1967
*Dec. 6, 7
1968
June 26

GERARD WILLIAM DeCLERCQ .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Voir dire—Confession—Trial by judge without jury—Accused asked by trial judge whether inculpatory statement true—Whether proper question—Criminal Code, 1953-54 (Can.), c. 51, s. 592(1)(b)(iii).

In the course of an investigation by the police, the appellant was taken to the police station where he was subsequently charged with indecent assault. He was then cautioned and made an inculpatory statement which he signed. During the *voir dire* as to the admissibility of that statement, the trial judge, sitting without a jury, asked the accused, while he was giving evidence, whether the statement was true. The trial judge had stated at the outset of the inquiry that he did not propose to look at it. An objection to the question was overruled, and the accused replied that the statement was substantially correct. The trial judge admitted the statement. The appellant was convicted and his conviction was affirmed by a majority judgment in the Court of Appeal. He appealed to this Court, where the issue was as to whether the trial judge erred in law when he asked the accused whether the statement was true.

Held (Hall, Spence and Pigeon JJ. dissenting): The appeal should be dismissed.

Per Cartwright C.J.: The trial judge did not err in law in putting the question which he did. It was not possible to say that, as a matter of law, the question was not permissible, although it was permissible only on the ground that it might assist the trial judge in determining the credibility of the evidence which the accused was giving on the *voir dire*. However, this was eminently a case in which the trial judge should, in the exercise of his discretion, have refrained from putting the question.

Per Fauteux, Abbott, Martland, Judson and Ritchie JJ.: The question was admissible: *R. v. Hammond*, [1941] 3 All E.R. 318. While the

*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

inquiry on a *voir dire* is directed to finding whether a statement is voluntary, it does not follow that the truth or falsity of the statement must be irrelevant to such an inquiry. There had been no attempt by the trial judge to use the *voir dire* as a means of determining the guilt of the appellant. The inquiry as to the truth of the statement was related solely to the weight to be given to the evidence on the issue as to whether or not it was voluntary.

Per Hall J., *dissenting:* It is true that the accused cannot be compelled by the Crown to testify on the *voir dire* and does so only of his own will. However, the very purpose of holding a separate inquiry into the admissibility of a confession is that this issue may be dealt with only on evidence relevant thereto. It is an essential feature of this system that the accused is thereby permitted to testify on that issue without prejudice to his right not to testify on the main issue. If an accused cannot testify on the *voir dire* without being liable to be asked questions bearing directly on his guilt or innocence, he is put in a situation where he cannot do so without in effect being deprived from the benefit of the rule against compulsory self incrimination. At least this is so when the trial is by a judge alone. The question as to whether it was proper for the trial judge to do what he did is a pure question of law.

Per Spence J., *dissenting:* The question should be ruled to be inadmissible. Under the particular circumstances of the *voir dire,* the answer of the accused to the question as to whether the statement was true is not relevant, has no probative value in determining the voluntary or involuntary character of the statement, and deprives the accused from the benefit of the rule against self incrimination. It was not possible to say that the putting of the question by the trial judge did not cause a miscarriage of justice.

Per Pigeon J., *dissenting:* Questions to an accused concerning the truth of a statement allegedly made by him cannot be permitted as having a bearing on his credibility. These questions really go to the main issue of guilt. They cannot be helpful in reaching a decision on the only issue on the *voir dire*: the admissibility of the statement. The result of permitting, on a *voir dire,* questions pertaining to the truth or falsity of the statement must inevitably be to weaken the rule against the admission of involuntary statements and thus to undermine a very necessary safeguard against improper treatment of suspects.

Droit criminel—«Voir dire»—Confession—Procès par un juge seul—Le juge demande à l'accusé si sa déclaration incriminante est véridique—Est-il permis de poser une telle question—Code criminel, 1953-54 (Can.), c. 51, art. 592(1)(b)(iii).

Au cours d'une investigation policière, l'appelant a été amené au poste de police où il a été subséquemment accusé d'avoir commis un attentat à la pudeur. Il a fait et signé une déclaration incriminante après avoir été mis en garde. Lors du «voir dire» pour décider de l'admissibilité de cette déclaration, le juge au procès, siégeant sans jury, a demandé à l'accusé au cours de son témoignage si la déclaration était véridique. Le juge avait déclaré au début de l'enquête qu'il n'avait pas l'intention de regarder la déclaration. Une objection à

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cette question ayant été rejetée, l'accusé a répondu que la déclaration était substantiellement exacte. Le juge a admis la déclaration. L'appelant a été déclaré coupable et ce jugement a été confirmé par un jugement majoritaire de la Cour d'appel. L'accusé en appela à cette Cour, où le débat s'est engagé sur la question de savoir si le juge avait erré en droit lorsqu'il a demandé à l'accusé si la déclaration était véridique.

Arrêt: L'appel doit être rejeté, les Juges Hall, Spence et Pigeon étant dissidents.

Le Juge en Chef Cartwright: Le juge n'a pas erré en droit en posant la question. Il n'est pas possible de dire qu'en droit, la question n'était pas admissible, bien qu'elle ne l'était que pour aider le juge à en venir à une conclusion sur la crédibilité du témoignage de l'accusé sur le «voir dire». Cependant, il s'agit du cas par excellence où le juge aurait dû, dans l'exercice de sa discrétion, s'abstenir de poser la question.

Les Juges Fauteux, Abbott, Martland, Judson et Ritchie: La question était admissible: *R. v. Hammond,* [1941] 3 All E.R. 313. Bien que l'enquête sur le «voir dire» porte sur la question de savoir si une déclaration est volontaire, il ne s'ensuit pas que la véracité ou la fausseté de la déclaration n'a aucun rapport avec l'objet d'une telle enquête. Le juge n'a pas tenté de se servir du «voir dire» pour déterminer la culpabilité de l'appelant. L'enquête sur la véracité avait rapport seulement à la crédibilité du témoignage sur la question de savoir si la déclaration était volontaire.

Le Juge Hall, *dissident*: Il est vrai que l'accusé ne peut pas être contraint par la Couronne de témoigner sur le «voir dire» et qu'il le fait seulement de sa propre volonté. Cependant, le but véritable d'une enquête distincte sur l'admissibilité d'une confession est de faire en sorte que cette question ne soit traitée que sur la preuve qui lui est pertinente. Permettre ainsi à l'accusé de témoigner sur ce point sans préjudice de son droit de ne pas témoigner sur la question principale de culpabilité est une caractéristique essentielle de ce système. Si un accusé ne peut pas témoigner sur le «voir dire» sans s'exposer à ce qu'on lui pose des questions portant directement sur sa culpabilité ou son innocence, il est placé dans une situation telle qu'il ne peut le faire sans être effectivement privé du bénéfice de la règle que personne n'est tenu de s'incriminer. Tel est le cas du moins lorsque le juge siège sans jury. La question de savoir si ce que le juge a fait était permis est une pure question de droit.

Le Juge Spence, *dissident:* La question n'était pas admissible. Selon les circonstances particulières du «voir dire», la réponse de l'accusé à la question portant sur la véracité de la déclaration n'est pas pertinente, n'a pas de valeur probante pour déterminer le caractère volontaire ou involontaire de la déclaration et prive l'accusé du bénéfice de la règle que personne n'est tenu de s'incriminer. Il n'est pas possible de dire que le fait d'avoir posé cette question à l'accusé n'est pas une erreur judiciaire grave.

Le Juge Pigeon, *dissident:* Des questions à un accusé sur la véracité de la déclaration censée avoir été faite par lui ne peuvent pas être admises comme ayant rapport à sa crédibilité sur le «voir dire». Ces questions portent en réalité sur la question principale: sa

culpabilité. Elles ne peuvent pas être utiles pour en arriver à une conclusion sur le seul point qui se soulève lors d'un «voir dire»: l'admissibilité de la déclaration. Permettre, alors des questions sur la véracité ou la fausseté d'une déclaration ne peut avoir d'autre résultat que d'affaiblir la règle à l'encontre de l'admission d'une déclaration involontaire et ainsi détruire une protection indispensable contre le mauvais traitement des prévenus.

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], confirmant une déclaration de culpabilité pour attentat à la pudeur. Appel rejeté, les Juges Hall, Spence et Pigeon étant dissidents.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the appellant's conviction for indecent assault. Appeal dismissed, Hall, Spence and Pigeon JJ. dissenting.

Joseph A. Mahon, Q.C., for the appellant.

R. G. Thomas, for the respondent.

THE CHIEF JUSTICE:—The facts out of which this appeal arises and the course of the proceedings in the Courts below are set out in the reasons of my brother Hall and I will endeavour to avoid repetition.

The only question not disposed of at the hearing of the appeal is whether the learned trial Judge erred in law when he asked the appellant, who was giving evidence on the *voir dire,* whether the inculpatory statement, dated August 6, 1964, signed by the appellant, which the Crown was seeking to introduce in evidence, was true and insisted on an answer to the question in spite of the objection of counsel.

The rule that when the Crown seeks to introduce in evidence an inculpatory statement said to have been made by the accused the onus lies upon the Crown to show that the statement was voluntary is firmly established. It is stated in the following words in *Ibrahim v. R.*[2]:

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against

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1 [1966] 1 O.R. 674, [1966] 2 C.C.C. 190.

2 [1914] A.C. 599 at 609.

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

It has frequently been applied in this Court.

While the reason for the rule is said to be the danger that a confession, the making of which has been induced by threats or promises made by a person in authority, may well be untrue, it must now, I think, be regarded as settled that when an inquiry is held during the course of a trial as to the admissibility of an inculpatory statement sought to be introduced by the Crown, the question to be determined is whether or not the statement was voluntary and not whether or not it is true. On the other hand, an assertion by the accused that the statement is untrue may logically have a bearing in determining whether or not it was voluntary.

In *R. v. Mazerall*[3], Robertson C.J.O., giving the unanimous judgment of the Court of Appeal, said at page 787:

> It would be a strange application of a rule designed to exclude confessions the truth of which is doubtful, to use it to exclude statements that the accused, giving evidence upon this trial, has sworn to be true.

I incline to the view that this observation was *obiter*. The statements the admissibility of which was in question in that case had been made by Mazerall under oath before a Royal Commission under the compulsion of a statute. The basis of the judgment was that such evidence could be used against him unless he had objected to answer and thereby become entitled to the protection afforded by s. 5 of the *Canada Evidence Act*.

The question to be determined by the Judge on the *voir dire* being whether or not the statement was voluntary in the sense mentioned above, I think it clear that the Crown could not lead evidence on that inquiry, the sole object of which was to show that the statement given was true. Such evidence should be excluded on the ground that it was irrelevant. In *Hollington v. F. Hewthron & Co.*[4], Lord Goddard, giving the judgment of the Court of Appeal, drew a distinction between the "modern law" of evidence

[3] [1946] O.R. 762, 2 C.R. 261, 86 C.C.C. 321, 4 D.L.R. 791.

[4] [1943] 1 K.B. 587.

and the law before the passing of the statutes which removed the incompetency of witnesses and parties and their spouses on the ground of interest, and, having done so, said at page 594:

> The law being what it was before these statutes were passed, it is not surprising to find Sir FitzJames Stephen saying, in his Digest of the Law of Evidence, 12th ed., p. 217, Note XVIII, that the law of competency "was formerly the most, or nearly the most important and extensive branch of the law of evidence," and that rules of incompetency are "nearly the only rules of evidence treated of in the older authorities." But, nowadays, it is relevance and not competency that is the main consideration, and, generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded.

I agree with his concluding statement that the general rule is that all evidence that is relevant to an issue is admissible while all that is irrelevant is excluded.

I do not understand that counsel for the respondent seeks to justify the putting of the question as to the truth of the statement on the ground that it was relevant; his argument is that it was a question properly put on cross-examination as bearing upon the credibility of the accused.

It is not possible to say that at the stage when the question was put the credibility of the accused was not in issue; he had deposed that one of the officers had said to him "it would be better for me if I did make a statement and co-operated in this respect"; the two officers who were present at the time at which the accused said that this had been said to him had both been examined as witnesses; one had said that he had no recollection of such a statement being made and the other had in effect denied the making of any such statement.

While he did not refer to them by name, it would seem that when the learned trial Judge said he was satisfied by the authorities that the question which he put to the accused was proper, he had in mind the cases of *R. v. Hammond*[5] and *LaPlante v. The Queen*[6]. Neither of these cases suggests that the question put to the accused as to the truth of his statement was permissible on any ground other than its bearing on the question of his credibility.

In the *Hammond* case, *supra*, Cassels J., who was the trial Judge, made it clear that he did not decide on the

[5] [1941] 3 All. E.R. 318, 28 Cr. App. R. 84.
[6] [1958] O.W.N. 80.

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admissibility of the confession as the result of the admission of the appellant that it was a true confession. He admitted it because he was satified on all the evidence that it was a voluntary statement and this is stressed in the judgment of the Court of Criminal Appeal.

In the *LaPlante* case, *supra,* the second ground of appeal was "that answers made by the accused to questions put by counsel for the Crown showing that the contents of the statement made by him were true were not admissible in evidence on the *voir dire* held to decide whether those statements should be admitted as voluntary". Laidlaw J.A., who gave the unanimous judgment of the Court of Appeal, dealt with this ground in the following paragraph, at page 81:

> In respect of the second ground, we can add nothing to the reasons given by Mr. Justice Humphreys in *R. v. Hammond* (1941), 28 Cr. App. R. 84. The evidence given by the accused in cross-examination on the *voir dire* that the statements made by him were true, touches the issue of credibility. Likewise, the admission by him that he killed Edwin Jones touches the matter of his credibility, and his answers in respect of both matters to the questions put by counsel for the Crown were relevant to the issue as to whether or not the statements made by him were voluntary.

It should be noted that an application for leave to appeal from the judgment of the Court of Appeal in the *LaPlante* case was made to this Court. It was heard on December 16, 1957, and judgment was reserved. Judgment was given on December 19, 1957, dismissing the application. As is usual in such cases, written reasons for dismissing the application were not given. The case being a capital one, five Judges sat to hear the application. The Court consisted of Kerwin C.J., Rand, Locke, Cartwright and Abbott JJ.

While it may be that much of what was said in the judgment in *R. v. Hammond, supra,* was *obiter,* the paragraph quoted above from the judgment in *LaPlante v. The Queen, supra,* formed the ratio of that decision.

In the case at bar the decision of the learned trial Judge at the conclusion of the *voir dire* was as follows:

> The court has to determine whether the statement is a free and voluntary statement, and I am satisfied on the evidence that it is. Accordingly, it will be admitted.

I do not find it possible to say that, as a matter of law, the question put in the case at bar was not permissible

although I think it clear that it was permissible only on the ground that it might assist the trial Judge in determining the credibility of the evidence which the accused was giving on the *voir dire*.

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*[7]:

> It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

This passage has frequently been referred to with approval; an instance is the unanimous judgment of this Court in *Lizotte v. The King*[8].

While, in my opinion, the learned trial Judge ought not to have put the question and ought not to have required an answer after the objection of counsel, I find myself unable to say that the course he followed constituted an error in law. It was, in my view, with the greatest respect, a mistaken exercise of his discretion but, as has so often been held, in an appeal to this Court in a criminal case, our jurisdiction, differing sharply from that of the Court of Appeal, is limited to dealing with questions of law in the strict sense.

For these reasons, I have reached the conclusion that it cannot be said that the learned trial Judge erred in law in putting the question which he did. The ground on which I am of opinion that he ought not to have put it raises no question of law in the strict sense and it follows that in my opinion the appeal must be dismissed.

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[7] [1949] A.C. 182 at 192.

[8] [1951] S.C.R. 115 at 127, 128, 11 C.R. 357, 99 C.C.C. 113, 2 D.L.R. 754.

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The judgment of Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

MARTLAND J.:—The facts which give rise to this appeal are set out in the reasons of my brother Hall. The sole issue before this Court is as to whether the learned trial judge erred in law when he asked the appellant whether the statement which he had signed was true.

This is exactly the same issue which had to be determined by the Court of Criminal Appeal in *R. v. Hammond*[9]. In that case, as in this, a question had been put to the accused on the *voir dire* as to whether a statement which he had made was true. The judgment of the Court was delivered by Humphreys J., who said, at p. 321:

> This appeal is brought on the sole ground that the question which was put by counsel for the prosecution in cross-examination of the accused was inadmissible. 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 then 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 says, "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. 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, and they could not, therefore, have wrongly affected the mind of the judge.

It was after stating this conclusion as to the admissibility of the question that he went on to point out that the trial judge had not reached his conclusion as to the admissibility of the statement as the result of the admission as to its truth.

As the Chief Justice has pointed out in his reasons, the *Hammond* case was followed by the Court of Appeal for Ontario in *LaPlante v. The Queen*[10], a capital case, and an application for leave to appeal, which could only have been granted on a question of law, was refused by this Court.

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[9] [1941] 3 All E.R. 318, 28 Cr. App. R. 84.

[10] [1958] O.W.N. 80.

The notice of motion for leave to appeal to this Court, in that case, relied only upon two grounds. The first was that there had been non-direction amounting to mis-direction in the charge to the jury in respect of serious inconsistencies in the evidence. The second was stated as follows:

> Were the questions put to the appellant during the course of cross-examination on the voir dire by counsel for the Crown as to the truth or falsity of Exhibits 26 and 27 inadmissible, irrelevant and prejudicial?

The exhibits mentioned were statements made by the appellant.

The written submission to the Court said, in respect of this question:

> It is submitted that the sole function of the Voir Dire is to determine whether or not the Statement or Statements are voluntary. It is submitted that on the Voir Dire the truth or falsity of the Statement is irrelevant and any question directed to the issue of truth or falsity is irrelevant, inadmissible and prejudicial.

Reference was made to the *Hammond* case as well as to *R. v. Weighill*[11] and *R. v. Mandzuk*[12].

I am in agreement with the conclusions stated in the *Hammond* case. While it is settled law that an inculpatory statement by an accused is not admissible against him unless it is voluntary, and while the inquiry on a *voir dire* is directed to that issue, and not to the truth of the statement, it does not follow that the truth or falsity of the statement must be irrelevant to such an inquiry. An accused person, who alleged that he had been forced to admit responsibility for a crime committed by another, could properly testify that the statement obtained from him was false. Similarly, where the judge conducting the *voir dire* was in some doubt on the evidence as to whether the accused had willingly made a statement, or whether, as he contended, he had done so because of pressure exerted by a person in authority, the admitted truth or the alleged falsity of the statement could be a relevant factor in deciding whether or not he would accept the evidence of the accused regarding such pressure.

There was no attempt by the learned trial judge in the present case to use the *voir dire* as a means of determining

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[11] (1945), 83 C.C.C. 387, 61 B.C.R. 140, 1 W.W.R. 561, 2 D.L.R. 471.

[12] (1945), 85 C.C.C. 158, 62 B.C.R. 16, 3 W.W.R. 280, [1946] 1 D.L.R. 521.

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the guilt of the appellant. He stated at the outset of the inquiry that he had not seen the statement and that he did not propose to look at it. When it was produced it was handed to the witness for identification and he was questioned concerning it. Had he been satisfied that the statement was not voluntary, the trial judge would not have become aware of its contents. The inquiry as to its truth was related solely to the weight to be given to the evidence on the issue as to whether or not it was voluntary.

In my opinion, the appeal should be dismissed.

HALL J. (*dissenting*):—The appellant was convicted by His Honour Judge Waisberg, sitting without a jury in the County Judges' Criminal Court for the County of York on May 5, 1965:

> THAT he did on or about the 4th day of August in the year 1964 at the Municipality of Metropolitan Toronto in the County of York, indecently assault one Patricia D'Amata, a female person, contrary to the Criminal Code.

He was sentenced on May 14, 1965, to six months definite and two years less one day indefinite.

The charge arose out of a complaint by an 11-year old child, Patricia D'Amata, that, in the absence of her parents from the house in which the appellant was a lodger, he had indecently assaulted her by having carried her to his room and placed her on his bed and while on the bed had touched her on the thigh above the knee. She objected and was released. The complaint continued that the appellant grabbed a younger sister, placed her on the bed and touched her in the same manner, but on being threatened by the older girl with a broom he released the younger girl and both girls went to their own room. The complainant's parents were employed away from the home and when they came home in the evening the complainant told her father what had happened. He phoned the police who came to the D'Amata home about 8:00 o'clock that evening, August 4, 1965.

At approximately 2:00 a.m., August 6, 1965, Detectives Gossen and Pringle of the Metropolitan Toronto Police Department went to the appellant's room and requested him to accompany them to the police station. They told him they were conducting an investigation but the matter would not be discussed until they arrived at the police

station. The appellant got dressed and agreed to go along with the officers. At the police station the appellant was told by the officers that they were investigating an alleged indecent assault with respect to the daughters of his landlord. The appellant was not cautioned and had not been placed under arrest. After some conversation with the appellant, the officers charged him with indecent assault. He was cautioned and a statement taken which was reduced to writing and signed by him.

A *voir dire* was held as to the admissibility of that statement. The two detectives testified that no advantage had been held out to the appellant nor were any threats made. They said the appellant was nervous, embarrassed and co-operative. The learned trial judge said when the statement was being tendered as an exhibit on the *voir dire* that he did not propose to look at it. The record as to this is as follows:

> Q. I am showing you a statement which I ask to be entered as Exhibit One.
>
> MR. MAHON: It shouldn't be entered as an exhibit yet.
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> MR. HANS: This would be merely, Your Honour, for identification, his signature and Detective Pringle's signature, and the fact that this was read out loud and corrected, not as far as content ...
>
> THE COURT: I haven't seen the statement yet. I don't propose to look at it.
>
> MR. HANS: This is on the voir dire.

The appellant gave evidence on the *voir dire* as follows:

> *DIRECT-EXAMINATION ON THE VOIR DIRE BY MR. MAHON:*
>
> Q. Gerard, the officers say that they came to your room at 2:00 A.M. on the 6th day of August 1964, is that correct?
>
> A. That is correct.
>
> Q. And that you were asleep in your room and that they woke you up, is that correct?
>
> A. Yes, sir.
>
> Q. I see; did they say anything to you in the room as to the nature of the charge against you?
>
> A. No, they didn't.
>
> Q. I see. And then you put your clothes on, did you?
>
> A. Yes.
>
> Q. Why did you do that?
>
> A. They asked me to.
>
> Q. Did they ask you to do anything else?
>
> A. To come along with them to the station.
>
> Q. Did you ask them the nature of the charge?
>
> A. Yes, I did.

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Q. Did they tell you?
A. No, sir.
Q. So you went and got into the car and went with the officers, is that right?
A. Yes.
Q. There were two officers, and the two officers who testified, was it these two?
A. Yes.
Q. On the way down to the station, was there any conversation about the charge, or the nature of the charge?
A. I was trying to find out what it was all about. I was sort of puzzled.
Q. Did they tell you?
A. No.
Q. Did they tell you the nature of the charge?
A. I asked whether it was a serious charge?
Q. What did they say?
A. One of the officers agreed to it?
Q. Pardon?
A. One of the officers said it was serious.
Q. He said it was a serious charge, I see. Now, after you got down to the station, what happened?
A. Well, they began to interrogate me.
Q. They began to question you?
A. Yes, sir.
Q. There were just the two officers there, Gossen and Pringle, and what happened?
A. The officers—its such a long time ago, its very hard to remember exactly what happened.
Q. The exact wording?
A. Yes; they did explain that the indecent assault had happened in the house at 54 Beatrice Street.
Q. I see.
A. And they asked me would I be so kind...
Q. Speak up, I can't hear.
A. ...as to make a statement, which I did.
Q. And did they say anything else before you made the statement?
A. Well, I asked them what I should do; did I have to. They said, well, it would be better for me if I did make a statement and cooperated in this respect.
Q. And was it subsequent to that you told them—you made a statement?
A. Yes.
Q. Then later, was there a caution given to you?
A. Yes.
Q. I see. And was what you told them before caution in the statement itself?
A. More or less, it was all along the same lines, yes.
Q. The officer said you were nervous and agitated, would you agree with that?
A. Yes, I may have been.

Q. And did they tell you you were entitled to counsel?
A. No, sir.
Mr. Mahon: That will be all.

CROSS-EXAMINATION ON THE VOIR DIRE BY MR. HANS:

Q. Mr. DeClercq, at this time were you feeling ashamed? Were you feeling ashamed of yourself?
A. Yes, I think any person with police officers. . .
Q. Was your conscience bothering you?
Mr. Mahon: No. Objection; the only matter that is material here—This is not cross-examination in general. It is an examination purely on the question of the voluntariness of the statement.
The Court: Where is the statement? Have you it there?—Court receives document.
By The Court:
Q. Give the witness the exhibit. Is that the statement you signed?
A. Yes, sir.
Q. Is it true?
Mr. Mahon: Now, in addition to that, the question of whether the statement is true or is not is not material here.
The Court: I think it is.
Mr. Mahon: It is purely whether the statement is voluntary or not.
The Court: Eventually the proper statement was put to the witness. I think it is very important whether it is true or not. I note your objection and I think it is a proper question taken at this time.
Mr. Mahon: There are all sorts of cases.
The Court: Yes, I have read them all. I am quite familiar with them and I am satisfied with my ruling.
Witness: Yes, Your Honour.
The Court: All right.
Witness: . . . except for a few details, I would say the statement is correct.
The Court: All right. Have you any further questions?
Mr. Hans: No further questions, Your Honour.

It is obvious that the first part of the last answer was not recorded and it is to be noted that the appellant was not asked as to the details in which the statement was not correct. After hearing argument, the learned trial judge admitted the statement. It could not be successfully argued that the statement should not have been admitted because the evidence on the *voir dire* was quite conclusive that it was in fact a voluntary statement apart altogether from the question as to its truth put by the judge.

Accordingly, the issue in this appeal is not whether the statement was properly admitted but whether the learned trial judge was in error in taking over the cross-examination of the appellant, and having directed that the

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'confession' be put in the appellant's hands, put to him the question "Is it true?" Defence counsel objected that the question was not proper. The learned judge ruled that his question was proper and required the appellant to answer which he did.

An appeal was taken to the Court of Appeal[13] on a number of grounds, but the only one we are now concerned with is no. 5 as follows:

> 5. That I gave evidence on the voir dire; that when objection was made by my Counsel to my being cross-examined on the contents of the statement, the Judge himself, over the objection of my Counsel questioned me as to the truth or otherwise of the statement; that I replied that the statement was true in part; that the learned trial Judge erred in questioning me on the statement otherwise than on the ground as to whether or not the statement was a voluntary statement.

The appeal was heard by MacKay, McLennan and Laskin JJ.A. MacKay and McLennan JJ.A. dealt with this ground of appeal as follows:

> As to the appellant being asked on the *voir dire* if his statement given to the police was true, we are bound by the decision of this court in *Regina v. LaPlante* (1958) OWN 80 in which it was held that such a question is permissible.

Laskin J.A. dissented, saying:

> The accused was charged with an offence of a sexual nature, and the rule of caution against convicting on the uncorroborated evidence of the complainant is applicable. If the accused's statement was properly receivable, it would provide ample corroboration of competent evidence against the accused. Objection was taken at the trial to its admissibility, and the trial Judge, who was sitting alone, proceeded to a *voir dire*. The accused gave evidence on the trial within a trial, and in the course of his testimony the presiding Judge asked him if the statement was true. The reply given after objection was that it was substantially true.
>
> In my opinion, this question was improperly asked on the *voir dire*. I do not find fault with the trial Judge because he was following the judgment of this Court in *Regina v. LaPlante*, (1958) O.W.N. 80, which in turn rested on the judgment of the English Court of Criminal Appeal in *Rex v. Hammond*, (1941) 3 All E.R. 318, 28 Cr. App. R. 84. To say, as was said in the *Hammond* case that the question is relevant to credibility is too simple an analysis of the issues raised by the question. I prefer the contrary approach of the Saskatchewan Court of Queen's Bench in *Regina v. Hnedish* (1958) 26 W.W.R. 685, 29 C.R. 347. I note also that *Rex v. Hammond* was questioned by the British Columbia Court of Appeal in *Rex v. Weighill*, (1945) 2 D.L.R. 471, 83 C.C.C. 387, and it is criticized in Cross on Evidence (2nd ed. 1963) p. 55.

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[13] [1966] 1 O.R. 674, [1966] 2 C.C.C. 190.

I do not regard this Court as being prevented by any principle of *stare decisis* from reconsidering its previous decisions. If distinctions must be made, I would readily agree that to allow a trial Judge sitting alone (or Crown Counsel in such a case) to ask the incriminating question is more prejudicial than to permit it to be put on a *voir dire* in the course of a trial by jury. I do not, however, find it seemly to rest my difference with the *LaPlante* case on this distinction alone.

A number of vital principles of criminal law administration are brought under scrutiny in respect of the matter at hand. It is, of course, clear that the prevailing rule in Canada that permits illegally obtained evidence to be adduced at a trial if relevant to the issues does not apply to what I may call involuntary admissions of guilt made to persons in authority. The reason for this has to do with the values that we believe are worth protecting beyond the mere desirability of whether the holding of a trial within a trial is designed to control improper inducements or threats or other misbehaviour by the police in any efforts they may make to secure an incriminating statement from an accused or whether the *voir dire* is merely intended to assure the presiding Judge that the statement is reliable. I realize that I am drawing a line that may be very thin, since reliability or trustworthiness is closely related to the conduct of the interrogating police officers. Authorities can be cited to show that both the considerations mentioned lie back of holding of a trial within a trial for a preliminary consideration of admissibility. Although the basis of the exclusion of confessions improperly extracted from an accused has not hitherto been regarded, at least in our cases, as based on the privilege against self-crimination, there is the respected opinion of Dixon J. as he then was, of the High Court of Australia in *McDermott v. The King* (1948) 76 C.L.R. 501, at p. 513 that the rules respecting confessions and the privilege against self-crimination are related.

If an accused must expose himself on a *voir dire* to an incriminating inquiry when he finds it necessary to give evidence to resist the reception of an inculpatory statement, the relation with the privilege against self-crimination is more pronounced and the privilege is prejudiced, especially on a trial by a Judge alone. Indeed, on such a trial, the distinction between a *voir dire* and the trial proper becomes blurred if the accused, who is not then testifying in defence, may be compelled on the *voir dire* to answer an incriminating question. However, there is prejudice to the principle that an accused is not a compellable witness. Strictly speaking, the *Hammond* case does not preclude a trial Judge from excluding a confession as involuntary even where the accused has admitted its truth. But this possibility seems to me to be weak protection against what I consider substantial unfairness. I gave fleeting consideration to possible resort to section 5 of the *Canada Evidence Act,* R.S.O. 1952, c. 307 in connection with the *voir dire* but I do not see how it can be said that the *voir dire* and the trial on the merits are separate proceedings. Apart from this, I would not think that an accused's admission on the *voir dire* that his statement was true could be put before the jury even if the statement itself was admitted. Even if he gives evidence before the Jury, the trial Judge ought not to allow cross-examination on his admission on the *voir dire* nor should he permit that admission to be adduced through a Crown witness. This is predicated on the correctness of the *Hammond* case so far as it goes. I doubt that even it can be carried so far as to support the right of a Crown witness to give evidence that the accused admitted the truth of his inculpatory statement on the *voir dire*.

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Apart from the foregoing, the law of evidence has developed policies of exclusion based on confusion of issues and undue prejudice. The first is more appropriately referable, on the matter under discussion, to trial by Judge alone, but the second has a general application for present purposes. The trial within a trial has a limited object—to enable the trial Judge to decide whether an inculpatory statement made to persons in authority is admissible by examining the circumstances surrounding its making. To use such an occasion to obtain verification from the accused of the truth of his statement is to depart from the purpose for which the *voir dire* is held, and is to prejudice the accused unfairly on the very question of admissibility. Putting the matter another way, the question whether a confession is true, even if relevant to the issue of its voluntariness (and, hence, admissibility), involves resort to a line of inquiry that goes to much beyond the issue for which it is invoked at to make it improper either to initiate it or pursue it.

Since *Rex v. Hammond*[14] is the starting point for all subsequent discussion on the point, it is desirable to see what was really dealt with in *Hammond*. The facts as stated in the report at pp. 84-5 are as follows:

In opening the case counsel for the prosecution stated that the appellant had made a statement amounting to a confession of the crime to the police and that he proposed to relate the circumstances in which the statement had been made. Defending counsel said that he intended to object to the admissibility of the statement, and the Judge then heard evidence as to its admissibility in the absence of the jury. After the evidence of the police the appellant went into the witness-box and said that the confession had been extorted from him by violence and ill-treatment on the part of the police. Counsel for the Crown then cross-examined the appellant as follows: "Q.—Your case is that this statement was not made voluntarily? A.—Yes. Q.—Is it true? A.—Yes." Counsel put further questions in order to ensure that the appellant understood what he was saying. After hearing all the evidence on the preliminary issue, Cassels, J., ruled that the statement was voluntary and admissible, and it was subsequently put in evidence at the trial before the jury. The statement described in great detail how the appellant had committed the crime and included a number of matters which were proved to be unknown to the police.

It is of great importance to note that Hammond's confession was not received in evidence by the trial judge, Cassels J., as a result of Hammond's admission that it was a true confession but the confession was admitted by Cassels J. as a voluntary one apart altogether from Hammond's admission that what it contained was true. This is made very clear by Humphreys J. in the appeal judgment at p. 88 where he said:

The facts of this case go even further, for it is clear from the statement made by Cassels, J., the presiding Judge, that he did not decide

[14] [1941] 3 All E.R. 318, 28 Cr. App. R. 84.

on the admissibility of this confession as the result of the admission of the appellant that it was a true confession. He himself had some doubt whether or not the question as to its truth was a desirable question to put, and he said: "I had almost said that it was unnecessary to put the statement in detail. I have listened to everything the prisoner had to say in his evidence-in-chief. I hold that this statement is a voluntary statement, and admissible in evidence."

We cannot entertain the smallest doubt that the appellant was rightly convicted upon evidence which was properly before the jury. Further, we are satisfied that the evidence of his confession of the crime was rightly admitted by the Judge, who was in no way misled by anything which took place. The appeal is dismissed.

The *ratio decidendi* is clearly in those last two paragraphs. They show that what was said as to the question respecting the truth of the confession being relevant to credibility on the *voir dire* is an *obiter dictum* which deserves respect but nothing more.

Concerning the refusal in this Court of leave to appeal from the judgment of the Ontario Court of Appeal in the *LaPlante* case, no reasons were given and, therefore, nothing shows that this was not done on the view that, it being a jury trial, no substantial wrong or miscarriage of justice had occurred because, apart from the question respecting the truth of the confession, there was sufficient evidence to justify the trial judge's conclusion that it was voluntary.

The question 'was the learned trial judge right or wrong in putting the question which he did to the appellant and in requiring him to answer?' now comes to this Court for the first time. A discussion of the nature of the *voir dire* in respect of alleged confessions is, therefore, indicated.

The most quoted and generally recognized authoritative statement relating to the admissibility of confessions by an accused is that of Lord Sumner in *Ibrahim v. The King*[15], where at pp. 609-10, he said:

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 shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *Reg. v. Thompson* ((1893) 2 Q.B. 12)...

[15] [1914] A.C. 599.

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This statement was accepted and applied by this Court in *Boudreau v. The King*[16]. Kerwin J. (as he then was) said at p. 267:

> Again with great respect, I think it advisable that it should now be stated clearly what this Court considers the law to be. My view is that it has not been changed from that set out in *Ibrahim v. Rex* (1914) A.C. 599 and *Rex v. Prosko* 63 S.C.R. 226.

and Rand J. at pp. 269-70 said:

> The case of *Ibrahim v. Rex* (1914) A.C. 599, *Rex v. Voisin* (1918) 1 K.B. 531 and *Rex v. Prosko* 63 S.C.R. 226 *lay it down that the fundamental question is whether the statement is voluntary.* No doubt arrest and the presence of officers tend to arouse apprehension which a warning may or may not suffice to remove, and the rule is directed against the danger of improperly instigated or induced or coerced admissions. It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule. What the statement should be is that of a man free in volition from the compulsions or inducements of authority and what is sought is assurance that that is the case. *The underlying and controlling question then remains: is the statement freely and voluntarily made?*

(Emphasis added)

In *The Queen v. Fitton*[17], Rand J. referred to *Boudreau* and said at p. 962:

> The rule on the admission of confessions, which, following the English authorities, was restated in *Boudreau v. The King* (1949) S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, (1949) 3 D.L.R. 81, at times presents difficulty of application because its terms tend to conceal underlying considerations material to a determination. The bases of torture, actual or threatened, or of unabashed promises are clear; perplexity arises when much more subtle elements must be evaluated. The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them.

It will be seen that in none of these statements is the question of the actual truth of the alleged confession put as one of the factors to be considered. Rand J. stated the proposition in language that permits of no doubt when he said: "The underlying and controlling question then remains: is the statement freely and voluntarily made?" There are numerous decisions to the effect that a confession, even if the truth, will not be admitted if it was obtained by threats or promises or by duress of any kind.

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[16] [1949] S.C.R. 262, 7 C.R. 427, 94 C.C.C. 1, 3 D.L.R. 81.

[17] [1956] S.C.R. 958, 24 C.R. 371, 116 C.C.C. 1, 6 D.L.R. (2d) 529.

See *Regina v. McLean and McKinley*[18]; *R. v. Sim*[19]; *Regina v. Starr*[20] and art. 833 on pp. 267-68 in Wigmore on Evidence, 3rd ed.

Another rule of universal acceptance is that the admissibility of the statement or confession is a question for the judge alone who must decide after a *voir dire* whether or not it is admissible. Once admitted, the statement goes to the jury who alone may decide whether the statement was in fact made, whether it was true and who may give it such weight as they think fit. The circumstances of the taking of the statement must be given in evidence again before the jury even though fully gone into on the *voir dire*. One of the most apt statements of the law in this regard is that of O'Halloran J.A. in *Rex v. Mandzuk*[21], where he said:

> Once these distinctive functions of the Judge and jury (which apply equally in principle where as in this case the Judge sits alone and thereby assumes the additional function of the jury) are appreciated, it becomes apparent that, in determining the admissibility of a statement which may be a confession, it is not the function of the Judge to consider its likely effect upon the minds of the jury. He is confined to determining whether the statement in itself is a confession in whole or in part and if so whether it is voluntary. *He is not concerned with its truth or its untruth as such* or the good or bad effect it may ultimately have upon the minds of the jury. He is of course concerned with the truth of testimony as to whether the statement was or was not made and as to what statement was made. But once the confession is admitted in evidence, then it is to be weighed and judged in the same way as any other testimony which may affect the minds of the jury advantageously or adversely to the accused.

(Emphasis added)

This being the law, it is elementary that the function of the judge on a *voir dire* is to determine:

(1) Whether the evidence establishes that the statement being tendered was in fact made by the accused. If he is not satisfied beyond a reasonable doubt as to this, he must not admit the statement;

(2) Whether the statement was voluntary within the rule in *Ibrahim v. The King* and *Boudreau v. The King*.

The problem is whether the truth of the statement is relevant to this inquiry. It is obvious that it is not directly

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[18] (1957), 126 C.C.C. 395, 32 C.R. 205, 31 W.W.R. 89.

[19] (1954), 108 C.C.C. 380 at 389, 18 C.R. 100, 11 W.W.R. 227.

[20] (1960), 128 C.C.C. 212, 33 C.R. 277, 31 W.W.R. 393.

[21] [1945] 3 W.W.R. 280 at 284, 62 B.C.R. 16, 85 C.C.C. 158, [1946] 1 D.L.R. 521.

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relevant because fundamentally it is relevant only to the main issue, namely the guilt or innocence of the accused. However, it is contended that it is indirectly relevant as bearing on the credibility of the accused testifying on the *voir dire*. But is it not rather a *petitio principii*, trying to find out from the accused whether he is guilty in order to decide whether to admit his confession as evidence of his guilt?

Whenever the statement or confession amounts to an admission by the accused that he has committed the offence of which he is charged, the truth of the incriminating statement is but theoretically distinguishable from his guilt. If the statement is totally incriminating, asking the accused testifying on the *voir dire*: "Is the statement true?" is tantamount to asking him: "Are you guilty of the offence?" But that is precisely what an accused may not be asked unless he chooses to testify at the trial. In *Batary v. Attorney-General for Saskatchewan*[22], Cartwright J. (as he then was) said, speaking for the majority of the Court:

> It would be a strange inconsistency if the law which carefully protects an accused from being compelled to make any statement at a preliminary inquiry should permit that inquiry to be adjourned in order that the prosecution be permitted to take the accused before a coroner and submit him against his will to examination and cross-examination as to his supposed guilt. In the absence of clear words in an Act of Parliament or other compelling authority I am unable to agree that that is the state of the law.

Would it not be a stranger inconsistency if the law which carefully protects an accused from being compelled to testify at his trial should permit that, if an incriminating statement has been improperly obtained from him, he would not be permitted to give evidence of such impropriety without being submitted against his will to cross-examination as to his guilt.

It is true that an accused cannot be compelled by the Crown to testify on the *voir dire* and does so only of his own will. However, the very purpose of holding a separate inquiry into the admissibility of a confession is that this issue may be dealt with only on evidence relevant thereto. It is an essential feature of this system that the accused is

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[22] [1965] S.C.R. 465 at 476, 46 C.R. 34, 51 W.W.R. 449, [1966] 3 C.C.C. 152, 52 D.L.R. (2d) 125.

thereby permitted to testify on that issue without prejudice to his right not to testify on the main issue. As Cartwright J. said in the *Batary* case (at p. 478):

> the maxim *nemo tenetur seipsum accusare* ... has been described (by Coleridge J. in *R. v. Scott*, 1856, Dears & B. 47 at 61, 169 E.R. 909) as "a maxim of our law as settled, as important and as wise as almost any other in it".

If an accused cannot testify on the *voir dire* without being liable to be asked questions bearing directly on his guilt or innocence, he is put in a situation where he cannot do so without in effect being deprived from the benefit of the rule against compulsory self-incrimination. At least this is so when the trial is by a judge alone. Before a jury, the problem is not so serious. Those who have to pass upon the guilt or innocence of the accused are to remain in complete ignorance of the evidence on the *voir dire*. But when the accused is tried by a judge alone once this judge has acquired knowledge of the guilt of the accused by a question that he has himself put to him, how can he properly weigh the evidence and give the benefit of the doubt if need be? When the question is being put on the *voir dire*, it cannot be presumed that the confession will be found to have been voluntarily made. The inquiry into the truthfulness then being made as bearing on credibility, it is uncertain whether the confession will be admitted, even if truthful. If it is rejected, how can the accused not be seriously prejudiced by an admission of guilt obtained from him while testifying?

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, even when the accused is tried by a judge alone, an essential safeguard against improper pressure by police authorities is being seriously compromised. If the confession was not voluntarily made, the accused will know that he cannot go into the witness box to disprove the evidence brought against him on that issue without, in fact, renouncing the right to refrain from testifying on the main issue and thus prevent the Court from questioning him on his guilt or innocence. Under our law this right is so sacred that any comment by the prosecutor or the judge on the failure to testify is strictly

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prohibited. In the Supreme Court of Ontario by Rule 317 of the Rules of Practice it is provided that:

> ... no statement of the fact that money has been paid into court under the preceding rules shall be inserted in the pleadings, and no communication of that fact shall at the trial of any action be made to the judge or jury until all questions of liability and amount of debt or damages have been decided ...

Is it not much more serious for a judge trying a criminal case to acquire knowledge of the guilt of the accused otherwise than through evidence properly admitted at the trial? It goes without saying that evidence on the *voir dire* is not evidence at the trial.

This Court having jurisdiction in such cases only on questions of law in the strict sense, a last point remains to be considered, namely whether questioning the accused as was done is an error in law. In *Demenoff v. The Queen*[23], the question before this Court was the admissibility, as a voluntary statement, of the confession of guilt made by the appellant. It was held that the issue being the inferences to be drawn from the evidence relevant to the voluntariness of the confession, the question was not one of law in the strict sense. Reference was made to *The Queen v. Fitton, supra,* where this principle had been admitted but it had been held that the rejection or admissibility of the statement did raise a question of law. Here the question raised is whether it was proper for the trial judge to question the accused respecting the truthfulness of the statement that was sought to be introduced in evidence. This does not depend on any question of fact like the voluntariness or otherwise of the statement. It is a pure question of law.

Reference has been made to the following passages of the judgment of Lord Du Parcq in *Noor Mohamed v. The King*[24]:

> It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The

[23] [1964] S.C.R. 79, 41 C.R. 407, 46 W.W.R. 188.

[24] [1949] A.C. 182 at 192.

distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

It must be pointed out that in that case the Privy Council was considering the propriety of allowing in a murder case evidence of another murder. This had been permitted by the trial judge as evidence of a "similar pattern". The Privy Council quashed the conviction. Immediately after the passage quoted above, which is clearly *obiter,* Lord Du Parcq went on to say:

> Their Lordships have considered with care the question whether the evidence now in question can be said to be relevant to any issue in the case.

He finally concluded by saying (at p. 193):

> After fully considering all the facts which, if accepted, it revealed, their Lordships are not satisfied that its admission can be justified on any of the grounds which have been suggested or on any other ground.

When that decision was considered by this Court in *Lizotte v. The King*[25], the following passages were quoted in addition to the passage first above referred to, namely at p. 190:

> In *Makin v. Attorney-General for New South Wales* (1894, A.C. 57, 65), Lord Herschell L.C., delivering the judgment of the Board, laid down two principles which must be observed in a case of this character. Of these the first was that "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried". In 1934 this principle was said by Lord Sankey L.C., with the concurrence of all the noble and learned Lords who sat with him, to be "one of the most deeply rooted and jealously guarded principles of our criminal law" and to be "fundamental in the law of evidence as conceived in this country". (*Maxwell v. The Director of Public Prosecutions,* 1935, A.C. 309, 317, 320).

And at pp. 195-196:

> Their Lordships think that a passage from the judgment of Kennedy J. in the well-known case of *Rex v. Bond* (1906, 2 K.B. 389, 398) may well be quoted in this connexion:
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> > "If, as is plain, we have to recognize the existence of certain circumstances in which justice cannot be attained at the trial without

[25] [1951] S.C.R. 115 at 126, 11 C.R. 357, 99 C.C.C. 113, 2 D.L.R. 754.

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> a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England, which (to the credit, in my opinion, of English justice) excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions."
>
> Their Lordships respectfully approve this statement, which seems to them to be completely in accord with the later statement of the Lord Chancellor in *Maxwell's* case (1935, A.C. 309, 320), when he said "It is of the utmost importance for a fair trial that the evidence should be prima facie limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined." They would regret the adoption of any doctrine which made the general rule subordinate to its exceptions.

On the basis of those principles this Court held in the *Lizotte* case that evidence disclosing the commission of another murder had been improperly admitted in the course of the cross-examination of a witness and the conviction was quashed and a new trial ordered.

I would quash the conviction here and order a new trial.

Spence J. (*dissenting*):—Upon this appeal, I agree with my brother Hall. Despite reference in various cases to the possible impropriety of the exclusion of statements of the accused which are true, it has most certainly been settled by the decisions both in this Court and in England that the task of the trial judge in considering the admissibility of a statement made by the accused to a person in authority is to determine not whether that statement is true but whether it is voluntary. I need not cite authorities for that proposition, the Chief Justice has already done so in his reasons.

The only justification, in my opinion, for either counsel for the Crown or the trial judge questioning the accused when giving evidence on the *voir dire* as to truth or falsity of his statement, which it is sought to introduce, is the relevance of his answer as to the truth of the statement upon the question of his credibility. Careful consideration of the matter convinces me that under the particular circumstances of the *voir dire* the answer of the accused to that question is not relevant and has no probative value in determining the voluntary or involuntary character of the statement. It must be remembered that the statement of

the accused to a person in authority is introduced during the evidence advanced by the prosecution and very often quite early in the course of the trial. At that time, of course, no evidence has been given as to guilt or innocence by the accused or anyone on his behalf, and indeed in the usual course the only evidence given up to that time is evidence by such witnesses as the complainant and police officers. If the accused were to answer the question when put by either Crown counsel or the trial judge in the negative, then there would be no basis upon which the trial judge could come to the conclusion that his answer was false and that therefore his credibility in his testimony to the effect that the statement was not voluntary might be untrue until the trial had been completed. That conclusion could be made only on the basis of the whole evidence. Therefore, I cannot see how a negative answer by the accused to the question as to the truth of the statement would in any way damage his credibility and assist the trial judge in coming to the conclusion as to whether the accused's evidence denying the voluntary nature of the statement was false.

If, on the other hand, the accused answered the question as to the truth of the statement in the affirmative, it would not in any way damage or cast doubt on his other evidence that the statement was not voluntary. It might well be part of the accused's case that despite the fact that he did commit the offence with which he has been charged he cannot be convicted thereof as the Crown must prove its case beyond reasonable doubt, and surely it is plain that the Crown cannot proceed to do so by the production of a statement made to a person in authority which was not voluntary.

Under the circumstances, the affirmative answer in this situation makes the prejudice two-fold; firstly, as I have said, it is not relevant to the issue of whether the statement was voluntary or not voluntary and, secondly, and particularly when, as in the present case, the trial was by judge alone without a jury, the accused suffers all the disabilities pointed out by my brother Hall in his reasons. I am, therefore, of the opinion that despite the decision in

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Rex v. Hammond[26] and in *Regina v. LaPlante*[27], the question should be ruled to be inadmissible whether put by Crown counsel or even in the careful fashion put by the learned trial judge in the present case.

It would appear from the wording of the learned trial judge's ruling as cited by the Chief Justice in his reasons that the learned trial judge realized his task and determined that the statement was a voluntary one. I am, however, of the opinion that that ruling is not sufficient justification for this Court to act under the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code*. It would be speculation for this Court to say that despite the question put by the learned trial judge to the accused, which I am of the opinion for the above reasons was improper, and the accused's answer thereto, the learned trial judge would have ruled the statement voluntary. The accused's answer to that question may well have been the telling factor in causing the learned trial judge to determine that the statement was a voluntary one. Moreover, had the statement been excluded then counsel for the accused might well have proceeded in a very different fashion in his defence, and might well have chosen not to call the accused in defence.

For these reasons, I am of the opinion that this Court cannot say that the putting of the question by the learned trial judge to the accused upon the *voir dire* caused no substantive miscarriage of justice. I, therefore, agree with my brother Hall that the conviction should be quashed and a new trial directed.

Pigeon J. (*dissenting*):—In this appeal I agree with what my brothers Hall and Spence have said and wish to add the following observations.

I cannot hold that questions to an accused concerning the truth of a statement allegedly made by him, although irrelevant to the inquiry on the *voir dire,* may be permitted as having a bearing on his credibility. These questions really go to the main issue: the guilt or innocence. On the *voir dire,* the answers to such questions cannot be tested

[26] [1941] 3 All E.R. 318, 28 Cr. App. R. 84.
[27] [1958] O.W.N. 80.

against full evidence, and they cannot be of any real help in reaching a decision on the only issue: the admissibility of the statement.

In my view, the result of permitting on a *voir dire* questions pertaining to the truth or falsity of the statement must inevitably be to weaken the rule against the admission of involuntary statements and, in fact, to admit in evidence statements which otherwise would have to be rejected as not voluntarily made. This would be unfortunate because it would tend to undermine a very necessary safeguard against improper treatment of suspects.

There is no reason for the judge sitting on a *voir dire* to put or permit any question respecting the truth of the statement unless he is in some doubt as to whether it was voluntarily made or not. Seeing that he must at that time take the answer of the accused as given, the consequence of such a question must be that any doubt concerning the voluntary character of the statement is resolved in favour of the prosecution if the accused says it is a true statement. The end result of such a course of action is to admit in evidence, because the accused says it is true, an incriminating statement that would otherwise probably be rejected.

Where this can lead is strikingly illustrated by what occurred in the Australian case of *Reg v. Monks* as related in the Australian Law Journal (1960, vol. 34, p. 111). The accused testifying on the *voir dire* said that a confession had been extorted from him by brutal treatment on the part of the police. This confession was the only evidence of any consequence against him. When cross-examined he admitted that it was true in fact and also that he had committed all the offences with which he was charged. Thereupon the trial judge, the Chief Justice himself, ruled the confession admissible, saying that it would be a "public scandal" if, after a full confession upon oath in open court, the accused should thereafter be acquitted. Who will say that this man should properly have been disbelieved when saying that the confession had been extorted because he ought to be believed when confessing his crimes? Yet this is what must be the reasoning on the issue of credibility if

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one is going to contend that the principle of not allowing involuntary confessions in evidence remains unimpaired.

In the present case, much is made of the fact that the trial judge did not look at the statement before he asked the accused whether it was true. It is said that this shows that the accused would not have been prejudiced if the judge had decided to reject the statement. In my view, the fallacy of this reasoning is that under those circumstances the statement was inevitably going to be received in evidence if the accused admitted it to be true. Although the contents had not been disclosed to the judge, it was obvious from what had been said that the statement was inculpatory. When, in order to resolve his doubt concerning its voluntary character, the judge asked the accused whether it was true, the admission obtained by this questioning necessarily resulted in the statement being admitted. To say that the statement was admitted because the trial judge came to the conclusion that it had been voluntarily made is not strictly accurate in the circumstances of this case. In fact, the judge came to this conclusion partly because the accused admitted that it was true.

Because the rule against compulsory self-incrimination is the root of the objection, I cannot agree that this is a matter of judicial discretion respecting the extent of cross-examination on credibility. In considering the cogency of the reasoning in the *Hammond* case we should bear in mind that, in the United Kingdom, judges are allowed to comment on the omission of the accused to testify. In this perspective it is much less obnoxious to permit incriminating questions on the *voir dire*, than under a system where such comments are strictly prohibited. One only has to read the *Bigaouette* case[28] to appreciate the importance of this difference in the applicable legal principles.

Appeal dismissed, HALL, SPENCE *and* PIGEON JJ. *dissenting.*

Solicitor for the appellant: J. A. Mahon, Toronto.

Solicitor for the respondent: The Attorney-General for Ontario.

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[28] [1927] S.C.R. 112, 47 C.C.C. 271, 1 D.L.R. 1147.