## EVIDENCE—CONFESSIONS—VOLUNTARINESS—JUDGE AND JURY QUESTION

A recent decision of the Ontario Court of Appeal has brought up once again a point which is becoming increasingly important in criminal jury trials in Canada when it is sought to introduce as evidence an extra-judicial statement or utterance of the accused. The purpose of this comment is not to discuss the admissibility of confessions generally, and the rules relating thereto, but rather to examine the function of judge and jury when a confession is tendered at the trial, and the way in which the duty of each is discharged. It would appear that some confusion has arisen in recent years in this area; confusion which was, it is submitted, introduced by two English cases which have been adopted to some extent by Canadian Courts.

In *Regina* v. *Mulligan*[1] the accused was charged (inter alia) with robbery with violence. The only evidence against the accused on this count consisted of an oral statement made by the accused, while in custody, to the police officers. The Court of Appeal ordered a new trial on the ground that the jury had not been adequately charged on the extent of their duties.[2]

At page 274, MacKay J.A. introduces the matter which is to be the subject of this comment. The learned judge emphasizes the point that this statement was the only evidence against the accused, and that therefore the jury should have been carefully instructed, because, as he says:

> The purpose of the trial within a trial is only to determine whether certain evidence should be admitted for consideration by the jury. Once admitted it stands in no higher or different position than any other evidence, and is subject to the same rules as generally apply to evidence in criminal cases. Any question as to the statement having been in fact made, whether it is true, or the weight to be given to it, are all matters for consideration by the jury.

He then goes on to point out that in the ordinary case, the confession is only one part of the evidence against the accused, in which case the jury might conclude that on the whole of the evidence the accused had been proven guilty beyond a reasonable doubt; but in the case under consideration the confession was the only evidence, and if they had any doubt they should have acquitted. He then quotes at length from the two English cases dealing with confessions, *Rex* v. *Murray*[3] and *Reg.* v. *Bass*.[4] Mr. Justice MacKay chose to accept the law as laid down in these cases on points of very great importance to the law relative to the use of confessions in evidence, that is to say, the right of defence counsel to cross-examine witnesses in th presence of the jury on the question of how the confession was obtained, i.e. voluntariness, and the duty of the jury in dealing with the confession after it has been admitted in evidence by the trial judge.

*Rex* v. *Murray* (*supra*) was a case very similar to the Mulligan case in that

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[1] (1955), 20 C.R. 269.

[2] In this case, the confession was the only evidence implicating the accused, and it was an oral statement. Thus it was extremely important that the jury should deduce not only if the statement were true, but also the preliminary point of whether the accused had made it, a peculiar circumstance which clarifies some of the observations made in this case.

[3] [1951] 1 K.B. 391.

[4] [1953] 1 All E.R. 1064.

the confession was the only evidence implicating the accused. Lord Goddard C.J. held that the weight and value of the confession are for the jury, and that it is the right of counsel for the defence to cross-examine before the jury, all the witnesses that had been heard before the Judge alone, on the question of voluntariness, with the object of persuading the jury that the confession had been obtained by promise, favor or threat, thereby weakening its value in the minds of the jurymen so that they would give it no weight and disregard it. He emphasized the proposition that it is a miscarriage of justice to direct the jury that they are not to consider voluntariness at all. The case of *Reg* v. *Bass* (*supra*) in the English Court of Criminal Appeal, followed the Murray case and took it one step further, to such an extent in fact, as to tend to upset the balance and function of judges and jury in these cases. In that case, Byrne J. in delivering the judgment ofthe Court, said:[5]

> It is to be observed, as this court pointed out in *Rex* v. *Murray* (supra) that, while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge, *he should direct the jury to apply to their consideration of it the principle as stated by Lord Summer*,[6] 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.

It is this case, and more particularly, this statement, which gave a boost to that which Wigmore calls[7] the great heresy; a rising trend toward giving over to the jury the question of voluntariness by charging them that it is part of their function to make a finding on this question. The charge to the jury suggested by Byrne J. in the Bass case (supra) has been adopted to a certain extent in Canada.[8] The Ontario Court of Appeal seems to have adopted this principle also, in the Mulligan case, and this, it is submitted, marks the adoption, by a strong court, of a principle which is not generally accepted in Canada.

Wigmore[9] sets out what has long been considered to be the function of the judges and jury in this regard, and MacKay J.A. outlines these principles in the *Mulligan* case.[10] While there is no power in the jury to reject the con-

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[5] At page 1066.

[6] In *Ibrahim* v. *Reg.*, [1914] A.C. 599, and quoted earlier by Byrne J., in *Reg. v. Bass*.

[7] Wigmore on Evidence (3rd ed.) vol. iii, at p. 348.

[8] In a recent case in the Supreme Court of Alberta, Trial Division, *Reg. v. Sim* (1954), 11 W.W.R. (N.S.) 227, at p. 231, McBride J., accepted the course suggested in *Reg. v. Bass* (supra) with regard to charging the jury in matters relating to confession. He said, in the course of making a ruling on admissibility:

> ". . . one the heaviest responsibilities of a trial judge . . . is to determine the admissibility of such statements . . . having in mind the fundamental principle that they must be ruled inadmissible by me unless the Crown establishes that they were voluntarily made within the special meaning of that word in our criminal law and of authorities binding one me. The responsibility . . . is not lessened—if any such statement is eventually admitted—because of the fact that in my opinion, our law required me, when later charging the jury, to instruct them that it is their right and duty to consider the manner in which it was obtained, and all the circumstances connected with its being given, and further to instruct the jury that, unless *they* are satisfied that it was given voluntarily in the sense I have just mentioned, they must rejuest it, that is give it no weight but entirely disregard it."

It is th direction to the jury to consider the *legal* rules relating to voluntariness and admissibility which this writer objects to—see Wigmore cited above.

[9] *Supra.*

[10] At page 274.

fessions as being inocompetent, there is no power in the court to control the jury in the weight to be given to the facts. It was this aspect of the jury's function which was referred to when the Court held, in the Murray and the Bass case, that cross examination on the issue of how the confession was obtained was to be allowed. But the jury should not be allowed to transcend their function. The jury may decide that the confessions are untrue, or not entitled to any weight, on the ground that they were not voluntarily made, and to that extent, voluntariness will be an "issue" before the trier of fact. However, Boyle J. in the passage quoted from the Bass case (supra) indicated that the jury is to try the issue of voluntariness on the principles upon which the judge decides this issue at the trial within a trial. This has the effect of exceeding the true function of the jury, which is to try the main issue and decide it on all the evidence. The jury must take the confession with all the other evidence in reaching a conclusion on the whole evidence. They are at liberty to believe all of it, part of it, or none of it.[11] This treatment of a confession would not allow the jury to decide upon its, admissibility in accordance with rules of law before including it with the other body of evidence in deciding the main issue. The question of voluntariness, upon which admissibility depends, and as an issue in itself, is one which is finally decided at the conclusion of the trial within a trial. That it is a question for the judge alone is a matter of substantial judicial pronouncement.[12] To direct the jury to make a finding on the question of voluntariness is really to defeat the purpose of the trial within a trial, for the jury are then directed to "disregard" the confession (rather than consider it as a part, however small, of the whole) a direction which is, from a practical viewpoint, almost meaningless. Voluntariness is relevant, within the field of the jury's own function in deciding the question of weight and truth. It is conceivable that a jury could decide that the confession had not been given voluntarily, and at the same time decide, from other circumstances, that it was true, in which case it would appear that they should act on it, the judge having already ruled as a matter of law, that it is voluntary. To allow or direct the jury to decide the admissibility according to the legal rules stated in principle in *Ibrahim* v. *Reg.*[13] is, as Wigmore points out:[14]

> . . . an abject surrender of the fixed principle that all questions of admissibility are questions of law for the judge only.

Also, the artificial nature of the confession rules, which do not attempt to measure the utlimate value of the confession would act as a crippling check on the ultimate trier of fact, who is not familiar enough with them to attempt to employ them.

In the case of *Rex* v. *Brown*[15] a similar position to that expounded in the

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[11] See: *Rex* v. *Zacharuik* [1948] 2 W.W.R. 1084 at p. 1086.

[12] See: *Ibrahim* v. *Reg.*, [1914] A. C. 599 at p. 610, *Rex* v. *Orel*, [1944] 2, W.W.R. ,378, *Rex* v. *Rubletz*, 75 C.C.C., *Reg.* v. *Thompson*, [1893] 2.Q.B. 12 at p. 16.

[13] *Supra.*

[14] Wigmore on Evidence, vol. iii, at p. 347.

[15] [1931] O.R. 154.

Bass case was put forward in the dissenting opinion of Magee J.A. who[16] quoted from 16 Corpus Juris, page 926 sec. 2,287:

> 'Whether a confession offered in evidence was free and voluntary is a question relating to the admissibility of evidence, and as such is generally a question for the Court in the first instance, particulary where the circumstances under which it was obtained are such as reasonably to indicate whether it was or was not voluntary. But it has been held that while it is the right of the court to decide primarily on the admissibility of a confession it is for the jury to determine ultimately whether such confession was voluntary; and that if there is a conflict of evidence and the court is not satisfied that the confession was voluntary, it should submit the confession to the jury, with instructions to disregard it, if upon all the evidence they believe that it was involuntary.'

Magee J.A. thought this course should have been adopted. It has found some favor in some America jurisdictions.[17] Magee J.A. found that the evidence surrounding the giving of the confession left some doubt as to whether it had been voluntary, and that it therefore should be left to the jury to decide if it had been a voluntary expression, a question which they would presumably decide by having regard to the legal rules for deciding this question. This, then was the position contended for by Boyle J. in the Bass case (supra). The majority of the Ontario Court of Appeal did not accept those principles in the Brown case, (supra) but held[18] that the question is one for the judge's discretion, subject to well-defined principles after a full investigation of surrounding circumstanmes.

> Whether or not the alleged confession is admissible is a question to be determined upon the facts of the case, but it is well settled that in such an case the consideration of and decision upon the facts is for the judge and not for the jury. The latter, however, once the evidence is admitted, must determine the weight which shall be given to it.[19]

*Rex* v. *Rubletz*[20] and *Rex* v. *Orel*[21] are two cases which should be considered together as throwing a good deal of light on the subject. It is pointed out in *Rubletz* that there are two issues in a trial involving a confession. The first is, was it voluntary—that is a question for the judge alone. If it were found not to have been made voluntarily, it would not come before the jury at all. The second question is, if the confession is submitted to the jury, is it true? Turgeon C.J.S. points out that:

> This issue is different from the issue of admissibility which was before the judge, and necessitates the inquiry going much further afield.[22]

He also emphasizes the fact that the jury must not be led to think that, because the judge has ruled the confession to be admissible that it is therefore true. To avoid this pit-fall, careful direction must be given to the jury.[23] Their minds must be directed to many surrounding circumstances. These principles, as outlined in the *Rubletz* case, were later adopted by the Saskatchewan Court

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[16] At page 163.

[17] See the cases cited in Wigmore, *supra*.

[18] At page 160, Grant J.A.

[19] *Rex* v. *Brown* (supra) p. 160, Grant J.A.

[20] [1940] 3 W.W.R. 577.

[21] [1944] 2 W.W.R. 378.

[22] [1940] 3 W.W.R. 577 at p. 590.

[23] For examples of some of the matters which should be considered by the jury in determining the weight to be given to a confession, see *Rex* v. *Sykes* (1913), 8 Cr. app. R. 233.

of Appeal in *Rex* v. *Orel*. And in *Rex* v. *Mandzuk*,[24] O'Halloran J.A. points up the function of judge and jury with regard to confessions. He illustrated that it is no part of the function of the judge at the trial within a trial to concern himself with the truth or untruth of the confession. His concerns are (1) is it a confession and (2) is it voluntary. Having decided these two questions, from testimony given as to surrounding circumstances, the trial judge may admit the confession in evidence, and

> . . . then it is to be weighed and judged in the same way as any other testimony which may affect the minds of the jury advantageously or adversely to the accused.[25]

This last proposition, is, it is submitted, the true one in regard to the effect of the confession as evidence when submitted to the jury. It was expressed in a different way in the Alberta Court of Appeal in *Rex* v. *Zachariuk*,[26] where Harvey C.J. explained how a confession should be treated by the jury, that is, that is must be taken with all the other evidence in reaching their conclusion on the whole of the evidence. They are at liberty in law to belive all of it, part of it or none of it, in deciding as they do, upon the weight or truth of any evidence submitted to them.

To what exent then, are the jury to look at the question of voluntariness of a confession? It has been demonstrated in many cases that this question is for the judge at the trial within a trial. However it does arise again after the jury has returned to the room and the confession has been admitted. At this point, the Crown, while submitting the confession as evidence, should make available the police officers who obtained it for cross-examination by defence counsel. The weight of the confession being for the jury, they are entitled to hear all the evidence as to the making of the confession, so as to determine whether or not is to be believed. In this way defence counsel has the opportunity of repudiating the confession by weakening it in the minds of the jury. However it must be kept firmly in mind that this question of voluntariness is not an "issue" before the jury. The case of *Rex* v. *McLaren* laid down what is, it is submitted, the correct principle here:[27]

> Unless a confession is voluntary when made to one in authority it is not admissible in evidence and for the purpose of deciding its admissibility the trial judge must find the fact that it is voluntary and such findings by the trial Judge *has a legal aspect*, but once it is admitted its weight is entirely for the consideration of the jury and, in deciding what weight should be attached to it, it is the right and duty of the jury to consider the manner in which it was obtained and all the circumstances connected with its being given. In doing so the jury properly will *consider* not *find* whether it was in their opinion given voluntarily and attach such importance to that fact as they think proper. (Italics added).

It should be noted that in this case, defence counsel was given full opportunity to cross examine, in the jury's presence, the police officers who had obtained the confession. This is, it is submitted, now generally recognized as the right of defence counsel, even though this evidence has been taken before the judge alone. It is highly unlikely that the accused will be called at this time to give evidence in an attempt only to discredit the confession in the mind of the jury,

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[24] [1945] 3 W.W.R. 280.

[25] [1945] 3 W.W.R. 280 at p. 284.

[26] [1948] 2 W.W.R. 1084 at p. 1086.

[27] [1949] 1 W.W.R. 529 at p. 535.

even if he gave evidence at the voir dire upon this limited question which was then an issue. If he does take the stand at this time, he is open to question on any relevant issue, and not merely on the question of how the confession was obtained. Thus one of the best ways for defence counsel to attack the weight and truth of the confession is by cross-examination of the witnesses who say it was given voluntarily. This right was affirmed in *Rex* v. *Murray* and *Reg.* v. *Mulligan*, but it is submitted that the Ontario Court of Appeal went too far in adopting the expression used in *R.* v. *Bass*, as outlined earlier, that is, that the jury should decide this question of voluntariness on the legal principles outlined in *Ibrahim* v. *Rex*. As pointed out in *Rex* v. *McLaren*, a finding on this question has already been made by the judge, and has a "legal aspect".

Recently, in *Ford* v. *Reg.*,[28] the Quebec Court of Appeal considered the question of repudiation of a confession. The Ford case is peculiar because there, the accused went into the witness box before the jury for purpose of denying and explaining away the confession.[29] He was trying to convince the jury that he had only made the confession under promise of favor. The jury were directed that if they believed the confession, they must convict; if not, they must acquit. Thus the real question before them was merely—was it true or false—and as a part of the evidence going to this was the matter of how it had been obtained. In such circumstances the judge ought to instruct the jury in such a manner as to call to their attention all the circumstances surrounding the case and which may affect the truth of falisity of the confession. It should be noted that an accused may be convicted on the strength of his extra-judicial statements alone.

The effect of the decision in *Reg.* v. *Bass* and as adopted in *Reg.* v. *Mulligan* seems to be contrary to most of the decisions in Canadian cases. However, the idea of leaving the question of voluntariness to the jury is gaining judicial favor every day. It has the desirable effect of giving the accused the extra chance of having the confession ruled out by the jury even after the judge has ruled it admissible. The history of criminal law in this country indicates that such rules, which are favorable to the accused, are looked upon with favor. However, such considerations must not be allowed to go so far as to destroy the separate functions of judge and jury, for which, in this matter of confessions, there are very good reasons.

—W. E. Wilson,
*Third Year Law.*

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[28] (1953), 17 C.R. 26.

[29] For a case in which the accused went before the jury and admitted the confession was true, and was cross-examined on it, see *Rex* v. *Sykes* (1951), 3. W.W.R. (N.S.) 643, Gallihet J.A., in B.C. Court of Appeal.