

Latham C.J.,  
Dixon and  
Williams J.J.



H. C. OF A. APPLICATION for special leave to appeal from the Court of Criminal  
1948. Appeal of New South Wales.

McDERMOTT Frederick Lincoln McDermott was convicted on 26th February  
v. 1947 upon a charge of murdering one William Henry Lavers at  
THE KING. Grenfell on 5th September 1936. Lavers conducted a roadside  
store about twelve miles distant from Grenfell and from petrol  
pumps erected in front of the store supplied petrol to passing motor  
drivers. Early on the morning of Saturday, 5th September 1936,  
wearing his working clothes and slippers, he proceeded to feed some  
horses owned by him. He was not seen again. About two hours  
later blood was noticed on and about one of the petrol pumps and  
blood and hair was on the pump's detachable handle. Recently-  
made marks were discernible of a car which appeared to have been  
drawn up at the pump. There was evidence from which it might  
be concluded that McDermott and another man named McKay, who  
were engaged in shearing at various places in the neighbourhood,  
had driven in a ramshackle car along the road past Lavers' store to  
a camping reserve and that they had returned very early on the  
morning of 5th September. On 15th December 1944, McDermott  
was questioned by the police and a written statement was obtained  
from him which was concerned substantially with the movements of  
McDermott and others between 5th and 8th September 1936, and  
their use of an old car. The police continued to make exhaustive  
investigation and by October 1946 material had been collected  
which pointed to McDermott being the murderer or one of the  
murderers. On 10th October 1946, four detectives saw McDermott  
at Dubbo and having decided to charge him with the murder of  
Lavers, took him to the police station. After having been cautioned  
that he need not answer any questions, and that anything he said  
might be given in evidence, he was questioned for a period of  
approximately one hour. He was asked whether during a quarrel  
between him and a woman called Florrie, who was living with him  
as his wife, and which quarrel had occurred in the presence of another  
named woman, Florrie had accused him of killing Lavers, cutting  
up his body and burying it in the sheep yards. McDermott said,  
"Yes, she is always saying that to me." The police then asked  
"Did you then say 'I killed Lavers, I hit him on the head with the  
bowser handle, we had no money to pay for the petrol. We took  
him away in the car and buried him in the sheep yards at Gren-  
fell'?" to which McDermott answered, "Yes, if I had not said  
that I would not be here now." McDermott was asked, "Is it true  
that you said to a man named Holland that you had killed Lavers  
and disposed of his body?" to which he replied, "Yes, but if



Florrie had kept her mouth shut I would not be here now. Have you seen McKay ? ” A detective said, “ Yes ”. McDermott said, “ Did he say I did it ? ” and the detective replied, “ No he did not say that, but if you were concerned with the murder of Lavers as you have said will you tell me now what was done with the body ? ” McDermott said, “ I won’t say any more now.” He was then charged with the murder of Lavers. At the trial the evidence of what took place at this interview was objected to but it was admitted by the trial judge, *Herron J.*, who said that an examination by police of an accused person after his arrest was not inadmissible as a matter of law and the statements made by the accused on such an interrogation were not inadmissible provided that they were voluntarily made. The trial judge further said that that did not end his function because he had a discretion for the exercise of which he must make well-defined inquiries. He found that (i) a proper caution had been administered to McDermott before the questions were asked ; (ii) he was not unwilling to be questioned and make an answer ; (iii) there was no insistence or pressure by the police officers ; and (iv) the matters inquired about pertained to an investigation by the police and it was an investigation of an event which had occurred ten years before. In his opinion there was nothing in the actual questioning which should cause him to exclude the evidence of the confessional statements.

McDermott was convicted.

An appeal by him on the ground that the evidence of what took place at the above-mentioned interview should not have been admitted, was, by a majority, dismissed by the Court of Criminal Appeal (*Davidson* and *Street JJ.*, *Jordan C.J.* dissenting) (*R. v. McDermott* [No. 2] (1) ; see also *R. v. McDermott* [No. 1] (2) ).

McDermott applied for special leave to appeal from that decision. Further material facts appear in the judgments hereunder.

*Barwick K.C.* (with him *Vizzard*), for the applicant. The Court below has decided : that there are cases where although a statement of an accused is not inadmissible, the trial judge ought, in his discretion, to reject it : see *Ibrahim v. The King* (3) ; that that Court has jurisdiction to, and in a proper case should, review the exercise by a trial judge of his discretion : see *Cornelius v. The King* (4) ; that in the present case, apart from the confessions, the evidence was either insufficient in law to support a conviction, or at least such

H. C. OF A.

1948.

McDERMOTT

v.

THE KING.

(1) (1947) 47 S.R. (N.S.W.) 407 ; 64 W.N. (N.S.W.) 104.

(2) (1947) 47 S.R. (N.S.W.) 379 ; 64 W.N. (N.S.W.) 91.

(3) (1914) A.C. 599, at p. 614.

(4) (1936) 55 C.L.R. 235, at pp. 241, 247-249.



H. C. OF A.  
 1948.  
 }  
 McDERMOTT  
 v.  
 THE KING.

as ought not to be found sufficient ; that the police officers, having formed the belief that probably he was guilty, arrested the applicant with the intention of charging him with the crime of murder ; that after his arrest the police officers took the applicant to a police station although they had full opportunity of taking him to a magistrate then available ; that for the space of one hour they there cross-examined him with a view to obtaining from him damaging admissions and, in particular, admissions which would serve to obviate the calling of a witness who was unreliable. This is a case of cross-examination by police officers of an accused person in unlawful custody with a sole view to obtaining from him damaging admissions as to relevant matters. The Court below also decided that the Judges' Rules, set forth in *R. v. Jeffries* (1) are not rules of law and are not operative in New South Wales ; that they are not criteria of "fairness" or "policy" the breach of which calls for the exercise of the discretion to exclude otherwise admissible evidence ; and that the only evidence which so affects an accused person in fact is where he is incapable of appreciating what he is asked, or of doing justice to himself. The majority of the members of the Court below have not appreciated the position. In a case of this nature the trial judge has a discretion to reject evidence and the Court of Criminal Appeal has power to review the exercise of that discretion. In this case, apart from the evidence objected to, there was insufficient evidence to sustain a conviction. Upon his arrest the applicant should have been taken by the police officers to the nearest available magistrate instead of to the police station. The subsequent cross-examination by the police while he was in unlawful custody was made for a wrong purpose and was improper. The common law doctrine as to exclusion of confessions was not founded upon nor concerned with the likelihood of falsity or unreliability of the confession, nor with questions of whether the accused subjectively understood what he was asked or was able to do himself justice. The doctrine was founded upon broad policy (*Ibrahim v. The King* (2) ). The modern rule—perhaps not as yet fully developed or stated—is that, in the discretion of the trial judge, a confession may be rejected on grounds which do not depend on the breach of the Judges' Rules (*R. v. Jeffries* (3) ; *Ibrahim v. The King* (4) ). Even though they have not the force of law in England or in New South Wales, the Judges' Rules, with their explanations, afford sound, but not exclusive, criteria of propriety

(1) (1946) 47 S.R. (N.S.W.) 284, at pp. 291-293.

(2) (1914) A.C., at p. 611.

(3) (1946) 47 S.R. (N.S.W.), at p. 292.

(4) (1914) A.C., at p. 614.



and fairness in police dealings with accused persons (*R. v. Jeffries* (1); *R. v. Treacy* (2); *R. v. Mills and Lemon* (3)). Unless restrained by statute both policy and need for uniformity require that the Courts should regard breach of those rules as calling for rejection of evidence thus obtained. There is no more reason for limiting the power of rejection to those cases in which the accused is reduced to an irresponsible state than there is for limiting the rejection of confessions to cases where the accused has in fact been misled into making a false, or probably false, confession (*Ibrahim v. The King* (4)). Cross-examination, as distinguished from interrogation, after arrest and before charge to obtain damaging admissions should be visited with the exclusion of the evidence thus obtained (*R. v. Knight and Thayre* (5); *Lenthall v. Curran* (6); *R. v. Brown and Bruce* (7)). Unless this be done then in every case a nice question will arise as to whether the cross-examination was evidence or unfair, thus introducing uncertainty (*R. v. Treacy* (8); *R. v. Gardner and Hancox* (9); *R. v. Booth and Jones* (10); *R. v. Matthews* (11); *R. v. Mills and Lemon* (12); *Halsbury's Laws of England*, 2nd ed., vol. 9, p. 207, note). Such a case of cross-examination is to be distinguished from interrogation before arrest directed to the gathering of information or to offering an opportunity for exculpation (*R. v. Knight and Thayre* (5); *Lenthall v. Curran* (6)) and is also to be distinguished from questions in a leading form in pre-arrest questioning (see *Bales v. Parmeter* (13)). The inability of the magistrate to conduct such a cross-examination is a much more potent reason in that case than in the case of pre-arrest interrogation. Theoretically the individual should be brought before a magistrate with despatch and there should not be any available interval in which to conduct such a cross-examination. This case is distinguishable from *R. v. Jeffries* (14) where the questions by the police were directed to ascertaining whether a crime had been committed.

H. C. OF A.  
1948.

McDERMOTT

v.  
THE KING.

*Crawford K.C.* (with him *Tonking*), for the Crown. The law is correctly stated in the majority judgments in *R. v. Jeffries* (15).

- (1) (1946) 47 S.R. (N.S.W.), at p. 293.
- (2) (1944) 2 All E.R. 229, at p. 235; 30 Cr. App. R. 93.
- (3) (1946) 2 All E.R. 776, at p. 778; 32 Cr. App. R. 23.
- (4) (1914) A.C., at pp. 610 et seq.
- (5) (1905) 20 Cox, C.C. 711.
- (6) (1933) S.A.S.R. 248, at p. 260.
- (7) (1931) 23 Cr. App. R. 56.
- (8) (1944) 2 All E.R., at pp. 235, 236; 30 Cr. App. R., at pp. 95, 96.
- (9) (1915) 11 Cr. App. R. 265.

- (10) (1910) 5 Cr. App. R. 177.
- (11) (1919) 14 Cr. App. R. 23.
- (12) (1946) 2 All E.R., at p. 278; 32 Cr. App. R. 23.
- (13) (1935) 35 S.R. (N.S.W.) 182, at p. 189; 52 W.N. 41, at p. 43.
- (14) (1946) 47 S.R. (N.S.W.) 284; 64 W.N. 71.
- (15) (1946) 47 S.R. (N.S.W.), at pp. 299-304, 309-314; 64 W.N. 71, at pp. 74-78.



H. C. OF A. The trial judge heard argument on the *voir dire* respecting the admission of the evidence of the interview which is attacked, and held that the principles respecting the admissibility of statements by an accused person were observed in this case. The questions asked by the police were the result of fresh information received by them since the interview they had had with the applicant two years before. Those questions were asked in a spirit of complete fairness, and the operation of the caution was fully realized by the applicant. The statements were made voluntarily and did not transgress either s. 410 of the *Crimes Act* 1900 (N.S.W.) or the common law. There was not any cross-examination.

1948.

McDERMOTT

v.

THE KING.

*Cur. adv. vult.*

Sept. 22.

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 in New South Wales. The applicant, Frederick Lincoln McDermott, was convicted of murdering one William Henry Lavers on 5th September 1936. At the trial before *Herron J.* evidence was admitted of answers given by McDermott to questions by police officers while he was in custody. He was asked whether he had said to certain persons that he had killed Lavers. He admitted that he had said so. It was not suggested that there had been any promises or threats or any violence or fraud or pressure on the part of the police. Objection was taken at the trial to the admission of this evidence because the statement was made by the accused while he was in custody and because, it was said, it was obtained by what was described as “cross-examination.” The Court of Criminal Appeal (*Davidson* and *Street JJ.*, *Jordan C.J.* dissenting) dismissed the appeal and an application is now made to this Court for special leave to appeal.

In this case we have to consider only the law of New South Wales. The law in Victoria, for example, is different (*Cornelius v. The King* (1)).

In *R. v. Jeffries* (2) it was held that a verbal confession made to police officers by an accused person while he was in custody was admissible, but that the trial judge had a discretion to reject a confession or other incriminating statement made by the accused if, though the statement could not be held to be inadmissible as evidence, in all the circumstances it would be unfair to use it in

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

(2) (1946) 47 S.R. (N.S.W.) 284; 64 W.N. 71.



evidence against him. Examples of such unfairness would be afforded by irresponsibility of the accused on the occasion when the statement was made or failure on his part to understand and appreciate the effect of questions and answers. Special leave to appeal to this Court was refused in *Jeffries' Case* (1). We are now asked to reconsider the decision in *Jeffries' Case* (1). In view of *Ibrahim v. The King* (2); *Hough v. Ah Sam* (3) where *R. v. Roger-son* (4) was expressly approved, and *R. v. Voisin* (5) I see no reason for reconsidering the decision in *Jeffries' Case* (1) that the rules of the common law and the *Crimes Act* 1900 (N.S.W.), s. 410, do not render statements by a person inadmissible simply because he was in custody at the time when he made the statement. The rules of the common law requiring that a statement made to a person in authority by a person who is actually charged or is about to be charged with the commission of a crime must be shown to be voluntary before it can be admitted in evidence provide extensive protection to an accused person.

It was further argued that at least there was a rule that persons in custody should not be "cross-examined." The authority for this contention was found in Rule 7 of what are known as the Judges' Rules 1912, which may be found in *Archbold on Pleading, Evidence and Practice in Criminal Cases*, 31st ed. (1943), p. 370; *Phipson on Evidence*, 8th ed. (1942), p. 251, and *R. v. Jeffries* (6). Rule 7 is in the following terms:—"A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said." The Judges' Rules are not rules of law, even in England: *R. v. Voisin* (7). The reference in the Judges' Rules to cross-examination is a reference to cross-examination about a voluntary statement which a prisoner has already made. The questions which were asked in the present case were not cross-examination in this sense. Thus even if those rules were binding as rules of law, they do not in this case support the arguments of the applicant.

In my opinion the application should be refused.

DIXON J. This is an application for special leave to appeal from an order of the Supreme Court of New South Wales sitting as a Court of Criminal Appeal. The order, which was made by *Davidson*

H. C. OF A.  
1948.

McDERMOTT  
v.  
THE KING.  
Latham C.J.

(1) (1946) 47 S.R. (N.S.W.) 284; 64 W.N. 71.

(2) (1914) A.C. 599, at pp. 611 et seq.

(3) (1912) 15 C.L.R. 452.

(4) (1870) 9 S.C.R. (N.S.W.) 234.

(5) (1918) 1 K.B. 531, at pp. 538, 539.

(6) (1946) 47 S.R. [(N.S.W.)], at p. 292.

(7) (1918) 1 K.B. 531.



H. C. OF A.  
1948.  
MCDERMOTT  
v.  
THE KING.  
DIXON J.

and *Street JJ.*, *Jordan C.J.* dissenting, dismissed an appeal by a prisoner from a conviction of murder. The notice of motion in this Court was not given until nearly fifteen months after the decision of the Supreme Court. This fact ought not to pass unnoticed, because, although it has not affected the Court's decision upon the present application, delay is a matter to be taken into consideration when special leave is sought and it is not difficult to imagine cases in which it might prove a determining factor.

The ground upon which reliance is placed in support of the application is that at the trial certain confessional statements to the police attributed to the prisoner ought to have been excluded but were admitted in evidence by the learned judge who presided, *Herron J.*

The prisoner was convicted on 26th February 1947 upon a charge of murdering one William Henry Lavers at Grenfell on 5th September 1936. Lavers was a farmer who conducted a roadside store about twelve miles outside Grenfell on the road to Forbes. In front of the store were some petrol pumps or bowzers from which he supplied petrol to passing motor drivers. On the morning of Saturday, 5th September 1936, he rose about a quarter to six, dressing in his working clothes and wearing slippers. He said he would feed the horses. He was not seen again. A couple of hours later it was noticed that there was blood on a petrol bowser and upon the cement where it stood and blood and hair upon the detachable pump-handle belonging to the bowser. The hose pipe was lying on the ground. There were the fresh marks of the wheels of a car that appeared to have drawn up at the bowser. The theory was formed that the deceased had been called to supply a passing car with petrol and that the occupant or occupants of the car had attacked him, possibly because they could not pay him, and had carried away his senseless or lifeless body in their car. Evidence was given at the trial from which the jury might conclude that the prisoner and another man, named McKay, had driven in a ramshackle car on the previous day, 4th September, from somewhere near Forbes along the road past the deceased's store to a camping reserve five miles beyond it and that they had returned very early on the morning of 5th September. They were engaged in shearing at various places in the vicinity. On 15th December 1944 the police questioned the prisoner and obtained a written statement from him. He had been living with a half-breed Maori woman named Florrie Hampton and leading a nomadic existence. It appeared that in bouts of intoxication she became excited and



abusive and in that state had been heard to accuse the prisoner of having killed Lavers for a few drops of petrol. The statement, which was received in evidence, is concerned for the most part with the manner in which the prisoner's movements were to be accounted for at and about the time of Lavers' disappearance, but portion of it deals with these accusations of Florrie Hampton and explains them as drunken abuse suggested by the fact that the prisoner had told her that McKay had been questioned about the matter. But at the trial evidence was given by one witness of a drunken altercation between Florrie Hampton and the prisoner in which the latter appeared to admit participation in the crime. In response to her repeated allegations that the prisoner had murdered Lavers, had driven to a reserve, and had cut up his body and buried it in some sheep yards, the prisoner replied, according to this testimony, that he was not the main one, that "Scotty" hit him first, that the prisoner hit him with the handle. Another witness of a similar altercation ascribed to the prisoner a statement that of course he did as Florrie stated, repeating her words. No doubt the interpretation of this reply was for the jury but it reads more like a piece of sarcasm than an acknowledgment of guilt.

In the meantime, on 10th October 1946 the police had taken the prisoner to the police station at Dubbo and there questioned him. He was then charged with murder. The evidence of what took place at this interview was objected to, but it was admitted. The application for special leave turns upon the propriety of admitting it in evidence.

Shorthand notes were taken at the interview of what was said and with these before him the policeman who took them gave an account of what occurred. At the beginning the detective in charge informed the prisoner that since their previous interview many inquiries had been made and said that he wanted to tell the prisoner now that he was not obliged to say anything or answer any questions, as anything he said might be used in evidence. To this the prisoner replied that he understood and knew that as far as he was concerned it was a serious matter. After that the detective addressed to him a series of questions concerning his movements from 5th to 7th September 1936 and subsequently. He began by dealing with two cheques the prisoner had received bearing those respective dates. They might have proved material in fixing his movements. These questions took the form of simple inquiries as to facts and circumstances. There is nothing to suggest an attempt to obtain answers prejudicial to the prisoner, or answers which

H. C. OF A.  
1948.

McDERMOTT  
v.  
THE KING.  
Dixon J.



H. C. OF A.  
1948.  
McDERMOTT  
v.  
THE KING.  
Dixon J.

confirmed the detective's opinion or suspicions, or to insist on a reply or to beguile or entrap the prisoner. After he had dealt with the subject of his movements the detective put one or two other questions. He then turned to the prisoner's replies to Florrie Hampton's statements, made at various times in the presence respectively of three people, two of whom gave evidence, as has already been stated. As to the first person the prisoner was asked whether in his presence he had said to Florrie Hampton that he would do her in the same as the other fellow. To this he answered, "I suppose I did." As to the second person the prisoner was asked whether, in her presence, Florrie Hampton had not said in the course of a quarrel with him, "You killed Lavers, cut his body up and buried it in some sheep yards." The prisoner replied that she was always saying that. He was next asked whether he had not then said, "I killed Lavers for two gallons of petrol, we had no money to pay for the petrol, so I hit him on the head with the crank handle and we put him in the car and drove out to Grenfell to the sheep yards and buried him there." The prisoner replied, "Yes that's what comes of saying too much, if I had not said that, I would not be in this trouble." As to the third person who had heard Florrie Hampton's statements to the prisoner, the detective asked the latter whether in that person's presence he had said he killed Lavers. To this the prisoner replied, "Yes but if Florrie had kept her mouth shut I would not be here now." Then the prisoner asked whether the detectives had seen McKay and whether he had said that the prisoner had done it. After receiving an affirmative reply to the first and a negative reply to the second of these questions, the prisoner, in answer to the next inquiry, which related to the disposal of the body, said that he did not want to say any more then and he declined to make a statement in writing.

The questioning seems to have occupied less than an hour. It is clear enough that the police had decided to lay a charge of murder before the questioning took place, though it was antecedently conceivable that with the aid of the cheques the prisoner might have made a sufficiently plausible case to induce them again to hold their hands. They had not, however, formally arrested him. Four detectives saw him at Dubbo and told him that they wanted him at the police station. He made no demur and they took him there in a police car.

In ruling that the evidence should be admitted *Herron J.* began by saying that an examination by police of an accused person after his arrest is not inadmissible as a matter of law and the statements



made by the accused on such an interrogation are not inadmissible provided that they are voluntarily made. His Honour went on to say that that did not end his function because he had a discretion for the exercise of which he must make well-defined inquiries. *Herron J.* found that (i) a proper caution had been administered to the prisoner before the questions were asked; (ii) he was not unwilling to be questioned and make an answer; (iii) there was no insistence or pressure by the police officers; (iv) the matters inquired about pertained to an investigation by the police and it was an investigation of an event occurring ten years before. He was of opinion that there was nothing in the actual questioning which should cause him to exclude the evidence of the confessional statements.

In considering whether the decision of *Herron J.* to admit the evidence should be sustained it is important to distinguish between the imperative rules of law requiring the rejection of confessional statements unless made voluntarily and the so-called discretion of the court to exclude evidence of such statements if the manner in which they were obtained is considered to have been improper.

The imperative rules of law are founded upon the principles of the common law, but in New South Wales they are in part embodied in a statutory provision: s. 410 of the *Crimes Act* 1900.

At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made. This means substantially that it has been made in the exercise of his free choice. If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made: per *Cave J.* in *R. v. Thompson* (1). The expression "person in authority" includes officers of police and the like, the prosecutor, and others concerned in preferring the charge. An inducement may take the form of some fear of prejudice or hope of advantage exercised or held out by the person in authority (*Ibrahim v. The King* (2); *R. v. Voisin* (3)). That is the classical ground for the

H. C. OF A.

1948.

McDERMOTT

v.

THE KING.

DIXON J.

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

(3) (1918) 1 K.B., at pp. 537, 538.

(2) (1914) A.C., at pp. 609, 610.



H. C. OF A.  
1948.  
McDERMOTT  
v.  
THE KING.  
Dixon J.

rejection of confessions and looms largest in a consideration of the subject. In New South Wales it has been formulated in the statutory provision that has been mentioned—s. 410 of the *Crimes Act*. Possibly that provision extends the common law rule: for it includes untrue representations made to the accused person as well as threats and promises held out to him by persons in authority. By its third sub-section it removes any doubt created by the decisions in *R. v. Drew* (1) and *R. v. Morton* (2) that to tell a prisoner that what he said would be taken down and used for or against him at his trial amounted to an inducement. See however *R. v. Baldry* (3). Section 410 does not derogate from the common law rule, which remains applicable except in so far as the section applies (*Attorney-General (N.S.W.) v. Martin* (4)). The extreme applications which were made at one time of the principle that confessions obtained by the use by persons in authority of hope or fear were inadmissible gave this head of inducement an importance which has tended to obscure other forms of inducement. It is perhaps doubtful whether, particularly in this country, a sufficiently wide operation has been given to the basal principle that to be admissible a confession must be voluntary, a principle the application of which is flexible and is not limited by any category of inducements that may prevail over a man's will.

But, as the prisoner's counsel conceded, it is plain that the present case cannot be brought within the operation of the imperative rules of exclusion, common law and statutory. Certainly the fact that the prisoner was questioned by the police is not enough, even if he were in custody. The warning was given, there was no importunity, no pressure, nothing to overbear the accused man's will.

The application for special leave is based upon the view that the learned judge possessed a discretion to exclude the statements and that he erroneously exercised this discretion in deciding to admit them. The view that a judge presiding at a criminal trial possesses a discretion to exclude evidence of confessional statements is of comparatively recent growth. To some extent the course of its development is traced by Lord Sumner in *Ibrahim's Case* (5). In part perhaps it may be a consequence of a failure to perceive how far the settled rule of the common law goes in excluding statements that are not the outcome of an accused person's free choice to speak. In part the development may be due to the fact that the

(1) (1837) 8 Car. & P. 140 [173 E.R. 433].  
(2) (1843) 2 M. & Rob. 514 [174 E.R. 367].

(3) (1852) 2 Den. 430, at pp. 442, 445 [169 E.R. 568, at pp. 573, 574].  
(4) (1909) 9 C.L.R. 713.  
(5) (1914) A.C., at pp. 611-614.



judges in 1912 framed or approved of rules for the guidance of the police in their inquiries (see *R. v. Voisin* (1) ; *Archbold on Pleading, Evidence and Practice in Criminal Cases*, 28th ed. (1931), p. 406) and not unnaturally have sought to insist on their observance. In part too it may be due to the existence of the jurisdiction of the Court of Criminal Appeal to quash a conviction if the court is of opinion that on any ground whatsoever there was a miscarriage of justice. But whatever may be the cause, there has arisen almost in our own time a practice in England of excluding confessional statements made to officers of police if it is considered upon a review of all the circumstances that they have been obtained in an improper manner. The abuse of the power of arrest by using the detention of an accused person as an occasion for securing from him evidence by admission is treated as an impropriety justifying the exclusion of the evidence. So is insistence upon questions or an attempt to break down or qualify the effect of an accused person's statement so far as it may be exculpatory. The practice of excluding statements so obtained is supported by the Court of Criminal Appeal in England, which will quash convictions where evidence has been received which in the opinion of that Court has been obtained improperly, that is, in some such manner.

It is acknowledged that the rules drawn up by the judges at the request of the Home Secretary as guides for police officers have no binding force upon the courts. "These rules have not the force of law ; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice" (*R. v. Voisin* (1)). Nevertheless the tendency among English judges appears to be strong to treat them as standards of propriety for the purpose of deciding whether confessional statements should be received.

It is apparent that a rule of practice has arisen, deriving almost certainly from the strong feeling for the wisdom and justice of the traditional English principle expressed in the precept *nemo tenetur se ipsum accusare*. It may be regarded as an extension of the common law rule excluding voluntary statements. In referring the decision of the question whether a confessional statement should be rejected to the discretion of the judge, all that seems to be intended is that he should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused. The growth

H. C. OF A.  
1948.

MCDERMOTT  
v.  
THE KING.  
Dixon J.

(1) (1918) 1 K.B., at p. 539.



H. C. OF A. 1948.  
 McDermott v. The King.  
 Dixon J.

of rules of practice and their hardening so that they look like rules of law is a process that is not unfamiliar. It has occurred with the rule relating to cautioning juries to require corroboration of the testimony of an accomplice. This rule, being one of practice, seemed to *Cussen J.* not to bind Victorian Courts. Indeed, he considered it inapplicable (*Peacock v. The King* (1)). *Sed dis aliter visum.*

Australian courts have not entirely accepted nor entirely rejected the English rule or practice with respect to the "discretionary" exclusion of confessional statements obtained "improperly." The State of Victoria, because of s. 141 of the *Evidence Act* 1928, stands perhaps in a special position. "In New South Wales the same strictness has not been observed with respect to the interrogation by a police officer of persons who have been arrested, or whom the officer has decided to arrest, upon a criminal charge": per *Jordan C.J.*, *Bales v. Parmeter* (2); *R. v. Jeffries* (3); *R. v. Hokin* (4). The practice in South Australia has been stated thus by *Napier C.J.*: "Up to the present it has not seemed necessary to the Judges of this Court to insist upon a strict observance of the rules, approved by the Judges in England, for the guidance of the police when interrogating persons in custody or suspected of crime (see *Archbold on Pleading, Evidence and Practice in Criminal Cases*, 26th ed. (1922), p. 390), or to make a general practice of rejecting or discountenancing evidence of answers obtained by the interrogation of persons in custody (See *R. v. Winkel* (5) and *R. v. Brown and Bruce* (6)). In so far as our practice varies in this respect from that of the Courts in England, I think that it has the sanction of the High Court in *Hough v. Ah Sam* (7) and of the Privy Council in *Ibrahim v. The King* (8)" (*Lenthall v. Curran* (9)). As to Queensland see *R. v. Zerafa* (10) and *R. v. Cross* (11).

This Court is now invited to lay it down that the practice now obtaining in England must be followed and in particular that the Judges' Rules must be accepted as a standard of propriety. To do so would be to go beyond the function which this Court so far has exercised in appeals by special leave in criminal matters. No rule of law has yet been established either here or in England imposing either upon the judge at a criminal trial or upon the Court of

(1) (1911) 17 A.L.R. 566, at p. 584.

(2) (1935) 35 S.R. (N.S.W.) 182, at p. 189.

(3) (1946) 47 S.R. (N.S.W.) 284; 64 W.N. 71.

(4) (1922) 22 S.R. (N.S.W.) 280; 39 W.N. 76.

(5) (1911) 76 J.P. 191.

(6) (1931) 23 Cr. App. R. 56.

(7) (1912) 15 C.L.R., at p. 455.

(8) (1914) A.C., at pp. 612, 613, and p. 614.

(9) (1933) S.A.S.R., at p. 260.

(10) (1935) Q.S.R. 227.

(11) (1946) Q.S.R. 65.



Criminal Appeal the duty of rejecting confessional statements if they have been obtained in breach of the "Judges' Rules" or if they have been obtained by questioning the accused after he has been taken into custody or while he is "held," though held unlawfully. In some circumstances the Court of Criminal Appeal may consider that such a method of obtaining admissions implies a miscarriage. A judge at the trial may adopt in advance the same view and reject the statements as improperly procured. But that is all. Here as well as in England the law may now be taken to be, apart from the effect of such special statutory provisions as s. 141 of the *Evidence Act* 1928 (Vict.), that a judge at the trial should exclude confessional statements if in all the circumstances he thinks that they have been improperly procured by officers of police, even although he does not consider that the strict rules of law, common law and statutory, require the rejection of the evidence. The Court of Criminal Appeal may review his decision and if it considers that a miscarriage has occurred it will allow an appeal from the conviction.

H. C. OF A.  
1948.

McDERMOTT  
v.

THE KING.

Dixon J.

But the facts of the present case do not bring it within any rule established in Australia which requires the rejection of the confessional statements complained of. The fact that the police intended to arrest the prisoner, that they virtually held him in custody and delayed for an hour making the charge, and that they asked him questions are not in themselves enough to require that the statements the prisoner made to them should be excluded. The character of the questions, the absence of any insistence or pressure in putting them, the fact that no questions were put directed to breaking down or destroying the prisoner's answers or statements and the fact that there was no attempt to entrap, mislead or persuade him into answering the questions, still less into answering them in any particular way, these are all matters which negative such a degree of impropriety as to require the exclusion of the testimony as to the prisoner's admissions.

Herron J. took all the relevant considerations into account and reached a conclusion in which there appears to be nothing erroneous or unsound.

For these reasons special leave to appeal should be refused.

WILLIAMS J. This is an application for special leave to appeal by one, F. L. McDermott, who was convicted at the sittings of the Central Criminal Court on 26th February 1947 of the murder of W. H. Lavers at Grenfell on 5th September 1936. McDermott



H. C. OF A. 1948. }  
McDERMOTT v. THE KING. Williams J. appealed to the Supreme Court of New South Wales sitting as the Court of Criminal Appeal under the *Criminal Appeal Act of 1912* but his appeal was dismissed by a majority (*Davidson J.* and *Street J.*, *Jordan C.J.* dissenting).  
The ground on which special leave to appeal is sought is that a certain part of a confession was wrongly admitted in evidence at the trial. The confession consisted of a number of answers given by the appellant to questions asked by the police at Dubbo Police Station on 10th October 1946. These questions were asked after the police had decided to arrest the appellant for the murder of Lavers. After the appellant had been cautioned that he need not answer any questions, and that anything he said might be given in evidence, he was asked whether during a quarrel between him and a woman called Florrie, who was living with him as his wife, which occurred in the presence of another woman, Doretta Williams, Florrie had accused him of killing Lavers, cutting his body up and burying it in the sheep yards. The accused said, "Yes, she is always saying that to me." The police then asked, "Did you then say 'I killed Lavers, I hit him on the head with the bowser handle, we had no money to pay for the petrol. We took him away in the car and buried him in the sheep yards at Grenfell'"; to which he answered, "Yes, and if I had not said that I would not be here now." He was then asked whether he would tell the police what he had done with the body but replied that he would not say any more.

A confession can only be admitted in evidence against an accused person if it is proved to the satisfaction of the judge that it is a voluntary confession. In *Phipson on Evidence*, 8th ed. (1942), p. 248, it is stated that in criminal cases a confession made by the accused voluntarily is evidence against him of the facts stated. But a confession made after suspicion has attached to, or a charge been preferred against him, and which has been induced by any promise or threat relating to the charge and made by, or with the sanction of, a person in authority, is deemed not to be voluntary and is inadmissible. This rule of the common law is now embodied in and possibly extended by s. 410 of the *Crimes Act 1900* (N.S.W.). It was not contended that McDermott's confession was inadmissible at common law or under this section.

But it was contended that although a confession may not have been induced by any untrue representation made to the accused or by any threat or promise held out to him by the prosecutor or some person in authority, the court still has a discretion to refuse to admit a confession or part of a confession if in all the circumstances



of the case it would be unfair to admit the evidence against the accused. In *Ibrahim v. The King* (1), Lord Sumner delivering the judgment of the Privy Council referred to this ground "insofar as it is a ground at all" for excluding a confession as a ground of more modern growth. His Lordship then discussed the decisions relating to this ground and made it clear that it is one which leaves the matter to the discretion of the trial Judge "depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case." Under modern conditions the persons who put the questions are almost invariably the police, and in England the Judges Rules lay down for the police rules of conduct the disregard of which will usually lead the presiding Judge to reject the evidence (*R. v. Voisin* (2)). But these rules "are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice." They have not the force of law, even in England, and they certainly do not form any part of the positive criminal law of New South Wales. But I see no reason to doubt the opinion of the Supreme Court that the trial judge may exclude a confession on this modern ground where there are any circumstances which would make it unfair to admit the evidence.

It was contended that the answers of the accused objected to should have been rejected on the ground that they were made in answer to questions put to him not to obtain information but by way of cross-examination. In *R. v. Gardner* (3), *Avory J.*, speaking for Lord *Reading C.J.*, himself and *Lush J.*, said that the "police have been constantly told that a prisoner after being arrested and charged must not be cross examined." But the mere asking by the police of a question which would only be asked in cross-examination at the trial does not, in my opinion, amount to cross-examination of the accused by the police. A cross-examination for this purpose would be an examination intended to break down the answers of the accused to questions put by the police to which they had received unfavourable replies. It might have been unfair for the police to have asked *McDermott* to admit the contents of a conversation which took place in the presence of the woman *Florrie* and *Doretta Williams* if the Crown had not intended to call them as witnesses, and this would have justified the trial judge in excluding the answers. But *Doretta Williams* was called as a witness by the Crown. The woman *Florrie* was not called but as *Davidson J.* pointed out: "She appears to have been a drunken and dissolute person whose evidence

H. C. OF A.  
1948.

McDERMOTT  
v.

THE KING.

Williams J.

(1) (1914) A.C., at p. 610.

(2) (1918) 1 K.B., at pp. 539, 540.

(3) (1915) 114 L.T. 78, at p. 79.



H. C. OF A.  
1948.

McDERMOTT

v.

THE KING.

Williams J.

would be of no value. The appellant's answers to her statements in the presence of other people were the important factors. Furthermore, the appellant accepted throughout the statements of . . . Doretta Williams, who were called as witnesses, as being true, merely claiming that his own agreement with them was of an ironical nature and not true. But this aspect of the matter was one for determination by the jury."

It is manifest from the reasons given by the trial judge for admitting the answers of the accused to the questions of the police with some exceptions that his Honour considered that he had a discretion to reject any of the answers if he was not satisfied that in all the circumstances it would be fair to the accused to admit them. He said that he required to be satisfied that the accused was properly cautioned, that he knew that he need not answer the questions unless he wished to do so voluntarily, that he answered the questions voluntarily, that he was not cross-examined by the police, and that the questions asked were matters pertaining to the investigations by the police. As his Honour said, there are cases in which the border line of fairness is crossed by the police in their zeal to investigate a crime, and in those cases the confession should be rejected. But his Honour held that the present was not such a case and admitted the evidence. The exercise of his discretion was subject to review and was reviewed by the Court of Criminal Appeal. By s. 6 of the *Criminal Appeal Act* that Court is directed to allow the appeal if it is of opinion that on any ground whatsoever there was a miscarriage of justice. There would only necessarily have been such a miscarriage if the appellant had in fact been cross-examined by the police, and it was part of the law of New South Wales that where an accused who has been or is about to be arrested is cross-examined by the police his answers are inadmissible. But, as *Davidson J.* pointed out in *R. v. Jeffries* (1) there is no such law. It is for the trial judge in the exercise of his discretion to see that the questioning was not carried to an improper length, and if it was to exercise his discretion and reject the answers as unfair to the accused, and as having been obtained under such circumstances that to admit them might lead to a miscarriage of justice.

This application is in all substantial respects similar to the application for special leave to appeal in *R. v. Jeffries* (2). On that application this Court, which consisted of five judges, refused special leave to appeal (3). It would be seldom that the circum-

(1) (1946) 47 S.R. (N.S.W.), at pp. 298, 299; 64 W.N., at p. 74.

(2) (1946) 47 S.R. (N.S.W.) 284; 64 W.N. 71.

(3) (1947) 73 C.L.R. 664.



stances would be sufficiently special to justify this Court granting special leave to appeal where, as here, the true basis of the application is that the discretion of the trial judge was wrongly exercised. In the present case, since the matter has been argued at length, I am prepared to say that I see no reason to disagree with the way in which *Herron J.* exercised his discretion.

In my opinion special leave to appeal should be refused.

*Special leave to appeal refused.*

Solicitor for the applicant, *S. G. Watson*, Public Solicitor.

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

J. B.

H. C. OF A.  
1948.

McDERMOTT  
v.

THE KING.

Williams J.