P.C. L.A.R. case memoranda

See 1962 V.L.R. 545
" 1963 " 451
" 1964 " 91
" 53 W.N. Pt. 1. 35.
1958. S.A.S.R. 301
Dist. 1969 V.R. 631

App. 1979 Vic. 215.

Cons [1985] 2 NSWLR 710
Foll 82 ALR 11
Appl 83 ALR 650

App at p. 150: Ref to. at pp. 146, 154/5 - (1975) 1 NSWLR - 617.
C. & Foll. (1975) 12. SASR, 501.

[HIGH COURT OF AUSTRALIA.]

App. at p. 150. 1975 Q.S.R. 399.

THE KING . . . . . APPELLANT;

C. - 1954 S.R. 304.

AND

LEE AND OTHERS . . . . . RESPONDENTS.

Cons 151 CLR 2.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF VICTORIA.

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MELBOURNE, *May* 25, 26, 29, 30.

BRISBANE, *June* 23

Latham C.J., McTiernan Webb, Fullagar and Kitto JJ.

Criminal Law—Evidence—Admissibility—Onus of proof—Voluntary statement by accused—Discretion of trial judge—"Confession" not to be rejected on ground that promise or threat held out unless judge "is of opinion that the inducement was really calculated to cause an untrue admission of guilt"—Evidence Acts 1928-1946 (*No.* 3674—*No.* 5183) (*Vict.*), *s.* 141.

Section 141 of the *Evidence Act* 1928 (Vict.) provides: "No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge . . . is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made."

Held that s. 141 applies only to confessions, i.e., statements which amount to admissions of actual guilt of the crime in question. It applies to compel the admission of some confessions which the common law would regard as non-voluntary, i.e., confessions induced by a threat or promise by a person in authority; but it applies only to cases in which the common law would have rejected the confession as non-voluntary on the sole ground that it was induced by such threat or promise, not to cases in which the common law would have rejected the confession as non-voluntary on any other ground. Within the field not covered by s. 141, the modern common law allows in the case of statements made by accused persons to police officers, whether confessions or not, a discretion to reject evidence of such statements; but, in all cases to which it applies, s. 141 is imperative and leaves no room for the exercise of discretion in any relevant sense. No question of discretion can arise unless the statement in question is a voluntary state-

Refn'd to 86 C.L.R. 8
1953 (N.S.W.) S.R. 80
Referred to: 86 C.L.R. 376
Ref to (1980) 1 NSWLR 950
Cons'd 151 CLR 2.

[NOTE:—On the 27th day of February 1951 the Judicial Committee of the Privy Council refused special leave to appeal from this decision.]

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ment in the common-law sense. If it is non-voluntary, it is—subject to s. 141—legally inadmissible. If it is voluntary, circumstances may be proved which call for the exercise of discretion; but there is no onus on the Crown to show a reason for the exercise of the discretion in favour of admitting the statement. The discretion rule represents an exception to a rule of law, and it is for the accused to bring himself within the exception. The question for the presiding judge in considering the exercise of the discretion is whether in all the circumstances it would be unfair to use the statement against the accused, regard being had to the propriety of the means by which the statement was obtained. If there has been some impropriety in the obtaining of the statement, it is relevant to consider the likelihood or otherwise of its having led to an untrue admission. If the judge thought that the impropriety was calculated to cause an untrue admission to be made, that would be a reason for exercising his discretion against admitting the statement. If, on the other hand, he thought that it was not likely to result in an untrue admission, that would be a good—though not a conclusive—reason for admitting the statement.

R. v. *Jeffries*, (1946) 47 S.R. (N.S.W.) 284, at pp. 311-314; 64 W.N. 71, approved.

Ibrahim v. *The King*, (1914) A.C. 599, *R.* v. *Voisin*, (1918) 1 K.B. 531, *R.* v. *Hokin*, (1922) 22 S.R. (N.S.W.) 280; 39 W.N. 76, *Cornelius* v. *The King*, (1936) 55 C.L.R. 235, *Sinclair* v. *The King*, (1946) 73 C.L.R. 316, at p. 337, and *McDermott* v. *The King*, (1948) 76 C.L.R. 501, referred to.

Decision of the Court of Criminal Appeal of Victoria reversed.

APPEAL from the Court of Criminal Appeal of Victoria.

In the Supreme Court of Victoria, before *Gavan Duffy* J. and a jury, Jean Lee, Robert David Clayton and Norman Andrews were presented together on a charge of murder; they were convicted and sentenced to death. They appealed, by leave, under Part V. of the *Crimes Act* 1928 (Vict.) to the court (defined in s. 592 of the *Crimes Act* 1928 as amended by s. 14 of the *Crimes Act* 1949, and hereinafter referred to, as the "Full Court") constituted as the Court of Criminal Appeal of Victoria. The Full Court, by a majority (*Barry* and *Smith* JJ.) (*O'Bryan* J. dissenting) quashed the convictions and ordered a new trial of the three accused. The facts and the reasons for judgment of the Full Court appear sufficiently in the judgment hereunder.

From the decision of the Full Court the Crown appealed, by special leave, to the High Court.

H. A. Winneke K.C. (with him *B. J. Dunn*), for the Crown. The trial judge found that each of the statements of the accused which are here in question was voluntary, and, on the basis that

he was required to exercise a discretion, that it would not be unfair to any of the accused to admit the respective statements. The first question is whether, in Victoria, when a statement is shown to have been voluntary, there is a discretion in the trial judge to exclude the statement on grounds of unfairness to the accused having regard to the circumstances in which the statement was obtained. It is submitted that there is no room in Victoria for any discretion wider than the legislative intention disclosed in s. 141 of the *Evidence Acts* 1928-1946 (Vict.). Until doubt as to the scope of that section was raised by *Cornelius* v. *The King* (1) no discretion was recognized in Victoria. On this point see *R.* v. *Kelly* (2); Statement by *Mann* C.J. (3): see also *R.* v. *Best* (4). [He also referred to *McDermott* v. *The King* (5).] *Cornelius* v. *The King* (6) is not a binding authority for the introduction of any "discretion" rule into Victoria, and it is significant that since that decision the legislature has not seen fit to introduce any alteration into the statute law. A discretion to reject a statement notwithstanding that it is voluntary if there are circumstances suggesting that some unfairness might result from its admission does not fit readily into a system in which statements which are not voluntary must be admitted even though similar circumstances of unfairness exist. Clearly, it is submitted, in such cases as are within s. 141 of the *Evidence Acts*, there is no room for any discretion rule. If the conditions of the section are fulfilled, the statement must be admitted although it is in the common-law sense non-voluntary; the trial judge has no power to reject it on considerations which are outside the section. It is submitted, therefore, that the discretion rule of the common law cannot exist side by side with s. 141 and it should be held to have no place in the law of Victoria. If, however, there is a discretion rule in Victoria, it is inconsistent with the terms in which the rule has been stated that there should be any onus on the Crown in regard to it: See *McDermott* v. *The King* (7); *R.* v. *Voisin* (8); *R.* v. *Jeffries* (9); *Sinclair* v. *The King* (10). The only onus on the Crown is to show that the statement tendered is a voluntary statement. The statement is then admissible unless the discretion rule applies to exclude it. The onus should then be on the party who claims that it should

(1) (1936) 55 C.L.R. 235: See particularly pp. 245, 247, 248, 251.
(2) (1921) V.L.R. 489.
(3) (1936) 42 A.L.R. (C.N.) 519.
(4) (1909) 1 K.B. 692.
(5) (1948) 76 C.L.R. 501, at pp. 506, 507, 514, 515.
(6) (1936) 55 C.L.R. 235.
(7) (1948) 76 C.L.R., at pp. 506, 513.
(8) (1918) 1 K.B. 531.
(9) (1946) 47 S.R. (N.S.W.), 284, at pp. 300, 303, 312, 314; 64 W.N. 71.
(10) (1946) 73 C.L.R. 316, at pp. 322, 324, 325, 339, 340.

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be excluded as a matter of discretion. It was not inconsistent with the proper exercise of a discretion by the trial judge that he should have considered the likelihood of an untrue admission being made. If there was no such likelihood, there could be no unfairness to the accused in admitting the statement. This is a consideration, it is submitted, which has no necessary relation to s. 141 of the *Evidence Acts*; but the criticism in the majority judgments in the Full Court of the trial judge's treatment of this point stresses the difficulty that is presented by the question of reconciling the existence of a discretion rule with s. 141 or, at all events, of determining the nature and extent of the discretion that can be fitted in with s. 141. The matters raised are of such great public importance and involve questions of law so fundamental to the administration of criminal justice in Victoria that the leave reserved to the accused when the Crown was granted special leave to appeal should not result in the rescission of the grant. [He referred to the Constitution s. 73 (ii.); *Judiciary Act* 1903-1948, s. 35 (1) (*b*); *R.* v. *Wilkes* (1); *Re Eather* v. *The King* (2).]

M. J. Ashkanasy K.C. (with him: for Lee and Clayton, *S. H. Cohen*; for Andrews, *J. S. Rowan*), for the respondents. All the judges of the Full Court recognized that since *Cornelius* v. *The King* (3) s. 141 of the *Evidence Acts* cannot be treated as a code, as was previously the practice in Victoria, but that it merely creates certain exceptions from the common law. This leaves the law in Victoria—apart from the specific exceptions created by the section—in uniformity with the common law of England and the other States of the Commonwealth. [He referred to *McDermott* v. *The King* (4); *Archbold, Pleading, Evidence and Practice in Criminal Cases*, 13th ed. (1857), p. 193; *T. P. Fry, Admissibility of Statements Made by Accused Persons*, 11 A.L.J. 425, 443; *R.* v. *Winkel* (5).] That being so, all that the majority of the Full Court did in this case was to review the exercise by the trial judge of a discretion; and that is not a matter which should result in the granting by this Court of special leave to appeal. The argument for the Crown before this Court seeks to give to s. 141 of the *Evidence Acts* not merely the scope attributed to it in *Cornelius* v. *The King* (3), but an extended effect which will exclude the operation of the common law in

(1) (1948) 77 C.L.R. 511.
(2) (1915) 20 C.L.R. 147.
(3) (1936) 55 C.L.R. 235.
(4) (1948) 76 C.L.R. 501.
(5) (1911) 76 J.P. 191.

cases which in fact are not within the words of the section. There is nothing in s. 141 which puts any difficulty in the way of the operation of the rules of the common law in cases which are not within the actual words of the section. All that the section does is to take certain cases out of the common-law rule as to the inadmissibility of non-voluntary statements. Otherwise the common law can operate quite consistently with the section. There has grown up in the common law what borders on a rule, that statements obtained by improper methods should be rejected unless the court thinks it is not unfair to admit them. What are known in England as the Judges' Rules, although not conclusive, have been taken as a general indication of what is proper: see *McDermott* v. *The King* (1); *R.* v. *McDermott* (*No.* 2) (2); *R.* v. *Male* (3); *Ibrahim* v. *The King* (4); *R.* v. *Brown* (5); *R.* v. *Dwyer* (6); *R.* v. *Jeffries* (7). The matter is not precisely—at all events not necessarily—one of imposing an added burden of proof on the Crown. It must appear that there has been some impropriety in connection with the obtaining of the statement before the question can arise as to whether unfairness to the accused might result from its admission in evidence; that is to say, the Crown, in tendering a statement, does not have to negative impropriety in the method of obtaining the statement. Where, however, it appears that there has been such impropriety, the presiding judge should not—if there is to be any point at all in the discretion rule—admit the statement unless it is clear that the impropriety could not result in any such unfairness. [He referred to *Woolmington* v. *Director of Public Prosecutions* (8); *Ibrahim* v. *The King* (9); *Archbold, Pleading, Evidence and Practice in Criminal Cases*, 31st ed. (1943), p. 365.] In this case it is submitted that the majority of the Full Court was warranted in finding some impropriety by relation to the rules which correspond to the English Judges' Rules and in concluding that the trial judge had not attached sufficient significance to the impropriety; in particular—whether or not it is apt in this connection to speak of burden of proof—that he had not correctly applied the test that the statements should be rejected unless it was clear that no unfairness would result.

(1) (1948) 76 C.L.R., at pp. 512, 514-516, 518.
(2) (1946) 47 S.R. (N.S.W.) 407, at pp. 414-416; 64 W.N. 104.
(3) (1893) 17 Cox C. C. 689.
(4) (1914) A.C. 599, at pp. 612, 613.
(5) (1931) 23 Cr. App. R. 56.
(6) (1931) 23 Cr. App. R. 156.
(7) (1946) 47 S.R. (N.S.W.) 284, at pp. 303, 311, 312; 64 W.N. 71.
(8) (1935) A.C. 462.
(9) (1914) A.C., at p. 609.

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H. A. Winneke K.C., in reply, referred to *Ross* v. *The King* (1); *McDermott* v. *The King* (2); *Ibrahim* v. *The King* (3); *Cornelius* v. *The King* (4).

Cur. adv. vult.

June 23.

THE COURT delivered the following written judgment:—

Jean Lee, Robert David Clayton and Norman Andrews were, on 20th March 1950, presented before *Gavan Duffy* J. and a jury on a charge of having murdered a man named Kent. The jury convicted each of the accused and they were sentenced to death. They applied for leave to appeal to the Full Court of Victoria under Part V. of the *Crimes Act* 1928 (Vict.) and on 19th May 1950 that court gave leave to appeal, allowed the appeal, quashed the convictions and ordered that a new trial of the three accused be had. The court consisted of *O'Bryan*, *Barry* and *Smith* JJ., and the decision was that of the majority of the court, *O'Bryan* J. dissenting. The Crown thereupon moved under s. 35 (1) (*b*) of the *Judiciary Act* 1903-1948 for special leave to appeal to this Court. It is clear that special leave should be granted to the Crown only in very exceptional circumstances. However, it appeared at an early stage that the case raised questions of great public importance on which there were substantial differences in point of view and in opinion between *Gavan Duffy* J. and *O'Bryan* J. on the one hand and *Barry* J. and *Smith* J. on the other hand. Accordingly the Court granted special leave and proceeded forthwith to hear the appeal on its merits. This did not, of course, preclude the Court from rescinding special leave at a later stage, and leave was expressly reserved to counsel for the respondents to move for rescission. It may be noted that special leave was given to the Crown in *R.* v. *Bradley* (5) and also in *A.-G.* (*N.S.W.*) v. *Martin* (6), a case in which similar questions arose to those which arise in the present case. Those questions relate to the admissibility in evidence of certain statements made to detectives by each of the respondents.

Kent was killed in a house in Carlton on the night of 7th November 1949, probably shortly before 9 p.m. The cause of death was strangulation, but he had been tied up and badly battered about the face and head before being strangled. There was a substantial body of strong evidence, apart altogether from the statements in question, upon which a jury would clearly have been justified in finding each of the accused guilty of the murder of Kent, but to

(1) (1922) 30 C.L.R. 246, at pp. 254, 255.
(2) (1948) 76 C.L.R., at p. 513.
(3) (1914) A.C., at p. 614.
(4) (1936) 55 C.L.R., at p. 247.
(5) (1935) 54 C.L.R. 12.
(6) (1909) 9 C.L.R. 713.

say this is not to deny that considerable importance attached to those statements. About three o'clock in the morning of 8th November detectives went to a hotel in Spencer Street, Melbourne. Shortly after their arrival the three respondents entered the hotel and were intercepted. After their rooms had been searched they were taken to Police Headquarters in Russell Street and separately questioned. The arrival at Russell Street took place at about 4 a.m. and the three were charged with murder at about 7 a.m. It is unnecessary to set out the details of the questioning, which are stated in the judgment of *O'Bryan* J. It is desirable, however, to state briefly the general nature of what occurred.

Clayton at first said that he had not been in the house at Carlton, but on being told that Kent was dead he made in answer to questions a statement to the effect that he had been at the house with the other two accused, but that when the other two indicated their intention of using violence, if necessary, to get Kent's money, he had left the house and some time later met the others in the city. After he had been cautioned in the usual terms, he repeated what he had said and it was taken down in writing and the written statement was signed by him. It should be mentioned at this stage that it would appear that Clayton and Lee, who had very recently come together from Sydney to Melbourne, had been for some six weeks living together as husband and wife, while Andrews was an acquaintance whom they had met after their arrival in Melbourne.

Lee at first refused to say anything. When told that Clayton had made a statement she still refused to say anything, but a little later, without being further questioned, she expressed a wish to see his statement. It was shown to her and she read it. She then asked to be confronted with Clayton, and Clayton was brought in. In answer to a question by her, he admitted having made the statement and began to weep. She then said: "And they call women the weaker sex. I love Bobby" (i.e., Clayton) "and I still love him, but, if he wants it that way, he can have it". She then made orally a statement to the effect that after the two men had left the house, she had attacked Kent with a bottle and a piece of wood. In answer to a question she said that she had tied Kent's hands with a piece of cord. She was asked if she had robbed Kent and she said "No, but I knew he was dead when we left him." She was asked "Who do you mean by we?", and she said "There was only me". She refused to answer any further questions and refused to sign any written statement. In

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cross-examination the detective who questioned her said that she had tears in her eyes when confronted with Clayton.

Andrews at first denied being with the other two, but later, on being told that Clayton had made a statement, said that he wished to see it. It was read to him and then he read it. He then said, in answer to questions, that he had held Kent while Clayton and Lee "went through him", that he had not struck Kent, and that he had received some of the money which Clayton and Lee had taken from Kent.

At the trial, at which each of the accused was represented by counsel, evidence of the statements of Clayton and Lee was admitted without objection. In the course of the examination-in-chief of De Vere, the detective who had questioned Andrews, objection was taken by his counsel, and the question of the admissibility of all the statements was thereupon argued in the absence of the jury. The learned trial judge expressed the opinion that all the statements were admissible, but at this stage the court adjourned for luncheon without any further evidence being taken in the presence of the jury. During the adjournment his Honour consulted a number of authorities, and on returning into court heard some further argument, after which he heard the rest of De Vere's evidence on *voir dire*. Andrews was not called by his counsel on the *voir dire*. His Honour decided that De Vere's evidence and the evidence of the detectives who had earlier deposed to the statements made by Lee and Clayton was admissible, and De Vere, in the presence of the jury, completed his evidence and was cross-examined by counsel for Andrews. Each of the accused gave evidence on oath, the effect of their evidence being that they had gone to Kent's room in the house at Carlton and drunk a bottle of wine with him, and that after thanking him for his hospitality they had parted from him on the verandah, leaving him in a normal state. None of them said that there had been, on the part of the detectives, any violence or intimidation or promise or threat or harsh treatment or that any of them was not in a fit condition to make a statement. Lee said that she either did say or "could have said" everything material which the detectives said that she did say. She did indeed say (in cross-examination, not in examination-in-chief) that when she was confronted with Clayton's statement she became hysterical and did not know what she was saying and that she wanted to have some peace and quiet. The detective who had questioned her said that she was certainly not hysterical. Clayton in effect agreed that he had told the detectives substantially what they

said he had told them, but said that those things were not "by any stretch of imagination at all" true. Clayton said that he had been drinking since four o'clock in the morning of 7th November and that he was in a "highly nervous state" and "under great stress" and that he had been pressed with questions, but he admitted that he had said the material things and expressed the opinion that he had been "a yellow dog" to say them. Andrews denied having said most of the more important things attributed to him by the detectives.

The statements by Lee and Clayton that they had been "hysterical", "under great stress", &c., and the denials by Andrews that he had said what was attributed to him, were made not in examination-in-chief but in cross-examination when they were invited by counsel for the Crown to explain what they were said to have said to the detectives. The only comment that seems necessary is this. It is impossible to read the cross-examination of Lee and Clayton without feeling that it would be far from surprising if first the Judge and later the jury (to whom these matters were fully and forcefully put by counsel for the accused) refused to believe that either of them was not in a perfectly fit state to be questioned or that the statements made by them were not made in the exercise of a free choice to speak or refrain from speaking.

It may be well, before proceeding, to consider for a moment the realities of the situation between 4 a.m. and 7 a.m. on 8th November. The detectives had a good deal of evidence against the three respondents. They had descriptions of two men and a woman who had been in Kent's room, and they had evidence that nobody had entered Kent's room between the time when the men and woman described left together and the time when Kent's dead body was found. They had found bloodstains on clothing of the accused and cuts and abrasions on their hands, and they had other evidence which must have led them to think it very likely that they had the guilty party or parties in their hands. They had evidence that Kent and the three accused had been drinking together at a hotel in Carlton in the afternoon, that Kent had revealed that he had a substantial sum of money, that Lee had at the hotel torn a page from a pocket diary and given it to Kent with something written on it, that the page had been found in a tobacco tin in Kent's room and the diary with the page torn out in Lee's possession. And they had other evidence too. It is unlikely, in spite of what De Vere said, that they would have allowed any of the three to go until all had been questioned.

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Indeed, they might well have been thought blameworthy had they allowed such a thing. On the other hand, they had a difficult and important task to perform. They were investigating a murder, and they were bound, as *O'Bryan* J. said, to make a full and complete investigation into the crime. However likely it may have seemed to them that they had found the guilty party or parties, they could not know to whom the actual guilt attached. They had evidence that each of the three had been absent from Kent's room at what might have been a critical time. The actual guilt might attach to any one or to any two or to all three of the parties. All were under grave suspicion, but any one or any two might be innocent. The detectives were bound, before they preferred the most serious of all criminal charges, to see what, if anything, each suspect had to say about the events of the night. It is very difficult to see any reason why they should not put to each the matters which caused suspicion to rest on him or her.

It is necessary now to examine the reasons which led the Full Court to quash the convictions, but before doing so it is convenient to mention two matters which have been much discussed in the course of this case.

In the first place, s. 141 of the Victorian *Evidence Act* 1928 contains a provision which first came into force in 1857 and which has no counterpart in England or in any other of the Australian States, though a similar section is in force in New Zealand. The Victorian section, so far as relevant, is in the following terms:— "No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge . . . is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made."

In the second place, certain Standing Orders with regard to the questioning of persons by police have been promulgated by the Chief Commissioner of Police in Victoria. They do not, we think, differ in material respects from the rules adopted by the Home Office in England and known as the Judges' Rules. The relevant Victorian rules are as follows:—"(1) When a member of the Force is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons whether suspected or not, from whom he thinks useful information can be obtained. (2) When any member of the Force has made up his mind to charge a person with a crime, he must first caution such person before asking any questions, or any further questions, as the case may be. (3) Persons in custody

should not be questioned without the usual caution being first administered. (4) If the prisoner wishes to volunteer any statement the usual caution should be administered. (5) The caution to be administered to a prisoner when he is formally charged should be in the following words :—' Do you wish to say anything in answer to the charge. You are not obliged to say anything unless you wish to do so but whatever you say may be taken down in writing and given in evidence.' . . . (7) A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him except for the purpose of removing ambiguity in what he has already said . . . (8) When two or more persons are charged with the same offence, and statements are taken separately from the persons charged, police must not read these statements to the other person charged, but each of such persons should be furnished by the police with a copy of such statement, and nothing should be done or said by the police to invite a reply. If the person charged desires to make a statement in reply the usual caution should be administered."

In addition to the above rules, which are described as rules for the guidance of the members of the force when questioning persons suspected or in custody and which are set out in Standing Order 62, two other Standing Orders should be mentioned. In the first place Standing Order 63 reads as follows :—" These rules are formulated for the purpose of explaining to members of the force engaged in the investigation of crime the conditions under which the courts would be likely to admit in evidence statements made by persons suspected of or charged with crime. It is quite impossible to lay down a code of instructions which will cover the various circumstances of every case. Members of the Force should bear in mind the purpose for which these rules are drawn up, viz., to ensure that any statement tendered in evidence should be purely a voluntary statement, and therefore admissible in evidence. In carrying out their duties in connection with the questioning of suspects and others, they must, above all things, be scrupulously fair to those whom they are questioning, and in giving evidence as to the circumstances in which any statement was made or taken down in writing, they must be absolutely frank in describing to the court exactly what occurred, and it will then be for the court to decide whether or not the statement tendered should be admitted in evidence."

Standing Order 65 is in the following terms :—" With regard to the form of the caution, it is obvious that the words in rule (5) are only applicable when the formal charge is made . . . The

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caution may be properly used at any time during the investigation of a crime at which it is necessary or right to administer a caution. For instance, where a prisoner is being interrogated by a member of the Force under rule (1) whether at a police station or elsewhere and a point is reached where the member of the force would not allow that person to depart until further enquiry has been made and any suspicion that has been aroused had been cleared up, it is desirable that such a caution should be administered before any further questions are asked. When any form of restraint is actually imposed, such a caution should certainly be administered before any further questions are asked. When it comes to cautioning a prisoner immediately before he is formally charged, the form prescribed in rule (5) should be used."

The reasons of the majority of the Full Court for allowing the appeal to it are set out in the careful and closely reasoned judgment of *Smith* J. His Honour began by putting s. 141 on one side on the ground that in the present case there was no evidence of a threat or promise, and then set out two imperative rules of the common law regarding confessional statements in the language of *Dixon* J. in *McDermott* v. *The King* (1). These rules, stated in abbreviated form, are—(1) that such a statement may not be admitted in evidence unless it is shown to have been voluntarily made in the sense that it has been made in the exercise of free choice and not because the will of the accused has been overborne or his statement made as the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure, and (2) that such a statement is not voluntary if it is preceded by an inducement, such as a threat or promise, held out by a person in authority, unless the inducement is shown to have been removed. These two "rules" are, of course, well established, but it is important, we think, in this case to observe that they seem to be not really two independent and co-ordinate rules. There seems to be really one rule, the rule that a statement must be voluntary in order to be admissible. Any one of a variety of elements, including a threat or promise by a person in authority, will suffice to deprive it of a voluntary character. It is implicit in the statement of the rule, and it is now well settled, that the Crown has the burden of satisfying the trial judge in every case as to the voluntary character of a statement before it becomes admissible.

Smith J. went on to say that there is a further rule of the common law under which the judge has a so-called discretion to reject confessional statements which are not inadmissible under either of the

(1) (1948) 76 C.L.R. 501, at p. 511.

imperative rules. This third rule he formulated in the following terms :—" The judge should reject evidence of confessional statements which have been obtained by the police by improper methods if, having regard to the nature and degree of the impropriety and the effect which it is likely to have had in causing the statement to be made or upon the form and contents of the statement, it would in all the circumstances be unfair to the accused to use the statement in evidence against him." His Honour held, further, as we understand his judgment, that the Crown had the burden of satisfying the trial judge, in every case of " impropriety " of any kind, that no unfairness to the accused could arise from using his own words against him. In considering whether a member of the police force has employed " improper methods " or whether any " impropriety " has occurred, it was said that the " Standing Orders " published by the Chief Commissioner should be " taken as a guide " but that it was " the spirit and not the letter " of the rules which should guide the court, cf. *R.* v. *Voisin* (1).

Having propounded and elaborated these principles, the majority of the Full Court proceeded to apply them to the case of the three respondents. In the case of Lee they held that it would have been open to the learned trial judge to find that her statement was not voluntary because her will had been overborne. They considered it unnecessary, however, to decide finally whether her statement was inadmissible on this ground, the view being taken that the trial judge was bound in any case to exclude it under the " discretion rule." It was held that it was " not open to his Honour, addressing his mind to the proper considerations, to find that the Crown had satisfied the onus which rested upon it in her case." The " onus " referred to is the onus of satisfying the trial judge that the discretion ought to be exercised in favour of admitting the evidence. In Lee's case it was held that her statement was inadmissible. In the cases of Clayton and Andrews the majority held that there was no ground for the contention that their statements were not voluntary, and they further held that it was open to the learned trial judge to admit them in the exercise of his discretion. They nevertheless quashed the convictions and ordered a new trial in the cases of Clayton and Andrews, as well as in the case of Lee, on the ground that in exercising his discretion his Honour addressed his mind to a matter which was irrelevant and excluded from his consideration material aspects of the question which he had to determine. The

(1) (1918) 1 K.B. 531, at pp. 539-540.

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matter which was held to be irrelevant is the question whether the procedure of the detectives was likely to cause an untrue admission of guilt to be made. In speaking of material aspects which are said to have been overlooked the judgment is doubtless referring to an earlier broad statement of the question to be considered in the process of exercising the discretion. It had been said, in effect, that the question to be considered is whether there is any ground for thinking that improper conduct on the part of the police may have resulted in the accused " failing to do justice to his real position ".

Mr. *Winneke*, for the Crown, invited us to say that what has come to be known as the " discretion rule " was not part of the law of Victoria and that it could not exist alongside s. 141 of the *Evidence Act*. There can be little doubt that s. 141 was, up to 1936, regarded by the Victorian Courts as excluding the exercise of any discretion as to the admissibility of confessions and other statements voluntarily made by accused persons. But the application of the section is limited in two respects. In the first place it applies only to " confessions ", i.e., complete admissions of guilt. It does not apply generally to extra-judicial statements by accused persons. It does not apply, for example, to statements which are in fact of an exculpatory character but which can be used against an accused person because they contain admissions or allegations of fact which subsequently prove to be relevant and adverse to the accused. In the second place it applies only to cases in which the confession would have been excluded at common law on the ground that it had been induced by a threat or promise made or given by a person in authority and on no other ground.

There can be no doubt, we think, that the section is limited in these two ways, although it is quite likely that it was intended to cover all statements by accused persons which would have been rejected at common law on the ground that they were not voluntary, and it is by no means surprising that it was for many years regarded as effectuating such an intention. For, although it cannot be doubted that the broad statement by *Dixon* J. in *McDermott* v. *The King* (1) of the rule that a statement must be voluntary in order to be admissible is correct, the typical case of a non-voluntary statement was the case of a statement induced by a threat or promise by a person in authority. Indeed the rule has not seldom been stated as if a statement so induced were the only case of a non-voluntary statement. For example, in

(1) (1948) 76 C.L.R., at p. 511.

R. v. *Scott* (1), Lord *Campbell* C.J. said that a statement must be voluntary, but added " but this only means that it shall not be induced by improper threats or promises ". Even the often cited statement of the rule by Lord *Sumner* in *Ibrahim* v. *The King* (2) is capable of a similar interpretation. His Lordship said :—" It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." Moreover, the common law took an extremely wide view of what constituted a threat or promise and of what constituted a person in authority, and was very ready to infer inducement. The remarks of *Parke* B. in *R.* v. *Baldry* (3) on the " tenderness " of the common law in these respects are well known.

A consideration of the authorities referred to in the judgments and in argument in that case will show the object which s. 141 of the *Evidence Act* 1928 was intended to secure. Some decisions had gone very far in excluding statements made to persons in authority on the ground that they were induced by a threat or promise ; for example, in *R.* v. *Drew* (4) a statement by a person was excluded because he had been told " not to say anything to prejudice himself, as what he said " would be taken down, " and would be used for him or against him at his trial ". So also in *R.* v. *Morton* (5) a statement was excluded because a constable said to the prisoner " what you are charged with is a very heavy offence, and you must be very careful in making any statement to me or anybody else, that may tend to injure you ; but anything you can say in your defence we shall be ready to hear, or to send to assist you ". These cases were overruled in *R.* v. *Baldry* (6), but in that case the Court rejected the argument for the prisoner that the ground of excluding statements made to a person in authority after a threat or promise was that the law in such a case presumed the statement to be untrue, or at least to be probably untrue. The Court declined to adopt the principle that the ground of exclusion was that a statement made in such circumstances could not be relied upon, and it was held that the ground upon which such confessions were to be rejected

(1) (1856) Dears & Bell 47, at p. 58 [169 E.R. 909, at p. 914].
(2) (1914) A.C., at p. 609.
(3) (1852) 2 Den. 430, at p. 444 [169 E.R. 568, at p. 574].
(4) (1837) 8 Car. & P. 140 [173 E.R. 433].
(5) (1843) 2 M. & Rob. 514 [174 E.R. 367].
(6) (1852) 2 Den. 430 [169 E.R. 568].

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was that it was supposed that it would be dangerous to leave such evidence to the jury. It is this principle which has been deliberately altered by the Parliament of Victoria in s. 141 of the *Evidence Act* 1928. That provision adopts, in cases of threats and promises which would have led to the exclusion of a confession at common law, the criterion that such a confession is not to be rejected as evidence merely on the ground of a preceding or concurrent threat or promise unless the judge is of opinion that the threat or promise " was really calculated to cause an untrue admission of guilt to be made ". In this provision the legislature has directly enacted that the probability of a threat or promise inducing an untrue admission of guilt is an element which it is relevant to consider in deciding whether or not the confession should be admitted in evidence.

The development, in British countries in which there is no such provision as s. 141 of the Victorian Act, of a rule that the judge may in his discretion refuse to admit statements made in certain circumstances to police officers is of comparatively recent growth. That development has been considered notably in *Ibrahim* v. *The King* (1), *R.* v. *Voisin* (2), *R.* v. *Hokin* (3), *Cornelius* v. *The King* (4), and *McDermott* v. *The King* (5). It is unnecessary to examine its history further. Its historical source seems to be found in what Lord *Sumner* in *Ibrahim* v. *The King* (6) calls " the growth of a police force of the modern type ", and its legal source probably in the statutory power of the Court of Criminal Appeal to quash a conviction if " on any ground there was a miscarriage of justice ". The trial judge would naturally, if he thought that the Court of Criminal Appeal would regard the admission of any particular evidence as constituting a miscarriage of justice, anticipate the Court of Criminal Appeal by rejecting that evidence himself. This Court, in *McDermott* v. *The King* (5), recognized what may be conveniently called the discretion rule as existing in all the Australian States except Victoria, and it was not denied in that case that the discretion rule did or could exist in Victoria: the question was simply left open.

In the light of the considerations which we have mentioned there is, we think, a great deal to be said for the view that a discretion to exclude statements which are, in the strict common law sense, voluntary, cannot satisfactorily exist alongside s. 141, and it seems natural enough that for many years the view generally

(1) (1914) A.C. 599.
(2) (1918) 1 K.B. 531.
(3) (1922) 22 S.R. (N.S.W.) 280; 39 W.N. 76.
(4) (1936) 55 C.L.R. 235.
(5) (1948) 76 C.L.R. 501.
(6) (1914) A.C., at p. 610.

accepted in Victoria was that no such discretion existed. However, since 1936, in which year *Cornelius* v. *The King* (1) was decided by this Court, it appears that that view has ceased to be generally accepted. *O'Bryan* J. says that since that year " it has certainly been the practice of some at least of the judges of the Supreme Court to exclude confessional statements which have been improperly obtained by the police ". It is probable that the change in practice arose mainly because what was said in *Cornelius* v. *The King* (1) produced a realization that, wide as was the scope of s. 141, there was a considerable field which lay outside it and within which a discretion could be exercised without actually disobeying s. 141. This field does exist. If the field exists and if within it the Full Court of Victoria, sitting as a court of criminal appeal, holds that a discretion exists which has been held to exist in other British jurisdictions, we do not think that this Court ought to interfere by denying the existence of such a discretion.

The introduction of a discretion rule may be considered by some to be, on the whole, unnecessary. The word " voluntary " in the relevant connection does not mean " volunteered ". It means " made in the exercise of a free choice to speak or be silent ". But a full understanding and correct application of the common law rule that confessional statements must be voluntary provides (as *Latham* C.J. observed in *McDermott* v. *The King* (2)) extensive protection to accused persons. In the same case (3) *Dixon* J. suggests that the development of the discretion rule may perhaps 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 ". His Honour had just said : " 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 ". Again, it is to be remembered that the admission of such evidence does not make it conclusive. It is for the jury to determine what weight should be attached to it. They will have evidence of all the circumstances in which it was made and should have received any necessary warning from the judge. Nor should it be forgotten that an accused person is now entitled to give evidence on oath and has been so entitled for many years. As *Dixon* J. said in *Sinclair* v. *The King* (4), " The tendency in more recent

(1) (1936) 55 C.L.R. 235.
(2) (1948) 76 C.L.R., at p. 507.
(3) (1948) 76 C.L.R., at p. 512.
(4) (1946) 73 C.L.R. 316, at p. 337.

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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." However, all the learned judges of the Full Court in the instant case agreed that the discretion rule existed in Victoria; its existence in New South Wales was recognized in *McDermott* v. *The King* (1) and we are not prepared to deny its existence in Victoria. When it comes to an exercise of discretion the considerations which we have just mentioned may well be borne in mind.

It has been desirable to consider at some length the effect of s. 141 of the Victorian *Evidence Act* 1928 and the origin of the discretion rule. Before considering further the nature and scope of that rule it may be well to summarize certain conclusions:— (1) Section 141 applies only to confessions, i.e., statements which amount to admissions of actual guilt of the crime in question. (2) It applies to compel the admission of some confessions which the common law would regard as non-voluntary, i.e., confessions induced by a threat or promise by a person in authority. (3) But it applies only to cases in which the common law would have rejected the confession as non-voluntary on the sole ground that it was induced by such a threat or promise, not to cases in which the common law would have rejected the confession as non-voluntary on any other ground. (4) Within the field not covered by s. 141 the modern common law allows in the case of statements made by accused persons to police officers, whether confessions or not, a discretion to reject evidence of such statements. (5) But in all cases to which it applies s. 141 is imperative and leaves no room for the exercise of discretion in any relevant sense.

No question of discretion can arise unless the statement in question is a voluntary statement in the common law sense. If it is non-voluntary it is, subject to s. 141, legally inadmissible. If it is voluntary, circumstances may be proved which call for an exercise of discretion. The only circumstance which has been suggested as calling for an exercise of the discretion is the use of

(1) (1948) 76 C.L.R. 501.

" improper " or " unfair " methods by police officers in interrogating suspected persons or persons in custody. It was with such cases in mind that *Latham* C.J., in *McDermott* v. *The King* (1), said 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 evidence against him." In the same case *Dixon* J. (2) said :—" 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." In our opinion the rule is fully and adequately stated in those two passages. What is impropriety in police methods and what would be unfairness in admitting in evidence against an accused person a statement obtained by improper methods must depend upon the circumstances of each particular case, and no attempt should be made to define and thereby to limit the extent or the application of these conceptions. *O'Bryan* J. in the present case in effect adopted the passages quoted when he said that voluntary statements by accused persons were admissible in evidence " unless they were obtained by such improper means by the police officers that in the circumstances it would be unfair to the accused to admit them in evidence ". The majority of the Court, however, while initially stating the rule in a manner to which perhaps no very strong objection can be taken, proceed to an exposition which cannot in our opinion be supported. The exposition, indeed, seems to carry the matter beyond the range of discretion and to lay down what practically amounts to a new rule of law. There are three main features which emerge on an examination of this exposition and it is necessary to consider each of these.

In the first place, it is said that it will be unfair to allow the evidence to be used if there is " some ground for thinking that the improper conduct of the police may have resulted in the accused failing to do justice to his real position." The expression " do justice to his real position " seems to be taken from the judgment of *Davidson* J. in *R.* v. *Jeffries* (3), where his Honour uses those words after referring to an account of a trial in England in which *Charles* J. is said to have used the words " do justice

(1) (1948) 76 C.L.R., at pp. 506-507.
(2) (1948) 76 C.L.R., at p. 513.
(3) (1947) 47 S.R. (N.S.W.) at p. 303 ; 64 W.N. 71.

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to himself " : cf. per *Street* J. in the same case (1). No satisfactory meaning, in our opinion, can be attached to the words " his real position " and there is a highly dangerous ambiguity about them. His real position, one would suppose, is to be assumed to be the position which he takes up at the trial, which may be a position far removed from the truth, and which may be unknown to the judge at the stage of the trial at which evidence of the statement is tendered. The learned judges did not, of course, mean that it was enough to exclude the evidence that there should be ground for thinking that the accused had had insufficient opportunity to invent plausible falsehoods. This is made plain by the example taken of a case where the accused has been " badgered into apparent contradictions or trapped or surprised into making some ambiguous comment which is suggestive of guilt ". But another example taken is the case of " an untrue statement which he believes to be wholly or partly exculpatory but which in fact goes to establish some part of the Crown's case or is inconsistent with the defence set up at the trial, e.g., an alibi ". The selection of this as an illustration suffices to show how dangerous the test laid down could be. In so far as it suggests that the judge, in ruling on whether a statement should be admitted, should consider whether it is true or false, it cannot, in our opinion, be supported. It cannot be that the exclusion of a " statement " from evidence is to depend on whether or not it is prejudicial to the defence set up at the trial. But the words used in formulating the test are capable of bearing that meaning. Any such formula should in our opinion be rejected. The " unfairness " of using a " statement " must arise from the circumstances under which it was made.

In the second place the exposition casts upon the Crown (in certain circumstances at any rate) the onus of satisfying the judge that the discretion ought to be exercised in favour of admitting the evidence. The practical importance of the proposition that the onus is upon the Crown seems to be that it means that, if the slightest " impropriety " on the part of the police is proved, the Crown must satisfy the judge that it had no such effect as to make it unfair to admit the statement in question. It will be necessary to consider this proposition more generally in a moment. It is sufficient at this stage to say that the placing of an onus on the Crown in connection with the exercise of a discretion to reject evidence of the kind in question represents in our opinion a new departure, and we do not think that there is any justification for it. The discretion rule represents an exception to a rule of law,

(1) (1947) 47 S.R. (N.S.W.), at p. 311; 64 W.N. 71.

and we think that it is for the accused to bring himself within the exception. We have called attention to the great breadth of the common law rule that a statement is not admissible unless it is proved to be voluntary. If it is proved to be voluntary then it is prima facie admissible. It is admissible as a matter of law unless reason is shown for rejecting it in the exercise of discretion.

In the third place, the exposition lays it down that in the exercise of the discretion the possibility or probability that some "impropriety" might lead to the making of an untrue admission is to be disregarded as an irrelevant consideration. This is not in our opinion correct. Surely, if the judge thought that the "impropriety" was calculated to cause an untrue admission to be made, that would be a very strong reason for exercising his discretion against admitting the statement in question. If, on the other hand, he thought that it was not likely to result in an untrue admission being made, that would be a good reason, though not a conclusive reason, for allowing the evidence to be given. Although the better opinion seems to be that the rule which excludes non-voluntary statements is based on broad grounds of policy, many judges have (as already stated) considered that the possibility of an untrue confession being made was the justification, or one justification, for the rule: see, e.g., *R.* v. *Court* (1), quoted by *Dixon* J. in *Sinclair* v. *The King* (2). In *R.* v. *Baldry* (3) Lord *Campbell* C.J. had, in considering at the trial whether a certain confession by a person in custody ought to be admitted, taken into account among other matters "that it could have no tendency to induce him to say anything untrue", and *Parke* B. said that he considered that the reasons given by the Lord Chief Justice for admitting the evidence were "satisfactory". See also per *Starke* J. in *Sinclair* v. *The King* (4), and cf. per *Dixon* J. (5). In Victoria, where s. 141 of the *Evidence Act* 1928 is in force, it affords, we think, a strong additional reason for regarding as relevant, though not necessarily decisive, the question whether any "impropriety" was such as to be likely to result in the making of an untrue admission. If this were not so, the position would, as is pointed out by *Gavan Duffy* J. in his report to the Full Court, be absurd. A confession obtained by a serious threat or promise might be admitted of necessity under s. 141, while a confession following upon some far less serious impropriety could be rejected in the exercise of discretion.

(1) (1836) 7 C. & P. 487 [173 E.R. 216].
(2) (1946) 73 C.L.R., at p. 334.
(3) (1852) 2 Den., at p. 430 [169 E.R., at p. 568].
(4) (1946) 73 C.L.R., at p. 328.
(5) (1946) 73 C.L.R., at p. 336.

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With regard to the Chief Commissioner's Standing Orders, which correspond in Victoria to the Judges' Rules in England, they are not rules of law, and the mere fact that one or more of them have been broken does not of itself mean that the accused has been so treated that it would be unfair to admit his statement. Nor does proof of a breach throw any burden on the Crown of showing some affirmative reason why the statement in question should be admitted. As has already been pointed out, the protection afforded by the rule that a statement must be voluntary goes so far that it is only reasonable to require that some substantial reason should be shown to justify a discretionary rejection of a voluntary admission. The rules may be regarded in a general way as prescribing a standard of propriety, and it is in this sense that what may be called the spirit of the rules should be regarded. But it cannot be denied that they do not in every respect afford a very satisfactory standard. Their language is in some cases imperative and in others merely advisory: sometimes the word "must" is used: sometimes the word "should", and the tendency to take them as a standard can easily develop into a tendency to apply rejection of evidence as in some sort a sanction for a failure by a police officer to obey the rules of his own organization, a matter which is of course entirely for the executive. It is indeed, we think, a mistake to approach the matter by asking as separate questions, first, whether the police officer concerned has acted improperly, and if he has, then whether it would be unfair to reject the accused's statement. It is better to ask whether, having regard to the conduct of the police and all the circumstances of the case, it would be unfair to use his own statement against the accused. We know of no better exposition of the whole matter than that which is to be found in the two passages from the judgment of *Street* J. (as he then was) in *R.* v. *Jeffries* (1) which are quoted by *O'Bryan* J. in the present case. His Honour said (2): "It is a question of degree in each case, and it is for the presiding Judge to determine, in the light of all the circumstances, whether the statements or admissions of the accused have been extracted from him under conditions which render it unjust to allow his own words to be given in evidence against him." His Honour then proceeded to refer to the account of the trial of Jones and Hulton published in the *Old Bailey Trial Series*. "It was conceded," he said, that in that case "the examination demonstrably transgressed the limits permitted under the Judges' Rules." It

(1) (1947) 47 S.R. (N.S.W.), at pp. 311-314; 64 W.N. 71.

(2) (1947) 47 S.R. (N.S.W.), at p. 312; 64 W.N. 71.

appeared, however, that the accused was in a condition properly to answer to the "gruelling questioning" which had been administered to him, and the learned trial judge admitted the evidence. An appeal was dismissed by the Court of Criminal Appeal. His Honour then concludes:—"The obligation resting upon police officers is to put all questions fairly and to refrain from anything in the nature of a threat, or any attempt to extort an admission. But it is in the interests of the community that all crimes should be fully investigated with the object of bringing malefactors to justice, and such investigations must not be unduly hampered. Their object is to clear the innocent as well as establish the guilt of the offender. They must be aimed at the ascertainment of the truth, and must not be carried out with the idea of manufacturing evidence or extorting some admission and thereby securing a conviction. Upon the particular circumstances of each case depends the answer to the question as to the admissibility of such evidence."

In the present case it does not appear to us to be possible to say that there was any serious breach of any of the rules contained in the Commissioner's Standing Orders. Perhaps the nearest approach to a serious breach lay in the reading of Clayton's statement to Andrews. But it was immediately afterwards given to Andrews to read for himself. Rule 3 applies only to persons in custody. At the material time the three respondents would most probably not be regarded by the detectives as being in custody: they had not been arrested or charged: the matter was still in the stage of police inquiry and investigation: cf. *R.* v. *Voisin* (1). It is to be noted that the prescribed "caution" begins with the words "Have you anything to say in answer to the charge?" In any case we think that O'*Bryan* J. was right in saying that the absence of a caution was of no consequence in this case, having regard to all the circumstances. The expression "voluntary statement" in rule 7 probably has reference to a volunteered statement. But in any case an invitation to explain established facts can hardly be called cross-examination in any relevant sense. It is cross-examination in the sense of breaking down the will and extorting admissions by persons who are being questioned by the police that is to be reprehended. Rule 8 was not applicable at any material time.

In the cases of Clayton and Andrews the Full Court quashed the convictions only because the majority considered that the learned trial judge had not really exercised his discretion in that

(1) (1918) 1 K.B., at p. 538.

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he had failed to consider material aspects of the question which he had to determine and had taken into account an immaterial consideration. Having read the whole of what his Honour said on the matter at the trial, and having also read his Honour's report furnished to the Full Court under s. 599 of the *Crimes Act* 1928, we are of opinion that there is no ground for saying that he did not take into consideration everything which he was required to take into consideration, and that he was right in considering, among other things, the question whether the procedure of the detectives was likely to cause an untrue admission to be made. In ruling on questions which arise for immediate decision in the course of a jury trial, civil or criminal, it very often and very naturally happens that a judge does not make a complete statement of the reasons which really actuate him. This, however, is not, we think, such a case. Here the learned trial judge said in finally announcing his decision :—" I have a discretion, as I have said. If I think the evidence is obtained in such a way that it would be unfair to admit it, I should not admit it." It is true that a little later he proceeded to " test the matter " by asking whether there had been anything likely to induce an untrue admission. But a fair reading of the whole passage seems to make it clear that his Honour's process of thought was as follows :— " If the evidence was obtained in such a way that it would be unfair to admit it, I should not admit it. I do not think that it was obtained in such a way. Unless and until I am constrained by superior authority, I will not hold that a failure to observe the Commissioner's Standing Orders amounts in itself to obtaining evidence in such a way that it would be unfair to admit it. I think that I ought to consider in this connection not merely the Standing Orders but the substantial question whether there was anything likely to induce the making of an untrue admission." In his report the learned judge, while indicating a doubt as to whether the relevant law and practice were the same in Victoria as in New South Wales, says expressly : " I could not in all the circumstances of this case find anything which would make it unfair to admit their statements in evidence." In this state of affairs it seems to us to be impossible to say that his Honour did not consider everything which he was called upon to consider. It is true that he did not propound to himself the question whether anything done or said by the detectives had resulted in either Clayton or Andrews failing to do justice to his real position. But he was not, in our opinion, called upon to ask himself that question. He did not refer to an " onus " in connection with an exercise of

discretion. But it would be wrong in our opinion to approach the matter from the point of view that any onus lay upon the Crown in connection with the exercise of his discretion. His Honour did advert to the possibility of impropriety being likely to bring about an untrue admission. But in our opinion he was right in regarding this possibility as a relevant matter. It is most important to observe that his Honour at the trial expressly held that the statements in question were voluntary. In his report he says: "I was clearly of the opinion and, after hearing the applicants" (the respondents here) "in the witness box, remained of the opinion that each of the statements was in the fullest sense voluntary". So far as Clayton and Andrews are concerned, the appeal should, in our opinion, be allowed, the order of the Full Court set aside and the convictions and sentences restored.

Nor do we think that the case of the respondent Lee stands essentially in any different position. The majority of the Full Court thought that it was open to the learned trial judge to find that her statement was not voluntary because her will was overborne by the shock of being shown Clayton's statement "so that she was unable for a time to maintain her resolution not to answer any questions". It is obvious that for a time she did not maintain her resolution not to answer any questions. Whether she was unable to maintain this resolution because her will was overborne is another matter altogether. It may have been open to the learned trial judge so to find, but his Honour did not so find. He saw and heard the detectives in the witness box, and he saw and heard Lee in the witness box. He gave full consideration to the matter and both at the trial and in his report he expressed the clearest opinion that her statement was voluntary in the fullest legal sense. We can see no reason whatever for thinking that he was wrong. Nor was the majority of the Full Court prepared to decide the case on the ground that he was wrong in this respect. The actual decision of the majority with regard to Lee was based, not on the view that her statement was not voluntary, but on the view that the learned judge could not lawfully exercise his discretion in favour of admitting her evidence. It is said that Lee became "so far unbalanced emotionally that she ceased to desire to guard her own interests", and that this was due to the "improper course" pursued by the detectives. *Smith* J. said "By the improper course pursued by the detectives the accused Lee at the time when she made the admissions relied upon had been brought to a state of mind in which she was not able to do justice to her real position. It was therefore not open to his Honour,

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addressing his mind to the appropriate considerations, to find that the Crown had satisfied the onus which rested upon it in her case."

The view expressed by the majority of the Full Court is open to several comments. In the first place, the view that Lee became "unbalanced emotionally" amounts to a finding by an appellate court of a fact which could not, save in very exceptional circumstances, be satisfactorily determined except upon seeing and hearing the material witnesses. In the second place, it cannot possibly be essential to the exercise of a discretion in favour of admitting a statement by an accused person that it should be shown that at the time of making the statement that person was actuated only by a desire to guard his or her own interests. In the third place, the view that any onus rests on the Crown when the admission of evidence becomes a matter of discretion is, as we have said, in our opinion misconceived. In the fourth place, even if the learned judge had thought that Lee's emotions did get the better of her for a few moments, he would not have been bound to reject evidence of what she said. To say that he would have been so bound would be inconsistent with *Sinclair* v. *The King* (1). Further, it is, in our opinion, very far indeed from being clear that Lee ceased to desire to guard her own interests. Nor is it, in our opinion, shown that there was any improper conduct of any relevant significance on the part of the detectives. It is said that she was not cautioned. It is not suggested that she did not know that she was not bound to say anything. It is said that they persisted in questioning her. There does not seem to have been any undue persistence or importunity. It is said that they showed Clayton's statement to her. Even if we take the Standing Orders as our criterion and regard Lee as a "person charged" within the "spirit" of rule 8 (though she had not been charged at the material stage), it cannot be said that it was improper on the part of the detectives to show to Lee the statement made by Clayton and to give her an opportunity of replying to it if she so wished. The detectives invited no reply before Lee spoke. It is said that the detectives cross-examined her. She was told the substance of what the detectives believed had taken place, and she had an opportunity to explain, if she could and wished to do so, the evidence which might incriminate her. The decision of the majority of the Full Court illustrates, we think, the dangerous ambiguity of the criterion which was adopted. Lee said at the trial, as did the others, that they had left Kent hale and hearty on the verandah. If this was her "real position", her statement

(1) (1946) 73 C.L.R. 316.

to the detectives certainly failed to do justice to it. But it is sufficient to say that the learned trial judge, whose opportunities of forming a correct estimate of what happened were much greater than can be those of any appellate court, took no such view of what took place as did the majority of the Full Court. We think that the Full Court was applying wrong criteria, that the learned trial judge applied right criteria, and we can see no reason for thinking that he applied them in any respect wrongly.

Gavan Duffy J. applied the test prescribed by s. 141, but he did not treat it as conclusive, or as providing the only relevant consideration. He exercised a discretion, though it is not clear to us that he was in the circumstances of this case really called upon to exercise a discretion. He exercised it in favour of admitting the statement. He was not under a duty to reject it, and there was, in our opinion, no ground for saying that he was bound to exercise a discretion in favour of rejecting it. It would, of course, be otherwise if, being bound to exercise a discretion, he exercised no discretion or proceeded on wrong principles.

We should perhaps add that we do not think that our view of this case or anything that we have said in any way violates any of the general principles stated in the judgment of *Barry* J. It is, of course, of the most vital importance that detectives should be scrupulously careful and fair. The uneducated—perhaps semi-illiterate—man who has a "record" and is suspected of some offence may be practically helpless in the hands of an over-zealous police officer. The latter may be honest and sincere, but his position of superiority is so great and so over-powering that a "statement" may be "taken" which seems very damning but which is really very unreliable. The case against an accused person in such a case sometimes depends entirely on the "statement" made to the police. In such a case it may well be that his statement, if admitted, would prejudice him very unfairly. Such persons stand often in grave need of that protection which only an extremely vigilant court can give them. They provide the real justification for the Judges' Rules in England and the Chief Commissioner's Standing Orders in Victoria, and they provide (if we are to assume that the requirement of voluntariness is not enough to ensure justice) a justification for the existence of an ultimate discretion as to the admission of confessional evidence. The duty of police officers to be scrupulously careful and fair is not, of course, confined to such cases. But, where intelligent persons are being questioned with regard to a murder, the position cannot properly be approached from quite the same point of view.

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A minuteness of scrutiny, which in the one case may be entirely appropriate, may in the other be entirely misplaced and tend only to a perversion of justice. Each case must, of course, depend upon its own circumstances considered in their entirety. No better guidance is, we think, to be found than in the passages from the judgment of *Street* J. in *R.* v. *Jeffries* (1) which we have quoted above.

In our opinion the appeal should be allowed in the case of all three respondents, the order of the Full Court of Victoria should be discharged and the convictions and sentences restored.

Special leave to appeal granted in each case. Appeals allowed. Order of Full Court of Supreme Court discharged. Convictions and sentences restored.

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

Solicitor for the respondents, *C. M. S. Power*, Public Solicitor.

E. F. H.

(1) (1947) 47 S.R. (N.S.W.), at p. 312; 64 W.N. 71.