GUILT AND THE VOIR DIRE

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The law has always been ambivalent in its treatment of confessional evidence and nowhere is this revealed more clearly than in the conflicting judicial attitudes towards the permissible limits in cross-examination of the accused on a *voir dire*.

It might at first be thought that the only function of a criminal trial was to answer the question: "Did the accused commit the offence with which he is charged?" It would follow then, that all evidence should be admitted if it is relevant to establish the charge, and that evidence should only be excluded if it is inherently unreliable. So far as confessions are concerned, those who adopt this attitude would say that the only question to be considered is: "Is the confession true?" If the answer be yes then the methods by which it is obtained are relevant only in so far as they affect its reliability. Hence Wigmore's[1] view that:

> The principle upon which a confession is treated as sometimes inadmissible is that under certain conditions it becomes untrustworthy as testimony.

This view has received some direct judicial support. In *R.* v. *Thomas*[2] it was said that the only proper question for the court to decide in such cases is "whether the inducement held out to the accused was calculated to make his confession an untrue one." Similar considerations no doubt lay behind the enactment of section 20 of the Evidence Act 1908,[3] at least in its original form.

The contrary view is that the courts are vitally concerned with the methods used to obtain the confession in themselves and not merely because they might affect its reliability. There are two different considerations involved here: firstly, it is said that judicial integrity demands that the courts should not be seen to condone improper police activities, and secondly that the exclusion of confessions obtained by such methods may act as a deterrent so far as the police are concerned. While these policy factors seldom receive direct expression in the cases, they probably form the basis of the common law rules as to voluntariness. Certainly they provide the criteria by which a judge is to exercise his discretion in confession cases. Indeed it is difficult to explain the Judges' Rules on any other basis.

This basic conflict of views tends to be obscured because it is seldom that a judge will be called upon to exclude evidence

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1 *Wigmore on Evidence* (3rd ed.) Vol. 3, para. 822.

2 (1836) 1 Car. and P. 345, 346; also also *R.* v. *Garner* (1848), Den. 329, 331; *R.* v. *Scott* (1856) Dears and Bell 47, 58; they are of course inconsistent with the test laid down by Lord Sumner in *Ibrahim* v. *The King* [1914] A.C. 599, 609.

3 The section is discussed pp. 186-189 *post*.

which has been obtained by methods which are shown to be grossly improper, in the full knowledge that this may well lead to the acquittal of an admittedly guilty man. Where however the accused admits his guilt in open court such a choice is hard to avoid.

The earliest reported case in which this conflict arose was *R.* v. *Hammond*[4]. The accused was charged with murder. He had made a statement to the police which amounted to a confession but on the *voir dire* he said on oath that the confession had been extorted from him by violence and ill treatment on the part of the police (which was contrary to the evidence of three police officers who testified on the *voir dire*). He was then cross-examined as to whether the confession was true and admitted it was. Not surprisingly the accused did not give evidence before the jury. (The trial judge found that the statement was voluntary). The Crown made no attempt to introduce before the jury what had transpired on the *voir dire*. The accused was convicted and appealed on the sole ground that the question put by counsel for the prosecution was inadmissible. The Court of Criminal Appeal rejected this argument saying:

> It was a perfectly natural question to put, and was *relevant to the issue whether the story which the appellant was then telling of being attacked and ill-used by the police was true or false.* It was put by the Lord Chief Justice in the early part of the argument of counsel for the appellant, that it surely must be admissible because it went to the credit of the person who was giving evidence. If a man says, 'I was forced to tell the story, I was made to say this, that and other', it must be relevant to know whether he was made to tell the truth or whether he was made to say a number of things which were untrue. In other words, in our view, the contents of the statement which he admittedly made and signed were relevant to the question of how he came to make and sign that statement, and, therefore. the questions which were put were properly put. They were admissible. [Emphasis supplied].

While such a question may be relevant the issues involved do not stop there. How is it relevant? Whether or not it is relevant should such a question be asked and should the accused be required to answer it? If an answer is obtained to what use may it it be put? In any case the remarks quoted appear to be obiter since the Court of Criminal Appeal accepted the trial judge's explanation that he would have found the statement to be voluntary even if Hammond had denied its truth. A judge faced with these issues cannot help but feel that:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that "the interests of justice" means only "the interests of the prisoners".[5]

Similar views were given frank expression in the Tasmanian case of *R.* v. *Monks*.[6] Monks was charged on several counts of house breaking and robbery. He had made detailed confessions to the police which were the only evidence of any consequence against him. He alleged that they were obtained by violent beatings at the hands of the police. At the inevitable *voir dire*

4 [1941] 3 All E.R. 318.
5 *Per* Goddard L.C.J. in *R.* v. *Grondowski* (1946) 31 C.A.R. 116, 120.
6 Tasmanian Supreme Court, 1955. Unreported, noted (1960) 34 A.L.J. 111.

the accused gave evidence and was asked in cross examination whether the confession was true. He said that it was and in response to further questions he admitted all the offences with which he was charged. The trial judge held that the statement was voluntary, prefacing his decision with the observation that: "it would be a public scandal if after full confession on oath in open court the accused should thereafter be acquitted."

Even if the decision in *Hammond* is correct (as far as it goes) its literal and unthinking application may well have unfortunate consequences. First, it may tend to encourage improper police practices. It certainly will not discourage them. In the words of a dissenting judge in a recent Canadian case:

> It must also be considered that if it is held to be permissible to question an accused testifying on the *voir dire* as to the truthfulness of the statement of confession sought to be introduced in evidence . . . an essential safeguard against improper pressure by police authorities is being seriously compromised.[7]

Secondly, if the truth of the accused's confession is relevant to his credibility on the issue of voluntariness then it is immaterial whether or not he *concedes* that it is true. In other words the court may be obliged to consider the likelihood of the accused's guilt even where he denies the confession on the *voir dire*.[8]

Thirdly it faces the accused with the impossible choice of accepting the confession as being properly obtained when he knows it is not, or of committing perjury on the *voir dire*.

While conceding the validity of these criticisms it is difficult to find a conceptual basis for them within the framework of the law of evidence as it now stands. Arguments which have been advanced against the approach taken in *Hammond* are:

(a) It breaches the privilege against self-incrimination.

(b) It is irrelevant to the issues which the court has to decide on the *voir dire*.

(c) The judge should not allow the question to be put in the exercise of his discretion.

(d) It is inconsistent with section 20 of the Evidence Act 1908.

(a) *Breach of Privilege:*

This was the approach adopted in a Queensland case, *R.* v. *Toner*.[9] The accused was charged (jointly with others) with robbery. On the *voir dire* he was asked whether or not he was present at the scene of the robbery and other questions relating to the events out of which the various charges arose. His counsel asked that he be advised to claim privilege which course the trial judge adopted. His reasons are of interest:

7 Per Hall J. in *De Clercq* v. *R.* [1968] S.C.R. 902, 923.
8 Unless it is relevant to credibility *only*.
9 [1966] Q.W.N. 44. See also *R.* v. *Gray* [1965] Q.R. 373, *R.* v. *Silley* [1964] Q.W.N. 45, and the dissenting judgments in *De Clercq supra*. n. 7.

> The law on this matter is in a state of uncertainty but it being my view that privilege from self incrimination is a deeply ingrained constitutional right, I should not interpret s. 618A of the Criminal Code in a way or apply any other view of the law which would whittle away that constitutional right.

Unfortunately such an argument is probably not available in New Zealand. The provision referred to by His Honour is broadly similar in its terms to section 5 (2) (c) of the Evidence Act 1908 which provides:

> Where any person is charged with an offence . . . the person so charged shall be a competent witness for the defence . . . *at every stage of the proceedings*. Provided that:
>
> (a) A person charged and called as a witness in pursuance of this subsection may be asked any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged. [Emphasis supplied].

The words "at every stage of the proceedings" are missing from the Queensland provision. If, as was held in R. v. *Wheeler*,[10] these words include the situation where an accused gives evidence in mitigation of sentence then they surely apply to proceedings on a *voir dire*. While the decision in *Toner* does not purport to be decided on any narrow statutory basis it is difficult to see how it could be followed in New Zealand.

(b) *Irrelevant to the issues on the voir dire:*

This approach is based on the assumption that the only issue before the court on the *voir dire* is whether the confession is voluntary, and that the truth or otherwise of the confession is of no assistance in resolving this issue. This is the argument adopted in some of the earlier Canadian cases.[11] Regrettably it does not bear close scrutiny.[12] The truth of the confession is relevant in two ways: (i) as to voluntariness. It might be said that a true confession is more likely to be freely made.[13] It is of course true that a guilty person has an excellent motive for remaining silent in the first place but whether the confession was in fact made is not the issue on the *voir dire*. (Although there is nothing to prevent him raising it at the trial — a factor which can only add to the trial judge's difficulties). (ii) as to his credibility on the *voir dire*. It might be said that a self-confessed criminal is not to be believed. Or, it might be argued that a man who is prepared to admit to a crime on oath has little reason to lie about the manner in which the police obtained the confession. Either way it is relevant.

That the accused's guilt is relevant is beyond a doubt. *How* it is relevant will depend upon the assumptions one makes about criminal psychology.

10 [1917] I K.B. 283.
11 *R.* v. *Sim* (1954) 11 W.W.R. 227. See also *R.* v. *Hvedish* (1958) 26 W.W.R. 685; *R.* v. *Weighill* [1945] 2 D.L.R. (2nd) 471. See also the dissenting judgment of Spence J. in *De Clercq, supra.*
12 See *R.* v. *La Plante* [1958] O.W.N. 80.
13 See F. M. Neasey, "Cross-Examination of the Accused on the *Voire Dire*" (1960) 34 A.L.J. 110.

(c) *Excluded in the exercise of discretion:*

Such an approach was suggested in the recent Canadian case of *De Clercq*.[14]

> The accused was charged with indecent assault. After being questioned by the police, he signed a written confession, which he later alleged was made involuntarily. A *voir dire* was held to determine the voluntariness of the confession, during which the trial judge handed the statement to the accused (without looking at it himself) and asked him, "Is it true?" Defense counsel objected but was overruled, and the accused replied that "except for a few details" it was correct. The statement was held to be voluntary and was admitted. On appeal, the issue was not the voluntariness of the confesson, but the propriety of the trial judge's question on *voir dire* concerning its truthfulness.

The Supreme Court of Canada decided (with three strongly dissenting judgments) to apply *Hammond* and held that the question was a proper one. The court appeared to derive some comfort from the fact that the trial judge did not look at the statement before putting his unfortunate question (and yet he must have realised it was to some degree inculpatory otherwise the defence would not have objected to its admission). Presumably on this basis, the court drew a distinction between leading the evidence for the sole purpose of proving the accused's guilt which they felt was clearly improper and the admission of the evidence as going to the accused's credit on the *voir dire* which they felt was perfectly correct. Such a distinction is untenable since it requires an inquiry into the motives of the person asking the question. (Something like such an inquiry was undertaken in *Hammond* itself where the prosecuting counsel assured the Court of Criminal Appeal that the accused's reply was totally unexpected, as no doubt it was.)

That the court felt uneasy about this conclusion is apparent from the judgment of Cartwright C. J.:[14a]

> However, while it cannot be said that the question was legally inadmissible, in my respectful opinion, this was eminently a case in which the trial Judge should, in the exercise of his discretion, have refrained from putting the question on the ground discussed in *Noor Mohamed* v. *The King*.

While this appears to offer a tempting solution to the problem it may be doubted whether any such discretion exists on the *voir dire* itself. The whole rationale underlying the use of the judge's discretion (or discretions) in a criminal trial is that it is desirable to keep from the jury logically probative evidence which it is feared they will misuse. It has never been suggested that the evidence should be kept from the trial judge, indeed he must be made aware of it in order to exercise the discretion at all. Perhaps a more cogent objection to the use of the discretion in this context is that it is difficult to see any rational basis on which it can be exercised. What makes such a question permissible in one case and not in another? Indeed this is apparent from the judgment of Cartwright C. J., for in effect, he says, the discretion should always be exercised against admission. Then of course it ceases to be a discretion.

14 [1968] S.C.R. 902; (1968) 70 D.L.R. (2nd) 530.
14a *Ibid.*, 909; 535.

(d) *Section 20 Evidence Act 1908:*

This section states that:

> A confession tendered in evidence in any criminal proceedings shall not be rejected on the ground that a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the person confessing, if the judge or other presiding officer is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made.

It may seem strange that a section which was clearly designed to emphasise truth as the prime criterion of admissibility (so far as confessions are concerned) should be used to limit the cross-examination of the accused on the *voir dire*. Yet this is precisely the effect of the New Zealand case, *R.* v. *Hammond*.[15] The case involved a prosecution for burglary. The accused maintained on a *voir dire* that a confession tendered by the Crown had been obtained by repeated violence or threats of violence at the hands of the police which was denied by the officers concerned. Wilson J. accepted their version of the events but found, even accepting their evidence, that after a lengthy period of questioning during which the accused steadfastly denied his guilt, he asked one of the officers whether he would be allowed to return home if he admitted the offence. He was assured that he would be permitted to do so. After this assurance was repeated by the other officers present the accused admitted his part in the crime. His Honour felt that he would not have confessed had he not been given these assurances which were undoubtedly "inducements" within the meaning of the section. As to whether they were *"likely to cause an untrue confession of guilt to be made"*. His Honour indicated that:

> ". . . the test to be applied in stating this question is whether or not an *innocent person* in the position of the accused and in the circumstances in which he is placed would be likely to confess to a crime which he had not committed. I think that Mr Holland was right when he submitted that, for this purpose, the Judge is not entitled to have regard to any view which he may have formed as to whether the admission was actually made was true but must restrict himself to the consideration of the tendency or otherwise, of the accused, assuming him to be innocent, to admit guilt. [Emphasis supplied].[15a]

In other words, in cases to which the section applies the court is only concerned with the likely effect of police misconduct generally, not its effect on this particular accused. If this is so then it can be argued an accused should never be asked in such cases whether his confession is true since such a question can never be relevant. This argument is open to criticism on various grounds. Firstly it completely ignores the issue of credibility on the *voir dire* itself. While the accused's guilt may not be relevant to an objective assessment of the likely effect of police misconduct, it is highly relevant to his credibility. Secondly such an interpretation ignores the words *"in fact* likely to cause" which seem to suggest that it is the effect on a particular accused with which the court is concerned. If this is so then the accused's admission of guilt on the *voir dire*

15 [1965] N.Z.L.R. 257 cited hereafter as *Hammond* (N.Z.)
15a *Ibid.*, 258.

would be relevant to this issue. It is perhaps worth noting that in the case of *Cornelius* v. *The King*,[16] the Australian High Court was of the view that section 141 Evidence Act 1948, (Vic.), a provision similar to our section 20, required the court to calculate the effect of the inducement "on each particular prisoner". It must be conceded however, that the Victorian section uses the words *"really calculated to cause* an untrue admission" rather than "in fact likely to cause" (as did section 20 prior to its amendment in 1950).

Even if section 20 has the effect contended for by Wilson J. where does that leave statements not covered by its provisions, that is:

(i) Those obtained by "the exercise of violence or force or other form of compulsion" and

(ii) Those which are not "confessions" e.g. exculpatory statements.

So far as the former are concerned, then it may be that we have the anomalous situation that the accused may be asked questions tending to establish his guilt on the *voir dire* if he alleges the confession was beaten out of him but not where it was obtained as the result of a minor infringement of police practice. This raises the further point that where conflicting stories are told, and the accused alleges the use of force or fraud, as in *Hammond* (N.Z.) the judge must decide which is correct before he can decide whether the accused is to be questioned as to the truth of the confession. This would lead to "a trial within a trial within a trial." One answer to this problem is to say that when the legislature chose to exclude confessions obtained by force, fraud etc. from the ambit of section 20 presumably it did so because it felt that such conduct was always inexcusable however successful in convicting the guilty. Hence in such cases the truth of the confession is not relevant to the issues on the *voir dire*. Again, this is to ignore credibility.

As regards statements which are less than full confessions, they would appear to be of two kinds. First those which are completely exculpatory on their face and which can only be used against the accused if they are inconsistent with other statements he has made. These are clearly not within the section.[17] Then there are those which, while not amounting to a full confession of the offence charged, are partially incriminating: e.g. where the accused admits being present at the scene of the crime but denies taking part. According to Smith J. in *R.* v. *Coats*[18] these too are outside the section.

Where the accused makes a completely exculpatory statement then a *voir dire* is unlikely though conceivable. Where the statement is partially incriminating then an accused may well wish to dispute it. Can he then be questioned on the *voir dire* to show that the statement did not go far enough? There are dicta, in *Coats, supra,* which suggest that section 20 is a code

16 (1935) 55 C.L.R. 235, 245.
17 *R.* v. *Coats* [1932] N.Z.L.R. 401; *R.* v. *Lee* (1950) 82 C.L.R. 863.
18 [1932] N.Z.L.R. 401.

and that the common law does not apply to statements which are not "confessions".[19] If this is so then an exculpatory statement can never be rejected as *"involuntary"* and hence cannot be the subject of a *voir dire* and the problem does not arise.

It can be seen then that section 20 provides no simple answers to the problem.

The Use which can be made of the Answers

Assuming then, that an accused can be asked and required to answer on the *voir dire* questions tending to establish his guilt of the offence charged what can be done with the answers before the jury? There are two possibilities:

(i) The answers can be used in cross-examination of the accused where he gives contrary evidence before the jury. This seems incontrovertible; the answers on the *voir dire* are admissible in the same way as any other prior inconsistent statement would be. This would be so even where the original confession was ruled inadmissible by the judge.

Can the judge keep the answers from the jury in the exercise of his discretion? This may be contrary to section 10 of the Evidence Act 1908 which on its face appears to be mandatory:

> Every witness under cross-examination, and every witness on his examination in chief (if the Judge being of the opinion that the witness is hostile, permits the question), may in any proceeding civil or criminal, be asked whether he has made any former statement relative to the subject matter of the proceeding, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and, if he does not distinctly admit that he made such statement, proof may be given that he did in fact make it.

Skerman J. in *R.* v. *Gray*[20] felt that the equivalent Queensland provision had this effect, viz. once the answer is given there is no discretion to prevent the accused being cross-examined on it before the jury.

(ii) The answers can be used as admissions in themselves whether or not the accused gives evidence. This was done in *R.* v. *Monks*,[21] although oddly enough in *Hammond* (Eng.) this point was not raised, the Crown being content to rely on the original confession.

The Canadian case of *R.* v. *Cripps*[22] went even further and held that evidence given on the *voir dire* which is favourable to the accused is admissible at the trial.

Since the accused is not required to give evidence on the *voir dire* it cannot be argued that his answers there are made under compulsion. This would seem to be a case however, where

19 See the judgment of Adams J., 406. This seems contrary to *R.* v. *Phillips* [1949] N.Z.L.R. 316 where it was clearly stated that s. 20 as it then stood was not designed to cover the whole field of the common law.

20 [1965] Qd. R. 373, 377; the decision in *R.* v. *Silley* [1964] Q.W.N. 45 appears to be contrary although it is not clear from the report whether the accused gave evidence.

21 See n. 6 *ante*.

22 Unreported, noted in *R.* v. *Milner* (1970) 72 W.W.R. 572 *ante*.

the exercise of the discretion would be permissible and appropriate, otherwise we could have the absurd result that a confession which is held to be improperly obtained can be used to obtain another confession which is absolutely unassailable before the jury.

Onus and Standard of Proof

At common law the burden ofw satisfying the court that the statement was made voluntarily rests on the Crown.[23] In cases to which section 20 of the Evidence Act 1908 applies the onus is also now[24] placed on the Crown to satisfy the judge that any inducement which led to the confession was not likely to cause an untrue admission. In *R. v. Douglas*[25] however, the judge rejected a confession without finding the alleged inducement to be proven which suggests that the Crown also bears the onus of negativing *any* improper inducement as at common law.[25a]

English authorities suggest that the appropriate standard is beyond reasonable doubt, a view contrary to that taken by Australian courts.[26] Thus in *Wendo* v. *The Queen* Dixon C. J. drew a distinction between issues for the jury and "incidental matters of fact which the judge must decide" in which latter case he felt the civil standard was more appropriate.

In *R.* v. *Sparks*[27] the Privy Council stated that the voluntariness need only be shown to the "satisfaction of the judge", words which are more appropriate to the civil than the criminal standard.

So far as section 20 is concerned, it requires the judge to be "satisfied" that the inducement is unlikely to cause an untrue confession. Once again this suggests a civil standard. It would surely be inappropriate for the Crown to be required to establish that the inducement was made beyond a reasonable doubt and if they fail to discharge that heavy onus to then prove on the balance of probabilities that the inducement is unlikely to lead to an untrue confession.

Magistrates' Courts

The admissibility of confessions in the Magistrates' Court raises the problems considered in this paper in an even more acute form. Much will depend upon the procedure followed by individual magistrates when an objection is taken to the admissibility of the confession. In New Zealand two alternative procedures are followed. The evidence as to admissibility may be given in open court by the police and/or the accused and the question is decided then and there, the police evidence not usually being repeated at the continuation of the hearing. The second alternative is similar except that the evidence as to

23 *R.* v. *Thomason* [1893] 2 Q.B. 12, *R.* v. *Ibrahim*, n. 2 *ante*.
24 This was in some doubt prior to the 1950 Amendment.
25 [1962] N.Z.L.R. 1117.
25a *R.* v. *Sartor* [1961] Crim L. R. 397, R. v. *McLintock* [1962] Crim. L. R. 549, *R.* v. *Cave* [1963] *Crim.* L. R. 371.
26 *Wendo* v. *R.* [1963] 37 A.L.J.R. 26, *R.* v. *Bodsworth* [1968] 2 N.S.W.R. 132.
27 [1964] A.C. 984.

admissibility is given in chambers; in this case the evidence is always repeated again in open court.

In either event it is obviously undesirable that the accused be asked questions on the issue of admissibility which tend to establish his guilt of the offence charged, since the magistrate is also the trier of fact. This was recognised by the dissenting judges in *De Clercq, supra.* Thus Hall J. said:[28]

> Before a jury the problem is not so serious. Those who have to pass on the guilt or innocence of the accused are to remain in complete ignorance of the evidence on the *voir dire.*[29] But when the accused is tried before a judge alone[30] once this judge has acquired knowledge of the guilt of the accused by a question that he has himself[31] put to him how can he properly weigh the evidence and give the benefit of the doubt if need be?

Conclusion

It must be conceded that the truth of a confession is at least relevant to the accused's credibility on the *voir dire.* It may also be relevant to the issues on the *voir dire* itself. (The truth of a confession tells us something about its voluntariness, but what?) Equally obviously it seems impossible to keep such an answer from the jury once the accused decides to give evidence. Nor is section 20 Evidence Act a complete antidote to these difficulties.

Perhaps the fairest solution would be to amend section 5 (2) (c) Evidence Act so that the accused could claim privilege at the *voir dire.* This would still leave him free to deny the truth of the confession if he wishes. (Which he could not do if the question could not be put at all.) Even this has its flaws — if he did claim privilege, the judge might surmise why. Once again the magistrate would be in a worse position. Perhaps the question should not be put at all in the Magistrates' Court — there is after all no reason why the law of evidence should be identical in both jurisdictions, a fact which the Court of Appeal seems to recognise.[32]

28 (1968) 70 D.L.R. (2nd) 530, 548.
29 This does not follow — see discussion p 188 *ante.*
30 As he was in *De Clercq.*
31 With respect, it can matter little who asks the question.
32 See *Martyn* v. *Police* [1967] N.Z.L.R. 396 where Hardie Boys J. suggests that different considerations apply in the Magistrates' Court when considering the desirability of cross-examinations as to previous convictions. See also *Garry* v. *Brian* (unreported, Supreme Court, Wellington, 14/6/72) which suggests that a magistrate has a discretion to *admit* hearsay evidence.