[HIGH COURT OF AUSTRALIA.]

ATTORNEY-GENERAL OF NEW SOUTH WALES . . . . . } APPELLANT;

AND

PATRICK MARTIN . . . . . RESPONDENT

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 6, 7.

Griffith C.J. Barton, O'Connor and Isaacs JJ.

Criminal law—Crimes Act 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 410—*Evidence—Statement by prisoner—Statement to constable after arrest—Confession—Admission—Exculpatory statement—Evidence of inducement—Voluntary statement.*

The *Crimes Act* 1900, No. 40, sec. 410, provides that no confession, admission, or statement shall be admissible against an accused person if it has been induced by any untrue representation, threat, or promise. The respondent was charged with wounding F. with intent to murder him. At the trial a written statement, signed by the prisoner, was tendered in evidence by the Crown. In this statement the prisoner admitted that he was about 200 yards away from F. when he was wounded, but alleged that the offence was committed by another man. Evidence was given by the Crown that this statement was made by the prisoner to a constable after his arrest, and that before the statement was made the constable read something to the prisoner, but it was not proved what was read to the prisoner by the constable. Objection was taken to the admissibility of the statement upon the ground that it was not proved to have been voluntarily made. This objection was overruled and the statement was admitted. The Supreme Court, by majority, quashed the conviction upon the ground that the statement was not admissible.

Held, *per tot. cur.*, that the common law rule as to the admissibility of confessions is still in force in New South Wales.

Held, by *Griffith* C.J., *Barton* and *O'Connor* JJ., that the statement was a "statement," within sec. 410, but that under that section it was not incumbent upon the Crown to prove by positive affirmative evidence that the

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statement was voluntarily made, and that as there was nothing to suggest that it was induced by any untrue representation, threat, or promise, it was admissible against the prisoner. *Held*, also, that assuming that the statement were regarded as a confession it was rightly admitted.

Held, *per Isaacs* J., that the statement being purely exculpatory, was not a "statement" within sec. 410, but that, assuming it were regarded as a confession, it would not have been admissible, as in the absence of evidence of what was read to the prisoner by the constable, it had not been proved affirmatively that it was voluntary.

R. v. *Thompson*, (1893) 2 Q.B., 12; 17 Cox Cr. Ca., 641, considered.

Decision of the Supreme Court of New South Wales (*Rex* v. *Martin*, 9 S.R. (N.S.W.), 740; 26 W.N., 143) reversed.

APPEAL by special leave from the decision of the Supreme Court quashing a conviction upon a case stated by *Cohen* J.

The case stated was as follows:—

"This prisoner was convicted at the recent Wagga Wagga Assizes of feloniously wounding James Finnegan, with intent to murder him, on 11th May 1909. On 13th May the prisoner was arrested by Constable McAlpine, and on 14th May, when he was in his cell, McAlpine said to him, 'Well, Martin, do you still say you are not the man that assaulted Finnegan?' Prisoner said, 'Yes.' McAlpine said, 'Did you see anybody else there?' Prisoner said, 'No.' McAlpine said, 'Did you see anybody else assault him?' Prisoner said, 'No.' McAlpine said, 'Why were you inquiring for Finnegan at Barmedman the day previous to the assault?' Prisoner said, 'I was not.'

"On 15th May McAlpine read something to the prisoner in the lockup, and the prisoner made a statement which McAlpine took down in writing, and which was read to the prisoner, who afterwards signed it. He was not asked any question by McAlpine or Sub-Inspector Flynn who were present. It is exhibit D.

"Mr. *Weigall*, who defended the prisoner, and had objected to the admission of the foregoing evidence, requested me to reserve the following points:—

(1) That I was wrong in admitting evidence of statements made by the prisoner after arrest, and

(2) That it was not proved that either statement was free or voluntary.

"Point 2 was not taken in that form at the time the evidence was given, and I understand it is taken as substantially point 1 in another form.

"The question for the Court is, whether I was right in admitting the foregoing evidence: see *R.* v. *Gavin* (1); *R.* v. *Male* (2); *R.* v. *Archer* (3)."

The material part of the statement, Exhibit D., was as follows:—

"Lockup,
Temora, 15th May 1909.

"After reading James Finnegan's deposition to accused Martin he voluntarily made this statement in the presence of Sub-Inspector Flynn and Constable McAlpine:

"I remember the night Finnegan was assaulted. I took my mare over to a water-hole to give her a drink, and while I was there (about 200 yards away) I heard the report of a gun. I came back to the camp. Finnegan was on the ground groaning and trying to speak. There was a man there with a bay mare and a chestnut foal. The man was there before I left the camp to give my mare a drink. I saw the blood on Finnegan's face, and the man had left. I don't know who the man was. He was about 35 years old, 5 feet 8 inches high, red moustache, ruddy complexion, grey hat with white band round it, black coat and vest. The first time I saw him there was about half-past four o'clock, the second time was about 7.30 p.m., when the shot was fired. When I came back from watering my horse and saw Finnegan on the ground, I asked him what was the matter with him, and he replied, 'Somebody hit me.' I went to the sulky then and got my blanket and rolled it round Finnegan. I picked him up and carried him to his hammock. When I put him into his hammock I asked him if he knew the man that hit him. He said, 'No, but he shot me.' I asked him if he robbed him of any money, he replied, 'No.' I asked Finnegan if he was able to walk to the Reefton Hotel, and he said, 'No, I am stunned.'"

The Supreme Court quashed the conviction (4).

The Attorney-General appealed from this decision upon the

(1) 15 Cox Cr. Ca., 656.
(2) 17 Cox Cr. Ca., 689.
(3) 9 W.N. (N.S.W.), 204.
(4) 9 S.R. (N.S.W.), 740.

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following grounds:—(1) That the Supreme Court was in error in holding that the onus was upon the Crown to prove affirmatively that there was no inducement to the prisoner to make the statement in question; (2) That the statement was not a statement within the meaning of sec. 410 of the *Crimes Act* 1900; (3) That sec. 410 applies only to confessions, admissions and statements, from the terms of which an inference of guilt can be drawn.

The prisoner was subsequently convicted upon another charge in relation to the same offence.

Blacket, for the appellant. The statement by the prisoner was not a statement within the meaning of sec. 410. It was an entirely exculpatory statement. If the facts had been as alleged by the prisoner he could not have been convicted of the offence charged. The section consolidates sec. 11 of the *Evidence Amendment Act* 1858, 22 Vict. No. 7, and sec. 357 of the *Criminal Law Amendment Act* 1883, 46 Vict. No. 17. Sec. 11 of 22 Vict. No. 7 provided that no confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any untrue representation or by any threat or promise whatever, and every confession made after any such representation or threat or promise shall be deemed to have been induced thereby unless the contrary be shown. Then by sec. 357 of 46 Vict. No. 17 it was provided that no admission or statement tendered in evidence against an accused person shall be received which has been induced by any untrue representation, or threat, or promise, where such threat or promise has been held out by the prosecutor or some person in authority, and that every admission or statement made after any representation, threat, or promise, shall be deemed to be induced thereby unless the contrary be shown, provided that no admission or statement shall be rejected by reason only of the accused having been told by a person in authority that whatever he might say might be given in evidence for or against him. These two sections were consolidated in sec. 38 of the *Evidence Act* 1898, No. 11, and this last-mentioned section was repealed and re-enacted by sec. 410 of the *Crimes Act*. This section was only intended to apply to confessions, that is confessions in express terms of the commission of the offence

charged, admissions of the exact facts necessary to be proved, or statements by the prisoner which are evidentiary of the facts necessary to be proved. It has no application to statements in which, as in the present case, the prisoner throughout is denying his guilt, and stating facts which are entirely inconsistent with the inference that he has committed the offence with which he is charged: *R.* v. *Bates* (1).

In *R.* v. *Laird* (2) *Windeyer* J. was of opinion that the common law rule as to the admissibility of confessions was still in force after the passing of the *Criminal Law Amendment Act*, and this view was concurred in by *Simpson* J. in *R.* v. *Dean* (3). The section does not incorporate the common law rule with regard to the proof of confessions, and extend it to admissions and statements made by a prisoner. The common law rule applies only to confessions and not to admissions. Anything short of a statement by the prisoner that he committed the offence charged is not a confession: *R.* v. *Cain* (4); *Russell on Crimes*, 6th ed., vol. III., p. 500; *R.* v. *Blackburn* (5); *R.* v. *Green* (6). Whatever a prisoner says at any time against himself is evidence: *R.* v. *Clewes*, M.SS. cited in *Russell on Crimes*, 5th ed., at p. 480. But even assuming that this statement was a confession, the learned Judge was right in admitting it. There was no evidence before him to give rise to the suggestion that any inducement was held out to the prisoner. In the absence of any evidence the presumption is that the statement was properly obtained. In *R.* v. *Williams*, M.SS., referred to in *Russell on Crimes*, 6th ed., vol. III., at p. 535, *Taunton* J. said:—"A confession is presumed to be voluntary unless the contrary is shown; and as no threat or promise is proved to have been made by the constables, it is not to be presumed." The principle referred to in *R.* v. *Thompson* (7) only applies where there is evidence from which an inference can be drawn that there was an inducement. The onus is upon the prisoner in the first instance to give some evidence of inducement, and the Crown must then prove affirmatively that the statement was voluntary, but until

(1) 16 N.S.W. L.R., 268.
(2) 14 N.S.W. L.R., 354.
(3) 17 N.S.W. L.R., 224, at p. 241.
(4) Joy 16; 1 C. & D. C.C., 37.
(5) 6 Cox Cr. Ca., 333.
(6) 6 C. & P., 655.
(7) 17 Cox Cr. Ca., 641.

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there is something upon which a doubt can be founded the onus of proof is not cast upon the Crown. In this case there was nothing in the circumstances under which the statement was made which could reasonably suggest that it was not voluntary. The statement itself shows that what was read to the prisoner was a deposition of the man who was wounded. It states that it was voluntarily made, and it is signed by the prisoner. [He also referred to *R.* v. *Matthews*; *Wilkinson's Australian Magistrate*, 5th ed., p. 303; *R.* v. *Thomas*, *ibid*, p. 304.]

Weigall, for the respondent. This statement was either a confession or a statement within sec. 410. That section is not confined to confessions. Where the legislature uses different words in the same section, the presumption is that they were used to express different ideas: *R* v. *Great Bolton* (1). The Crown, having tendered the document as evidence against the prisoner, cannot be heard to say, when the document is objected to, that it was admissible because it did not tend to prove the prisoner's guilt: *Bram* v. *United States* (2). Even at common law a statement may amount to a confession, although it does not in terms admit the commission of the offence charged. In *Greenleaf on Evidence*, 10th ed., p. 304 (*n*), it is stated that the rule as to the admissibility of confessions "excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though in terms it is an accusation of another, or a refusal to confess." In *Wilson* v. *United States* (3), the statement by the prisoner was a denial of guilt, but contained answers to questions which were made the basis for contradiction at the trial. The Court held that the rule as to the admissibility of confessions applied to this statement. See also *R.* v. *Court* (4); *R.* v. *Tyler* (5); *R.* v. *Clewes* (6); *R.* v. *Swatkins* (7); *R.* v. *Hall* (8).

Assuming this statement is either a confession or a statement within sec. 410, that section was clearly intended to deal with the onus of proof of confessions. The words, "If it has been induced,"

(1) 8 B. & C., 71, at p. 74.
(2) 168 U.S., 532.
(3) 162 U.S., 613.
(4) 7 C. & P., 486.
(5) 1 C. & P., 129.
(6) 4 C. & P., 221.
(7) 4 C. & P., 548.
(8) 2 Leach, 559 (*n*).

as applied to a confession, can only mean either that the onus of proof remains as at common law, and that the Crown must prove that a confession was voluntary, or that a confession is admissible unless the prisoner proves that it was induced by an untrue representation, threat or promise. The section, so far as it relates to confessions, is in effect a re-enactment of sec. 11 of 22 Vict. No. 7. It was held in *R.* v. *Dean* (1), by the Chief Justice and *Stephen* J. that the whole law as to the admission of confessions was contained in sec. 357 of the *Criminal Law Amendment Act*, and that under that section the onus of proof is the same as at common law. *Simpson* J., in that case held that this section was an extension of the common law in favour of the prisoner. The statement of *Windeyer* J. in *R.* v. *Laird* (2), that the common law as to the rejection of confessions was still in force, refers to the nature of the inducement, and not to the onus of proof. If the words of the section are ambiguous the Court will not assume that it was the intention of the legislature to alter the common law as to the admissibility of confessions adversely to the interests of a prisoner. If the words "if it has been induced" as applied to confessions deal with the onus of proof, and sub-sec. (2) of sec. 410 shows that the legislature in this section were dealing with the onus of proof, there is no principle of construction by which they can be held to mean that, with regard to confessions, the onus is on the Crown to prove that they are voluntary, and with regard to statements, the onus is on the prisoner to prove that they are not voluntary.

Assuming that the onus was upon the Crown to prove that the statement was voluntary, the majority of the Court below were right in holding that upon the facts of this case the Crown had not discharged this onus. Evidence was given that something was read to the prisoner, which, *ex hypothesi*, might or might not contain an inducement. In the absence of evidence of what was said to the prisoner before he made the statement, the Judge at the trial could not find that no inducement was held out to the prisoner, because all the material facts were not before him. The constable should either have said that

(1) 17 N.S.W. L.R., 224. (2) 14 N.S.W. L.R., 354.

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he held out no inducement to the prisoner, or stated what he read to him. The Crown were bound to prove affirmatively that the statement was voluntary. If by reason of all the material facts not being proved the matter is left in doubt, the statement should have been rejected: *Russell on Crimes*, 5th ed., pp. 491, 496; *R.* v. *Thompson* (1); *R.* v. *Warringham* (2); *R.* v. *Swatkins* (3); *Greenleaf on Evidence*, 10th ed., p. 304. In *R.* v. *Rose* (4) Lord *Russell of Killowen* C.J. says:—"It must be borne in mind by magistrates . . . that in all cases of statements alleged to have been voluntarily made it is their duty *à priori* to satisfy themselves that the confession of the prisoner can be affirmatively proved to have been voluntarily made," and that until they have so satisfied themselves it cannot be admitted. The contention of the Crown is that this rule only applies to cases where there is some evidence that there was an inducement. But no authority for any such qualification of the rule can be found in any of the later cases. The Crown tender the document, and the onus must be upon them in the first instance to show that it is legally admissible against the prisoner, that is, that it was voluntarily made. The intention of the section was to extend the common law in favour of the prisoner by placing any statement tendered by the Crown as evidence of the prisoner's guilt on the same footing as a confession, properly so called, and to codify the law on this subject. In many of the text books the words "confession" and "statement" are used as practically synonymous. Questions had also arisen at common law as to the onus of proof, in cases where, after an inducement had been held out, a prisoner on a subsequent occasion made a confession. In both these cases the doubt was resolved by the legislature in sec. 410 in favour of the prisoner.

Blacket, in reply.

GRIFFITH C.J. Special leave to appeal was given in this case because it appeared to raise a question of great general importance as to the proper construction of sec. 410 of the *Crimes Act*. It is satisfactory to know that the decision of the Court, if

(1) 17 Cox, 641.
(2) 2 Den., 447 (*n*).
(3) 4 C. & P., 548.
(4) 67 L.J.Q.B., 289, at p. 292.

adverse to the present respondent, will not injuriously affect him. Sec. 410 is in these words:—"No confession, admission, or statement shall be received in evidence against an accused person if it has been induced—(*a*) by any untrue representation made to him; or (*b*) by any threat or promise, held out to him by the prosecutor, or some person in authority."

The second paragraph of the section says:—"Every confession, admission, or statement made after such representation or threat or promise shall be deemed to have been induced thereby, unless the contrary be shown."

The section, which is negative in form, is a re-enactment of earlier provisions of the law of New South Wales, the first of which (22 Vict. No. 7), passed in 1857, had relation to confessions only. That also was in the same negative terms:—"No confession shall be received in evidence against an accused person," and so on. At that time the admissibility of confessions was governed by the common law, and the greatest care was taken by Judges in seeing that confessions had not been induced by improper means. The law, was that only voluntary confessions were admissible in evidence. By the *Criminal Law Amendment Act* (46 Vict. No. 17) a similar provision was made with regard to admissions or statements made by prisoners. I doubt whether this enactment as to admissions or statements made any difference in the law so far as regards admissions or statements induced by threats or promises, but it did alter the law so far as regards statements induced by untrue representations. As I understand the decision of the Supreme Court in this case, they held that when any statement of any kind is made by a prisoner, the onus is upon the Crown to negative the conditions under which it might become inadmissible in evidence under this Statute. I think it is better when you are construing a provision of an Act to look at the words of the Act itself. There is nothing in the language of sec. 410 to suggest that, when a statement made by a prisoner is offered in evidence, the Crown is bound to prove by positive evidence that no untrue representation was made to him before he made it. That is quite contrary to the maxim, "*Ei qui affirmat, non ei qui negat incumbit probatio*," which is an elementary rule of the law of evidence, and a

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rule of common sense. There is nothing then in this section to cast the onus on the Crown to prove that the excluding conditions did not exist, and I do not think that the prisoner can claim any benefit from it. That the legislature had the question of onus of proof in their minds is manifest from the second paragraph, but that only casts the onus upon the Crown in certain circumstances, and not the general onus of proving a negative. It may be doubtful—and there have been differences of opinion in the Supreme Court of New South Wales on the subject—whether this section now contains the whole of the law as to the admissibility of statements of accused persons. If it does, there is nothing in it to show that the Crown is called upon to discharge any burden, beyond proving that the confession was made in fact. It is, however, contended that the old law, which required that the Judge should satisfy himself that a confession, properly so called, was voluntary, has not been altered, and I am disposed to accept that view. If it has, the whole case is at an end. If it has not, it is still necessary in order that a confession can be admitted that it should have been made voluntarily. The case of *Reg.* v. *Thompson* (1) is sometimes referred to as summing up the law on the subject. A great number of other cases were cited, but in all of them the facts were fully disclosed, and the question was whether on those facts there had been what amounted to an inducement by threat or promise. There is no reported case in which the abstract question has been discussed—whether it is necessary for the Crown to prove affirmatively that there was no threat or promise. In *Reg.* v. *Thompson* (1) the confession was made by the prisoner to the chairman of the company from which he was said to have embezzled money. The chairman said in evidence that before receiving the confession he had said to the prisoner's brother—"It will be the right thing for Marcellus to make a clean breast of it," and that he expected this to be communicated to the prisoner, and the Court thought that these facts raised a doubt whether the confession was free and voluntary. *Cave* J., who delivered the judgment of the Court, summed up the matter in these words (2):—"I prefer to put my judgment on the ground that it is the duty of the prosecution to

(1) (1893) 2 Q.B., 12.

(2) (1893) 2 Q.B., 12, at p. 18.

prove, in case of doubt, that the prisoner's statement was free and voluntary, and that they did not discharge themselves of this obligation." That is very different from saying that in every case, even when on the facts no doubt is raised, it is the duty of the prosecution to prove by positive evidence, negativing all possibilities to the contrary, that a confession is free and voluntary.

Another case in which the facts were disclosed is that of *R.* v. *Williams*, cited in *Russell on Crime*, 6th ed., vol. III., p. 535:—"A prisoner being in custody of two constables on a charge of arson, one Bulloch went into the room, and the prisoner immediately asked him to go into another room, as he wished to speak to him, and they went into another room, when the prisoner made a statement; it was urged that the constables ought to be called to prove that they had done nothing to induce the prisoner to confess. It was evident that the prisoner acted under some influence, as he first proposed going into another room, and *R.* v. *Swatkins* (1) was relied on. *Taunton* J. said:—'A confession is presumed to be voluntary unless the contrary is shown, and as no threat or promise is proved to have been made by the constables, it is not to be presumed.' Having consulted *Littledale* J., his Lordship added:—'We do not think according to the usual practice that we ought to exclude the evidence, because a constable may have induced the prisoner to make the statement; otherwise we must in all cases call the magistrates and constables, before whom or in whose custody the prisoner has been.'" But in another case, *Reg.* v. *Clewes* (2), the point was taken that before the prisoner made the confession, which was made to the coroner, he had been interviewed by a Mr. Clifton, a magistrate, and it was suggested that he might have told the prisoner something. *Littledale* J. said:—"As something might have passed between the prisoner and Mr. Clifton respecting the confession, it would be fair in the prosecutors to call him, but I will not compel them to do so. However, if they will not call him, the prisoner may do so if he chooses." It was pointed out by *Coleridge* C.J. in *R.* v. *Fennell* (3) that that chapter in *Russell* was written

(1) 4 C. & P., 548.
(2) 4 C. & P., 221, at p. 223.
(3) 7 Q.B.D., 147, at p. 150.

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by Sir E. V. Williams, so that it bears the stamp of his high authority.

I cannot find in any case the principle that a confession is inadmissible in the absence of affirmative evidence that it was obtained without threat or promise, when there is nothing in the facts disclosed to suggest the existence of such threat or promise. At the same time Judges have always taken the greatest care to see that there is nothing of that sort done before a confession is admitted as evidence, and I hope they always will take that course. But I do not think there is any rule of law to render the document inadmissible if, in the absence of any circumstances giving rise to doubt, the Judge comes to the conclusion that the confession is voluntary. In the present case, all we know as far as this document is concerned—whether we treat it as a confession or a statement—is that a constable read something to the prisoner in the lock-up in the presence of an inspector. There is, on its face, evidence from which it appears—perhaps it did not appear at that point of the trial—that what he read was the deposition of the man the prisoner was charged with wounding. Thereupon the prisoner made a statement which was undoubtedly a statement within the meaning of sec. 410 of the *Crimes Act*. No questions were asked of him, and he made what statements he pleased. Upon these facts I cannot see any reason to justify the learned Judge in coming to the conclusion that there was any doubt whether the statement was made voluntarily. If there had been any doubt he would have satisfied himself whether there was any foundation for it. I cannot see, in the circumstances, any ground for any suspicion that the statement had been induced by any untrue representation, or by any threat or promise. Of course it may have been, just as it is quite possible that two persons, apparently husband and wife, may never have been married, but that does not of itself justify a doubt whether they are. I do not think there was ever such a rule as has been suggested. But if there was any such rule it referred only to statements of an incriminating nature, and not to statements which are not of the nature of an admission of guilt, but incidental statements relating to relevant facts, and admissible on that ground. For instance, where a person was found in recent

possession of stolen property, it was never necessary to prove affirmatively that the account which he gave of his possession was not induced by any untrue representation, threat or promise. In the absence of any evidence that it was so induced, it was sufficient to prove that the prisoner made the statement.

Sec. 410 puts confessions, admissions, or statements on the same footing, to the extent that if it is shown that any admission or statement was induced by any untrue representation or threat or promise it is inadmissible. But, literally construed, it certainly does not require the proof of a negative. If it did, as pointed out by *Taunton* J., the administration of justice would become impracticable. There never was any such rule at common law: *R.* v. *Best* (1). In my opinion, the two learned Judges who formed the majority of the Supreme Court fell into an error in thinking that before any statement made by a prisoner can be admitted in evidence it must be shown affirmatively that the conditions of sec. 410 did not exist. I think the learned Acting Chief Justice was right, and that the conviction should have been affirmed. I may add that, for myself, I am quite unable to distinguish between the evidence which was admitted of the conversation between the prisoner and the constable, and the evidence of the statement itself. I agree that in accordance with the universal practice of Courts of Justice it is the duty of the Judge to see that any statement made by the prisoner is not improperly obtained. If there is any reason to suspect that it is, it is the duty of the Judge to ascertain the facts. But if there is nothing to raise such a suspicion in his mind he should admit it.

BARTON J. I am of the same opinion. The *Evidence Act* 1858 (22 Vict. No. 7), sec. 11, deals only with confessions, and has no reference to the question whether the person making a threat or promise is a person in authority.

The *Criminal Law Amendment Act* 1883 (46 Vict. No. 17), sec. 357, uses the words "admission or statement," but not the word "confession" and excludes (*inter alia*) any admission or statement induced by a threat or promise, "where such threat or

(1) (1909) 1 K.B., 692.

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promise has been held out by the prosecutor or some person in authority."

The provisions of the *Evidence Act* 1858 not having been repealed, there was an Act passed in 1898, the *Evidence Act* (No. 11), sec. 38, in which these provisions, both repealed, seem to have been consolidated, and the provision made in the Act of 1898 in the section to which I have referred is precisely that which we now find repealed and re-enacted in the *Crimes Act* 1900. There are two questions raised in the case. First, whether this is a statement within the meaning of the Act; and next, whether it was made voluntarily. Has there been such an inducement within the meaning of the Act as will cause the statement to be inadmissible? As to the first proposition, I think this is a statement within the meaning of the Act, and if one studies the phraseology of the succeeding enactments it becomes more evident that this is so. Inasmuch as every admission is not a confession, the criminal law speaks of confessions and then goes on to speak of admissions, apparently regarding them as distinct. Sec. 38 of the Act of 1898, now sec. 410 of the Act of 1900, refers to confessions, admissions and statements. It seems to me that the legislature by using this phraseology intended to refer first to confessions, next to admissions which might not be confessions, and next to statements which might not be either admissions or confessions, and intended to include the whole in the later law.

The statement referred to in this case is in a sense not a confession, and in a sense not an admission. The prisoner says inferentially that he did not do the thing he is charged with doing, and tries to fix the blame on another person. In another sense it is an admission, because he states he was there and saw the man lying on the ground, with blood on his face, and that he was groaning. He heard a shot while he was 200 yards away, and saw a man whom he describes. But he does not say that he saw all that was done, and he does not say that he struck any blow, or that he fired the shot. But that is not very much to the purpose, for he leaves it to be inferred that the wound was inflicted by the other man. There is a certain degree of admission in that he was within a distance of 200 yards of the prosecutor

when he was wounded. I think that, whether it is an admission or not, it was a statement within the meaning of sec. 410 of the *Crimes Act*. The term "statement," of course, includes in its ordinary sense both confession and admission. Statements which are neither confessions nor admissions, may be made incriminatory by subsequent evidence. I think statements were given conditional protection by the legislature where the circumstances are such that the transaction needs the protection. Then, was this statement induced by any untrue representation, or threat, or promise by a person in authority? There is nothing in the evidence stated in the case to show that it was. It is said that something was read over by the constable to the accused, and the accused then made the statement which has been admitted. Was there anything in the circumstances of the case to raise a doubt or a suspicion as to the voluntary nature of the statement? I grant at once that it might possibly have been wiser if the Judge who presided at the trial, when he knew that something had been read to the accused by the constable, had said that this had better be before the Court. But he was not in point of law bound to do so, nor was the Crown Prosecutor. It was open to the cross-examining counsel to bring it out, but he did not do so. There was nothing to found any inference as to what was in the statement. There were three lines prefixed to the statement, from which it appears that what was read over to the accused was the deposition of Finnegan. I do not think that is very material, except that it does not go to show that any threat was made or any promise held out. That seems to me to be the evidentiary position of the matter—first, that there was something read over to the accused; and next, that there was a statement made thereupon by the prisoner, which he signed—and I do not find there is anything there which calls for explanation.

In the case of *R.* v. *Thompson* (1), so much cited, the facts were very different. There are some passages in the judgment of *Cave* J., speaking for the Court, which have been claimed not only by counsel in this case, but seem to have been set up in some text books, and even higher authorities, as tending to prove

(1) (1893) 2 Q.B., 12.

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the argument set up for the defence here. As in all the other cases which have been cited, the evidence relied on as possibly an inducement was before the Court. There was a statement made to the prisoner's brother, which, unexplained, might have operated as an inducement. There was nothing in the rest of the evidence which tended to show that the natural effect of the statement made to the prisoner's brother, which, according to all experience of human nature, was almost certain to be communicated to the prisoner, and would there operate as an inducement, had been removed. True there was no evidence that it reached the prisoner, but the question put to the Court was this: *Cave* J. says (1):—"The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point being in its nature preliminary, is addressed to the Judge, who will require the prosecutor to show *affirmatively*, to his satisfaction, that the statement was *not* made under the influence of an improper inducement, and who, *in the event of any doubt subsisting on this head*, will reject the confession." And he says the simple test is (2):—"Is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible." These passages relate to a case where a statement has been preceded by an inducement, and where, there being such an inducement, the effect of it has not been removed before the statement is made. That becomes clear as we go on with the judgment. His Lordship goes on to say:—"Now there was obviously some ground for suspecting that the confession might not have been free and voluntary and the question is whether the evidence was such as ought to have satisfied their minds that it was free and voluntary." Then he goes on:—"The new evidence now before us throws a strong light on what was the object of the interview between Mr. Crewdson and the prisoner's brother and brother-in-law, why he made any communication to them, and why he expected that

(1) (1893) 2 Q.B., 12, at p. 16. (2) (1893) 2 Q.B., 12, at p. 17.

what he said would be communicated to the prisoner. There is, indeed, no evidence that any communication was made to the prisoner at all; but it seems to me that after Mr. Crewdson's statement, that he had spoken to the prisoner's brother and brother-in-law about the desirability of the prisoner making a clean breast of it, with the expectation that what he had said would be communicated to the prisoner, it was incumbent on the prosecution to prove whether any, and if so, what communication was actually made to the prisoner, before the magistrates could properly be satisfied that the confession was free and voluntary." And he continues (1):—"I prefer to put my judgment on the ground that it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary, and that they did not discharge themselves of the obligation."

If there is any doubt it is incumbent on the prosecutor to remove that doubt or the confession will be rejected, and I do not think we can get any further by referring to the whole of the cases than we do by taking the law contained in *R.* v. *Thompson* (2). That is to say, if the proceedings surrounding a confession or statement give no room for any suggestion that it has been obtained by any inducement, or is not free and voluntary, then the presumption is that it is free and voluntary. If a doubt is raised, then it is incumbent upon the prosecution to remove that doubt. That seems to me to be the conclusion to be drawn. This being a statement within the meaning of sec. 410 of the *Crimes Act*, the question is whether there is anything to prevent it from being regarded as a purely voluntary statement. I confess that I cannot find anything, and I think that the course adopted by the learned Judge who tried the case was the right one, and that the evidence was rightly admitted, and the conviction must stand.

O'CONNOR J. I am of the same opinion. I would not think it necessary to add anything to what has been already said were it not that I consider the question involved as being of much importance in the conduct of criminal trials. The case reviewed

(1) (1893) 2 Q.B., 12, at p. 18. (2) (1893) 2 Q.B., 12.

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referred to two separate conversations between the constable and the prisoner after his arrest. Mr. *Weigall* very properly did not persist in his objection as to the first. The real question for determination, therefore, is whether having regard to the nature of the second conversation the prisoner's written statement made during the course of it is admissible in evidence. It appears that at the beginning of the second interview, which took place in the police cell, the constable read something to the prisoner, who thereupon made a statement which the constable took down in writing and which the prisoner signed. That is the statement which was admitted in evidence, and the question for determination is whether it was properly admitted. The constable was no doubt under the circumstances a person in authority. There is, it is alleged, no evidence of the contents of the document which he read to the prisoner immediately before the statement was made. It is left in doubt what its contents were. Mr. *Weigall* contends it is for the Crown to clear up the doubt before the written statement can be admitted in evidence, otherwise the Crown will fail in proving affirmatively that the prisoner's statement was made voluntarily in the sense understood by the law. There is no evidence that the document read did contain an untrue statement by the prosecutor or constable, or that it contained any threat or promise by either of these persons which could induce a confession. But it is contended that, as the contents of the document read were not proved, doubt is raised whether it did or did not contain an untrue statement or inducement such as would render the confession inadmissible. In such a case the onus, Mr. *Weigall* says, is on the prosecutor, not on the prisoner, to clear up the doubt before the document can be admitted. In support of the argument reliance was placed on sec. 410 of the *Crimes Act*. That section, it is contended, puts any statement of a prisoner on the same footing as a confession, and requires the prosecution to prove affirmatively that no false statement by the prosecutor or person in authority, and no inducement held out by them, preceded the making of it. I cannot assent to that contention. The section deals with three classes of communications —confessions, admissions and statements. With regard to all of

them it is provided that if they are induced by any untrue representation, or threat or promise, by a person in authority, they shall not be admissible in evidence. One provision only is made with respect to proof, and that is in sub-sec. 2, which provides that if any of these communications are made after any such false representation, threat or promise it shall be deemed to have been induced thereby, unless the contrary is shown. Other than that the section establishes no rule of proof. Under these circumstances the ordinary principle must apply. The inducement of the communication by any of the matters mentioned in the section is a matter of defence, which it is for the prisoner to prove. It was also contended that the expression "statement" must be read as meaning a statement in the nature of a confession or admission. I can find no ground for any such contention. The collocation of the three words seems rather to indicate that the statement referred to must be something of a different kind from a confession or admission. The legislature having used the three words, it must be taken that they meant to convey a different idea by each. I am of opinion, therefore, that the word "statement" is not the same, but of a different kind from the other communications referred to in the section, and that the onus of proof which the eommon law imposes on the prosecution in the case of confessions is not extended by the Act to mere "statements."

But it is further contended that the statement signed by the prisoner in this case is in reality a confession, and that the obligations of proof, which would rest upon the Crown if the statement were a confession, must apply to a statement of this nature. I agree with the learned Acting Chief Justice in the Court below that confessions as mentioned in the section must be proved by the Crown in the same way that a confession would have to be proved at common law. It is well established that at common law the prosecution is bound to prove affirmatively that a confession is voluntary, and before it can be admitted there must always be evidence which *primâ facie* shows that the confession was not induced by any of the means of inducement which the law prohibits. Generally speaking, where the circumstances afford in themselves no suggestion of

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any such inducement, and the confession has been made by the prisoner, apparently of his own free will, the onus is satisfied. But if there is any circumstance in the case which could be interpreted as pointing to an inducement, the Judge at the trial would properly insist upon the Crown clearing up the doubt before admitting the confession in evidence. There is no doubt whatever as to that being the principle which should decide a Judge in admitting a confession in a criminal trial. But difficulties often arise in the application of the principle to the facts of particular cases. The reports are full of decisions upon the application of the rule, but none of those cited throw any new light on the principle itself. The real strength of the case against the prisoner is that the statement in this case is not a confession within this meaning of the common law principle. There are many definitions of what will amount to a confession for the purposes of the rule I am considering. They all agree in this, that it must be either a direct admission of guilt, or of some fact or facts which may tend to prove the prisoner's guilt at the trial. The statement in question is certainly not a direct admission of guilt, nor does it admit any fact or facts which may tend to prove the prisoner's guilt at the trial. On the contrary, all the facts stated are exculpatory. He states that on the occasion when the wounding took place he was in the neighbourhood, but was some 200 yards away. He heard the shots fired that caused the injury. He did not take any part in it. On the contrary, he came back, found the man wounded, and was afterwards set upon by the person who, he alleges, committed the crime. I cannot imagine anything less like a confession than that narrative in explanation of the prisoner's presence in the neighbourhood when the crime was committed. I am, therefore, of opinion that the communication was not a confession, but merely a statement under sec. 410, on the face of it made voluntarily, and that the onus of clearing up any doubt that might arise as to whether it had been improperly obtained was upon the prisoner and not on the Crown. Assuming the statement was a confession, I am disposed to hold, if it were necessary to decide the matter, that there is in the case reserved and in the statement itself sufficient evidence that it was not

improperly induced or obtained. But I shall not pursue that aspect of the case, as I prefer to rest my judgment upon the grounds I have fully dealt with, namely, that the statement is not a confession within the meaning of the common law, but merely a statement in regard to which no onus is imposed on the Crown other than to prove that it was made by the prisoner apparently in the exercise of his own free will. That it was so made seems to be abundantly clear from the facts as stated in the case reserved by the learned Judge at the trial. I therefore agree that the decision of the majority of the Supreme Court must be reversed, and the conviction affirmed.

ISAACS J. I agree with the judgments which have been delivered by my learned brothers upon one ground, and that is that the statement made by the prisoner is not a statement within the meaning of the section. Sec. 410 provides that "no confession, admission or statement shall be received in evidence against an accused person if it has been induced—(*a*) by any untrue representations made to him; or (*b*) by any threat or promise, held out to him by the prosecutor, or some person in authority."

And sub-sec. 3 says that "no confession, admission or statement by the accused shall be rejected by reason of his having been told, by a person in authority, that whatever he should say might be given in evidence for or against him." Now, a confession, admission, or statement referred to in the section must, I apprehend, be of such a nature that it might be induced by an untrue representation or a threat or a promise, and I cannot conceive that a denial of guilt, or a statement merely by way of exculpation, could be induced by any threat or any promise of a person in authority. That class of statement is not the statement that the legislature were thinking of when they wanted to protect a prisoner. It was held in effect in 1869 in *R.* v. *Summerell* (1), when the old Act was in operation, that the words "by some person in authority," though not expressly inserted, must be implicitly understood as qualifying "threat or promise." It was held that no promise could be held to operate on the mind of the prisoner so as to induce a confession unless it

(1) 8 S.C.R. (N.S.W.), 214.

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were made by some person in authority. That is plain, I think, when you come to see what the legislature were doing—namely, protecting the prisoner from the effect of a statement which might directly prejudice him, or implicate him in the offence with which he was charged. When you find the word "statement" used in association with the words "confession" and "admission," both of these well known words implying admission of guilt — or of circumstances proving it — the test I apply in determining whether "statement" is within the section is summed up in the well known maxim —"*noscitur a sociis.*" Looking at the statement in the present case, I find there is nothing incriminating in that document. Everything in it from beginning to end is a denial of guilt. The accused says he was not on the spot at all when the man was injured, that he was 200 yards away; but another man had been left with the injured man at the time when the prisoner left, and that when he came back he spoke to the injured man and then went away, and he ultimately came up with the man he had previously seen, that there was an altercation, and he (the prisoner) was shot by the other man. Altogether it is a denial or exculpation, and therefore it is outside the principle of protection which the common law has thrown around a prisoner to guard him against a confession gained under the influence of a threat or promise, and consequently I am of the opinion that it is not within the Act. I have said that the statement was not incriminatory. I should like to add this: that in one sense a false statement by a prisoner, though a denial or exculpation, might indirectly be the means of convicting him, not by reason of that statement proving his guilt, but by reason of other evidence which shows the statement is untrue, or that the prisoner is unworthy of belief. If he says that he at the time was elsewhere, but it is proved that he was not; or if he says some other person was there and it is proved the other person was not there, that might destroy his defence. It does not, however, prove he actually committed the crime. The prosecution still has to depend on its own affirmative evidence for that, and therefore I do not think a denial or exculpation is, even when contradicted by subsequent evidence, to be regarded as an

incriminatory document, in the same sense as a confession or admission of guilt or a statement which is an affirmative link in the chain of evidence, because it admits some fact which tends to prove the guilt of the prisoner.

I now address myself to the other questions which have been referred to. I shall for this purpose assume it is a confession. It is not all confessions that are inadmissible if they are not proved to be free from threat or promise. The general rule is that where a statement relevant to the issue is made by a person or prisoner, either in civil or criminal jurisdiction, it may be proved in evidence against him, but there is this exception—and I will read the words from the *Laws of England*, edited by Lord *Halsbury*, vol. IX., p. 394:—"Subject to this exception, that admissions or confessions of guilt made by a defendant before his trial can only be proved against him, if they were made freely and voluntarily, *i.e.*, without being induced by hopes held out or fear or threats caused or made by a person in authority. In giving evidence of such admissions or confessions it lies upon the prosecution to prove affirmatively to the satisfaction of the Judge who tries the case that such admissions were not induced by any promise of favour or advantage or by the use of fear or threats or promise by a person in authority." If a confession is not made to a person in authority, the burden of proof now asserted does not arise, and no objection can be raised by the prisoner or his counsel that the Crown has not fulfilled the onus of showing the confession was free and voluntary. But directly the fact is proved that the confession was made to a person in authority, by which is meant any magistrate, officer of police, or any other person or officer having the custody of the prisoner, or any person acting on behalf of the prosecutor, the law raises the presumption from that fact that it was not free or voluntary, or what comes to the same thing, it puts the burden, by reason of that fact, on the Crown to prove affirmatively that the confession was free and voluntary, notwithstanding the presence of the person in authority.

In *East's Pleas of the Crown*, vol. II., p. 658, the reason of the rule is thus stated:—"To guard against the possibility of an innocent person being from weakness seduced to accuse himself,

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in hopes of obtaining thereby some favour, or for fear of meeting with worse punishment." Of course, that only applies where there is a person in authority to whom the confession is made, and the English cases have limited it to that, and so in the page of Lord *Halsbury's Laws of England*, to which I have referred, it is definitely stated that before giving evidence of such admissions or statements it lies affirmatively on the Crown to prove that such admissions were not induced by any promise of favour or advantage or by the use of fear or threats or promise by a person in authority. It is the "person in authority" that governs the position, and therefore it raises the doubt which has been expressed in the case, and calls upon the Crown to dissipate that doubt; and I think, without any question, every text writer who has referred to it, and all the modern cases, have recognized the rule that proof of the affirmative rests upon the Crown.

I shall not do more than very briefly read one or two references. *Russell on Crimes*, 6th ed., vol. III., p. 529, says: "Where a confession is tendered in evidence, the proof that it was made voluntarily lies upon the prosecutor; and if it be left in doubt whether the confession were made in consequence of an inducement, it will be rejected." Again, in *Russell*, at p. 534 of the same edition, a similar statement is made. So, in *Best on Evidence*, 9th ed., p. 569, cited by my learned brother *O'Connor* J. Again, in *R.* v. *Thompson* (1) the same principle is laid down, and also in *R.* v. *Dean* (2). They are references which support the proposition. That is the common law in my opinion, and I agree with what has been said by my learned brother, *O'Connor* J., that the common law has not been away done with. It would take very strong words indeed to deprive accused persons of the fundamental protection which they had by common law in this regard. The section does not say what confessions should be admitted. That is left to the principle of common law with any special modification found enacted in the section. It does not say on whom the onus of proof lies to establish the existence of a threat or promise, and for this and other reasons I am of opinion that the common law applies, except where expressly modified by the words of the Act itself.

(1) (1893) 2 Q.B., 12. (2) 17 N.S.W. L.R., 224, at pp. 234 and 236.

Then, I ask, has the Crown satisfied this onus, supposing it to be a confession? I do not think it has. The evidence is that the statement was made to a person in authority—the constable. It is proved affirmatively that he read something to the prisoner. In the document itself there is a statement contained in three lines. Now, either those three lines are part of the statement or they are not. If they are not part of the statement they are not in evidence, and the Court knows nothing whatever of those words. They are not sworn to, and they are not to be made evidence in their present form. If they are part of the statement, then I apprehend that in order to test the admissibility of the statement you cannot take a part and regard it as in evidence for the purpose of letting the other part in also. The question is whether the whole statement is to be put in evidence or kept out of evidence. I quite approve of what was said by the Supreme Court of the United States in *Bram* v. *United States* (1):—"Much of the confusion which has resulted from the effort to deduce from the adjudged cases what would be a sufficient quantum of proof to show that a confession was or was not voluntary, has arisen from a misconception of the subject to which the proof must address itself. The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crimes charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent." Therefore, if it is part of the statement, you cannot take one part of that statement and practically consider it as evidence in order to judge whether the whole statement including the part in question might be put in evidence. You must have evidence *dehors* the statement in order to judge whether the statement should be admitted as testimony. If those three lines were taken away you have absolutely nothing except that a person in authority obtained the confession, and

(1) 168 U.S., 532, at p. 549.

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that a person in authority had read something to the accused. Under these circumstances I consider that from every aspect the Crown left the whole matter in doubt, and if it were a confession I should think that the evidence was wrongly admitted. But, for the reasons I have given, I do not think it was a statement in the nature of a confession or in any way implicatory of the accused, and therefore I think the appeal should be allowed.

Appeal allowed. Order appealed from discharged. Conviction affirmed.

Solicitor, for appellant, *J. L. Tillett*, Crown Solicitor.

Solicitor, for respondent, *W. U. Smyth King*.

C. E. W.

Cons *Taxation, Federal Commissioner of v Everett* (1980) 143 CLR 440

Foll *Hadlee v. Commissioner of Inland Revenue* [1991] 3 NZLR 517

Appl *Thompson v Australian Capital Television Pty Ltd* (1994) 127 ALR 317

Refd to *Levenstrath Community Assoc v Nymboida SC* (1999) 105 LGERA 362

[HIGH COURT OF AUSTRALIA.]

HOCKING AND OTHERS . . . . APPELLANTS; DEFENDANTS,

AND

THE WESTERN AUSTRALIAN BANK . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 22, 26, 27; *Nov.* 3.

Griffith C.J., Barton and O'Connor JJ.

Partnership—Mining Syndicate—Mining Act 1904 (*W.A.*) (*No.* 15 *of* 1904), *sec.* 281*—*Partnership Act* 1895 (*W.A.*) (59 *Vict.*, *No.* 23), *secs.* 34, 42—*Com-*

* No. 15 of 1904, sec. 281 (5), declares that "a partner's interest in the mining partnership may be sold or assigned without dissolving the partnership, and without the consent of the other members, and from the date of such sale or assignment the purchaser or assignee shall be deemed to be a member of the partnership.

"Provided that he shall be deemed to take such interest subject to all such liens existing in favour of the partners as are registered, but not further."