FOLL. 1962 V.L.R. 650
C. 1960 Q.S.R. 525
APVD. 1967. 2. A.C. 160
adopted 1969. 1 Q.B. 17
DIST. 1970 V.R. 674
FOLL. (1975) 13 S.A.S.R. 392.
DIST. (1980) 2. N.S.W.L. 545.

[HIGH COURT OF AUSTRALIA.]

BASTO

AGAINST

THE QUEEN.

H. C. OF A. 1954.

SYDNEY, *Nov.* 18, 22; *Dec.* 17.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Criminal Law—Special leave to appeal—Application—Direction to jury—Matters set up on behalf of accused—Reference—Adequacy—Probabilities—Evidence—Statement by accused—Confessional—Admissibility—Crimes Act 1900-1951 (*N.S.W.*) (*No.* 40 *of* 1900—*No.* 59 *of* 1951), *ss.* 27, 410.

Upon the trial of an accused, a qualified medical practitioner, for administering to his child poison with intent to murder, the trial judge, in his direction to the jury, put very clearly and prominently before them the question of the intent to murder as the central issue in the case and drew their attention to matters tending in the accused's favour on that issue, as well as to matters supporting an inference against him. There was evidence that when a sedative is to be given to a child chloral hydrate is that more commonly used. The judge was not asked at the conclusion of his charge to put the additional argument that the accused's use of chloral hydrate would tend to weaken or even negative the inference that his intent was to kill the child.

Held, that the additional argument, which formed part of an argument on probabilities advanced on behalf of the accused, was one of fact, not law, and it was impossible to treat the omission of an evidentiary consideration of such a kind from the summing-up as a ground for granting special leave to appeal to the High Court.

In a case where evidence of a confession is sought to be adduced, and the judge is of the opinion that the confession has been freely and voluntarily given and decided to admit it, the only question for the jury to consider with reference to the evidence so admitted is its probative value or effect. The admissibility of evidence is not for the jury to decide, and voluntariness is only a test of admissibility. *Reg.* v. *Czerwinski* (1954) V.L.R. 483 approved; *Reg.* v. *Bass* (1953) 1 Q.B. 680; 37 Cr. App. R. 51 disapproved.

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

Robert Alexander de Castro Basto, a legally qualified medical practitioner, practising at Macquarie Street, Sydney, as an eye, ear, nose and throat specialist, was charged on 22nd March 1954

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in the Central Criminal Court of New South Wales before *Maguire* J. and a jury of twelve on an indictment containing two counts, namely: that he on 13th December 1953, at Sydney, New South Wales, (1) feloniously did administer poison to Michelle Christine Basto with intent to murder her; and (2) did attempt to commit suicide.

Basto was convicted on each count. Sentence of death was recorded against him by the direction of the judge on the first count and his Honour deferred passing sentence on the second count.

An appeal by Basto against his conviction and sentence on the first count on the ground (i) that the verdict of the jury was against the evidence and weight of evidence; (ii) that evidence was wrongly admitted; (iii) misdirection as to the administering of poison; and (iv) fresh evidence, was dismissed by the Court of Criminal Appeal of New South Wales.

Basto applied to the High Court for special leave to appeal against that decision.

Further facts appear in the judgment hereunder.

Sir *Garfield Barwick* Q.C., *J. W. Smyth* Q.C. and *K. J. Holland*, for the applicant.

H. A. R. Snelling Q.C. (Solicitor-General for New South Wales) and *T. O. Zeims*, for the Crown.

Cur. adv. vult.

Dec. 17.

THE COURT delivered the following written judgment:—

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 dismissed an appeal by the applicant from a conviction upon an indictment for administering poison with intent to murder. The charge was that on 13th December 1953 he administered poison to his infant daughter, then aged a little over two years, with intent to murder her. The indictment did not specify the poison. There was another count for attempting to commit suicide. The truth of this count was not denied by the applicant at the trial and he was convicted upon it also.

It appears that the applicant was a qualified medical practitioner practising in Sydney as a specialist in eye, ear, nose and throat. He was married in 1952 and the infant daughter to whom he administered poison is the child of the marriage. In December 1952 there was a separation between himself and his wife. She had the

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custody of the child but he was entitled to access. He was to have the child once a week or once a fortnight on Sunday between some time in the morning and 5 p.m. He resided in a flat at Elizabeth Bay. On Sunday, 13th December 1953, he called at his wife's place of residence and obtained the child to take out for the day. He said that he intended to take her to Newport and this may have been so. But owing to a difficulty in securing the assistance he expected in looking after the child he says that he gave up the intention and that the child played about in a park near his flat. The child was not returned to her mother at 5 o'clock and at intervals from shortly after that hour until about 9 o'clock at night the latter telephoned to the applicant's flat at Elizabeth Bay. She obtained no response to her telephone calls and at length she went to a police station and thence to his flat, which she says she reached at about 10 o'clock. The flat seemed to be in darkness, she knocked and received no response. She waited outside for about half an hour and then seeing a light she went again to the flat. In the meantime the applicant's female secretary, who resided at a clinic which he conducted, had occasion to communicate with him. She made repeated telephone calls to his flat from about half-past seven in the evening without obtaining an answer, although she heard the bell ringing. At length, at a time she fixes as about half-past ten, he answered the telephone. She says that his voice sounded slurred. He inquired who was speaking and when he learned who it was, asked her to come to the flat. When she entered the flat she found it in considerable disorder. In the bedroom the child was lying on the floor, unconscious. Her father was lying on the bed semi-conscious but fuddled and unable to rise. He was partly clothed but the left sleeve of his shirt was rolled up and on his arm were the needle marks of hypodermic injections. Hanging near by was a solution bottle with a rubber tube extending to the bedside and at the end of the tube was a hypodermic needle. A second tube had been affixed to a jet of the gas stove in the kitchen. The tube extended to the bedroom and had been attached to the bed but the gas was not turned on and windows were open. She saw no marks of a hypodermic needle on the child's arms which were bare. Otherwise the child was fully clothed, except for shoes and socks. Having inspected the child she removed her to another room and placed her on the bed. She then at once telephoned to the doctor who usually attended the applicant. The applicant asked her not to call the police ; but she did so. Indeed it seems that she had communicated with them before she left her own home. She thought it better to tell the child's mother, who came to the

door of the flat before the doctor or the police arrived, that the child was not there. When the doctor came he at once washed out the child's stomach and then caused her and the applicant to be taken to hospital. There the child was found to be in a stupor, and to exhibit some pallor and very shallow respirations. She failed to respond at all to sound and she responded very little to the stimulus of pinching. Her pulse rate was somewhat raised but her temperature was normal. Later she developed pneumonia, but that might have been due to some fluid being drawn into the trachea while her stomach was being washed out. She remained comatose for another eighteen hours when consciousness began to return. For two more days she was drowsy. That she was drugged was clear enough, but there was no certainty as to the identity of the drug. The assumption was made that it was a barbiturate, because on the information available that seemed the most likely, but the possibility of its being chloral hydrate was not put out of account, and later, partly because of something said by her father, it was thought that it might be a morphine. These drugs, amongst others, were at hand in the flat and there was some evidence in the case of each of them of recent use. Eventually the child recovered fully both from the drug and the pneumonia. When the applicant was admitted to hospital he was, according to the description of the resident in charge of the casualty ward, in a delirious, irritable condition, very difficult to examine and very noisy and unco-operative, bearing on his left arm the marks of a hypodermic needle. He was considered to be recovering from the taking of a drug, which on the evidence appeared likely to be of the barbiturate group. When the flat was examined next day it was found that it contained a number of drugs. They included sodium pentothal, which is a barbiturate injected intravenously as an anaesthetic, and an analysis of what remained of the liquid in the suspended bottle, from which the tube with the hypodermic needle led, showed that this was the drug it contained. There were phials of morphine sulphate and hypodermic syringes. One such syringe had been used recently and it contained a solution of morphine sulphate. Stains on the bedclothing proved to be from some derivative of barbituric acid, although it was not possible to go further chemically and identify sodium pentothal as the particular derivative. A bottle containing a solution of chloral hydrate was also found in the kitchen on the refrigerator top. Morphine sulphate, sodium pentothal and chloral hydrate are all poisons in the sense that the administration of excessive quantities is dangerous to life, and certain quantities are lethal. But chloral hydrate in proper

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doses is a sedative and hypnotic which may be safely administered and, if necessary, it is used in the case of children.

On Friday, 11th December, that is two days earlier, the applicant had called at a chemist's shop near his rooms and had discussed with the chemist, who knew him well, the use of chloral hydrate. He inquired how it was dispensed for rectal use and asked about its administration in the case of a child of three. Chloral hydrate is usually taken by the mouth but it has a very unpleasant taste. The applicant bought a box containing six ampoules each containing 1.5 grams of sodium pentothal. The chemist was the first witness at the trial. He gave evidence as an expert of the nature, use and pharmacological character of a number of the drugs found in the applicant's flat. But there was no suggestion in the result that on the Sunday the applicant had administered any drugs either to himself or the child except one or more of the three mentioned, viz. morphine sulphate, sodium pentothal or chloral hydrate.

The case of the applicant at the trial, as it appeared from a long unsworn statement he made from the dock, was that he was so overwrought with his domestic troubles and with the loneliness he felt on the Sunday afternoon that he determined to take his life. He arranged the means of asphyxiating himself with gas from the stove but decided against this course because it involved or might involve the asphyxiation of the child. He therefore determined to use the sodium pentothal and to die with the child in his arms. While he was making his preparations he saw the bottle of chloral hydrate on the table and took a dose. The drug began to take effect upon him and he was hazy. When the child would not stay quiet with him, he mixed some chloral hydrate with ice cream and gave it to her with the idea of making her drowsy so that she would stay near him and remain in his arms in his last moments. He had no intention of harming her.

The substantial issue at the trial was therefore whether in administering a poison he did so with intent to murder. On this issue the general circumstances of the case were, of course, of evidentiary importance but evidence of certain statements made by the applicant was given and it was directly material. When his secretary found him, she says that he was barely conscious. He asked her for a tourniquet and a syringe but otherwise what he said amounted only to unintelligible mumblings. To the questions of the doctor who came to the flat, he made no answer except to say that he would not tell him what had happened. The resident who saw him when he reached hospital could get nothing from him,

except that at some subsequent time, in reply to the repeated question what drug he had given the child, he said " morphia ". About half an hour after midnight his wife saw him in the casualty ward and asked him what he had done with the child, to which he answered " Oh she will be better off ". His wife says that he was then anything but normal. He was raving and saying a lot of stupid and incomprehensible things. To the resident who saw him at half-past eight next morning he appeared excitable but rational. But the applicant told him that he could not remember what had happened. At about 7 a.m. a detective sergeant of police visited his bedside. Without objection he gave this evidence of what occurred : " The accused was lying in bed. I said to him ' Are you Dr. Basto ? ' He said ' Yes, who are you ? ' I said ' I am Detective Sergeant Holmes of Darlinghurst and I have come down to see how you are and try and find out what happened last night '. He said ' You are my friend, I will tell you. I took poison to kill myself and kill my little girl and take her with me '. I said ' What kind of poison did you take ? ' He said ' I will tell you later if I live. We will both be happy to die '. I said ' Won't you tell me what kind of poison you gave the little girl so that I can tell the doctor ? ' He said ' I will tell you later if I live. I do not want to talk about it now. Please go away and let me die '. I said ' If you tell me what poison you gave the little girl the doctor might be able to save her life '. He said ' I won't talk any more '. I then left him ".

The detective sergeant then visited the flat, after which he returned to the applicant's bedside at about a quarter to eleven in the morning. The detective's evidence of what took place is as follows : " I said to him ' I have been down to your flat and I am going to tell you certain things and ask you certain questions which you need not answer unless you desire '. He said ' I do not want to hear anything, let me die '. I showed him the morphine phial produced and said ' Is this what you gave your little girl ? ' He said ' I want to die, let me die '. I repeated my question to him and he kept repeating the words over and over again ' I want to die, let me die '. I was of the opinion that it was useless trying to carry on a conversation ".

The applicant was discharged from the hospital that afternoon whereupon the detective sergeant " deemed him to be insane " and lodged him in the reception house where he remained a week. While there he saw his solicitor who advised him to make no statement to the police. On the occasion of his discharge the detective sergeant, accompanied by some colleagues, interviewed

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him. He put the whole case as resulting from his inquiries to the applicant briefly. To every question the applicant replied that his solicitor had told him not to make a statement. The detective then said: 'Don't you want to give any explanation of why your room was set up in the manner I have described and why you attempted to take your own life and the life of your child?' He said 'I do not want to make any statement'.

Q. Then did you show him the morphia phial which has been made an exhibit? A. Yes, I showed him that and I said 'Is this what you gave your child?'"

At this point counsel for the accused objected. After hearing evidence on the *voir dire* concerning the voluntariness of the statement, the judge at the trial disallowed the objection. The evidence then proceeded:

"Q. Then you said: 'I found this on your kitchen sink drainboard. Is that what you gave to your child?' A. Yes.

Q. After that the accused said: 'I do not want to make a statement'? A. Yes.

Q. What followed that? A. I then said to him: 'Do you remember speaking to us at St. Vincent's Hospital on the morning of the 14th of this month?' He said: 'Yes. That is when I wanted to die'. I said: 'Do you remember saying to us that you had taken poison to kill yourself and kill your little girl, to take her with you?' and he said 'Yes'. I said: 'Remember me asking you what kind of poison you gave the little girl and you said you would tell us later, if you lived? Doctor De Meyrick has informed me that you told Dr. Maguire that you gave the child morphia. Is that right?' He said 'Yes, I have been through time with my relatives and I would not care if it was all ended. I have nothing to live for now'. I said to him: 'You are going to be charged with the attempted murder of your daughter and attempted suicide'. He said: 'I understand that'."

The learned judge who presided at the trial (*Maguire* J.) early in his charge to the jury emphasized the intention of the accused as the thing they might find to be the crucial matter. His Honour directed them that the onus rested on the prosecution to satisfy them beyond reasonable doubt of the guilt of the accused and, after an explanation of that requirement, turned to the place taken in the case by the accused's story of matrimonial discord and unhappiness and his emotionally disturbed condition. In effect the learned judge said that, if the accused intended to kill the child, emotional or mental disturbance would afford no defence unless it amounted to insanity, a defence which was not set up. Subject

to what he was about to say the jury could therefore discard from their minds any question of mental instability or lack of understanding or of normal mentality. His Honour then dealt with the reservation to which his statement was subject and explained that in both counts a specific intent was necessary, in the first a specific intent to murder, and, in substance, that the jury might think the accused's mental processes were such that they would not be prepared to say he had the intent which they might attribute to an ordinary man doing the same thing. His Honour then told the jury that on the first count the Crown must prove first that poison was administered to the child, secondly that it was administered by the accused and thirdly, what they might think in this case most important, that at the time he administered the poison he intended to murder her. He dealt with these issues in order and discussed the evidence relating to them. Under the first head, the learned judge defined poison as being a substance which if taken in sufficient quantity would be deleterious and harmful to human life or human health and well-being. It was not necessary for the Crown to prove that the dose administered was sufficient to bring about death ; it was enough if the substance was of a nature to do so if administered in sufficient quantity, provided that the other two elements were proved. He spoke of the statement attributed to the accused that morphia had been administered and of the accused's case that he had given the child chloral hydrate. His Honour also mentioned sodium pentothal. He said that if they accepted the view that it was chloral hydrate and not morphia, it would not matter very much because both substances were poisons ; if they were satisfied beyond reasonable doubt that any one of the substances was administered to the child the Crown would have established the first ingredient in the crime. The learned judge then turned to the question whether the poison so found to be administered was administered by the accused and dealt with some of the facts, ending that topic by saying that the accused said that he gave the child chloral syrup, that is chloral hydrate, but without the intention of committing a crime. His Honour then directed them with some fulness upon the issue whether the accused, if he administered poison, did so with intent to murder his child. He dealt first with the accused's case as to his intent and in doing so stated as part of his case that the accused put it that he was so worried and upset that he was not thinking clearly and did not measure out the child's dose with the care he otherwise might. His Honour then put the case for the Crown on the issue and in the course of stating it referred to the statements attributed by

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the detective sergeant and his fellow officer to the accused. He put before the jury the two questions which they must consider concerning the statements, namely first whether the accused said what was ascribed to him and second, if so, whether it could be relied upon as a true recital of what had happened. As his Honour made this point he referred to the assertion of the accused that at that time, viz. on the morning of 14th December, he was in a very confused and muddled state. As to the statement said to have been made by the accused on 21st December his Honour told the jury that the accused denied making any statement and he discussed the probabilities, having regard to the advice the accused had received from his solicitor. As his Honour drew to the conclusion of his charge he repeated that it was not necessary that the Crown should prove that a lethal dose of any particular poison was administered; it was sufficient if it was established that any quantity of poison was administered provided that it was established that at the time it was administered the accused intended to take the child's life. After making some further observations bearing upon the identification of the poison, his Honour said that there was plenty of poison about but just what happened or how it was used was a matter for them, remembering that it was not for the accused to prove his innocence. The charge ended with a brief reference to the case made by the accused.

From the foregoing abstract of the learned judge's charge to the jury, it will be seen that there was no express reference to the bearing which the nature of the drug found to have been given to the child might have upon the intent with which it was administered and there was no reference to the manner in which the detectives obtained the admissions from the accused as a matter affecting the probative value the jury should place upon the alleged admissions or the use the jury should make of them.

In support of the present application for special leave to appeal it is said with respect to each of these matters that it was imperative that the jury should receive an adequate direction upon it. In any case, it was said, the evidence of what the accused said to the detectives ought not to have been admitted.

The indictment was laid under s. 27 of the *Crimes Act* 1900-1951 (N.S.W.), which simply defines the crime as consisting in the administering to, or causing to be taken by, any person any poison with intent in any such case to commit murder. The indictment is not irregular or bad because it does not specify the poison. It is complained, however, that to allow the trial to proceed on the basis that the poison administered might have been any one of

three drugs is to convert the count into three alternative charges. Doubtless three counts might have been contained in the indictment, one specifying morphine, one chloral hydrate and the third sodium pentothal. That the indictment did not identify the poison is hardly a point upon which the Court might be expected to give special leave to appeal. But the fact is that the count charges a single crime consisting in administering poison on a single occasion and the identification of the poison is a matter of evidence only.

The correctness of the direction that it was unnecessary that the dose should be lethal, provided the substance administered was a poison, can hardly be doubted, even if it is supported only by the authority of *Reg.* v. *Cluderay* (1). But the gist of the complaint made on behalf of the applicant is that it remained important for the jury to decide whether it was chloral hydrate, and not morphine or sodium pentothal, that he gave to the child because the first named drug is a recognized sedative given to children, that is of course in a proper dose. Accordingly it was unlikely that he would use that drug if he intended to murder the child and his use of it would point to the truth of his story that he meant only to quieten her so that she would lie in his arms but in his muddled condition he gave her a greater dose than otherwise he would have done. In the cross-examination by his counsel of witnesses called by the Crown evidence was elicited that when a sedative is to be given to a child chloral hydrate is that more commonly used. The argument that his use of chloral hydrate would tend to weaken or even negative the inference that his intent was to kill the child is, of course, one of fact, not law. It formed part of an argument on probabilities advanced on his behalf. *Maguire* J. in his direction to the jury put very clearly and prominently before them the question of intent to murder as the critical issue in the case and drew their attention to matters tending in the accused's favour on that issue, as well as to matters supporting an inference against him. The learned judge was not asked at the conclusion of his charge to put this additional argument and it is impossible to treat the omission of an evidentiary consideration of such a kind from the summing-up as a ground for granting special leave to appeal. It is hardly necessary to say that as a reason for granting a new trial, after a conviction in a criminal case, it is not enough that the presiding judge has not mentioned to the jury all the matters which were set up on behalf of the accused as affecting probabilities. The point which it is said the judge should have made for the accused is certainly not a decisive consideration and so far as the facts upon which it depends and the issue to which it

(1) (1849) 1 Den. 514 [169 E.R. 352]; 2 Car. & K. 907 and 909 [175 E.R. 381].

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relates are concerned, they were put definitely and clearly before the jury. It was contended in support of the present application that the minds of the jury would be turned away from the point, and the argument made upon it, by the learned judge's direction that if they thought that it was chloral hydrate that was administered to the child it would not matter much because that drug was a poison. But this direction was given specifically and clearly in relation to the first issue which his Honour submitted to the jury, viz. whether in fact poison was administered to the child, and before his Honour dealt with the issue whether the accused intended to murder the child. When the point was repeated towards the end of the charge the proviso was expressly added " provided that also they establish that at the time of the administration the prisoner intended to take his child's life ". The question raised as to the reception in evidence, and the treatment in the summing-up, of the testimony of the detectives concerning the admissions made by the accused is of course not unconnected with that just considered. For both matters go to the finding of the jury that the accused possessed the intent to murder. As appears from what has been already said, no objection was taken to much of this testimony. It is only the confirmation ascribed to the accused on 21st December of his admission made on the morning of 14th December that the judge at the trial was asked to reject. There was a good deal of evidence, not all of it consistent, as to the degree to which the accused had recovered his intelligence by the time when, on 14th December, the detective sergeant visited him and asked him questions. But much of the evidence suggests that he had hardly recovered sufficiently from the drug or drugs he had administered to himself to make it altogether desirable or seemly that he should be questioned. Moreover shortly afterwards he was deemed an insane person. But the evidence of what he then said could not have been excluded on the common law ground that it consisted of confessional statements that were not voluntarily made or under s. 410 of the *Crimes Act* and the learned judge was not asked to exclude it as an exercise of discretion and did not do so. Nor, if he had been asked to exclude it, is it by any means clear that his Honour would have adopted a view of the facts which would have afforded any justification for his exercising his discretion to reject the evidence.

On 21st December the accused was quite himself but the detectives were, as he knew, about to arrest him and charge him with poisoning with intent to murder and the detective sergeant persisted in his questions notwithstanding the accused's repeated refusals to answer on the ground that his solicitor had advised him to make no statement. These facts are not in themselves enough to make the

evidence inadmissible as involuntary under s. 410 of the *Crimes Act* 1900-1951 or at common law. The accused's will was not overborne nor was there any inducement in the form of some fear of prejudice or hope of advantage exercised or held out by the police officers as persons in authority : *McDermott* v. *The King* (1) ; *R.* v. *Lee* (2). *Maguire* J. did not consider that he should reject the evidence in his discretion as obtained in an improper manner and no sufficient ground arose for the Court of Criminal Appeal to decide that he ought to have done so, still less for this Court to grant special leave for the purpose of reviewing his Honour's conclusion.

The chief attack, however, made upon the course pursued by the judge at the trial was not this : it was that his Honour had not expressly submitted to the jury the question whether the confessional statement was voluntary or the question whether it was made in such circumstances that the jury ought not to act upon it or to regard it as safe to do so. In *Sinclair* v. *The King* (3), *Rich* J. said : " If the admissibility of the evidence depends upon the existence of the fact and the judge is not satisfied by the evidence given on the *voir dire* that it exists, he rejects the evidence. If he is so satisfied he admits it. But it does not follow from this that the evidence given before him on the *voir dire* on the question of whether the evidence should be admitted may not, in a proper case, be given again in its entirety as evidence in the trial, not of course for the purpose of inviting the jury to give a ruling on admissibility of evidence, but for the purpose of assisting them to consider whether, in their opinion, the evidence qualifies the weight of the evidence which the judge has admitted. This is a point which occurs every day in courts exercising criminal jurisdiction. The prosecution tenders a confession made by the prisoner to the police and subsequently written out and signed by him. It is almost common form for the document to be objected to on the ground that it is not voluntary and for the judge, then, in the absence of the jury to hear evidence on the *voir dire* from the prisoner that he was forced to make the confession by brutal ill-treatment on the part of the police, and from the police in denial of this allegation. If the judge is not satisfied that the prisoner's assertions are true, he admits the confession, and afterwards the prisoner, in the witness-box, or more commonly in a statement from the dock, repeats his allegation of ill-treatment to the jury, who, after having heard the denials on oath of the police officers, give it all the attention which, in their opinion, it deserves " (4).

(1) (1948) 76 C.L.R. 501.
(2) (1950) 82 C.L.R. 133.
(3) (1946) 73 C.L.R. 316.
(4) (1946) 73 C.L.R., at p. 326.

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This passage is based upon a correct view of the law, except in so far as it may perhaps suggest that the burden lies on the prisoner of establishing involuntariness, and the decision of the Court of Criminal Appeal in *R.* v. *Murray* (1), accords with it. The jury is not concerned with the admissibility of the evidence; that is for the judge, whose ruling is conclusive upon the jury and who for the purpose of making it must decide both the facts and the law for himself independently of the jury. Once the evidence is admitted the only question for the jury to consider with reference to the evidence so admitted is its probative value or effect. For that purpose it must sometimes be necessary to go over before the jury the same testimony and material as the judge has heard or considered on a *voir dire* for the purpose of deciding the admissibility of the accused's confessional statements as voluntarily made. The jury's consideration of the probative value of statements attributed to the prisoner must, of course, be independent of any views the judge has formed or expressed in deciding that the statements were voluntary. Moreover the question what probative value should be allowed to the statements made by the prisoner is not the same as the question whether they are voluntary statements nor at all dependent upon the answer to the latter question. A confessional statement may be voluntary and yet to act upon it might be quite unsafe; it may have no probative value. Or such a statement may be involuntary and yet carry with it the greatest assurance of its reliability or truth. That a statement may not be voluntary and yet according to circumstances may be safely acted upon as representing the truth is apparent if the case is considered of a promise of advantage being held out by a person in authority. A statement induced by such a promise is involuntary within the doctrine of the common law but it is plain enough that the inducement is not of such a kind as often will be really likely to result in a prisoner's making an untrue confessional statement. Perhaps an even clearer example is the statutory extension of the common law doctrine made by s. 410 (1) (a) to untrue representations made to a prisoner. A prisoner may, of course, be misled by a false representation into stating by way of admission something the truth of which there is no reason to doubt. Unfortunately, in *Reg.* v. *Bass* (2), *Byrne* J., speaking for himself and *Goddard* L.C.J. and *Parker* J., used language which makes it appear that the question for the jury is whether the statements are voluntary and that they must be so told. "When a statement has been admitted

(1) (1951) 1 K.B. 391; 34 Cr. App. R. 203.

(2) (1953) 1 Q.B. 680; 37 Cr. App. R. 51.

by the judge, he should direct the jury to apply to their consideration of it the principle as stated by Lord *Sumner* (*scil.* in *Ibrahim* v. *The King* (1)) and he should further tell them that if they are not satisfied that it was made voluntarily they should give it no weight at all and disregard it " (2). With all respect, this cannot be right. The admissibility of evidence is not for the jury to decide, be it dependent on fact or law : and voluntariness is only a test of admissibility : see *Cornelius* v. *The King* (3). The true view is expressed by the Supreme Court of Victoria in a judgment delivered by *Gavan Duffy* J. in *Reg.* v. *Czerwinski* (4).

But in the present case the complaint against the charge goes further than the erroneous point that voluntariness was not submitted to the jury. It is complained that there was no adequate direction to the jury to consider the probative value of the statements ascribed to the accused in the light of the circumstances in which they were made, not only on 14th December but also on 21st December, to consider, for example, the effects of the drugs upon his condition on the first occasion and of the persistence of the detectives' questions on the second occasion. The short answer to this contention is that the jury's attention was sufficiently directed to the necessity of considering, first, whether the accused made the statements attributed to him and, second, how far reliance should be placed upon them or effect given to them, if made.

It was suggested that the evidence about the various drugs found in the flat and their toxicological character was calculated to lead the jury away from the issue and confuse them. But the judge's charge brought the matter down to the three drugs that have been mentioned and on this point the jury could not be under any misconception. In fact an examination of the whole charge given by *Maguire* J. to the jury leaves the strong impression that it was not only legally correct but factually it was balanced, fair and sufficient.

The case does not disclose any ground upon which this Court should give special leave to appeal. The application should be refused.

Application for special leave refused.

Solicitors for the applicant, *Nicholl & Hicks.*

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

J. B.

(1) (1914) A.C. 599, at p. 609.
(2) (1953) 1 Q.B., at pp. 684, 686; 37 Cr. App. R., at pp. 57, 58.
(3) (1936) 55 C.L.R. 235, at pp. 246, 248, 249.
(4) (1954) V.L.R. 483.