

Wong Kam-ming - - - - - Appellant

v.

The Queen - - - - - Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 20TH DECEMBER 1978

Present at the Hearing:

LORD DIPLOCK
LORD HAILSHAM OF SAINT MARYLEBONE
LORD SALMON
LORD EDMUND-DAVIES
LORD KEITH OF KINKEL

[Majority Judgment delivered by LORD EDMUND-DAVIES]

This is an appeal by special leave granted by this Board from a judgment of the Court of Appeal of Hong Kong, dismissing the appeal of Wong Kam-ming against his conviction in October 1976 of murder by the Supreme Court (Commissioner Garcia and a jury). The indictment charged the appellant and five other males upon counts of murdering one man and of maliciously wounding two others. The case for the Crown was that the accused men were part of a gang who went to a massage parlour in Kowloon and there fatally attacked the manager and wounded others in retaliation for an earlier attack on one of their number. Four of the accused were acquitted on all charges, while the other two (including the present appellant) were convicted on each.

When the trial opened, the only evidence implicating Wong Kam-ming consisted of a signed statement which he had given to the police. In this he admitted being one of those present in the massage parlour, that at one stage he had a knife in his hand, and that he had "chopped" one of those present. Defending counsel having intimated to the Court that he challenged the admissibility of this statement on the ground that it was not voluntary, before the Crown opened its case the learned judge (in the absence of the jury) proceeded to deal with the issue of admissibility on the *voir dire*. After two police witnesses had testified to its making, the accused gave evidence that he was never cautioned, that he was questioned at length while in custody, that he was grabbed by the shirt and shaken, that an inducement was offered that if he confessed his "sworn brother" would not be arrested, and that he had been forced to copy out and sign a statement drafted by the police. Under cross-examination he was asked a series of questions based on the detailed

contents of the statement, and directed at establishing its truth. At this stage it is sufficient to say that, at the conclusion of the *voir dire*, the trial judge excluded the statement.

This ruling placed the Crown in dire difficulty, for it is common ground that without it they could not establish even that the appellant was present in the massage parlour at any material time. Finding themselves in that situation, they resorted to a course of action which none of their Lordships had hitherto ever heard of. Prosecuting counsel indicated to the trial judge (in the absence of the jury) that he proposed to establish, by reference to what had transpired in the *voir dire*, that the appellant had,

“in circumstances where there is no question of involuntariness, admitted he was present and involved in the incident with which we are concerned”.

As authority for submitting that he should be allowed to prove such admission by calling the shorthand writer present during the *voir dire* he cited *R. v. Wright* (1969) S.A.S.R. 256, to which reference must later be made. Defending counsel's objection was overruled, the trial judge holding that *Wright* was good law, and expressly refusing to exercise in favour of the accused any discretion he might have to exclude the proffered new evidence. Two shorthand writers were then called to produce extracts from their transcripts of what the accused had said during the *voir dire*, and this despite a renewed objection by defending counsel.

A submission of “No case” was likewise overruled, the trial judge saying:

“The main point here is presence at the scene at the relevant time.”

Defending counsel thereupon called the appellant. Following his evidence in chief, he was closely cross-examined by reference to the shorthand transcript of what he had said on the *voir dire*, prosecuting counsel repeatedly pointing out discrepancies and observing at one stage:

“That is extraordinarily different from the evidence you have given *this time*”.

And in the course of summing-up the judge told the jury that the appellant

“... in certain proceedings held on the 25th and 26th August this year gave answers to certain questions put to him in cross-examination by . . . Crown counsel, and such answers indicate that he was present in the premises of the music parlour on the night of the 28th December 1975. A copy of those questions and answers is also in your hands.”

Following upon these proceedings which, it will be seen, had taken several unusual turns, the jury, as already indicated, convicted the accused upon all three charges, and he was sentenced to death on the murder charge. The conduct of the trial has been attacked in several respects, and these were conveniently summarised by counsel for the appellant in framing the following questions:

1. During the cross-examination of an accused in the *voir dire* as to the admissibility of his challenged statement, may questions be put as to its truth?
2. If “Yes”, has the Court a discretion to exclude such cross-examination, and (if so) was it properly exercised in the present case?
3. Where, although the confession is held inadmissible, the answers to Questions 1 and 2 are nevertheless in favour of the Crown, is

the prosecution permitted, on resumption of the trial of the main issue, to adduce evidence of what the accused said during the *voir dire*?

4. If "Yes", is there a discretion to exclude such evidence, and (if so) was it properly exercised here?
5. Even although it be held that the answer to Question 3 is "No", may the accused nevertheless be cross-examined upon what he said during the *voir dire*? Their Lordships proceed to consider these questions.

Questions 1 and 2 : Relevance of truth of extra-judicial statements

In *R. v. Hammond* [1941] 3 All E.R. 318 prosecuting counsel was held entitled to ask the accused, when cross-examining him during the *voir dire*, whether a police statement which the accused alleged had been extorted by gross maltreatment was in fact true, and elicited the answer that it was. Upholding the propriety of putting the question, Humphreys J. said in the Court of Criminal Appeal (at p. 321):

"In our view, [the question] clearly was not inadmissible. It was a perfectly natural question to put to a person, and it 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 surely must be admissible, and in our view it 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".

Although much criticised, that decision has frequently been followed in England and Wales and in many other jurisdictions, though it would serve little purpose to refer to more than a few of the many decisions cited by learned counsel. Mention must, however, be made of *De Clercq v. The Queen* [1968] 70 D.L.R. 2d 530, a majority decision of the Supreme Court of Canada following *Hammond*, where Martland J. said (at p. 537):

". . . it does not follow that the truth or falsity of the statement must be irrelevant . . . 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".

Their Lordships were told by learned counsel that in England and Wales it has become common practice for prosecuting counsel to ask the accused in the *voir dire* whether his challenged statement was in fact true. It is difficult to understand why this practice is permitted, and impossible to justify it by claiming that in some unspecified way it goes to "credit". As McMullin J. said in his dissenting judgment in the instant case:

“... I cannot see that the answer to this question has any material relevance even to the issue of credibility. Where the answer to the question ‘Is this confession the truth?’ is ‘No’ the inquiry is no further advanced. The credibility of the defendant in relation to the alleged improprieties can scarcely be enhanced or impaired by an answer which favours his own interests in opposing the admission of the statement. On its own, demeanour apart, it is neutral”.

The cogency of these observations may be respectfully contrasted with those of Huggins J.A. who said, in delivering the majority judgment:

“Although questions may be put to the defendant as to the truth of his extrajudicial confession that does not make the truth or falsehood of that confession relevant to the issue of voluntariness: what is relevant—because it goes to the credibility of the defendant—is that the defendant asserts that the extrajudicial confession is true or false”.

But the basis of this assertion is unclear. If the accused denies the truth of the confession or some self-incriminating admission contained in it, the question whether his denial is itself true or false cannot be ascertained until after the *voir dire* is over and the accused’s guilt or innocence has been determined by the jury—an issue which the judge has no jurisdiction to decide. If, on the other hand, the accused made a self-incriminating admission that the statement is true, then, as one critic has expressed it,

“If the confession is true, this presumably shows that the accused tends to tell the truth, which suggests that he is telling the truth in saying the police were violent”. (Heydon, ‘Evidence’, 1975, p.181.)

The sole object of the *voir dire* was to determine the voluntariness of the alleged confession in accordance with principles long established by such cases as *Ibrahim v. Rex* [1914] A.C. 599. This was emphasised by this Board in *Chan Wei Keung v. Reg.* (1966) 51 Cr. App. R. 257, while the startling consequences of adopting the *Hammond* approach were well illustrated in the Canadian case of *Reg. v. Hnedish* (1958) 26 W.W.R. 685, where Hall C.J. said (p.688):

“Having regard to all the implications involved in accepting the full impact of the *Hammond* decision which can, I think, be summarized by saying that regardless of how much physical or mental torture or abuse has been inflicted on an accused to coerce him into telling what is true, the confession is admitted because it is in fact true regardless of how it is obtained, I cannot believe that the *Hammond* decision does reflect the final judicial reasoning of the English courts I do not see how under the guise of ‘credibility’ the court can transmute what is initially an inquiry as to the ‘admissibility’ of the confession into an inquisition of an accused. That would be repugnant to our accepted standards and principles of justice; it would invite and encourage brutality in the handling of persons suspected of having committed offences”.

It is right to point out that learned counsel for the Crown did not seek to submit that the prosecution could in every case properly cross-examine the accused during the *voir dire* regarding the truth of his challenged statement. Indeed, he went so far as to concede that in many cases it would be wrong to do anything of the sort. But he was unable to formulate an acceptable test of its propriety, and their Lordships have been driven to the conclusion that none exists. In other words, in their Lordships’ view, *Hammond (ante)* was wrongly decided, and any decisions in Hong Kong which purported to follow it should be treated

as over-ruled. The answer to *Question 1* is therefore "No", and it follows that *Question 2* does not fall to be considered.

Their Lordships turn to *Questions 3 and 4*. As part of its case on the main issue, may the prosecution lead evidence regarding the testimony given by the accused on the *voir dire*? As already related, the trial judge originally thought that this question required a negative answer, but he was led to change his mind by the decision in *R. v. Wright* (1969) S.A.S.R. 256, where the Supreme Court of South Australia held that the Crown was entitled to lead such evidence, subject to the discretion of the trial judge to disallow it. But the weight of judicial authority is against such a conclusion. The earliest relevant decision appears to be that of the Federal Supreme Court of Southern Rhodesia in *Chitambala et al. v. Reg.* 1961 R. & N. 166, where Clayden A.C.J. said (p. 169):

"In any criminal trial the accused has the right to elect not to give evidence at the conclusion of the Crown case. To regard evidence given by him on the question of admissibility as evidence in the trial itself would mean either that he must be deprived of that right if he wishes properly to contest the admissibility of a statement, or that, to preserve that right, he must abandon another right in a fair trial, the right to prevent inadmissible statements being led in evidence against him. . . . To me it seems clear that deprivation of rights in this manner, and the changing of a trial of admissibility into a full investigation of the merits, cannot be part of a fair criminal trial".

This decision was followed in Hong Kong in *Li Kim-hung v. Reg.* (1969) H.K.L.R. 84 and in *Ng Chun-kwan v. Reg.* (1974) H.K.L.R. 319. In the latter McMullin J. (who dissented in the instant case) said, in giving the judgment of the Full Court (p.328):

". . . What the accused said on the *voir dire* may not be used as substantive evidence against him or his co-accused. . . . In this respect evidence on the *voir dire* is distinguishable from an extra-judicial confession and the basis for the distinction lies in the accused's right to remain silent upon the trial of the general issue even though he has elected to give evidence on the *voir dire*".

Yet in the instant appeal counsel for the Crown felt constrained to submit that, even were the trial judge to exclude a confession on the ground that torture had been used to extort it, any damaging statements made by the accused on the *voir dire* could nevertheless properly be adduced as part of the prosecution's case. Boldness could go no further.

Fortunately for justice, their Lordships have concluded that, where the confession has been excluded, the argument against ever admitting such evidence as part of the Crown case must prevail. But what if the confession is held *admissible*? In such circumstances, it is unlikely that the prosecution will need to do more than rely upon the confession itself. Nevertheless, in principle should they be prevented from proving in addition any admission made by the accused on the *voir dire*? This question has exercised their Lordships a great deal, but even in the circumstances predicated it is preferable to maintain a clear distinction between the issue of voluntariness, which is alone relevant to the *voir dire*, and the issue of guilt falling to be decided in the main trial. To blur this distinction can lead, as has already been shown, to unfortunate consequences, and their Lordships have therefore concluded that the same exclusion of evidence regarding the *voir dire* proceedings from the main trial must be observed, regardless of whether the challenged confession be excluded or admitted.

It follows that *Question 3* must be answered in the negative, and *Question 4* accordingly does not arise.

Question 5 remains for consideration by their Lordships. Notwithstanding the answer to *Question 3*, in the event of the accused giving evidence in the main trial, may he be cross-examined in respect of statements made by him during the *voir dire*? In the instant case the majority of the Court held that he could, and McMullin J. (who dissented) had earlier been of the same view, having said in *Ng Chun-kwan v. Reg.* (*ante*) at p. 328:

“The only way in which evidence of an admission made by the accused on the *voir dire* may be adduced in evidence is by way of rebuttal if he gives evidence on the general issue and if that evidence is inconsistent with what he has said on the *voir dire* . . . We cannot see any warrant for the contention . . . that everything which transpires in the course of a *voir dire* is to be regarded as having acquired an indefeasible immunity from all further resort for any purpose whatsoever”.

The problem is best approached in stages. In *Treacy* (1944) 30 Cr. App. R. 93, where the accused's answers under police interrogation were held inadmissible, it was held that he could not be cross-examined to elicit that he had in fact given those answers, Humphreys J. saying (p. 96):

“In our view, a statement made by a prisoner under arrest is either admissible or not admissible. If it is admissible, the proper course for the prosecution is to prove it . . . If it is not admissible, nothing more ought to be heard of it. It is a complete mistake to think that a document which is otherwise inadmissible can be made admissible in evidence simply because it is put to an accused person in cross-examination”.

In their Lordships' judgment, *Treacy* was undoubtedly correct in prohibiting cross-examination as to the *contents* of confessions which the Court has ruled inadmissible. But what if during the *voir dire* the accused has made self-incriminating statements not strictly related to the confession itself but which nevertheless have relevance to the issue of guilt or innocence of the charge preferred? May the accused be cross-examined so as to elicit those matters? In the light of their Lordships' earlier conclusion that the Crown may not adduce as part of its case evidence of what the accused said during a *voir dire* culminating in the exclusion of an impugned confession, can a different approach here be permitted from that condemned in *Treacy*?

Subject to what was said to be the Court's discretion to exclude it in proper circumstances, respondent's counsel submitted that it can be, citing in support section 13 of the Hong Kong Evidence Ordinance (C.8), which was based on the familiar provision in section 4 of the Criminal Procedure Act 1865 of the United Kingdom, relating to the confrontation of a witness with his previous inconsistent statements. But these statutory provisions have no relevance if the earlier statements cannot be put in evidence. And, having already concluded that the *voir dire* statements of the accused are not admissible during the presentation of the prosecution's case, their Lordships find it impossible in principle to distinguish between such cross-examination of the accused on the basis of the *voir dire* as was permitted in the instant case by the trial judge and upheld by the majority of the Court of Appeal and that cross-examination based on the contents of an excluded confession which, it is common ground, was rightly condemned in *Treacy*.

But what if the *voire dire* resulted in the impugned confession being *admitted*, and the accused later elects to give evidence? If he then testifies to matters relating, for example, to the *reliability* of the confession (as opposed to its *voluntariness*, which *ex hypothesi*, is no longer

in issue) and in so doing gives answers which are markedly different from his testimony given during the *voir dire*, may he be cross-examined so as to establish that at the earlier stage of the trial he had told a different story? Great injustice could well result from the exclusion of such cross-examination, and their Lordships can see no justification in legal principle or on any other ground which renders it impermissible. As has already been observed, an accused seeking to challenge the admissibility of a confession may for all practical purposes be *obliged* to testify in the *voir dire* if his challenge is to have any chance of succeeding, and his evidence is then (or certainly should be) restricted strictly to the issue of admissibility of the confession. But the situation is quite different where, the confession having been *admitted* despite his challenge, the accused later elects to give evidence during the *main trial* and, in doing so, departs materially from the testimony he gave in the *voir dire*. Having so chosen to testify, why should the discrepancies not be elicited and demonstrated by cross-examination? In their Lordships' view, his earlier statements made in the *voir dire* provide as acceptable a basis for his cross-examination to that end as any other earlier statements made by him—including, of course, his confession which, though challenged, had been ruled admissible. Indeed, for such purpose and in such circumstances, his *voir dire* statements stand on no different basis than, for example, the sworn testimony given by an accused in a previous trial where the jury had disagreed.

No doubt the trial judge has a discretion and, indeed, a duty to ensure that the right of the prosecution to cross-examine or rebut is not used in a manner unfair or oppressive to the accused, and no doubt the judge is under an obligation to see to it that any statutory provisions bearing on the situation (such as those earlier referred to) are strictly complied with. But, subject thereto, their Lordships hold that cross-examination in the circumstances predicated which is directed to testing the credibility of the accused by establishing the inconsistencies in his evidence is wholly permissible.

In the instant case, however, the challenged confession was excluded. It therefore follows that in the judgment of their Lordships no less than three substantial irregularities occurred in the trial:

- (1) in the *voir dire* the accused was cross-examined with a view to establishing that his extra-judicial statement was true;
- (2) in the trial proper, the Crown was permitted to call as part of its case evidence regarding answers given by the accused during the *voir dire*; and
- (3) the accused was permitted to be cross-examined so as to demonstrate that what he had said in chief was inconsistent with his statement in the *voir dire*.

As a result, evidence was wrongly placed before the jury that the accused was one of those present in the massage parlour at the material time and that he had then been in possession of a weapon. But for that evidence, it is common ground that the submission of "No case" made by defending counsel must have succeeded.

It follows that their Lordships will humbly advise Her Majesty that this appeal should be allowed and the conviction quashed.

[*Dissenting Judgment by Lord Hailsham of Saint Marylebone*]

I regret that for the reasons which follow there is a substantial portion of the advice of the majority in this case from which I must respectfully record my dissent.

I wish to begin, however, by making it plain that I entirely endorse the result proposed. This is because I entirely agree with the proposed

answer to the third of the questions posed by counsel for the appellant and referred to in the advice of the majority, and this is sufficient to dispose of the whole appeal. I also agree with both parts of the proposed answer to the fifth question. Once a statement has been excluded I consider that, to adapt the words of Humphreys J. in *Treacy* [1944] 2 All E.R. 229, nothing more should be heard of the *voir dire* unless it gives rise to a prosecution for perjury.

I have stated elsewhere (*D.P.P. v. Ping Lin* [1975] A.C. 574) that the rule, common to the law of Hong Kong and that of England, relating to the admissibility of extra-judicial confessions is in many ways unsatisfactory, but any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the Courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary. For this reason it is necessary that the accused should be able and feel free either by his own testimony or by other means to challenge the voluntary character of the tendered statement. If, as happened in the instant appeal, the prosecution were to be permitted to introduce into the trial the evidence of the accused given in the course of the *voir dire* when the statement to which it relates has been excluded whether in order to supplement the evidence otherwise available as part of the prosecution case, or by way of cross-examination of the accused, the important principles of public policy to which I have referred would certainly become eroded, possibly even to vanishing point.

I also agree with the opinion of the majority that when and if the statement has been admitted as voluntary and the prosecution attempt to cross-examine an accused on discrepancies between his sworn testimony on the *voir dire* and his evidence on the general issue at the trial, rather different considerations apply. By the time that evidence is given the statement will have been admitted on the ground that the prosecution has succeeded in establishing to the satisfaction of the judge beyond reasonable doubt that it was properly obtained, and the whole evidence relating to the statement will have to be rehearsed once more, this time in front of the jury (where there is one) in order that they may form a conclusion not as to its admissibility but as to the reliability of the admissions made. It seems to me that in those circumstances the statements on oath made by the defendant on the *voir dire* as material for cross-examination do not, from the point of view of public policy, stand in any other situation than any other statements made by him, including the statement which has been admitted. For this purpose the true analogy is the position of his sworn testimony in a previous trial where the jury have disagreed. No doubt the trial judge has a discretion to see that the right of the prosecution to cross-examine or rebut is not used in a manner unfair or oppressive to the accused, and no doubt the judge is under a strict obligation to see that any statutory provisions (for instance those in the Criminal Evidence Act 1898 or its Hong Kong equivalent) are rigorously complied with. But, in my view, once the substantive statement is admitted on the *voir dire*, the fewer the artificial rules limiting the admissibility of evidence which may be logically probative the better. I therefore agree with both parts of the advice tendered by the majority to the fifth of the questions propounded by counsel in argument.

The reservations I feel about the opinion of the majority in this case are therefore confined to the views they express in relation to questions (1) and (2). In order to avoid prejudice to the accused the *voir dire* normally takes place in the absence of a jury. It is therefore a trial on an issue of fact before a judge alone. It is open to the accused (presumably under the provisions of the Criminal Evidence Act 1898 or its Hong Kong equivalent) to give evidence and there are limits imposed by that Act or the equivalent Ordinance on what may be asked him in cross-examination. Subject to these limitations, and to any other general rules of evidence (such as those relating to hearsay) it seems to me that the only general limitations on what may be asked or tendered ought to be relevance to the issue to be tried, as in any other case in which an issue of fact is to be tried by a judge alone, and as to this, subject to appeal, the judge is himself the arbiter on the same principles as in any other case in which he is the judge of fact. It appears to be the opinion of the majority that it is possible to say *a priori* that in no circumstances is the truth or falsity of the alleged confession relevant to the question at issue on the *voir dire* or admissible as to credibility of either the prosecution or defence witnesses. I disagree. It is common ground that the question at issue on the *voir dire* is the voluntary character of the statement. This is the *factum probandum*, and, since the burden is on the prosecution, the prosecution evidence is taken before that of the defence. The *voir dire* may take place, as in the instant appeal, at the beginning of the trial, when all that is known of the facts must be derived from the depositions, or from counsel's opening. More frequently, however, the *voir dire* takes place at a later stage in the trial when the prosecution tenders the evidence, usually of the police, in support of the voluntary character of the statement. By that time many facts are known and much of the evidence has been heard. I can conceive of many cases in which it is of the essence of the defence case on the *voir dire* that the confession, whose voluntary character is in issue, is in whole or in part untrue, and, it may be, contrary to admitted fact. If the defence can succeed in establishing this or even raising a serious question about it either as the result of cross-examining the prosecution witnesses, or by evidence led by the defence itself, serious doubt can be raised as to the voluntary nature of the confession. How can it be said, counsel for the defence might wish to argue, that the accused can have provided so much inaccurate information to his own detriment, unless he was forced to do so by some improper means? If the defence can be allowed to make the point, which seems to me to be a valid one, it must be open to the prosecution to cross-examine upon it when it is the turn of the defence witnesses to be scrutinised. It must be remembered that it is frequently the case that the alleged confession is not always, as in the instant appeal, a written statement copied out in the writing of the accused, though the point can arise even in such a case. Often, perhaps more often, the statement in question may have been oral, and the case on the *voir dire* for the defence may be that it was obtained only after a long period in custody, perhaps without rest, food, or drink, as the result of a long and harassing interrogation at which either no caution was administered or improper pressures were brought to bear. In such circumstances it seems to me inevitable that the truth or otherwise of what is alleged to have been said, and what was actually said in response to what questions or the accuracy of what is alleged to have been copied down in the police notebooks (and the questions though logically separate are often difficult to separate in practice) must be investigated in order to establish, or cast doubt upon, the voluntary character of the confession. I am the first to deprecate what counsel for the respondent, who has a wide experience of current practice at the Central Criminal Court and elsewhere, admitted without justifying, to be a growing habit of counsel for the prosecution, namely to begin his

cross-examination on the *voir dire* in every case with a question directed to the truth or otherwise of the confession. Though I tend to regard the use made in the advice of the majority of the passage in *Heydon on Evidence* 1975, at p.181, as an example of the fallacy known as *ignorantia elenchi*, I agree with them that it is no answer when the admissibility of an alleged confession has been challenged on the grounds that it was improperly obtained, that it was a confession of the truth and not the reverse. But counsel for the prosecution may be entitled to know the exact limits of the case he has to meet. Has he to answer the suggestion that the confession is more likely to be involuntary because it was so contrary to fact? Can he himself rely on the argument that it is inconceivable that a detailed albeit admittedly truthful confession of a really serious crime, as for instance murder, was elicited as the result of a relatively trivial inducement such for instance as being allowed to see a close relative for a short time? I am wholly unable to see that these are not questions and arguments which can in particular cases have a bearing on the voluntary or involuntary character of statements tendered in evidence by the prosecution and therefore, in suitable cases, investigated at the *voir dire*. Disputes not infrequently occur on the *voir dire* not merely as to the *facta probanda* but as to what was said and at what stage (e.g. before or after a caution) and though a *voir dire* is not required at all when the defence case is that no statement of any sort was made, the more usual situation at the *voir dire* is that what is in dispute between the parties is not merely whether what was said was voluntary (the *factum probandum* on the *voir dire*) or whether anything was said (a question for the jury, and not the judge) but exactly what was said and in what circumstances and at what point of time, and as the result of what inducement if any (*facta probantia* or *reprobantia*, but not *probanda*). For these questions, which must be investigated before a judge admits a statement on the *voir dire*, it seems to me impossible to say *a priori* that every question of the truth or falsity of the statements must be excluded, and although I agree that in the ultimate resort the questions will be for the jury if the statement is admitted, the judge may often be in a position when he is compelled to form an opinion as to the relative reliability of rival versions of what took place in order to form an opinion as to whether what was said was said voluntarily or as the consequence of inducement. An example of another kind is where the prosecution case is that a statement was originally volunteered orally and subsequently signed voluntarily by the accused, and the case for the accused is that the statement was concocted by the police, written down by the police and then signed by the accused under improper pressures. In this case the prosecution may wish to say that details in the alleged concoction could only have come from the accused and were accurate facts not otherwise known at the time, and the accused may wish to point to inaccuracies in the statement as pointing to concoctions. In each case, although not directly affecting the allegation of signature under pressure, the accuracy or otherwise of the contents of the confession must be open to some enquiry on the *voir dire*. Obviously the judge must be allowed a discretion in the matter. He must not permit counsel to pursue the matter of the truth or falsity of items in a confession for an ulterior reason or in an oppressive manner, or at undue length, but I am not able to say *a priori* that all must necessarily be irrelevant. I am somewhat fortified in this view by the reflection that if the *voir dire* is decided in favour of the prosecution, almost all of the evidence given is repeated at the trial of the general issue, where the *factum probandum* is guilt or innocence and not the voluntary or involuntary character of the statement admitted. Contrary, I believe, to what is suggested at one point in the majority opinion, the jury are absolutely free to form their own view of the circumstances in which the statement was obtained irrespective of the opinion of the judge (as to which in theory at least

they are wholly ignorant) in order to form their own opinion as to the facts relied on by the prosecution or the defence on the general issue. Though the judge has found the confession to be voluntary, and therefore admissible, the jury is perfectly entitled to act on the contrary belief and therefore to disregard it as unreliable. It is of course not logically necessary that the converse of this position is also true, namely that the judge can be assisted by his view of the truth or otherwise of the material contained in an alleged statement in order to determine whether the statement is wholly voluntary or not. In many cases no doubt (*Hammond* [1941] 3 All E.R. 318 was one), the judge will be wholly uninfluenced in his decision by whether the confession contained accurate or inaccurate material and in such a case either the question is improper, or the answer irrelevant. But I am not prepared to say *a priori* that in all cases it must always be so. In my opinion questions of relevance or otherwise can only seldom be decided *a priori*, as in my view the opinion of the majority purports to do, but are far better left to the logical faculties of the trial judge in the context of the concrete case which he has to try. For these reasons I would give different answers to questions (1) and (2) to those proposed by the majority. I agree with their answers to questions (3) and (4) and to both aspects of (5) and that the appeal must in consequence be allowed.

In the Privy Council

WONG KAM-MING

v.

THE QUEEN
