

## THE ADMISSIBILITY OF CONFESSIONS IN CRIMINAL CASES \*

T. D. MACDONALD AND A. H. HART  
Halifax

### *Introduction*

The purpose of this study is to examine briefly the genesis and development of the rule as to the admissibility in evidence of confessions made to persons in authority, and particularly its manifestations in the recent cases of *Gach v. The King*<sup>1</sup> and *Rex v. Dick*.<sup>2</sup> As a background of the study it will be helpful first to state the rule as set forth in a standard recent text, Phipson on Evidence:<sup>3</sup>

In criminal cases, a confession made by the accused *voluntarily* is evidence against him of the facts stated. But a confession made after suspicion has attached to, or a charge been preferred against, him, and which has been induced by any promise or threat relating to the charge and made by, or with the sanction of, a person in authority, is deemed *not* to be *voluntary*, and is inadmissible.

### *First Clear Expression of the Rule*

The first full and clear expression of the rule appears in the case of *The King v. Warickshall*.<sup>4</sup> Jane Warickshall was charged in the year 1783 with receiving stolen goods. As a result of a confession ruled inadmissible because obtained by promise of favour, the goods were found in her bed. Her counsel argued "that, as the fact of finding the stolen property in her custody had been obtained through the means of an inadmissible confession, the proof of that fact ought also to be rejected; for otherwise the faith which the prosecutor had pledged would be violated, and the prisoner made the deluded instrument of her own conviction". The court said:

It is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith, no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit. A free and voluntary

---

\*A submission made to the August 1947 meeting of the Criminal Law Section of the Conference of Commissioners on Uniformity of Legislation in Canada by the Nova Scotia Sub-Committee. The Commissioners decided that no codification would be recommended at this time.

<sup>1</sup> (1943), 79 C.C.C. 221.

<sup>2</sup> (1947), 87 C.C.C. 101.

<sup>3</sup> 8th. ed., at p. 248 (hereinafter referred to simply as Phipson).

<sup>4</sup> (1783), 1 Leach 263 (168 English Reports 234).

confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected.

Wigmore states that, up to the middle of the seventeenth century at least, the use of torture in extracting confessions was common and that confessions so obtained were employed evidentially without scruple.<sup>5</sup> Stephens states that the general maxim that confessions ought to be voluntary is historically the old rule that torture for the purpose of obtaining confessions long has been illegal in England.<sup>6</sup> "In fact" he says "it cannot be said that it ever was legal although it seemed at one time as if it were likely to become legal." Whether or not the actual employment of torture and the existence of a jurisprudence of evidence were ever contemporaneous so as to react upon one another, the basis of the rule as set out in this early case is clear: "confessions are received in evidence or rejected as inadmissible under a consideration whether they are or are not entitled to credit"; that is to say, the consideration is probative value.

### *Early Trend in Favour of Exclusion*

For some half century or more following the *Warickshall* case, the trend of the application of the rule is supposed to have been in favour of the accused. In the case of *The King v. Jacob Thompson*<sup>7</sup> the accused was apprehended by a Mr. Cole who, apparently being then in authority over him and being unimpressed with his explanation as to how he came into possession of a stolen bank bill, said: "Unless you give me a more satisfactory account, I will take you before a Magistrate". The prisoner thereupon made a confession which was rejected upon his trial for the theft of the bank note. Mr. Baron Hotham said:

It is almost impossible to be too careful upon this subject; This scarcely amounts to a threat, but it is certainly a strong invitation to him to confess, and the manner in which it seems to have been expressed renders it more efficacious. The prisoner was hardly a free agent at the time. Suppose Mr. Cole had said to him, 'I can hang you; you had better confess: if you do not I shall carry you before a Magistrate'; it

---

<sup>5</sup> Wigmore on Evidence (2nd ed.), Vol. 2, p. 131 (hereinafter referred to simply as Wigmore).

<sup>6</sup> Criminal Law, Vol. 1, p. 447.

<sup>7</sup> (1783), 1 Leach 291 (168 English Reports 248).

is certain, that a confession made under such circumstances could not have been received in evidence, but he only said, 'Unless you give me a more satisfactory account I shall take you before a Magistrate'. Now, what was the understanding of the prisoner's mind upon hearing these expressions? Why, his answer explains what he conceived to be their meaning; for he immediately replied, 'Why then, Sir', that is, since you will otherwise carry me before a Magistrate, 'if you will keep a secret, I will tell you the whole business', and immediately makes the desired confession. I must acknowledge that I do not like to admit confessions, unless they appear to have been made voluntarily, and without any inducement. Too great a chastity cannot be preserved on this subject; and I am of opinion, that under the present circumstances the prisoner's confession, if it was one, ought not to be received.

In the case of *Rex v. Hannah Kingston*<sup>8</sup> the accused girl was charged with administering poison with intent to murder. The surgeon who was called in saw the girl and said to her, "You are under suspicion of this and you had better tell all you know", whereupon she made a statement to the surgeon. Parke J., having conferred with Littledale J., held that the statement was not admissible.

In the case of *Rex v. David Dunn*<sup>9</sup> the accused was indicted for stealing a hymn book and a witness, Fieldhouse, proved that the prisoner wished to sell the book to him and that he told the prisoner he had better tell where he got it. The following is taken from the report:

"Mr. Justice Bosanquet.—You must not tell us what he said. "Scott, for the prosecution.—The witness was not a person in any authority.

"Mr. Justice Bosanquet.—Any person telling a prisoner that it will be better for him to confess, will always exclude any confession made to that person." The evidence was rejected.

### *Disciplining the Police*

If not inherent in the rule, a consideration distinct from immediate probative value crept in at a fairly early stage. It might be referred to as "disciplining the police". In the case of *Rex v. Swatkins and Others*<sup>10</sup> the accused was charged with setting fire to a stack of barley. A constable called to prove a confession stated that he went into a public house, where he found the prisoner in custody of another constable, who thereupon left the room and the prisoner made a statement. Mr. Justice Patterson said: "It appears, that the constable,

<sup>8</sup> (1830), 4 Car. and P. 387 (172 English Reports 752).

<sup>9</sup> (1831), 4 Car. and P. 543 (172 English Reports 817).

<sup>10</sup> (1831), 4 Car. and P. 548 (172 English Reports 819).

who had this prisoner in custody, left the room immediately on this person's coming in, and that the prisoner at once began to make a statement. Now, I think, as the witness did not caution the prisoner not to confess, it would be unsafe to receive such evidence. It would lead to collusion between constables." The statement was later received when it turned out that the prisoner was not then held upon a charge, but only as a witness. The concept illustrated here — disciplining the police — is apprehended to be an important one. It will be observed in many of the cases hereinafter referred to and, indeed, may appear to the reader to have become the dominant element in the rule. While not related to immediate probative value, *i.e.* the probative value of a statement that has actually come up for consideration, it nevertheless has long range probative value as its object, since the principle involved is to discourage future improprieties on the part of the police by making their past improprieties ineffectual. It will later be proposed that it ought to be one of the two cardinal elements that enter into a sound rule in respect of confessions — the other being the question of a substantial inducement.

### *Turning Point of the Trend Toward Exclusion*

The case of *Regina v. William Baldry*<sup>11</sup> is frequently cited as marking the turning point in the trend in favour of exclusion. This was a case in which the accused was tried for administering poison with intent to murder. A constable called to prove a confession said: "I went to the prisoner's house on the 17th December. I saw the prisoner. Dr. Vincent, and Page, another constable, were with me. I told him what he was charged with. He made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said he need not say anything to criminate himself, what he did say would be taken down and used as evidence against him." The confession was admitted, but the trial judge, Lord Campbell, reserved the question for the Court of Appeal, comprising Lord Campbell C.J., Pollock C.B., Parke B., Erle J. and Williams J. The high tide of sentiment in favour of accused persons is well shown in the argument addressed to the Bench:

. . . if any inducement — of the slightest description — whereby any worldly advantage to himself as a consequence of making a statement, be held out to a prisoner, the law presumes the statement to be untrue. . . . The law assumes that a man may falsely accuse himself upon the slightest inducement . . . The law will not measure the force of the inducement;

---

<sup>11</sup> (1852), 2 Den. 430 (169 English Reports 568).

and the law supposes that there are circumstances in which a man will make false accusation against himself. . . . The law is suspicious in the highest degree of confessions; it suspects that it does not get at the truth as to the way in which they are obtained. . . .

Pollock C. B., after reviewing some of the older cases, said:

The question now is, whether the words employed by the constable 'he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him', amount either to a promise or a threat? We are not to torture this expression, or to say whether a man might have misunderstood their meaning, for the words of the statute might by ingenuity be suggested to raise in the mind of the prisoner very different ideas from that which is the natural meaning. The words are to be taken in their obvious meaning. It is very important for the protection of innocence that any man charged with a crime should be told at the time of his apprehension what the charge is. Attention should be paid to any communication made by him at that time, because generally a prisoner has no means of paying for witnesses. The accused may frequently be in a situation at once to say that he was in such a place and could prove an alibi, and may be able to make some statement of extreme importance, in order to shew that he did not commit the crime, or was not the person intended to be charged.

The words ". . . because generally a prisoner has no means of paying for witnesses . . ." appear to be highly significant and will be reverted to later. Parke B. said at page 574:

By the law of England, in order to render a confession admissible in evidence it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority, vitiates a confession. The decisions to that effect have gone a long way; whether it would not have been better to have allowed the whole to go to the jury, it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation of Mr. Pitt Taylor, that the rule has been extended quite too far, and that justice and common sense have, too frequently, been sacrificed at the shrine of mercy. We all know how it occurred. Every Judge decided by himself upon the admissibility of the confession, and he did not like to press against the prisoner and took the merciful view of it. If the question were *res nova* I cannot see how it could be argued that any advantage is offered to a prisoner by his being told that what he says will be used in evidence against him.

Lord Campbell C.J. concurred in the doubt implied by Parke B. as to whether (Lord Campbell): "If the matter were *res integra* . . . it might not have been advisable to allow the confession to be given in evidence, and let the jury give what weight to it they pleased".

*Background of the Early Decisions*

It may be well to pause here for a moment to look at the background against which the early decisions were given. A number of factors present themselves: (A) Wigmore (page 222) refers to "the character of persons usually brought before the judges on charges of crime" and points out that, having regard to the social cleavages and the feudal survivals of the period, the offenders came chiefly from the lower classes who were characterized by subordination, half respectful and half stupid, toward those in any measure of authority over them and that the situation of such persons charged and urged to confess by their superiors "involves a mental condition to which we may well hesitate to apply the test of a rational principle"; (B) "Another reason", says Wigmore (page 222), "is to be found in the absence at that time of the right of appeal in criminal cases, and the practical creation of the law of confessions by isolated judges at *Nisi Prius* without consultation and on independent responsibility"; (C) "A third reason", says Wigmore (page 223), "and one amply sufficient in itself to account for the narrowness of confession rulings, and for much besides, was the extraordinary handicap placed upon the accused at common law in the shape of his inability either to testify for himself or to have counsel to defend him"; (D) To these can be added the harshness of the punishments then in effect and (E) the consideration implied in the words of Pollock C.B. (*supra*), "because generally a prisoner has no means of paying for witnesses". The inference appears to be that in some cases, at least, if the case came to trial, the prisoner, through his own lack of means accompanied by his ignorance or lack of counsel, was already lost. In such a position, any gamble upon a promise or half-promise of forbearance or mercy must have been a not unreasonable choice.

*The Period from 1852 to 1893*

The following cases are typical of the period between the *Baldry* case and the *Thompson* case, which is the next case in the nature of a landmark that will be reviewed.

The case of *Rex v. Jarvis*<sup>12</sup> was a case reserved for the Court of Criminal Appeal by the Recorder of London. The accused's employer said in evidence: "the prisoner Jarvis was in my employ. On the 13th of May we called him up, when the officers were there, into our private counting house. I said

---

<sup>12</sup> (1867), 10 Cox's Criminal Cases 574.

to him, 'Jarvis, I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police, and I should advise you that, to any question that may be put to you, you will answer truthfully, so that if you have committed a fault, you may not add to it by stating what is untrue'. I produced a letter to him which he said he had not written, and I then said: "Take care, Jarvis, we know more than you think we know'." A confession was then made by the accused relating to the theft of silk with which he was charged and such confession was held to be admissible and it was held that the words of the employer were only cautions to tell the truth and not an exhortation, threat, or promise.

In 1872, the case of *Regina v. Sarah Reason*<sup>13</sup> was decided. Sarah Reason was indicted for the murder of her child. Evidence showed that the child had been found drowned in a canal and the police officer who was about to arrest Sarah Reason asked her some questions. In the course of this conversation he said to her: "I must know more about it", to which she answered, "I did do away with it in the canal". This statement was held admissible. Keating J. said, "In my time it used to be held that a mere caution given by a person in authority would exclude an admission, but since then there has been a return to doctrines more in accordance with the common sense view". He also said: "It is the duty of the police-constable to hear what the prisoner has voluntarily to say, but after the prisoner is taken into custody it is not the duty of the police-constable to ask questions. So, when the police-constable has reason to suppose that the person will be taken into custody, it is his duty to be very careful and cautious in asking questions."

In 1881, *Regina v. Fennell*<sup>14</sup> was decided by a court consisting of five judges. The facts were that before being charged Fennell was taken into a room with the prosecutor and a police officer. The prosecutor said: "He [meaning the police officer] tells me you have been making housebreaking implements. If that is so, you had better tell the truth. It may be better for you." A statement made after this was held not to be admissible as the words of the prosecutor were clearly an inducement.

The facts in the case of *Regina v. Gavin and Others*<sup>15</sup> were that Gavin was taken into custody and charged with robbery. He later made a statement to a police officer in which he con-

<sup>13</sup> (1872), 12 Cox's Criminal Cases 228.

<sup>14</sup> (1881), 14 Cox's Criminal Cases 607.

<sup>15</sup> (1885), 15 Cox's Criminal Cases 656.

fessed his own guilt and implicated two others. When the others were apprehended, they first denied all knowledge of the offence but later, when confronted with Gavin and when Gavin's statement was read over to them, they said, "Yes, that is right". It was held that this statement could not be given in evidence against the others. A. L. Smith J. said: "When a prisoner is in custody, the police have no right to ask him questions. Reading a statement over, and then saying to him 'What have you to say?' is cross-examining the prisoner and therefore I shut it out".

In the case of *Regina v. Brackenbury*<sup>16</sup> the prisoner was charged with breaking and entering. A police officer who met him on the highway said to him, "I am going to ask you some questions, and what you say may be taken down in writing, and might be used in evidence against you". The accused then made several admissions and, on further questioning, confessed, at which time he was taken into formal custody. Counsel for the prisoner objected to the admission of the statement, saying that the accused was practically in custody, as the police officer's act amounted to an imprisonment and he cited the *Gavin* case to show that a police constable had no right to ask questions and, therefore, admissions obtained after questioning could not be admissible. Day J. admitted all the statements made by the accused to the policeman and expressly dissented from the ruling of A. L. Smith J. in the *Gavin* case.

In *R. v. Male and Cooper*<sup>17</sup> Cooper, after being arrested, was cautioned and while being taken to the police station was questioned and was told that another prisoner had made a statement which, at Cooper's request, was read to him. Then Cooper made a statement. It was held by Cave J. that Cooper's statement was not admissible. Cave J. went on to say: "A policeman should keep his mouth shut and his ears open. He is not bound to stop a prisoner in making a statement; his duty is to listen and report, but it is quite another matter that he should put questions to prisoners. . . . It is no business of a policeman to put questions, which may lead a prisoner to give answers on the spur of the moment, thinking perhaps he may get himself out of a difficulty by telling lies."

#### *The Thompson Case*

The next landmark is the case of *The Queen v. Thompson*.<sup>18</sup> The accused was tried for embezzling funds belonging to Kendal

<sup>16</sup> (1893), 17 Cox's Criminal Cases 628.

<sup>17</sup> (1893), 17 Cox's Criminal Cases 689.

<sup>18</sup> (1893), 17 Cox's Criminal Cases 641.



Union Gas and Water Company, his masters. The president of the Company gave evidence that he had told the prisoner's brother, "It will be the right thing for Marcellus to make a clean breast of it". The witness added, "I won't swear I did not say 'It will be better for him to make a clean breast of it'. I may have done so. I don't think I did. I expected what I said would be communicated to the prisoner. I won't swear I did not intend it should be conveyed to the prisoner. I should expect it would. I made no threat or promise to induce the prisoner to make a confession. I held out no hope that criminal proceedings would not be taken." After the interview, the policeman charged the accused with embezzlement and one of the directors told the prisoner he was in a very embarrassing position, to which the prisoner replied: "I know it. I will give the Company all the assistance I can." He said in answer to the policeman's charge: "Yes, I took it; but I do not think it is more than £1,000. It might be a few pounds more." Subsequently the prisoner made out a list of moneys which he admitted had not been accounted for by him. This list with the above statements was admitted in evidence. The prisoner was convicted and the acting chairman of quarter sessions stated a case for the opinion of the Court of Queen's Bench, the question being whether the evidence of the confession was properly admitted. The judgment quashing the conviction was delivered by Cave J., who said:

Many reasons may be urged in favour of the admissibility of all confessions, subject of course to their being tested by the cross-examination of those who heard and testify of them; and Bentham seems to have been of this opinion (*Rationale of Judicial Evidence*, Bk. v., ch. vi., s. 3). But this is not the law of England. By that law, to be admissible, a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible. On this point the authorities are unanimous. As Mr. Taylor says in his *Law of Evidence* (8th Ed. Part 2, ch. 15, s. 872), 'Before any confession can be received in evidence in a criminal case, it must be shewn to have been voluntarily made; for, to adopt the somewhat inflated language of Eyre, C.B., 'a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and, therefore, it is rejected;' *Warickshall's Case*. The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point being in its nature preliminary, is addressed to the judge, who will require the prosecutor to shew affirmatively, to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession.

If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, Is it proved affirmatively that the confession was free and voluntary, that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible.

I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession; — a desire which vanishes as soon as he appears in a court of justice. In this particular case there is no reason to suppose that Mr. Crewdson's evidence was not perfectly true and accurate; but, on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary, I think it ought not to have been received. In my judgment no other principle can be safely worked by magistrates.

With all deference to the learned judge, it would appear to be neither remarkable that evidence of a confession is rarely given when the proof of the accused's guilt is otherwise clear and satisfactory — why should the prosecution embark upon such a superfluous and hazardous project? — nor that the desire to confess has vanished by the time (the words "as soon as" are presumptive and misleading) he appears in a court of justice. It is not uncommon knowledge that the time immediately following the commission of an offence or its detection finds the offender in a state of mind compact of fear, remorse, confusion, or one or more of them, which influences him toward disclosure. In many cases, the factor may be the inherent instability that underlies the commission of the offence. By the time the trial has come up, the prisoner has come to accept his position, has reorientated himself upon the basis of it and wishes to make the best of it; and has probably been informed by counsel that, without the confession, there is no case against him; so that a favourable outcome of the issue will not merely be to leave him as he was before it, unconvicted, but to put his continued freedom beyond peradventure. That the accused frequently regrets and repudiates his initial candour can scarcely be surprising. Yet to fail to take advantage of the criminal at the time he is most vulnerable, by discouraging him from speaking, is to pay too much attention to the "sporting instinct" to which Wigmore refers at page 180 and not enough to the

interests of the public. The detection and punishment of crime are not a game and the person responsible for an offence is entitled to no advantage of a sporting chance. That he is entitled to a rigid application of the principle that he *may not be induced to make evidence against himself* is beyond the necessity of statement.

### *The Period from 1893 to 1914*

Of the period between the time of the *Thompson* case and that of the leading case of *Ibrahim v. The King*,<sup>19</sup> hereinafter reviewed, the following cases are typical.

In the case of *Regina v. Miller*,<sup>20</sup> Miller was indicted for the murder of Edward Moyse. Evidence was given that a police officer had called on the prisoner and said, "I am going to ask you some questions on a very serious matter, and you had better be careful how you answer". Then he questioned the prisoner and at the end of the conversation took the prisoner into custody and charged him with murder. Counsel on behalf of the prisoner objected to the answers given by the prisoner being put in evidence and cited, among other cases, *Regina v. Gavin*, *Regina v. Brackenbury*, *Regina v. Thompson* and *Regina v. Male and Cooper* (*supra*). It was held by Hawkins J. that these answers were admissible. No threats or inducements had been held out and, therefore, the statements were voluntary. He also said that it is impossible to discover the facts of a crime without asking questions and these questions were properly put. Hawkins J. did not express dissent from any of the cases cited but said, "Every case must be decided according to the whole of its circumstances. . . ."

In the case of *Regina v. Histed*,<sup>21</sup> Histed was charged with bigamy. A detective gave evidence that he had taken Histed into custody and cautioned her in the usual form. She made no reply and he took her to the police station. The following day, after being brought before the magistrate and being remanded, she was brought face to face with the minister who had performed the first marriage ceremony, and the detective said without a further caution, "Do you know this gentleman?" and Histed said "Yes", and went on to say that he was the minister who had married her and Charles Histed. This question was necessary in the proof of the case because in no other manner was identity proven. It was held that this answer was

<sup>19</sup> [1914] A.C. 599.

<sup>20</sup> (1895), 18 Cox's Criminal Cases 54.

<sup>21</sup> (1898), 19 Cox's Criminal Cases 16.

not admissible. Hawkins J. said: "No one, either a policeman or anyone else, has a right to put questions to a prisoner for the purpose of entrapping him into making admissions. . . . In this case, no caution was given by the detective. In my opinion, when a prisoner is once taken into custody, a policeman should ask no questions at all without administering previously the usual caution." A footnote to the case says that when the cases of *Regina v. Gavin* and *Regina v. Brackenbury* were brought to the attention of the judge, he said: "I entirely agree with the ruling of Smith J. in *Regina v. Gavin*. Cross-examination of a prisoner by a policeman should not be permitted, and in my discretion I should exclude evidence obtained in that way."

In the case of *Rogers v. Hawken*,<sup>22</sup> Hawken was charged with permitting a lame horse to work and was questioned by a police officer without a caution as to whether he had sent the horse out. Hawken's answers constituted the whole case against him, which answers were held admissible. Lord Russell C.J. said: "With reference to *Regina v. Male*, I should like to say that the observations made by Mr. Justice Cave in that case were perfectly just, but that they must not be taken to lay down the proposition that a statement of the accused made to a police-constable without threat or inducement is not in point of law admissible. There is no rule of law excluding statements made under such circumstances."

*Rex v. Knight and Thayre*<sup>23</sup> was a case of post office fraud. A detective questioned the two prisoners for roughly six hours, but they had both been cautioned. It was doubted whether the prisoners were in custody, but evidence showed that the detective would not at any time permit Knight to leave the room alone. For two hours Knight denied the charges, but after this he began to make some compromising statements. It was proved that no threats or inducements were held out. It was held that his statements were not admissible and Channell J. said:

It is not easy to extract from the cases what is the guiding principle underlying the matter. It is, I think, clear that a police officer, or anyone whose duty it is to inquire into alleged offences, as this witness here, may question persons likely to be able to give him information, and that, whether he suspects them or not, provided that he has not already made up his mind to take them into custody. When he has taken anyone into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. A magistrate or judge cannot do it, and a police officer certainly has no

<sup>22</sup> (1898), 19 Cox's Criminal Cases 122.

<sup>23</sup> (1905), 20 Cox's Criminal Cases 711.

more right to do so. I am not aware of any distinct rule of evidence, that if such improper questions are asked the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answer to be given in evidence, and in my opinion that is the right course to pursue.

Of particular interest is the case of *Rex v. Kay*,<sup>24</sup> because it is the report of a trial before (then) Mr. Justice Duff, of the British Columbia Bench, who later took part as a Judge of the Supreme Court of Canada in the *Gach* case (*infra* and *supra*). The accused was arrested and charged with theft and on being taken to the police office was questioned by the police officers without a previous caution having been given him. The concept of insisting upon a warning as a rule of law when a person is in custody was rationalized by Duff J., who said: "In this case the statements were made after the arrest of the accused in answer to questions put by the chief constable. In such a case it is not, in my opinion, sufficient for the prosecution simply to shew that no inducement was put forward by way of threat or promise, express or implied. The arrest and charge are in themselves a challenge to the accused to speak; an inducement within the rule." This case appears to have been disapproved in the *Prosko* case (*infra*) but vindicated in the *Gach* case (*infra*).

In 1909, in *Rex v. Ernest Best*,<sup>25</sup> the appellant had been convicted of larceny by a trick. Best was in custody charged with two similar (but not the present) offences. He had been cautioned and was searched and the constable asked him where he got the money that was found on him. He replied, "Some of it is mine, the biggest part of it I have got by this trick". The ground of appeal related to the reception of this statement. The judgment of the court was delivered by Lord Averson C.J. who, after pointing out that there were no grounds for interfering in the case, commented on *Regina v. Gavin* (*supra*), which had been cited by the counsel for the appellant. He said in this regard: "As to the decision in *Regina v. Gavin*, we think the case, as reported, states the law too broadly, a view that is borne out by the note at the end of the report. Moreover, Day J. expressly dissented from it in *Brackenbury*." This, at least, seems to dispose of the *Gavin* case, but we shall be reminded of it again in the *Brown and Bruce* case (*infra*).

<sup>24</sup> (1904), 9 C.C.C. 403.

<sup>25</sup> (1909), 2 C.A.R. 30.

*The Ibrahim Case*

*Ibrahim v. The King*<sup>26</sup> was an Indian case in the Privy Council. The judgment was delivered by Lord Sumner. The appellant was a private in the 126th Baluchistan Infantry. Some ten or fifteen minutes after a native officer had been shot and killed, Major Barrett, in charge of the detachment, having been summoned, arrived and finding the private already in custody, said, "Why have you done such a senseless act?", to which the private replied, "Some three or four days he has been abusing me; without a doubt I killed him". It was argued that the accused's statement was inadmissible: (a) as not being a voluntary statement but obtained by pressure of authority and fear of consequence; and (b) in any case, as being the answer of a man in custody to a question put by a person having authority over him as a commanding officer and having custody of him through the subordinates who had made him prisoner. Lord Sumner said:

The appellant's objection was rested on the two bare facts that the statement was preceded by and made in answer to a question, and that the question was put by a person in authority and the answer given by a man in his custody. This ground, in so far as it is a ground at all, is a more modern one. With the growth of a police force of the modern type, the point has frequently arisen, whether, if a policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him, apart altogether from fear of prejudice or hope of advantage inspired by a person in authority.

It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest, or otherwise strictly goes only to its weight. In an action of tort evidence of this kind could not be excluded when tendered against a tortfeasor, though a jury might well be told as prudent men to think little of it. Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of policy. 'A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it': *Rex v. Warickshall*. It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice: *Reg. v. Baldry*. Accordingly, when hope or fear was not in question, such statements were long regularly admitted as relevant, though with some reluctance and subject to strong warnings as to their weight.

---

<sup>26</sup> [1914] A.C. 599.

This case is not an entirely satisfactory one from the standpoint of the present issue. The appeal, in so far as it affects us here, was upon the ground that there was a grave miscarriage of justice by reason of the misreception of evidence; the court came to the obvious conclusion that the preponderance of unquestioned evidence was so great and it was so highly improbable that the jury could have been influenced at all by the confession, that it could not be concluded that there had been any miscarriage of justice. Furthermore, custody and questions by superior military officers may possibly pose some different considerations of policy than in the case of police. But even allowing for these factors, the case is, having regard to the decision and the court, of highest general authority. After a lengthy review of cases, Lord Sumner, it being remarked that the point is whether questioning by a person in authority (and in circumstances where there was no caution) vitiates a confession, said:

The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred.

If, as appears even on the line of authorities which the trial judge did not follow, the matter is one for the judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think, as will hereafter be seen, that in the circumstances of this case his discretion is not shewn to have been exercised improperly.

The conviction was upheld. The case is also noteworthy for the statement of the rule (at page 609) in terms that have since been often quoted:

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. The principle is as old as Lord Hale.

#### *The Period From 1914 to the Present Time*

Of the period from the time of the *Ibrahim* case to the present time, the following cases are typical.

*Rex v. Voisin*<sup>27</sup> was the case of an appeal to the Court of Criminal Appeals from a conviction for murder. The trunk of the body of a woman had been found in Regent Square in a parcel, which also contained a piece of paper with the words "Bladie Belgium" written upon it. The police requested the appellant to go with them to the Bow Street police station and account for his movements. He made a statement which was taken down in writing. He was asked to write the words "Bloody Belgian" and wrote "Bladie Belgium" in the same handwriting as on the paper referred to. The police had not then decided to charge the appellant and he had not been cautioned. An appeal was entered on the ground *inter alia* of misreception of this evidence. The judgment of the court (A. T. Lawrence, Lush and Salter, JJ.) was read by A. T. Lawrence J. He said: "It is clear, and has been frequently held, that the duty of the judge to exclude statements is one that must depend upon the particular circumstances of each case". He went on to say: "The question as to whether a person has been duly cautioned before the statement was made is one of the circumstances that must be taken into consideration, but this is a circumstance upon which the judge should exercise his discretion. It cannot be said as a matter of law that the absence of a caution makes the statement inadmissible; it may tend to show that the person was not upon his guard as to the importance of what he was saying or as to its bearing upon some charge of which he has not been informed." He continued further: "We read that case [*R. v. Best, supra*] as deciding that the mere fact that a statement is made in answer to a question put by a police constable is not in itself sufficient to make the statement inadmissible in law. It may be, and often is, a ground for the judge in his discretion excluding the evidence; but he should do so only if he thinks the statement was not a voluntary one in the sense above mentioned, or was an unguarded answer made under circumstances that rendered it unreliable, or unfair for some reason to be allowed in evidence against the prisoner. Even if we disagreed with the mode in which the judge had in this case exercised his discretion, which we do not, we should not be entitled to overrule his decision on appeal. This was evidence admissible in law, and it could not be fairly inferred from the other circumstances that it was not voluntary."

*R. v. Read*<sup>28</sup> was a case of appeal to the Alberta Supreme Court, Appellate Division, from the judgment of Ives J., dismissing an application by way of certiorari to quash a conviction on a

<sup>27</sup> [1918] 1 K.B., 531.

<sup>28</sup> (1921), 36 C.C.C. 200.



summary trial by a police magistrate against the defendant for keeping a common bawdy house. The facts of the case were that the defendant was asked some questions without a caution and her answers formed the larger part of the case. On reversing Ives J.'s findings and quashing the conviction, Clarke J.A., in whose judgment the other members of the court concurred, said: "The record shews that no warning was given. It may be this was unnecessary if proper evidence of the admissions being voluntary were given. The authorities leave this point in considerable doubt. There are authorities of weight to the effect that where the prisoner is under arrest or virtually under arrest in addition to evidence of the admissions being voluntary, the prisoner must be warned of the consequence of his statements, especially where they are elicited by questions."

In the case of *Prosco v. The King*,<sup>29</sup> Prosco was wanted for murder in Quebec. He had gone to the United States, to which a Canadian detective pursued him and where he was arrested under a warrant issued by the United States immigration authorities, looking toward deportation. This was decided upon as a more convenient method than extradition and Prosco was apparently aware of the plan to arrest him for murder immediately he was taken across the line into Canada. When the Canadian detective brought Prosco before the United States immigration authorities he (Prosco) told them that he was as good as dead if he returned to Canada and upon being asked what he meant, he made an incriminating statement later put in evidence on the murder trial and made the basis of the appeal to the Supreme Court of Canada. Davies C.J., Idington, Anglin and Brodeur, JJ., concurred in dismissing the appeal. Mignault J., while not entering a formal dissent, said, "... I cannot do otherwise than express my serious doubts as to the admissibility of this evidence". Davies C.J. said of the immigration authorities: "I concede that they were persons in authority having at the time Prosco in their custody with the intention of bringing him before the United States Immigration Board to be examined whether or not he was an undesirable immigrant to the United States, and with a view to his deportation being ordered if he was found undesirable". Idington J. said: "It is the inducement exercised by the officers in charge that is to be guarded against and not the accidental circumstances of an arrest and the bearing thereof on the mind of one accused that has to be guarded against". Anglin J. said: "The two detectives were persons in authority. The accused was

<sup>29</sup> (1922), 37 C.C.C. 199.

in my opinion in the same plight as if in custody in extradition proceedings under a warrant charging him with murder. No warning whatever was given to him." And later: "At all events the discretion exercised by the trial judge in receiving it could not properly have been interfered with. *R. v. Voisin*, [1918] 1 K.B. 531, at p. 537."

*Bigaouette v. The King*<sup>30</sup> was an appeal to the Quebec Court of King's Bench from a conviction on an indictment for murder. The appellant had been convicted of murdering his mother and had made a statement, probably without a warning. Greenshields J. said, in holding the statement admissible:

Let me repeat what I have said on another occasion. The necessity of warning an accused that he is not bound to speak, and if he does, it may be used against him at his trial, is not a rule of positive law. It may be it has become what I might call, a rule of practice, which amounts today to a rule of law, but the question to be decided in each case where it is proposed to put in evidence a confession made by an accused to a person in authority, is not, whether the warning had been given or not. The question is far from that. It is, whether the statement, declaration, or confession, was made, voluntarily, in the sense that it had not been extorted, or obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority.

In the case of *Sankey v. The King*,<sup>31</sup> the Supreme Court of Canada ordered a new trial in a murder case upon the ground "of the improper reception of the unsworn evidence of a child". Anglin C.J.C., who delivered the judgment, went on to say:

We feel, however, that we should not part from this case without expressing our view that the proof of the voluntary character of the accused's statement to the police, which was put in evidence against him, is most unsatisfactory. That statement, put in writing by the police officer, was obtained only upon a fourth questioning to which the accused was subjected on the day following his arrest. Three previous attempts to lead him to 'talk' had apparently proved abortive—why we are left to surmise. The accused, a young Indian, could neither read nor write. No particulars are vouchsafed as to what transpired at any of the three previous 'interviews'; and but meagre details are given of the process by which the written statement ultimately signed by the appellant was obtained. We think that the police officer who obtained that statement should have fully disclosed all that took place on each of the occasions when he 'interviewed' the prisoner; and, if another policeman was present, as the defendant swore at the trial, his evidence should have been adduced before the statement was received in evidence. With all the facts before him, the Judge should form his own opinion that the tendered statement was indeed free and voluntary as the basis for its admission rather than accept the mere opinion of the police officer, who had obtained it, that it was made 'voluntarily and freely'.

<sup>30</sup> (1926), 46 C.C.C. 311.

<sup>31</sup> (1927), 48 C.C.C. 97.

It should always be borne in mind that while on the one hand, questioning of the accused by the police, if properly conducted and after warning duly given, will not per se render his statement inadmissible, on the other hand, the burden of establishing to the satisfaction of the Court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown. *Rex v. Bellos*, [1927] 3 D.L.R. 186; *Prosko v. The King* (1922), 37 Can. C.C. 199, 66 D.L.R. 340. That burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer, who obtained it, that it was made freely and voluntarily.

In *Rex v. Bellos*<sup>32</sup> the Court of Appeal of British Columbia had ordered a new trial in a murder case because of the reception of evidence of a constable to the effect that, after warning the accused, he had drawn his attention to the condition of his hat and arm, thereby eliciting statements from the accused prejudicial to him. The Supreme Court of Canada in an oral judgment delivered by Anglin C.J.C.<sup>33</sup> said: "The Crown discharged its burden of establishing the voluntary character of the statements made by the accused who had been given the customary warning. The mere asking of a question by the officer subsequently, or his directing the accused's attention to the subject of one of such statements, did not amount to an inducement or persuasion such as would render the statements inadmissible. The appeal is allowed and the conviction is reinstated."

In the case of *R. v. Seabrooke*<sup>34</sup> the accused, who was apparently then suspected of the murder by shooting of an oil station attendant, was arrested and told that he was wanted at the police station for questioning about a cheque. He was later told he had been brought in for questioning "as to how Paul Lavigne came to his death by shooting". He was then questioned in the presence of five policemen and a clerk who recorded the examination, which was commenced with the usual warning. The statement was admitted on the trial for murder on the evidence as to "voluntariness" of one of the policemen alone and this would appear to be the real (and a sufficient) ground upon which the Ontario Court of Appeal quashed the conviction. On August 9th, 1932, Mulock C.J.O., in delivering the judgment of the court, did say, however: "A charge of murder had not then been laid against him, nor was he given to understand that he was to be charged with murder. So far as appears he was under arrest 'because of a cheque'. Culver told him that he was brought to

<sup>32</sup> (1927), 47 C.C.C. 157.

<sup>33</sup> (1928), 48 C.C.C. 126.

<sup>34</sup> (1932), 58 C.C.C. 323.

the station for questioning as to how Paul Lavigne came to his death by shooting. This statement of Culver does not imply that Lavigne had been murdered, or that the accused was to be put on trial for murdering him, and the warning of Culver that any admissions which the accused might make might be given in evidence against him 'at his trial' does not necessarily apply to a trial for murder. If it does not, then no warning qua the trial in question, was given." It would appear that most people would be put on their guard by being told they were being questioned as to how a man "came to his death by shooting" and warned in the usual form, including the statement that whatever was said might be given in evidence against the person who said it "at his trial". However, as has already been said, the chief ground of the quashing of the conviction appears to be the failure of the Crown to show all the relevant facts surrounding the confession.

*R. v. Anderson*<sup>35</sup> was a case in the British Columbia Court of Appeal. While three police officers were searching a house for liquor, the sergeant in charge of the squad, without warning, asked Anderson, Who was in charge of the house? and on her answering that she was, he charged her with keeping liquor for sale. Sloan J.A. said:

While the law upon this subject is not as clear as one might wish, and the authorities are conflicting, in my view the general trend of more modern authority seems to indicate that when a suspected person is interrogated by the police and afterwards charged with an offence because of admissions elicited by that questioning, the exclusion of those inculpatory statements at his trial is a matter which must be left to the discretion of the trial Judge to be decided upon the diverse and particular circumstances of each case. To say because the statement of the accused is proved to have been made without fear of prejudice or hope of advantage it is therefore admissible against him in complete disregard of all other factors which a wise 'rule of policy' might, under certain circumstances, consider as having exercised an improper influence or inducement upon the free mind of the confessor, is in my opinion to fetter unduly the discretion of the trial Judge to exclude the statement.

He went on to say:

Briefly, in my view, the trial Judge has a wider range of reasons for excluding a statement than he has for admitting it. This really results from giving 'voluntary' a more extended meaning when excluding a statement (as in *R. v. Price* and like cases) than when admitting it.

### *The Judges Rules*

"In 1912", says Mr. Justice Lawrence in the *Voisin* case (*supra*), "the judges, at the request of the Home Secretary, drew

---

<sup>35</sup> (1942), 77 C.C.C. 295.

up some rules as guides for police officers. These rules have not the force of law; they are administrative directions, the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners, contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial."

The four rules referred to are set out at page 539 of the report containing the *Voisin* case. They have since been added to until they now number nine, and, with instructions in elaboration thereof, appear in Phipson at page 251. These rules, which seek to regulate the interrogation of suspected and accused persons, enjoin a caution as soon as a police officer has decided to prefer a charge, before any questions or further questions are put, and discourage the questioning of a person in custody, even after caution upon the warning that "long before this Rule was formulated, and since, it has been the practice for the Judge not to allow any answer to a question so improperly put to be given in evidence".

### *The Rule Just Prior to the Gach Case*

Before proceeding to a consideration of the *Gach* and *Dick* cases and the cases in which they were followed, it will be well to sum up the rule as it now appears upon the authorities, and to compare it with that stated in the *Warickshall* case and that stated by Phipson. This can be done shortly by reverting to the *Ibrahim* case. It will be remembered that the rule was stated thus:

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. The principle is as old as Lord Hale.

and that Lord Summer said:

If, as appears even on the line of authorities which the trial judge did not follow, the matter is one for the judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think, as will hereafter be seen, that in the circumstances of this case his discretion is not shewn to have been exercised improperly.

It will also be remembered that A. T. Lawrence J. said in the *Voisin* case: "It cannot be said as a matter of law that the

absence of a caution makes the statement inadmissible. . . . We read that case [*R. v. Best, supra*] as deciding that the mere fact that a statement is made in answer to a question put by a police constable is not in itself sufficient to make the statement inadmissible in law." Nor does that case appear to turn upon the refinement that the accused had not yet been charged. In the *Prosko* case, where the admissibility was upheld, Anglin J. said: "The accused was in my opinion in the same plight as if in custody in extradition proceedings under a warrant charging him with murder. No warning whatever was given to him." And later, "At all events the discretion exercised by the trial judge in receiving it could not properly have been interfered with. *R. v. Voisin*, [1918] 1 K.B. 531, at page 537." The strict legal position therefore appears to have been that warning or lack thereof to a person in custody charged with an offence and whether or not his statement was elicited by questions were only factors among others to be taken into consideration; and that if the trial judge, having considered the circumstances of a statement, admitted it upon the view that it had not been induced by promise or threat, his discretion ought not to be interfered with unless at least it appeared that there had been a real miscarriage of justice. This appears to be consonant with the statement of the rule in the *Warickshall* case, the *Ibrahim* case and in *Phipson*.

It is necessary to note, to complete the record, a weak implication in the *Seabrooke* case that a warning is only significant upon the trial of the charge on which the accused was in custody when the warning was given; and a weak implication in the *Sankey* case that questioning an accused before warning may vitiate a confession thereby obtained.

### *The Gach Case*

In the case of *Gach v. The King*<sup>36</sup> the facts were that the accused was convicted by a police magistrate at Winnipeg for unlawfully receiving certain ration books knowing them to have been stolen. The Manitoba Court of Appeal confirmed the conviction and a further appeal was taken to the Supreme Court of Canada wherein judgment was given on April 2nd, 1943, allowing the appeal. The following is taken from the report of the case in the Supreme Court of Canada:

The evidence at the trial was very short. The first witness, one Edward Nagurski admitted having stolen ration books, which he sold for \$17. When asked in cross-examination if he could identify the accused, his answer was: 'No, I am not certain'.

---

<sup>36</sup> (1943), 79 C.C.C. 221.

All the other witnesses, Nicholas Lyssey, Clarence Hannah, Melville Anthony, are members of the Royal Canadian Mounted Police. Lyssey and Hannah, bearers of a search warrant, called at the residence of the appellant. They informed him that Nagurski had made a statement to the effect that he had sold to the appellant eleven gas ration coupon books for \$17, and proceeded to question him. They told him that he 'could be prosecuted', and that 'in any event it would be better for him to hand them over'. At the end of the conversation they informed the accused 'that he was to accompany them to the barracks' to talk to Inspector Anthony.

Inspector Anthony repeated to the appellant 'that as far as he was concerned he might in any event be charged' and 'that he would be charged in all probability'.

In answer to these various questions, the appellant said: 'What if I have them, it is his word against mine; he brought them here anyway'. He added: 'I have not any gasoline ration books, what is this all about?' 'My mother just died last night, and I do not know where I am at'. 'You have advised me that I would be charged, so if I return them, I would not have any chance'.

Anthony also says in his evidence: 'I agreed he was perfectly right, and he asked how the books could be returned, and I told him it was up to himself. If he had them that he could hand them in to me, or I said there is a good postal service in Winnipeg, and he wanted to go. It was his mother's funeral, and I let him go. On the eighth of August I received from the Post Office eight ration books enclosed in air mail envelopes, addressed R C M P Winnipeg'.

The Supreme Court of Canada were unanimous in allowing the appeal. Taschereau J. delivered a judgment in which Rinfret and Hudson JJ. concurred. Kerwin J. delivered a judgment in which the Chief Justice concurred. The judgment of Kerwin J. proceeds upon the grounds of an inducement implied in Hannah's telling the accused that he (Hannah) thought it would be better for him (the accused) to return the books to Hannah, but Taschereau J. said at page 225: "Before being questioned by these officers who were persons in authority, the appellant should have been warned. It is true, that at that time he was not arrested yet, but he was practically in custody." Although Taschereau J. then goes on to refer to the creation of "an atmosphere prejudicial to the accused" by the methods of investigation followed, he later proceeds to reiterate what is obviously the real basis of the majority judgment:

There is no doubt that when a person has been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence, unless proper caution has been given. This rule which is found in Canadian and British law is based on the sound principle that confessions must be free from fear, and not inspired by a hope of advantage which an accused may expect from a person in authority.

I believe that under the circumstances of this case, the same rule must apply — for the reasons that justify it in the case of an accused person, are equally applicable when the suspect is threatened of being charged with the commission of a crime.

The appellant should not have been questioned, unless properly warned and, the burden was upon the Crown to show that such warning has been given.

The effect of the *Gach* case, or at any rate the meaning that it conveyed to the Saskatchewan Court of Appeal and which it will, in all probability, be taken as having laid down by other appellate bodies in Canada, is set out by Mackenzie J.A. at page 320 of the report of the case of *Rex v. Scory*:<sup>37</sup>

By such decision the Supreme Court has turned the matter of warning from a circumstance or question of fact relevant to the issue whether the statement was voluntary into a rule of law. Until such time therefore as that Court may be pleased to remove such rigidity this Court is duly bound to follow it. I would hold therefore that because of such decision the learned Chief Justice was right in this case in ruling against the admissibility of the statements in question as he did simply on the ground that the respondent had not been previously warned.

General discussion of the *Gach* case will be postponed until reference has been made to the *Dick* case.

### *The Dick Case*

In the case of *Rex v. Dick*<sup>38</sup> the accused, in connection with the murder of her husband, was taken into custody by the police on March 19th, 1946, and taken to police headquarters. She remained constantly in custody until and including the time of her trial. Between March 19th and April 12th the police obtained from her seven statements, all of which were tendered in evidence at the trial. Some were taken after caution, others not. Most, if not all, were preceded by questioning. A vagrancy charge was laid following the third statement and a charge of murder was laid, apparently after the fifth statement. No statement was made after the charge of murder was laid which was preceded by a caution. After criticizing the tactics of the police and dwelling on the burden that lies upon the Crown to show the "voluntary nature" of confessions, Robertson C.J.O. went on to say at page 113:

As already stated, some of the statements of the appellant to the police were made without any caution whatever being given; others were made after a caution had been given in the usual form, but beginning

---

<sup>37</sup> (1944), 83 C.C.C. 306.

<sup>38</sup> (1947), 87 C.C.C. 101.



with the statement that the appellant was charged with vagrancy. No statement was made by her after the charge of murder was laid which was preceded by a caution. If the caution is to amount to anything more than the idle recitation of a form of words, without regard to their true import, then it seems to me it cannot fairly be regarded as a caution such as is proper to be given to establish the voluntary character of a statement of the accused on her trial for murder, when she is asked whether she has anything to say in answer to a charge of vagrancy. It is in relation to that charge, and to that charge only, that the person questioned is cautioned that whatever he may say may be used in evidence. Whatever uses may otherwise be made of a statement made after such a caution and no other, it cannot, in my opinion, be admitted as a voluntary statement on the trial of the accused person for an entirely different offence, merely on proof of a caution such as was given here. It seems to me to be an abuse of the process of the criminal law to use the purely formal charge of a trifling offence upon which there is no real intention to proceed, as a cover for putting the person charged under arrest, and obtaining from that person incriminating statements, not in relation to the charge laid and made the subject of a caution, but in relation to a more serious and altogether different offence: *R. v. Seabrooke*, [1932] 4 D.L.R. 116, at pp. 119-20, O.R. 575, at p. 579, 58 Can. C.C. 323, at pp. 326-7. It is trifling with the long-established maxim *nemo tenetur seipsum accusare*, and has more than the mere appearance — but, in the intended result it has at times the effect — of a trial by the police in camera before even the charge has been laid. In my opinion such of the statements admitted in evidence here as were taken without the giving of a preliminary caution, (including therein the statements of April 12th) and any statements taken by the police before the laying of the charge of murder, were improperly admitted in evidence as voluntary statements.

There was obviously a good deal in the methods of the police in the *Dick* case to invoke the disapproval of the court and had the court ruled the statements inadmissible on the ground that, having regard to all the facts, the Crown had not discharged the onus of showing the statements to be voluntary, the decision could have been supported without doing any violence to the rule. The Ontario Court Appeal, however, went much further than that, as is indicated by the foregoing passage. Even at that, the words of the Chief Justice might, having regard to their context and the facts, have been taken as leaving the door open to the possibility that the Crown might in different circumstances still show that a confession taken in respect of one charge was so "voluntary" as to be admissible upon the trial of a different charge; witness his words, "merely upon proof of a caution such as was given here". The door was pushed closed, however, in the *Deagle* case.

The *Dick* case was followed in *Rex v. Deagle*<sup>39</sup> in the Appellate Division of the Supreme Court of Alberta. The accused, a taxi

<sup>39</sup> (1947), 88 C.C.C. 247.

driver, was arrested for the illegal sale of liquor, warned in the usual form and told at some stage prior to the statement that he was under arrest on a charge of illegal sale of liquor. Upon being taken to the police station and questioned without further warning, he made a statement to the effect that he engaged in procuring for reward men for a local prostitute. This part of the statement was detailed. In a few lines at the end of the statement he admitted the sale of liquor. Shortly after making the statement, which was reduced to writing and signed, he was charged with living on the earnings of prostitution and the statement was admitted in evidence. The accused admitted there had been no inducement held out to him and said: "I gave it freely. I thought it was on the liquor charge and I had no mind of fighting the liquor charge. I had no mind at all of fighting the liquor charge." Harvey C.J.A., with whom Ford, Macdonald and Parlee, J.J.A. concurred, noted the passage above set out in the *Dick* case and said: "There would appear to be no difference in principle between that and the present case and in *R. v. Glenfield*, [1935] 1 D.L.R. 37, 62 Can. C.C. 334, this Division sitting with five Judges unanimously laid down the rule that decisions upon uniform Dominion law by the highest Court of another Province would be accepted by our Court as authoritative as a general rule. I may add, too, that I am in entire accord with that decision and the grounds on which it is based." As O'Connor J.A. (dissenting) remarked, "How he could understand that the statement was 'on the liquor charge' is incomprehensible since the liquor charge is not mentioned until the end of the statement."

The Appellate Division might have, by distinguishing the *Dick* case, reinstated the rule; instead it carried the innovation of the *Dick* case into a state of facts where the result as well as the principle appears regrettable and went far toward establishing a strict rule that, without regard to any other circumstance and in entire disinterest as to whether a confession is induced, it will not be admissible on the trial of a charge different in nature from that in respect of which it was taken. The *Deagle* decision is a more significant one than the *Dick* decision, because the facts in the former case are the less easily distinguished. Furthermore, there is latent in the *Deagle* case more plainly than in the *Dick* case a complete denial of any tendency to distinguish the *Gach* case, since, no inquiry having been made as to whether, having regard to all the circumstances, the confession was voluntary, it must be taken that it fell upon the absolute principle that a confession in custody must, to be admissible, be preceded by a warning, with the added refinement that the confession may only

be used on the trial of the offence in respect of which the accused was in custody or, at least, a similar offence. It is interesting and, on the whole, relevant here to contrast the practice and procedure upon a preliminary inquiry, following which the indictment preferred may be entirely different from the charge upon which the accused person has been arrested and brought before the magistrate. It would scarcely be urged, it is submitted, that a statement made by an accused person after the usual warning upon a preliminary inquiry could not be used against him upon the trial of a different charge supported by the depositions.

### *The Rule According to the Gach, Scory, Dick and Deagle Cases*

Upon the authorities (excluding the *Gach* case) reviewed by Mackenzie J.A. in the *Scory* case, he would have concluded "that the only legal requirement . . . to permit the admission . . . of the statements . . . was that they were voluntary and that the questions, (1) whether they were obtained by interrogation, or (2) after [the accused] had been placed in custody, or (3) charged, or (4) warned, were only matters . . . to be taken into consideration . . . in order to determine whether [the statement] was voluntary. . ." Such a conclusion, it is suggested, is consonant with the law prior to the *Gach* case, consonant with the form of the rule in the *Warickshall* case and in *Phipson*. The result of the four cases mentioned above, however, is, it is suggested, to add the italicised words to the rule:

In criminal cases, a confession made by the accused voluntarily is evidence against him of the facts stated. But a confession made after suspicion has attached to, or a charge been preferred against, him, and which has been induced by any promise or threat relating to the charge and made by, or with the sanction of, a person in authority, is deemed not to be voluntary, and is inadmissible. *Such a confession if elicited by questions before warning, is conclusively deemed to have been so induced and a warning is only effective for purposes of the trial of the charge in respect of which it was given or an offence of like nature.*

The effect of these cases, therefore, appears to have been to encumber the rule with two more artificial tests.

Of the *Gach* case it must be said, however, that it carries the statement of the rule, as a rule of law, no further than (apparently not as far as) it has been now authoritatively stated in England as a rule of practice; witness the statement in the Judges' Rules that "it has been the practice . . . not to allow any answer to a question so improperly put to be given in evidence". This statement has the support of the modern case of *R. v. Alfred Brown*

and John Bruce.<sup>40</sup> A constable, upon seeing the appellants stop to look into the window of a shop that had recently been broken into, suspected and questioned them and took them to the police station where they made, as a result of questioning, the statements sought to be introduced as confessions on their trial. The Lord Chief Justice in delivering the decision of the Court of Criminal Appeal said:

In the evidence of a police officer one finds this passage: 'In the charge room at Spalding police-station I cautioned the accused and said 'I am satisfied you both know something about taking the glass from the window in Ashwell's shop on the night of the 20th April and stealing the goods.' I said: 'Do you care to say what you do know?' 'They both made a voluntary statement'. Those statements so obtained seem to us clearly to come within the mischief described in Winkel. In the circumstances, without saying more, it seems to us that the trial was unsatisfactory. The appeals must be allowed, and the convictions quashed.

Having regard to the *Gavin* case (*supra*), in the language of the Talkies, *this is where we came in!* As to the merits, the giving of a caution in the approved form may, depending upon the manner of the giving and the receptivity of the person to whom it is given and upon other circumstances, constitute a useful and effective warning to an accused person that he is under no obligation to speak and must expect that anything he does say prejudicial to his interests may be used against him. On the other hand, it may amount to no more than a verbal rigmarole or a non-understood formula inscribed at the top of a sheet of paper and hastily or even unintelligibly read to the accused. In many cases where no caution has been given, it is undoubtedly true that the confession has, nevertheless, been freely and voluntarily made, while it is also free from doubt that in many cases where the record indicates the caution to have been given with meticulous care, the accused person was not in fact apprised of his rights. The inefficacy of the recitation of the approved caution alone is demonstrated by the frequency, as in the case of *Rex v. Hanna*,<sup>41</sup> with which conscientious officers endeavour to amplify it for the benefit of accused persons. In this regard, it is interesting to note that almost the exact words of the customary warning were for many years considered to be an inducement.

In *R. v. Drew*<sup>42</sup> a magistrate's clerk told the prisoner "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

<sup>40</sup> (1931), 23 C.A.R. 56.

<sup>41</sup> (1940), 73 C.C.C. 109.

<sup>42</sup> (1837), 8 Car. and P. 140 (173 English Reports 433).

trial". Coleridge J. held this to be an inducement by a person in authority and said, "I cannot conceive a more direct inducement to a man to make a confession". Also in *R. v. Morton*<sup>43</sup> the words, "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 send to assist you", were held to convey to the prisoner's mind that what he said would be for his benefit and "a hope was created and remains." And in *R. v. Furlley*<sup>44</sup> Maule J., in declaring inadmissible a statement made after a police constable had told the accused whatever she told him would be used against her on her trial, said that he followed *Drew's* case and that the confession could not be received.

It is difficult to rationalize the *Deagle* interpretation of the *Dick* case. Rationalization can scarcely proceed upon the ground that the less serious nature of the liquor charge might have led the accused to be less careful of the truth; because his statement would, presumably, have been admitted on the trial of the liquor charge, though any doubt of the truth would be just as pertinent to the one charge as the other. Surely if a statement is given freely and voluntarily without inducement, it should be admissible upon the trial of any issue to which it is relevant; and conversely if it be suspect for purposes of the trial of a charge different from that in respect of which it was taken, then it must be suspect for all purposes.

### *Nemo Tenetur Seipsum Accusare*

Before proceeding to our conclusions it is necessary to explore a slight diversion in the way. Running through the fabric of the cases, sometimes in pattern and sometimes out, is the thread of an idea different from the rule we have been considering. *Nemo tenetur seipsum accusare (prodere)*. No one is bound to criminate (or betray) himself. The idea is one of privilege; it has nothing to do with *probative value*. According to Phipson (page 199) and Wigmore (page 143) the proper limits of this principle are statements made in court under process as a witness. Nevertheless it is frequently, in modern Canadian cases, spoken of as applying to statements out of court made to police officers: witness the *Dick* and *Scory* cases (*supra*). Wigmore remarks that the rule as to confessions and this privilege (now modified by statute) of non-incrimination have the common feature of relating to acknowledgement of guilty facts and that the test of voluntariness for confessions become almost identical with the idea of compulsion

<sup>43</sup> (1843), 2 M. and Rob. 514 (174 English Reports 367).

<sup>44</sup> (1844), 1 Cox's Criminal Cases 76.

as forbidden by the privilege. While conceding for these reasons that judicial expressions blending the two into one principle might be expected, he emphasizes that "this confusion is radically erroneous, both in history, principle, and practice". A rationalization of the extension of the privilege into extra-judicial proceedings, is indicated in the *Knight and Thayre* case (*supra*), although the privilege maxim is not expressly mentioned, "A magistrate or judge cannot do it [make an accused a witness against himself] and a police officer certainly has no more right to do so". It will not be necessary to follow this diversion further; the revision now to be postulated for the rule would allow the judge to exclude a statement where, although satisfied on the score of probative value, he felt that the accused had, having regard to the circumstances of the examination, been deceived as to, or not accorded, his rights, and compelled to, or made to believe that he must, or bullied until he did, make a statement.

### Conclusions

It has been proposed in the Criminal Law Section of the Conference of Commissioners on Uniformity of Legislation in Canada that it is high time that the rule as to the admissibility of confessions were codified and that such codification should provide, among other things, that a caution in approved form be a condition precedent to the admission of a confession made by a person in custody to police officers. On the other hand, it is suggested by Wigmore that all confessions should be admitted upon proof that they were made and that the only issue should be as to their probative value. Instances of false statements, he says, are admittedly few and "To employ an anomalous occurrence as the basis of indiscriminate exclusion is not reasonable". After all, a false confession is only one instance, and not a frequent one, of how a court may be misled and the possibilities of misinformation are at least as great in the fields where admissibility is the rule. Moreover, the spirit of the criminal community today is not one of subordination and stupidity, but of "keen appreciation of the possibilities of evading justice"; and the accused has now "ample opportunity of offering any facts affecting the weight of the confession". So his argument proceeds.

It is suggested that neither of these courses is the appropriate solution. To hem round admissibility by requirements of caution, to circumscribe the effective field thereof, and impose other such requirements, is to create a system that is too frequently and unnecessarily inimical to the administration of justice and sometimes to the accused himself. To borrow an apt expression that Dr. Cecil A. Wright has used in a different context, the

regulation of the mutual interests in this aspect of accused and the public "is really a matter which is impossible of formation in word-magic, and must, in the final analysis, rest on the discretion of the trial judge". But to make the whole issue one of probative value and let the statement go in every case to the jury, with a warning where appropriate about the circumstances in which it was taken, would, it is felt, be as objectionable as the first-mentioned course. That policeman may upon occasion overreach themselves because of their zealousness is scarcely open to doubt among those who have had any considerable part in the administration of criminal justice; and the fact that, as Wigmore says, instances of false confessions are concededly few, is probably due in part to the discouraging scrutiny of the courts and not exclusively to the moderation of the police. The magistrate and the judge are aware of the possibility of words being put into a prisoner's mouth by well-intentioned but too enthusiastic investigators; and their minds are not closed to the possibility by straightforward bearing or competent delivery on the part of policemen in the capacity of witnesses. The same thing cannot, of necessity, be said for the jury, whose attitude is apt to be that the policeman draws his salary in any event and has no incentive to be unfair; and it is felt that to throw a confession to the jury without regard to the manner in which it was taken (no matter how many warnings may accompany it) would be to impose on the jury a problem beyond its capacity of discernment.

It is felt rather that a practical working solution of the problem may lie in codification of the rule along the following lines:

A. The question of voluntariness, that is to say, whether or not a confession has been obtained by an inducement, is a question for the judge, to be decided by him upon all the circumstances, of which the cautioning of an accused person or his examination while in custody are only items.

B. Notwithstanding a judge is satisfied that a confession has been made voluntarily in the sense that it was procured by no inducement, he may in his discretion exclude such confession if he believes that, having regard to the manner in which it was obtained (for example, the procedure followed by the police), it is against the interests of the present and future administration of justice that it be admitted.

Such a codification, it is suggested, would keep the consideration of immediate probative value to the forefront, where it should be, and at the same time maintain a check upon police methods in case the spirit of the Judges' Rules is not adequately enforced by the police administration.