TRUTH OR CONSEQUENCES

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The continually increasing significance attached to "confessions" by those charged with the duties of criminal investigation and prosecution warrants a most careful scrutiny of the law relating to the admissibility of these "confessions."

It is not my intention to deal with all facets of the law on this fascinating subject but rather to deal with one vital phase upon which there is open conflict in the judicial ranks.

While the law governing the admission of confessions is by no means settled, the one fundamental requirement of all jurisdictions in Canada and England is that the confessions be "voluntary" in the manner described by Lord Sumner in the now famous decision of *Ibrahim* v. *The King*:[1]

> ". . . . 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 shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority . . ."

The sole ground, according to *Wigmore*,[2] for the exclusion of statements which are not "voluntary" is simply that they are "testimonially untrustworthy."

The Supreme Court of Alberta by the majority decision of Mr. Justice Hugh John Macdonald in *Regina* v. *Martin*[3] adopts this reasoning.

The question which immediately springs to mind is: If it can be clearly established by extraneous evidence that the confession is true, will it be admitted regardless of the circumstances under which it was obtained?

The decision of McRuer, C.J.H.C. in the case of *Regina* v. *St. Lawrence*[4] is of particular significance in relation to that question. The Chief Justice after an exhaustive review of the authorities dealing with confessions which, though not voluntary, had revealed certain facts which would tend to establish at least a portion of the confession as being true, stated at page 391:

> ". . . Where the discovery of the fact confirms the confession—that is, where the confession must be taken to be true by reason of the discovery of the fact—then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible. Of all the authorities referred to, Taylor most nearly agrees with this view of the law."

This reasoning would seem to be approved by the Court of Appeal in Ontario in the case of *Regina* v. *Briden*.[5] Porter, C.J.O., clearly states at page 163 that statements not in the form of confessions are admissible regardless of the circumstances under which they are obtained and refers with approval to the *St. Lawrence* case:

> "In *Rex* v. *St. Lawrence*, McRuer, C.J.H.C. fully examined the authorities upon the principles involved. In that case there were a number of statements made by the accused which were held to be involuntary. Some parts of the statement

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1[1914] A.C. 599; 83 L.J.P.C. 185; per Lord Sumner at p. 190.

2Wigmore on Evidence, 3rd ed., ss. 822, 823 at pp. 246-248.

3(1961) 35 W.W.R. 385.

4[3 C.C.C. 376.

5[3 C.R. 159.

were, however, held to be admissible to show knowledge of certain material facts which were independently proven. These statements were separable from the confession.

"*Where the evidence of a statement is tendered and meets with these conditions, the possibility that it was improperly induced has no relevance.* The untrustworthiness of a confession improperly induced is the main reason for its inadmissibility. Where the statement indicates knowledge of a material fact but falls short of being a confession, the proof of its truth by other means removes the necessity for enquiry into its voluntariness. Unless a confession were involved, and inseparable from such a statement, I do not think that a voir dire would be necessary to determine admissibility. No such authority was cited to us to the contrary."[6]

Does it not follow then that if the entire confession were established to be true "by other means" that it would be admissible perhaps without a voir dire?

To determine whether a confession is voluntary a voir dire must be held. If the only evidence given on the voir dire is that of police officers, which is inevitably that no improper procedure was followed, the Court will generally find the confession voluntary and admit the same. If the accused should take the stand in an effort to establish that it was not voluntary he may be placed in a hopeless dilemma if the question is permitted, namely: *Is the statement true?* The conflict referred to earlier in this article arises over whether or not such a question may be asked by the prosecution. In *R.* v. *Hammond*[7] the accused was charged with murder and at his trial the Crown sought to put his confession in evidence. On the voir dire the accused gave evidence-in-chief that the statement had been extracted from him by physical violence. The first question put to him by Counsel for the Crown was: *Your case is that this statement was not made voluntarily? — Yes. Is it true? — Yes, sir.* Finally the accused was asked: *What you are now saying is that you were forced into saying what was true by something that was done. Is that right? — Yes, sir. So you did kill Mr. Roberts? — Yes, sir.* Naturally after that the Crown asked no more questions. The statement was admitted and the accused convicted. He appealed on the sole ground that the questions put by Counsel for the Crown on the voir dire were inadmissible. Humphreys, J. gave the judgment of the Court of Criminal Appeal and stated succinctly in referring to the questions:

"In our view, it clearly was not inadmissible. It was a perfectly natural question to put to a person, and was relevant to the issue of *whether the story which he was telling of being attacked and ill-used by the police was true or false.*

"It may be put as it was put by Viscount Caldecote, L.C.J. in the early part of the argument of Counsel for the Appellant, that it surely must be admissible, and in our view is admissible, because it went to the credit of the person who was giving evidence. If a man say, 'I was forced to tell the story. I was made to say this, that, and the 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."[8]

It is apparent that the Court of Appeal held the question to be relevant and therefore admissible solely on the grounds that they went to the accused's credibility. Therefore, it follows that great importance must have been attached by the Court of Criminal Appeal to the truthfulness of the accused at the time the confession was taken.

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[6] *Ibid*, at p. 164.
[7] [1941] 3 All E.R. 318.
[8] *Ibid*, p. 321.

The reasoning in the *Hammond* case was adopted by the Ontario Court of Appeal in the judgment of Laidlaw, J.A., in the case of *Regina* v. *LaPlante*,[9] in which the same circumstances arose.

The only purpose of the voir dire is to ensure that no evidence, which is not voluntary and therefore testimonially untrustworthy, be admitted in evidence. If the accused takes the stand and swears that evidence which is against his interests is true then the court is no longer concerned with whether it is voluntary, for the truth is no longer in question.

It follows, seemingly irrefutably, that if truth is established then not only statements not in the form of confessions and portions of improperly induced confessions but in fact entire confessions improperly taken, will be admitted in evidence regardless of whatever methods were used to obtain the same.

If the search for truth is to be paramount and to override every other consideration in the administration of criminal justice, then a rather undesirable situation arises on both legal and moral grounds.

Consider the impossible predicament in which the *Hammond* decision places an accused who has given a statement to the police. If he takes the stand on a voir dire and gives evidence that after a severe beating he confessed in order to save himself from further physical abuse and that the confession he gave to the police was false, then this fact, the fact that he lied to the police, if credibility is the issue, weighs heavily against his evidence that he was physically attacked by the police.

On the other hand, if he states that being subjected to violence he confessed and that the confession is true, if credibility again is the issue, then it must surely be to his advantage in convincing the Court that he was in fact attacked by the police, as he has apparently been truthful throughout.

Therefore, it follows that a person who states that his confession is true must be considered as more credible than one who admits lying to the police and would ostensibly be in a better position of having the statement excluded on the grounds that it was involuntary. However, as previously pointed out, once truth is established the voluntariness of the statement is of no concern.

However, one ray of hope does appear in the blunt refusal of Hall, C.J.Q.B. (*Saskatchewan*) in the case of *Rex.* v. *Hnedish*[10] to follow *Rex.* v. *Hammond* and *Rex.* v. *LaPlante*. At page 688 he comes squarely to grips with the problem and states:

> "Having regard to all the implications involved in accepting the full impact of the *Hammond* decision which can, I think, be summarized by saying that regardless of how much physical and mental torture or abuse has been inflicted on an accused to coerce him into telling what is true, the confession is admitted because it is in fact true regardless of how it was obtained. I cannot believe that the *Hammond* decision does reflect the final judicial reasoning of the English courts. I feel that when the point comes squarely to be decided, another court will take a hard look at the whole question, including the implication above mentioned and others.
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> "I do not see how under the guise of 'credibility' the court can transmute what is initially an inquiry as to the 'admissibility' of the confession into an

9 (1958) O.W.N. 80.
10 (1958) 26 W.W.R. 685.

> inquisition of an accused. That would be repugnant to our accepted standards and principles of justice; it would invite and encourage brutality in the handling of persons suspected of having committed offences."

If innocent persons are not to be placed in peril and a mockery made of the dignity of the individual, the reasoning of Hall, C.J.Q.B. must be preferred over that of Humphreys, J. and Laidlaw, J.A.

Another factor which would seem to relieve against the harsh and arbitrary rule of law enunciated in the Wigmore theory was stated by Egbert, J. in the Alberta decision of *Regina* v. *Dreher*,[11] where he states at page 344:

> ". . . As the Court said in *Regina* v. *Anderson*, 77 C.C.C. at 295, to say that because a statement was made without fear of prejudice or hope of advantage is therefore admissible against an accused, in complete disregard of all other factors which 'a wise rule of policy' might consider as having exercised an improper influence or inducement upon the free mind of the confessor, is to fetter the wide discretion of the trial judge to exclude the statement, a discretion exercisable in the light of all the facts and circumstances of the case . ."

Surely our accepted standards and principles of justice preclude the admission in evidence of at least whole confessions obtained by methods which are repugnant to any humane standard of conduct in the treatment of accused persons.

And as it has ever been in the history of the English common law it is only the courage and integrity of Her Majesty's Judges which stand between some of the more barbarous aspects of the common law and the brutality of unchecked authority.

The judgment of Hall, C.J.Q.B. is indicative of that courage and integrity which must be constantly exercised if the judicial safeguards designed to protect the innocent and the dignity of the individual are not to be brushed aside as mere impediments in the search for truth.

[11] 14 C.R. 339.