HIS MAJESTY THE KING .....APPELLANT; 1951

AND *May 14 *Jun. 20

FRED MURAKAMI .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Abortion—Appeal by Crown from acquittal—Statement by accused rejected by trial judge—Onus of Crown not discharged—Criminal Code ss. 303, 1023(3).

Respondent was acquitted of having unlawfully used instruments with intent to procure a miscarriage when the trial judge refused to admit in evidence a statement made by respondent on the ground that he was not satisfied that it was freely and voluntarily made.

Two police officers, who were friendly with the accused, were sent out to obtain information from him. After meeting him and having coffee with him, they asked him to come to the barracks relative to a personal matter. He agreed. There they told him that the girl was in a serious condition and that in all probability serious charges would arise out of it against him. He was then given the usual warning and the statement was elicited by detailed questions, a form suggested by the accused.

The Crown appealed, but the Appellate Division of the Supreme Court of Alberta affirmed the rejection of the statement.

Held, affirming the judgment appealed from (Estey J. dissenting), that there was evidence before the trial judge on which he could properly find that the Crown had not shown affirmatively that the statement had been given voluntarily, without inducement, and that, in the determination of that question, the trial judge had not misdirected himself.

APPEAL by the Crown from the judgment of the Supreme Court of Alberta, Appellate Division (1), confirming, O'Connor C.J.A. and Parlee J.A. dissenting, the acquittal of respondent on a charge of abortion.

H. J. Wilson K.C. for the appellant.

A. Macdonald K.C. and G. J. Gorman for the respondent.

KERWIN J.:—Assuming that we have jurisdiction, I have come to the conclusion that there was evidence before Shepherd J. upon which he could find that the Crown had not shown affirmatively that the confession of the appellant was voluntary in the sense that it was made without inducement.

The appeal should be dismissed.

*PRESENT: Kerwin, Rand, Estey, Locke and Cartwright JJ.

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Rand J.

The judgment of Rand and Locke JJ. was delivered by

RAND J.:—The case of *Rex* v. *Boudreau* (1), has laid down the rule to be applied in the case of confessions: was the statement freely and voluntarily made. That means, I think, was it made by one whose mind and will were disposed to the making of it free from any real influence exerted upon them by any direct or indirect inducement of hope or fear held out by a person in authority. We have not complicated that by consideration of the relative weights of the inducement and its alternatives in producing a false as distinguished from a truthful admission.

The only question in the appeal is whether Shepherd J. had evidence before him on which he could properly find that the Crown had not shown affirmatively that the mind and will of the accused were so free and whether, in any manner, in his determination of the question, he misdirected himself. The significant circumstances are these: the police officers, advised that the young woman was in the hospital and in a serious condition and that the accused was suspected of being responsible, had been sent out to obtain whatever information they could from him. They approached him under the cloak of an admitted familiar acquaintance; they had coffee with him and tossed a coin to see who would pay for it; the opening question at their quarters was, "Do you know that your girl friend, Betty, is in the hospital in a serious condition", followed by "in all probability serious charges will arise out of it against you"; the statement was elicited by detailed questions, a form suggested by the accused. These to me furnish ample matter, first, from which to draw the inference that there was an indirect inducement, and, secondly, that its effect had not been removed by the formal warning. Since the officers were out to obtain information from him, what other possible object could the reference to the likelihood of charges have had than to exert upon him a coercive pressure to disclose what he knew? And how can it be said that he might not take that to imply that it would be better for him to do so? To suggest that it was a friendly warning to be circumspect or on guard would falsify the object

(1) [1949] S.C.R. 262.

which they were instructed to and did pursue to the end. I think the trial judge could properly have made the finding he did. Although the word "discretion" is used in some of the cases, I am unable to see the appropriateness of the term to that finding: but having sufficient facts before him and not misdirecting himself as to the requirements of the rule, his finding ought not to be interfered with.

I would dismiss the appeal.

ESTEY J. (dissenting):—This is an appeal on behalf of the Attorney-General of Alberta, under sec. 1023(3) of the *Criminal Code*, from a majority judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the dismissal of a charge preferred under sec. 303 of the *Criminal Code*.

In the course of the trial, when counsel for the Crown tendered a statement made by the accused, the trial judge, in the absence of the jury, heard evidence of the circumstances under which that statement had been obtained. At the conclusion of this "trial within a trial" he held that he was not satisfied that the statement had been voluntarily made within the meaning of the law. Counsel for the Crown at once intimated that apart from the contents of the statement the evidence did not justify his proceeding. The learned trial judge accordingly directed the jury to return a verdict of not guilty. This the jury did and the charge was dismissed.

In the course of the police investigation a sergeant directed two constables, Sargent and Thompson, to interview the accused, with whom they were acquainted. They met him about mid-afternoon and asked him to come to the barracks relative to a personal matter. He agreed. They all three had coffee at a corner café and then proceeded to the barracks at the Court House. There they went into the Court Room and for the first time this matter was discussed. Thompson said to the accused:

"Freddie, did you know that your girl friend Betty was in the hospital?"

and upon his replying that he did not Thompson said:

"Well, she is in the hospital and she is in serious condition", and that there were serious charges likely to arise from her condition, charges against him because of her condition.

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Thompson then gave the usual warning and continued:

I explained it to him a little more simpler. I told him that he didn't have to say anything if he didn't wish to and that there was nothing that myself or Constable Sargent could do or say to him that could influence him or make him make any statement or make him say anything if he didn't wish to do so, and I asked him if he understood the meaning of the warning and he replied that he did fully. Following this we sat for a moment or two, none of us saying anything, and the accused had his head bowed and after a moment or two he looked up and he said, "I didn't want to do it, she is the one who wanted it done."

Nothing was then said for another moment or two when Thompson said:

"Fred, how long have you been going with Betty?"

to which the accused replied:

"One year now and six months before."

Then, after a further short silence, Thompson asked:

"Where did you get the stuff, Fred?", and he replied, "At the Sterling Drug Store."

Then Thompson said:

"Well, do you wish, would you like to make a statement covering this business, Fred?"

The accused paused for a moment and said:

"Yes, I might as well."

The accused then said he did not know how to begin, or words to that effect, and Thompson said:

"Well, in that case I might be able to ask you questions to help you to make your statement."

Thompson says he again told him that the

statement must be purely voluntary and in your own words and must be taken down as such, that I didn't want to ask him any questions that might lead him to, if I asked him any questions it would be in such a way it might help him to make his statement.

The constable then proceeded to ask questions and to put these and the answers in writing. When the statement was completed the accused read it through. He was asked if there were any mistakes or errors he desired to correct and, upon his reply that everything seemed all right, he was asked to, and did sign it.

The constables took the statement to the sergeant who had detailed them to make the investigation. While there Thompson was advised that the accused, who had remained in the Court Room, desired to see him. Thompson returned

at once to the Court Room, where the accused expressed the desire to, and did dictate another paragraph, which he read over and signed. Thompson then returned to the sergeant's office, where the matter was discussed and a decision arrived at to lay a charge against the accused contrary to sec. 303.

The statement was not marked as an exhibit, nor was it read by the learned trial judge, and was, of course, neither before the Appellate Division nor this Court.

At the conclusion of this evidence the learned trial judge stated:

> One thing that worries me here, Mr. Moyer (counsel for the accused), is the statement to the accused by Thompson that serious charges are going to be laid against you, are likely to be laid against you arising out of what has happened to this woman . . . Well, is it an inducement or a threat? Aside from that, Mr. Moyer, I can't see anything to keep this statement out.

The argument continued, in which both counsel for the Crown and the accused took part, at the conclusion of which the learned trial judge stated, in part, as follows:

> No, viewing this thing as widely as I can, giving it serious consideration, Mr. Read, you have not convinced me that this confession was gotten out of this Accused freely and voluntarily on the grounds that we have been discussing, in particular the statement of the Police Officer to him, "Serious charges are likely to be laid against him arising out of what has happened to this young woman," that coupled with the method in which the information contained in that statement was elicited, that is by questioning him. I appreciate these things do present difficulties, but they must be solved in favour of an Accused where the Court is in doubt, and I do feel very much in doubt, and I must resolve it in his favour, I would not for a moment suggest any censure of the Police Officers, none whatever, but I think the method they undertook was in error.

In the Appellate Division the rejection of this statement in evidence was affirmed by a majority of the learned judges. Mr. Justice Parlee, with whom Chief Justice O'Connor agreed, dissented and was of the opinion the learned trial judge should have received the statement and would have directed a new trial.

The appeal to this Court, being under sec. 1023(3) of the *Criminal Code,* is restricted to a question of law upon which there has been a dissent in the Appellate Court. *Steinberg* v. *The King* (1); *Rex* v. *Décary* (2).

Mr. Macdonald, counsel for the accused, contends that whether a statement is voluntary within the meaning of

(1) [1931] S.C.R. 421. (2) [1942] S.C.R. 80.

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the law is a question of fact or the exercise of a discretion upon the part of the trial judge and, therefore, cannot be raised as a question of law under sec. 1023(3). Mr. Wilson, on behalf of the Attorney-General, contends that it is a question of law and properly raised within the meaning of that section.

A confession or statement which may tend to prove the guilt of an accused party is admissible in evidence if it be affirmatively proved by the Crown that it was made voluntarily in the sense that it was not obtained by fear of consequence or hope of benefit held out by one in authority.

When such a statement is tendered in evidence at a trial the judge will at once hear the evidence of the circumstances surrounding the making of the confession as tendered by both parties. If it be a jury trial, this trial within a trial will be conducted in the absence of the jury. The judge must be there satisfied that the Crown has, by the evidence adduced, affirmatively proved that the statement, having regard to all of the circumstances, was voluntarily made. If so satisfied, he will find as a fact that the statement was voluntarily made and admit it as evidence; if not, he will reject it. His conclusion may often depend upon which of the witnesses he believes, upon weighing the evidence and construing both oral and written statements. It cannot be said to be a question of law, but rather a question of fact or of mixed law and fact.

In *The Queen* v. *Thompson* (1), Cave J. states the question that has been so often judicially approved:

> Is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible.

That was a decision under the *Crown Cases Act 1848* (11 & 12 Vict., c. 28) where a case could be reserved upon "any question of law which shall have arisen on the trial." The evidence adduced before the magistrates did not remove the possibility that the inducement or threat made by a party in authority to a brother and brother-in-law of the accused

(1) (1893) 2 Q.B. 12; 17 Cox C.C. 641; L.J., M.C. 93.

had not been communicated to him and, therefore, as stated by Cave J. on behalf of the Court at p. 18:

> . . . it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary, and that they did not discharge themselves of this obligation.

In *Ibrahim* v. *Rex* (1), Lord Sumner stated at p. 610:

> With *Reg.* v. *Thompson* ((1893 2 Q.B.D. 12) before him, the learned judge must be taken to have been satisfied with the prosecution's evidence that the prisoner's statement was not so induced either by hope or fear, and, as is laid down in the same case, the decision of this question, albeit one of fact, rests with the trial judge.

Lord Sumner dealt with the question asked in the *Ibrahim* case and construed it, though in form a question, to be, in effect, "indistinguishable from an exclamation of dismay on the part of a humane officer." No misdirection was found and the reception of the statement was affirmed.

Prosko v. *The King* (2), was an appeal under sec. 1023. This Court, though a question was asked, affirmed the decision of the trial judge that the statement received in evidence was voluntary.

Sankey v. *The King* (3), was also an appeal under sec. 1023. Five grounds of appeal, based upon the dissenting opinion of the Appellate Court, were considered in argument. Under one of these it was contended that the statement given to the police by the accused was not voluntarily made and was improperly received at the trial. The appeal was in fact disposed of and a new trial granted upon one of the other grounds, but Chief Justice Anglin, in delivering the judgment of the Court, continued at p. 440:

> We feel, however, that we should not part from this case without expressing our view that the proof of the voluntary character of the accused's statement to the police, which was put in evidence against him, is most unsatisfactory. . . . With all the facts before him, the learned judge should form his own opinion that the tendered statement was indeed free and voluntary as the basis for its admission, rather than accept the mere opinion of the police officer, who had obtained it, that it was made "voluntarily and freely."

In *Gach* v. *The King* (4), also an appeal under sec. 1023, the magistrate had received the admission in evidence and this was affirmed by a majority of the Appellate Court in Manitoba. In this Court it was held that the evidence did not affirmatively prove the statement was voluntary. Mr.

(1) [1914] A.C. 599.
(2) (1922) 63 Can. S.C.R. 226.
(3) [1927] S.C.R. 436.
(4) [1943] S.C.R. 250.

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Justice Kerwin, with whom the Chief Justice agreed, was of the opinion that a threat had been made and that the evidence did not affirmatively prove that the statement had been made before the words constituting the threat, while the majority stressed, in the particular circumstances, the absence of any caution or warning.

In *Boudreau* v. *The King* (1), again an appeal under sec. 1023, the majority of this Court were of the opinion that the learned trial judge had not misdirected himself, as suggested by the dissenting opinion in the Appellate Court of Quebec, and, therefore, affirmed his reception of the statements as voluntarily made.

In *The King* v. *Bellos* (2), the Appellate Court held the statements of the accused, following questions by the police, had been improperly received in evidence at the trial. Leave to appeal was granted under sec. 1024(2) (later 1025). This Court reversed the Appellate Court, holding that the Crown had discharged its burden of establishing the voluntary character of the statements made by the accused. Chief Justice Anglin, speaking for the Court, stated at p. 261:

> The mere asking of a question by the officer subsequently, or his directing the accused's attention to the subject of one of such statements, did not amount to an inducement or persuasion such as would render the statements inadmissible.

In *Thiffault* v. *The King* (3), special leave to appeal was obtained under sec. 1025 of the *Criminal Code*. The Appellate Court in Quebec had held that the decision upon the admissibility of a statement taken from an accused party in answer to questions was a matter of discretion for the trial judge. This Court held that it was not a matter of discretion and, following the Sankey case supra, held that the evidence did not establish the statement had been voluntarily made.

In the foregoing cases, the failure of the trial judge to direct himself as to the burden that rests upon the Crown and its duty to call all available witnesses who were present at the making of the confession, as in *The Queen* v. *Thompson, Sankey* v. *The King* and *Thiffault* v. *The King*, constitutes a misdirection in law. Also, when the trial judge has directed himself that the absence of caution or warning,

(1) [1949] S.C.R. 262. (2) [1927] S.C.R. 258.
(3) [1933] S.C.R. 509.

as in *Gach* v. *The King,* or the mere asking of questions, as in *Bellos* v. *The King,* of necessity excludes the statement, he has misdirected himself in law. On the other hand, where there was no misdirection and there was evidence to support the finding of fact, as in *Prosko* v. *The King* and *Boudreau* v. *The King,* this Court approved the judgment of the trial judge.

There is a difference of judicial opinion expressed in the Provincial Courts, but, when examined, the weight of authority supports the view that whether a statement is voluntary or not is a question of fact, or of mixed law and fact.

The Crown was first given the right of appeal to the Provincial Appellate Courts in 1930 by an amendment to sec. 1013 (20 & 21 Geo. V., c. 11, sec. 28). In *Rex* v. *Rasmussen* (1), the Crown exercised its right to appeal upon a "question of law alone," contending, inter alia, that the trial judge had improperly rejected two written statements or confessions made by the accused. The decision there turned upon the meaning of the reasons given by the trial judge in rejecting the statement. The majority, in construing these reasons, held that the learned trial judge had found the statement to be freely and voluntarily made. In part these reasons read:

> . . . I have the feeling that the statement . . . was obtained freely and voluntarily, but considering all the surrounding circumstances I don't feel that it convinces me to that degree of certainty which I think the law requires.

The trial judge detailed these circumstances and the majority in the Court of Appeal held that the evidence of these circumstances did not justify his rejecting the statement. Baxter J. (later C.J.) stated at p. 240:

> . . . the learned trial Judge was in error in thinking that there were rules of law which precluded him from giving effect to the conclusion of fact at which he had arrived, viz., that the statement was made freely and voluntarily.

Barry C.J.K.B. found a disagreement in his reasons as stated at the trial, and as stated in his certificate under sec. 1020 of the *Criminal Code,* and would have ordered a new trial on that ground. The construction of the learned trial

(1) 62 Can. C.C. 217.

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judge's reasons and whether there was any evidence to justify them and the construction of his certificate all raised questions of law.

The same Appellate Court in *Rex* v. *Robichaud* (1), in a judgment of the Court written by Baxter C.J., affirmed the admission of a statement made by the accused at the trial. At p. 372 it was stated:

> Whether it was voluntary or not was a question of fact for him (trial judge) and for him alone. . . . While agreeing with his action, I would not be at liberty, if I thought otherwise, to overrule it as no principle of law has been violated.

Counsel for the Crown particularly referred to *The King* v. *Lai Ping* (2), where an application for leave to appeal from a conviction, on the basis, inter alia, that the confession of the accused was improperly admitted into evidence, was refused, and where Chief Justice Hunter stated, at p. 471:

> . . . whether the trial Judge was right in coming to the conclusion that the confession was voluntary, is a question of law and can be reserved as such.

He went on to find that the magistrate was right in admitting the confession and refused leave to appeal. In the same case Duff J. (then a member of the British Columbia Court and later Chief Justice of this Court) stated at p. 473:

> . . . if the decision of the preliminary question turned upon conflicting statements of fact made by witnesses, I should have thought it was fairly clear that the correctness of such a decision could not be raised on a question of law. I certainly find some difficulty, myself, in stating a case arising upon such a decision in the form of a question of law.

This was a decision to the effect that, as no error in law was found, the conclusion at trial should be affirmed and leave to appeal refused.

Counsel also referred to *Rex* v. *Baschuk* (3). In that case the Appellate Court in Manitoba, in effect, held that the trial judge had misdirected himself in refusing to hear evidence on the part of the accused that the statement was not voluntary. Dennistoun J.A., in delivering the judgment of the Court, stated at p. 209:

> The admissibility of the statement was a question of law and was for the Judge alone.

(1) 70 Can. C.C. 365. (2) 8 Can. C.C. 467.
(3) 56 Can. C.C. 208.

and cited *Ibrahim* v. *The King, supra.* The Court in the *Baschuk* case was clearly dealing with a question of law and, therefore, the statement just quoted must be read in that relation.

Counsel also cited *Rex* v. *Weighill* (1). The Appellate Court in British Columbia affirmed the reception in evidence of a confession. Mr. Justice O'Halloran, with whom Mr. Justice Robertson agreed, stated at p. 563:

> Under these circumstances the learned Judge, after what is not questioned was a proper "trial within a trial," came to the conclusion that the prosecution had affirmatively proven that the confession was voluntary and admitted it in evidence.

Later in the same case the learned judge stated, at p. 564:

> The appeal was framed as one of law only. But upon it being pointed out that, while the admission or rejection of a confession is undoubtedly a question of law, nevertheless, the supporting findings of fact and the legitimate inferences therefrom may be questions of fact or of mixed law and fact. . . . Counsel for the appellant moved and was granted leave to appeal against those findings of fact or mixed law and fact.

This paragraph illustrates the difficulties involved in this question and, with respect, I think the preferable view is that whether the statement in question is voluntary is a question of fact, or of mixed law and fact, dependent upon a conclusion which involves an appreciation of all the circumstances, including determination of credibility, a weighing of evidence, and construction of oral statements and written documents. The position, as stated by Turgeon J.A., is not unusual:

> The learned Chief Justice was justified, taking into consideration the numerous warnings the accused had already received and listening to his own evidence and observing him, in concluding that he did not make his statement under a promise or a threat of such a nature as to render his action involuntary.

Rex v. *Bahrey* (2).

In *Rex* v. *McLaren* (3), the Appellate Court of Alberta affirmed the reception in evidence of a confession made by the accused on which the case for the prosecution upon a charge of murder largely rested. Harvey C.J.A., writing the judgment of the Court, stated at p. 300:

> The trial Judge accepted the evidence of the policemen and I can see no ground for questioning the correctness of his finding that the confession was voluntary and therefore admissible.

(1) [1945] 1 W.W.R. 561; 83 Can. C.C. 387.
(2) [1934] 1 W.W.R. 376 at 386.
(3) 93 Can. C.C. 296.

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and later, in dealing with a somewhat similar point, he stated at p. 302:

> Unless a confession is voluntary when made to one in authority it is not admissible in evidence and for the purpose of deciding its admissibility the trial Judge must find the fact that it is voluntary . . .

The weight of authority supports the conclusion that when a trial judge finds a confession or statement has been voluntarily made by an accused he is not determining a question of law, but rather a question of fact, or a mixed question of law and fact. The appeal to this Court under sec. 1023 being restricted to a question of law upon which there has been a dissent in the Court below, it follows that no appeal can be taken to this Court under that section unless the dissent in the Appellate Court is upon a question of law in respect of which the learned trial judge, in arriving at his conclusion, has misdirected himself.

The appeal on behalf of the Crown in this case raises two questions of law: (*a*) was the learned trial judge in error in construing the words "that there were serious charges likely to arise from her condition, charges against him because of her condition;" and (*b*) was he in error in directing himself as to the effect of the questions asked in the course of the making of the statement?

The evidence in this case, upon the trial within a trial, was confined to that given by the policemen. It was all to the same effect and the statement would have been admitted as voluntary by the learned trial judge had he not construed the words spoken by constable Thompson "that there were serious charges likely to arise from her condition, charges against him because of her condition" as constituting an inducement or a threat. However these words might under other circumstances be construed, with respect, I cannot, in the circumstances here present, attribute such a meaning. The policemen and the accused were at least well acquainted and, while performing their duty in making the investigation, with commendable care they informed the accused of his position. When the words of Constable Thompson above quoted are read, as they must be, in association with the information which preceded and the warning which followed, it is clear that they did but plainly indicate to the appellant that criminal proceedings might

be taken against him. That he so understood what had been said to him is evident from his subsequent conduct, including his remarks. In the circumstances I do not think that these words did other than inform the accused of his position and did not constitute an inducement or a threat.

The learned judge also felt disposed to find the statement not voluntary because it was elicited by the asking of questions. It is the duty of the police to investigate and, so far as possible, to ascertain who has and in what manner they have violated the criminal law. In the course of their investigations it is necessary to ask questions, but, once it has been determined to take criminal proceedings against a party, that party should be advised of his position and appropriately warned. This is not a positive rule or requirement of law, but it is a wise precaution, as all statements made by an accused after his actual or virtual custody must be affirmatively proved to have been voluntarily made. If, thereafter, questions are asked, the nature and character of the questions are but additional facts to be taken into account in determining whether or not the statements have been made voluntarily. The mere fact that questions are asked does not of necessity exclude the confession or statement. Sir Lyman Duff, delivering the judgment of this Court, stated at p. 515:

> It results from this statement of the law that the determination of any question raised as to the voluntary character of a statement by the accused elicited by interrogatories administered by the police is not a mere matter of discretion for the trial judge, as the court below appears to have thought.

Thiffault v. *The King* (1); *Rex* v. *Best* (2); *Rex* v. *Bahrey* (3); *Rex* v. *Hanna* (4).

In this case the learned trial judge did not read the statement over and, therefore, was not in a position to pass upon the nature and character of the questions as asked. In view of the issues raised and the evidence given, the questions having been set out in the statement, the reading thereof was indispensable to an adequate appreciation of their possible effect. It may be that the questions did not

(1) [1933] S.C.R. 509.
(2) [1909] 1 K.B. 692.
(3) [1934] 1 W.W.R. 376.
(4) 73 Can. C.C. 109.

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in any way constitute an inducement or a threat, as in *The King* v. *Bellos* (1), where Chief Justice Anglin, speaking for the Court, stated:

> The mere asking of a question by the officer subsequently, or his directing the accused's attention to the subject of one of such statements, did not amount to an inducement or persuasion such as would render the statements inadmissible.

In these circumstances I am of the opinion that the learned trial judge misdirected himself as to the effect of the words of Constable Thompson and that, therefore, a new trial should be had. The learned trial judge also misdirected himself if his view was that the mere asking of questions precluded a finding that the statement was voluntarily made. This issue in this case must be determined at the new trial by a reading of the statement in relation to the other relevant evidence.

The appeal should be allowed and a new trial directed.

CARTWRIGHT J.—The relevant portions of the evidence and of the reasons of the learned trial judge for refusing to admit the statement of the accused are set out in the reasons for judgment of my brother Estey.

I am unable to find that the learned trial judge misdirected himself on any point of law. There is nothing in the record to suggest that he was unmindful of the well settled rule that the statement of the appellant should not be admitted in evidence against him unless it were shewn by the prosecution to have been voluntary in the sense that it was not obtained from him either by fear of prejudice or hope of advantage induced by a person in authority. It appears to me that the learned trial judge, on a consideration of the evidence as to all the circumstances surrounding the making of the statement, was not satisfied that the burden resting upon the Crown had been discharged.

It is not, I think, shewn that the learned trial judge directed himself that he must, as a matter of law, exclude the statement because prior to its making one of the officers had said to the appellant:—

> "Well, she is in the hospital and she is in serious condition," and that there were serious charges likely to arise from her condition, charges against him because of her condition.

(1) [1927] S.C.R. 258 at 261.

nor does it appear to me that the learned trial judge directed himself, as a matter of law, that the statement must be excluded because it was made as a result of questions put to the accused by the police officers. I think he treated both of these circumstances as matters to be weighed with the rest of the evidence in reaching his final conclusion. The majority of the Court of Appeal have concurred in the view of the learned trial judge and I find myself quite unable to say that they were wrong. It is not relevant to inquire whether I would necessarily have reached the same conclusion in the first instance.

Having formed the opinion that no error on the part of the learned trial judge has been shewn, I do not find it necessary to consider the question, so ably debated before us, whether the alleged errors, if established, could have been said to involve questions of law alone.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: *H. J. Wilson.*

Solicitor for the respondent: *F. C. Moyer.*