ADMISSIONS AND THE ADMISSIBILITY OF EXCULPATORY STATEMENTS

R. v. McKay [1967] N.Z.L.R. 139 (C.A.)

In *McKay,* the accused was charged with the murder of a woman in Auckland. Counsel for the defence informed the jury that he intended to call evidence of two psychiatrists who had administered "truth-drugs" to the accused, who, while under the influence of these drugs, had denied killing the woman. The psychiatrists, he said, would express their opinion that the answers given by the accused whilst under sedation were consistent with innocence, and that the accused was very probably telling the truth when he denied killing Mrs Kievet. The admissibility of this evidence was challenged by the Crown. Gresson J. dismissed the jury, and heard evidence from one of the psychiatrists whom the defence wished to call. It was conceded by the psychiatrist, Dr Gluckman, that it was still possible to lie under the influence of the drugs, but he said that in approximately 70% of the cases he had dealt with he had obtained truthful answers, and expressed the opinion that the statements made by the accused under sedation, were likely to be true. Gresson J. refused to allow counsel for McKay to adduce the evidence of the psychiatrists, since it would amount to "substituting . . . trial by psychiatrist, for trial by jury", but he agreed to state a case for the opinion of the Court of Appeal.

The Court of Appeal (North P., Turner J., and McCarthy J.), affirmed the ruling of the Supreme Court for a number of reasons:

> To begin with, previous statements of an accused person are generally inadmissible for the purpose of confirming the evidence he gives at his trial . . . .

(Gillie v. *Posho Ltd* [1939] 2 All E.R. 196; *Corke* v. *Corke and Cooke* [1958] P. 93; *Fox* v. *The General Medical Council* [1960] 1 W.L.R. 1017) per North P. at 143.

It is perhaps necessary to state that McKay gave evidence in his defence at his trial, otherwise the rule against proof of prior consistent statements would not have had any application.

> In the second place, if the appellant's statement to the psychiatrists is intended to prove the truth of the facts so asserted, then it is hearsay, and does not come within any of the recognized exceptions to the rule. (per North P. at 143).

Other grounds upon which the determination of the Court of Appeal was based were that,

(a) the psychiatrists could not be allowed to give evidence of their

opinions of the likelihood of the accused's guilt or innocence, the very question which the jury had to decide;

(b) the proposed evidence was too unreliable to be admissible, since science had not yet provided adequate guarantees of the accuracy of tests involving truth-drugs; and

(c) the defence, in not giving notice of the proposed test to the Crown to enable a Crown doctor to be present, had not followed an acceptable procedure.

In his effort to run the gauntlet avoiding both the rule against adducing evidence of prior statements for the purpose of showing consistency with evidence given at the trial, and the rule against hearsay, counsel for McKay relied upon a dictum of Ostler J. in an earlier decision of the New Zealand Court of Appeal, *R.* v. *Coats* [1932] N.Z.L.R. 401, 407. (C.A.):

> 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 a person who made them if he is subsequently charged with a crime.

It was submitted that this was one of the "numerous inroads" on the principle that self-serving statements to third persons protesting an accused person's innocence are generally inadmissible. This submission was rejected, and the court's finding that McKay's exculpatory statements were not admissible raises the interesting, and indeed (as we shall see), closely related questions:

(1) When is an exculpatory statement made by an accused person out of court admissible on his behalf?

(2) What constitutes an "admission" for the purpose of the well-recognised exception to the hearsay rule under which informal admissions by the accused are admissible, and could the statement of McKay be considered an "admission"?

The answer to the first of these questions has its roots in a group of early English decisions—*Smith* v. *Blandy* (1825) Ry. & Mood. 257; *Harrison* v. *Turner* (1847) 10 Q.B.D. 482; *R.* v. *Higgins* (1829) 3 C. & P. 603; *R.* v. *Clewes* (1830) 4 C. & P. 221; and *R.* v. *Steptoe* (1830) 4 C. & P. 397. These cases yield the rule:

> If a declaration made by the prisoner is given in evidence against him, it becomes evidence *for* him as well as against him, and any exculpatory matter in the declaration is to be considered by the Court and given such weight as the Court sees fit, having regard to the other evidence and the circumstances of the case.

In *Higgins*, for example, the prisoner was charged with the larceny

of two yards of woollen cloth. The informant was at an inn at Berkeley, and left the cloth in one of the rooms of the inn while he went out. On his return the cloth had gone. It was proved that, about four hours after the loss of the cloth, the prisoner had sold it at a place about eight miles from Berkeley. The prisoner's statement, made before the magistrate, was read as evidence on the part of the prosecution. In this, the prisoner said that the cloth "was honestly bought and paid for." In summing up Parke B. said:

> . . . what a prisoner says is not evidence, unless the prosecutor chooses to make it so by using it as a part of his case against the prisoner; . . . it then becomes evidence for the prisoner as well as against him . . . it is for you to say whether you believe it. (ibid., 604)

The rule in these English cases has been reaffirmed and applied in Canada: *Capital Trust Co.* v. *Fowler* (1921) 64 D.L.R. 289; *R.* v. *Hughes* [1943] 1 D.L.R. 1; and *R.* v. *Harris* [1946] 3 D.L.R. 520.

The operation of the rule is also seen in two very recent decisions, *Donaldson* v. *Police* [1963] N.Z.L.R. 750 and *R.* v. *McGregor* [1967] 3 W.L.R. 274 (C.A.). *Donaldson* concerned an appeal against conviction on a charge of driving a motor truck without due care and attention. The appellant, while driving the truck, mounted the footpath, and in his attempt to regain the highway, struck a telegraph-pole causing damage. He proceeded on after the accident, but said that he realised that there might be some damage, and returned to the scene of the accident. The prosecution case depended solely upon a statement made by the appellant on the same day as the happening, and upon a sketch plan which he had also acknowledged. The appellant claimed that a cat on the road had caused him to swerve, but the learned magistrate had held that sworn evidence to prove the existence of the cat was necessary to sustain the appellant's contention that there was no inference of negligence to be drawn against him, and that because there was no such sworn evidence, there was no basis for a legal defence. Relying on the early English cases cited previously, and on a passage from *Taylor on Evidence* (11th ed. 1920) at p.587, Henry J. held that where a Court has before it a statement made by the accused person, it must consider the whole of the statement, and is at liberty to give such weight to various portions of it as it thinks proper, whether the statement be exculpatory or inculpatory, without requiring proof on oath of exculpatory statements. Accordingly, it was held that the prosecution had failed to prove its case beyond reasonable doubt. The appeal was allowed and the conviction quashed.

In delivering the judgment of the English Court of Appeal in *McGregor* (supra), Parker L.C.J. discussed a ruling of Sergeant Bosanquet in the early English decision—*R.* v. *Jones* (1827) 2 C. & P. 629 —which was stated in the following terms:

> There is no doubt that if a prosecutor uses the

> declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as *true*. (ibid. 630)

The first part of this ruling is consistent with authority, and Lord Parker conceded that it is "quite correct" (ibid. 279). However, it has been held in many subsequent decisions, (including *Higgins, Clewes, Steptoe,* and *Donaldson* (supra)), that where a statement made by the accused is before the court, it should be left to the jury, (or the court), to give such weight to various parts of it as it thinks proper. If the ruling of Sgt. Bosanquet were to be accepted, then the court in *Donaldson,* for example, would have had to accept as true the assertion of the accused that there was a cat on the road. Henry J. did not, however, go as far as this, holding merely that the prosecution had not proved its case beyond reasonable doubt—the fact that the assertion of the accused *might* have been true being sufficient (on the facts of that case) to reach this conclusion. In over-ruling the second part of Sergeant Bosanquet's ruling, Lord Parker quoted with approval the view stated in Archbold *Criminal Pleading, Evidence and Practice* (36th ed. 1966) para. 1128:

> The better opinion seems to be that, as in the case of all other evidence, the whole should be left to the jury to say whether the facts asserted by the prisoner in his favour be true. (ibid. 279)

The decision of the Court in *McGregor* therefore substantially reiterates that of the Court in *Donaldson*—that where the prosecution puts in evidence an admission or confession of a defendant, the whole admission or confession must be put in, and it should be left to the jury to determine the truth of the facts asserted by the defendant in his favour.

We may say, therefore, that exculpatory matter in an extra-judicial statement is admissible for an accused person if that declaration is produced in evidence AGAINST him, i.e. in the words of Parke B. (ante) "if the prosecution chooses" to make the declaration evidence "by using it as part of his case against the prisoner". The situation in *McKay's* case, however, was not one in which this rule could be applied, since the statement made by McKay was not tendered in evidence against him. On the contrary, it was sought by counsel for the accused to have the statement admitted in evidence FOR him . . .

The answer to the second of the questions posed, (i.e. what constitutes an "admission"), is perhaps provided by Wigmore in his *Treatise on Evidence,* (3rd ed. vol.IV, p.4, s.1048.) He there suggests that:

> The hearsay rule . . . is not a ground of objection when an opponent's assertions are offered AGAINST him; in such a case his assertions are termed "admissions". But the hearsay rule *is* a ground of objection

> by the first party when the opponent's assertions are offered IN HIS FAVOUR; and such statements are *not* termed "admissions".[1]

What were his reasons for thus-stating the position? As Baker indicates in his book *The Hearsay Rule* (1950) at p.30, Wigmore adopts as the basis upon which the hearsay rule rests, the fact that the maker of the statement sought to be adduced is not on oath, nor subject to cross-examination. However, if statements made by the accused extra-judicially are admitted in evidence against him, then he can hardly object on the ground of lack of opportunity to cross-examine the maker thereof. (He may, of course, have a ground of objection if there has been non-compliance with the Judges' Rules).

If one accepts Wigmore's formulation, then the relationship between the answers to the two questions raised becomes evident and can be expressed in the following manner:

> An exculpatory statement made by the accused person is admissible only when the declaration in which it is contained is offered in evidence against him, such an assertion being then deemed to constitute an "admission" for the purposes of providing an exception to the hearsay rule.

A distinction should be made between the two senses in which the word "admission" may be used. In colloquial language the word "admission" is indicative of a statement prejudicial to its maker. It is submitted, however, that in legal parlance, anything relevant said by the accused, inculpatory or otherwise, which is tendered in evidence against him, is included in the term "admission". This follows from an acceptance of Wigmore's definition, and is the conclusion which can be drawn from the discussion so far. McKay's statements could not be considered "admissions" within this formulation, being neither tendered in evidence against him, nor adverse to his own case in any respect.

What was the attitude of the Court of Appeal to Ostler J.'s dictum in *Coats* (supra).? It will be recalled that Ostler J. said that exculpatory statements made to the police when making inquiries about a crime, if properly obtained, were always admissible both for and against a person who made them if he was subsequently charged with a crime. It is surprising that only Turner J. dealt directly with the dictum, and even then only briefly. He commented, (at p. 148), that it "may perhaps have been unguardedly wide", and was of the opinion that it should be applied to no wider a class of statements than those made (i) to the police, and (ii) in the course of their inquiries—i.e. that its application should be confined within its own express limits. This is, with respect, the only unsatisfactory aspect of the decision in *McKay*.

It is submitted that Ostler J.'s dictum, even as confined by Turner

1. Emphasis added.

J., is incorrect. No authority supports it and it came in the course of an unreserved judgment. It is strongly submitted, having regard to the foregoing discussion, that an exculpatory statement made by the accused to the police in the course of their inquiries could *never* be admitted in evidence for him unless it were first offered in evidence against him by the prosecution—a situation which is hardly likely to arise in the case of a purely exculpatory statement. Perhaps Ostler J. did not intend to assert the contrary and would have accepted this qualification. But the dictum is accepted without qualification in Garrow and Willis's *Law of Evidence* (5th ed. 1966) at p.89, where the only observation regarding it is that such statements must still be obtained in the "prescribed manner".

In *Coats* (supra), the accused was charged with the murder of a girl. The New Zealand Court of Appeal held that certain exculpatory statements made by him to the police had been rightly admitted by the trial judge. It was contended by the prisoner that his statements made to the police were wrongly admitted by the learned judge because they were confessions within the meaning of s.20 of the Evidence Act 1908 (which excludes confessions of guilt induced by a promise or threat held out to the person making the confession, if the judge presiding at the trial is of opinion that the threat or promise was likely to induce an untrue confession of guilt.) The Court of Appeal held however, that the word "confession" in s.20 of the Evidence Act 1908 means an admission of guilt of the offence which is actually before the court, and that the statements made by the accused were not confessions within the meaning of s.20. "They were statements made by a prisoner in order to exculpate himself from the suspicion which he knew he was under of causing the girl's abortion . . . " per Ostler J. at p. 407.

The determination of the Court of Appeal in *Coats* (supra) was confirmed by the Privy Council in *Anandagoda* v. *R.* [1962] 1 W.L.R. 817, where it was held that the test in deciding whether a particular statement is a confession is an objective one, and is whether words of admission in their context expressly or substantially admit guilt, or taken together in their context, inferentially admit guilt. There is a fundamental similarity of function between admissions and confessions. The relationship between them is perhaps indicated in the judgments in *Coats* and *Anandagoda,* but a good elucidation is provided again by Wigmore, (at para. 1050):

> A confession is one species of admission, namely an admission consisting of a direct assertion by the accused in a criminal case of the main fact charged against him, or of some fact essential to the charge.

An admission, however, as has been seen, is any relevant statement made by a party and adduced in evidence against him.

Once the conditions requisite for the reception of confessions have been satisfied, they assume the status of admissions and are received in evidence on the same basis, namely that such statements may reason-

ably be taken to be true as against the accused himself, (*R.* v. *Turner* [1910] 1 K.B. 346). The "conditions requisite" are defined by the limitation illustrated by many cases; *R.* v. *Gibbons* (1823) 1 C. & P. 97; *R.* v. *Baldry* (1852) 2 Den. 430, 169 E.R. 568; *R.* v. *Smith* [1959] 2 Q.B. 35),—that there should be no inducement in the form of a threat or promise, handed out by a person in authority, and calculated to destroy the trustworthiness of the confession.

Following the recent decision of the House of Lords in *Commissioner of Customs and Excise* v. *Harz and Power* [1967] 2 W.L.R. 297, it would appear that those conditions also extend to the reception of admissions which are not confessions. The defendants and others were concerned in trading in goods on which purchase tax became due and payable to the Revenue after the sale. It was alleged that vast quantities of goods bought by L.Ltd were transferred to Harz, who sold the goods to others without accounting for £119,000 purchase tax. The evidence to prove this consisted largely of the statements of the defendants to customs officers on the occasions of interviews with them, and the data extracted from the books of L.Ltd and other defendant companies, taken by, or handed over to, customs officers who were acting, or purporting to act in accordance with their powers under certain legislation.

The House of Lords held that the answers were not admissible at common law, since they were illegally obtained and were not free and voluntary, and that in this respect, there was no distinction between confessions and admissions which fall short of confessions. Harz had said to the customs officers—"We are not talking"; but the officers had told him that he would be prosecuted if he did not answer. He therefore gave answers on that occasion. At p.303-304, Lord Reid said:

> In similar circumstances one man induced by a threat makes a full confession, and another induced by the same threat makes one or more incriminating admissions. Unless the law is to be reduced to a mere collection of unrelated rules, I see no distinction between these cases.

A number of conclusions can be drawn from the discussion at this stage. First, an exculpatory statement, to be admissible, must be included in an admission, (i.e. an assertion made by the accused offered in evidence against him), in order to avoid the rule against proof of prior consistent statements, and the hearsay rule. Second, a purely exculpatory statement can never be admitted FOR an accused person in a criminal trial, (despite the dictum of Ostler J.), unless it is first offered in evidence against him, (which is unlikely). Third, the criterion of admissibility is that the statement be tendered in evidence AGAINST the accused. The statement will therefore generally include items adverse to the case of the accused. Fourth, an admission must be properly obtained, (i.e. there must be no inducement by way of a threat or promise), and there is no distinction between confessions and admissions in this connection.

It is true that the possibility of self-serving, or manufactured evidence being brought before the court in an "admission" is not altogether excluded. But when the requirement for admissibility is that the statement in question be tendered in evidence against its maker, the accused, the possibility of manufactured evidence coming before the court is less than if the criterion for admissibilty were that the statement include items adverse to, or against the interests of, its maker. For example, let us assume that an exculpatory statement could be admitted for an accused person if it contained items which were also detrimental or adverse to the interests of its maker, the accused. It would soon become necessary to inquire whether, in order to attract the rule, a statement must consist *mainly* of adverse items. If a statement were to be considered an "admission" on the strength of items adverse to the accused included in it, it would be possible for an accused person, in the course of police inquiries, to make a series of self-serving exculpatory statements and to include one or two items adverse to his interests (but not critically so) which he may suspect that the police will discover anyway, and then to subpoena a particular constable to verify his statement (including the exculpatory matter). It is submitted that this is the result if the dictum of Ostler J. in *Coats* (supra) is accepted.

The decision of the New Zealand Court of Appeal in *McKay,* while illuminating and with respect, entirely sound in regard to the main issues it discussed, obviously gave insufficient attention to the *Coats* dictum. Turner J.'s observations were all too brief and indecisive. It is to be hoped that Ostler J.'s dictum will not continue to be accepted by writers on the law of evidence and that it will not hereafter be resurrected from the grave to which the preceding discussion has endeavoured to consign it.

P.G.M.

2. For a fuller discussion of these issues, see Mathieson, "The Truth Drug: Trial by Psychiatrist?" [1967] Crim. L.R. 645.