Chan Wei Keung – – – – – – – – – *Appellant*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF HONG KONG

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH NOVEMBER 1966.

Present at the Hearing:

LORD HODSON
LORD PEARCE
LORD PEARSON

[*Delivered by* LORD HODSON]

This is an appeal from the judgment of the Court of Appeal of the Supreme Court of Hong Kong, Appellate Jurisdiction (Rigby J., Macfee A.J. and Huggins A.J.) dated the 8th October 1965 whereby the appellant's appeal against the conviction of murder and sentence of death in the Supreme Court of Hong Kong on the 11th August 1965 was dismissed.

The trial took place before Briggs J. and a jury and the question on the appeal is whether or not the learned judge's direction to the jury was adequate or not in the following circumstances. The evidence of the Crown included the following: —

The deceased Leung Pui-chuen was employed as a night watchman at the Bonnie Hair Products Factory, 95A, Ha Heung Road, on the 9th floor. Above that, on the roof top, the appellant was employed until the 10th May 1965. He left the premises, having spent the night there, on the 11th May 1965. The deceased was last seen alive at 11.05 p.m. on the 11th May, 1965, and his body was discovered at 8.30 a.m. on the 12th May, 1965, lying on a canvas bed inside his employer's premises.

Dr. Lee Fuk-Kee said that the cause of death was shock and haemorrhage from multiple injuries to the head which were consistent with an attack with an iron rod similar to that found on the premises.

The appellant was seen on the 25th May and on that evening agreed to go to the Hung Hom Police Station. On arrival there at 9.10 p.m. he was questioned and made a statement describing his movements on the night of the 11th/12th May 1965 and on the succeeding night, claiming to have been in the company of certain persons. On the 25th May he was confronted with four of these persons, who denied in his presence that they had seen him on the 11th/12th May, 1965. After the fourth of those persons had left the room where the confrontation took place, the appellant said words to the effect that the officer need not ask him so

many questions: he was bored with them and would tell what really happened. He was cautioned and made two written statements confessing to the murder of the deceased.

The case for the prosecution rested entirely on these two statements. The admissibility of the statements was challenged. After hearing evidence in the absence of the jury Briggs J. ruled that these statements were voluntary and therefore admissible. The voluntary character of the statements was again challenged in the course of evidence subsequently given in the presence of the jury.

The appellant's contention is that the judge failed to direct the jury adequately, because, although the judge's general direction to the jury that they must be satisfied beyond reasonable doubt of the guilt of the appellant was not open to criticism, yet, he should have added a further direction that the jury must be satisfied as to whether the confessions were made voluntarily and if not so satisfied, they should give no weight to them and disregard them. This it is said he did not do and the majority of the Court of Appeal would have allowed the appeal on this ground but for a technical difficulty which need not now be discussed.

The law of Hong Kong is the same as the law of England as it existed on the 5th April, 1843 with any modifications made by local statutes.

The Criminal Procedure Ordinance s. 60 provides:—

> "If on a trial by jury of a person accused of an offence, a statement alleged to have been made by such accused person is admitted in evidence, all evidence relating to the circumstances in which the alleged statement was made shall be admissible for the purpose of enabling the jury to decide upon the weight (if any) to be given to the statement; and, if any such evidence has been taken in the absence of the jury before the admission of the statement, the Crown and such accused person shall have the right to have any such evidence retaken in the presence of the jury."

This section appears to have been brought into existence in 1949 to correct the effect of a decision of the previous year namely *Lau Hoi v. Reg* (1948) 32 H.K.L.R. 49. However this may be, in their Lordships' opinion, there is no inconsistency between this section and the law of England. There is no doubt that the question whether a confession is voluntary is determined by the judge on the voirdire in order to decide whether it is admissible or not and that at this stage the accused may give evidence himself as well as call witnesses.

In the civil case of *Bartlett v. Smith* 11 M. & W. 484 the admissibility of a Bill of Exchange was objected to. Lord Abinger said categorically that all questions respecting the admissibility of evidence are to be determined by the judge, who ought to receive that evidence and decide upon it without any reference to the jury. Parke, B. was of the same opinion and recollected the case of Major Campbell who was indicted for murder in Ireland. On a dying declaration being tendered in evidence, the judge left it to the jury to say whether the deceased knew, when he made it, that he was at the point of death. The question as to the propriety of the course adopted was sent over for the opinion of the English judges, who returned for answer that the course taken was not the right one, and that the judge ought to have decided the question himself. Alderson, B. was of the same opinion and said:—

> "Where a question arises as to the admissibility of evidence, the facts upon which its admissibility depends are to be determined by the judge, and not by the jury. If the opposite course were adopted, it would be equivalent to leaving it to the jury to say whether a particular thing were evidence or not. It might as well be contended that a judge ought to leave to the jury the question, whether sufficient search had been made for a document so as to admit secondary evidence of its contents."

Rolfe, B. concurred.

In *Minter v. Priest* [1930] A.C. 558 the House of Lords had to determine a question as to the admissibility of evidence and Lord Atkin put the matter succinctly in these words at page 581:—

> "The question is one of admissibility of evidence: and on all such questions it is for the judge to decide after hearing, if necessary, evidence on both sides bearing on any contested question of fact relevant to the question. Thus the question whether a confession is voluntary or a deposition admissible as a dying deposition are questions to be determined by the judge and not the jury: cf. *Bartlett v. Smith* (*supra*)."

The truth of the confession is not directly relevant at the voirdire although it will be a crucial question for the jury if the judge admits it. This is well illustrated by a decision of the Court of Criminal Appeal, *Rex v. Murray* [1951] 1 K.B. 391. There the only evidence against the prisoner on an indictment for felony was a confession signed by him but not, as he alleged, voluntarily made. The Recorder having heard evidence from the police and the prisoner held that it had been properly obtained and was admissible. He, however, refused to allow counsel for the prisoner to cross-examine the police again in the presence of the jury as to the manner in which the confession had been obtained and in his summing up told the jury that they must accept from him that the confession was a voluntary one obtained from the prisoner without duress, bribe or threat. Lord Goddard C. J. delivered the judgment of the Court consisting of himself, Byrne and McNair J. J., which allowed the appeal, and used these words:—

> "It has always, as far as this court is aware, been the right of counsel for the defence to cross-examine again the witnesses who have already given evidence in the absence of the jury; for if he can induce the jury to think that the confession was obtained through some threat or promise, its value will be enormously weakened. The weight and value of the evidence are always matters for the jury."

This gives the accused a second chance of attacking the confession but it is a long way from saying that the jury must be directed specifically that the Crown must satisfy them beyond reasonable doubt that the confession is voluntary otherwise they must disregard it. This would be to disregard the fact that voluntariness is a test of admissibility not an absolute test of the truth of the statement.

Their Lordships have been referred to a recent decision of the Privy Council, *Sparks v. The Queen* [1964] A.C. 969 where the question of admissibility of confessions arose. Lord Morris in delivering the judgment of the Board cited the words of Lord Sumner in an earlier case before the Privy Council, *Ibrahim v. The King* [1914] A.C. 599 at p. 609 where 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 shown 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."

Their Lordships will refer to this citation again, but draw attention at this point to the fact that Lord Sumner was dealing with the admissibility of evidence and not its truth or weight. At page 983 of the *Sparks* case Lord Morris referred to the admissibility of statements made by the appellant saying:—

> "If they were held by the judge to be admissible it was still open to the prosecution and the defence to allow the jury to hear the testimony as to the circumstances under which they came into being so that the jury, forming their own opinion as to the testimony, could decide what weight to give to the statements or could decide not to give any weight at all to them for the reason that they (the

> jury) were not satisfied that they were voluntary statements. An accused person is, however, entitled in the first place to have evidence excluded if on the view of the facts which is accepted by the judge at the trial it is not shown that the evidence is legally admissible."

True that the point now under consideration did not arise (indeed the reference on pages 982 and 983 to the case of *Reg. v. Francis & Murphy* (1959) 43 Cr. App. R. 174 indicates that it did not), yet the passage which has been cited from *Sparks* case is consistent with the distinction which can be drawn from the cited cases, between voluntariness as a test of admissibility and as a matter to be considered by the jury in arriving at the truth.

The contention of the appellant to which their Lordships now turn derives from a decision of the Court of Criminal Appeal in *Reg. v. Bass* [1953] 1 Q.B. 680 where Byrne J. speaking for himself and Goddard L. C. J. and Parker J. used language which has made it appear that one question for the jury is whether they are satisfied that the statements are voluntary and that they should be so told. The full passage reads:—

> "It is to be observed, as this court pointed out in *Rex v. Murray*, that while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge he should direct the jury to apply to their consideration of it the principle as stated by Lord Sumner, (viz. in *Ibrahim v. R. supra*) and he should further tell them that if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it."

The passage from Lord Sumner's judgment has been referred to already and deals with admissibility and the meaning of the word voluntary. The language of Byrne J. may have been intended to go no further than the decision in *R. v. Murray* (*supra*) for the former judgment was given by Goddard L. C. J. who was a party to the *Bass* case but it is susceptible of the construction that a jury must always be told to disregard a confession which was not in their view made voluntarily even if they should consider it to be true. The difficulties of accepting the language of Byrne J. literally have led the High Court of Australia to doubt this part of the judgment in *R. v. Bass*. In *Basto v. R.* (1954–55) 91 C.L.R. 628 where the Court consisted of Dixon C. J. Webb, Fullagar, Kitto and Taylor J. J. after a reference to *R. v. Murray* the Court said at page 640:—

> "The jury is not concerned with the admissibility of the evidence; that is for the judge, whose ruling is conclusive upon the jury and who for the purpose of making it must decide both the facts and the law for himself independently of the jury. Once the evidence is admitted the only question for the jury to consider with reference to the evidence so admitted is its probative value or effect. For that purpose it must sometimes be necessary to go over before the jury the same testimony and material as the judge has heard or considered on a voirdire for the purpose of deciding the admissibility of the accused's confessional statements as voluntarily made. The jury's consideration of the probative value of statements attributed to the prisoner must, of course, be independent of any views the judge has formed or expressed in deciding that the statements were voluntary. Moreover the question what probative value should be allowed to the statements made by the prisoner is not the same as the question whether they are voluntary statements nor at all dependent upon the answer to the latter question. A confessional statement may be voluntary and yet to act upon it might be quite unsafe; it may have no probative value. Or such a statement may be involuntary and yet carry with it the greatest assurance of its reliability or truth. That a statement may not be voluntary and yet according to circumstances may be safely acted upon as representing the truth is apparent if the case is considered of a promise of advantage being held out by a person in authority. A statement induced by such a promise is

involuntary within the doctrine of the common law but it is plain enough that the inducement is not of such a kind as often will be really likely to result in a prisoner's making an untrue confessional statement."

Later commenting on *R. v. Bass* (*supra*) the Court said:—

" Unfortunately, in *Reg. v. Bass* Byrne J., speaking for himself and Goddard L. C. J. and Parker J., used language which makes it appear that the question for the jury is whether the statements are voluntary and that they must be so told. 'When a statement has been admitted by the judge, he should direct the jury to apply to their consideration of it the principle as stated by Lord Sumner (*scil.* in *Ibrahim v. The King*) and he should further tell them that if they are not satisfied that it was made voluntarily they should give it no weight at all and disregard it.' With all respect, this cannot be right. The admissibility of evidence is not for the jury to decide, be it dependent on fact or law: and voluntariness is only a test of admissibility: see *Cornelius v. The King* (1936) 55 C.L.R. 235, at pp. 246, 248, 249. The true view is expressed by the Supreme Court of Victoria in a judgment delivered by Gavan Duffy J. in *Reg. v. Czerwinski* (1954) V.L.R. 483."

In an earlier passage the Court referred to the case of *R. v. Murray* as being in accord with their view.

Their Lordships have been referred to other cases in Australia and to the Canadian cases of *Regina v. McAloon* [1959] O.R. 441 and *Rex v. McLaren* [1949] 1 W.W.R. 529. The Commonwealth decisions are all in line with the judgment of Goddard in *R v. Murray* (*supra*) and in their Lordships opinion they correctly express the law as to the admissibility of evidence and the direction to the jury after evidence has been admitted.

R. v. Bass on its literal interpretation has led the Court of Criminal Appeal in several cases, apparently without hearing argument, to restate the necessity of a separate direction to the jury to the effect that they must be satisfied beyond reasonable doubt as to the voluntariness of statements notwithstanding their admission after a decision has been given as to admissibility by the judge. Many of the cases are to be found only in newspaper reports but one namely *Reg. v. Francis & Murphy* (*supra*) was reported and was noticed in the judgment delivered by Lord Morris in *Sparks v. The Queen* (*supra*).

Their Lordships are of opinion that the learned judge's direction to the jury is not open to criticism on the ground that he did not follow the course of giving a specific direction that the jury must be satisfied beyond reasonable doubt as to the voluntariness of the confessions before giving them any consideration.

It should be added that the respondent contended that if such a course were necessary the learned judge's direction, when read as a whole, was sufficient to comply with the need for a specific direction of this kind. It is unnecessary to pursue this matter in detail for their Lordships are in agreement with the learned judges in the Appellate Court that, had it been necessary for the jury to decide as a separate issue whether the appellant's statements had been voluntarily made the direction was insufficient.

Their Lordships have accordingly humbly advised Her Majesty that this appeal be dismissed.