

## THE QUEEN v. MCKAY

*New Zealand Law Reports, 1967, page 139*

Court of Appeal, Wellington. 10, 28 October 1966. North, P.,  
Turner, J.; McCarthy, J.

## THE QUEEN v. MCKAY

**Criminal law—Evidence and proof—Accused Subjected to Psychiatric Examination Under Truth Drugs—Whether Evidence of Psychiatrists Admissible as to Self-serving Statements Made by Accused in Course of Examination—Whether Psychiatrists to be Permitted to Say That as Result of Examination They are Satisfied that Accused's Evidence on Oath is True—Whether Accused to be Permitted to Say in Evidence That He was Prepared to Submit to Examination Under Truth Drugs**

Evidence of psychiatrists as to self-serving statements made to them by a person accused of a crime while he was under the influence of truth drugs is inadmissible, as is evidence of the psychiatrists to the effect that, as a result of their examination of the accused while affected by those drugs, they are of opinion that the testimony given by the accused on oath at his trial was true.

*Blackie v. Police* [1966] N.Z.L.R. 910, referred to.

*R. v. Coats* [1932] N.Z.L.R. 401; [1932] G.L.R. 105, distinguished.

The accused should not be allowed to say in evidence that he was prepared to submit to psychiatric examination involving the administration of drugs.

CASE STATED for the opinion of the Court of Appeal under s. 380 of the Crimes Act 1961. The following statement of facts is taken from the judgment of North P:

The appellant was convicted of murder in the Supreme Court at Auckland on 24 August 1966, and was sentenced by T. A. Gresson J. to life imprisonment.

In the course of opening the defence during the morning of 22 August, Mr Williams, counsel for the accused, told the jury that he intended to call the evidence of two psychiatrists as to the results of a test which they had conducted on the accused at Mount Eden Prison on 14 August while he was under the influence of what are commonly described as "truth drugs", and that the doctors would express the opinion that the answers which the accused then gave were consistent with innocence and that, on a balance of probabilities, he was telling the truth when he denied that he killed Mrs Kievet. Counsel for the Crown, who had no notice of the proposed evidence, saw the Judge in Chambers after the luncheon adjournment and challenged the admissibility of this evidence. On 23 August, in the absence of the jury, the learned Judge heard the evidence of Dr Laurie Kalman Gluckman of Auckland, psychiatrist, who said that, in conjunction with Dr Culpan, he had administered to the accused two drugs, first methydrine, and secondly a combination of barbiturates, namely, sodium pentathol and sodium amytal, both drugs being administered intravenously and in that order. When the appellant was properly sedated, he was closely questioned by Dr Gluckman regarding the crime, and he maintained his innocence. Dr Gluckman conceded that it was still possible for a person to lie while under the influence of these drugs, but he claimed that in approximately 70 percent of the cases he had dealt with he had obtained truthful

answers. In cross-examination he conceded that a difference had to be recognised between cases where the doctor was merely concerned with the patient's condition and treatment and cases like the present one where the question in issue was that of criminal responsibility. He agreed that a murderer would have a strong motivation against admitting his guilt. In answer to a question from the Judge, he agreed that what the appellant had said might not necessarily be true, but he expressed the opinion that it was more likely to be true.

The learned Judge, having considered the matter, ruled that the evidence was inadmissible, saying: "It is the general rule that an expert witness cannot express an opinion upon the ultimate issue of fact which the jury has to determine. The truth of the facts deposed to must, in my view, be determined by the jury. These facts were not observed, of course, by the doctors, and in my view it would be quite improper to allow them to express any opinion as to the guilt or innocence of the accused. . . . There is another well established principle, namely, that self-serving statements to third persons protesting an accused's innocence are, in general, inadmissible, and the fact that the statements are said to have been made to doctors does not preclude the application of the general rule. If, conceivably, insanity were in issue in this trial, or automatism, or amnesia, which is colloquially referred to as a 'black-out', then it might, in certain circumstances, be proper to allow evidence to be given of tests to try and establish if memory of the events in issue could be recalled, but that is not the position here. In short, if I were to receive this evidence it would, in my considered opinion, amount to this, that I should be substituting trial by lie detector, or trial by psychiatrists, for trial by jury, and it would, in my view, be improper to permit that course. I am satisfied, therefore, for the reasons which I have given, that this evidence should be excluded, and I so rule. It is, as I have stated earlier, unfortunate that this topic has been opened by the defence without prior reference to the Judge, because it is a well established procedural rule that if there is any doubt as to the admissibility of certain evidence, that matter should be raised in advance and not opened upon to the jury. It is too late to correct entirely any harm that may have resulted from the course that was here adopted, and in my view the most that in these particular circumstances I can now allow is for the defence to prove through McKay that, at the instigation of his solicitors, he indicated his willingness to submit to interrogation by psychiatrists under the influence of medical drugs, and that is the maximum I think I can properly permit."

T. A. GRESSON, J. agreed to state a case for the opinion of the Court of Appeal and has asked two questions. These are:

"(1) Was my ruling excluding the proposed psychiatric evidence correct in the circumstances of this case?"



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"(2) Was my ruling permitting evidence to be given by the accused of the fact that he was prepared to submit to psychiatric examination, involving the administration of drugs, correct in law?"

*Williams*, for the appellant.

*Speight* and *Neazor*, for the Crown.

*Williams*, for the appellant:

The kernel of the appeal turns on the administration of what is colloquially known as "truth" drugs.

The evidence of Dr Gluckman should have been admitted. The administration of the drugs results in a free, uninhibited flow of speech and the evidence had a direct bearing on the credibility of McKay and therefore it was favourable evidence for McKay in two respects: (a) McKay had denied guilt whilst under the influence of these drugs and it would be for the jury to evaluate the weight to be attached to this evidence; (b) The fact that McKay had been prepared to undergo the administration of these drugs was conduct consistent with innocence.

Opinion evidence is acceptable if given by an expert on a topic requiring expertise: see *Philipson on Evidence*, 10th ed., para. 1285 and further at paras. 1295, 1296. *Phipson* gives subjects on which experts may not testify but this does not include the administration of drugs and interviews while under drugs. Further, at para. 1300, the results of *experiments* made either out of Court with special reference to the trial or even before the Court itself may be given in evidence in corroboration, illustration or rebuttal of the opinion.

See also *Toohy v. Metropolitan Police Commissioner* [1965] A.C. 595; [1965] 1 All E.R. 506. In this case it was a relevant issue whether or not a witness was more prone to hysteria than a normal person and medical evidence was held to be admissible in respect of this topic and it was further held that medical evidence was admissible concerning illness or abnormality affecting the mind of a witness and reducing his capacity to give reliable evidence.

His Honour further said that "a man's statement made after the alleged crime when under special medication, the effect of which is somewhat unpredictable and controversial, should in my view be excluded" but 10 *Halsbury's Laws of England*, 3rd ed., 474, states that a confession made under the influence of drink is not necessarily inadmissible.

His Honour further stated that "there is another well established principle excluding this evidence, namely that self-serving statements to third persons protesting an accused's innocence are in general inadmissible" but there are already numerous inroads on this principle. Exculpatory statements made to the police, if properly obtained, are always admissible both for and against the person who made them if he is subsequently charged with a crime. See *Ostler, J. in R. v. Coats* [1932] N.Z.L.R. 401; [1932] G.L.R. 105. So also are oral complaints to third persons by complainants in cases of a sexual nature, statements by

accused persons constituting part of the *res gestae* and evidence of the denial of the prisoner when charged out of Court.

I also rely upon *dicta* in the case *Corke v. Corke and Cook* [1958] P. 93; [1958] 1 All E.R. 224.

The evidence of denials of guilt in this case whilst under the drugs was not planned deliberately as Dr Gluckman deposed the prime purpose of the examination was to determine McKay's mental condition; but after this evidence had been obtained, from the defence's point of view it became evidence of a helpful nature and it was unjust to disallow it even though there may be some tenuous ground for holding it technically inadmissible.

There is a clear distinction between a self-serving statement made in the circumstances of the McKay case and that in a case like *R. v. Roberts* [1942] 1 All E.R. 187 where the trial Judge refused to admit the evidence of the appellant's father as to what the appellant said to him after his arrest.

I briefly refer now to an article which appeared in 69 *Harvard Law Review* 683 entitled *Testing of the Unconscious in Criminal Cases*. References are made in a footnote to a case *United States v. Hiss* for the authority that psychiatric testimony concerning credibility of a witness has only recently been admitted.

I refer to an article in [1954] *Crim. L.R.* 423 entitled *The Truth Drug*. This is a discussion of a case, *R. v. Barker*, where the administration of a sort of truth drug (oxygen and carbon dioxide) for the first time in a murder investigation, drew public attention. A psychiatric defence was raised, but like many psychiatric defences it involved the deciding of questions of fact upon which obviously the defence's psychiatrists were passing their opinion, to wit, whether or not the accused genuinely suffered from a memory loss. This of course was really a question of credibility of the accused. The defence psychiatrist, Dr Lewis, gave evidence of administering the truth drug and said that whilst under the influence, the accused had no memory of the stabbing.

I also refer to another so-called truth drug case reported in (1954) 98 Sol. Jo. 794.

These last two cases were referred to his Honour before he made his oral ruling and his Honour seems to infer that this evidence might be allowed in cases where insanity or blackouts were raised. There is no logical basis for making this differentiation, because in both *Barker's* case and the Nottingham case the administration of a drug was used to determine not merely the mental state of the accused either at the time of the interview or of the alleged crime but was primarily concerned with investigating the credibility of the accused. These cases are on all fours with the *McKay* case.

The position therefore is that there are English authorities justifying the admission of this evidence but there are no authorities to the contrary.



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The trial Judge was incorrect in criticising truth drug evidence without allowing it to be adduced.

*Speight*, for the Crown:

The problem which we are dealing with is the extent to which a Court will allow an expert to depart from the hearsay rules. It is necessary to comment on two different situations which can occur. With psychiatrists there are two quite separate problems. The common case is a defence of insanity where the facts as to what occurred are not in issue and the thing which is in issue is the quality of a man's mind. In those cases it becomes relevant and admissible for a psychiatrist to say what a man has recounted as being relevant to the issue which is to be decided on mental disease.

Insanity was disclaimed as a defence in this case and the issue was whether the acts alleged had taken place. The questions we ask are these: 1. Can a man call evidence to show that he denied or said something to someone else as proof of the consistency of what he now says; 2. Does it make any difference if the person to whom he said it was a psychiatrist who comes along and says, as an expert, "I believe him"?

The reasons one objects to hearsay and the reason why certain exceptions to it are allowed are primarily because the hearsay statement might not be true: *R. v. Roberts* [1942] 1 All E.R. 187, 191; *Jones v. South Eastern and Chatham Railway* (1917) 87 L.J.K.B. 775; *Gillie v. Posho. Ltd.* [1939] 2 All E.R. 196, 201; *Cross on Evidence*, 2nd ed., 18, 198, 206; *Phillips on Evidence*, 10th ed., p. 613, para. 1573.

There are several exceptions to the hearsay rule: 1. The admission of statements made as part of the *res gestae*; 2. Dying declarations.

In the present case if there were 100 percent accuracy proved for a lie detector or truth drug it might be, in the future, that a further exception would be added to the hearsay rule. Where we are getting into the realm of about a half-and-half chance of getting at the truth, the evidence is properly excluded in the same way as other forms of self corroboration for two reasons, first technically it is hearsay and secondly, if it is different from hearsay, of the danger of manufactured evidence.

I distinguish *Corke v. Corke and Cook* [1958] P. 93; [1958] 1 All E.R. 224. If a man is prepared to undergo a test of which the evidence is admissible, there is room to say his willingness might be admissible as showing his state of mind. That is different from the acts we are concerned with, because what this man was willing to undergo was something which was inadmissible anyhow.

Refers to an article by Pearce in (1956) 24 *Proceedings of the Medico-Legal Journal*.

As to the opinion of doctors as to whether a man is telling the truth, see *R. v. Barker* [1954] Crim. L.R. 423.

*Williams*, in reply.

*Cur. adv. vult.*

NORTH, P. [after stating the facts as above]: In this Court, Mr Williams, for the appellant, submitted that the evidence had a direct bearing on the credibility of McKay and therefore was favourable evidence for McKay and would assist the jury in determining what weight should be given to his assertion at the trial that he was innocent of the charge of murder. Mr Speight, on the other hand, submitted that to admit this evidence would constitute a departure from the hearsay rule.

In my opinion this evidence should be excluded. To begin with, previous statements of an accused person are generally inadmissible for the purpose of confirming the evidence he gives at his trial. "The purpose of such evidence of a witness's previous statements is and can only be to support his credit, when his veracity has been impugned, by showing a consistency in his account which adds some probative value to his evidence in the box. Generally speaking, as is well known, such confirmatory evidence is not admissible, . . ." per Lord Radcliffe in *Fox v. The General Medical Council* [1960] 1 W.L.R. 1017, 1024; [1960] 2 All E.R. 225, 230. The fact that the statement was made to a doctor while under drugs is not the subject of any recognised exception to this rule. In the second place, if the appellant's statement to the psychiatrists is intended to prove the truth of the facts so asserted, then, as Mr Speight submitted, it is hearsay and does not come within any of the recognised exceptions to that rule: *15 Halsbury's Laws of England*, 3rd ed., 294, 295. Thirdly, in my opinion there is no authority whatever which in any way supports a submission that psychiatrists, having conducted this test, are entitled to express an opinion that, on a balance of probabilities, the appellant was telling the truth when at his trial he denied that he had killed Mrs Kievet.

It is quite true, as was pointed out in argument, that when questions of insanity are in issue, qualified doctors are permitted to express their opinion as to the state of mind of the accused, and are allowed to say that, as a result of their examination and questioning of the accused, they are of opinion that at the time of the commission of the crime he was incapable of understanding the nature and quality of the act or of knowing that the act was morally wrong. Indeed, the researches of counsel have brought to our notice two cases where the so-called "truth drugs" were administered by the doctors in the course of their investigations into the state of mind of the accused person. The first is an unnamed manslaughter case referred to in (1954) 98 S.J. 794, where the evidence was given by a Dr Hugh Garland of Leeds that the accused's statement that he had had a black-out immediately before the accident was consistent with his statements made under sedation. The accused was acquitted. The second case is *R. v. Barker* [1954] Crim. L. R. 423. This was a murder case where the "truth drug" was administered by the doctor in the course of his investigation into the question whether the accused was insane at the time of the commission of the crime. It will be seen at once, however, that neither of these cases are of assistance to the



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appellant, for both are concerned with establishing the state of the mind of the accused at the relevant time.

Mr Williams is endeavouring to carry the matter a stage further and has advanced—so far as I am aware for the first time—the startling proposition that, whatever the state of the evidence may be, psychiatrists, having examined an accused person, are entitled to express their opinion that he is not guilty of the crime with which he is charged. In my opinion there is no authority to support the admission of this kind of evidence. The question of an accused's guilt or innocence under our system of law is to be determined by the jury on the factual evidence presented to it. To allow the admission of evidence of the nature proposed here would, as T. A. Gresson, J. rightly said, be to substitute a trial by psychiatrists for a trial by jury. It really amounts to a modern version of trial by ordeal or inquisition: if the prisoner is resolute enough, then, as Dr Gluckman freely concedes, he may maintain his lie.

The general rule is against the admission of opinion evidence, for it tends "to usurp the functions of the "tribunal whose province alone it is to draw the "conclusions of law or fact": *Phipson on Evidence*, 10th ed., 475. It is true that, where necessary, opinion evidence is admitted, but only where the issue comprises a subject of which knowledge can only be acquired by special training or experience: *Campbell v. Rickards* (1833) 5 B. & Ad. 840; 110 E.R. 1001; 15 *Halsbury's Laws of England*, 3rd ed., 321. But even in such cases the expert will not be allowed to testify to the ultimate issue when that can be avoided. Occasionally the expert may be asked the very question which the jury have to decide if he has himself observed the facts: see *Blackie v. Police* [1966] N.Z.L.R. 910, 913. But this is certainly not such a case. I am quite alive to the fact that the Court must pay due regard to the advances of science, and if the time ever does come when it is established beyond doubt that answers given by an accused person under the influence of drugs are always true, then it may be that a change in the law of evidence may be called for, but such a revolutionary change would need to be introduced by an Act of Parliament, which I am sure would not be passed until after a close investigation into the scientific and moral aspects of the proposal and with proper safeguards provided to ensure that the tests were carried out in the presence of the Crown. So far as the Courts are concerned, the extension of the law must be by the development and application of fundamental principles, and the course proposed in this trial is quite contrary to fundamental principles: see *Myers v. Director of Public Prosecutions* [1965] A.C. 1001; 1021; [1964] 2 All E.R. 881, 885 per Lord Reid.

For these reasons, I am of opinion that the first question should be answered, Yes.

Question (2) thus becomes academic. The learned Judge was placed in a very difficult position by the failure of Mr Williams to act in accordance with the well established rule that, if there is any doubt as to the

admissibility of evidence, the matter should not be opened upon to the jury. In my opinion, the evidence of McKay that he was willing to submit to the interrogation of psychiatrists while under the influence of medical drugs should not have been allowed. It was irrelevant. In this case it was an indulgence granted to the defence, but the proper course would have been for the judge to explain to the jury that he had ruled that the evidence as to the tests was inadmissible and that they should not be influenced in any way by what they had been told by Mr Williams in the course of his opening.

It remains to make a short reference to the general appeal which was filed in this case. Ground (1) merely restates question (1) in the case stated, and does not call for separate treatment. Ground (2) complains that the learned Judge was wrong in fact and in law when he criticised to the jury the evidence relating to the administration of the said drugs although not allowing the jury to hear the said evidence. In my opinion, there is nothing in this submission. The learned Judge, as I have earlier said, through the course taken by Mr Williams, was obliged to say what he did to the jury. Ground (3) complains that the learned Judge was wrong in fact and law when in his summing up to the jury he told the jury that he congratulated the Crown Prosecutor for not attempting to exhibit pieces of human tissue and certain distressing photographs to the jury as this evidence would clearly have been inadmissible if the Crown had attempted to have it admitted, and the learned trial Judge was therefore referring the jury to inadmissible evidence. There is nothing in this complaint either. All that the Judge said was: "You simply "evaluate the evidence in the particular case, and you "do that in a detached, clinical, conscientious way. It is "to the credit of the Crown Prosecutor in this particular "case that no attempt has been made to shock your "feelings. No appeal has been made to your emotions. "There has been no detailed discussion or description "of mutilation. This, I am sure, Mr Foreman, will not "have escaped your notice. There has been no attempt "to exhibit pieces of human tissue. There has been "no attempt to confront you with distressing photo- "graphs, and it is in that restrained, conscientious, "clinical mood that I would ask you to approach the "evidence."

If the Crown had thought it necessary to exhibit pieces of human tissue or to produce photographs of the mutilated body, it would have been a matter for the Judge to have ruled whether this evidence should be admitted or not. It is a matter which would have been within his discretion. I see no occasion whatever to criticise the way the learned Judge put this matter to the jury, and I would dismiss the appeal against conviction.

The Court being unanimously of that opinion, the appeal against conviction is dismissed accordingly and the questions asked by Gresson, J., are answered as follows: Question (1), Yes; Question (2), No.



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TURNER, J. This appeal comes before us on a case stated by T. A. Gresson, J., and raises the novel and important question of the admissibility of the evidence of a psychiatrist as to a narrative of events made to him by an accused person while under the influence of the so-called "truth drugs" methydrine, sodium pentathol, and sodium amytal. The appellant was convicted at Auckland before Gresson, J., and a jury on 24 August last on a charge of murder. He gave evidence in his own defence, denying that he had anything to do with the killing of the victim. The jury convicted the appellant on the circumstantial evidence tendered by the Crown, and must be taken as having rejected the evidence which he gave on oath.

During the course of the defence Dr Laurie Kalman Gluckman, a psychiatrist in practice at Auckland, was called as a witness; it was proposed that he and another medical witness should depose to a conversation, or to questions and answers, between himself and the appellant while the appellant was under the influence of the drugs which I have mentioned, the effect of which was said to be that the appellant consistently denied having had any part in the killing of the deceased or indeed any knowledge of or connection with it. Mr Williams intimated to T. A. Gresson, J., that the evidence of these two medical witnesses would be that the effect of the drugs was such as to make it almost certain, or at least very likely that the narrative of the appellant given under their influence would be a true account of what had actually happened, and that in the circumstances the Court should admit it as an exception to the ordinary rules of evidence. It was submitted that this second-hand account of the matters about which the case was concerned should be admitted either as a previous statement of the accused, consistent with the one now told in the witness box, or independently as a statement ordinarily excluded by the rules of hearsay, but which, supported as it would be by the evidence of the psychiatrists, the Court was invited to admit as a new exception to the hearsay rule on the ground that it was certainly or almost certainly true. T. A. Gresson, J., heard preliminary evidence from Dr Gluckman in the absence of the jury by way of instructing himself as to the nature of the testimony which it was proposed to tender if it were admitted. He then excluded the evidence, in an oral ruling, but reserved the question for the opinion of this Court. In the case stated he asks the question: 1. Was my ruling excluding the proposed psychiatric evidence correct in the circumstances of this case?

While the appellant was himself in the witness box Mr Williams (who had previously opened the whole of the matters which I have mentioned to the jury without seeking any ruling or permission on the subject from T. A. Gresson, J., or giving any intimation to the prosecution of his intention so to do, a course which I find it hard to pass by without some degree of censure) having now been refused leave to adduce the evidence, asked the permission of the learned Judge to have the appellant depose in re-examination to the fact that he

had been prepared to submit to psychiatric examination "involving a demonstration of certain drugs". With some hesitation T. A. Gresson, J., agreed to this course and the appellant, recalled for further re-examination by Mr Williams, was asked:

Q. On Friday, 12 August 1966, were you approached by your lawyer at Mt. Eden Prison, Auckland, and asked whether or not you were prepared to have certain drugs administered to you by a psychiatrist?

A. That is correct, Sir.

Q. Did you agree or disagree?

A. I agreed to, sir.

In a second question in the case stated the learned Judge inquires from this Court: "(2) Was my ruling 'permitting evidence to be given by the accused of 'the effect that he was prepared to submit to psychiatric examination, involving the administration of drugs, 'correct in law?'"

These two questions constitute the whole of the matters raised for the opinion of this Court by the case stated. In addition, however, the appellant has filed a general appeal, in which he submits as the first ground (and indeed the principal ground) the same question of admissibility as has been raised in the case stated. In his notice of general appeal he submits three further grounds of appeal of which it is necessary here only to say of the last of them ("that there has been a mis-carriage of justice and the accused may have been 'wrongfully convicted of murder'") that it was consequential only, and not the subject of separate argument, and as to the second and third that this Court indicated at the hearing that there was no foundation upon which either of them could be rested. This appeal accordingly must stand or fall simply on the question of admissibility raised in question 1 of the case stated.

It was not made clear to us by Mr Williams' argument precisely what facts he had proposed to prove, or precisely what evidence the psychiatrists were to give. It did appear, however, that he proposed that they should give some account of what was said between them and the appellant while the appellant was under examination by them under the influence of the drugs mentioned. I will assume, in the appellant's favour, in the first place, though it does not by any means appear either from the record or from Mr Williams' submissions, that this account was to be tendered as a full *verbatim* account meticulously accurate and without omissions, of the whole of this conversation or examination. This account might have been tendered simply as a statement of the accused, made previously to his trial, consistent with the evidence given by him in the witness box, and on this account reinforcing or confirming it; or it might have been tendered as a narrative of relevant events to be accepted as true in itself, and as evidence of its own truth, when taken in conjunction with certain qualifying evidence to be given by the psychiatrists as to the likelihood, under the circumstances, of anything which the appellant said being the truth. There might also



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have been tendered—and from the record it would appear that this was contemplated—the expert opinion of the psychiatrists engaged in the interview on the question of the accused's guilt of innocence having regard to the tenor of the conversations. I will deal separately with each of these possible uses of the testimony which was tendered to and rejected by T. A. Gresson, J.

If the evidence is tendered simply as an account of the appellant's actions at the times and in regard to the events under inquiry, given by him previously to his trial, and consistent with evidence that he gave at his trial, and on this account reinforcing or confirming that evidence, principle and authority alike must lead to its rejection. Previous statements of an accused person are always inadmissible for this purpose. The reasons for this have been placed on several different grounds, which are interestingly discussed in *Cross on Evidence*, 2nd ed., 198, *et seq.* On whatever ground the objection to them is placed, however, *Gillie v. Posho Ltd.* [1939] 2 All E.R. 196 is an authority binding on this Court for the proposition that such statements are not admissible. Citing an earlier judgment of the Court of appeal in *Jones v. South-Eastern and Chatham Railway Co.* (1917) 87 L.J. K.B. 775, Lord Porter, delivering the advice of the Judicial Committee, after first quoting a passage from the judgment of Swinfen Eady, L.J., said: "In the same case Neville, J. set out the general rule applicable to that case, and as their Lordships think to this case, at page 779: '... we have simply "to apply here the general rule of evidence that "statements may be used against a witness as "admissions, but that you are not entitled to give "evidence of statements on other occasions by the "witness in confirmation of her testimony.' In their "Lordships' view these observations correctly set out "the rule of evidence applicable to this case ...'" (*ibid.*, 201).

It may be noticed, however, that Swinfen Eady, L.J. had based his judgment in *Jones'* case on the ground that "if a statement of that kind were admitted it would "be easy to manufacture evidence by telling your "various friends and then calling them as witnesses to "prove what you had told them".

This was the reasoning which led to the rejection of the same type of evidence by the Court of Criminal Appeal in *R. v. Roberts* [1942] 1 All E.R. 187.

It is therefore perfectly clear that on authority as it at present stands a statement by an accused person made on some earlier occasion cannot be tendered by him as confirming evidence later given by him in the Court. But it may be taken as argued by Mr Williams that in the present case this general rule should be relaxed, simply because, by reason of the influence of the drugs under which the statement was made, the reasoning formulated by Swinfen Eady, L.J., is not applicable. I will later deal with this specialised argument; for the moment I will conclude that, unless it can be accepted,

the statement in this case must on the authority of *Gillie v. Posho Ltd.* (*supra*) and *R. v. Roberts* (*supra*) be excluded.

Similarly, if the statement is tendered in the second of the ways I have mentioned as evidence of the truth of the statements contained therein, it must on any view be regarded as hearsay; and while confessions of an accused person (i.e., statements made by him tending to prove his guilt) may always be admitted against him if properly obtained, self-serving statements will be excluded—and for the same reasons as were given by Swinfen Eady, L.J., in *Jones'* case. This is a principle of very long standing—see for instance *R. v. Haines* (1858) 1 F. & F. 86; 175 E.R. 638. Mr Williams attempted to support an attack on this rule with a *dictum* in the judgment of Ostler, J., in *R. v. Coats* [1932] N.Z.L.R. 401; [1932] G.L.R. 105 where that learned Judge said: "Exculpatory statements made to "the police when making inquiries about a crime or "suspected crime, if properly obtained, are always "admissible both for and against the person who made "them if he is subsequently charged with a crime" (*ibid.*, 407; 108).

This *dictum* may perhaps have been unguardedly wide; but, it is at least to be applied to no wider a class of statements than those made to the police when making inquiries, and can have no application to statements made privately in the absence of the police or their representatives to a psychiatrist retained by the defence. The most that can be said to support the admission of the evidence in the case before us is that it is to be supported as an exception—and a new one—to the hearsay rule, on the ground that the dangers inherent in the admission of hearsay are minimised in the particular circumstances, by reason of the qualifying evidence, to be given by the psychiatrists, as to the likelihood of the truth emerging under the influence of the drugs.

It will be seen, then, that, whether regarded as previous statements consistent with present evidence, or as self-serving statements of the nature of hearsay, the conversations to which the psychiatrists proposed to depose must be excluded on principle, except if one consideration prevails—it is submitted by Mr Williams that the evidence of the psychiatrists proves that what was said by the appellant under duress is *very likely to be true*, and this is put forward as a reason why it should be admitted, in exception to the ordinary rules.

Mr Williams was able to produce no decision of any Court of high authority, either in Commonwealth jurisdictions or in the United States of America, to support his argument. He cited two reports to us, both of an informal nature, neither of which turned out to be by any means exactly in point, but both of which are of some related interest. In (1954) 98 Sol. Jo. 794 there is the following item in the "Current Topics" column of that periodical for 27 November of that year.

In a manslaughter case at Nottingham Assizes on 19 November evidence was given by Dr Hugh Garland, of Leeds, that the accused, who had said that he had had a



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black-out immediately before the accident concerned, agreed to undergo a "truth drug" test with pentathol and methydrine. "The story he told me in his normal state," said Dr Garland, "and the story he told me while under the pentathol and methydrine were precisely the same, and it is the same story that he has told the jury in Court today. In the whole of my experience I have not known anyone who was able to lie while under the influence of these drugs. No one can resist their effects." New methods of detection demand new rules for the protection of accused persons, and if it is elementary that such persons have a right to refuse to take drugs which loosen their tongues, it is, we hope, equally elementary that their refusal should not be construed as a sign of guilt. In the Nottingham case the accused was acquitted, and his agreement to submit to the drug was obviously due to his conviction of his innocence. It does not by any means follow that a refusal to submit is a sign of guilt.

It does not appear who was the Judge or Recorder who admitted the evidence. It is clear, however, that it was directed to a question absolutely different from that to which the evidence in this case was directed—viz, the question whether the accused had any present recollection of *something which he had admittedly done*, with a view to determining *his mental condition at the time of the crime*. This difference, in itself, makes the note quite useless as an authority for the admission of the evidence which we are now asked to consider.

Again in the same year [1954] Cr. L. Rev. 423 prints an article giving an account of the prosecution of one Barker for murder at the Central Criminal Court on 26 February of that year. Cassels, J., presided at the trial. The defence was insanity. Again in this case it became relevant to inquire whether accused had any genuine present recollections of what he had admittedly done, and again the inquiry was directed to the state of mind of the accused. Cassels, J., admitted the evidence of a psychiatrist, of investigation under drugs directed to this end. Here again the essential difference from the present case as to the nature of the inquiry before the Court renders the report of little assistance. In the present case the question is whether the same sort of evidence should be admitted, but for a completely different purpose, viz, to establish whether or not the accused did the relevant acts.

Mr Williams was not able to refer us to any useful discussion of the topic in any texts dealing with the law in Commonwealth jurisdictions. There has, however, been some discussion of it in the United States, and members of the Court were able to mention the passage in *McCormick on Evidence* (West Publishing Co. St. Paul, Minn., 1954) at pp. 373 *et seq.*, where that eminent and learned author interestingly canvassed the principles which might apply. But the late Professor McCormick, who was by no means averse to considering the possibility that some such evidence might ultimately be made admissible, under sufficient safeguards, as techniques improved to the necessary degree of perfection with the passing of the years, was constrained to conclude, as regards actual authority, that "defendants so far have offered such drug-induced 'statements without avail', citing *The People v. McNichol* 100 Cal. App. 2d. 554 and *State v. Hudson* 314 Mo. 599, as examples of the rejection of such

evidence. Such research as we have ourselves been able to make has not revealed any United States decision since 1954 where such evidence has been successfully tendered by a defendant.

Is this Court, then, to be induced on the evidence now before it to allow a new exception to the exclusive rules as they at present stand and to sanction the acceptance of the evidence now tendered? Having given careful consideration to all the arguments advanced by Mr Williams I have no doubt whatever but that it should decline to do so. From whatever point of view the matter is examined, the question seems to admit of but one answer. If the matter is regarded as one of medical jurisprudence, it must be concluded by the unsatisfactory nature of the evidence offered by the psychiatrists; they are quite unable to say that, by the administration of the drugs, more is done than to render it less likely than before that the patient may tell lies. It is less probable—how much less probable cannot be said with certainty—but it is by no means impossible that he will continue to lie, if he was lying before. The scientific basis for Mr Williams' argument simply is not there. And if this difficulty could possibly be surmounted the procedure by which the "test" so conducted in the present case was so objectionable as to make it quite impossible to consider admitting the evidence—it was conducted in private, without notice to the Crown, without any Crown doctor present, and without any check whatever on the completeness or accuracy of the record to be given. And even if all these formidable, nay as they seem to me insurmountable, objections could be overcome, the contemplated amendment to Court procedure as it is at present constituted would be of so revolutionary a nature that for myself I would never agree to sanction it by Judge-made law. It is perfectly true, and I have said it before in this Court, and as recently as this year, in *Blackie v. Police* [1966] N.Z.L.R. 910, 921, that the law of evidence is Judge-made law, and must evolve to meet circumstances as they arise. So it must; and I hope that in this country it will continue to evolve with the freedom which is the characteristic advantage of Judge-made law over codified regulations. But there is a limit to the magnitude of the changes in the law permitted to Judges in their quasi-legislative function, even in their control over adjectival law; and I am sure that it is reached in this case. This is the same problem (but in greater degree) as that which faced the House of Lords in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001; [1964] 2 All E.R. 881. There the question was whether the Court (at that stage of appeal, the House itself) should add a further new exception to the hearsay rule, whereby the admission of commercial records, not produced by the maker thereof, should be sanctioned to prove the truth of their contents in a criminal case. The House, by a majority of three to two, declined to take this step. The decision of their Lordships has been the subject of discussion, and of respectful criticism, throughout Commonwealth jurisdictions. But, while I myself was one of those who ventured to think, respect-



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fully agreeing in this regard with what was said by Lord Pearce and by Lord Donovan, that the change in the law which the House was invited to make in *Myers'* case might fairly have been regarded as properly within its quasi-legislative function, I respectfully and wholeheartedly adopt the reasoning of Lord Reid in his speech in that case as thoroughly applicable to the present case, in which this Court is asked to go very much further than ever the House of Lords was asked to go in *Myers'* case, and to make a change the result of which would be to revolutionise criminal procedure. Lord Reid said: "I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases; but there are limits to what we can or should do" (*ibid.*, 1021; 885).

Lord Reid thought that the only satisfactory solution of the problem then before the House must be through legislation; and for myself I am satisfied, with regard to the problem with which we are now confronted, that if ever the time should come when the conclusions of medical science and the sober judgment of lawyers may together support some such innovation as is now proposed, the only way to introduce it will be by legislation deliberately embarked upon, carefully considered, and adequately safeguarded. It is certainly not a matter which I would consider making the subject of legislation in this Court.

There remains the third possibility arising out of Mr Williams' submissions—the suggestion that the psychiatrists, either after giving a verbatim account of what was said by the appellant under drugs, or not giving any such account, should be allowed to express an expert opinion as to the likelihood of his guilt or innocence. Such a proposal I mention only to reject it utterly. To adopt it would be to substitute trial by psychiatrists for trial by jury.

For the reasons then which I have endeavoured to express I am of opinion that the general appeal should be dismissed, and that on the case stated the first question asked by T. A. Gresson, J., should be answered "Yes".

I would not answer the second question asked in the case stated. It concerns a ruling given by the learned Judge—perhaps overanxious at this stage of the trial to be perfectly fair to the accused—permitting him to be recalled for further examination, and to give evidence that he was prepared to submit to psychiatric examination. The course taken was an extraordinary one; but then the circumstances under which the ruling was given were by no means ordinary. The answer to this question cannot affect the result of the appeal; and hence following the decision of the majority of this Court in *R. v. Fogden* [1945] N.Z.L.R. 380; [1945] G.L.R. 176 I would for myself leave the question unanswered. But, the other members of the Court preferring a more positive response, I will fall into line

with them, and will express my agreement with the view to which the President has come on question 2.

MCCARTHY, J. So far as the general appeal and question 2 asked by the case stated are concerned, I agree with and do not want to add to what the President has said. I shall confine my observations to question 1 which raises the issue of the admissibility of the psychiatrists' evidence.

I have no doubt that T. A. Gresson, J. acted correctly in excluding the evidence of Drs Gluckman and Culpan as to what the appellant said while under drugs, which, it seems, tend to promote uninhibited speech. I notice that psychiatrists, or at any rate those in the United States of America, call this form of interrogation narcoanalysis or narcointerrogation. The defence sought to produce the two doctors to recount what the appellant said, and then to express their views of the reliability of what he had said. A retelling of the appellant's words spoken under investigation was plainly inadmissible in the present state of our law. I assume that it could be claimed to have sufficient relevance, and it did seem that it was on that basis that Mr Williams sought to build his argument, but it was also hearsay and had to be excluded as such, if one accepts, as I think one must, the modern conception of hearsay as covering all testimony of oral or written assertions of persons other than a witness who is testifying, and which are produced as evidence of the truth of what is asserted; *Cross on Evidence*, 2nd ed., 3. Not that such an objection need always be fatal. I would hope, despite what appears in the speeches of the majority in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001; [1964] 2 All E.R. 881 that the common law has still sufficient vitality to create further exceptions to its own self-made rules of hearsay. The time could come when we should make further exceptions in the light of what wider scientific knowledge and improved techniques show to be desirable. But the use of drugs and instruments such as the polygraph to delve into man's unconscious mind can conflict with the upholding of human dignity. The problem is a complex one. Not all means of arriving at truth can be justified, and the use of drugs and machines, if uncontrolled, could lead to practices as objectionable as those adopted in more barbarous ages.

The results of polygraph tests and narcoanalysis seem to be invariably rejected in the criminal Courts of the United States, where the issue has been considered quite often, in contrast to the British Commonwealth where there has been little or no consideration of it: see Notes in 23 A.L.R. 2d. 1306, and 3 Later Case Service 611; *Curran, Law and Medicine* (1960) 500; *Morgan, McGuire, Weinstein, Cases and Materials on Evidence* (1956) 324. On the other hand, there has been some recognition in the United States that this form of interrogation can be a valuable adjunct to psychiatric investigation, and instances appear in the books where the evidence of interrogation under drugs has been admitted there in support of an expert's opinion as to the mental condition of the accused: see, for example, *People v. Cartier* 51 Cal. 2d. 590. The two English cases relied upon



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by Mr Williams, the only references to which, so I understand, are in articles in [1954] Crim. L.R. 423, and (1954) 98 Sol. Jo. 794, appear to be instances of this use of psychiatric evidence. In their exclusion of such evidence in relation to the issue of guilt or innocence, whether it be called by the prosecution or by the defence, the Courts of the United States are generally agreed that the results of narcoanalysis are not sufficiently reliable to be acceptable. Exclusion for this reason is in line with the principle of English law referred to by *Phipson on Evidence*, 10th ed., p. 277, para. 639, when, speaking of hearsay and its exceptions, he says:

Such statement, then, being one, which, if made by a witness, would be perfectly admissible, is, where not so made, excluded because it is wanting in the sanction and the tests which apply to sworn testimony, and admitted only when, in respect of the persons making it, or of the circumstances under which it was made, there is some security for its accuracy, which countervails the absence of those safeguards.

The marked absence of security for the accuracy of an accused's statements under narcoanalysis, at least when the drugs now used are employed, is apparent from the evidence given by Dr Gluckman in the absence of the jury. That evidence seems to me to support the conclusion that, even if we disregard all other considerations surrounding this form of investigation of truth, the results at this point of time are not sufficiently certain to justify the admission of the disputed evidence.

The evidence was also objected to on another ground; the rule that evidence cannot generally be given of previous statements to establish the consistency of the testimony of a party to proceedings, civil or criminal: see, for example, *Corke v. Corke and Cook* [1958] P. 93; [1958] 1 All E.R. 224. But again, there are exceptions to this general rule, and if the circumstances justified it, I see no reason why the Courts should not dispose of this objection, too, by creating a further exception. If and when it can be satisfactorily demonstrated that narcoanalysis is reliable to an acceptable standard, then there could be, I imagine, no sufficient justification for rejecting the evidence on this particular ground alone, because the very inducement to admit the evidence, namely the truth of the accused's revelations, ensures that his instinctive desire to protect himself with self-serving assertions—the consideration behind the general rule—has been sufficiently subdued or controlled.

Since the evidence of Dr Gluckman recounting what the appellant said was not admissible, the question whether he could express an opinion as to the reliability of what was said does not arise. But the problem could possibly be stated another way; accepting that he could not have been allowed to relate what was said under examination, could he not have expressed his view that, as a result of that examination, he was of the opinion that the testimony given by the accused on oath at his trial was true? This raises again the question which this Court considered recently in *Blackie v. Police* [1966] N.Z.L.R. 910, viz., the occasions when an expert may state his opinion as to what is really the ultimate issue which the Court has to decide. As

North, P., and I said in that case, English Courts have not sought to arrange those occasions in any philosophical order, but have acted pragmatically. In my view, English Courts would not permit, and we in New Zealand should not permit, an expert to give evidence as to the credibility of the testimony given by an accused in his own defence. *R. v. Toohey* [1965] A.C. 595; [1965] 1 All E.R. 506, which Mr Williams cited, is a very different case. It concerns medical evidence called to establish some defect of mind that diminishes the reliability of a witness's evidence. Here the witness sought to express his conviction that an accused was telling the truth, and therefore did not commit the act charged. That question must be reserved wholly for the jury.

I would dismiss the appeal.

*Judgment accordingly.*

Solicitor for the appellant: *P. A. Williams* (Auckland).

Solicitor for the Crown: *Crown Solicitor* (Auckland).

(All England Law Reports, 1967, page 112)

Queen's Bench Division (Lord Parker, C.J., Glyn-Jones and Widgery, J.J.), November 10, 1966

# **DIRECTOR OF PUBLIC PROSECUTIONS v. BRADFUTE AND ASSOCIATES LTD.**

Gaming—Lottery—Advertisement—Distribution of Advertisement of Lottery—Bingo Prize Competition—Label Attached to Tin of Proprietary Cat Food—Label Containing Bingo Card of 16 Digits with Prize Values which Might be Won if Line Completed from Adjoining Rectangle Containing 18 Digits—No Skill Required to Complete Line—Matter of Luck in Obtaining a Winning Label—Easy Puzzle then to be Solved before Competitor Could Claim Prize—Element of Skill in Solving This—Whether Scheme One Entire Scheme Severable into Two Stages—Whether Scheme Involved a Lottery—Betting, Gaming and Lotteries Act 1963 (c. 2), s. 42 (1) (c) (i)

The respondents printed and distributed an advertisement in the form of a label attached to tins of a proprietary cat food. On the outside of the label were the words "Play World's Biggest £30,000 Bingo. Your card is inside the label". On the other side of the label was a provision for the so-called playing of Bingo—"the world's biggest Bingo—£30,000 in cash prizes". There was then set out a square comprising a Bingo card of 16 digits, and opposite each line horizontally and vertically were the prize values which might be won if the line were completed—they went from £1 up to £1,000. There was another rectangle containing 18 digits, and the so-called play consisted of going through the numbers in the rectangle and striking off any similar numbers that appeared in the square with the 16 digits. If by this means a line were completed, the holder of the label or the card was entitled to claim the prize set out at the end of that line. Before the prize was paid the customer had to solve a puzzle, which consisted of a geometrical diagram; the person applying for the prize had to state the number of triangles that appeared in that geometrical figure. On appeal by the prosecution against the dismissal of an information against the respondents of causing to be printed for the purpose of publication or distribution an advertisement of a lottery, contrary to s. 42 (1) (c) (i) of the Betting, Gaming, and Lotteries Act 1963,

*Held*, the scheme in the present case was severable into two stages, the first, the obtaining of a label which would enable the Bingo card to be completed in one line, was one purely of luck and the second, the puzzle, involved a little skill; since no skill was required for the first stage and the