REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1935-1936.

[HIGH COURT OF AUSTRALIA.]

McKAY . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF VICTORIA.

H. C. OF A. 1935.

MELBOURNE, *Nov.* 12, 13.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Criminal Law—Evidence—Confession—Sufficiency of confession, without other evidence, to support conviction.

There is no general rule of law that a person cannot be convicted of a crime on the sole evidence of a confession by him of his guilt.

Special leave to appeal from the decision of the Court of Criminal Appeal of Victoria refused.

APPLICATION for special leave to appeal.

Before the Court of General Sessions at Melbourne on 21st May 1935 William George McKay was convicted of buggery. The boy upon whom the offence was alleged to have been committed made a statement to detectives concerning the details

H. C. OF A. 1935. McKAY v. THE KING.

and incidents of the offence. The accused signed a confession of the offence and also signed the statement made by the boy, initialling each page of the statement. At the trial the boy, while admitting that he made the statement, swore that it consisted of lies, and the accused, while admitting that he signed the confession, said that it was not true and that he signed it because he was feeling so worried. Both denied on oath that any offence had been committed. It was objected that the jury could not properly convict upon the uncorroborated confession of the accused and that there should have been other evidence showing that an offence had actually been committed and that the Judge should so have directed the jury. The Chairman of General Sessions directed the jury in the following words :—" The proof relied upon by the Crown in this case is a confession by the accused, and I tell you gentlemen, as a matter of law, that if you find that the accused man made a voluntary confession, that it is direct and positive, and it has been satisfactorily proved to you, you may convict, because of that, without any corroboration whatsoever."

The accused appealed against his conviction to the Court of Criminal Appeal of Victoria, which dismissed the appeal.

The accused now applied for special leave to appeal from that decision to the High Court.

O'Keeffe, for the applicant. The point raised is whether a confession by the prisoner is sufficient evidence on which to convict without any other evidence of the existence of the crime. The text book writers all regard the position as doubtful (*Halsbury, Laws of England*, 2nd ed., vol. 9, p. 183, note *g* ; *Russell* on *Crimes*, 8th ed. (1923), p. 1996). There can be no conviction for homicide without some proof of the existence of a dead body. The rule is earliest laid down by Sir *Matthew Hale* (*History of the Pleas of the Crown* (1800), vol. II., p. 290). This rule probably arises from excess of caution, but the crime in this case is analogous to homicide as being an offence upon a body, and it is just as dangerous to presume a living body that has been outraged as to presume a body that has been killed. There are no cases where there has been a conviction upon a confession supported by no other evidence

(*Best* on *Evidence*, 12th ed. (1922), p. 474; *R.* v. *Falkner and Bond* (1); *R.* v. *Eldridge* (2)). On examination of the cases it appears that there was some other evidence (*R.* v. *Tippet* (3); *R.* v. *White and Langdon* (4)). *R.* v. *Wheeling* (5) is distinguishable. To require corroboration of a confession is one thing; it is another to require corroboration of the crime. *R.* v. *Wheeling* (5) deals with proof of the confession, not with proof of the facts in the confession. There must be clear and unequivocal proof of the *corpus delicti* (*Best* on *Evidence*, 12th ed. (1922), p. 373). There must be a criminal fact ascertained, before the giving of presumptive proof as to who did it (*R.* v. *Unkles* (6); *R.* v. *Sullivan* (7)). Neither of these cases was based upon confessions at all (*R.* v. *Sykes* (8); *Wills* on *Circumstantial Evidence*, 5th ed. (1902), p. 91). The authorities are unsatisfactory, as appears from *Roscoe's Criminal Evidence*, 15th ed. (1928), pp. 37, 38. The Court may look at the matter as a whole. The case should have been taken from the jury at the conclusion of the Crown's case. When a person makes a confession, the confession in most cases is: "I committed a certain crime," the crime being known, but a confession that "there was a certain crime, and I committed it" is unsatisfactory. Such a confession can only be regarded as presumptive evidence that A has committed a crime which one can assume only if one relies on the confession. Usually a confession is supported by other facts which of themselves prove the *corpus delicti*. It is a rule of prudence that a jury, without other evidence that a crime has been committed, should not convict upon a confession without a warning from the Bench. The rule in regard to this crime should be the same as in the case of homicide. The grounds for that rule are sufficient to support the extension (*R.* v. *Davidson* (9)). It is open to the Court in all the circumstances to say that this evidence is unsatisfactory and unsafe to rest a conviction on.

Book K.C., for the Crown. Whatever the rule is in cases of homicide, a confession is here sufficient (*R.* v. *Kersey* (10); *Ross* v. *The King* (11)). If a confession is properly proved it warrants

(1) (1822) Russ. & R. 481.
(2) (1821) Russ. & R. 440.
(3) (1823) Russ. & R. 509.
(4) (1823) Russ. & R. 508.
(5) (1789) 1 Leach 311n.
(6) (1873) I.R. 8 C.L. 50.
(7) (1887) 16 Cox C.C. 347.
(8) (1913) 8 Cr. App. R. 233.
(9) (1934) 25 Cr. App. R. 21.
(10) (1908) 1 Cr. App. R. 260; 21 Cox C.C. 690.
(11) (1922) 30 C.L.R. 246, at pp. 254, 255.

H. C. OF A. 1935. McKAY v. THE KING.

a conviction without corroboration (*R.* v. *Sullivan* (1); *R.* v. *McNicholl* (2)). It has never been held that juries should look round for other evidence before accepting a confession.

O'Keeffe, in reply. The Irish cases should not be accepted as authority against the opinion of Sir *Matthew Hale*. [He referred to *R.* v. *McNicholl* (3).]

Cur. adv. vult.

Nov. 18. The following written judgments were delivered :—

LATHAM C.J. This is an application by William George McKay for special leave to appeal from a conviction for buggery before the Court of General Sessions in Melbourne on 21st May 1935.

The alleged offence was committed upon a boy who made to detectives a very full and particular statement concerning all the details and incidents of the offence. The accused himself signed a full confession of the offence and also signed the statement made by the boy, initialling each page of the statement.

At the trial the boy, while admitting that he made the statement, swore that it consisted of lies, and the accused, while admitting that he signed the confession, said that it was not true and that he signed it because he was feeling so worried. Both denied on oath that any offence had been committed. It was objected that the jury could not properly convict upon the uncorroborated confession of the accused, that there should have been other evidence showing that an offence had actually been committed and that the Judge should have so directed the jury. The learned Chairman of General Sessions directed the jury in the following words :—"The proof relied upon by the Crown in this case is a confession by the accused, and I tell you gentlemen, as a matter of law, that if you find that the accused man made a voluntary confession, that it is direct and positive, and it has been satisfactorily proved to you, you may convict, because of that, without any corroboration whatsoever."

(1) (1887) 16 Cox C.C. 347.
(2) (1917) 2 I.R. 557, at pp. 587 et seq.
(3) (1917) 2 I.R., at p. 592.

It may be said that an examination of the evidence discloses a number of circumstances which may be described as corroborative of the confession in the sense that if the evidence (consisting in part of admissions made by the accused in the box) were accepted by the jury, it would make the truth of the confession probable. It is not, however, necessary to consider whether such corroboration added to the confession would be sufficient to justify a verdict of guilty, because the direction of the learned Judge was unequivocally to the effect that a voluntary confession which was direct and positive and satisfactorily proved was sufficient to justify a conviction without any corroboration of any kind.

In the course of the argument a number of text books and decisions have been cited, but there is no decision of a Court which lays down the proposition for which the applicant contends, namely, that a confession must always be corroborated before a jury can act upon it. The opinions of text writers exhibit much divergence upon the subject. In *Halsbury's Laws of England*, 2nd ed., vol. 9, p. 207, it is stated that " a defendant may be convicted on his own confession without any corroborating evidence," but, at p. 183, note *g*, it is stated that " the *corpus delicti* may be proved by direct evidence or by irresistible grounds of presumption . . . It is doubtful whether it must be established by some evidence other than the mere confession of the accused." In *Phipson* on *Evidence*, 6th ed. (1921), p. 264, *Best* on *Evidence*, 12th ed. (1922), p. 474, and *Archbold's Criminal Pleading, Evidence and Practice*, 29th ed. (1934), p. 398, it is stated that a confession is sufficient to justify a conviction without any corroborative evidence. In fact the learned Chairman of General Sessions in this case evidently framed his charge upon the basis of the statement in *Archbold*. On the other hand, *Wills* on *Circumstantial Evidence*, 5th ed. (1902), p. 92, *Taylor* on *Evidence*, 12th ed. (1931), p. 546, and *Roscoe's Criminal Evidence*, 15th ed. (1928), p. 38, all state that the matter is doubtful. In *R.* v. *Falkner and Bond* (1) a confession of one of the accused persons was held sufficient to justify his conviction without any corroborative evidence. In *R.* v. *Tippet* (2) the majority of Judges held that, apart from any confirmatory evidence, the confession was sufficient, and, although

(1) (1822) Russ. & R. 481.

(2) (1823) Russ. & R. 509.

H. C. OF A. 1935. McKAY v. THE KING. Latham C.J.

the case is very shortly reported, *R.* v. *Wheeling* (1) is a decision to the same effect. In the cases of *R.* v. *Kersey* (2), *R.* v. *Sullivan* (3) and *R.* v. *McNicholl* (4), it was also decided that a clear and unequivocal confession is sufficient to support a conviction. Some of the authorities to which reference has been made suggest that a distinction should be drawn in cases of homicide, bigamy, and cases affecting titles to property, and that in such cases corroboration is required. It is not necessary in determining this application to deal with these possible exceptions. The common reference to such cases as exceptions supports the contention that a general rule to which there are exceptions is recognized as existing. Therefore the position is that, so far as authority goes, it supports the charge of the learned Chairman. There is no actual authority to the contrary effect.

There is no doubt that a confession is admissible in evidence. In England, a confession, to be admissible, must not only be free and voluntary but it is necessary also that it should not have been induced by any threats or promises by or on behalf of some person in authority. In Victoria the *Evidence Act* 1928, sec. 141, provides that " no confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the Judge or other presiding officer is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made." A confession, when received in evidence, admits the commission of acts constituting the offence and admits that the accused did the acts in question.

It is contended that there must be independent evidence (in addition to any confession) that the acts were in fact done, or, at least, other evidence tending to show that the confession is probably true. In cases of homicide, in the absence of any other proof that a person has been killed, the Courts are reluctant to accept confessions and Judges have wisely adopted the practice of warning juries that they must consider the matter very carefully before they convict upon the sole evidence of a confession in such a case. In dealing with this application I express no opinion upon cases of homicide

(1) (1789) 1 Leach 311n.
(2) (1908) 1 Cr. App. R. 260.
(3) (1887) 16 Cox C.C. 347.
(4) (1917) 2 I.R. 557.

and the other exceptions mentioned. Dealing then with other criminal offences, I have been unable to discover any authority that it is a rule of law that a prisoner cannot be convicted upon evidence consisting solely of his confession. It is for the jury to determine whether the confession, when admitted in evidence, is in fact a confession of the particular offence charged, and whether it is a confession that the accused person was the person who did the acts or was guilty of the omissions which constitute the offence charged. If a confession is subsequently repudiated, it is for the jury to decide what degree of credit should be given to the original confession and the subsequent repudiation respectively. In my opinion the direction given to the jury by the learned Chairman was correct.

I add that this is an application for special leave to appeal and I see no reason for fearing that there was any miscarriage of justice in this case.

The application should be refused.

STARKE J. I agree with the conclusion reached by the Chief Justice.

Despite some expressions of doubt in the text books and elsewhere, both principle and authority in English law are in favour of the view that " a confession, admission, or statement, although extra-judicial, if made by a person charged with a crime is sufficient without independent proof of the commission of the crime to sustain a conviction " (see *R.* v. *Sullivan* (1)). The American authorities, with exceptions in some jurisdictions, have, according to *Wigmore* on *Evidence*, 2nd ed. (1923), vol. 4, par. 2071, adopted the contrary view. The probative value of the confession, admission, or statement must vary according to the nature and circumstances of the case, as also must the comments which a trial Judge thinks proper to make upon the danger of acting on such a confession, admission or statement without other evidence to support it ; but the law prescribes no measure of the comments which a Judge should make upon it (*Ross* v. *The King* (2)).

(1) (1887) 16 Cox C.C., at p. 347.

(2) (1922) 30 C.L.R., at pp. 254, 255.

H. C. OF A. 1935. McKAY v. THE KING.

DIXON J. The prisoner voluntarily made an express acknowledgment of the commission of the criminal acts for which he was afterwards indicted. The circumstances in which he made the confession were such as to make it improbable that he would own his guilt for any other reason than a consciousness that it was in fact undeniable. No cause, rational or irrational, for his making a false confession appeared and no reasonable hypothesis could be suggested which would account for his acknowledgment of guilt if it were untrue. On the other hand, several facts were established independently of the confession which were more easily explained by the assumption that the criminal conduct with which the prisoner was charged took place than upon any other assumption. Nevertheless the prisoner retracted his confession, testified to his innocence and called evidence which, if believed, negatived his guilt. The jury were directed that if they found it satisfactorily proved that the confession had been made, that it was voluntary and was direct and positive, definite and explicit, they might convict without any corroboration whatever. At the same time, the additional circumstances of suspicion and their significance were explained to the jury. The prisoner was convicted. He appealed to the Supreme Court, which affirmed the conviction. He now seeks special leave to appeal to this Court from the decision of the Supreme Court. To obtain such leave he must show something in the case making it special. He cannot point to any general proposition of law in the judgment of the Supreme Court which would give it that character. So far as appears, that Court may have acted on the view that in the particular case no substantial miscarriage of justice had occurred. What is said to give the case a special character is the direction that the jury might act on the prisoner's confession without corroboration. It is contended that at common law an uncorroborated confession could never suffice to support a conviction. But there is no such absolute rule. The judgment of *Palles* C.B. in *R.* v. *Sullivan* (1) has disposed of the notion that a general rule of law existed that, without corroborative evidence, no confession by a prisoner could be enough to found a verdict of guilty. It is a mistake to attempt to lay down general propositions as to the

(1) (1887) 16 Cox C.C., at pp. 350-354.

sufficiency of forms or descriptions of evidence to establish an issue. Cases rarely, if ever, occur in which one description of evidence is isolated from all others. The ultimate standard of proof required by law in a criminal case is a sufficiency of legal evidence to satisfy reasonable men to the exclusion of any reasonable doubt. When a confession is relied upon in fulfilment of this requirement, it must almost necessarily happen that the circumstances in which it was made are proved, and these must go far to determine its actual probative force. It is true that in Victoria, as a result of sec. 141 of the *Evidence Act* 1928, the tests of the voluntary character of confessional evidence are not the same as at common law, and such evidence is often admitted without affirmative proof that the confession was freely made. But even so, when it is put in evidence circumstances affecting the probability of the truth of the confession will almost invariably be proved. The very term confession illustrates the difficulty of laying down general propositions. For its meaning extends from the most solemn, spontaneous, express and detailed acknowledgments of the facts constituting a crime to casual admissions of some only of the specific facts involving guilt.

Again, the word "corroboration" needs explanation when it is used in relation, not to the testimony of a witness, but to a confession. In one case it may be used to describe evidence of facts which make it unlikely that a false confession would be made by the prisoner. In another, it may denote independent evidence tending to prove the occurrence of facts otherwise appearing from the confessional evidence alone. Probably it will be found in most cases less profitable to inquire whether there are or are not circumstances amounting to "corroboration" than to examine the considerations, if any, supplying hypotheses by which the making of a confession may be explained more or less reasonably consistently with innocence. But the circumstances of a given case may be such that it would be quite unsafe to act upon a confession, unless some particular piece of confirmatory evidence is true. It is, therefore, equally impossible to state as a general rule that always a conviction may be based upon an express voluntary confession of the commission of criminal acts uncorroborated. Moreover Courts of Criminal Appeal possess powers of quashing convictions on grounds which are not limited to mere

H. C. OF A. 1935. McKAY v. THE KING. Dixon J.

error of law. Even if confessional evidence might appear sufficient to submit to a jury, yet a conviction would doubtless be quashed if it appeared that the jury had been allowed or encouraged to act upon views of it which are unsafe. It is conceivable that a direction to a jury that they might convict, although they were unable to find confirmatory evidence, or to accept it, might in some circumstances have this result.

In the present case, however, a vehement presumption of the prisoner's guilt arose from the undoubted facts of the case. The direction which the jury received was not contrary to law. It was likely to lead to no miscarriage of justice.

In my opinion it is not a case for special leave.

EVATT J. I am of the opinion that the application for special leave should be refused for the reasons stated by my brother *Dixon*.

MCTIERNAN J. The evidence adduced by the Crown consisted of a written statement signed by the accused, in which he in terms admitted the truth of a written statement made by the boy against whom the offence was alleged to have been committed. Both these statements were obtained by the police and signed in their presence, the boy's statement also being initialled on each page by the accused. The learned Judge having on this evidence refused to take the case from the jury, both the boy and the accused gave evidence in which each denied the commission of the alleged offence. The accused, while not denying that he had given the police a signed statement and initialled the boy's statement, said however that he had made a mistake in making these alleged admissions. The boy in his evidence denied that the accused had committed the offence with him and said that the contents of his written statement to the police were untrue.

However, in the evidence of both the boy and the accused there are certain circumstantial details of much probative force tending to show that the offence charged had been committed against the boy and implicating the accused. In his charge to the jury the learned Judge said :—" The proof relied upon by the Crown in this case is a confession by the accused, and I tell you, gentlemen, as a

matter of law that if you find that the accused man made a voluntary confession, that it is direct and positive, and that it has been satisfactorily proved to you, you may convict, because of that, without any corroboration whatsoever." This direction cannot on the authority of any decided case be said to be incorrect. There is no question that the accused's admission of the truth of the boy's statement, whereby he in terms admitted his guilt, was admissible in evidence. It must be remembered that the law surrounds the admission of a confession in evidence with safeguards for the protection of the accused; and, repeating some observations made in earlier cases as to the probative force of confession by an accused person, Sir *James Campbell* C.J., in *R.* v. *McNicholl* (1), said: "If it is conceded, as now it must be, that in the case of every other crime a confession by the accused is the highest and most satisfactory proof of guilt . . ." (cf. *R.* v. *Lambe* (2) and *R.* v. *Sullivan* (3)). In the circumstances of this case there is, in my opinion, no reason why the accused's confession should not have attributed to it this quality. The direction complained of is amply supported by the authorities cited in the judgment of the Chief Justice.

Special leave should be refused.

Application for special leave refused.

Solicitor for the applicant, *J. R. A. O'Keeffe.*

Solicitor for the Crown, *Frank G. Menzies*, Crown Solicitor for Victoria.

H. D. W.

(1) (1917) 2 I.R., at p. 590.
(2) (1791) 2 Leach 552, at p. 554.
(3) (1887) 20 L.R. Ir. 550.