[HIGH COURT OF AUSTRALIA.]

SINCLAIR . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF NEW SOUTH WALES.

H. C. OF A. 1946.

SYDNEY, *Nov.* 28; *Dec.* 23.

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

Criminal Law—Evidence—Confessions—Admissibility—Schizophrenic—Procedure at trial—Judge and jury—Functions—Crimes Act 1900-1929 (*N.S.W.*) (*No.* 40 *of* 1900—*No.* 2 *of* 1929), *s.* 410.

A confession is not necessarily inadmissible as evidence upon a criminal trial because it appears that the prisoner making it was at the time of unsound mind and, by reason of his mental condition, exposed to the liability of confusing the products of his disordered imagination or fancy with fact.

The question of the admissibility of a confession, even though the question depends upon a decision on fact, is for the judge and it is a proper course for the judge in a criminal trial to hear evidence upon the *voir dire* in the absence of the jury. When the confession is admitted it is for the jury to determine the weight, if any, to be given to it.

Special leave to appeal from the decision of the Court of Criminal Appeal of New South Wales refused.

APPLICATION for special leave to appeal from the Court of Criminal Appeal of New South Wales.

Boyd Sinclair, who was born on 13th September 1918, was, in March 1936, committed for trial on a charge of feloniously and maliciously murdering one John Thomas Smillie at Croydon, New South Wales, on 24th September 1935. A few days after he had been committed for trial Sinclair was found to be suffering from schizophrenia and was certified as insane. Upon being so certified Sinclair was transferred from the State Penitentiary, Long Bay, Sydney, to the Criminal Lunatic Asylum, Parramatta.

Upon an inquiry held under the *Lunacy (Amendment) Act* 1946 (N.S.W.) a jury found that Sinclair was fit to plead and he was accordingly put upon his trial on the charge of murder. He pleaded not guilty to the charge on the ground that he did not commit the murder and, although not taken on Sinclair's behalf as a ground of defence, the trial judge (*Owen* J.) also put to the jury the question whether Sinclair was insane at the time of the murder. After hearing evidence on the *voir dire* the trial judge held that certain confessions made by Sinclair were admissible and admitted them.

The jury convicted Sinclair of the murder and, under s. 127 of the *Child Welfare Act* 1939 (N.S.W.), he was sentenced to imprisonment for life with hard labour.

An appeal made on behalf of Sinclair against that conviction was dismissed by the Court of Criminal Appeal of New South Wales whereupon an application was made on his behalf to the High Court for special leave to appeal to that Court against the decision of the Court of Criminal Appeal on the ground, *inter alia*, that the Court should have held that evidence of the confessions and/or statements of Sinclair was inadmissible on the ground that at the time they were made Sinclair was insane and unable to distinguish fact from fancy.

Other material facts appear in the judgments hereunder.

Windeyer K.C. (with him *Jones* and *Spain*), for the applicant. It having been established on the *voir dire* that the applicant was incapable of distinguishing between the state of recollection and the state of imagination the confessions made by him were not "voluntary" confessions. A confession made by a person who is proved to be unable to distinguish between fact and fancy is open to the same objection as a confession induced by hate and fear and is of such a character as to be unreliable. The trial judge should have held that the confessions were inadmissible on this ground (*R.* v. *Baldry* (1)). The real principle is not that this type of evidence is known to be false but that it may be false and should be excluded because it is tainted with the possibility of unreliability (*R.* v. *Baldry* (2)). A voluntary confession is one which is the real will of the person who made it. A person who is incapable of operating his will, that is to say is liable to be misled by his own imagination, is incapable of making a "voluntary" confession. Confessions made by such a person are so questionable that credit ought not to be given to them and they should be rejected (*R.* v. *Warickshall* (3)).

(1) (1852) 2 Den. 430, at pp. 441, 442 [169 E.R. 568, at p. 573].

(2) (1852) 2 Den., at p. 446 [169 E.R., at p. 575].

(3) (1783) 1 Leach 263 [168 E.R. 234.]

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In his summing-up the trial judge informed the jury that without the confessions it would be unsafe to convict the applicant. The question of whether the contents of the confessions or statements made by the applicant were " the products of a diseased imagination " was a question for the trial judge and should not have been left to the jury. A trial judge should decide, and not as a matter of discretion, whether that element exists which would require rejection of certain proposed evidence. The only evidence is that the applicant was incapable of distinguishing between fact and fancy, and no test could be applied to ascertain whether his confessions or statements were facts or fancies. This question was wrongly left to the jury. Before a confession is admitted in evidence it must be clearly established that there is no possibility of that confession not being a narration of facts. What constitutes a " voluntary " confession was discussed in *Cornelius* v. *The King* (1), *Ibrahim* v. *The King* (2), *R.* v. *Fennell* (3) and *R.* v. *Baldry* (4). " Voluntary " means the act of a person who is capable of making a decision, or, in other words, the exercise of an intelligent will (*R.* v. *Burnett* (5); See also *R.* v. *Spilsbury* (6)). One of the essential requirements of the evidence is that it should be data of recollection; imagination is not recollection (*Wigmore* on *Evidence*, 3rd ed. (1940), vols. 1, 2 and 3, pp. 58, 115, 255, 592 ; vol. 4, ss. 86, 499,726, 766, 822, 823, 841, 842).

Crawford K.C., for the respondent. A confession or statement is voluntary unless there has been some inducement to make it. It is for the trial judge to decide whether or not a confession or statement should be admitted, and if he decides in the affirmative it is then a matter for the jury to decide the credibility and weight of the evidence so admitted (*R.* v. *Hill* (7)). The collateral circumstances connected with the applicant, relating to his employment, course of study and the like, which had a bearing upon the applicant's mental capacity, were in evidence before the judge decided to admit the confessions. The record shows that after carefully considering the evidence before him the trial judge " without any hesitation " decided that " the matter is one for the jury " ; if fact, to consider it ; if fantasy, to reject it. The evidence shows that at interviews had with the applicant he took part therein in a sensible, rational and intelligent manner.

(1) (1936) 55 C.L.R. 235, at p. 245.
(2) (1914) A.C. 599, at p. 609.
(3) (1881) 7 Q.B.D. 147, at pp. 150, 151.
(4) (1852) 2 Den. 430 [169 E.R. 568].
(5) (1944) V.L.R. 115, at p. 116.
(6) (1835) 7 Car. & P. 187 [173 E.R. 82].
(7) (1851) 2 Den. 254, at p. 262 [169 E.R. 495, at p. 498].

Windeyer K.C., in reply. The confessions should have been rejected under s. 410 (2) of the *Crimes Act* 1900-1929 (N.S.W.).

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. This is an application for special leave to appeal from a decision of the Court of Criminal Appeal, New South Wales, dismissing an appeal by Boyd Sinclair from a conviction for murder. On 31st July 1946 he was convicted of the murder of John Smillie on 24th September 1935. In 1935 Sinclair was seventeen years of age. On 17th March 1936 he was certified as insane and, as he had been committed for trial, was placed in a criminal lunatic asylum : *Lunacy Act* 1898-1946, s. 66. Under the *Lunacy (Amendment) Act* 1946 provision was made for the determination by a jury of the question whether a person so detained was fit to plead. Upon an inquiry held under that Act the jury found that Sinclair was fit to plead and accordingly he was put upon his trial. His defence was that he did not commit the murder, and the trial judge also put to the jury the question whether he was insane at the time of the murder, although this defence had not been raised on Sinclair's behalf.

Only one question has been argued upon this application, namely, whether certain confessions made by Sinclair were admissible. It was contended for him that he was suffering from schizophrenia at the time when he made them and that therefore they were inadmissible in evidence. The learned trial judge (*Owen* J.), after hearing evidence on the *voir dire*, held that the confessions were admissible and admitted them, telling the jury that, apart from the confessions, there was not sufficient evidence upon which to convict the accused —which was clearly the case. The Court of Criminal Appeal held that the confessions were admissible. It was said in the reasons for judgment that " the contention that it is for the judge, and not the jury, to determine the authenticity of an alleged confession, hardly needs refutation." In this Court any such contention was disclaimed by counsel for the applicant. The argument was that the evidence upon the *voir dire* showed that the confessions could not be regarded as voluntary confessions in the sense in which a confession must be voluntary in order to be admissible ; that is, it was contended that the confessions must not only be made without being affected by any promise or threat made by a person in authority or induced by violence, but must be shown to be the expression of a responsible and intelligent mind.

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The murdered man, John Smillie, was a taxi driver. In his dying deposition he said that his car was picked up by a man in Castlereagh Street, Sydney, who told him to drive to Homebush, where the man attacked him and shot him three times. He was unable to identify his assailant.

The confessions in question were three in number. The first was made by Sinclair to a companion named Graham a few days after the murder. According to Graham's evidence, Sinclair borrowed a revolver from him, failed to return it, explaining that he had lost it, and stated that he had murdered Smillie. The second confession was made verbally to officers of the Police Force on 6th March 1936. The third confession consisted of a statement in writing composed and signed by the accused on 6th March 1936. Evidence upon the *voir dire* was given by Graham and by Dr. J. R. McGeorge. I assume that the written statement of Sinclair was before the judge. Evidence was not given on the *voir dire* as to the verbal confession made to the police.

The statement to Graham deposed to by Graham was quite rational in all particulars. The written confession was also rational and intelligible, but it contained extravagances of language and was expressed in a melodramatic form. Dr. J. R. McGeorge, a psychiatrist of great experience, gave evidence that he had examined Sinclair on 17th March 1936 and then certified him as insane. He had seen him again on 28th March 1944 and on 25th June 1946. He said that he was suffering from a mental condition known as schizophrenia, that he lived in a world of fantasy, and that he showed a tendency to live in a dream world, to confuse facts and fantasy. It was put to him interrogatively—" . . . a schizophrenic is unable to distinguish between the data of experience on the one hand and the data of imagination on the other ? Answer : Yes, that may occur. His Honour : Is unable to, or may be unable to ? Witness : May be unable to. That may occur." I quote the following questions and answers :—" His Honour : Q. Supposing he gave a detailed statement of his movements on a particular day. Do I understand you to say that that might be fact or it might be fancy ? Yes, it would depend on the verification of his statements.

Q. Suppose the account which he gave of his movements on a particular day turned out to accord in considerable detail with what other persons observed him doing on that particular day, would that tend to show fact and not fancy ? Yes."

The evidence of Dr. McGeorge appears to me to be well summed up by an answer which he gave to counsel for the accused :—" Q. The confession of 6th March, which was made at a time when Sinclair

was actually insane, might well be the product of a delusion and have no basis in fact. Do you agree with that? A. As a possibility, yes."

There was also evidence that Sinclair earned his living as a warehouse employee, and that he was attending a technical college. Graham gave evidence that Sinclair was a moody person and said that he was rather eccentric because he did not take any active part in usual sports. He also gave evidence that he spoke from time to time about "embarking on a life of crime." The learned trial judge, after hearing this evidence, expressed his decision by saying that the effect of the medical evidence was what he would have said himself, namely "that a person in this condition may indulge in fantasy or may state facts." The learned judge continued: "Primarily it is for the jury to decide whether what has been said is fact or fantasy and in considering that you must have regard to all the circumstances and if you find the statement is one which goes into a great deal of detail and that detail is sworn to by other witnesses, the jury might well adopt the view that this statement is not fantasy but fact." (I suggest that the word "primarily" may be a mistake for "finally".)

The argument for the appellant was based upon the contention that the confessions made by Sinclair were not shown to be voluntary in the sense required by the law. It was said that, though there is no decision precisely in point, the reasoning upon which confessions are excluded unless they are shown to be voluntary is applicable in the case of a confession made by a person who is subject to a mental aberration—the basis of the rule of exclusion of confessions not shown to be voluntary being that it was too dangerous to allow them to be submitted to the jury because there was a risk that in the circumstances they might not represent the true mind of the man who made them. There was a similar risk, it was contended, in the present case, and on this ground the judge should have excluded the confessions instead of allowing the jury to consider them and to determine what weight should be given to them.

All questions of admissibility of evidence, including the question of the admissibility of a confession, even though the question depends upon a decision on fact, are for the judge: See *Taylor* on *Evidence*, 11th ed. (1920), vol. 1, p. 25, s. 23; p. 2, s. 2; *Cornelius* v. *The King* (1). It is a proper course for the judge in a criminal trial to hear evidence upon the *voir dire* in the absence of the jury, as was done in the present case: *Cornelius* v. *The King* (1). When the confession is admitted it is for the jury to determine the weight, if any, to be given to it.

(1) (1936) 55 C.L.R. 235.

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Special rules are applicable by statute and at common law in determining the admissibility in a criminal trial of confessions of guilt.

The New South Wales *Crimes Act* 1900, s. 410, provides :—" (1) 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. (2) Every confession, admission, or statement made after any such representation or threat or promise shall be deemed to have been induced thereby, unless the contrary be shown. . . ."

In the present case there is no evidence which makes it possible to reject the confession either to Graham or to the police on any of the grounds referred to in this section. There is no evidence whatever of any untrue representation being made to the accused person or of there being any threat or promise held out to him by any person.

This statutory provision, however, does not exclude the application of the common law (*Attorney-General for New South Wales* v. *Martin* (1)). At common law a confession of an accused person is not admissible upon his trial unless it is shown by the Crown to be free and voluntary, that is, not to have been induced by violence or by any threat or promise held out by any person in authority. In the present case there is, as already stated, no evidence of any threat or promise and no evidence of any violence. Accordingly, neither the statutory provision quoted nor the common law relating to the voluntary character of confessions as it is ordinarily stated make Sinclair's confessions inadmissible in the present case.

It is contended, however, that the basis of the common law rule is to be found in the fact that confessions induced by violence or by threats or promises by people in authority are likely to be untrue and that the danger is so great that therefore it is better that they should not be allowed to go before a jury : See, e.g. *R.* v. *Warickshall* (2) : " . . . a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it ; and therefore it is rejected." Mr. *Windeyer* referred to the full treatment of this subject in *Wigmore* on *Evidence*, 3rd ed. (1940), vol. 3, p. 30, and particularly to vol. 4, s. 822, where the fundamental principle is stated to be that confessions obtained as the result of violence, promises or threats by persons in authority are, because of the conditions under which they have been

(1) (1909) 9 C.L.R. 713.

(2) (1783) 1 Leach 263, at p. 264 [168 E.R. 234, at p. 235].

made, "untrustworthy as testimony." It was argued that such confessions were excluded, not because they were shown to be untrue, but because the circumstance showed that they *might* be untrue. It was contended that the medical evidence showed that statements made by a person suffering from schizophrenia might be untrue, or quite probably were untrue, and for that reason they should be excluded upon analogy to the rule excluding confessions not shown to be voluntary.

In my opinion this argument goes too far. It obviously cannot be said that a witness ought to be or can be excluded as incompetent because it is proved that he is an habitual liar or romancer or that an admission or confession made by an accused person ought to be or can be excluded for such a reason. Further, it must be admitted that, in applying the rules as to confessions, the judge does not decide whether or not the confession is likely to be true or untrue. He decides only whether or not it was voluntary in the relevant sense.

But it is argued that the position is different when the probability that a confession may be untrue arises from the existence of some mental aberration. The question is, in my opinion, really not a question of the admissibility of a confession. As I have already shown, the confessions in question are not excluded from evidence by any of the special rules which apply to confessions.

The question which arises is, in my opinion, the same in substance as that which would have arisen if Sinclair had been called as a witness in proceedings at the time when the confessions were made. If he were then not competent as a witness, it would be wrong to admit his confessions. The question should be determined upon the principles which apply in determining the competency of witnesses. The real question is whether the evidence shows that when Sinclair made his statement to Graham a few days after the murder and later in March 1936 to the police he was in such a mental condition that in fairness to him no attention ought to be paid to what he said. If a witness who is called to give evidence is obviously insane and incapable of understanding questions put to him and of making intelligible answers, the judge, and not the jury, determines the question of the admissibility of his evidence, and, in such a case, would exclude it on the ground that the witness was incompetent to give evidence. The question is, as put in *Wigmore* on *Evidence*, 3rd ed. (1940), vol. 2, p. 492, whether the derangement or defect of the witness is such as to make the person highly untrustworthy as a witness: See *R.* v. *Hill* (1). The same rule is applicable in the case of a witness who is drunk: See cases cited in *Wigmore* on

(1) (1851) 2 Den. 254 [169 E.R. 495].

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Evidence, 3rd ed. (1940), vol. 2, at p. 499. Such witnesses may be deficient in capacity of observation or recollection or communication. It is for the judge to say whether they are so deficient in any of these capacities that their evidence should not be admitted. If the judge determines that they are not so defective in mentality as to make it proper to exclude their testimony, the weight of the evidence is a matter for the jury.

In the present case there was the evidence of Dr. McGeorge that Sinclair was a schizophrenic. That evidence did not go further than to show that there was a real risk, recognized by psychiatrists, that on a particular occasion such a man as Sinclair might fail to distinguish fact from fantasy and that he might construct and relate an imaginative account of something that had really never happened. This evidence showed, as I think Dr. McGeorge agreed, that it would be very wise, and indeed necessary, to check such evidence carefully by reference to independently proved facts and by any other available means. But it did not show that Sinclair had a mind so disordered and irresponsible that it would be dangerous to pay any attention whatever to what he said.

On the other hand, there was the character of the confessions themselves. They were not absurd or irrational, but were coherent, and all that could be said for the purpose of showing that they did not really constitute responsible and fully comprehended statements was that the language in the written confession was of a stilted and extravagant character. But self-dramatization and exaggeration do not amount to testimonial incapacity. There was also the evidence that Sinclair earned his living in an apparently ordinary manner, and no evidence was submitted of any abnormal behaviour on other occasions except that he was moody and talked about engaging in crime.

If, after evidence had been given on the *voir dire* and the confessions had been admitted, the evidence as given before the jury had shown that they ought not to have been admitted, the judge would have acted properly in withdrawing them from the consideration of the jury; or, if such a course might not be sufficient to secure a fair trial, he could have discharged the jury (*Cornelius* v. *The King* (1) and cases there cited). In the present case the evidence as given before the jury disclosed no grounds for excluding the confessions other than those which had been relied upon in relation to the question of admissibility. The evidence as to the confession to Graham and as to the written confession to the police was the same as that given upon the *voir dire*. The oral statements made to the

(1) (1936) 55 C.L.R., at p. 249.

officers of police which preceded the written confession, were, as deposed to by the officers, quite rational and intelligible. The accused gave a full and detailed account of his movements and actions on the night when the murder was committed. It showed premeditation and a calculated and remembered course of action. This evidence afforded no ground for excluding evidence of any of the confessions from the consideration of the jury.

Upon the evidence the learned judge held that it had not been shown that the confessions of Sinclair should be rejected upon the ground that they did not represent a sufficiently rational mind. In my opinion he was right in so holding and in telling the jury that they were to give such weight to the confessions as they thought proper, having regard to the medical evidence (which was repeated before the jury), the evidence of Sinclair himself and of other witnesses, and such correspondence between the confessions and other facts as might be proved by other evidence—particular attention being directed to the consideration whether or not Sinclair could have been aware of those facts before he made the confessions.

In my opinion the application for special leave to appeal should be refused.

RICH J. This is an application for special leave to appeal from a dismissal by the Court of Criminal Appeal of the State of New South Wales of an appeal by one Sinclair from a conviction on a charge of murder. One Smillie was killed in 1935. Sinclair was committed for trial on a charge of having murdered him; but, having been certified to be insane, he was confined in an asylum for the criminal insane under the *Lunacy Act* 1898. This Act was amended in 1946 by making provision for having it determined by a jury whether a person so confined is fit to plead. An inquiry having been held under the provision, as the result of which it was found that Sinclair was fit to plead, he was put upon his trial for Smillie's murder. At the trial it was not suggested that he had ceased to be fit to plead, nor was the defence of insanity raised, although the trial judge himself explained the position with respect to insanity to the jury.

Before the Court of Criminal Appeal, various points were taken, but the only point sought to be made before this Court is a submission that the trial judge erred in admitting in evidence two confessions made by Sinclair shortly after the alleged murder. It is contended that it was his duty to reject them.

I think the law on the subject to be reasonably plain. If, in the course of a trial by judge and jury, a question of law arises as to whether matter tendered in evidence is legally admissible, two

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positions may arise. The question may be purely one of law. In this class of case, it is obviously for the judge. Or the legal admissibility of the evidence may depend on the existence of a fact. In this class of case, it is for the judge to hear on the *voir dire*, in the absence of the jury if their hearing the evidence may prejudice the trial, such evidence as may be adduced of the existence or non-existence of the fact and to determine whether he is satisfied of two things, that the fact exists, and, if so, whether, as a matter of law, its existence makes the evidence admissible or inadmissible (*De Gioia* v. *Darling Island Stevedoring & Lighterage Co. Ltd.* (1)). The question whether a confession is voluntary is an instance of this (*Minter* v. *Priest* (2)). If the admissibility of the evidence depends upon the existence of the fact and the judge is not satisfied by the evidence given on the *voir dire* that it exists, he rejects the evidence. If he is so satisfied he admits it. But it does not follow from this that the evidence given before him on the *voir dire* on the question of whether the evidence should be admitted may not, in a proper case, be given again in its entirety as evidence in the trial, not of course for the purpose of inviting the jury to give a ruling on admissibility of evidence, but for the purpose of assisting them to consider whether, in their opinion, the evidence qualifies the weight of the evidence which the judge has admitted. This is a point which occurs every day in courts exercising criminal jurisdiction. The prosecution tenders a confession made by the prisoner to the police and subsequently written out and signed by him. It is almost common form for the document to be objected to on the ground that it is not voluntary and for the judge, then, in the absence of the jury to hear evidence on the *voir dire* from the prisoner that he was forced to make the confession by brutal ill-treatment on the part of the police, and from the police in denial of this allegation. If the judge is not satisfied that the prisoner's assertions are true, he admits the confession, and afterwards the prisoner, in the witness-box, or more commonly in a statement from the dock, repeats his allegation of ill-treatment to the jury, who, after having heard the denials on oath of the police officers, give it all the attention which, in their opinion, it deserves. It has never been suggested that a trial judge acts otherwise than with perfect propriety in taking this course; or, on the other hand, in rejecting the alleged confession if he thinks it reasonably possible that there is some truth in the prisoner's assertion.

In the present case, when evidence of the confessions was tendered at the trial, it was objected to on the ground that there was no evidence that they were voluntary. The trial judge took the

(1) (1941) 42 S.R. (N.S.W.) 1, at p. 8. (2) (1930) A.C. 558, at pp. 581, 582.

obviously proper course of hearing on the *voir dire* evidence of the facts relevant to the question of whether they were voluntary. This evidence evidently satisfied him that they were, and he admitted them, leaving it to the defence to attack them, as it proceeded to do.

Nothing that has been said in the present application has raised the slightest doubt in my mind that the trial judge's action in admitting the confessions was entirely proper. Indeed, on the material before him, which is the material relied upon by the applicant before us, I do not see how he could, with propriety, have taken any other course.

The application for special leave should be dismissed.

STARKE J. Motion for special leave to appeal on the part of Boyd Sinclair convicted of murder and sentenced to imprisonment for life with hard labour (See *Child Welfare Act* 1939 (N.S.W.), s. 127).

The only question argued before this Court was whether the evidence of one Graham of a confession made by the prisoner to him and also evidence of a confession made by the prisoner to police officers was rightly admitted in evidence. Objection was taken at the trial to the admissibility of the confessions, and evidence was taken by the trial judge upon a preliminary inquiry to determine their admissibility. It appeared that the prisoner was a schizophrenic, who had been certified insane, but found by a jury fit to plead (See *Lunacy (Amendment) Act* 1946, s. 3). A well known psychiatrist was called and deposed that the prisoner lived for considerable periods in a world of dreams or fantasy. And as a possibility the witness deposed that the confessions might be the result of his disordered mental condition. But in cross-examination the following evidence was given :—

"Q. Assume a conversation is proceeding and he (the prisoner) was asked : 'Did you get a revolver from a certain person ?' Then this pouch is shown. 'Did you borrow this pouch from a man—Graham ?' He (the prisoner) then looked at it and said :—'You appear to know everything. It was a sudden impulse came over me. It is the third one I have had' : Would that be consistent with his appreciating the position that was then under discussion ? A. Yes.

Q. And though he would be suffering from schizophrenia you say he would appreciate a reality even though he suffered from fantasy at times ? A. Yes : that is possible. Q. And the grim reality of shooting a person, would that be a matter that, even though suffering from that continuous trouble, he would be capable of appreciating ?

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A. Yes. Q. And has he not explained the very happening to you ? A. What happened, yes. Q. And told you fully ? A. Yes, he made quite a detailed statement. Q. And in so far as the statement was concerned, did it relate to what appeared to be hard facts ? A. Yes."

The learned trial judge at the conclusion of this preliminary inquiry said :—" I am quite satisfied that the evidence is admissible and that the question of its weight is entirely one for the jury. What the doctor has said is what I would have said myself, that a person in this condition may indulge in fantasy or may state facts. Primarily it is for the jury to decide whether what has been said is fact or fantasy and in considering that you must have regard to all the circumstances and if you find the statement is one which goes into a great deal of detail and that detail is sworn to by other witnesses, the jury might well adopt the view that this statement is not fantasy but fact.

Mr. *Jones* : In this case there is no detail that might not have been suggested to the accused.

His Honour : Without any hesitation I would say the matter is one for the jury. If they think the statement is one of fact they would give it considerable weight, and if they think it is based on fantasy they will discard it. Prima facie I think the evidence is admissible and I will admit it."

Cornelius v. *The King* (1), in this Court, sets forth the function and duty of the trial judge when objection to the admissibility of evidence is taken and I shall not repeat what is there said. But it was argued that the trial judge in the present case did not consider whether the confessions were or might be the result of the disordered mental condition of the prisoner but left the whole question for the consideration of the jury. But I am unable to accept this view. He decided for himself that the confessions were not the result of a disordered mental condition but statements of fact, and went on to explain the functions of the jury in relation to the confessions which he admitted. But then it was contended that the mere possibility that the confessions were the result of a disordered mental condition was sufficient to exclude them from evidence. Again I am unable to agree. A judge is not bound to exclude a confession from evidence because of such a possibility. He is entitled and bound to consider the probability of the mental condition affecting the truth of a confession in all the circumstances of the case and to decide whether there is prima facie reason for presenting it to the jury. And in this case I am satisfied that the trial judge did consider

(1) (1936) 55 C.L.R. 235.

these matters and upon the evidence adduced before him on the preliminary inquiry it cannot be said that he erred in admitting the confessions.

Moreover no substantial or grave miscarriage of justice appears in this case.

Special leave to appeal should be refused.

DIXON J. The contention upon which the prisoner's counsel rests his application for special leave to appeal is that certain confessional statements made by the prisoner ought not to have been admitted in evidence upon his trial because of his mental condition at the time he made them.

That he was of unsound mind there can be little doubt and the question for our decision appears to me to be whether the admissibility in evidence of a confession of crime depends upon a standard or criterion of mental soundness on the part of the confessionalist to which the prisoner, Boyd Sinclair, was shown in fact not to have conformed.

The murder of which Boyd Sinclair has been convicted was committed on the evening of 24th September 1935 when he had just turned seventeen years of age. The victim was the driver of a taxi cab. In Parramatta Road, Flemington his fare shot him three times in the back with a revolver and was then seen by a passing cyclist to make off over the fences of the sale yards in the vicinity.

The murdered man's dying depositions showed that the fare, who was a young man unknown to him, had engaged him near the Central Railway Station and had asked to be driven to Homebush. Near the sale yards he had directed his victim to stop and had then fired three times into his back and, after striking him on the head, had got out of the taxi cab and fled. For some months it could not be discovered who had committed the crime or why he had done it. The murder was, of course, reported in the newspapers which published the detailed circumstances of the crime so far as they were known.

Boyd Sinclair lived in Newtown with his mother and his father, a retired master mariner. He had left school at fourteen years of age and worked by day at a manufacturing chemist's and in the evening gave irregular attendance at a night school. He also took correspondence lessons in short story writing. A week or so before the date of the murder a youth, named Graham, with whom Boyd Sinclair had long been friendly, produced to the latter a revolver, somewhat tarnished with rust, which he said he had found. Graham was about to go into the country on a holiday and asked Boyd

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Sinclair to lend him a pea rifle belonging to the latter. In exchange for the pea rifle Boyd Sinclair asked for and obtained a loan of the revolver together with a leather holster which Graham had made for it. Graham came back from the country some days after the date of the murder. He returned the pea rifle and asked Boyd Sinclair for the revolver. He, however, said that he had lost it and then, on Graham showing incredulity, made the first of the confessional statements that are objected to. According to Graham he said, "Did you read about a taxi driver being shot at Flemington the other night? . . . I did it. . . . It was me." Graham, who had not in fact read of the crime, treated him as romancing and Boyd Sinclair went to get the newspapers but could not find them. In his evidence on the *voir dire* Graham said that he knew Boyd Sinclair and his moods very well and that he just left him; that Boyd had on a number of occasions outlined plans for embarking on a life of crime, plans based mainly on magazine thrillers which he was reading at the time. They included the obtaining of a motor car and an automatic gun. Graham seems to have told his own mother about Boyd Sinclair's claim to have committed the crime but otherwise he kept his counsel.

Evidently some information about Boyd Sinclair and his talk was carried to the police and eventually, on 6th March 1936, they visited his place of employment and took him to the detective office. There is no suggestion that any threat or promise was held out to him to induce him to confess but the result of what took place was the second confessional statement to which objection is made. Boyd Sinclair sat down in the detective office and spent an hour and half or more in writing an account of how he killed the taxi driver. It is a florid and affected narrative, its style suggesting that the writer was less concerned with the predicament in which he stood or the human life that had been destroyed than with employing the cliches and fustian of the "crime and horror" story. There is much in the document itself to indicate that it is the product of a mind whose world is unreal and whose responses to a situation are histrionic and dramatic and not those of sensible behaviour. After Boyd Sinclair had signed his written statement, he was shown some undischarged revolver cartridges that had been found on the floor of the taxi cab. He said that the revolver had opened and they had fallen out of the chambers. He then went with the detectives over the route he said he had travelled from the picking up of the taxi cab and he showed the place of the murder and the course of his flight thence and journey home. He fixed the place where he said he dropped the holster, which had been found thereabouts by a schoolboy and identified. The account

he gave orally of the crime and his escape and return home during this tour with the detectives may be regarded as the third confession objected to.

Upon the return of the party to the detective office Boyd Sinclair was charged with murder, but, a week later, he was certified as insane and the charge was not proceeded with. He was confined as a lunatic for about ten years and then, in consequence of some agitation, an inquiry into his case was held, with the result that he was placed upon his trial.

For the purpose of considering the objections to the admissibility of the confessional statements the learned judge at the trial, in the absence of the jury, heard evidence upon the *voir dire* including that of a specialist in psychiatry who had seen Boyd Sinclair a few days after his arrest as well as in 1944 and 1946. His evidence was afterwards given before the jury and, as I gather, it was accepted by common consent as a reliable assessment of Boyd Sinclair's mental condition at the time when he made the statements. Compendiously stated his evidence was to the following effect. When the witness first saw Boyd Sinclair he was certifiably insane and clearly so. His mental disorder was schizophrenia and it took a paranoid form. The schizophrenic may live in a dream world. In such a case the data of experience and of imagination are bound up together in his mental life and it is difficult for him to distinguish between them. He retreats so far from reality that he confuses facts and fantasy in his mind. Boyd Sinclair was the subject of fantasy. It is common for the schizophrenic to fail to distinguish unreal facts from reality when they are suggested to him. On the other hand, the ability at the same time to appreciate real occurrences when they take place is not necessarily absent. His life is not entirely dominated by his fantasy and there are times when he can make contact with reality and can discuss things in a reasonably normal way. As a possibility the written confession made by Boyd Sinclair might be the product of a delusion without any basis of fact. Without comparison with external facts a psychiatrist has no means of telling whether a statement made by a schizophrenic is based upon fact or fantasy, unless it is irrational or too improbable on the face of it. Self-accusation may result from several types of mental disorder including schizophrenia and it does occur, but not with great frequency. Exaggerated, stilted and unusual phraseology is characteristic of schizophrenics. They tend to dramatize themselves, imagining that they are the centre of some event in which they have in fact played no part.

The learned judge admitted the confessional statements in evidence and, in his charge, put the question of their reliability to the jury.

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He also submitted to the jury the question whether, if the jury were satisfied that Boyd Sinclair killed the taxi driver, he was insane at the time, although the defence of insanity had not been set up by counsel. The jury returned a verdict of guilty.

It was not contended in this Court that, if the confessional statements were rightly admitted in evidence, any ground remains upon which the verdict can be set aside. The case is, therefore, reduced to the question whether a confession is admissible as evidence upon a criminal trial when it appears that the prisoner making it was at the time of unsound mind and by reason of his mental condition was liable to confuse the products of his disordered imagination or fancy with fact. By "liable" I mean that to do so is a recognized incident of his abnormal mental condition which might or might not occur. There is little or no authority in England governing the question and none, I believe, in this country. It must, therefore, be decided by reference to principles or considerations of a general nature. There are, I think, three possible sources of analogy to which we might resort.

In the first place, it might be considered reasonable to compare the question with that which arises when a witness is tendered who proves to be insane and the court is called upon to consider whether he is competent to testify. If a confession is regarded as a medium of proof, that is, a narrative of relevant facts by a narrator who need not appear before the Court as a witness on oath because the self-incriminatory nature of his statement is sufficient assurance of its probable truth, then the tests of his competence to make the confession may be assimilated to the tests of the competence of witnesses to testify.

In the second place, it is perhaps a tenable view that a confession out of court should be regarded as on the same footing as, or a similar footing to, a formal confession in court by a plea of guilty to an indictment. If so, the analogy would be found in the tests of the competence of a prisoner who is arraigned to plead to the indictment.

In the third place, it is possible to find in some of the basal considerations which have been assigned as explanations or justifications for the exclusion of confessions held not to be voluntary grounds for concluding that a confession to be admissible must be the volitional product of a sound mind. It might, perhaps, be said that, just as in contract consent is made unreal not only by duress but also by a certain degree of unsoundness of mind, so the voluntariness of a confession is made unreal by unsoundness of mind, as well as by intimidation and by threats or promises of advantage in relation to the charge held out by a person in authority. It might

also be suggested that, if such threats and promises destroy the presumption of truth which is the foundation of the admissibility of confessions and other admissions by a party, so must mental infirmity of a kind likely to affect the motives of the confessionalist or his capacity to distinguish real events from what he has conjured up.

But, to whichever of these analogies we may go for assistance we must recognize that at bottom the choice is between the course of placing before the jury material which bears upon the case, leaving them to judge of its reliability and probative value, and the course of withholding it from them on the ground that there is too much danger in their taking into consideration matter which by reason of its source or provenance is prima facie dubious and untrustworthy.

None of the three foregoing possible analogies appears to be close or to provide sufficiently direct guidance.

A witness appears personally before the court. The judge and, if his evidence is taken, the jury have a good opportunity of judging for themselves how far his mental condition affects his reliability as a witness of the particular facts which he is called to prove. Since *R.* v. *Hill* (1) an insane person is not rejected as a witness unless his form of derangement is such as to affect his testimony on the particular facts or class of matter to which he is to depose. It is probably true that his competence may be displaced by mental defects which negative his capacity for observation or destroy his recollection or make it impossible to know whether what he says is in any way related to real experience. But no very rigid test has been laid down and the question of the competence of an insane person as a witness is left very much to the observation and good sense of the judge before whom he personally appears when called (cf. *District of Columbia* v. *Armes* (2)).

In the principle that what is to be considered is the competence of the witness *in hac re* and not at large some guidance may be found. For it suggests that, at all events, the inquiry into a confessionalist's competence should be directed to the class of facts the subject of the confession or, if other circumstances affecting the validity of the confession are suggested, to the relation to them of his mental condition. Such other circumstances might, for instance, consist in some response to pressure or to other influences to which a sane person would not respond.

In the present case there is no element of this kind and the case is, perhaps, singular in the fact that it turns altogether on the mental state of the person making the confession ; neither intimidation nor pressure nor promise nor threat forms a contributing element.

(1) (1851) 2 Den. 254 [169 E.R. 495]. (2) (1883) 107 U.S. 519 [27 Law. Ed. 618].

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The possible analogy from the situation arising when an insane person is arraigned does not, on examination, supply much help. The matter is discussed in *Pope* on *Lunacy*, 2nd ed. (1890), Bk. III., ch. 2; in *R.* v. *Pritchard* (1); *R.* v. *Berry* (2); *R.* v. *Governor of Stafford Prison*; *Ex parte Emery* (3) and in *R.* v. *Lee Kun* (4).

Again some emphasis is placed upon the opportunity given to the jury trying the issue of judging the condition of the man before them. The matters to be considered are whether the form of insanity of the prisoner arraigned allows him to comprehend the course of the proceedings so as to make a proper defence, to challenge any juror to whom he may wish to object and to comprehend the details of the evidence. It does not seem to have been noticed by the text writers how high a degree of intelligence this test might demand if it were literally applied. But in none of the cases or treatises apparently is the matter discussed on the footing that a plea of guilty may be tendered by the prisoner whose sanity is in doubt. That he will undergo a trial is assumed. Probably this is because of the traditional practice of questioning such a plea when there is any doubt about it and taking measures to secure the substitution of the entry of a plea of not guilty. But the result is that little light is to be obtained upon the degree or kind of mental competence required as a condition of receiving a confession of guilt.

Counsel for the applicant placed his reliance on the third suggested analogy, finding support for his contention in the reasons which have been given to explain the English rules concerning the inadmissibility of confessions if not voluntary.

Confessions, like other admissions out of Court, are received in evidence as narrative statements made trustworthy by the improbability of a party's falsely stating what tends to expose him to penal or civil liability. A ground that has been assigned for rejecting confessions that are not "voluntary" is, in effect, that the circumstances negative this improbability. "The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed" (*R.* v. *Court* (5), per *Littledale* J.). This was the justification for the presumption worked out at common law by which a threat or promise in relation to the charge held out by a person in authority brought a consequential confession under the heading of an involuntary statement. The

(1) (1836) 7 Car. & P. 303 [172 E.R. 135].
(2) (1876) 1 Q.B.D. 447.
(3) (1909) 2 K.B. 81.
(4) (1916) 1 K.B. 337, at pp. 341, 342.
(5) (1836) 7 Car. & P. 486, at p. 487 [173 E.R. 216].

argument is that to be admissible evidence of a confession must be an expression of the independent will of the confessionalist and, moreover, must derive from the circumstances in which it is made that assurance of trustworthiness which the law finds in the improbability of a false admission being made of incriminating facts. If the mind is unsound and its infirmity disables the person confessing from distinguishing between reality and unreality, how, it is asked, can these conditions be fulfilled? The argument appears to me to press too far the supposed logical basis of the exclusion of "involuntary" confessions. "The rule which excludes evidence or statements made by a prisoner, when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of policy. 'A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it' (*R.* v. *Warickshall* (1)). It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice: *R.* v. *Baldry* (2). Accordingly, when hope or fear was not in question, such statements were long regularly admitted as relevant, though with some reluctance and subject to strong warnings as to their weight" (*Ibrahim* v. *The King* (3), per Lord *Sumner*. Even *O. W. Holmes* J. considered that the rule had been carried very far: *Commonwealth* v. *Chance* (4)).

In Canada the effects of addiction to opium have not been considered to disqualify a Chinaman deprived of the drug of his competence to confess (*The King* v. *Lai Ping* (5)).

On the other hand, a confession obtained after the use of hypnotic suggestion has been rejected in Alberta as inadmissible because not voluntary (*R.* v. *Booher* (6)).

In the United States the general rule is that an insane person is not necessarily incompetent to make a confession. The rule there prevailing is stated in a passage I shall quote from the reasons given by the Supreme Court of Massachusetts in *Commonwealth* v. *Zalenski* (7). In that case the prisoner who had made the confessional statements was described as a defective delinquent of dangerous and irresponsible type, not capable in a normal way of appreciating the distinction between right and wrong as to the act he had committed, the killing of a girl. The passage from the judgment is as follows:

(1) (1783) 1 Leach 263 [168 E.R. 234].
(2) (1852) 2 Den., at p. 445 [169 E.R., at p. 574].
(3) (1914) A.C., at pp. 610-611.
(4) (1899) 174 Mass. 245, at p. 249.
(5) (1904) 8 Can. Cr. Cas. 467.
(6) (1928) 4 D.L.R. 795.
(7) (1934) 287 Mass. 125, at pp. 128, 129.

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—"There was no error in the admission of testimony as to the confession and admissions made by the defendant . . . No inducements were held out to him to make it. . . .

This testimony was not rendered inadmissible by the mental condition of the defendant. The medical evidence falls far short of proving that the mental infirmities of the defendant deprived him of the faculty of consciousness of the physical acts performed by him, of the power to retain them in his memory, and of the capacity to make a statement of those acts with reasonable accuracy. An insane person is not necessarily an incompetent witness: *Kendall* v. *May* (1); *District of Columbia* v. *Armes* (2). A confession made by a defendant more or less under the influence of intoxicating liquor is not inadmissible as evidence unless the degree of intoxication is so great as to deprive him of understanding what he was confessing: *Commonwealth* v. *Howe* (3). In refusing to sustain an argument that testimony was inadmissible of conversations with a defendant recently recovered from a fit of delirium tremens, it was said by the court speaking through *Holmes* C.J. in *Commonwealth* v. *Chance* (4): 'We have no disposition to make the rule of exclusion stricter than it is under our decisions. It goes to the verge of good sense, at least.' The rule prevailing in other jurisdictions is that confessions made by defendants of more or less mental instability arising from intoxication or insanity are admissible in evidence: *State* v. *Feltes* (5); *State* v. *Berberick* (6); *State* v. *Church* (7).

The testimony of the alienists as to the mental and moral deficiencies of the defendant did not warrant a ruling that his confession and admissions were utterly unreliable as a recital of what he did with respect to the homicide. They were rightly received in evidence. Their weight was for the jury."

Though there is only indirect English authority on the subject and that but slight, *W. M. Best* in his book on *Evidence* stated briefly his views, citing the authority mentioned. He wrote:—"Self-harming statements, &c., made by a party when his mind is not in its natural state, ought, in general, to be received as evidence, and his state of mind should be taken into consideration by the jury as an infirmative circumstance. Thus a confession made by a prisoner when drunk has been received; and although contracts entered into by a party in a state of total intoxication are void, it is otherwise where the intoxication is only partial, and not sufficient to prevent

(1) (1865) 10 Allen 59, at p. 64.
(2) (1883) 107 U.S. 519 [27 Law. Ed. 618].
(3) (1857) 9 Gray 110, at p. 112.
(4) (1899) 174 Mass. 245, at p. 249.
(5) 51 Iowa 495, at p. 497.
(6) 38 Mont. 423, at pp. 442-448.
(7) 199 Mo. 605, at pp. 632-634.

his being aware of what he is doing. So what a person has been heard to say while talking in his sleep seems not to be legal evidence against him, however valuable it may be as indicative evidence; for here the suspension of the faculty of judgment may fairly be presumed complete": *Best* on *Evidence*, 12th ed. (1922), p. 460, par. 529. He cites *R.* v. *Spilsbury* (1) and *Gore* v. *Gibson* (2) as to intoxication.

The suggestion that the complete suspension of the faculties as by sleep makes what is said inadmissible perhaps covers the case in Alberta of hypnotism.

The tendency in more recent times has been against the exclusion of relevant evidence for reasons founded on the supposition that the medium of proof is untrustworthy, in the case of a witness, because of his situation and, in the case of evidentiary material, because of its source. The days are gone when witnesses were incompetent to testify because they were parties or married to a party, because of interest, because of their religious beliefs or want of them or because of crime or infamy. We now call the evidence and treat the factors which formerly excluded it as matters for comment to the tribunal of fact, whose duty it is to weigh the evidence. It must be remembered that the rules relating to the presumptive involuntariness of confessions were developed at a time when the incompetency of witnesses on such grounds was a matter of daily inquiry and, moreover, when the prisoner could not testify. These are all considerations against extending the principle upon which confessions resulting from intimidation or from a threat made or promise given in reference to the charge by a person in authority are excluded as involuntary to cases of insanity where the will may be affected or there may be a liability to confuse the data of experience with those of imagination, so that such factors without more would be enough to exclude a confession.

It is hardly necessary to say that, where there has been pressure or other inducement, the mental condition of a person purporting to confess invalidates his confession as evidence. That objection, in my opinion, cannot be sustained unless a description or degree of derangement is shown much more destructive of the possibility of safely using the confession as a circumstance tending to prove the criminal acts.

Boyd Sinclair's mental state did not disable him from observing, appreciating, recollecting and recounting real occurrences, events or experiences. The fact that his mind, in its schizophrenic state,

(1) (1835) 7 Car. & P. 187 [173 E.R. 82].

(2) (1845) 13 M. & W. 623 [153 E.R. 260].

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may have been stored with imaginary episodes and with the memory of unreal dramatic situations would, of course, make it impossible to place reliance upon his confessional statements as intrinsically likely to be true. The tendency of his mental disorder to dramatic and histrionic assertion formed another difficulty in attaching an inherent value to what he said. But it is to be noticed that his condition did no more than make it possible that the source of any confessional statement made, lay in these tendencies. His was not a case in which it could be said that the higher probability was in favour of his confession of such a crime being the product of imagination. Reason suggests that in such circumstances it is for the tribunal of fact to ascertain or verify the factual basis of the statements of a man in such a mental condition by comparing their contents with the independent proofs of the circumstances and occurrences to which they relate. It happens that external facts independently proved do supply many reasons for supposing that the confessional statements made by Boyd Sinclair were substantially correct. Though this consideration is not relevant to the question of the legal admissibility of such statements, it provides an example of the inconvenience or undesirability of a rule of rigid exclusion.

It may be conceded that a confession may in fact be made by a person whose unsoundness of mind is such that no account ought to be taken of his self-incriminating statements for any evidentiary purpose as proof of the criminal acts alleged against him. In such a case it might properly be rejected. It is enough in the present case to say that I do not think that Boyd Sinclair's derangement was such as to place his confessional statements in that category. His mental condition was not shown to be inconsistent with any standard or criterion we should adopt as the test of admissibility in evidence of confessional statements. A confession is not necessarily inadmissible as evidence upon a criminal trial because it appears that the prisoner making it was at the time of unsound mind and, by reason of his mental condition, exposed to the liability of confusing the products of his disordered imagination or fancy with fact.

After *Cornelius* v. *The King* (1), it is, perhaps, unnecessary to add that for the purpose of ruling whether a confession is or is not inadmissible by reason of the insanity of the person making it, the judge at the trial must decide all matters of fact as well as any question of law and, if necessary, he must for that purpose take evidence upon the *voir dire*. Once he admits the confession in evidence, it is for the jury to place upon it what reliance they think proper in all the circumstances, after receiving appropriate directions from the judge.

(1) (1936) 55 C.L.R. 235.

The correct course was followed at the trial in this case.

For the reasons I have given I think that the application on the part of Boyd Sinclair should be refused.

McTIERNAN J. In my opinion this application for special leave to appeal should be refused.

The question which is raised by the application is whether the confessions made by the accused were admissible in evidence. The decision of the question whether any evidence is admissible rests with the trial judge. In New South Wales the admissibility of a confession is governed by s. 410 of the *Crimes Act* 1900-1929 (N.S.W.) and the common law (*Attorney-General (N.S.W.)* v. *Martin* (1)).

The question therefore is whether, according to the principles of common law, the learned trial judge erred in admitting the confessions in evidence.

At common law a confession is not admissible unless it is shown to be a voluntary confession : the burden of proving that a confession is voluntary is upon the prosecution : and the decision of the question, although one of fact, rests with the trial judge (*Ibrahim* v. *The King* (2) ; *R.* v. *Thompson* (3)).

" 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 " : *Cornelius* v. *The King* (4).

At common law, a confession is not deemed to be a voluntary confession if the accused was induced to make it by improper means. It is not necessary now to state what are means which the common law regards as improper. It is not suggested that the confessions were obtained from the accused by any such means. The confessions were voluntary in the sense that they were not obtained by force, or fear or by any improper promise (See *Ibrahim* v. *The King* (5) ; *Best* on *Evidence*, 9th ed. (1902), par. 551 ; *Halsbury's Laws of England*, 2nd ed., vol. 9, p. 203).

The ground of the reception of a voluntary confession is " the presumption that no person will voluntarily make a statement against his interest unless it be true." The ground of the rejection of a confession which is not voluntary is " the danger that the prisoner may be induced, by hope or fear, to criminate himself falsely " : *Phipson* on *Evidence*, 3rd ed. (1902), p. 227. " Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and

(1) (1909) 9 C.L.R. 713.
(2) (1914) A.C., at pp. 609, 610.
(3) (1893) 2 Q.B. 12.
(4) (1936) 55 C.L.R., at p. 249.
(5) (1914) A.C., at p. 609.

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voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as evidence of guilt, that no credit ought to be given to it; and therefore it is rejected" (*Warickshall's Case* (1)). *Campbell* C.J. said in *R.* v. *Scott* (2): "It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because, under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon." It follows, I think, that if it is alleged that a voluntary confession is not entitled to any credit and the trial judge is asked not to admit it in evidence upon that ground, the burden of proving the allegation is upon the defence.

It was alleged in the present case that the confessions were as untrustworthy as if they were involuntary confessions because of the mental condition of the accused which, it was said, prevented him from distinguishing between fact and fancy in giving a narration of his conduct. But the evidence does not deny that the accused was capable of giving a true account of his conduct. I think that the burden was on the defence to prove that at the time the accused made each confession he was not rational enough to make a true confession. Cf. *Best* on *Evidence*, 12th ed. (1922), p. 126, par. 133. After reading the evidence on this issue I think that it was not affirmatively proved that the accused was not competent to make a true confession. At best the evidence left the question *in dubio*. The learned trial judge was not in error in admitting the confessions in evidence: Cf. *R.* v. *Hill* (3) and *R.* v. *Spilsbury* (4). It was within the province of the jury to estimate the credit due to the confessions according to the circumstances of the case, and these circumstances included the mental condition of the accused.

Application for special leave to appeal from the Court of Criminal Appeal refused.

Solicitor for the applicant, *W. H. Clark.*

Solicitor for the respondent, *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.

(1) (1783) 1 Leach, at pp. 263, 264 [168 E.R., at pp. 234, 235].
(2) (1856) Dears. & Bell 47, at p. 58 [169 E.R. 909, at p. 914].
(3) (1851) 2 Den. 254 [169 E.R. 495].
(4) (1835) 7 Car. & P. 187 [173 E.R 82].