[HIGH COURT OF AUSTRALIA.]

CORNELIUS . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF VICTORIA.

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MELBOURNE, *May* 28; *June* 9.

Starke, Dixon, Evatt and McTiernan JJ.

Criminal Law—Evidence—Confession—Admissibility—Whether confession voluntary—Promise or threat—"Calculated to cause an untrue admission of guilt to be made"—Procedure at trial—Evidence Act 1928 (*Vict.*) (*No.* 3674), *sec.* 141.

Sec. 141 of the *Evidence Act* 1928 (Vict.) 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 . . is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made."

Held that, when a confession is tendered in evidence, its voluntary character must, apart from sec. 141, appear before it is admissible. The trial Judge must determine whether a confession is voluntary, and, if a promise or threat has been made, whether it is really calculated to cause an untrue admission of guilt. Where the admissibility of a confession depends on matters of fact the Judge must determine the question on evidence.

Observations on the procedure to be adopted in a criminal trial in determining the admissibility of a confession.

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

APPLICATION for special leave to appeal from the Court of Criminal Appeal of Victoria.

This was an application by Edward Cornelius for special leave to appeal from the judgment of the Court of Criminal Appeal of

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Victoria dismissing his appeal against his conviction for murder and sentence of death passed on him. The ground of the application was that the confession of the prisoner given in evidence by the Crown was inadmissible as being not made voluntarily and made in such circumstances as to be calculated to cause an untrue admission of guilt to be made.

The facts and arguments sufficiently appear in the judgments hereunder.

J. L. Long, for the applicant.

Maurice Cussen, for the respondent.

Cur. adv. vult.

June 9.

The following written judgments were delivered :—

STARKE J. A motion has been made on behalf of Edward Cornelius for special leave to appeal from the judgment of the Supreme Court of Victoria in Full Court dismissing his appeal against his conviction for murder and sentence of death passed upon him.

This Court should be slow to interfere with the administration of criminal justice unless some substantial and grave injustice has been done. We might well, I think, adapt our practice to that of the Judicial Committee of His Majesty's Privy Council. In *Arnold* v. *The King-Emperor* (1), the Committee reiterated its practice in these words :—" This Committee is not a Court of criminal appeal. It may in general be stated that its practice is to the following effect : It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside the pale of regular law or unless, within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and, secondly,

(1) (1914) A.C. 644.

that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided" (1). "Their Lordships were referred to the dicta of Judges and the rules set up with regard to the procedure of the Court of Criminal Appeal in England. . . . The authority of these decisions, which apply to a different system, a different procedure, and a different structure of principle, must stand out of the reckoning of any body of authority on the matter of the procedure of this Board in advising His Majesty" (2). This Court is no more a Court of criminal appeal than is the Judicial Committee of His Majesty's Privy Council. But jurisdiction is conferred upon it to give special leave to appeal against any judgment of the Supreme Court of a State in a criminal matter. The States have set up Courts of criminal appeal, constituted by Judges experienced in the administration of criminal justice. These Courts "can go into questions of evidence and into questions of procedure, and can deal with the case on the same footing as an ordinary Court of appeal" (*Clifford* v. *The King-Emperor* (3)).

In the case now before us, the prisoner himself gave evidence upon oath at his trial. Shortly, he admitted entering the vicarage of St. Saviour's Church in Collingwood for the purpose of stealing money. The vicar, the Reverend Harold Laceby Cecil, discovered the prisoner rifling the drawers of his desk, and seized him. A struggle took place, and the prisoner succeeded in tripping the vicar and breaking away. But the vicar again grappled with him, and they fell. The prisoner rose, and, according to him, the vicar made a movement as if to draw a pistol from his pocket, and "more instinctively than intentionally I picked up a parcel of spanners which I had previously placed on the desk, and struck my opponent a blow on the head." The prisoner searched the vicar's pocket, but it contained no dangerous weapon. The vicar bled freely from the wound on his head, and appeared to be seriously injured. He revived, however, and "grabbed" the prisoner, who then, according to his evidence, lost control of himself. He could not give any clear description of what happened from then onwards, though on

(1) (1914) A.C., at p. 648. (2) (1914) A.C., at pp. 650, 651.
(3) (1913) L.R. 40 Ind. App. 241.

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cross-examination he admitted that he had then no doubt that he struck the vicar a number of times on the head with a spanner and killed him.

The trial Judge thus directed the jury: "The law is that every man is presumed to intend the ordinary and natural consequences of his act, and if in this particular case you found that the accused man killed this unfortunate clergyman as has been described, that he killed him by repeated blows on the head with a heavy object such as this spanner, it would be open to you from these facts to draw the inference that he intended either to kill or to do him grievous bodily harm and in either case he would be guilty of murder." The charge was merciful to the prisoner, for his own evidence established, if it were accepted, every element of the crime of murder. It is almost impossible, in these circumstances, for the prisoner to establish any substantial or grave injustice sustained by him in consequence of any irregularity in the conduct of the trial, misdirection, or misreception of evidence. (See *Ibraham* v. *The King* (1); *Clifford* v. *The King-Emperor* (2).) But I shall examine the ground upon which special leave to appeal is sought.

It is that a written confession made to police officers was inadmissible in evidence. According to English law, a confession is inadmissible unless it be established that it was made without any promise of favour, or menaces, to the person confessing, or by reason of terror on his part. In Victoria, the *Evidence Act* 1928, sec. 141, has somewhat modified the rule: "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." "All questions as to the *admissibility* of evidence are for the Judge. It frequently happens that this depends on a disputed fact, in which case all the evidence adduced both to prove and to disprove that fact must be received by the Judge, and—however complicated the facts or conflicting the evidence—must be adjudicated on by him *alone*. For example, the Judge alone must decide a question of whether a confession should be excluded on account of some previous

(1) (1914) A.C. 599, at p. 615. (2) (1913) L.R. 40 Ind. App. 241.

threat or promise, and, to do this, has to determine, first, whether the threat or promise was really made; and secondly, whether, if made, it was sufficient in law to warrant the exclusion of the evidence." The Judge merely decides whether there is prima facie any reason for presenting the evidence at all to the jury, and his decision on this point, if erroneous, is open to review if appeal lies. But the Judge before whom the question comes for decision has the best means of deciding correctly. He has the evidence of his own eyes, the witnesses are before him, and his experience will enable him to form a more correct judgment than any Court of appeal. Moreover, the provision of the *Evidence Act* 1928, in cases to which it extends, should not be overlooked. A Court of review ought not to substitute its opinion for the opinion of the Judge who presides at the trial. That would simply contradict the provision of the Act. "The credibility and weight of the evidence after it has been admitted is entirely a question for the jury, who may consider all the circumstances of the case, including those already proved before the Judge, and give such evidence only the credit which, upon the whole, they think it deserves." All this is elementary, and may be found at large in *Taylor* on *Evidence*, 10th ed. (1906), pp. 25-27, pars. 23A, 24A; and see *Duke of Beaufort* v. *Crawshay* (1).

It was insisted in the present case that the prisoner's confession should not have been received, because the trial Judge did not proceed in a regular manner to determine the facts upon which its admissibility depended. The Prosecutor for the King proposed to open the confession to the jury, but counsel for the prisoner suggested that it should not be so opened, because the confession was not made freely and voluntarily. The learned Judge at this point examined the depositions taken before magistrates, and he saw nothing in them which induced him to think the confession would be improperly tendered, and did not accede to the suggestion made on behalf of the prisoner. Such a course, the Full Court of the Supreme Court asserts, is a common practice in Victoria, and in so convenient and just a practice I perceive nothing wrong or irregular. The confession was opened to the jury, and evidence was subsequently given by police officers of the circumstances in which it was made. The

(1) (1866) L.R. 1 C.P. 699.

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confession was tendered, and admitted in evidence, without objection on the part of the prisoner. No suggestion was made to the presiding Judge that he should then hear evidence, and decide whether the confession should be excluded on account of some previous threat or promise, or for any other reason. But the prisoner himself, as already mentioned, gave evidence, and detailed the circumstances in which, he said, the confession was made. But the trial Judge, according to the judgment of the Full Court, of which he was a member, " was not impressed by that evidence, and saw no occasion to withdraw the confession from the jury." It is plain, therefore, that the trial Judge did adjudicate upon the admissibility of the confession even if he departed from the normal and regular course of procedure. No substantial or grave injustice, or, indeed, any injustice, was done to the prisoner, and in any case the irregularity suggested affords no ground whatever for the intervention of this Court.

It was also urged that the evidence disclosed that threats and promises, calculated to cause an untrue admission of guilt, were held out to the prisoner as an inducement to confess. The learned trial Judge, after seeing and hearing the witnesses, decided otherwise, and his decision was affirmed by the Full Court. There is ample evidence to support this conclusion. In my opinion, it is detrimental to the administration of criminal justice that such matters are investigated in this Court, and it would be highly mischievous if we substituted our opinion for that of the trial Judge, without having any of the advantages already referred to, or the experience which he and the Full Court possess.

Further, it was contended that police officers " hectored " and " bullied " the prisoner in a manner calculated to induce an untrue admission of guilt. The trial Judge himself reported that the questioning of the prisoner was " very drastic and far-reaching," and that his statement seemed to have been obtained by methods which might well have rendered it inadmissible in an English Court. But he added that there was nothing in the Victorian statute law, or practice, which justified its exclusion. And he directed the jury to disregard any part of the statement that they thought untrue. It may be safely left to the learned Judges of the Supreme Court of

Victoria to protect prisoners against the undue questioning of police officers if and when it occurs. This Court should not intervene unless there has been such an interference with the administration of criminal justice as is regarded by the Judicial Committee as essential for that tribunal's intervention. No such interference, or anything approaching it, has taken place in the present case.

Special leave to appeal should be refused.

DIXON, EVATT AND MCTIERNAN JJ. The prisoner, who was convicted of murder before *Martin* J., seeks special leave to appeal from an order of the Full Court of Victoria dismissing an application for leave to appeal against the verdict. The ground upon which he relies is that in the course of the Crown case a written confession which he had made to detectives was improperly received in evidence. At the conclusion of the Crown case, the prisoner gave evidence on his own behalf. He did not deny that the deceased had died by his hands. On the contrary, he gave an account of the facts which did not radically depart from the narrative contained in his written confession. His testimony stated the circumstances with greater detail, and in some particulars corrected what he said were inaccuracies in the account attributed to him by the document. No doubt the object of calling him as a witness on his own behalf was to better the chances of the jury's finding that his crime amounted to manslaughter and not murder. For the additional circumstances to which he deposed and the corrections he made in the confession did in some measure bear, or might be thought to bear, upon his intention or state of mind when he committed the homicide.

The victim was the vicar of a parish in Collingwood and he was killed in his vicarage, where he lived alone. The crime took place on the morning of Thursday, 12th December 1935, and the time probably was about half past nine.

The prisoner says that he happened to pass by the vicarage. He was in need of money and had heard that money was kept there. He went to the door to see if anyone was in the house and the deceased answered his knock. The prisoner pretended that he wished to arrange for a marriage. He was led to the study where he gave some fictitious particulars, and with them the vicar filled up the

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usual forms. The prisoner says that he noticed some money on the desk. When the forms were completed, he left the house, but he noticed that the door had been left open, and, after a short time, he returned. He had with him a spanner and, he says, one or two other motor-car tools. He entered the house by the open door and went to the study. According to his evidence, he placed his tools, which were in paper, upon the desk. The money was no longer there. He opened one of the drawers and began to look through it. As he was doing so, he was suddenly seized from behind by the deceased, who had entered the study. A struggle followed in the course of which the prisoner, as he swore, fell and received a blow on the back of the head. He rose and saw as he did so a movement of the deceased's hands towards his hip pocket. The prisoner says he thought the deceased might have a weapon, and that " more instinctively than intentionally " he picked up the parcel of spanners and struck him on the head. He struck one blow. The deceased fell and while he lay unconscious the prisoner felt in his trouser pocket where he found not a weapon but a purse. He says he began to ring up for help ; but he desisted and went to the front door to close it. As he returned, he was confronted by the deceased who had risen to his feet and followed him. The prisoner says that he presented a terrifying appearance as a result of his injuries. The prisoner's evidence goes on :—" As he approached I simply could not move. I seemed to be rooted to the spot, as the expression goes. He grabbed me and I do not know clearly whether anything was said then or not by him, but, as he grabbed me, I am afraid I lost control of myself and cannot give any clear description of what happened from then onwards, for I do not know what length of time. It may have been a minute or five minutes or more. The next thing I realized was that I was leaning against the door of the bedroom in an exhausted condition, and it was several moments before I could stand up without support. My opponent was lying at my feet partly in the bedroom door and partly in the hall." The deceased was in fact found dead in some such position, and with very many wounds upon his head such as might have been inflicted by repeated blows of a spanner. The prisoner's evidence then gives an account of how he cleaned away blood from an injury he himself had received,

collected his tools, took two watches and a chain and left the house.

The variances between this narrative and the confession do not involve many actual inconsistencies. The more notable differences are these. The confession makes him leave home an hour and a half earlier than his evidence, and does not say he happened to pass the vicarage. This, it is said, might adversely affect the jury's opinion of his assertion that he had not planned to steal from the dwelling. The confession does not say that he noticed money on the desk. It says that he went through a couple of drawers looking for money, not one. It does not give the details of the struggle. It says nothing about the deceased's hand moving towards his pocket, or the prisoner's suspecting he had a weapon, and represents the prisoner as inserting his in the pocket to get the purse. It says that he hit the deceased several times, two or three times, that is before he fell in the study. Here the prisoner says the confession erroneously sets down what he had stated, namely, that altogether he hit his victim two or three times. The confession does not describe the deceased's appearance as he came up the passage, or the prisoner's condition of mind. It does state that the deceased said: "You can't get away" and that the prisoner again hit him on the head with the spanner, a couple of times he thought, but how many times he was not sure. It says the purse contained the definite amount of £8, and that the watches and chain were lying on the study floor where they had fallen from the deceased's waistcoat in the struggle.

Martin J., in his charge to the jury, directed them that, if the prisoner intended by his blows with the spanner to kill the deceased or to do grievous bodily harm, harm of a nature likely to cause death, he was guilty of murder. He did not direct them that it would be murder if the prisoner struck the blows causing death in order to complete the felonious purpose for which he came, or in order to escape apprehension by the deceased; blows obviously dangerous to life.

Having regard to the weapon used by the prisoner and the injuries inflicted by it, no doubt it was enough to present the case to the jury in the simpler form which his Honour adopted. But it is apparent that the account of the facts given by the prisoner in his evidence

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left little room for the view that none of the various forms of malice aforethought existed, any one of which would suffice to bring the homicide within the category of murder. Indeed, in the circumstances, unless it appeared that for some reason he became incapable of forming such an intention when he delivered the fatal blows, the conclusion appears almost inevitable that he meant to inflict bodily harm likely to endanger life, or injury sufficient to enable him to escape, which he must have foreseen might cause death. In his evidence he suggests that, when he attacked his victim in the passage, he was beside himself, that he was unable to say what he did. But it is hard to understand how it could properly be found that his acts were unintentional.

These considerations make it more than usually difficult for the prisoner to discharge the burden of showing that some special reason exists for this Court's permitting an appeal from the conviction. The reason given in support of the application for special leave is that the confession ought not to have been received in evidence, and that, in any event, the proper course was not pursued at the trial for deciding upon its admissibility. No doubt it is highly probable that, if the confession had been rejected, the prisoner would not have been called as a witness on his own behalf. There is a decision of the Supreme Court of New South Wales that, in considering whether a miscarriage of justice had occurred, the evidence of an accused person given in answer to confessional evidence erroneously admitted ought not to be regarded, although it might prove the same facts as the confession (*R.* v. *O'Keefe* (1)). Whatever may be said as to such a doctrine, it is not one that governs this Court's discretion in granting special leave to appeal.

In the present case, the statement of facts contained in the confession is, to the extent already described, less favourable to the prisoner than that given in his evidence. Whether, on that evidence, a verdict of manslaughter only would or would not have been a proper one, the power of finding such a verdict, if they thought fit, could not be denied to the jury. The chance of the jury's exercising this power might have been lessened to some extent by their considering the statement of facts in the confession and comparing it with

(1) (1893) 14 L.R. (N.S.W.) 345 ; 10 W.N. (N.S.W.) 71.

his evidence. It is thus desirable that this Court should deal with the substance of the objection made to its admissibility, and not dispose of the prisoner's application for special leave on the more general grounds arising out of his own evidence.

The objection is that the confession was not shown to be and was not in fact voluntary. At common law no confession is admissible in evidence unless it is a free and voluntary statement. If it is made as a result of violence, intimidation, or of fear, it is not voluntary. It is not voluntary if it is given in consequence of a threat made, or a promise of advantage given, in relation to the charge by a person in authority, as, for instance, an officer of police (*R.* v. *Fennell* (1); *R.* v. *Baldry* (2)). The promise or threat might be implied and need not be express.

In 1857 the Victorian Legislature enacted a provision which made it necessary that the promise or threat should appear to have an actual likelihood of inducing a false confession (21 Vict. No. 8, sec. 19). It is now contained in sec. 141 of the *Evidence Act* 1928 and so far as material is as follows: "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."

In the year after the enactment of this provision, *Stawell* C.J., speaking for the Full Court, said, after stating the terms of the section:—"The Judge is, therefore, to decide in each case whether the inducement was really calculated to cause an untrue admission to be made. If, in his opinion, it was so calculated, the evidence should be rejected; if not so calculated, it should be received. It was urged on behalf of the prisoners in the present case, that the Legislature never could have intended the Judge to enter into a metaphysical discussion as to what amount of influence might or might not have been exercised on the mind of each prisoner, and that the section in question was intended to provide for extreme cases only, in which the threat or promise was of too trifling or insignificant a character to induce an untrue admission of guilt to

(1) (1881) 7 Q.B.D. 147, at pp. 150, 151.

(2) (1852) 2 Den. 430; 169 E.R. 568.

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be made. We are of opinion, however, that the terms of the clause do not admit of doubt or justify us in limiting its application as contended for. The duty, onerous and responsible as it may be, is now cast on the Judge in every case of determining from the evidence as to the " [probable ?] " effect of the alleged inducement upon each particular prisoner " (*R.* v. *Douthwaite* (1)).

This, no doubt, correctly states the effect of the provision. When it appears that, but for a particular promise or threat made by a person in authority, the prisoner's confession would be voluntary, it becomes necessary for the Judge at the trial to decide whether the promise or threat in question was really calculated, that is, really likely, to cause an untrue admission of guilt to be made. But a promise of advantage and a threat of harm are not the only matters which may deprive a statement of its voluntary character. For instance, a confession which is extracted by violence or force, or some other form of actual coercion is clearly involuntary, and, therefore, cannot be received in evidence. The enactment does not relate to such cases. The position is well stated by *Brandeis* J. in delivering the judgment of the Supreme Court of the United States in *Wan* v. *United States* (2) :—" The requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was in fact voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise." The notes to this case (3) give numerous examples where the compulsion alleged takes the form of prolonged and sustained pressure by police officers upon a prisoner in their hands, until, through mental and physical exhaustion, to which want of sleep and food sometimes contributes, he consents, in order to obtain relief, to make a confession of the crime. If it is alleged that the confession is the outcome of

(1) (1858) *The Argus*, 23rd November, p. 6 ; see *Kerferd and Box, Digest*, col. 149 ; *Australian Digest*, vol. 5, col. 699.

(2) (1924) 266 U.S. 1, at p. 14 ; 69 Law. Ed. 131, at p. 148.

(3) (1924) 69 Law. Ed. 131.

pressure, the question whether by persistent interrogation, or by other means, a prisoner has been constrained to confess so that his statement cannot be regarded as voluntary must sometimes be decided as a matter of degree.

In *Ibrahim* v. *The King* (1), Lord *Sumner*, speaking for the Judicial Committee, said: "With the growth of a police force of the modern type, the point has frequently arisen, whether, if a policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him, apart from fear of prejudice or hope of advantage inspired by a person in authority." This question he discusses over the four next ensuing pages and in a very instructive manner. Although he gives no final answer to it, his discussion of the matter leaves little doubt that, as a matter of law, a confession does not cease to be legal evidence merely because it is the result of questions by a police officer to the prisoner while he is in his custody. A matter upon which his Lordship touches is how far a discretionary authority has come to belong to English Judges enabling them to direct that confessional evidence shall not be adduced if, in their view, it has been improperly obtained. In the Dominions, there does not appear to be a uniform adoption of the view that Criminal Courts possess a discretionary authority to exclude confessions, notwithstanding that to admit them is not contrary to law (See *Attorney-General* v. *M'Cabe* (2); *Thiffault* v. *The King* (3); *R.* v. *Lynch* (4)).

So far as we are aware, it has not become the practice in the State of Victoria to deal with the reception of confessional evidence as a matter of discretion, that is, except in so far as sec. 141 of the *Evidence Act* 1928 and the principles upon which the voluntary character of a confession is determined may be regarded as calling for that kind of judgment in which discretion must play a part. There is not, we think, any definite English authority which we ought to follow, establishing that, at common law as affected by legislation adopted in Victoria, a discretion exists to exclude confessional evidence, although in strictness voluntary. In the absence of

(1) (1914) A.C., at p. 610.
(2) (1927) I.R. 129, at p. 134.
(3) (1933) S.C.R. (Can.) 509, at pp. 514, 515.
(4) (1919) S.A.L.R. 325, at p. 333.

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any such authority, this Court should not, in our opinion, go further in this Victorian case than deciding whether the admission in evidence of the prisoner's statement was contrary to law. This question necessitates, in the present case, some consideration of the course prescribed by law for deciding at the trial the admissibility of such evidence, a course which, according to the contention made for the prisoner, was not pursued.

When a confession is tendered in evidence, its voluntary character must, apart from sec. 141 of the *Evidence Act* 1928, appear before it is admissible. Whether it is voluntary must sometimes depend upon disputed facts. The further question, whether a threat or promise, if one appears to have been made, is really calculated to cause an untrue admission of guilt, may also be influenced by facts. But these are all questions which the Judge must decide. For the admissibility of evidence is always for the Court and never for the jury. Where its admissibility depends upon matters of fact, he must ascertain the facts by legal evidence. Thus, in *Doe* v. *Davies* (1) Lord *Denman* C.J. said :—" There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus an oath, or its equivalent, and competency, are conditions precedent to admitting viva voce evidence ; and the apprehension of immediate death to admitting evidence of dying declarations; and search to secondary evidence of lost writings ; and stamp to certain written instruments : and so is consanguinity or affinity in the declarant to declarations of deceased relatives. The Judge alone has to decide whether the condition has been fulfilled. If the proof is by witnesses, he must decide on their credibility. If counter-evidence is offered, he must receive it before he decides ; and he has no right to ask the opinion of the jury on the fact as a condition precedent." (See *Bartlett* v. *Smith* (2) ; *Jacobs* v. *Layborn* (3) ; *Cleave* v. *Jones* (4) ; *Boyle* v. *Wiseman* (5) ; *Commonwealth* v. *Preece* (6).)

The question of fact for the Judge is collateral and irrelevant to the issues upon which the jury are to pass. The question may,

(1) (1847) 10 Q.B. 314, at p. 323 ; 116 E.R. 122, at p. 125.
(2) (1843) 11 M. & W. 483 ; 152 E.R. 895.
(3) (1843) 11 M. & W. 685 ; 152 E.R. 980.
(4) (1852) 7 Ex. 421 ; 155 E.R. 1013.
(5) (1855) 11 Ex. 360 ; 156 E.R. 870.
(6) (1885) 140 Mass. 276.

therefore, be heard and determined in the absence of the jury (*Chadwick* v. *The King* (1)). In simple cases it may not be necessary to hear and decide the question in the absence of the jury, if it appears that no prejudice to the prisoner could arise from the jury's hearing the evidence and discussion relating to the voluntary nature of the prisoner's statement. But, otherwise, the evidence should be taken as upon a voir dire and the admissibility determined in their absence. When a confession is admitted in evidence, the weight to be attached to it is then, of course, a question for the jury, and upon that question the circumstances in which it was made are relevant and may be proved before the jury. If, during the course of the trial, evidence is adduced from which the Judge concludes that he was mistaken in holding the confession to be admissible, he may withdraw it from the consideration of the jury (*Jacobs* v. *Layborn* (2) ; *R.* v. *Whitehead* (3)). But, in such a case, it may be impossible sufficiently to remove the prejudice to the prisoner already caused by laying the confession before the jury, and, in that case, the jury may be discharged (*The State* v. *Treanor* (4)).

Upon the trial of the prisoner in the present case, the question of the admissibility of the confession arose when the Prosecutor for the King proceeded to open the case. *Martin* J., in the absence of the jury, considered the material parts of the depositions. He was informed by counsel for the prisoner that the latter would give evidence that he had been induced to sign the statement by means of a threat. Counsel also objected that the confession was not voluntary, because it was obtained under such circumstances as might intimidate the prisoner. His Honour considered that the questioning to which the prisoner had been subjected was of a very drastic and far-reaching kind, and the methods by which his statement had been obtained might well have rendered it inadmissible in an English Court, but he felt no doubt that there was nothing in the Victorian statute law or practice which would justify him in excluding it. Accordingly, he allowed the Prosecutor to open the confession to the jury. His Honour was not asked to and did not take oral evidence upon the admissibility of the confession. But,

(1) (1934) 24 Cr. App. R. 138.
(2) (1843) 11 M. & W. 685 ; 152 E.R. 980.
(3) (1866) L.R. 1 C.C.R. 33.
(4) (1924) 2 I.R. 193, at pp. 209, 210.

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during the trial, the circumstances in which the confession was obtained were gone into fully both by the witnesses for the Crown and in the prisoner's own evidence. When the confession was tendered, no actual objection was taken.

It does not clearly appear what conclusions *Martin* J. drew from the evidence relating to the making of the statement when he had heard it, but he did not withdraw the confession from the jury. There was, as appears from what has been said, a departure at the trial from the course prescribed by the common law for determining a question of admissibility of evidence depending upon matters of fact. If at the present stage any real doubt remained as to the admissibility of the confessions, some difficulty might arise from this departure. But, in our opinion, the evidence when given showed that the confession was legally admissible. The facts disclosed by that evidence may be stated briefly :—At about six o'clock in the morning of 12th February 1936, a number of detectives visited the apartments occupied by the prisoner and by a woman. They were roused by the visit and required to dress. After the premises had been thoroughly searched, the prisoner and the woman were taken in separate motor cars to the detective office. The detectives say they arrived there between a quarter past and half past seven : the prisoner says they arrived much earlier. The prisoner and the woman were there questioned in different rooms. He was asked whether he had ever forged another person's name to any document. He said he had not. He swore, and the detectives who gave evidence denied, that he was told, in effect, that they could sheet home a charge of forgery upon which he would be sentenced to ten years. He was requested to write on various pieces of paper, including cards for notifying marriages. He was then told that he was suspected of the murder and pressed to admit it. He repeatedly denied all knowledge of the matter. He was shown photographs of the deceased's injuries and the spanner was exhibited to him. He continued to deny responsibility for the crime. His writing was compared with that on the marriage card found in the vicarage and the similarities were pointed out to him. He was asked whether anybody else took part with him in the crime ; whether the woman had been there. He still denied it. He swore, and the detectives

denied, that he was told that, if he did not make a statement, the woman would be charged with the murder in company with himself. But he was admittedly told that she had said he had given her money on the day of the crime. At one stage of the interrogation, tea and toast were brought to him. At length he asked if he could see the woman and speak to her. She was brought into the room and he asked her whether she was all right. She said: "Yes". After she had left the room, he agreed to make a statement and to tell all he knew. He then made a confession which was reduced to writing. From the time he arrived at the detective office until he agreed to make a statement he was questioned and argued with continually. The time was variously estimated by the witnesses. His was the longest estimate, two hours: the shortest was between an hour and an hour and a quarter. He swore that his main reason for confessing was so that the girl would be released.

Upon this evidence, the first question which arose for determination at the trial was whether a threat or a promise of advantage had been made to him by the detectives. The threats, which he says were made, are that the woman would be charged with him, and that he would be proved guilty of forgery. A promise is implied in the threat supposed, viz., that if he did confess, the first of these consequences at any rate would not ensue. But, assuming the making of the alleged threat and promise, it would become necessary under the Victorian enactment to consider whether the inducement would be really calculated to cause an untrue admission of guilt to be made. We do not think that, in all the circumstances of the case, it would be reasonable to consider either of these alleged threats or promises, if made, as really calculated to cause the prisoner to make an untrue admission of guilt.

The second question which arose for decision was whether the nature of the treatment to which the prisoner was subjected at the detective office deprived the confession he made of voluntariness, independently of the supposed threat and promise. Approval or disapproval of the measures taken by the detectives to obtain a confession appears to us to be beside the point in deciding this question. What matters for present purposes is the effect produced upon the prisoner. "It would be a lamentable thing if the police

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were not allowed to make inquiries, and if statements made by prisoners were excluded because of a shadowy notion that if the prisoners were left to themselves they would not have made them" (per *Darling* J., *R.* v. *Cook* (1)). A statement need not be spontaneous or volunteered in order to be voluntary. But, on the other hand, no doubt can be felt that interrogation may be made the means or occasion of imposing upon a suspected person such a mental and physical strain for so long a time that any statement he is thus caused to make should be attributed not to his own will, but to his inability further to endure the ordeal and his readiness to do anything to terminate it. The difficulty of defining a standard in such a matter is necessarily almost insuperable, and, perhaps for this reason, it has been found necessary by the Courts in England on grounds of policy to adopt the practice which there prevails of setting aside convictions if the rules made by the Home Office on the advice of the Judges have been ignored. But whatever difficulties may be felt in other circumstances in deciding whether a statement procured by the insistence of police officers is voluntary, the circumstances of the present case do not, in our opinion, suggest that the prisoner was brought to such a condition, or made to endure so much that his statement was not voluntary. He does not say in his evidence that his confession was extorted from him in such a way. What he says is that he confessed in order to free the woman who had been brought to the office.

In all the circumstances of the case, we think special leave to appeal should be refused.

Special leave to appeal refused.

Solicitor for the applicant, *J. L. Long.*

Solicitor for the respondent, *F. G. Menzies*, Crown Solicitor for Victoria.

H. D. W.

(1) (1918) 34 T.L.R. 515, at p. 516.