). But cf. Bingham v. State, 97 Tex.Cr.R. 594, 596-601, 262 S.W. 747, 749-750 (1924) (perhaps states Massachusetts rule).

WISCONSIN: State v. Bronston, 7 Wis.2d 627, 638, 97 N.W.2d 504, 511 (1959); Pollack v. State, 215 Wis. 200, 217, 253 N.W. 560, 567 (1934).

WYOMING: Clay v. State, 15 Wyo. 42, 59, 86 P. 17, 19 (1906).

III. 'Massachusetts' or 'Humane' Rule.

Judge hears all the evidence and rules on voluntariness before allowing confession into evidence; if he finds the confession voluntary, jury is then instructed that it must also find that the confession was voluntary before it may consider it.

ALASKA: Smith v. United States, 268 F.2d 416, 420-421 (C.A.9th Cir. 1959).

***418** ARIZONA: State v. Hudson, 89 Ariz. 103, 106, 358 P.2d 332, 333-334 (1960); State v. Pulliam, 87 Ariz. 216, 220-223, 349 P.2d 781, 784 (1960); State v. Hood, 69 Ariz. 294, 299-300, 213 P.2d 368, 371-372 (1950); State v. Johnson, 69 Ariz. 203, 206, 211 P.2d 469, 471 (1949). But see State v. Federico, 94 Ariz. 413, 385 P.2d 706 (1963) , vacated and remanded on authority of the present case sub nom. Owen v. Arizona, 378 U.S. 574, 84 S.Ct. 1932; State v. Owen, 94 Ariz. 404, 409, 385 P.2d 700, 703 (1963), vacated and remanded on authority of the present case sub nom. Owen v. Arizona, 378 U.S. 574, 84 S.Ct. 1932; State v. Preis, 89 Ariz. 336, 338, 362 P.2d 660, 661, cert. denied, 368 U.S. 934, 82 S.Ct. 372 (1961) (seem to state or follow New York rule).

CALIFORNIA: ****1803**People v. Bevins, 54 Cal.2d 71, 76-77, 4 Cal.Rptr. 504, 351 P.2d 776, 779-780 (1960); People v. Crooker, 47 Cal.2d 348, 353-355, 303 P.2d 753, 757-758 (1956), aff'd sub nom. Crooker v. California, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958); People v. Gonzales, 24 Cal.2d 870, 876-877, 151 P.2d 251, 254-255 (1944) ; People v. Appleton, 152 Cal.App.2d 240, 244, 313 P.2d 154, 156 (Dist.Ct.App.1957) (trial judge may follow Massachusetts rule after he has found confession to be voluntary). Cf. People v. Childers, 154 Cal.App.2d 17, 20, 315 P.2d 480, 482 (Dist.Ct.App.1957) (states Massachusetts rule without qualification).

DELAWARE: Wilson v. State, 10 Terry 37, 49 Del. 37, 48, 109 A.2d 381, 387 (1954), cert. denied, 348 U.S. 983, 75 S.Ct. 574, 99 L.Ed. 765 (1955).

HAWAII: Territory v. Young, 37 Haw. 189, 193 (1945) (semble); Territory v. Alcosiba, 36 Haw. 231, 235 (1942) (semble).

IDAHO: State v. Van Vlack, 57 Idaho 316, 342-343, 65 P.2d 736, 748 (1937). But cf. State v. Dowell, 47 Idaho 457, 464, 276 P. 39, 41 (1929); ***419**State v. Andreason, 44 Idaho 396, 401-402, 257 P. 370, 371 (1927) (seem to state 'orthodox' rule).

MAINE: State v. Robbins, 135 Me. 121, 122, 190 A. 630, 631 (1937); State v. Grover, 96 Me. 363, 365-367, 52 A. 757, 758-759 (1902).

MARYLAND: Parker v. State, 225 Md. 288, 291, 170 A.2d 210, 211 (1961); Presley v. State, 224 Md. 550, 559, 168 A.2d 510, 515 (1961), cert. denied, 368 U.S. 957, 82 S.Ct. 399, 7 L.Ed.2d 389 (1962); Hall v. State, 223 Md. 158, 169-170, 162 A.2d 751, 757 (1960); Linkins v. State, 202 Md. 212, 221-224, 96 A.2d 246, 250-252 (1953); Smith v. State, 189 Md. 596, 603-606, 56 A.2d 818, 821-822 (1948). But cf. Grammer v. State, 203 Md. 200, 218-219, 100 A.2d 257, 265 (1953), cert. denied, 347 U.S. 938, 74 S.Ct. 634, 98 L.Ed. 1088 (1954); Jones v. State, 188 Md. 263, 270-271, 52 A.2d 484, 487-488 (1947); Peters v. State, 187 Md. 7, 15-16, 48 A.2d 586, 590 (1946); Nicholson v. State, 38 Md. 140, 155-157 (1873) (not disapproved in later cases, appear to state 'orthodox ' rule).

MASSACHUSETTS: Commonwealth v. Sheppard, 313 Mass. 590, 603-604, 48 N.E.2d 630, 639 (1943) ; Commonwealth v. Preece, 140 Mass. 276, 277, 5 N.E. 494, 495 (1885).

NEBRASKA: Cramer v. State, 145 Neb. 88, 97-98, 15 N.W.2d 323, 328-329 (1944); Schlegel v. State, 143 Neb. 497, 500, 10 N.W.2d 264, 266 (1943); cf. Gallegos v. State, 152 Neb. 831, 837-840, 43 N.W.2d 1, 5-6 (1950) (semble), aff'd on another point sub nom. Gallegos v. Nebraska, 342 U.S. 55, 72 S.Ct. 141 (1951).

NEW HAMPSHIRE: State v. Squires, 48 N.H. 364, 369-370 (1869) (seems to hold that trial judge may in his discretion follow the Massachusetts rule; otherwise he may follow the 'orthodox' rule).

NEW JERSEY: State v. Tassiello, 39 N.J. 282, 291-292, 188 A.2d 406, 411-412 (1963); ***420**State v. Smith, 32 N.J. 501, 557-560, 161 A.2d 520, 550-552 (1960), cert. denied, 364 U.S. 936, 81 S.Ct. 383, 5 L.Ed.2d 367 (1961).

OKLAHOMA: Williams v. State, 93 Okl.Cr. 260, 265, 226 P.2d 989, 993 (1951); Lyons v. State, 77 Okl.Cr. 197, 233-237, 138 P.2d 142, 162-163 (1943), aff'd on another point sub nom. Lyons v. Oklahoma, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944); Wood v. State, 72 Okl.Cr. 364, 374-375, 116 P.2d 728, 733 (1941). But cf. Cornell v. State, 91 Okl.Cr. 175, 183-184, 217 P.2d 528, 532-533 (1950); Pressley v. State, 71 Okl.Cr. 436, 444-446, 112 P.2d 809, 813-814 (1941); Rowan v. State, 57 Okl.Cr. 345, 362, 49 P.2d 791, 798 (1935) (cases which appear to state the 'orthodox' rule and are ****1804** nevertheless cited with approval in the first-named group of decisions).

RHODE ISLAND: State v. Boswell, 73 R.I. 358, 361, 56 A.2d 196, 198 (1947); State v. Mariano, 37 R.I. 168, 186-187, 91 A. 21, 29 (1914).

APPENDIX B TO OPINION OF MR. JUSTICE BLACK.

RULES FOLLOWED IN THE FEDERAL JUDICIAL CIRCUITS TO DETERMINE VOLUNTARINESS OF CONFESSIONS.

In Wilson v. United States, 162 U.S. 613, 624, 16 S.Ct. 895, 900 (1896) this Court said that in federal criminal trials 'When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury, with the direction that they should reject the confession if, upon the whole evidence, they are satisfied it was not the voluntary act of the defendant.' This language appears to sanction either the 'orthodox' rule or the Massachusetts rule. The federal courts in the various circuits, however, often citing Wilson, have given it varying interpretations. ***421** Cases are cited below subject to the same qualifications set forth in Appendix A, supra.

I. Wigmore or 'Orthodox' Rule.

FIRST CIRCUIT: Kemler v. United States, 133 F.2d 235, 239-240 (1943).

FIFTH CIRCUIT: Andrews v. United States, 309 F.2d 127, 129 (1962), cert. denied, 372 U.S. 946, 83 S.Ct. 939 (1963); Schaffer v. United States, 221 F.2d 17, 21 (1955); Wagner v. United States, 110 F.2d 595, 596 (1940) cert. denied, 310 U.S. 643, 60 S.Ct. 1104, 84 L.Ed. 1411 (1940). But cf. Duncan v. United States, 197 F.2d 935, 937-938, cert. denied, 344 U.S. 885, 73 S.Ct. 185, 97 L.Ed. 685 (1952); Patterson v. United States, 183 F.2d 687, 689-690 (1950) (appear to state Massachusetts rule).

TENTH CIRCUIT: McHenry v. United States, 308 F.2d 700, 704 (1962), cert. denied, 374 U.S. 833,

83 S.Ct. 1878, 10 L.Ed.2d 1055 (1963). But cf. United States v. Ruhl, 55 F.Supp. 641, 644-645 (D.C.D.Wyo.1944), aff'd, 148 F.2d 173, 175 (1945) (appears to follow Massachusetts rule).

II. 'New York' Rule.

SECOND CIRCUIT: United States v. Leviton, 193 F.2d 848, 852 (1951), cert. denied, 343 U.S. 946, 72 S.Ct. 860, 96 L.Ed. 1350 (1952); but cf. United States v. Gottfried, 165 F.2d 360, 367 (1948), cert. denied, 333 U.S. 860, 68 S.Ct. 738 (1948) (' orthodox' rule); United States v. Lustig, 163 F.2d 85, 88-89, cert. denied, 332 U.S. 775, 68 S.Ct. 88 (1947) ('orthodox' rule); United States v. Aviles, 2 Cir., 274 F.2d 179, 192, cert. denied Evola v. U.S., 362 U.S. 974, 80 S.Ct. 1057, 4 L.Ed.2d 1009, and Santora v. U.S., 362 U.S. 974, 80 S.Ct. 1057, 4 L.Ed.2d 1010, and Lessa v. U.S., 362 U.S. 974, 80 S.Ct. 1058, 4 L.Ed.2d 1010, and Capece v. U.S., 362 U.S. 974, 80 S.Ct. 1058, 4 L.Ed.2d 1010, and Di Palermo v. U.S., 362 U.S. 974, 80 S.Ct. 1057, 4 L.Ed.2d 1010, and Genavese v. U.S., 362 U.S. 974, 80 S.Ct. 1059, 4 L.Ed.2d 1010, and Di Palermo v. U.S., 362 U.S. 982, 80 S.Ct. 1068, 4 L.Ed.2d 1015, and Palizzano v. U.S., 362 U.S. 982, 80 S.Ct. 1071, 4 L.Ed.2d 1016, and Barcellona v. U.S., 362 U.S. 982, 80 S.Ct. 1073, 4 L.Ed.2d 1016 (1960) (appears to hold no error to follow Massachusetts rule).
THIRD CIRCUIT: United States v. Anthony, 145 F.Supp. 323, 335-336 (D.C.M.D.Pa.1956) (quotes discretionary rule of Wilson v. United States, supra, but ***422** seems to apply New York rule and cites Pennsylvania cases following it).
SIXTH CIRCUIT: Anderson v. United States, 124 F.2d 58, 67 (1941), rev'd on another point, 318 U.S. 350, 63 S.Ct. 599 (1943); McBryde v. United States, 7 F.2d 466, 467 (1925).
SEVENTH CIRCUIT: United States v. Echeles, 222 F.2d 144, 154, cert. denied****1805** , 350 U.S. 828, 76 S.Ct. 58 (1955); Cohen v. United States, 291 F. 368, 369 (1923); but cf. Murphy v. United States, 285 F. 801, 807-808 (1923), cert. denied, 261 U.S. 617, 43 S.Ct. 362 (1923) (appears to state 'orthodox' rule).
EIGHTH CIRCUIT: Hayes v. United States, 296 F.2d 657, 670 (1961), cert. denied, 369 U.S. 867, 82 S.Ct. 1033 (1962); Shores v. United States, 174 F.2d 838, 842 (1949).
DISTRICT OF COLUMBIA CIRCUIT: Pea v. United States, 116 U.S.App.D.C. 410, 324 F.2d 442 (1963), vacated and remanded on authority of the present case, 378 U.S. 571, 84 S.Ct. 1929; Muschette v. United States, 116 U.S.App.D.C. 239, 240, 322 F.2d 989, 990 (1963), vacated and remanded on authority of the present case, 378 U.S. 569, 84 S.Ct. 1927; Wright v. United States, 102 U.S.App.D.C. 36, 45, 250 F.2d 4, 13 (1957); Catoe v. United States, 76 U.S.App.D.C. 292, 295, 131 F.2d 16, 19 (1942); McAffee v. United States, 70 App.D.C. 142, 145, 105 F.2d 21, 24 (1939), 72 App.D.C. 60, 65, 111 F.2d 199, 204, cert. denied, 310 U.S. 643, 60 S.Ct. 1094, 84 L.Ed. 1410 (1940); cf. Sawyer v. United States, 112 U.S.App.D.C. 381, 303 F.2d 392, 393 (1962).

III. 'Massachusetts' Rule.

FOURTH CIRCUIT: Denny v. United States, 151 F.2d 828, 833 (1945), cert. denied, 327 U.S. 777, 66 S.Ct. 521 (1946) (appears to follow Wilson v. United States, 162 U.S. 613, 624, 16 S.Ct. 895, 900 (1896), and apply Massachusetts rule).
***423** NINTH CIRCUIT: Leonard v. United States, 278 F.2d 418, 420-421 (1960) (semble); Smith v. United States, 268 F.2d 416, 420-421 (1959). But cf. Pon Wing Quong v. United States, 111 F.2d 751, 757 (1940) ('orthodox' rule).

Mr. Justice CLARK, dissenting.
The Court examines the validity, under the Fourteenth Amendment, of New York's procedure to determine the voluntariness of a confession. However, as I read the record, New York's procedure was not invoked in the trial court or attacked on appeal and is not properly before us. The New York procedure providing for a preliminary hearing could be set in motion, and its validity questioned, only if objection was made to the admissibility of the confession. It is clear that counsel for petitioner in the trial court-a lawyer of 50 years' trial experience in the criminal courts, including service on the bench-did not object to the

introduction of the statements made by the petitioner or ask for a preliminary hearing. His contention was that the circumstances of the sedation went to the 'weight' of the statements, not to their admissibility. This is shown by his cross-examination of the State's doctor and by the dialogue at the bench thereafter.[FN1] And, even after this dialogue, petitioner's counsel ***424** never ****1806** made any motion to strike the statements or any objection to their use by the jury, but challenged only the weight to be given them. This is further shown by his failure to raise the constitutionality of New York's practice at any time before verdict or thereafter on his motion for a new trial. Nor was it raised or passed upon by New York's Court of Appeals. That court's amended remittitur shows that the constitutional questions passed upon were whether the 'confession was coerced' and whether the judge erred in failing to instruct the jury that, 'in determining the voluntary nature of the confession, they were to consider his physical condition at the time thereof.' 10 N.Y.2d 816, 221 N.Y.S.2d 521, 178 N.E.2d 234.

FN1. 'The Court: Judge Healy raised the point in cross-examination that sedation of a kind was administered to the patient.
'Mr. Healy: Some kind.
'The Court: And therefore he is going to contend and he does now that the confession hasn't the weight the law requires. Is that your purpose?
'Mr. Healy: That's correct. There are two, one statement and another statement. One statement to the police and one statement to the District Attorney.
'The Court: Well, the one to the police was what hour, I would like to know, and the one to the District Attorney was what hour?
'Mr. Healy: The one to the police.
'Mr. Schor: To the police, to Detective Kaile, at two o'clock.
'The Court: Get the statement.
'Mr. Healy: The statement that I raised the point about. This is the statement taken by the District Attorney, by Mr. Postal.
'The Court: Yes.
'Mr. Healy: Mr. Lentini being the hearing reporter. That was taken at 3:55.
'The Court: That's the time that you say he was in no mental condition to make the statement?
'Mr. Healy: That's correct.
'The Court: Is that correct?
'Mr. Healy: That's correct.'

Still, the Court strikes down the New York rule of procedure which we approved in Stein v. New York, 346 U.S. 156, 73 S.Ct. 1077 (1953). The trial judge had no opportunity to pass upon the statements because no objection was raised and no hearing was requested. I agree with the Court that ' (a) defendant objecting to the admission of a confession is entitled to a fair hearing * * *.' However, I cannot see why the Court reaches out and strikes down a rule which was not invoked and which is therefore not ***425** applicable to this case. In reaching out for this question the Court apparently relies on Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963). While that case seems to have turned into a legal 'Mother Hubbard' I fail to see how it could govern this situation.

The Court seems to imply that New York's procedure 'injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness.' I think not. The judge clearly covered this in his charge:
'If you determine that it was a confession, the statement offered here, and if you determine that Jackson made it, and if you determine that it is true; if you determine that it is accurate, before you may use it, the law still says you must find that it is voluntary, and the prosecution has the burden of proving that it was a voluntary confession.'

This language is just the opposite of that used in Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735 (1961), the case upon which the Court places principal reliance.[FN2] There the jurors were told to use the confession if they found it 'in ***426** accord with the truth * * *.' And Connecticut's highest court held that the question was whether the conduct 'induced the defendant to confess falsely that he had committed the crime being investigated.' State v. Rogers, 143 Conn. 167, at 173, 120 A.2d 409, at 412. Here the judge warned the jury that even if they found the statements true, they must also find them voluntary****1807** before they may use them. And the proof of voluntariness was

placed on the State. As my Brother BLACK says, the Court, in striking down New York's procedure, thus 'challenge(s) the soundness of the Founders' great faith in jury trials.' I too regret this ' downgrading of trial by jury' and join in Section I of Brother BLACK'S opinion. To me it appears crystal-clear that the charge amply protected Jackson from the possibility that the jury might have confused the question of voluntariness with the question of truth. Dependence on jury trials is the keystone of our system of criminal justice and I regret that the Court lends its weight to the destruction of this great safeguard to our liberties.

> FN2. 'No confession or admission of an accused is admissible in evidence unless made freely and voluntarily and not under the influence of promises or threats. The fact that a confession was procured by the employment of some artifice or deception does not exclude the confession if it was not calculated, that is to say, if the artifice or deception was not calculated to procure an untrue statement. The motive of a person in confessing is of no importance provided the particular confession does not result from threats, fear or promises made by persons in actual or seeming authority. The object of evidence is to get at the truth, and a trick or device which has no tendency to produce a confession except one in accordance with the truth does not render the confession inadmissible * * *. The rules which surround the use of a confession are designed and put into operation because of the desire expressed in the law that the confession, if used, be probably a true confession.' 365 U.S. at 542, 81 S.Ct. at 740.

But even if the trial judge had instructed the jury to consider truth or falsity, the order here should be for a new trial, as in Rogers v. Richmond, supra. There the Court of Appeals was directed to hold the case a reasonable time 'in order to give the State opportunity to retry petitioner * * *.' 365 U.S. at 549, 81 S.Ct. at 744. (Emphasis supplied.) But the Court does not do this. It strikes down New York's procedure and then tells New York-not to retry the petitioner-merely to have the trial judge hold a hearing on the admissibility of the confession and enter a definitive determination on that issue, as under the Massachusetts rule. This does not cure the error which the Court finds present. If the trial court did so err, this Court is making a more grievous error in amending New York's rule here and then requiring New York to apply it ex post facto without benefit of a full trial. Surely under the ***427** reasoning of the Court, the petitioner would be entitled to a new trial.

Believing that the constitutionality of New York's rule is not ripe for decision here, I dissent. If I am in error on this, then I join my Brother HARLAN. His dissent is unanswerable.

Mr. Justice HARLAN, whom Mr. Justice CLARK and Mr. Justice STEWART join, dissenting.

Even under the broadest view of the restrictive effect of the Fourteenth Amendment, I would not have thought it open to doubt that the States were free to allocate the trial of issues, whether in criminal or civil cases, between judge and jury as they deemed best. The Court now holds, however, that New York's long-standing practice of leaving to the jury the resolution of reasonably disputed factual issues surrounding a criminal defendant's allegation that his confession was coerced violates due process. It is held that the Constitution permits submission of the question of coercion to the trial jury only if preceded by a determination of ' voluntariness' by the trial judge-or by another judge or another jury not concerned with the ultimate issue of guilt or innocence.[FN1]

> FN1. Whether or not the Court would permit the trial jury to render a special verdict on the issue of coercion and, having found the confession involuntary, go on to hear the evidence on and determine the question of guilt is unclear. See ante, p. 1782 and p. 1788, n. 19.

The Court does make one bow to federalism in its opinion: New York need not retry Jackson if it, rather than the federal habeas corpus court, now finds, in accordance with the new ground rules, the

confession to have been voluntary. I doubt whether New York, which in Jackson's original trial faithfully followed the teachings of this Court which were then applicable, will find much comfort in this gesture.

***428** Today's holding is the more surprising because as recently as 1953 the Court held precisely the opposite in Stein v. New York, 346 U.S. 156, 73 S.Ct. 1077 and in 1958 and again in 1959 implicitly accepted the constitutionality of the New York rule, Payne v. Arkansas, 356 U.S. 560, 568, note 15, 78 S.Ct. 844, 850; ****1808** Spano v. New York, 360 U.S. 315, 324, 79 S.Ct. 1202, 1207.[FN2]

FN2. Indeed, in his petition for certiorari to review the judgment of the New York Court of Appeals, 10 N.Y.2d 780, 219 N.Y.S.2d 621, 177 N.E.2d 59, which this Court denied, 368 U.S. 949, 82 S.Ct. 390, the petitioner did not even challenge the constitutionality of the New York procedure.

I respectfully dissent.

I.

The narrow issue of this case should not be swept up and carried along to a conclusion in the wake of broader constitutional doctrines that are not presently at stake. New York and the States which follow a like procedure do not contest or tacitly disregard either of the two 'axioms' with which the Court commences its argument, ante, pp. 1780-1781. It is not open to dispute, and it is not disputed here, that a coerced confession may not be any part of the basis of a conviction. Nor is there question that a criminal defendant is entitled to a ' fair hearing and a reliable determination' of his claim that his confession was coerced. Id., at 1781. The true issue is simply whether New York's procedure for implementing those two undoubted axioms, within the framework of its own trial practice, falls below the standards of fair play which the Federal Constitution demands of the States.

New York's method of testing a claim of coercion is described in the Court's opinion, ante, at p. 1781. It requires the trial judge 'to reject a confession if a verdict that it was freely made would be against the weight of the evidence.' People v. Leyra, 302 N.Y. 353, 362, 98 N.E.2d 553, 558. The heart of the procedure, however, is reliance upon the jury to resolve disputed questions of ***429** fact concerning the circumstances in which the confession was made. Where there are facts 'permitting different conclusions it is left for the jury, under a proper submission, to say whether or not there was coercion * * *.' Id., 302 N.Y. at 364, 98 N.E.2d at 559.

This choice of a jury rather than a court determination of the issue of coercion has its root in a general preference for submission to a jury of disputed issues of fact, a preference which has found expression in a state legislative determination, see New York Code of Criminal Procedure, s 419, [FN3] and in the practice in that State 'followed from an early day in a long line of cases.' People v. Doran, 246 N.Y. 409, 416, 159 N.E. 379, 381, see cases cited therein at 416-417, 159 N.E. at 381-382. Thus by statutory enactment as well as by undeviating judicial approbation, New York has evinced a deliberate procedural policy. One may wonder how this Court can strike down such a deep-seated state policy without giving a moment of attention to its origins or justification.

FN3. 'On the trial of an indictment for any other crime than libel, questions of law are to be decided by the court, saving the right of the defendant to except; questions of fact by the jury. And although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.'

At the core of this decision is the Court's unwillingness to entrust to a jury the 'exceedingly sensitive task,' ante, p. 1788, of determining the voluntariness of a confession. In particular, the Court hypothesizes a variety of ways in which the

jury, wittingly or not, 'may' have disregarded its instructions, and comes up with two possibilities: (1) that the jury will base a determination that a confession was voluntary on belief that it is true; (2) that, despite its belief that a confession was involuntary, the jury will rely on the confession as a basis for concluding that the defendant is guilty. These are, of course, possibilities***430** that the New York practice, in effect the jury system, will not work as intended, not possibilities that, working as it ****1809** should, the system will nevertheless produce the wrong result.

The Court's distrust of the jury system in this area of criminal law stands in curious contrast to the many pages in its reports in which the right to trial by jury has been extolled in every context, and affords a queer basis indeed for a new departure in federal regulation of state criminal proceedings. The Court has repeatedly rejected 'speculation that the jurors disregarded clear instructions of the court in arriving at their verdict,' Opper v. United States, 348 U.S. 84, 95, 75 S.Ct. 158, 165, 45 A.L.R.2d 1308,[FN4] as a ground for reversing a conviction or, a fortiori, as the reason for adopting generally a particular trial practice. 'Our theory of trial relies upon the ability of a jury to follow instructions.' Ibid. Two of the Court's past cases, especially, show how foreign the premises of today's decision are to principles which have hitherto been accepted as a matter of course.

> FN4. The Court does not question the sufficiency of the trial judge's instructions in this case.

In Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302, the appellant was charged with murder in the first degree. His defense was insanity. 'In conformity with the applicable state law, the trial judge instructed the jury that, although appellant was charged with murder in the first degree, they might determine that he had committed a lesser crime included in that charged. They were further instructed that his plea of not guilty put in issue every material and necessary element of the lesser degrees of homicide, as well as of the offense charged in the indictment. The jury could have returned any of five verdicts: (1) guilty of murder in the first ***431** degree, if they found beyond a reasonable doubt that appellant did the killing purposely and with deliberate and premeditated malice; (2) guilty of murder in the second degree, if they found beyond a reasonable doubt that appellant did the killing purposely and maliciously, but without deliberation and premeditation; (3) guilty of manslaughter, if they found beyond a reasonable doubt that appellant did the killing without malice or deliberation, but upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible; (4) not guilty, if, after a careful consideration of all the evidence, there remained in their minds a reasonable doubt as to the existence of any of the necessary elements of each degree of homicide; and (5) not guilty by reason of insanity, if they found beyond a reasonable doubt that appellant was insane at the time of the offense charged.' Id., 343 U.S. at 793-794, 72 S.Ct. at 1005 (footnotes omitted).

These complex instructions,[FN5] which required the jurors to keep in mind and apply the most subtle distinctions, were complicated still further by the law of Oregon regarding the burden of proof on an insanity defense:

> FN5. Their full complexity is not revealed even by the passage quoted. Since the law permitted two different verdicts of guilty of murder in the first degree, the difference being the inclusion or not of a recommendation as to punishment, a total of six possible verdicts was submitted to the jury for its consideration. Leland v. Oregon, supra, 343 U.S. at 793, n. 4, 72 S.Ct. at 1005.

'* * * (The) instructions, and the charge as a whole, make it clear that the burden of proof of guilt, and of all the necessary elements of guilt, was placed squarely upon the State. As the jury was told, this burden did not shift, but rested upon the State throughout the trial, just as, according to the instructions,***432** appellant was presumed to be innocent until the jury was convinced beyond a

reasonable**1810 doubt that he was guilty. The jurors were to consider separately the issue of legal sanity per se-an issue set apart from the crime charged, to be introduced by a special plea and decided by a special verdict. On this issue appellant had the burden of proof under the statute in question here.' Id., 343 U.S. at 795-796, 72 S.Ct. at 1006 (footnotes omitted).
The jury found the appellant guilty and sentenced him to death.

On appeal, the appellant argued that 'the instructions may have confused the jury as to the distinction between the State's burden of proving premeditation and the other elements of the charge and appellant's burden of proving insanity.' Id., 343 U.S. at 800, 72 S.Ct. at 1008. This Court responded:
'We think the charge to the jury was as clear as instructions to juries ordinarily are or reasonably can be, and, with respect to the State's burden of proof upon all the elements of the crime, the charge was particularly emphatic. Juries have for centuries made the basic decisions between guilt and innocence and between criminal responsibility and legal insanity upon the basis of the facts, as revealed by all the evidence, and the law, as explained by instructions detailing the legal distinctions, the placement and weight of the burden of proof, the effect of presumptions, the meaning of intent, etc. We think that to condemn the operation of this system here would be to condemn the system generally. We are not prepared to do so.' Ibid.

Every factor on which the Court relies in the present case to show the inadequacy of a jury verdict on the coerced confession issue and some factors which the Court *433 does not mention, were present in Leland: the factual issue was extremely complex, and required the jury to make a hazardous inference concerning the defendant's mental state, which inference in turn depended on exceedingly subtle distinctions; the instructions to the jury were themselves complex, their complexity being necessitated by the complexity of the issues; the crime charged was particularly heinous and likely to have aroused the community's and, in particular, the jurors' anger; the defendant had beyond question committed the act charged; the possible, and as it turned out actual, penalty was death.

I am at a loss to understand how the Court, which refused to recognize the possibility of jury inadequacy in Leland, can accept that possibility here not only as a basis for reversing the judgment in this case-involving far simpler questions of fact and easily understood instructions-but as the premise for invalidating a state rule of criminal procedure of general application resting on an entirely rational state policy of long standing. Why is it not true here, as it was in Leland, that 'to condemn the operation of * * * (the jury) system here would be to condemn the system generally'? Ibid.

The second case is Delli Paoli v. United States, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278. There the petitioner was tried jointly with four codefendants by federal authorities for a federal crime. The Government introduced in evidence the confession of another defendant, which was made after the conspiracy had ended and could not, therefore, be used against the petitioner. The jury was warned when the confession was admitted and again in the charge that it was to be considered only against the confessor and not against his codefendants. In fact, however, by reason of repeated express references to the petitioner and extensive corroborative detail, the confession implicated the petitioner as completely as it did the confessor. Rejecting the petitioner's*434 contention that admission of the confession was reversible error, the Court said:
'It is a basic premise of our jury system that the court states the law **1811 to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice.' Id., 352 U.S. at 242, 77 S.Ct. at 300.

In Delli Paoli, the jury was instructed that it might

give such credence as it chose to a clearly voluntary and apparently reliable confession when it considered its verdict as to one defendant, but that it must entirely disregard the same confession when it considered its verdict as to any other defendant; this despite the fact that the crime charged was a conspiracy and the confession named other defendants and described their acts in detail. In the present case, the Court believes that a jury 'may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession,' ante, p. 1783. How can it well be said that this policy is more difficult for a jury to understand than the policy behind the rule applied in Delli Paoli? So too, the Court finds danger in this case 'that matters pertaining to the defendant's guilt will infect the jury's findings of fact bearing upon voluntariness.' Id., at 1784. But was there not greater danger in Delli Paoli that one defendant's confession of his and his codefendants' guilt would infect the jury's deliberations bearing on the guilt of the codefendants? And was *435 it not more 'difficult, if not impossible,' ante, p. 1787, for the jurors to lodge the evidence in the right mental compartments in a trial of five defendants than here, in a trial of one?

The danger that a jury will be unable or unwilling to follow instructions is not, of course, confined to joint trials or trials involving special issues such as insanity or the admissibility of a confession. It arises whenever evidence admissible for one purpose is inadmissible for another, and the jury is admonished that it may consider the evidence only with respect to the former. E.g., Moffett v. Arabian American Oil Co., Inc., 2 Cir., 184 F.2d 859. More broadly, it arises every time a counsel or the trial judge misspeaks himself at trial and the judge instructs the jury to disregard what it has heard. E.g., Carr v. Standard Oil Co., 2 Cir., 181 F.2d 15. In short, the fears which guide the Court's opinion grow out of the very nature of the jury system.

Jury waywardness, if it occurs, does not ordinarily trench on rights so fundamental to criminal justice as the right not to be convicted by the use of a coerced confession. The presence of a constitutional claim in this case, however, does not provide a valid basis for distinguishing it from the other situations discussed above. There is not the least suggestion in the Court's opinion that the nature of the claim has anything to do with the trustworthiness of the evidence involved; nor could there be, since the Court's rule is entirely unconnected with the reliability of a confession. Nor, as the Delli Paoli and Leland cases amply attest, are factual issues underlying constitutional claims necessarily more beyond the jury's competence than issues underlyin g other claims which, albeit nonconstitutional, are nevertheless of equally vital concern to the defendant involved. Finally, Delli Paoli was tried in the federal courts, where this Court has general ' supervisory authority' over the administration of criminal*436 justice, McNabb v. United States, 318 U.S. 332, 340-341, 63 S.Ct. 608, 612-613, 87 L.Ed. 819, obviating any suggestion that this Court has power to act here which it lacks in other situations.

**1812 To show that this Court acts inconsistently with its own prior decisions does not, of course, demonstrate that it acts incorrectly. In this instance, however, the Court's constant refusal in the past to accept as a rationale for decision the dangers of jury incompetence or waywardness, because to do so would be to 'condemn the system generally,' Leland, supra, 343 U.S. at 800, 72 S.Ct. at 1008, does demonstrate the lack of constitutional foundation for its decision. It can hardly be suggested that a rationale which the Court has so consistently and so recently rejected, even as the basis for an exercise of its supervisory powers over federal courts, and which even now it does not attack so much as disregard, furnishes the clear constitutional warrant which alone justifies interference with state criminal procedures.

II.

The hollowness of the Court's holding is further evidenced by its acceptance of the so-called ' Massachusetts rule,' see ante, p. 1781 and note 8, under which the trial judge decides the question of voluntariness and, if he decides against the defendant, then submits the question to the jury for its independent decision.[FN6] Whatever their theoretical variance, in practice the New York and

Massachusetts rules are likely to show a distinction without a difference. Indeed, some commentators, and sometimes the courts themselves, have been unable to see two distinct rules.[FN7]

FN6. E.g., Commonwealth v. Sheppard, 313 Mass., 590, 604, 48 N.E.2d 630, 639-640.

FN7. The majority of this Court itself proclaims its inability to distinguish clearly between the States which do and those which do not follow the rule now found by it to be constitutionally required. See ante, p. 1782, note 9. In Appendix A to the Court's opinion, the rules in 14 States are listed as 'doubtful.'

Annotations in 85 A.L.R. 870 and 170 A.L.R. 567 recognize only two general practices, dividing the States into those in which 'voluntariness (is) solely for (the) court' (the so-called 'orthodox' rule, ante, p. 1781) and those in which 'voluntariness (is) ultimately for (the) jury,' with some jurisdictions listed as 'doubtful.' Massachusetts and New York are both listed as jurisdictions in which the question is ultimately for the jury. See also Ritz, Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court, 19 Wash. & Lee L.Rev. 35, 55-57 (1962). Although recognizing the difference between the two rules, Professor Ritz states that 'the distinctions in the different views may be more semantical than real.' Id., at 57 (footnote omitted). He asks:

'Is the trial judge's finding under the New York View that a confession is 'not involuntary' so that it may go to the jury very much different from the trial judge's finding under the Massachusetts View that a confession is 'voluntary,' with the jury given an opportunity to pass again on the same question?' Id., at 57, n. 120.

In Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U.Chi.L.Rev. 317 (1954), the distinction between the rules is defended, but the author states that 'the formal distinction between the New York and Massachusetts procedures is often blurred in appellate opinions,' id., at 323-324, and that '* * * it is sometimes difficult to determine which of two procedures is being approved, or whether a distinction between the two is even recognized.' Id., at 324 (footnote omitted).

437** The Court finds significance in the fact that under the Massachusetts rule 'the judge's conclusions are clearly evident from the record,' and 'his findings upon disputed issues of fact are expressly stated or may be ascertainable from the record.' Ante, p. 1782. It is difficult to see wherein the significance lies. The 'judge's conclusions' are no more than the admission or exclusion of the confession. If the confession is admitted, his findings of fact, if they can be ascertained, will, realistically, either have no effect on review of the conviction for constitutional correctness or will serve only to buttress an independent conclusion that the confession was not ***438** coerced. Indeed, unless the judge's findings of fact are stated with particularity, the Massachusetts*1813** rule is indistinguishable from the New York rule from the standpoint of federal direct or collateral review of the constitutional question. Whichever procedure is used, the reviewing court is required to give weight to the state determination and reverse only if the confessions are coerced as a matter of law. See Lisenba v. California, 314 U.S. 219, 236-238, 62 S.Ct. 280, 289-290, 86 L.Ed. 166; Payne v. Arkansas, 356 U.S. 560, 561-562, 78 S.Ct. 844, 846-847.[FN8]

FN8. If the Court's point is that under the New York rule there is no way of knowing whether the jury has addressed itself specially to the coerced confession issue at all the point simply raises again the fear of jury error discussed in the first section of this opinion.

The heart of the supposed distinction is the requirement under the Massachusetts rule that the judge resolve disputed questions of fact and actually determine the issue of coercion; under the New York rule, the judge decides only whether a jury determination of voluntariness would be 'against the weight of the evidence.' See, supra, p. 1794. Since it is only the exclusion of a confession which is conclusive under the Massachusetts rule, it is

likely that where there is doubt--the only situation in which the theoretical difference between the two rules would come into play--a trial judge will resolve the doubt in favor of admissibility, relying on the final determination by the jury.

The fundamental rights which are a part of due process do not turn on nice theoretical distinctions such as those existing between the New York and Massachusetts rules.

III.

My disagreement with the majority does not concern the wisdom of the New York procedure. It may be that in the abstract the problems which are created by leaving to the jury the question of coercion should weigh more heavily than traditional use of the jury system. Be that ***439** as it may, ' (t)he states are free to allocate functions as between judge and jury as they see fit.' Stein, supra, 346 U.S. at 179, 73 S.Ct. at 1090. I, like the Court in Stein, believe that this Court has no authority to ' strike down as unconstitutional procedures so long established and widely approved by state judiciaries, regardless of our personal opinion as to their wisdom.' Ibid. This principle, alone here relevant, was founded on a solid constitutional approach the loss of which will do serious disservice to the healthy working of our federal system in the criminal field.

It should not be forgotten that in this country citizens must look almost exclusively to the States for protection against most crimes. The States are charged with responsibility for marking the area of criminal conduct, discovering and investigating such conduct when it occurs, and preventing its recurrence. In this case, for example, the crime charged-murder of a policeman who was attempting to apprehend the defendant, in flight from an armed robbery-is wholly within the cognizance of the States. Limitations on the States' exercise of their responsibility to prevent criminal conduct should be imposed only where it is demonstrable that their own adjustment of the competing interests infringes rights fundamental to decent society. The New York rule now held unconstitutional is surely not of that character.

IV.

A final word should be said about the separate question of the application of today's new federally imposed rule of criminal procedure to trials long since concluded. The Court apparently assumes the answer to this question, for I find nothing in its opinion to suggest that its holding will not be applied retroactively.

To say, as the Court does, that New York was 'not without support in the decisions of this Court,' ante, p. 1790, ****1814** when it tried Jackson according to its existing rules ***440** does not give the State its due. Those rules had been directly considered and explicitly approved by this Court in Stein just seven years before Jackson was tried. They were implicitly reaffirmed by this Court in Spano, supra, little more than one year before the trial. If the concept of due process has as little stability as this case suggests, so that the States cannot be sure from one year to the next what this Court, in the name of due process, will require of them, surely they are entitled at least to be heard on the question of retroactivity. See my dissenting opinion in Pickelsimer v. Wainwright, 375 U.S. 2, 84 S.Ct. 80.

I would affirm.[FN9]

FN9. Like the Court, ante, p. 1789, n. 20, I reject petitioner's contention that looking only to the undisputed evidence his confession must be deemed involuntary as a matter of law.

U.S.N.Y. 1964.
Jackson v. Denno
378 U.S. 368, 84 S.Ct. 1774, 1 A.L.R.3d 1205, 12 L.Ed.2d 908, 28 O.O.2d 177

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566 F.2d 873

Briefs and Other Related Documents

United States Court of Appeals,
Fourth Circuit.
Herbert Levi FERGUSON, Appellant,
v.
F. C. BOYD, Appellee.
No. 76-2034.
Argued Feb. 15, 1977.
Decided Oct. 11, 1977.
Rehearing En Banc Decided Dec. 27, 1977.

Habeas corpus action was brought by petitioner who had been convicted of breaking and entering with intent to commit larceny. The United States District Court for the Western District of Virginia, 397 F.Supp. 129, Ted Dalton, J., denied the petition, and petitioner appealed. The Court of Appeals held that finding of state court judge that confession was voluntary was not fairly supported by the record, in view of evidence which established that petitioner's confession was involuntarily exacted as a consequence of undue psychological coercion and calculated pressures through the careful manipulation of petitioner, his girl friend, and his male companions.
Reversed and remanded.

West Headnotes

[1] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k531 Preliminary Evidence as to Voluntary Character
110k531(3) k. Weight and Sufficiency of Evidence. Most Cited Cases

Finding of state court judge that petitioner's confession was voluntary was not fairly supported by the record, in view of fact that undisputed evidence established that petitioner's acknowledgment of guilt was involuntarily exacted as a consequence of undue psychological coercion by local authorities who, holding petitioner and his girl friend in custody following arrest without hearing for one week, thereby separating girl friend from her two infant children, obtained petitioner's confession shortly before petitioner was allowed to speak with appointed counsel, knowing that petitioner had previously offered to make a statement in exchange for girl friend's release. Code Va.1950, § 19.1-241.2, Acts 1966, c. 460; § 19.2-1 et seq.; 28 U.S.C.A. § 2254(d).

[2] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k522 Threats and Fear
110k522(1) k. In General. Most Cited Cases

Involuntary confessions may be exacted as a result of mental coercion as well as physical abuse.

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[3] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k522 Threats and Fear
110k522(1) k. In General. Most Cited Cases

In determining whether involuntary confession has been exacted as result of mental coercion, ultimate question is whether pressure, in whatever form, was sufficient to cause defendant's will to be overborne and to cause capacity for self-determination to be critically impaired.

[4] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k522 Threats and Fear
110k522(1) k. In General. Most Cited Cases

In view of fact that degree of pressure necessary to crush one's will varies with the individual and the circumstances of the arrest and detention, finding of coercion and involuntariness of a confession must be based upon careful consideration of the totality of the circumstances.

[5] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(8) k. Confessions While in Custody Illegally or Under Invalid Process. Most Cited Cases

Under Virginia law, violation of statute requiring authority to bring arrested individual before judge for purpose of fixing bond and informing defendant of his right to counsel does not automatically afford defendant relief but is merely one circumstance along with others to be considered in evaluating voluntariness of confession. Code Va.1950, § 19.1-241.2, Acts 1966, c. 460.

[6] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k520 Promises or Other Inducements
110k520(6) k. Collateral Inducements. Most Cited Cases

Confession is not per se invalid merely because confessor implicates himself in an effort to secure best possible disposition of a charge pending against a relative or friend, but, rather, it must also be shown that friend or relative was improperly detained or threatened as the means whereby the confession was involuntarily exacted.

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[7] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k520 Promises or Other Inducements
110k520(6) k. Collateral Inducements. Most Cited Cases

Where confessor implicates himself in an effort to secure best possible disposition of charge pending against live-in girl friend, determination as to whether confession was voluntary should be based upon impact of circumstances rather than legal relationship of confessor and his live-in girl friend.

[8] KeyCite Notes

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k384 k. Procedural Error; Wrong Court or Remedy. Most Cited Cases
(Formerly 197k45.3(1.40), 197k45.3(1))

Where habeas corpus petitioner had raised issue concerning voluntariness of confession at trial but then proceeded by state habeas instead of appeal and where record did not indicate deliberate bypass of appellate route for tactical reasons, petitioner was not precluded from obtaining habeas corpus relief in federal court, despite *Sykes* decision of United States Supreme Court holding that failure to raise federal constitutional issue in state court trial precludes its use in subsequent federal habeas proceeding if state foreclosure rule prohibits raising federal claim for first time on appeal.

***873** Russell, Widener and Hall, Circuit Judges, would grant rehearing en banc.
***874** Barry Nakell, Chapel Hill, N.C. and Third Year Law Students Catherine Reid and Robert John White, for appellant.
Wilburn C. Dibling, Jr., Asst. Atty. Gen., of Virginia, Richmond, Va. (Andrew P. Miller, Atty. Gen. of Virginia, Richmond, Va., on brief), for appellee.

Before HAYNSWORTH, Chief Judge, WINTER, Circuit Judge, and COPENHAVER, District Judge.[FN*]

FN* District Judge for the Southern District of West Virginia, Sitting by Designation.

PER CURIAM:
Petitioner, Herbert Levi Ferguson, brings this appeal challenging the validity of his conviction in state court on the ground that a statement made by him to the prosecutor and admitted as evidence at his trial was involuntary in that it was (1) coerced by psychological means and (2) induced by a promise that his girlfriend would be released if he confessed. Petitioner also contends that the statement was obtained without the necessary Miranda [FN1] warning and in violation of his right to counsel.

FN1. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The statement having been entered as evidence at his trial in 1971, petitioner was convicted by the Circuit Court of the City of Buena Vista, Virginia, for breaking and entering with intent to commit larceny and was sentenced to prison for four years. Petitioner did not appeal. In 1972, he filed in state court a petition for habeas corpus. An evidentiary hearing was held in 1973 and his petition was

denied. Petitioner then appealed to the Supreme Court of Virginia, which in 1974 affirmed the Circuit Court's denial of the petition, holding that because of his failure to appeal he lacked standing to raise the issues on habeas corpus. Ferguson v. Superintendent of Virginia State Penitentiary, 215 Va. 269, 208 S.E.2d 749 (1974).

In 1975, petitioner filed a habeas petition in the United States District Court for the Western District of Virginia. The Commonwealth filed a motion to dismiss and on June 3, 1975, the district court denied the petition. Ferguson v. Boyd, 397 F.Supp. 129 (W.D.Va.1975). This appeal then ensued. [FN2] We reverse.

FN2. Petitioner's sentence has expired and he is now no longer in custody.

I. The Undisputed Evidence

On July 29, 1971, shortly after midnight, Buena Vista city police officers noticed a ***875** 1965 Ford in the municipal parking lot occupied by a man in the driver's seat and a woman in the rear seat. Petitioner was standing beside the car. The officers then saw another man, Rosser Williams, in the middle of the street walking away from the Western Auto Store and toward the car with an armful of guns. As the officers ran to the scene, the petitioner entered the rear seat of the car. The officers found a pile of guns where petitioner had been standing in addition to the guns they took from the man who was crossing the street. All four persons, including Lionel Mosby who was in the driver's seat and petitioner's girlfriend, Juanita Wolfolk, who had been sitting in the rear of the car, were arrested.

At the jail, petitioner was informed of his constitutional rights by one of the arresting officers. Moreover, petitioner was already generally aware of those rights by virtue of previous entanglements with the law. Although petitioner had been drinking and was not entirely lucid, he advised the officers that he wanted a lawyer and refused to make any statement or answer any questions, even to the extent of revealing his name, without an attorney. However, petitioner did inform the arresting officers that he would tell them "all about it if . . . (they) would let the girl go."

Shortly thereafter, the Commonwealth Attorney arrived at the jail and interrogated petitioner for the avowed purpose of obtaining a confession. Notwithstanding petitioner's earlier request for an attorney, and in clear violation of Miranda, the prosecutor, along with a police officer, proceeded to ask petitioner "what he had done and the fact that he had gone in there and all this . . ." Except for the exchange of "some right strong words" between the prosecutor and the petitioner, no additional statements were obtained from petitioner on the night of his arrest. Nevertheless, two things were then abundantly clear to the authorities: (1) petitioner wanted his girlfriend released, and (2) the case against the girlfriend was so "shaky" that it could only be pursued if she were implicated by one of the others.

The next day, instead of first taking the prisoners before the municipal court then sitting in Buena Vista for the purpose of setting bond and advising them of their right to counsel, as required by then Virginia law,[FN3] the authorities transported them some forty miles to the Augusta County Jail at Staunton. There the four were kept isolated from one another for six days until August 4, 1971, when Mosby, petitioner and his girlfriend were returned to Buena Vista for a court appearance at which bond was to be fixed and, for petitioner, counsel designated. During the six-day period of incarceration at Staunton, no effort was made to bring them before the court for the fixing of bond and the appointment of counsel as might have been done on either of the two occasions during that six-day period when the Buena Vista municipal court was in session.

FN3. "Every person charged with the commission of a felony not free on bail or otherwise shall be brought before the judge of a court not of record on the first day on which such court sits after the person is charged. At this time, the judge shall inform the accused of his right to counsel and the amount of his bail. The accused shall be allowed a reasonable opportunity to employ counsel of his own choice or if appropriate, the statement of

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> indigence provided for in s 19.1-241.3 of the Code shall be executed." Va. Code, s 19.1-241.2 (1975 Cum.Supp.) (repealed by 1975 Va. Acts, ch. 495, tit. 19.2).

The three were returned to Buena Vista by automobile and were accompanied by two police officers, including Police Chief Huffman. On the return trip, petitioner was seated next to his girlfriend from whom he had been separated for the past six days. Although the testimony is in sharp contrast as to whether the police officers or the petitioner initiated the conversation on the subject, it is conceded that the petitioner again offered on the return trip to make a statement in exchange for the release of the girl. One of the officers suggested that petitioner speak to the prosecutor. When they arrived at the courthouse some fifteen minutes prior to the convening of court, Chief Huffman promptly contacted the prosecutor and advised him ***876** that petitioner would make a statement in order to obtain the girl's release. The prosecutor then conversed with the petitioner in the presence of the officer and took his statement. [FN4] At that time, it was known by the prosecutor that the prime purpose of the court appearance was to enable the petitioner to confer with his attorney who had been selected the day before but who apparently was not to be formally appointed until the hearing that same morning. The prosecutor, who acknowledged at the habeas corpus hearing that he would surely have been thwarted in obtaining a confession from the petitioner once his attorney arrived to counsel him, received the confession in the few remaining minutes prior to the 10:00 a.m. hearing with the court.

> FN4. No further Miranda warning was given beyond that conveyed to the petitioner on the night of his arrest. The court below concluded that the confession was "both voluntary and spontaneous." 397 F.Supp. at 133.

The prosecutor acknowledges that he knew that the purpose of the confession by the petitioner was to obtain the release of the girl. He further concedes that his sole purpose as prosecutor was to obtain a confession implicating petitioner, not to absolve the girl. Indeed, he was aware that Williams had already exonerated the girl a fact that had not been relayed to the petitioner. In this connection, it is interesting to observe that the authorities chose to leave Williams at the jail in Staunton when the other three were returned to Buena Vista.

II. The Disputed Promise

It is unnecessary to resolve the disputed issue of whether a promise was made to the petitioner that his girlfriend would be released if he would confess. The petitioner insists that he was so promised. The prosecutor on the other hand, while acknowledging that he is not entirely certain as to whether a promise was made, states that he is under the impression that he made no promise. However, he does concede that the petitioner may have said, "If I tell you how this thing happened to prove to you that she didn't have anything to do with it, will she be released?" And the prosecutor further concedes that he "may very well have said 'yes.' "

Even adopting the state's version, it is understandable that the petitioner might have been led to believe the girl would be released if he confessed. The prosecutor knew that release of the girl was uppermost in petitioner's mind. The prosecutor also knew that the petitioner had offered on the night of his arrest to confess if the authorities would agree to release the girl. When petitioner came to court on August 4th, the prosecutor was informed that petitioner would make a statement for the purpose of obtaining the girl's freedom. Indeed, at one point in his testimony, the prosecutor acknowledged that he was informed by Chief Huffman immediately upon petitioner's return to Buena Vista and just prior to the confession that the petitioner would make a statement if the prosecutor would agree to turn the girl loose. Under all the attendant circumstances, the prosecutor ought to have known that his agreement that he would release the girl if petitioner told him how it happened to prove to him that the girl had nothing to do with it might very well create the impression in petitioner's mind that the girl would be released if petitioner confessed. Viewed from the petitioner's perspective, it would not have been unreasonable for him to understand that a promise had been made. Grades v. Boles, 398 F.2d 409 (4th Cir. 1968).

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Nevertheless, we do not rest our decision on the ground that an improper promise was made in order to induce from petitioner an involuntary confession. The state court judge in the habeas hearing necessarily resolved this credibility issue against the petitioner and we accept his finding thereon. For the same reason, we disregard petitioner's disputed contention that, in violation of his right to counsel, the police officers initiated the conversation on the August 4th return trip that led to his confession without benefit of a renewed Miranda warning ***877** just prior to the hearing at which counsel was to have been appointed for him.

III. The Coercion of the Confession

[1] We conclude that the finding of the state court judge that the confession was voluntary is not fairly supported by the record. 28 U.S.C. s 2254(d).[FN5] Our conclusion is reached on the basis of the undisputed evidence derived in a fully developed habeas hearing before the Circuit Court of the City of Buena Vista, Virginia. No specific findings of fact or separate conclusions of law were made by that court, which merely stated the mixed finding of fact and law that the confession "was not coerced or induced but was a voluntary statement and hence was admissible." Inasmuch as the evidence before the state court was adopted by the court below without further evidentiary hearing, the record in the state court reflects all of the evidence before us for consideration.

FN5. 28 U.S.C. s 2254(d) (1976) provides in relevant part as follows:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, . . .

* * *

(8) . . . unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . . .

[2] [3] [4] It has long been recognized that involuntary confessions may be exacted as a result of mental coercion as well as physical abuse. As the Supreme Court stated in Blackburn v. Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242 (1960):

A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion."

The ultimate question is whether the pressure, in whatever form, was sufficient to cause the petitioner's will to be overborne and his capacity for self-determination to be critically impaired. Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961). Inasmuch as the degree of pressure necessary to crush one's will varies with the individual and the circumstances of the arrest and detention, a finding of coercion and involuntariness must be based upon a careful consideration of the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93

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S.Ct. 2041, 36 L.Ed.2d 854 (1973).

In this case it is apparent that the prosecutor and police went to extraordinary lengths to extract from petitioner a confession by psychological means. They learned on the night of petitioner's arrest of his overriding concern for his girlfriend's release. This discovery set the stage for a week's exploitation of the relationship between the petitioner and his girlfriend which culminated in a successful race by the prosecutor to obtain the confession just moments prior to the courtroom arrival of petitioner's counsel. Throughout the course of the week's events, petitioner's girlfriend was separated from her two infant children, ages two and four, and held without bond, even though the case against her was admittedly "shaky" from the outset.

On the night of his arrest, the petitioner himself was subjected to interrogation despite his request for counsel and notwithstanding his assertion of his right to remain silent. This fundamental Miranda right was patently violated by no less than the county's leading legal officer, the Commonwealth Attorney, who found it necessary to visit the petitioner in the jailhouse in the early morning hours following his midnight ***878** arrest. The prosecutor interrogated the petitioner even though petitioner had been drinking and was not entirely lucid. His inquiry was accompanied by "some right strong words" and took place for the acknowledged purpose of obtaining a confession.

[5] [6] [7] Petitioner's reward for thwarting this improper exercise of police power was soon in coming. The next morning he was shipped, along with his girlfriend and two male companions, to the Augusta County Jail at Staunton, some forty miles away. This served to ignore the directive of the Virginia statute under which petitioner and his girlfriend ought to have been brought before a judge of the Buena Vista municipal court then in session for the purpose of fixing bond and informing them of their right to counsel.[FN6] Had such been done, the girlfriend, if not freed outright, would doubtless have been released on a modest bond so that she might return home to care for her infant children. Petitioner would also have been enabled to renew before the court his request for appointment of counsel. Such a course, however, would have deprived the authorities of their hostage the girlfriend.[FN7] It would likewise have resulted in the early appointment of counsel whom the prosecutor knew would have "sense enough to stop" petitioner from confessing.

> FN6. Va.Code s 19.1-241.2. Violation of the statute, however, does not automatically afford the petitioner relief but is merely one circumstance along with others to be considered in evaluating the voluntariness of the confession. Davis v. North Carolina, 339 F.2d 770, 777 (4th Cir. 1964).
>
> FN7. It is recognized that a confession is not per se invalid merely because the confessor implicates himself in an effort to secure the best possible disposition of a charge pending against a relative or friend. United States v. McShane, 462 F.2d 5, 7-8 (9th Cir. 1972); United States v. Stegmaier, 397 F.Supp. 611, 618 (E.D.Pa.1975). Rather, it must also be shown that the friend or relative was improperly detained or threatened as the means whereby the confession was involuntarily exacted. To the extent United States v. Reese, 351 F.Supp. 719, 721 (W.D.Pa.1972) holds that the detention of a live-in girlfriend does not have the same legal consequences as the detention of a wife or relative, we respectfully disagree. The determination should be based upon the impact of the circumstances rather than the legal relationship of the parties.

So it was that the petitioner and his compatriots were dispatched to Staunton where they were to languish in jail throughout yet another session of the Buena Vista municipal court in contravention of the same Virginia statute. For six days, the four remained in the Augusta County Jail isolated from one another. For six days and six nights, petitioner had little to do but brood over the jailing of his girlfriend with whom he had lived for the past year. His feelings of guilt respecting the involvement of his girlfriend were magnified by his concern for the safety and welfare of her children. This was especially the case with the two-year-old son whom the petitioner had personally taken to the hospital at least a dozen times that year.

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When the authorities determined that the petitioner and his girlfriend had been detained for hearing long enough, they were returned to Buena Vista. On the return trip, petitioner and the girlfriend were seated next to each other in the rear seat of the police officer's car where they were, at last, able to engage in a whispered conversation. Mosby accompanied them. Cleverly enough, Williams, who unknown to the others had made a statement absolving the girlfriend, was left behind. It wouldn't do, of course, for the petitioner to learn that someone else had already cleared the girl. Upon arriving at Buena Vista, the police officers immediately notified the prosecutor of petitioner's proposal to make a statement. The prosecutor, fully aware that petitioner's counsel would arrive within minutes, moved at once to obtain petitioner's confession before counsel could consider advising his client against it. Shortly thereafter, the girlfriend, as well as Mosby, were released on minimal bonds and subsequently freed altogether.

From this sequence of events, it is clear that petitioner's confession resulted from improper conduct on the part of the local ***879** authorities. The totality of the circumstances makes it abundantly plain that petitioner's acknowledgement of guilt was involuntarily exacted as a consequence of undue psychological coercion and calculated pressures brought to bear through clever manipulation of the petitioner, his girlfriend and his male companions.

Following argument of this case, the United States Supreme Court handed down its decision in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), holding that the failure to raise a federal constitutional issue in a state court trial precludes its use in a subsequent federal habeas proceeding if a state foreclosure rule (such as that applied in this case in Ferguson v. Superintendent of Virginia State Penitentiary, 215 Va. 269, 208 S.E.2d 749 (1974)) prohibits raising the federal claim for the first time on appeal.

[8] Without undertaking to consider the full scope of Sykes at this time, we hold it inapplicable to bar this petitioner who did raise the issue dealt with herein at trial but then proceeded by state habeas instead of appeal, especially inasmuch as the record does not indicate a deliberate by-pass of the appellate route for tactical reasons. Fay v. Noia, 372 U.S. 391, 438-40, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); Sykes, 433 U.S. at --, 97 S.Ct. at 2507 n. 12.

The judgment of the district court is reversed and this case is remanded for the issuance of a writ of habeas corpus unless, within a reasonable time, the Commonwealth should retry the petitioner without the use of his confession.

On Request For Rehearing, En Banc

An evenly-divided court having voted to deny rehearing en banc upon request made pursuant to Federal Rule of Appellate Procedure 35;

It is ADJUDGED and ORDERED that rehearing en banc is denied.

DONALD RUSSELL, WIDENER and K. K. HALL, Circuit Judges, would grant rehearing en banc.

C.A.Va. 1977.
Ferguson v. Boyd,
566 F.2d 873

Briefs and Other Related Documents (Back to top)

• 1976 WL 192932 (Appellate Brief) Brief of Appellee (Dec. 08, 1976) Original Image of this Document (PDF)

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• 1976 WL 192933 (Appellate Brief) Brief for Appellant (Nov. 08, 1976) Original Image of this Document (PDF)
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West Reporter Image (PDF)

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317 So.2d 141

District Court of Appeal of Florida, Fourth District.
Charles Samuel JARRIEL, Appellant,
v.
STATE of Florida, Appellee.
No 74-1579.
Aug. 8, 1975.

Defendant was convicted in the Circuit Court, Palm Beach County, Russell H. McIntosh, J., of grand larceny, and he appealed. The District Court of Appeal, Walden, C.J., held that urging defendant by direct and implied promises to make a statement was in violation of basic tenet of law that a confessing defendant should be entirely free from influence of hope or fear and was such as to require suppression of resulting statement.
Reversed and remanded.

West Headnotes

KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(1) k. In General. Most Cited Cases

Where police officer told defendant during interrogation that his wife would be arrested unless defendant made a statement and did not deny that he might have told defendant that he would only charge him with one incident if defendant would make a statement, defendant was improperly urged by direct or implied promises to make a statement, in violation of basic tenet of law that a confessing defendant should be entirely free from influence of hope or fear, and resulting statement was subject to suppression.

***141** Philip G. Butler, Jr., of Foley, Colton & Butler, West Palm Beach, for appellant.
Robert L. Shevin, Atty. Gen., Tallahassee, and Frank B. Kessler, Asst. Atty. Gen., West Palm Beach, for appellee.

WALDEN, Chief Judge.
After Jury trial defendant was found guilty of grand larceny. He appeals his conviction on the ground a statement made by him should have been suppressed. We agree and reverse.

After an officer had contacted defendant's wife to find out where defendant worked, he arrested defendant at this place of employment. Defendant was taken to the Sheriff's office and placed in a room for interrogation, and at no time was he booked or his location disclosed until after his statement had been given. It is undisputed that during interrogation the officer told defendant his wife would be arrested unless they could clear this thing up (by defendant's making a statement). The interrogating officer's testimony included the following:

'Q Did you talk to him and tell him that you could arrest the girls and if he would tell you about the incident you wouldn't have them arrested?

'A Based on what information I had I would have had to arrest his wife unless he could show me that

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she wasn't involved and that she was along because she was his wife.

'Q And did you tell him that you would only charge him with one incident if he gave you a statement?

'A I don't have that right. Probably if something of that nature was said I probably normally-normally the courts would only require a conviction of one of the charges and they normally don't try them all separately. In this case I don't recall this part of the discussion with him.'

It is undisputed that during interrogation the officer told defendant his wife would be arrested unless defendant made a statement. Further, the officer did not deny that he might have told the defendant that he would only charge him with one incident***142** if the defendant would make a statement.

We find that the defendant was improperly urged by direct or implied promises to make a statement, in violation of the basic tenet of law that a confessing defendant should be entirely free from the influence of hope or fear. The resulting statement here should be suppressed on authority of Lynumn v. Illinois, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963); M.D.B. v. State, 311 So.2d 399 (4th DCAFla.1975); State v. Chorpenning, 294 So.2d 54 (2d DCAFla.1974); Kraft v. State, 143 So.2d 863 (2d DCAFla.1962); and 13 Fla.Jur. Evidence s 248 (1957).

Reversed and remanded.

CROSS and DOWNEY, JJ., concur.

Fla.App. 1975.
Jarriel v. State,
317 So.2d 141

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JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +39 0831 257000 or +232 22 297000 or +39 083125 (+Ext)
UN Intermission 178 7000 or 178 (+Ext)
FAX: +232 22 297001 or UN Intermission: 178 7001

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Case Name: The Prosecutor – v- Sesay, Kallon & Gbao
Case Number: SCSL-2004-15-T
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☐ Affidavit
☐ Indictment
☐ Correspondence
☐ Order
☒ **Other**

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Name of Officer:

Advera Nsiima

Signed