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CONFESIONS IN CRIMINAL
CASES IN ZAMBIA

BY

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A B S T R A C T

In this dissertation, an attempt is made to examine the subject of confessions with regard to criminal cases. In Anandagoda v R (1962) 1 W.L.R. 817 at page 823, the Judicial Committee of the Privy Council said that a confession is the species of which an admission is the genus. However, the term "admission" is usually relevant in civil proceedings; when the term is used in relation to a crime, it denotes an admission of some fact relevant to the crime and the admission need not be voluntary. On the other hand, the term "confession" is used to denote the admission or acknowledgement of guilt and invariably applies to criminal cases. There are special rules governing the admissibility of a confession; these are discussed in the body of the work.

Chapter I looks at the meaning, nature and effect of a confession. It then concludes with historical observations.

Chapter II discusses the manner in which a confession may be conveyed.

Chapter III deals with persons to whom a confession may be made; such persons may, or may not, be persons in authority.

Chapter IV relates to what constitutes free and voluntary confessions, the significance of the Judges' Rules, the effect of any breach thereof and, finally, the question whether or not a free and voluntary confession requires to be corroborated.

(ii)

Chapter V deals with the admissibility of confessions. It discusses whether or not the whole, or part only, of a confession is admissible. It also discusses upon whom lies the burden of proving the voluntariness of a confession, the circumstances under which the procedure of a trial within a trial is introduced as well as the exercise of a judge's discretion.

Chapter VI concerns the inadmissibility of confessions on the ground of involuntariness or ambiguity. It also deals with the questions arising from subsequent confessions, facts discovered in consequence of inadmissible confessions and evidence procured as a result of an illegal or improper search and seizure.

Chapter VII looks at the use and abuse of confessions, the effect of confessions upon police investigations and the probative value of confessions.

The final Chapter - Chapter VIII - is an appraisal of what safeguards there are, or should be, for the protection of suspects or accused persons in relation to police interrogations and the taking down of statements from such persons. The writer concludes the chapter by expressing certain views on the subject.

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CHAPTER I

INTRODUCTION

1. Meaning and Nature of a Confession in Criminal Cases

At the outset of the study of any branch of law, it is desirable to endeavour to define and delimit the field of study. Fortunately, the term confession, unlike some other facets of law, does not defy definition or limitation. Although the term has variously been defined by courts, authors and statutes, only one generic definition appears to emerge as we shall very shortly be able to see. Various definitions as seen through the spectacles of courts, authors and statutes will now be examined in that order.

(a) Meaning of a Confession

(i) Courts

As a general rule courts of law do not find it necessary to define the term confession; the term is taken for granted to mean an acknowledgement of guilt. Even in the very few isolated exceptions where an attempt is made, courts are minded to deal with each one of such cases on its own merits, and so they do not deem it necessary to consider other forms of a confession. A classic example of this occurred in a Hong Kong case of Wong Chin Kwai 1, where the learned Chief Justice said:

"By confession I understand not necessarily a full confession of guilt, but any statement made which, being relevant to the issue may be put in evidence against the person making it." As appears from this passage, the reference to "any statement made ..." makes it evident that the issue before the court related to a confession statement and consequently any other type of confession, for example, confession by conduct, did not fall to be considered.

Similarly, in an American case of State v Reinhart, 2, Bean J., observed:

"a confession in a legal sense is restricted to an acknowledgement of guilt made by a person after an offence has been committed, and does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred."

In a South African case of Rex v Becker, 3, De Villiers, Ag.C.J., expressed himself as follows:

"A confession is an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty in a court of law"

However, in Pakala Narayana Swami v the Emperor, 4, an effort was made by the Judicial Committee of the Privy Council to define the word confession in what may conveniently be termed

a neutral form - neutral form because the definition can conceivably apply to any kind of confession. Pakala's case was an Indian case which went on appeal to the Judicial Committee of the Privy Council. During the course of determining the appeal Lord Atkin, who delivered the opinion of the court, said:

"a confession must admit in terms the offence or at any rate substantially all the facts which constitute the offence".

(ii) Authors

Like courts, many authors take for granted the definition of the word confession. It is, therefore, not surprising that such definition is very rare in text books on the law of evidence. This is what Roscoe, 5, says of a confession:

"In criminal law, confession generally means an acknowledgement of guilt."

Osbourne, 6, defines it to mean:

"an admission of guilt made to another by a person charged with a crime".

According to Wigmore, 7, that outstanding (American) professor of the law of evidence:

"A confession is an acknowledgement in express words, by the accused in a criminal case, of the truth or of some essential part of it".

Fitzjames Stephen, 8, defines a confession as -

"an admission made at any time by a person charged with a crime stating, or suggesting the inference, that he committed that crime."

(iii) Statutes

Once again, not many evidence acts contain the definition of the term confession. As yet there does not exist in Zambia a Criminal Evidence Act. However, the Law Development Commission of Zambia recently circulated, and invited comments on, a draft bill entitled "The Criminal Evidence Act, 1976". By clause 6(3) of the bill, a confession means -

"a statement in which the maker admits committing or being criminally implicated in an offence with which he is or may be charged".

Section 27 (1) of the Evidence Act (Cap. 62) of Nigeria and, to some extent, section 17 of the Evidence Act (Cap. 11) of Sri Lanka, have adopted Stephen's definition already referred to above.

It would appear that the most accommodating definition is one to be found in the Kenyan Evidence Act (Cap. 80). By section 25 of that Act -

"A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence".

However, where there is a conflict between a text-book definition and a statutory definition, the statutory definition prevails.

There are other definitions to which it is here not necessary to draw attention. Happily, it may be said that all the varying definitions are substantially identical in character in that they all have one striking feature in common, namely, that they point to an acknowledgement of guilt by a person who is or may be charged with a crime. The generic definition that appears to emerge may be stated thus:

"A confession is an acknowledgement of guilt by a person who is or may be charged with a crime."

Take, for example, the case of Edward Kunda v the People, 9, in which the accused was charged with storebreaking. The prosecution established that the accused had been seen by a policeman on the roof of the premises broken into. After a chase, the accused was apprehended and in his possession was found part of the stolen property. It was stated that on arrest the accused had said:

"I admit the charge. I am the one who broke into the store."

The then Court of Appeal held - and this was inevitable - that those words were in fact a confession; the words were a confession because they were (in the clearest terms possible) indicative of an acknowledgement of guilt. There were, of course, certain features of that case with which we are here not concerned.

(b) Nature of Confession

As we have just seen, a 'confession' is an acknowledgement of guilt by a person who is, or may be, charged with a crime. It may be full or partial; it may be extra-judicial, when made out of court, or judicial when made in court in the due course of legal proceedings. In order to render a confession admissible, it must be shown by the prosecution to have been voluntarily made, in the sense that it was not obtained from the accused by fear of prejudice or hope of advantage exercised or held out by a person in authority. See Per Lord Sumner in Ibrahim v R, 10.

A point has already been made to the effect that a confession may be made in more than one way. There are three different ways in which a confession may be made; it may be made, firstly, orally; secondly, in writing or in some other permanent or semi-permanent form; and, thirdly, by conduct. Generally speaking, the form of a confession is immaterial provided the substance of it is given; hence failure to prove actual words used will not exclude a confession though it may affect its weight, 11.

(i) Oral Confessions

An oral confession is a voluntary acknowledgement of guilt (by the maker) made by word of mouth to another person - usually (but not necessarily) a person in authority - which is not reduced to writing. Rules of admissibility apply to an oral confession in much the same way as they do

to a confession made in writing or in some other permanent or semi-permanent form. 12. It has been said in England that if Sexton was ever an authority that an oral confession must be repeated word for word, it was destroyed in R v Godinho, 11, where it was held that failure to prove actual words used merely goes to weight, not to admissibility. In Zambia, however, superior courts have exhibited a desire to have the actual words used by an accused person. Thus, in R v Kasengele Sondashi, 13, Cox C.J., held, on review, that the bare statement, "he admitted it" is not evidentially satisfactory, for it amounts to a construction being placed upon the words of the person making the alleged confession. In that case, the so called confession was narrated by three women who had confronted the accused with the offence of defilement. In reply to the accusation, the accused uttered certain words which the three women should have repeated in their evidence before the court as opposed to their interpretation of the words, since it is for the court, not a witness, to decide whether or not the actual words used amount to a confession.

Similarly, in the case of The People v Lukas Chiwaula, 14, Gardner J., as he then was, observed that -

"Whatever evidence which purports to be a confession is tendered to the court, it is most desirable that the exact words used by the accused should be given in evidence."

In 1972, the Court of Appeal for Zambia (the

predecessor of what is now the Supreme Court of Zambia) had occasion to assert a similar view.

This was done in Chisokola v The People, 15, where the court said:

"... the police officer proceeded to say, 'He made a voluntary reply admitting the charge.'. Here again, this court has repeatedly said that this is not adequate where an accused person is alleged to have made a statement. The precise statement must be put in and not a paraphrase or interpretation given verbally by a witness."

More recently (in 1976) the Supreme Court said in David Biloya and Another, 16.

"One further most important irregularity was the acceptance of evidence from a police witness that the applicant admitted the charge. That is not sufficient. Such evidence must be given in detail and the words used by the accused persons must be quoted verbatim by the interrogating officer."

In spite of the preference on the part of Zambian Superior Courts, to which reference has been made, failure to prove actual words used does nevertheless, go to weight only, not to admissibility, except perhaps in the extreme case where he (i.e. witness) cannot remember any of the words used by the accused. It sometimes happens that a person other than a police officer is the first one to be at the scene of a crime, or to have an early opportunity of being in contact with the offender. An oral confession made to any such person is admissible provided it is

made freely and voluntarily. Confessions of this kind have, for instance, been made in the presence and hearing of a village headman, 17; a kapasu (i.e. a messenger) 18; a Chief, 19; etc.

Similarly, an accused's confession made to, or overheard by, the police but which is not taped or taken down in writing (for example, where the circumstances are such that it is impracticable for this to be done) may be admissible in evidence.

Oral confessions - "verbals" as Celia Hampton refers to such statements in her book on Criminal Procedure and Evidence, 20, deserve to be treated by the court very gingerly indeed. Taylor sums up the position well when he puts it thus :

".... the evidence of oral confessions of guilt ought to be received with great caution. For not only does considerable danger of mistake arise from the misapprehension or malice of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory; but the zeal which generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition which is often displayed by persons engaged in pursuit of evidence, to magnify slight grounds of suspicion into sufficient proof - together with the character of the witnesses, who are sometimes necessarily called in cases of secret and atrocious crime - all tend to impair the value of this kind of evidence, and sometimes lead to its rejection...." 21

Macaulay, in his History of England, 22, expresses this sentiment in forcible language when he states that-

"Words may easily be misunderstood by an honest man. They may easily be misconstrued by a knave. What was spoken metaphorically may be apprehended literally. What was spoken ludicrously may be apprehended seriously. A particle, a tense, a mood, an emphasis, may make the whole difference between guilt and innocence."

(ii) Confessions made in writing or some other permanent or semi-permanent form

Whenever a suspect or an accused gives an intimation that he wishes to make a confession (or any relevant statement), he should be asked whether or not he wants to write down himself what he wants to say; he may say that he is unable to write or that he prefers the person before him to write it for him. If he chooses to write down his own statement, he should be allowed to do so without prompting, apart from merely indicating to him what matters are material. Thereafter he should be given an opportunity to read the statement and to make corrections, if any, before signing it. The person before whom the statement is made will then bear witness by signing it.

The general rule is that any confession should, whenever possible, be taken down in writing ipsissima verba (usually but not necessarily) by a person before whom it is made. This should be done without prompting the author or putting to him any questions save those that may be required to make the statement coherent, intelligible and relevant to the material matters.

The statement must then be read to, or by, the author, certified by him as having been correctly recorded, and signed by both the author and the person before or by whom the statement is recorded, as well as by a person, if any, witnessing it. If there are any mistakes to be corrected, alterations or/and additions to be made, all these matters should be attended to and the amendments initialled by the persons aforesaid.

The foregoing is, generally speaking, the procedure followed in Zambia by the police force. It is here pertinent to refer to the latest edition - the 1965 Edition - of the Zambia Police Force Instructions (a successor to the 1959 Northern Rhodesia Police Handbook) which clearly sets out the current practice. The relevant aspects are to be found in sub-paragraphs 4 - 9 of paragraph 151 (omitting sub-paragraph 7) under Part V of the "Force Instructions". These paragraphs (leaving out such portions as are not very relevant) areas follows:

" 4. A statement taken from an accused person on being charged, or a person who has been cautioned though not charged, will be taken down in the language used by him and his exact words must be recorded.....

5. On completion of the statement, the officer recording it will ensure that it is read over to the person making it, in the language used by him, and that he is given the opportunity of reading it himself.

6.(i) The words read over and admitted to be correctly recorded will be added to the statement, and the persons making it will be requested to sign it, or, if he is illiterate, to affix his right thumb print to it

(ii) If the person making the statement is illiterate, it will whenever possible be signed by another police officer as a witness to the affixing of the person's thumb print.

8. The person making the statement will be requested to initial or to affix his right thumb print against every alteration and addition to the statement, and the officer taking the statement will also initial the alteration or addition himself.

9. The statement will finally be signed by the officer who recorded it, and the officer will also record the date and time of his signature. "

Failure on the part of the police to observe the normal procedure may result in the rejection of the accused's statement. Thus, in Lester and Howard v Regina, 23, a Malawian case that ended up in the Federal Supreme Court in 1960, two appellants were asked by the police to accompany them for questioning. The first appellant was not in custody, there being no more than a general suspicion of him. For reasons which the Appellate Court regarded as good and sufficient, a statement that had been taken from the first appellant was not read over to, or signed by, him. At the hearing of the appeal it was submitted that in those circumstances the statement ought not to have been put in, but merely used to refresh the memory of the officer who had taken it. The Federal Supreme Court presided over by Tredgold, F.C.J., Clayden, F.J. and Patterson, C.J., of the then Northern Rhodesia (which

has, of course, now become Zambia), agreed that the contention was technically correct but felt that the admission of the statement had caused the appellant no prejudice. Although that was a Malawian case, the principle involved applies to Zambia also. In Joseph Chansa Thomson v The People, 24, the accused, who pleaded not guilty to theft of a motor vehicle, had made a straight forward confession to the police after being warned and cautioned; the confession was recorded in a police notebook - in compliance with the accepted procedure. In that confession the accused voluntarily said :

" I admit I stole this motor vehicle together with Duncan Swalya".

The accused was convicted and his appeal to the High Court against conviction was unsuccessful.

As we shall see later, a confession is evidence only as against its author unless a person implicated in it expressly or by implication adopts it so as to make it his own.

It has already been noted that a confession need not necessarily be made to a police officer. An unusual but interesting illustration of such type of case is to be found in R v Duck Ruxton, 25(a) which was decided in England in 1936. The case is unusual in the sense that although the accused readily made a confession (not to a police officer but to a civilian) some time before the commencement of his trial, the

effectiveness or force of that confession upon the proceedings in the trial court was rendered futile because it remained concealed throughout the proceedings and only came to light when everything, including the accused's execution, was all over.

In 1928 Isabella Kerr married Dr. Buck Ruxton. Dr. Ruxton - a medical doctor - was an excitable, jealous and suspicious husband, and usually assaulted Isabella whom he believed to be consorting with other men. To illustrate the extent to which he could go, the mere sight of her dancing with, or even speaking to, another man was enough to throw him into paroxysms of fury.

One day in September 1935, Mrs. Ruxton made a perfectly innocent outing using her husband's car. She returned late in the evening. To Dr. Ruxton's mind, the outing was yet another manifestation of infidelity on the part of Mrs. Ruxton. He killed Mrs. Ruxton and, in order to ensure the absence of the only eye witness - their nursemaid - he killed her too. The two bodies were then cut into small pieces with surgical skill, parcelled up and deposited some 100 miles away from the scene of the crime.

At his trial Dr. Ruxton was defended by leading Counsel Mr. Norman Birkett, K.C. (as he then was). The accused, who had made no confession to the police, or to anyone in authority, was convicted of murdering Mrs. Ruxton on overwhelming circumstantial evidence

and sentenced to death. There was an appeal to the Court of Criminal Appeal, but this was dismissed.

At one time in England it was common practice at the Coroner's inquest on the body of the executed criminal for the prison governor to reveal, usually in response to a juror's question, whether the condemned person had made any last minute confession of guilt. There had, however, been a Home Office instruction against this practice, and for many years past, such a confession, if made, was withheld from publicity. A considerable sensation was therefore caused when, on the Sunday following the execution of Dr. Ruxton, the News of the World published a signed confession by Dr. Ruxton in his own handwriting to the effect that he had killed both his wife and the maid. The confession was written in the following terms:

" Lancaster
14.10.35.

I killed Mrs. Ruxton in a fit of temper because I thought she had been with a man. I was mad at the time. Mary Rogerson was present at the time. I had to kill her.

B. Ruxton "25(b)

This document was written on the next day after Dr. Ruxton's arrest. What had happened was that immediately prior to his arrest, Dr. Ruxton had been visited in his surgery by a News of the World representative, who again saw him after he had been taken into custody. On

that second visit, Dr. Ruxton handed to the representative a sealed envelope, saying to him:

"Take great care of this. They have charged me with murder, and I, in turn, charge you to place this envelope in safety and security. On no account must it be opened until my death; if to die I am. If I am acquitted - and I think I must be acquitted - you will give it back to me."

Let it be said at once that Dr. Ruxton did this without the knowledge of Mr. Birkett who remained ignorant of the existence of the confession until after it had been published in the press. Although it is probable that Dr. Ruxton was influenced by financial considerations, the practice is one that ought to be deprecated.

In Zambia, as in many other common law countries, a confession which is tape-recorded is admissible in evidence. A recent example of this is to be found in an unreported case of Roy Mulolo v The People, 26. In that case, the accused appeared before the Senior Resident Magistrate's Court, Ndola, on two counts - one of conspiracy and the other of Corrupt Practices. What follows hereinafter relates only to the second count - Corrupt Practices - about which conviction was upheld on appeal to the High Court. Prior to his conviction, the accused was employed by the Judicial Department for about five years, as Deputy Assistant Registrar, a post commonly referred to as Judge's Marshal.

During April 1975, the accused approached Elizabeth Mwale, the 1st prosecution witness, whose brother

was in prison on a charge of Aggravated Robbery. The accused then told Elizabeth that on payment of K1,000, he could do something to alleviate her brother's predicament by removing from the relevant case record, certain material statements. After that Elizabeth narrated the story to the 6th prosecution witness, Brian Kaswa Nkonde, who happened to be her boy friend. News about this was leaked to the police. Without the accused's knowledge the police secretly arranged with Elizabeth and Brian that money be paid to the accused in Brian's house on a particular day and at a particular time. On the appointed day, a tape recorder was set in Brian's lounge - the police taking cover in an adjoining room. The accused then came into the house and was soon engaged in a conversation with Brian who was collaborating with the police. The conversation - incriminating on the part of the accused - was tape-recorded. In the meantime the amount payable had been bargained for and finally reduced from K1,000 to K500. The accused was prepared to accept K200 cash as part payment since Brian had told him he could not afford to pay at once the full sum. Brian counted the K200 composed of K20 notes and then handed that sum to the accused; the accused placed it into the inside right pocket of his jacket. At the sight of the police shortly afterwards, the accused who already knew one of them, took to his heels and in the course of his flight he succeeded in disposing of

the money that had been handed to him a few minutes previously. After chase, the accused was apprehended and although he denied the charge he was convicted, principally because of the conclusive nature of the tape-recorded confession. His appeal to the High Court, as indicated, was dismissed.

(iii) Confessions by Conduct

This is conduct from which guilt may be inferred. The conduct may be active or passive. Active conduct includes actions and demeanour, while passive conduct includes silence and some other forms of omission. Both kinds of conduct will now be examined.

Active conduct relates to such things as the running away of an accused person after the commission of a crime; the concealment of the fruits of a crime or things used in its commission, and any curious behaviour (other than the silence) of the accused when reference to the subject is made in his presence.

Over two centuries ago, for example, the English common law regarded flight so strong a presumption of guilt that in cases of treason and felony it carried, in addition to any other form of punishment, the forfeiture of the accused's goods. 27. This aspect of the common law was, of course, later abolished by statute. 28.

In this country the traditional (or customary) court system universally regarded the running away of a person after the commission of a crime as cogent evidence in proof of his guilt. This would arise,

for instance, if a person carrying dead game and walking away from a nearby game pit trap belonging to someone else and there being clear indications that the game had just been removed from the pit trap, dropped the game and fled at the sight of a person or on being greeted or asked how he had come by the game. In those circumstances the running away inescapably signified guilt conscience as to the commission of the offence of theft and the culprit was adjudged accordingly.

Apart from the Local Courts in Zambia, flight after the commission of an offence, as we have just observed in Mulolo's case, 26, still plays a relevant part in determining whether or not the fleeing person is guilty of the offence charged. In an unreported case of Lawrence Kabwe v The People, 29, the trial court, on a charge of defilement of a girl aged twelve, accepted the prosecution evidence which alleged that the accused had been found by a watchman flagrante delicto and that as soon as the watchman appeared on the scene both the accused and the prosecutrix ran away but were caught after a whistle had been blown. On the prosecutrix being medically examined semen was found on her. The running away on the part of the accused was, in the circumstances of the case, regarded by the trial court as a manifestation of guilt. The accused was convicted as charged.

In November 1975, the Supreme Court of Zambia heard and determined an appeal in the case of Elalia Chala and Another v The People, 30. In the presence of her sister the complainant was relieved, at a bus stop, of her money (i.e. K200) by two confidence tricksters - the appellants. Eight days later, the complainant and the sister saw both appellants near a taxi rank whereupon one of them covered his face with a piece of newspaper while the other looked away. As the women approached the appellants, they (the appellants) got up and walked in different directions. One woman followed the first appellant and the other followed the second. But as they did so both appellants increased their tempo by walking fast. Assistance was sought and the appellants were apprehended and charged with theft from the person of the complainant. At their trial both appellants conceded their presence at the taxi rank, but denied having behaved curiously as alleged by the prosecution. The prosecution evidence was believed and they were convicted. On appeal to the Supreme Court, their learned counsel submitted that the trial court had not fully considered that there could have been an honest mistake made in regard to the identity of the appellants. But the Supreme Court held that that issue had, in fact, been considered by the trial court and ruled out. It then said that -

"The conduct of the appellants on the identifying occasion, bearing in mind their denials in regard to that conduct which was not believed, fully entitled a magistrate to express himself to be satisfied that the identification by the complainant

could safely be relied on; the complainant had opportunity not only to observe the appellants but also to speak to both of them in the course of the commission of the offence."

That appeal was dismissed.

Mabushe Muhau Silumesi v The People (31) is a more recent decision of the Supreme Court. It is an aggravated robbery case in which the appellant, on arrival at a bus stop in Mengu, was asked by two youngmen, one of whom being the appellant, to go with them to Maramba Harbour. He agreed. He was able to see both of them clearly as they went past some brightly lit shops. As the journey progressed the appellant's companion threatened the complainant with a knife and demanded money. The complainant dropped his suitcase containing clothes and blankets. The matter was at once reported to the police. At about 0600 hours on the following day, the complainant visited Maramba Harbour and there saw the appellant and recognised him as one of the two assailants. On seeing the complainant the appellant immediately ran away but as hard luck would have it he fell over a canoe and was apprehended. At the time of his apprehension the appellant was wearing a spotted shirt and carrying a pair of shoes which items were identified by the complainant as part of his missing property. The court found that the complainant's suitcase, together with its contents, had been taken by the appellant and that both assailants had acted in concert. The evidence against the appellant was overwhelming and so he lost his appeal. In this case the appellant's conduct at the harbour was not that of an innocent man.

It has earlier on been said that active conduct includes concealment of the fruits of a crime or things used in its commission. This aspect merits a brief discussion. Concealment is of two kinds, viz., innocent safe-keeping and dishonest safe-keeping. We are here, of course, concerned with dishonest safe-keeping.

Some time ago, a large sum of money disappeared from a company. One of a number of persons suspected to have stolen the money was eventually traced, apprehended and charged with theft by servant. In spite of being subjected to rigorous interrogation the accused remained tight-lipped. The police then approached the accused's wife who, apparently after being visited on two or three occasions, gave them a lead as a result of which a 200 pound bag of mealie meal was examined and concealed in it was found a lot of currency notes. When the police told the accused of their discovery he immediately made a confession. The case is unreported.

In Musinga Jean Pierre v The People, 32, the appellant was convicted of aggravated robbery it being alleged that whilst in the company of four other persons unknown and while armed with firearms they broke into a house and stole a large quantity of goods, and as they did so they threatened violence to a servant of the householder. The appellant was convicted. Dismissing his appeal against conviction the Supreme Court observed:

"The other item of evidence of some significance was that in the appellant's room a revolver was

found hidden in a bag of mealie meal. It must be said at once that there was no evidence to show that the revolver was one of the firearms carried by the assailants on the night of the robbery, but its concealment and its possession when added to the other evidence to which we have referred represents an additional piece of evidence which a court is entitled to take into account. It must be stressed, however, that standing alone the finding of the firearm would not have been sufficient to connect the appellant with the offence. "

It is evident that had that revolver been one of the firearms carried by the assailants at the material time, the discovery of its concealment in the bag of mealie-meal, in the appellant's room, would have provided the necessary nexus.

A curious illustration is to be found in the case of John Mubanga and Another v The People, 33. Both accused were charged with aggravated robbery involving about K70.00 in cash. The evidence upon which they were convicted revealed that they had attacked the complainant in a toilet at a market place and had relieved him of the cash he had in his possession. The complainant shouted for assistance and the accused were caught and conveyed to a police station where they were charged. When asked by the police if they had any money on their persons they replied they had none. They were then searched and a sum of K20.06 comprising two K10.00 notes and six ngwee was found concealed between the buttocks of one accused and K4.20 was found in the pocket of another's underpants. A small sum of money was recovered by a witness from the toilet immediately after the commission of the crime. It is obvious that the rest of the money must have been dropped or in some way been disposed of by the accused who were virtually caught redhanded. The trial court found that that was "not a natural way and

manner of carrying money", and that the money in fact belonged to the complainant. On the evidence presented to the trial court, conviction was inevitable.

Before passing on to passive conduct, reference will be made to Rex v Haggerty and Others, 34, which was an English case in which remarkable marks of emotion signifying guilty conscience manifested themselves.

When a police officer spoke to the accused in connection with a murder committed four years previously, he immediately turned pale and would have fainted had water not been administered to him.

This now brings us to passive conduct, such as silence in the face of an oral accusation or failure to reply to a written allegation which may amount to an implied admission of the truth of the matter asserted.

In the 10th edition of Phillips and Arnold on the Law of Evidence published in 1852, 35, the law on the subject was stated as follows :

"In some cases, it is allowable to give evidence of written or verbal statements made, or of facts done, by others, and then to show the party who heard or read the statements, or saw the acts done, was affected by them - for the purpose of using his conduct, expressions or demeanour as evidence against him by way of admission. The evidence in such cases is altogether presumptive in its quality and character This species of evidence is very commonly used in criminal cases, although it appears to be somewhat inconsistent to hold, that the prisoner's silence on hearing an accusation is evidence against him, when his denial of the charge upon such an occasion would not be evidence for him."

Forty years later, Cave J., said in R v Mitchell, 36:

"Undoubtedly, when persons are speaking on even terms and a charge is made, and the person charged says nothing, and expresses no indignation and does nothing to repel the charge; that is some evidence to show that he admits the charge to be true."

The comment of Professor Sir Rupert Cross on the above quotation is that it states "a broad principle of common sense". 37. With this comment the Court of Appeal agreed in R v Chandler, 38, to which we shall return in a moment.

The historical exposition on the matter would not be complete without reference being made to R v Christie, 39, in which Lord Atkinson expressed himself as follows:

"....the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated, save so far as he accepts the statement, so as to make it in effect his own He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part. It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him and constitute evidence from which an acknowledgement of guilt may be inferred by them."

However, the mere fact that a person, having been charged with an offence and given a formal caution, declines to say anything does not necessarily constitute evidence of a prima facie nature tending to prove his guilt. That this is so

is illustrated by R v Chandler, 38. That was a case in which the appellant had been charged and convicted of conspiracy to defraud. At his trial evidence was given by a Detective Sergeant regarding an interview at a police station at which the sergeant asked the appellant certain questions in the presence and hearing of his (the appellant's) solicitor. He testified that in answer to one question the appellant stated he was "not prepared to say anything", and to others he said: "No comments", or "Don't wish to comment.". He was then cautioned, the questioning continued, and the appellant answered some questions and refused to make any comment when asked others. In summing-up the judge said:

"Where a man has been cautioned and thereafter remains silent that is absolutely within his right and he cannot be adversely criticised for so doing, because he accepts that part of the invitation in the caution to remain silent. Even if he is not cautioned it is part of what is known as his common law right to decline to answer questions. In those circumstances you must ask yourselves whether he did so in the knowledge that he was exercising his common law right to remain silent or whether he remained silent because he might have thought that if he had answered, he would in some way incriminate himself."

The appellant was convicted but he appealed on the ground that the judge had misdirected the jury. Delivering the judgment of the court Lawton L.J. said at page 589 :

"The law has long accepted that an accused person is not bound to incriminate himself but it does not follow that a failure to answer an accusation or a question when an answer could reasonably be

expected may not provide some evidence in support of an accusation. Whether it does will depend upon the circumstances";

and at page 590 he continued:

"When the Judge's comments are examined against the principles initiated in both Regina v Mitchell, 36, and Rex v Christie, 39, we are of the opinion that the defendant and the detective sergeant were speaking on equal terms since the former had his solicitor present to give him any advice he might have wanted and to testify, if needed, as to what had been said. We do not accept that a police officer always has an advantage over someone he is questioning. Everything depends upon the circumstances. A young detective questioning a local dignitary in the course of an inquiry into alleged local government corruption may be very much at a disadvantage. This kind of situation is to be contrasted with that of a tearful housewife accused of shoplifting or of a parent questioned about the suspected wrongdoing of his son. Some comment on the defendant's lack of frankness before he was questioned was justified provided the jury's attention was directed to the right issue, which was whether in the circumstances the defendant's silence amounted to an acceptance by him of what the detective sergeant had said. If he accepted what had been said, then the next question should have been whether guilt could reasonably be inferred from what he had accepted. To suggest, as the judge did, that the defendant's silence could indicate guilt was to short-circuit the intellectual process which is to be followed."

It was held that the judge's comments were not justified and could have led the jury to a wrong conclusion and the conviction was therefore quashed.

During the second half of 1976, the Judicial Committee of the Privy Council heard and determined an appeal in Parkes v The Queen, 40. The appeal was against a dismissal of the Court of Appeal of Jamaica of an appeal against conviction on a charge of murder. The appellant and the deceased, a young woman, lived in separate rooms of a house owned by the deceased's mother, Mrs. Graham, who herself lived in an adjoining house. At the appellant's trial Mrs. Graham testified how, one morning, she had found her daughter bleeding from two stab wounds from which she died three days later. Acting on what her daughter told her she proceeded to the appellant who had a closed knife in his hand. She accused him of having stabbed her daughter, by saying to him, "What she do you - why you stab her?". The appellant made no reply. She repeated the accusation but the appellant still made no reply. Mrs. Graham then boxed him twice and seized him by the waist band of his trousers and threatened to keep him there until the police came. At this point the appellant opened the knife and Mrs. Graham saw blood stains on its blade. The appellant aimed to strike Mrs. Graham with the knife and when she raised her arm to defend herself her finger was cut necessitating five stitches.

The appellant who called no witnesses made an unsworn statement in which he explained, inter alia, that he had said nothing in reply to Mrs. Graham's accusation because

he did not know what she was speaking about.

It was argued both in the Jamaican Court of Appeal and in the Judicial Committee of the Privy Council that the trial judge had fallen into error by directing the jury that failure on the part of the appellant to reply to Mrs. Graham's accusation that he had stabbed her daughter, coupled with his behaviour immediately after the accusation had been made, were matters from which the jury could infer that he had accepted the truth of the accusation. Cited in support of that argument was the following passage from the case of Hall v Regina, 41.

"It is a clear and widely known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. A fortiori he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordship's view silence alone, on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation. "

Hall's case was one in which a police officer communicated an accusation to the accused who was aware of the officer's involvement in the investigation of a drug offence.

After quoting from a speech of Lord Atkinson in R v Christie, 39, Lord Diplock, who delivered the opinion of the court in Parkes' case, 40, said :

"In the instant case there is no question of an accusation being made by or in the presence of a police officer or any other person in authority or charged with the investigation of the crime. It was a spontaneous charge made by a mother about an injury done to her daughter. In circumstances such as these, their Lordships agree with the Court of Appeal of Jamaica that the direction given by Cave J. in R v Mitchell, 36, (to which their Lordships have supplied the emphasis) is applicable :

'Now the whole admissibility of statements of this kind rests upon the consideration that if a charge is made against a person in that person's presence, it is reasonable to expect that he or she will immediately deny it and that the absence of such a denial is some evidence of an admission on the part of the person charged, and of the truth of the charge. Undoubtedly, when persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true.'

Here Mrs. Graham and the appellant were speaking on even terms. Furthermore, as Smith CJ. pointed out to the jury, the appellant's reaction to the twice repeated accusation was not one of mere silence. He drew a knife and attempted to stab Mrs. Graham in order to escape when she threatened to detain him while the police were sent for.

In their Lordships' view, Smith CJ. was perfectly entitled to instruct the jury that the appellant's reaction to the accusation, including his silence, were matters which they could take into account along with other evidence in deciding whether the appellant in fact committed the act with which he was charged."

For these reasons their Lordships advised Her Majesty that the appeal be dismissed.

Hall's case, 38, and Christie's case, 36, were, inter alia, quoted with approval by the Supreme Court of Zambia when it decided, in 1973, the case of Ali and Another v The People, 42. There the appellants were convicted of stealing a motor vehicle. The appeal against the first appellant was dismissed because the evidence against him was overwhelming. As regards the second appellant the only evidence against him rested on an identification made in court at their trial supported by his silence in the face of a statement implicating him alleged to have been made in his presence by the first appellant. A police officer who had been engaged in investigating the case gave evidence that when the first appellant made a statement in the presence of the second appellant accusing him of having been the driver, at the material time, of the stolen vehicle, the second appellant made no reply. When the police officer's note book was produced, however, it transpired that there was nothing whatever in it about the second appellant.

Placing reliance upon Hall's case, 38, the Supreme Court held that even if the statement had been made as alleged, the second appellant's silence in the circumstances of that case could not be held to support another witness's evidence of the second appellant's identification since there was "nothing in the record to suggest that the second appellant accepted the allegation of the first appellant by any positive conduct, action or demeanour". Allowing the appeal of the second appellant the court said:

"As in Hall's case, 38, all that is relied on is his mere silence. The learned judge erred in drawing an adverse inference from this silence."

In paragraphs 28 and 30 of their Eleventh Report, the Criminal Law Revision Committee (Cmd. 4991) of England "propose to restrict greatly the so-called right 'of silence' enjoyed by suspects when interrogated by the Police By the right 'of silence' we mean the rule that if the suspect when being interrogated omits to mention some fact which would exculpate him, but keeps this back until the trial, the court or jury may not infer that his evidence on this issue at the trial is true... "

Conduct (in the context in which we are using the word) is invariably a manifestation of fear. Human beings are differently constituted as regards moral courage and fear may sometimes spring from causes unrelated to guilty conscience. For instance, a suspect accused of stealing an article from a supermarket may find it necessary to seek safety by flight for fear that if he does not run

away he might be subjected to physical violence at the hands of an instant justice mob. In his summing-up to the jury upon the trial of Professor Webster for murder, Chief Justice Shaw of Massachusetts said:

"Such are the various temperaments of men, and so rare the occurrence of the sudden arrest of a person upon the charge of a crime so heinous, that who of us can say how innocent or guilty man ought or would be likely to act? or that he was too much or too little moved for an innocent man? Have you any experience that an innocent man, stunned under the mere imputation of such a charge, will always appear calm and collected? or that a guilty man, who by knowledge of his danger might be somewhat braced up for the consequences, would always appear agitated or the reverse." 43.

In the light of what we have observed, it can be said that whether fear proceeds from the conscience of guilt or from the apprehension of undeserved embarrassment (or disgrace) and from deficiency of moral courage, is a question of fact depending upon the circumstances of each individual case.

It is, therefore, respectfully submitted that the Eleventh Report of the Criminal Law Revision Committee of England goes too far. If an accused has the right to maintain silence at his trial, when the time to speak has come, and Counsel may not and Judges seldom comment on such silence, then it seems generally illogical to draw any inference of guilt from his silence before the trial. An inference may well be drawn from silence in the face of, say, accusations from another on level terms, see for instance, Parkes case, 40; to draw any inference of guilt from silence in the face of police interrogation, however, conflicts with the concept of the burden of proof in a criminal trial.

2. Effect of a Confession

A confession duly made and satisfactorily proved is, in general, sufficient to warrant a conviction. 44. In Rex v Warwickshall, 45, it was said that a voluntary confession of guilt, if it be full, consistent, and probable, is justly regarded as evidence of the highest and most satisfactory nature. And, in R v Baldry, 46, Erle, J. put it thus:

"When a confession is well proved it is the best evidence that can be produced. "

The principle upon which confessions are received in evidence is that on account of self-interest, the main spring of human conduct, a person of sound mind will not make a statement against his interest unless he believes it to be true. 47. Therefore, what a person admits against himself is presumed to be true. Taylor observes that -

"All reflecting men are now generally agreed that, deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the law, their value depending on the sound presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience." 48.

In the case of Mwape v The People, 49., the appellant had been convicted of aggravated robbery. The prosecution evidence, which was accepted by the trial court, conclusively established that a shop had been broken into and a large sum of money as well as merchandise stolen therefrom. A night watchman on guard duties at the shop was assaulted by assailants, stabbed, tied up and carried some distance away from the shop and there laid "face

down in the mud". Another witness was also tied up and laid next to the watchman. The incident occurred at night and both witnesses were unable to observe who the assailants were, with the result that they could never identify them. Although there was ample independent testimony to show that the crime charged had been committed, it was necessary, as it is in every criminal case, to prove that the crime had been committed either by the accused alone or by him together with other persons, known or unknown, if a conviction was to be secured. It turned out that the only fatal evidence against the accused was his own written confession which was satisfactorily proved and therefore properly admitted in evidence. The confession was long and detailed; in it the accused revealed how the raid on the shop had been planned and executed and how, at the end of the raid, he had driven to a distant Sub-Boma, 50., in a getaway motor vehicle that carried not only the accused's confederates but also the stolen property. He was convicted as charged, but on appeal the Supreme Court reduced the charge against him to one of store-breaking and theft. In that case it was as clear as daylight that in the absence of the confession there could have been nothing upon which to found the conviction against the accused. In R v Abraham Erumesi, 51, a Nigerian case, the accused was charged with murdering a woman. He had made a statement to the police confessing the commission of the crime, but beyond this there was very little else known by the Prosecution of the facts and circumstances surrounding the death of the deceased. Since there were other circumstances which showed beyond any reasonable doubt that a criminal act had been committed by someone and as the accused's confession

was fully consistent and probable it was held that he could be convicted on such a confession.

However, where there is no other evidence than the confession of the accused that the offence charged has been committed by someone, that is to say, some other independent evidence of the corpus delicti, such confession, in the absence of evidence of confirmatory nature, is not generally sufficient to justify a conviction for the offence of murder (manslaughter or bigamy) 52.

Courts are usually reluctant to accept and record a plea of guilty on charges for grave crime, and will generally advise the prisoner to retract it and to plead not guilty. 53. But where the prisoner refuses to withdraw his confession, something that is very rare, there is no alternative but to accept it, even in the case of murder. As to procedure on a plea of guilty to murder, see R v Vent, 54.

In Zakaria v The King, 55, the learned Defence Counsel, as well as the learned trial Judge, advised the accused not to plead guilty to the charge of murder. In spite of that advice, however, the accused pleaded guilty and made a long confession to the court which, accepting the plea, convicted him, without further evidence. The Court of Appeal for what was then Rhodesia and Nyasaland (which later became a Federation) held that while under English law it is proper to accept such a plea, it is desirable here that the courts should let the prosecution lead evidence pointing clearly and unequivocally to the accused's guilt in a murder case, however clear the plea. The question whether a confession requires corroboration will be discussed

later (in Chapter IV).

It is a fundamental rule of evidence that a confession (or statement) made by one defendant is evidence against himself; it is not, generally, evidence against a co-defendant unless the co-defendant either expressly or by implication adopts the confession (or the statement) and thereby makes it his own. 56. This subject will be examined in greater detail in the next chapter.

Whereas a confession made by a defendant is received in evidence upon the rebuttable presumption that a person will not make an untrue statement against his own interests, no such presumption arises in respect of a statement made in his own favour, otherwise it would be a simple matter for him to fabricate his defence in advance and then make a statement to reinforce such defence.

Although a conviction can be based on a confession, the degree of credit due to confessions must be estimated according to the particular circumstances of each case. Therefore, the fact that a confession has been admitted in evidence does not preclude the court from estimating what weight it will put on such confession; all the circumstances of the case must be taken into consideration.

3. Historical Observations

Prior to the exportation of the English law to Zambia the inhabitants of the country had their own methods of administering criminal justice. Confessions were an important aspect of the

system. There was no discrimination between voluntary and involuntary confessions and so, as long as there was an acknowledgement of guilt on the part of a defendant, it was not necessary to inquire how this had come about. More often than not fear had a free rein over suspects and defendants alike, and in that way confessions were made. For example, a person who steals green maize from another's field or steals game from another's game trap would, soon or sometime after an announcement is made about the theft, confess his guilt for fear of catching a disease or of exposing himself and his family to unnecessary hardship, through witchcraft. In serious cases, such as homicide, a defendant would be obliged to drink a concoction of a semi-poisonous or fully poisonous substance. Survival, normally through vomiting, was regarded as a manifestation of innocence, whereas failure to survive amounted to a confession, an automatic conviction and the resultant capital punishment. In the light of such measures it is not surprising that indulgence in criminal activities was not commonplace. Invariably flight was construed to mean guilty conscience. Flight might occur, for instance, if at a beer party or some such occasion an aggrieved person who is dancing armed with a spear, a firearm, etc., indicates that he knows the one who has committed a crime against him and that he would now harm or even kill such person; if a person runs away from the gathering, the fleeing person would be regarded as the culprit. In those days it was inconceivable to suppose that an innocent person would flee in the face of an accusation that he had committed a crime. This notion still lingers on although, of course,

it does not necessarily follow that a fleeing person is the real culprit, for he might be running away from an instant justice mob which is falsely accusing him of having committed a crime.

In England too, during the earliest stage of the use of confessions in criminal cases, there was no restriction upon the reception in evidence of confessions. In those days coercion, physical or moral, was apparently tolerated.

There is the horrific history of the infamous Star Chamber, the existence of trial by combat, by fire, and even by the boiling water method. Such methods were also apparently used elsewhere on the continent of Europe, for example, during the Spanish Inquisition.

Nokes gives us a glimpse of the history of the rule against forced confessions as we read the following passage. 57.

"Few subjects in the law of evidence present a more perplexing inconsistency than the emergence of the rule of forced confessions. In the early fourteenth century the King's justices heard evidence as to whether a confession was extorted; but about the same time torture was approved to compel a recalcitrant prisoner to submit to trial by jury and was practised for this purpose until the eighteenth century. Many years earlier Sir Thomas Smith and Sir Edward Coke were boasting that torture to induce confessions was unknown to the law. However, this was a prevarication. It is true that statutes on treason in the sixteenth century permitted a conviction on a confession only if it were given willingly without violence; but this would suggest that some confessions were extorted; and when he wrote, Coke well knew

that the Council authorised torture for extracting information. Nevertheless, this boast does seem to have been true in relation to confessions in ordinary cases.

Again while Justices of the Peace were interrogating suspected persons throughout the seventeenth century, there was growing up the rule, possibly as a reaction against the prerogative of torture before 1640, that an accused person need not answer incriminating questions in court. Yet during the same period confessions on examination by justices were admissible in evidence, apparently without any consideration whether they were induced by show of authority, intimidation or even less reputable means. "

On the other hand, Jardine, 58, tells us that up to about the middle of the 1600s at least, the use of torture to extract confessions was common and that the confessions so obtained were employed evidentially without scruple. He further informs us that the last instance of torture in England of which he can find any trace, occurred in the year 1640.

In R v Baldry, 46, decided in the middle of the eighteenth century, the court discussed at some length the policy of the confession rule and reviewed all the leading previous cases. Parke B, pointed out that -

"In order to render a confession admissible in evidence it must be perfectly voluntary; and there is no doubt that any inducement in the nature of compromise or of a threat held out by a person in authority vitiates a confession".

Fortyone years later, Cave J. said in R v Thompson, 59.

"By the law of England to be admissible a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime it is admissible. If it flows from hope or fear extorted by a person in authority, it is inadmissible."

R v Baldry, 46, cited with approval by the Privy Council in

R v Ibrahim, 10.

NOTES

1. Wong Chin Kwai's case (1900) 3 Hong Kong L.R.89.
2. State v Reinhart (1895) 26 Ore. 466.
3. Rex v Decker (1929) A.D. 171.
4. Pakala Narayana Swami v The Emperor, (1939) 1 All E.R. 296.
5. Redde, Criminal Evidence 16th Ed. p. 35.
6. Lebourne, Concise Law Dictionary 5th Ed. p. 81.
7. Wigmore on Evidence, Part III, 3rd Ed. p.238.
8. Stephen, Digest 36.
9. Edward Munda v The People, S.C.Z. No. 47 of 1971 p.204.
10. Ibrahim v R. (1914) A.C.599 at p.609.
11. R v Godinho (1911) 7 Cr. App. R. 12.
12. See Island Mkhawa v The People, S.C.Z. No. 35 of 1971.
13. R v Masengale Sundashi, (1946) 4 N.R.L.R. p.56.
14. The People v Lukas Chiwaula, S.C.Z. No. 26 of 1970, p.175 at p.176.
15. Chiockulu v The People, (1972) Z.R.46.
16. David Diloya and Another, S.C.Z. Application Nos. 141 & 171 of 1975.
17. R v Lansen Manuwa, 5 N.R.L.R. 176; also Mbopelaghe alias Kiyuni v R, (1960) S.C.N.R. 47; (1968) R & N. 588.
18. R v Topulu, (1935) N.R.L.R. (1931 - 40) p.9.
19. R v Okello Byensi s/o Anyoro, 5 E.A.C.A. 140.
20. Criminal Procedure and Evidence by Celia Hampton (1973 Ed.) at pp. 23, 435 - 436.
21. Taylor on Evidence, (11th Ed.), Vol. I, para. 862.
22. History of England by Macaulay, Vol.I Ch.5, p.583; see also footnote (c) at p. 582 of Taylor on Evidence, 11th Ed., Vol. I.

23. Lester and Howard v Regina, (1960) R. & N. 700.
24. Joseph Chansa Thomson v The People, HNA Judgment No. 490 of 197
- 25.(a) See Norman Birkett (The Life of Lord Birkett of Ulverston
By H. Montgomery Hyde).
- 25.(b) *ibid* at p. 448.
26. Roy Mulolo v The People, HNA Judgment No. 541 of 1975.
27. See Foster's Discourses on the Crown Law, Disc. I
Chapts. (ii) and (iii) pp. 272 - 286.
28. 7 & 8 Geo. Cap. 28 which was repealed by the Statute
Law Revision Act, 1888, (51 & 52 Vict. Ch. 57).
29. Laurence Kabwe v The People, Ndola Criminal Case No.
L.C. 1725/76 at pp. 5 & 9; S.C.Z. Appeal No. 212 of 1976;
retrial was ordered by the Supreme Court on two grounds -
 - (a) inadequacy of *voire dire* and
 - (b) trial court's failure to extend to the accused the
proviso of section 138 of the Penal Code, Cap. 146.
30. Eladio Chola and Another v The People, S.C.Z. Appeal
Nos. 138 & 139 of 1975.
31. Naboche Muhau Silumesi v The People, S.C.Z. Judgment
No. 154 of 1976.
32. Musinga Jean Pierre v The People, S.C.Z. Judgment
No. 14 of 1976. The firearms used in the commission
of the crime were not proved to be firearms within
the meaning of the Firearms Act and so the capital
sentence was not impossible..
33. John Mubanga and Another v The People, Case No. HL/47
of 1975.
34. Rex v Haggerty and Others, 6 Celebrated Trials, 19.
35. Phillips & Arnold on the Law of Evidence, 10th Ed.
(1852) Vol. 1, p. 334.

36. R v Mitchell, 17 Cox c.c. 503, at p. 508.
37. Cross on Evidence, 4th Ed. p. 189.
38. R v Chandler, (1976) 1 W.L.R. 585, at p. 590;
(1976) 3 All E.R. 105.
39. R v Christie, (1914) A.C. 554, at p. 565.
40. Parkes v The Queen, (1976) 3 All E.R. 380;
The Times October, 1976.
41. Hall v Regina, (1971) 1 All E.R. 322, at p. 324.
42. Ali & Another v The People, (1973) Z.R. 232.
43. Denis's Rep. 406 (1850).
44. R v Eldridge (1821) Russ & Ry 440; R v Sullivan
16 Cox 347; R v Sykes, 8 Cr. App. R. 233.
45. Rex v Warwickshall, (1783) 1 Leach, c.c. 263.
46. R v Baldry, (1852) 2 Den. 430.
47. R v Turner, (1910) 1 K.B. 346.
48. Taylor on Evidence, 11th Ed. Vol. I para. 865.
49. Kuape v The People, S.C.Z. Judgment No. 8 of 1976.
50. Sub-boma here means a small administrative town.
51. R v Abraham Erumesi, (1959) U.R.N.L.R. 258.
52. R v Sykes, 8 Cr. App. R. 238; R v Sullivan 16 Cox 347;
R v Nuwoso, (1965) Z.R. 91 at pp. 94 & 101.
53. 2 Halle 255.
54. R v Vent, 25 Cr. App. R. 55.
55. Zakaria v The King, (1947) L.N.C.R. 38.
56. See R v Rhodes, (1960) 44 Cr. App. R. 23;
R v Rudd, (1948) 32 Cr. App. R. 138.

57. An Introduction to Evidence by Nokes 3rd Ed. pp. 292 - 293.
58. 1836, Jardine's Use of Torture in the Criminal Law of England, 58 ff.
59. R v Thompson, (1853) 2 Q.B. 112.

CHAPTER II.

METHODS OF CONVEYING A CONFESSION

1. Accused

In the ordinary course of things a confession is made by the accused himself, not by a third party, in that basically, as we have been able to see, a confession is received in evidence upon the presumption that on account of self-interest, a sane person will not consciously and voluntarily make a statement against his own interests unless he believes it to be true. If it were not so third parties, because of spite or ill will, might be making statements incriminatory of the accused on which such accused persons might be convicted.

There are three types of cases, however, when such an incriminatory statement may validly be made, namely, when a co-accused or accomplice or agent gives evidence. This will now be briefly examined.

2. Co-accused (including an accomplice)

The general rule is that a confession made by one accused person, whether in the presence or absence of a co-accused, is only evidence against the confessor unless the co-accused expressly or by implication adopts the confession and thereby makes it his own.

In R v Rogers and Tarran, 1, for example, Crighton J. excluded certain verbal statements made by Rogers during a police interview on the ground of inadmissibility, but there is a difference if a co-accused gives evidence on oath or affirmation in the course of a joint trial because what he says then becomes evidence for all the purposes of the case including the purpose of giving evidence against his co-accused. 2. The prejudicial nature of a co-accused's statement may found an application for

a separate trial.

The following passages appear at paragraph 1297 of Archbold's Criminal Pleading, Evidence and Practice, 37th Edition:

"Where prisoners are tried jointly, and one of them gives evidence on his own behalf incriminating a co-prisoner, the prisoner who has given the incriminating evidence is not placed in the position of an accomplice, nor does the rule of practice with regard to the corroboration of an accomplice apply to such a case. The rule applies only to witnesses called for the prosecution: R.v. Barnes and Richards. 3. The Position, however, is different where one co-prisoner gives evidence against another co-prisoner and his evidence for that purpose becomes evidence for the prosecution against that co-prisoner. In such a case a warning with regard to corroboration of the evidence of an accomplice is proper: R. v Rudd. 4. Moreover, whether a witness can properly be classed as an accomplice or not, in practice it is desirable that a warning similar to that which is given in the case of accomplices should be given if the witness, whether a co-defendant or a Crown witness, may have some purpose of his own to serve: R.v Prater, 5; R v. Russell."6

In the case of R v. Rudd, 4, Humphreys J. had this to say (at p. 149):

"While a statement made in the absence of the accused person by one of his co-defendants cannot be evidence against him, if a co-defendant goes into the witness box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of giving evidence against his co-defendant".

Again, in the case of R. v. Barnes & Richards 3A, Lord Hewart, L.C.J. had this to say:

"One looks in vain for any case in which it has been decided that, where prisoners are tried together on the charge of being jointly concerned in the commission of a crime, and they elect to

give evidence, and in so doing one of them happens incidentally to give a piece of evidence which tells against another of the accused, it is requisite that the warning as to the evidence of accomplices should be given."

In R. v. Russell, 6A,, Diplock, L.J. said, however:

"but it is said that there is a rule of law or a rule of practice that the jury must be warned in terms of the need for corroborative evidence. In the view of this Court, where a co-defendant gives evidence there is no rule of law to that effect. The correct position is set out in the case of prater⁵ in which this court (at p. 86 and 466 of the respective reports) said: 'It is desirable - and I emphasise the word 'desirable' - in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given.',"

Although the evidence given by one accused on oath or affirmation is admissible against himself and his co-accused, the same rule does not apply to unsworn statements made by him. It seems that the evidence of this exclusionary principle is justified upon the basis that an unsworn statement made by a co-accused at his trial which incriminates the accused is in that same category as an (unsworn) statement made before trial to the police. An accomplice, being an admitted socius criminis, and therefore an infamous person, scarcely enjoys the confidence of the court and the practice is to regard his evidence with a considerable degree of suspicion. The basis for this distrust lies in the fact that he may be expected to save himself from punishment by procuring the conviction of others. Hoping for clemency in the matter of his own wrong doing, or perhaps actuated by a desire to drag others down to his own ruin, he may reasonably be expected to fabricate a story which bears little resemblance to the truth. The practice,

therefore, is not only to approach with great caution a confession or any other evidence of an accomplice that implicates the accused person but also to look for corroboration. However, statements made, like acts done, by one of several accomplices or co-conspirators in pursuance of a common design, are evidence against the others 7.

3. Agent

The general rule is that a principal is not criminally responsible for the act of his agent, nor an agent for the act of his principal. It follows, therefore, that neither can be affected by a confession made by the other. However, if an accused expressly or by implication authorises another person to make a statement on his behalf, such statement, if made, will be admissible as evidence against the accused as much as if he had made the statement himself 8. Thus, in R v. Downer 9, it was held that in order to make a client criminally responsible for a letter written by his solicitor, it is not sufficient to show that such letter was written "in consequence of" an interview but it must be shown that it was written in pursuance of "instructions" given by the client.

4. Officer of a Corporation

Although a corporation is a legal personality, it is an artificial one and must therefore act through human agents. Thus, an officer of a corporation, usually a director, may make a confession to a third party which binds the corporate body. The basis upon which such confession is received is not that the confession of another can be used against the corporation, but that the confession of such an officer is the confession of the corporation itself. It would appear that an extension of the principle covers any servant of a corporation

the particular acts which are the basis of a criminal charge. 10.

5. Through an Interpreter

A confession made by an accused person through an interpreter merits a separate discussion.

Where a confession made by an accused person to the police is taken down in writing, it is better that it should be written down in the language in which it is made. It often happens that statements have to be made to the police through an interpreter. Where an interpreter is used in the taking down of an accused's confession, the confession is inadmissible in evidence unless the person who interpreted it is called as a witness to testify that the confession produced correctly represents what was stated by the accused at the time. If the interpreter did not himself record the confession, it is necessary also to call the person who recorded it.

In R v Attard, 11, the accused, a Maltese who did not speak or understand English, was charged in England with murder.

In the course of the case for the Prosecution, the Crown proposed to call evidence by a Police Officer, of an interview which he had conducted with the accused through an interpreter who had acted as a mediator between the non-English-speaking accused and the English-speaking but non-Maltese-speaking Police Officer. The defence submitted that since neither the Police Officer nor the accused could understand what the interpreter said to the other, the evidence of the Police Officer was inadmissible and that only the interpreter could give evidence of what had transpired between the accused and the Police Officer. Gorman J. upheld the submission saying that the evidence of the interpreter ought not to be given through the mouth of the Police Officer in the witness box. Consequently

the police officer's evidence in relation to the interview was held inadmissible. As a direct result of that case the Home Office sent out a circular letter to Chief Officers of police stating that -

"It will be necessary in similar cases in the future to ensure that the interpreter is available to give evidence as to the oral statements made by the accused, as is already done in the case of written statements. It will be desirable that, whenever practicable, the interpreter should make his own notes of the interview for use in the event of his being called to give evidence. Failing this, the interpreter should be asked to initial the record of the interview made in the notebook of the police officer conducting the interview, so that it can be used by the interpreter to refresh his memory when giving evidence." 11A

In R v. Lesa Matunda, 12, a police sergeant who took the accused's statement gave evidence and after reference to the charge, warn and caution, the sergeant continued -

".... he made a statement in Chibemba. I took it down as he made it, translating it into English, as I did so. I produce the statement. It is signed by me. I read this statement over to the accused, in Chibemba, he agreed that it was correct. He then imprinted his right thumb ..."

Cox, C.J. held on review that where a statement is made in the accused's own language it should be recorded in that language and that that is the document which should be read back to the accused and signed by him if he agrees with it. Any translation into English should be prepared separately and does not require authentication by the accused.

It is, however, improper, to use a Police Officer as the accused's interpreter because of the danger that such Police interpreter might be prejudiced against the accused in that his sympathies normally lie with the Prosecution rather than with the Defence. This is illustrated by the practice which has grown up in Zambia concerning the production of confessions in criminal trials.

Invariably the police officer produces a translation as well as the original statement: the court should not automatically accept the translation as that puts the police officer in the category of an interpreter, whereas the court has the services of a qualified, duly sworn, interpreter at hand in court. The general practice is that the police officer reads out the original statement, the court interpreter then interprets it, the court comparing such interpretation with the police officer's translation and making notes on the record of any differences (i.e. where the police officer does not agree with the court interpreter and does not wish to amend his translations). The court is, of course, bound by the court interpreter's interpretation. Sometimes the police officer simply reads out the statement in the language in which it was made and recorded; the court interpreter then translates what is read out into the English language, and the court records it. The vernacular statement forms part of the case record as an exhibit.

NOTES

1. R v Rogers & Tarran, (1971) Crim. L.R. 413.
2. R v Rudd (1948) 32 Cr. App. R. 138 explaining R v Meredith and Others, 29 Cr. App. R. 40; and R v Garland, 29 Cr. App. R. 46.
3. R v Barnes and Richards, 27 Cr. App. R. 154.
- 3A. R v Barnes and Richards, (1940) 2 All E.R. 229 at p. 232.
4. R v Rudd, 32 Cr. App. R. 138, at p. 143.
5. R v Prater (1960) 2 Q.B. 464; 44 Cr. App. R. 83, C.C.R.
6. R v Russell (1968) 52 Cr. App. R. 147.
- 6A. *ibid* at pp. 149-150
7. R v Watson (1917) 2 Stark 116 at p. 140;
R v Desmond (1868), 11 Cox c.c. 146;
R v Blake (1844) 6 Q.B. 126.
8. R v Mallory (1884) 13 Q.B.D. 33.
9. R v Downer (1880) 43 L.T. 445; (1880) 14 Cox c.c. 406.
10. *cf.* Kirkstall Brewery Co. v Furnace Ry. L.R. 9 Q.B. 460.
11. R v Attard (1959) Cr. App. R. 90.
- 11A. See Archbold Criminal Pleading Evidence and Practice 38th Ed. para. 346a.
12. R v Lesa Matunda (1951) 5 N.R.L.R. 569.

CHAPTER III

PERSON TO WHOM A CONFESSION IS MADE

In general it is immaterial to whom a confession is made. Thus a confession may be made to a person in authority or to a person not in authority.

1. Extra-judicial Confessions

We have already seen that an extra-judicial confession is one where the accused either expressly or by implication confesses to his guilt out of court.

(a) (i) Inducement

In the language of Eyre CB. -

"a confession, forced from the mind by the flattery of hope, or by torture or fear, comes in so questionable a shape when it is to be considered as the evidence of guilt that no credit should be given to it; and therefore it is rejected". 1,

Similarly, Clayden CJ. said in Mbopelleghe v R., 1A, that a confession by an accused is inadmissible in evidence against him under the common law unless it is proved not to have been induced by threat, promise, or any other means whereby his will to remain silent has been overborne. Thus, a confession is inadmissible if it was caused by any inducement of a temporal character held out to the accused by a person in authority. The inducement may take a variety of forms, but

invariably it takes the form of a promise, pressure, threat or the use of actual violence. According to the recent English case of R v Middleton, 2, the categories of inducement are not closed.

Until 1967, the view was widely held that if the inducement related to something other than the charge or contemplated charge against the accused, the confession would be admissible. In that year, however, the House of Lords held in Commissioners of Customs and Excise v Harz and Power, 3, that where a confession has been induced by a threat or promise, it is inadmissible even if the threat or promise does not relate to the charge but to some other matter.

The inducement may result from a combination of the accused's words and those of the person in authority. Thus, in R v Zaveckas, 4, the accused, who was in custody, said to a police officer : "If I make a statement, will you give me bail now?", to which the officer replied: "Yes". It was held that the accused's subsequent confession was inadmissible.

In Zondo and Others v the Queen, 5, one of the leading cases on the law of confessions in Zambia, Charles J., reiterated the observations of Cave J.,



in R v Thompson, 6, that any inducement necessarily raises hope or fear, or both, in the person affected by it and, that in that sense it constitutes a threat or a promise of some kind, impliedly if not expressly. Charles J., then cited, with approval, the statement of Hayes J., in the Irish case of R v Johnston, 7, which was to the following effect. All that the common law requires is that the confession in pais be voluntary. But that word is to be understood in a wide sense, as requiring not only that the prisoner should have free will and power to speak, or refrain from speaking as he may think right, but also that his will should not be warped by any unfair, dishonest or fraudulent practices to induce a confession upon the principle that, in the tenderness of modern times, judges have uniformly refused to receive in evidence a confession that has been either certainly or probably procured by a promise of good or a threat of evil; by exciting a hope of reward or a fear of temporal punishment other than that which the law has prescribed for the offence charged. So also, a confession will be rejected if it appears to have been extracted by the presumed pressure and obligation of an oath or by pestering interrogatories or if it appears to have been made by the party to

rid himself of importunity, or if, by subtle and, answering questions, as those which are framed so as to conceal their drift and object, he has been taken at a disadvantage, and thus entrapped into a statement, which, if left to himself, and in the full freedom of volition, he would not have made. These are cited as instances of the several ways in which a confession may be unfairly and improperly secured, so as to deprive it of its character of being voluntary. It is manifest to everyone's experience that, from the moment a person feels himself in custody on a criminal charge, his mental condition undergoes a very remarkable change, and he naturally becomes more accessible to every influence which addresses itself either to his hopes or fears.

It is obvious that once the full scope of the word "inducement" is recognised and appreciated, prolonged police questioning may amount to an inducement, since it may excite the hope in the victim that it will be discontinued if he makes a statement and the fear in him that it will continue if he does not make a statement. However, the mere asking of a question or a number of questions of a suspect or an accused by a person in authority will not be an inducement provided such questioning does not amount to an importunity of the suspect or

accused to answer. In each case, whether the questioning has amounted to an inducement, that is, to an overbearing of the will of the person questioned to remain silent, must be determined by reference to the nature and extent of the questioning, the circumstances in which it took place, and with regard to the onus being upon the prosecution to negative the use and effect of any inducement.

In R v Ananias, 8, Beadle C.J., stated, in subjective terms, the following test of admissibility :

"Was or was not the confessor's will swayed by external impulses improperly brought to bear upon it which negated his freedom of volition? "

Whether or not what is said or done constitutes an inducement depends upon the circumstances of each given case. The character of the person in authority, his tone of voice and attitude and other circumstances may influence the court in deciding whether an inducement to confess was made. An inducement may be expressed in bold terms or in veiled terms. In Gwisayi and Dube v R, 9, the Federal Supreme Court of the then Federation of Rhodesia and Nyasaland found that there was a veiled inducement held out to the first accused in that he had been told by a person in authority

that there was a strong case against him and it was in his interests to confess. The second accused had been told, also by a person in authority, "that it would be good for him, or might be good for him, if he did make a confession." But in both cases, the question whether or not there had been any undue influence was treated as academic because both accused denied having made any statements at all.

In Muwowo v the People, 10, Charles J., observed that a confession is not voluntary if -

"it is made as a result of the accused's will to remain silent having been overborne by a person in authority inducing him to break silence or to continue speaking or to change his story by the use of violence, intimidation, persistent importunity or sustained or undue insistence or pressure or any other means whereby hopes of material benefit or fears of material evil, immediate or ultimate, are aroused Hence, though questioning of a suspect or accused by the police is not necessarily an inducement, it becomes so when conducted in a manner or to an extent which overpowers his will to remain silent or not to answer as desired."

In R v John Kahyata, 11, the accused made a written statement to a police officer after arrest, charge and caution; then, when he was taken to a village by the same police officer,

three days after arrest, the accused made an oral statement and, finally, when the accused was formally charged and cautioned by the same police officer, he made a written statement.

Charles J., said :

"The most obvious forms of inducement which vitiate confessions are physical torture and prolonged questioning under the so called third degree process whereby the will of a suspect not to incriminate himself is broken. Yet those forms of inducement do not operate by holding out any hope or fear as to the accused's position in relation to the charge or accusation but operate by inspiring the unfortunate victim with the hope of relief from immediate physical or mental pain."

All the three statements were found to have been made as a result of prolonged questioning which had been conducted in a manner or to an extent that the accused's will was broken. Consequently, all these statements were held inadmissible.

In Chicose v the People, 12, the appellant who had allegedly been assaulted by the police just over a month previously was again before a police officer. That police officer "banged" a table and told the appellant that he already had had a story from him could he repeat the statement he had previously given to the police. When the appellant recalled the beating allegedly suffered previously at the hands of the police and fearing

that similar treatment might be meted out to him, he made a confession. This confession was held to be inadmissible on the ground that the inducement that had been held out to the appellant on the previous occasion still persisted when the confession was made. We shall return to this case when the next sub-heading is discussed.

Confessions obtained by religious or moral exhortations have been held to be admissible. Such exhortations include the following:

"Don't run your soul into more sin, but tell the truth." 13.

However, according to Mell, C.B., in R v Jarvis, 16, the words - "you had better ('tell the truth, say more about it', etc.)" seem to have acquired "a sort of technical meaning" as an inducement and are therefore objectionable for they suggest that it would be better for the accused to say something, or that the best thing he could do would be to confess.

Although this appears contradictory to the decision in R v Reave, 14, where the expression - "you had better, as good boys, tell the truth" was held not to be an inducement, in point of fact, there is no contradiction because the formula - "you had better tell the truth" when qualified by the addition of the words "as good boys" reduces the expression as a whole to an appeal to morals.

The following expressions have been held to have an exclusionary effect:

"Unless you give a more satisfactory account, I will take you before a magistrate." 17.

"If you don't tell me, I will send for a constable". 18.

"If you don't tell me you may get yourself into trouble and it will be worse for you." 19.

"Tell me where the things are and I will be favourable to you." 17.

"It will be better for you to split and not suffer for all of them." 20.

In R v Smith, 21, it was held that -

"In deciding whether an admission is voluntary the court had been at pains to hold that even the most gentle threat or slight inducement will taint a confession".

and in Commissioners of Customs and Excise v Harz and Feber, 2, Lord Reid said:

"It is true that many of the so-called inducements have been so vague that no reasonable man would have been influenced by them, but one must remember that not all accused are reasonable men or women; they may be very ignorant and terrified by the predicament in which they find themselves".

(ii) Duration of Inducement

Where an inducement has been made to a person accused of a crime and that person subsequently makes a confession, the confession will, nevertheless, be admissible if the impression produced by the inducement is clearly shown to have been removed, for instance, by lapse of time or because of some intervening cause. Thus, if the impression that a confession is likely to benefit the accused has been removed from his mind, what he

says will be evidence against him, notwithstanding the fact that he has been induced to confess. In the Irish case of R v Doherty, 22, a constable told an accused in the morning that it would be better to tell the truth, and a confession made in the evening of the same day to another constable after a proper caution, was held inadmissible. In R v Smith, 23, it was held by the Courts-Martial Appeals Court that the appellant's first confession to the Regimental Sergeant-Major was inadmissible as having been induced by a threat, but that his subsequent oral and written confessions to the Sergeant of the Special Investigation Branch were admissible, as by that time the effect of the original threat had been dissipated. On appeal, however, the Court of Criminal Appeal in England said that the principle to be deduced from the case is really this:

"That if the threat or promise under which the first statement was made still persists when the second statement is made, then it is inadmissible. Only if the time limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement."

In R v Williams, 24, the accused, a soldier, caused a disturbance at the London flat of a homo-sexual civilian for whom the accused had been arranging introductions to

other soldiers. On June 7, 1935, the accused made a statement, not under caution, to the military authorities concerning the unlawful activities of the homo-sexual in which he implicated himself. Before making the statement, however, he had been told that the Army authorities were anxious to have full information about the civilian homo-sexual - "a thorough nuisance to all regiments" - and that if he could supply this information no prosecution would be brought against him by the Army authorities, but that the Army authorities could not speak for the Civilian authorities. It was made clear to him that any statement he made would be likely to be used as a witness statement in any prosecution that might follow as a result, against the homo-sexual civilian. On July the 19th, over a month later, the accused was interviewed by the police. Prior to the making of a further statement in which he confirmed the truth of the first statement, he was twice cautioned but at no stage was he informed that he might be charged or prosecuted. At the accused's trial the prosecution conceded that the first statement was inadmissible. His Honour Judge Rogers ruled that the second statement was also inadmissible. He observed that the fact of a promise was perhaps harder to dissipate than that of a threat and that he was not satisfied that the original inducement had by that date been dissipated.

On March 24, 1936, the High Court of the then Northern Rhodesia, made a decision in one of the early leading cases on the subject of duration of an inducement. The case was Rex v Singombe and Siababwa, 25, where two accused were arrested on October 24, 1935. There was presumably no, or very little, evidence against them because they were not formally charged with any offence. Statements very prejudicial to the accused, and, in the absence of which no charge could possibly have been preferred, were made by both Singombe and Siababwa to a police detective called Benjamin. It is significant to note that at the time of the hearing of the case, Detective Benjamin had since been dismissed or discharged as unsuitable for membership of the police force. Sometime later the accused were brought before another police officer - Constable Humphrey - for the purpose of being formally charged with murder. It is obvious that Constable Humphrey must have been aware that statements which were not admissible in evidence had been made to the detective, because these statements constituted the only vestige of evidence, at least against Singombe, upon which a charge of murder, or any charge, could have been formulated. Indeed, this fact was admitted by Constable Humphrey. Constable Humphrey conscientiously observed every rule of procedure laid down for his guidance. In his judgment, Fitzgerald, Ag.J., said:

"A question of considerable importance has been raised here. The Solicitor-General, with characteristic fairness, has intimated that he did not call the detective Benjamin, because he had satisfied himself that the statements made to the detective by the prisoners were inadmissible in evidence against them. In such cases this court must assume, in favour of the prisoners, that they were induced to speak by improper means.

The statements now tendered are in effect, though not in detail, similar to the ones made to the detective; they were made to Constable Humphrey after the statutory caution had been given. The administration of the caution is not denied by the prisoners, but it is contended on their behalf that the statements were made before the delusive hope or fear that induced the original statements to the detective had been effectually dispelled.

Now, it is a fundamental principle of justice that a confession, and this in effect is what the statements were, to be admissible must be free and voluntary, that it must not be extracted by any sort of threat or violence nor obtained by any direct or implied promise, however slight, nor by the exertion of any improper influence. In order to ensure this end both the statute law and the settled practice of the courts insist on the rigorous observance of certain conditions precedent to the admissibility of the statements at the trial of accused persons. One of these safeguards is where a confession has been obtained from a prisoner by undue means any statement made afterwards by him under the undue influence of that confession is inadmissible unless there is clear evidence to show that the impression caused by the undue means has been removed.... In determining whether an inducement has

ceased to operate it will be material to consider the nature of such inducement, the time and circumstances under which it was made, the situation of the person making it, the time which is intervening".

Later, the learned acting judge continued :

"here the prisoners had already been induced by improper means to compromise themselves. ...

Now if I admit these statements I must conclude that the effect of this technical caution which, in the absence of any simple explanation, must have been meaningless, was such as completely to remove the effects of the influence exerted by Benjamin who, at this period, was still in the police force and present near enough for the prisoners to see him.

.... speaking for myself, I shall examine all confessions made to the police with extreme caution

It follows that I am not satisfied that the influence which had been created on their minds by the detective Benjamin had ceased to operate when they made these statements which I must now rule to be inadmissible."

The above dicta are of great interest in as much as they were made some twenty-three years before R v Smith, 27.

More recently, the Court of Appeal for Zambia heard and determined an appeal in Nalishwa v the People, 26. In that case the appellant had been convicted of murder. He had been seen talking to the deceased during the evening she was last seen alive. He made a long statement to the police (under caution) in which he described the events immediately preceding her death; he confessed that he had killed her. Shortly afterwards he was formally charged with murder and he made a reply admitting the charge. On appeal the Court of Appeal said :

"It is settled law that where two confessions are made and the first is held not to have been freely and voluntarily made, the second would be equally inadmissible, even though there has been no fresh inducement, unless it is shown that the previous inducement had ceased to operate on the mind of the accused."

After quoting Lord Parker C.J., in R v Smith, 27, the court continued:

"On the facts of the present case it is quite clear that the two statements must stand or fall together, and it is unfortunate that counsel for the appellant, perhaps because he assumed that a second trial within a trial must inevitably lead to the same ruling as the first, decided not to register an objection; it is desirable in such cases that the defence ask the court to record that objection is taken to the second statement on the same grounds as applied to the first but that a second trial within a trial is not required (unless, of course, additional or different threats or inducements are alleged to have been present)".

The court then held that on principles of fair conduct, the trial court ought to have considered whether that was a proper case in which to exercise its discretion and exclude the evidence of the first confession. This had not been done and as the Court of Appeal could not say that had the matter been considered, the trial court must in any event have admitted the first confession; the Court of Appeal was unable to allow that confession to stand. Since both confessions stood or fell together, the second confession also fell away.

Similarly, in the Nigerian case of The Quson v Dabu Huske, 25, the appellant had made two statements. On appeal, the Federal Supreme Court of Nigeria held that in all the circumstances of the case, it could not safely be said that the learned trial judge would, having properly directed himself, certainly have found that the inducement made to the appellant, had been dissipated at the time of the second confession; or, even if he had so held, that he would necessarily have convicted the appellant on this subsequent confession alone. The appeal succeeded.

In the first quarter of 1977, the Supreme Court of Zambia heard and determined the case of Shirwa v the People, 12. The appellant who had been convicted of the murder of one Edgar Madzokoro (both of whom were Rhodesian Nationalists) denied to the police complicity in the disappearance of the deceased. An inspector of police then "banged" a table and said:

"Tell the the truth because we already got a story from you; tell us the statement you gave at force headquarters, even now we can show you the statement. "

This was on June 12, 1975. The appellant recalled the alleged beating he had previously received on the 8th or 9th of May, (just over a month previously) and feared similar treatment. He then made a statement similar to the one he had made at the police headquarters in which he admitted killing the deceased while assisted by others. The following is a passage from the ruling of the trial court in a trial within the trial :

"Assuming that the accused was beaten up on the 9th May, 1975, did that fear continue to operate on his mind on 12th June, 1975? In my view as the statement was taken one month after the alleged beatings the fear that the accused might have had spent itself by effusion of time."

Mr. Gani for the appellant argued that there was evidence on record to the effect that, as a result of the beating allegedly suffered at the hands of the police, the appellant had sustained an injury to the ears which continued to persist until September 1975, thus covering the period when the appellant made the confession to the police (on June the 12th). After reviewing the authorities of R v Smith, 27, and Nalishwa v the People, 26, the Supreme Court said:

"In the instant appeal, although only one statement was produced before the court, the appellant's evidence as to making a statement in May was not negatived. We hold the view therefore that in considering whether the earlier threat or inducement had dissipated at the time of the taking of the confession statement, the principles of law laid down in Smith, 27, and in Nalishwa, 26, are applicable.... we are of the view that whether or not an earlier threat or inducement has dissipated at the time of the making of a subsequent statement, is an issue of fact for the trial court. It was not contraverted that the appellant had defective hearing while in custody and that this defect was present at the time of the recording of the confession statement and that the defect persisted up to the time of trial."

The Supreme Court found that there were misdirections in the case and in effect said that it was not in a position to hold that had the trial court properly directed itself, it must inevitably have held "that the effects of the beating which the appellant received in May had dissipated when he made the statement in June...". As the prosecution case mainly hinged upon the inadmissible confession, the conviction had to be quashed.

Finally, where an attempt to procure a pardon was unsuccessful, and a confession was made after the accused knew that a pardon had been refused, the confession was held to be voluntary.²⁹

It is now convenient to consider the term "person in authority".

(b) Person in Authority

In order to operate effectively, the inducement must emanate from a "person in authority". By a "person in authority" is meant anyone whom the accused might reasonably suppose to be capable of influencing the course of the prosecution.

The law upon this point was declared by Parke, B., when he delivered the judgment of the Crown Cases Reserved (comprising a bench of five judges including himself) in R v Moore, 30. In that case, Mr. Creasy for the prisoner submitted that we must not look at the case as lawyers, but consider what would be the natural result of an inducement by a "person in authority". The test is not, he argued, who is the party to set justice in motion? but, who is likely to have influence? Who is most

natural that the prisoner should look to? Delivering the judgment of the court, Parke, C., said:

"Perhaps it would have been better to have held, when it was determined that the judge was to decide whether the confession was voluntary, that in all cases he was to decide that point upon his own view of all the circumstances, including the nature of the threat or inducement, and the character of the person holding it out, altogether; not necessarily excluding the confession on account of the character of the person holding out the inducement or threat. But a rule has been laid down in different precedents by which we are bound, and that is, if the threat or inducement is held out, actually or constructively, by a person in authority, it cannot be received, however slight the threat or inducement (may be). And the prosecutor, magistrate, or constable, is such a person; and so the master or mistress may be. If not held out by one in authority, it is clearly admissible but it is only where the offence concerns the master or mistress that their holding out the threat or the promise renders the confession inadmissible In the present case, the offence of the prisoner, in killing her child or concealing its dead body, was in no way an offence against the mistress of the house (to whom the confession had been made); she was not the prosecutrix then, and there was no probability of an indictment for that offence."

Accordingly, the court ruled that the maid servant's confession of murder of her child was inadmissible, though induced by her employer - the mistress. Had the offence,

for instance, been committed against the person or property of the employer, the latter would clearly have been held to be a "person in authority".

The term "person in authority", therefore, includes persons engaged in the apprehension, prosecution, or examination of, or otherwise directly connected with the proceedings against the accused, such as a police officer, a prison warden, or other person having the custody of the accused, a magistrate, the prosecutor or someone acting on behalf of the prosecutor or in the presence and without the dissent of such a person. Thus in the recent English case of R v Moore, 31, (decided in 1972) a father told his sixteen-year old son: "you had better make a statement and then we can go home". This was said in the presence and within the hearing of a police officer who made no dissent; the son made a confession. At his trial the learned trial judge refused to hold a trial within the trial on the ground that no promise or threat had been held out by the police officer. The son's conviction that followed was quashed on appeal because his father had acted in the presence of a "person in authority" who had not dissented.

The term "person in authority" extends to cover wives (or husbands) and advocates of such persons as are earlier referred to under this part. For example, in R v Upchurch, 32, a servant was charged with arson of his employer's house and the

exhortation of the employer's wife to confess because it might save the accused servant's neck led to the rejection of the accused's confession - the contention that the prosecutor's wife was not a "person in authority" having failed.

In R v Tapalu, 33, one Manta, a boma kapasu (i.e. a Chief's messenger or public officer) of Chief Kasempa, took the accused into custody. The accused then made statements in answer to questions put to him by the kapasu. At the accused's trial on a charge of murder, it was common ground that no caution had been administered to the accused, and that at least one of the statements made had been in answer to a question or questions put to him by the kapasu. But the prosecution contended that the Judges' Rules are applicable to police officers only, that the kapasu is not a police officer, and that statements made to him are not subject to the limitation imposed by the Rules. Fitzgerald Ag. J. said:

"In the more settled parts of this territory, criminal investigations are conducted and arrests are made by members of the Northern Rhodesia Police Force. In other areas where no police are stationed, these functions are performed by district messengers, and in Native Administration Districts, native law and custom provides, and the Government approves, that these duties should devolve on the kapasu. It seems to me that the underlying principle of the Rules that statements made by persons in custody to anyone whose duty it is to inquire into alleged offences and make arrests shall only be admitted

in evidence when certain satisfied conditions have been fulfilled. This being so, it is immaterial whether the arrest was made by a police officer, a district messenger or a kapasu provided that the person making it had authority to do so."

Accordingly, the kapasu was held to be the equivalent of a police officer (and was therefore a "person in authority").

In R v Sunson Manuwa, 34, the position of a village headman was considered by Lewey, C.J. The accused was charged with the murder of a young girl who had died as a result of having been sexually assaulted. It would appear that the village headman sent for the accused at the insistence of the deceased's parents in order to question him about the accusation made by the parents. Subsequently, the accused made a confession to the headman at an interview attended by the deceased girl's parents and the girl herself as she was then still alive - there being no suggestion that, at that time, anyone expected her to die. The accused's parents also attended the interview. For the prosecution, it was submitted that the headman was merely conducting an investigation to ascertain what the civil damages were and to see if there was anything to report to the Chief with a view to criminal proceedings. It was further contended that he had no power to try a case; he was not a kapasu; he had no power to arrest beyond that of a citizen to restrain the escape of a criminal and that he was not acting as a policeman and that no threat or promise had been made.

The defence replied that the headman was a "person in authority"; that he had disciplinary power in the village as the Chief's representative; that he was in a position of awe and respect; that he had told the accused he must answer and that the question of civil proceedings was a hidden inducement.

In its judgment, the court said at page 177:

".... it is clear that the headman was in some sense a person having authority in the village. But it was so only to a limited extent, for I am satisfied from the evidence that he was neither a kapasu nor a member of the Native Authority; and that he was really a representative of the Chief, appointed by the Chief - to use the headman's words 'to look after the village'. I accept the evidence that the headman had no powers of arrest beyond those of an ordinary citizen, and no authority to decide even a civil case in the village. His powers, where there was any village trouble, would seem to have been limited to investigating, and to making a report to the Chief."

and later at page 178 the court continued:

"Even assuming that the headman had restricted authority, the question remains as to whether in fact he used any threat or any promise so as to induce the prisoner to make a statement to him.....

Even taking the evidence at its strongest, I cannot find that words were used which the prisoner could have taken to constitute a threat.

..... I find that in the circumstances there was no promise or threat by the headman which so affected the mind of the prisoner as to induce him to make an admission or a confession to the headman. I have already found that the headman was in no sense in the position of a policeman."

The statement made to the headman was then held admissible. Similarly, in Mbopelache v the Queen, 1A, the Federal Supreme Court held that a village headman is not a "person in authority". The appellant had been convicted of murdering a young child, born to his wife, the father of the child being the appellant's brother. The crime was committed in a small village in what is now Malawi. On the night the child was killed, the appellant left the house; the child was then found outside the house strangled, and the appellant could not be seen. Next morning, the village headman sent two persons to search for the appellant. They did not find him. In the afternoon, however, he returned to his father's house for food, and, when the two men approached, he ran away. Chase was given and he was caught; a piece of cloth from his head was bound around his wrists, and he was taken to his house, where the village headman, the appellant's father and wife and other people, were present. The village headman then asked the appellant a question to the following effect: "Why did you run away? Is it you who has killed the child?" The appellant said he had killed the child.

In answer to the argument that the confession should not be admitted because it was made after arrest, without caution, and in answer to a question by the village headman, Clayden, F.J. said at page 511B:

"It is quite clear that the headman of this little village was nothing to do with the police. And I can see no

justification for this or any other court to extend the directions (i.e. the Judges' Rules) to persons other than police authorities".

And, later at page 512C, the learned judge continued:

"In Nyasaland the Judges' Rules are applied in regard to police authorities. Whether they should be applied to court messengers, see R v Kantunda, 35, or to the son of a Chief, as was decided in R v Edwin, 36, are questions which do not arise in this case. I can see no warrant to apply them to a village headman. The courts, by applying the law that a confession, to be admissible, must be voluntary, and by considering as part of that issue of voluntariness all the circumstances in which it is made will be doing what they are entitled to do."

In the same case, Tredgold, C.J., said at page 520C and G:

"In R v Edwin, 36, the 'authority' concerned was a Chief. On the rather scanty information contained in the report I am not prepared to say that the decision to exclude the evidence was wrong. In R v Kantunda, 35, the learned Chief Justice of Nyasaland pointed out that every case of this kind must be considered on its own facts and merits. With this I respectfully agree. The judgment referred to Edwin's case, 36, with disapproval

In this case the village headman, had so far as I am aware, no statutory powers to arrest. He was merely acting as a good citizen and the senior person then present in trying to discover the person responsible for a recent felony. There was material on which the learned Judge could properly find, as he did, that the accused's statement was voluntary, and there was no reason to suppose that anything unfair or improper had been done to him."

with due respect to the decisions in both Manuwa's case, 34, and Mbopaleshe's case, 1A, it is submitted that the better view would seem to be that a village headman is to be regarded as a "person in authority". The reason for the expression of this view is that a headman is the head of the village administration and as such he sees to the maintenance of law and order within his village jurisdiction. As Lewey C.J. rightly put it in Manuwa's case, 34, when there is any trouble in the village, it is within the headman's powers to investigate and make a report to the Chief. Homicide falls within the campus of trouble and as such it must be investigated or caused to be investigated by the village headman and then reported to the Chief who in turn might draw the attention of the police to the matter. Further, it would appear, as we saw at the beginning of the sub-heading now under discussion, that a village headman is one whom the accused might reasonably suppose to be capable of influencing the course of the prosecution.

In the People v Makhokha, 37, a case involving smuggling, Hoodley, R.M., as he then was, regarded a customs officer as falling within the category of a "person in authority".

For the reasons already stated above, it is submitted that the term "person in authority" includes a watchman, a security guard, a local court messenger, a district messenger and a special constable, to mention but a few instances.

There is no authority which clearly defines who does and who does not come within the category of a "person in authority". In R v Wilson, 38, counsel sought to put forward the principle that a "person in authority" is anyone who can reasonably be considered to be concerned or connected with the prosecution whether initiator, conductor, or witness. But the English Court of Appeal found it unnecessary to accept or reject the definition "save to say that we think the extension to a witness is going very much too far". (we shall very shortly return to this case). Indeed, in Dakinanan v R, 39, a trusted friend was, without the knowledge of the accused, corroborating with the police. The accused made a statement to him. The Privy Council held that the mere fact that a person may be a witness for the prosecution does not make him a "person in authority".

In R v Wilson, 38, R v Marshall-Graham, 38, the case(s) to which we said we would shortly return. The house of one Captain Birkbeck was broken into and some of his property stolen. The police, having failed to discover who was responsible or to recover all the property, the householder contacted David Alan Wilson, who had worked at his house, and offered him a reward for information with regard to the whereabouts of the property still missing. The householder made statements disparaging the police and indicated that he was acting on his own and that what he was doing was independent of any police inquiry. Wilson then admitted that he had most of this property under his control and described how he and his co-appellant had broken into the house and stolen it. Wilson told the householder

that he could have his missing property back for 2500. He introduced Marshall-Graham, the second appellant, to the householder. 2300 was then paid to Wilson who in turn handed over to the householder a substantial part of the missing property. The balance of 2200 was to be paid later. When Wilson failed to produce the balance of the missing property, the householder interviewed the second appellant and offered him the balance of the promised reward for information with regard to that property. The second appellant then admitted his part in the burglary, and said that he had handed over virtually all the property to his co-appellant, Wilson. At their trial on a charge of burglary and larceny, it was submitted, unsuccessfully, that the oral statements of both appellants to the householder were not voluntary.

Allowing the appeals, the Court of Appeal held that the householder, who was, and was known to be, the owner of the house that had been broken into and of the stolen property, and who was therefore the loser and the person most interested in the matter, was "a person in authority", even though he would probably have been unable to stultify a prosecution that had been brought or to prevent a prosecution from being instituted; and that the oral statements were inadmissible because the prosecution had not proved beyond reasonable doubt that they had not been made as a result of an inducement from a "person in authority". The convictions of both appellants were accordingly quashed but convictions for receiving were substituted by virtue of section 5(2) of the Criminal Appeal Act, 1967.

2. Judicial and quasi-judicial Confessions

A judicial confession is one made by an accused before a court; it may be made in answer to a charge and when this happens it takes the form of a plea of guilty; it may be made during committal proceedings; or it may be made before a coroner. A quasi-judicial confession is one made out of court to a judicial officer. Such a confession is common in, for instance, the East African countries, India, Sri Lanka and South Africa.

(a) Confessions to or before a Judicial Officer

In Zambia, out-of-court confessions made to judicial officers are few and far between. It is, therefore, proposed to confine ourselves under this sub-heading to confessions made in proceedings before the court.

(1) Committal Proceedings

These are commonly referred to as preliminary inquiries. Such proceedings take place in subordinate courts, in particular, the magistrates' courts, and are provided for under Part III of the Criminal Procedure Code, Chapter 160. Where an accused is charged before an examining magistrate and, at the close of the case for the prosecution, the magistrate decides, on the evidence, to commit him to the High Court for trial, the charge is read and explained to him, and the magistrate then cautions him in the following words or words to the like effect :

"This is not your trial. You will be tried later on in another court and before another judge, where all the witnesses you have heard here will be produced and you will be allowed to question them. You will then be able to make any statement you may wish or to give evidence on oath and to call any witnesses on your own behalf. Unless you wish to reserve your defence, which you are at liberty to do, you may now either make a statement not on oath or give evidence on oath, and may call witnesses on your behalf. If you give evidence on oath you will be liable to cross-examination. Anything you may say, whether on oath or not, will be taken down and may be used in evidence at your trial." 40.

Anything that the accused then says is taken down in writing, read over and signed by him and also by the examining magistrate. At the trial, the accused's statement, whether or not it is an admission of guilt or of facts from which guilt may be inferred, may be given in evidence.

(ii) Trial Court

In proceedings before the trial court, an accused may plead guilty (to a charge against him) at the very outset, that is to say, when the plea is taken, or at any time before judgment is given in the matter. A plea of guilty

is a species of confession; it must be unequivocal.

In pleading guilty to a charge, the accused must admit all the essential elements of the offence charged. 41.

Where an accused, having pleaded guilty, disagrees with a part of the statement of facts vital to conviction, he is retracting and a plea of "not guilty" should be entered. 42. But if the aspects of the statement of facts with which he disagrees are not material, then the plea of guilty stands.

In the recent case of The People v Masiasani, 43, the defendant had been convicted in a magistrate's court of assault occasioning actual bodily harm upon his own plea of guilty. What had happened was that when the defendant was called upon to plead to the charge he freely admitted having assaulted the complainant and caused him actual bodily harm. The Public Prosecutor then read out the facts of the case, which, in the main, revealed that the defendant had found the complainant and his wife seated by the road side discussing family matters and that he had forced them to undress and to make love in his presence; when they were reluctant to do so he fired in the air a gun which he had in his possession in order to induce them to do what he had asked them and that in addition to that he beat the complainant and thereby occasioned him actual bodily harm. The defendant accepted the facts as read out but denied having forced the couple to make love in his presence, or having fired into the air in order to induce them to make love, as alleged. Without further ado,

the trial court convicted him and passed sentence. At the hearing of the case on review by the High Court, the defendant's learned counsel argued that when the defendant denied having fired the gun into the air or forced the couple to make love, a plea of not guilty should have been entered and that failure to enter such a plea resulted in a mistrial. In its judgment, the High Court said this:

"It is trite law that where a plea of guilty is equivocal the court must enter a plea of not guilty and proceed to hear evidence. In Luka v Mulumba, 40 Somerhough J., held that where an accused, having pleaded guilty, disagrees with a part of the statement of facts vital to conviction he is retracting and should be invited to change his plea to one of 'not guilty', and in R v Zamba Chinda, 44, Robinson, J., held that if after pleading guilty the accused does not agree with the facts of the case 'in some essentially material point' a plea of not guilty should be entered and the case tried. If the accused does not agree with the prosecution outline of the facts in some minor or other details which cannot adversely affect the admitted commission of the offence, it does not matter. In the case under review, the defendant was charged with assault occasioning actual bodily harm. He admitted having assaulted the complainant and causing him actual bodily harm. These essential elements were contained in the statement of facts as read out by the Public Prosecutor and were admitted by the

defendant. This means, therefore, that the defendant admitted the substance of the charge as well as the material facts of the case. In those circumstances, it was perfectly proper for the learned trial magistrate to proceed to convict the defendant as charged. It is evident ... that the aspects of the facts which the defendant disputed were not in any way material, and could therefore not adversely affect the admitted commission of the offence charged. It follows, therefore, that there was no misdirection on the part of the trial court in relation to the entry of the plea of guilty (which was unequivocal) and the resultant conviction."

A plea of guilty may be withdrawn with the leave of the court at any time before sentence is passed, but not later. It is, however, entirely a matter for the discretion of the court whether a plea shall be withdrawn or not. 45.

It has been said that a man cannot plead guilty and then later seek to go back on his plea merely because he realizes for the first time the serious possible consequences of his act. 46.

(iii) Coroner

As a matter of practice, the deposition of an accused taken at an inquest before a coroner is admissible in evidence upon the trial of the accused, provided it is properly proved. In R v Bateman, 47, on a trial for manslaughter, the learned trial judge admitted as evidence against the accused his

Deposition on oath taken by the coroner at the inquest held on the deceased.

(b) Confessions in Other Cases

As a general rule any statement or confession by the accused on oath in another case is admissible against him unless it was made in answer to questions which he was improperly compelled to answer, in spite of his being under no obligation to incriminate himself. 48. In R v McGregor, 49, the appellant and his wife were charged jointly with receiving. At the first trial at which the jury acquitted the wife, but disagreed with regard to the appellant, the appellant had stated on oath that he had had possession of the goods stolen and had put them in his wife's shopping bag (where they were found by the police when a car of which the appellant was the driver and in which the wife was a passenger had been stopped). At the re-trial of the appellant, the prosecution called a police officer who had been present at the first trial to prove these admissions by the appellant. A transcript of the evidence of the first trial was supplied to the Defence and Defending Counsel cross-examined the police officer to bring out further statements and explanations on the part of the appellant. The appellant did not give evidence at the re-trial. The Court of Appeal (Criminal Division) of England held that admissions by the appellant on the first trial had been properly admitted in evidence on the re-trial since they were clearly evidence of possession, and that the admission of the evidence had not been unfair in the general circumstances of the administration of justice.

(c) Confessions in East Africa, India, Sri Lanka and South Africa

In the East African countries of Kenya, Uganda and Tanzania, the Evidence Acts are modelled on the Indian Evidence Act of 1872. In terms of sections 28 and 29 of the Kenya Evidence Act, 1969:

- " 28. No confession made by any person whilst he is in the custody of a police officer shall be proved as against such person, unless it be made in the immediate presence of -
- (a) a magistrate empowered or appointed by or under the Courts Ordinance to hold a subordinate court of any class; or
 - (b) a police officer of or above the rank of, or a rank equivalent to, sub-inspector.

29. No confession made to a police officer shall be proved against a person accused of any offence unless such officer is -
- (a) of or above the rank of, or a rank equivalent to, sub-inspector; or
 - (b) an administrative officer holding first or second class magisterial powers and acting in the capacity of a police officer. "

In Uganda, prior to the Evidence (Amendment) Decree No. 25 of 1971, section 24(1) of the Uganda Evidence Act (Cap. 43 of the 1964 Edition of the laws) made a somewhat similar provision to the Kenyan Evidence Act save that the police officer had to be above the rank of corporal. Now, however, the position is the same as in Tanzania and India, namely, that no confession made to a police officer is admissible. 46a.

Sections 24(1) and (2) of the Uganda (Amendment) Decree No. 25 of 1971 provides that -

"24.(1) No confession made to a police officer shall be proved against any person accused of any offence.

(2) No confession made by any person whilst he is in the custody of a police officer shall be proved against any such person, unless it be made in the immediate presence of a Magistrate."

In the unreported case of Rearututu v Uganda E.A. 50, the Court of Appeal of Uganda said:

"The new law is intended to ensure that all confessions relied on are truly voluntary. The best way to ensure this is by the prisoner being alone with the Magistrate, except for the interpreter, where one is needed. If a police officer was present there is always the danger that it might be alleged that his presence operated as a continuing reminder of an earlier threat. This would defeat the purpose of the new legislation.

.... The presence of the police in chambers of the Magistrate for use as interpreter was intentional, and done with the sole purpose of extracting statements from the accused persons. Courts are zealous to safeguard against the old malpractices in this sphere finding their way unobtrusively into the new law and will come down heavily in favour of the accused wherever their suspicion about the intentions of the police and the propriety of their action is aroused."

Section 24(1) and (2) of the Uganda Decree No. 25 of 1971 is couched in substantially identical terms to sections 27 and 28 of the Tanzania Evidence Act No. 6 of 1967, and

sections 25 and 26 of the Sri Lanka Evidence Act (Cap. 11). In Sri Lanka however, confessions to police officers have recently been made admissible in certain types of offences relating to political and exchange control matters. In such cases the confession must be made to, and recorded or caused to be recorded by, a police officer of a high rank, such as an Assistant Superintendent of Police. 51.

In South Africa, a confession must be made to a peace officer. The term "peace officer" includes a magistrate, a justice, a sheriff or deputy sheriff and a police officer. The proviso to section 244 of the South African Criminal Procedure and Evidence Act No. 56 of 1955 says that if a confession is shown to have been made to a peace officer, a magistrate or justice, it shall not be admissible under the section unless it is confirmed and reduced to writing in the presence of a magistrate or justice."

NOTES

1. Warwickshall's case (1783) 1 Lea 263.
- 1A. Mbopelleghe v R (1960) R & N. 509 at p. 512.
2. R v Middleton (1974) 2 All E.R. 1180.
3. Commissionere of Customs and Excise v Harz and Power (1967) 1 A.C. 760; 51 Cr. App. R. 123.
4. R v Zaveckas (1970) 54 Cr. App. R. 202
5. Zondo & Others v the Queen (1963-1964) Z.& N.R.L.R. 109.
6. R v Thompson (1893) 2 Q.B. 112 at pp. 115 & 117.
7. R v Johnston (1864) Ir. C.L.R. 60 at p.83.
8. R v Ananias (1963) R & N. 939.
9. Gwisayi and Dube v R (1963) R & N. 331.
10. Muwowo v the People (1965) Z.R. 91 at p. 95; also R v Lee (1950) 82 C.L.R. 133 at p. 149 (High Court of Australia).
11. R v John Kahyata (1963-1964) Z. & N.R.L.R. 84
12. Chigowe v the People S.C.Z. Judgment No. 10 of 1977.
13. R v Sleeman (1853) 6 Cox c.c. 245.
14. R v Reeve (1872) L.R.I. C.C.R. 362.
15. R v Holmes (1843) 1 Cox 9.
16. R v Jarvis (1867) L.R.I. C.C.R. 96; Cockle 180.
17. R v Thompson (1783) 1 Leach 291
18. R v Richards (1832) 5 C & P 318
19. R v Coley (1868) 10 Cox c.c. 536
20. R v Thomas (1836) 7 C & P 345
21. R v Smith (1959) 43 Cr. App. R 121 p. 126
22. R v Doherty (1874) 13 Cox c.c. 23; R v Rue (1876) 36 Cox 209 was to the same effect
23. R v Smith (1959) 2 QB 35 at p. 41; see also The People (A-G) v Galvin (1964) I.R. 325

24. R v Williams (1908) 52 Cr. App. R 439.
25. Rex v Singombe & Siababwa (1931 - 1948) N.R.L.R. 35.
26. Nalishwa v the People (1972) Z.R. 26.
27. R v Smith (1959) 2 All E.R. 193.
28. The Queen v Baba Haske (1961) 1 All N.L.R. 331.
29. R v Clewes (1830) L C & P 221.
30. R v Moore (1852) 5 Cox c.c. 555; (1852) 2 Den. c.c. 522.
31. R v Moore (1972) 56 Cr. App. R. 373, see also R v Wilson (1967) 2 Q.B. 406.
32. R v Upchurch (1836) 1 Mood. c.c. 465.
33. R v Topalu (1931 - 1948) 9.
34. R v Samson Manuwa, 5 N.R.L.R. 176;
35. R v Kantunda (1958) R & N. 419.
36. R v Edwin 4. N.R.L.R. 75.
37. The People v Nakhokha (1967) Z.R. 173.
38. R v Wilson (1967) 51 Cr. App. R. 194; (1967 2 W.L.R. 1094; (1967) 1 All E.R. 797 (N.B. R v Wilson was heard together with R v Marshal-Graham).
39. Deokinanan v R (1969) 1 A.C. 20.
40. S.228 U.P.C. Cap. 160.
41. R v Windasi (1963) R & N. 10.
42. R v Luka Mulumba (1959) S.J.N.R. 88; R v Zemba Chinda 2 N.R.L.R. 127.
43. The People v Masissani HPR/256 of 1977.
44. R v Zemba Chinda 2 N.R.L.R. 127.
45. The People v G. D. Zulu, S.J.Z. No. 6 of 1965 at p. 15; see also R v McNally (1954) 38 Cr. App. R 90.
46. Ruffles v the Queen 5 N.R.L.R. 193.
- 46A. See Tanzania Evidence Act of 1967 s.27; Zanzibar Evidence Decree s.25.

47. R v Bateman (1866) 4 F & F 1068; cf R v Colmer (1864) 5 Cox 506 and see R v Marriott (1911) 22 Cox 211.
48. R v Chidley (1860) 8 Cox 365; R v Chapman (1912) 29 T.L.R. 117.
49. R v McGregor (1968) 1 Q.B. 371; (1967) 2 All E.R. 267; (1967) 51 Cr. App. 338.
50. Rwarututu v Uganda E. A. Cr. App. 177.
51. See article on Confessions to Police Officers by N. B. D. S. Wijesekera in the Commonwealth Judicial Journal, June 1977.
52. Per Eyre C.B. in Warwickshall's case (1783) 1 Lea 263.
53. Baldry's case (1852), 2 Den 430.
54. Ibrahim v the King (1963 - 1964) Z. & N.R.L.R. 97 at p. 109.
55. See Victorian Evidence Act, 1928, s.141 and New Zealand Amendment Act, 1958, s.3.
56. R v Gardner (1932) N.Z.L.R. 1648.
57. R v Cornelius (1936) 55 Commonwealth L.R. 235.
58. Cowen's and Carter's Essays on the Law of Evidence, 1956 ed. at p. 55.
59. The People v Habwacha (1971) S.J.Z. 17 at p. 25.
60. Mandevu v R (1962) R. & N. 298 at p. 304.
61. Chileshe v the People (1972) Z.R. 222.
62. Zeka Chinyama & Others v the People S.C.Z. Judgment No. 27 of 1976.
63. R v Cheusi Kapini (1953) 5 N.R.L.R. 234.
64. R v Milison (1957) R. & N. 136, see also Mandevu v R. (1962) R. & N. 298 at p. 304.
65. R v Sullivan (1887) 16 Cox 347; R v Sykes (1913) 8 Cr. App. 233; Masalule v The King (1939) R.C.A. 174.
66. Watson v R (1960) R. & N. 560 at pp. 561-62.

67. The People v Hamainda (1972) Z.R. 310.
68. See Chilufya v The People (1975) S.C.Z. No. 65
69. Albert Chiseko Banda v The People C.A.Z. Judgment No. 15 of 1968.
70. Amishi Banda & Another v The People C.A.Z. Judgment No. 41 of 1970.
71. R v Unkles (1873) Ir. R. 8, C.L. 50 at p. 57.
72. Stone's case Dy 214b; 73 E.R. 474.
73. 1 Leach 264n.
74. 2 Hale P.C. 290.
75. Reg. v Burton Dears c.c. 282.

CHAPTER IV

VOLUNTARINESS

1. Free and Voluntary Confessions

We have already seen that a confession,, forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore is rejected. 1. In the words of Parke, B., in Baldry's case, 2:

"In order to render a confession admissible it must be perfectly voluntary...."

In Kangachepe Mbaio Zondo and Others v The Queen, 3, Charles J., recalled with approval the remarks of Lord Sumner in Ibrahim v The King, 4, namely that a statement by an accused is inadmissible unless it is shown to have been made voluntarily in the sense that it was not obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority. Echoing what the Australian High Court had said in R v Lee, 5, Charles J., stated in Muwowo v The People, 6, that the words "made voluntarily" do not mean "volunteered" but "made in the exercise of a free choice to speak or to be silent."

In Zambia, as in some other common law countries, the test is not truth but voluntariness of a confession. However, in Victoria (Australia) and New Zealand, there are special statutory provisions governing the admissibility of confessions which make specific reference to the test of truth. 7. Section 141 of the Victorian Evidence Act, 1928, provides that -

"no confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer is of opinion that inducement was really calculated to cause an untrue admission of guilt to be made. "

In New Zealand, legislation in these terms was first enacted in 1895 but this was replaced in 1950 by the Evidence Amendment Act, 1950, section 3 of which provided that -

"a confession tendered in evidence in any criminal proceeding shall not be rejected on the ground that a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the person confessing if the Judge or presiding officer is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made. "

However, the proposition that these statutory provisions excluded any consideration other than those of truth or falsity in relation to confessions has been challenged in both New Zealand and Victoria. In the New Zealand case of R v Gardner, 8, Smith J., declined to admit a confession of murder which had been obtained from a feeble-minded Maori boy. The learned judge held that the statutory provisions did not cover the field of confessions and that it applied only to cases of threats or promises, but not to cases involving other violent procedures, where the Crown could show the confession was free and voluntary.

In the Victorian case of R v Cornelius, 9, a confession had been obtained by protracted police interrogation of a suspect.

On appeal from the Supreme Court of Victoria, the High Court of Australia expressly held that the Victorian statute did not cover the whole field of confessions; it had only a limited field of application and that when a confession is tendered in evidence, its voluntary character must appear before it is admissible. The statute simply meant that where, but for a particular promise or threat, a confession would be voluntary, it was necessary for the judge to determine whether the promise or threat was really likely to produce an untrue admission of guilt. Other forms of pressure might induce confessions to which the statute would not apply, and which would be inadmissible because they were involuntary. In the course of a very careful judgment, O'Leary, S.J., considered the roots of the confession rule. He observed that at various stages the possibility that an improperly induced confession might be untrue had been advanced as the basis of the rule of exclusion. It, however, appeared from such cases as R v Baldry, 2, and Ibrahim v R, 4, that this was not the core of the common law rule. He then said:

"It therefore can be taken that this requirement (i.e. truth) is one created by statute in special cases, and does not attach to confessions or statements that call for consideration outside the statute the common law appears to be that evidence of a statement or confession by the accused is admissible only if the prosecution proves to the satisfaction of the Judge that it was made perfectly voluntarily. Further the evidence is admissible if it is the result of an inducement made by some person in authority, and inducements are not restricted to promises or threats. The inducement need not be of such character as is likely to cause an untrue confession."

The learned Chief Justice went further and held that even if a confession did not offend either the statute or the common-law rules, the judge still had a discretion to exclude it if it had been obtained by some unfair means, 10. It seems difficult to appreciate the principle which tests confessions induced by threats or promises by truth, but not those obtained by the "nagging tactics of police interrogation."

It would appear that the Victorian statute was badly drafted, that actual force (as distinct from a 'threat') would still vitiate a confession, but that a threat thereof would not necessarily do so, or indeed 'promise'. The word 'promise' seems to have been intended to cover 'inducement' and whilst one appreciates the common law principles expressed by O'Leary C.J., nonetheless one feels that he wished to avoid the effects of an oppressive piece of legislation which covered, one thinks, confessions extorted by all means other than actual violence. It seems illogical to suggest that a confession admissible after a promise, or even a threat, would be inadmissible if induced by some more gentle form of inducement.

As we have already observed, the test of admissibility of confessions in Zambia, is voluntariness, not trustworthiness although, of course, the latter is relevant with regard to what weight, if any, is to be placed on an already admitted confession. Recently in Zambia, Baron J., as he then was, expressed himself as follows, in The People v Habwacha, 11

"The basis upon which evidence of an incriminating statement is excluded in the absence of proof of the condition of admissibility is not that the law presumes the statement to be untrue in the absence of such proof, but because of the danger which induced confessions or admissions present to the innocent and the due administration of justice. That danger

has been aptly pointed out by the American authority on evidence, Professor Wigmore (Evidence, Vol. 4, section 2250) in the following passage:

'The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources ultimately the innocent are jeopardised by the encroachment of a bad system'.

Thus, a confession obtained as a result of an inducement emanating from a person in authority is inadmissible and considerations of truth or falsity are immaterial; but where a confession is admitted in evidence, such considerations would be relevant in relation to the probative value of the admitted confession.

and in the case of Mandevu v R, 12, Conroy, C.J., observed that -

"In deciding whether a statement made by an accused person to the police is admissible, the test which a court must apply is... whether that prosecution has affirmatively established that the statement was made freely and voluntarily."

Archbold says that voluntariness is only a test of admissibility. It is not an absolute test of the truth of the statement. 13. For example, it is quite conceivable that a person would voluntarily make a false confession and even suffer imprisonment as a consequence for a number of motives such as self-enrichment, protection of a loved one, etcetra.

Judges' Rules

In the interests of the administration of justice it is necessary to have rules of fair play. Accordingly, Judges' Rules were formulated as a means of maintaining fairness on the part of those in authority when dealing with suspects and accused persons. In England, there was a great deal of doubt among the police with regard to the proper course for them to take when making investigations into crime and taking statements from suspects. And so, in the year 1912, the judges of the King's Bench Division, at the request of the Home Secretary, drew up four Rules for the guidance of the police. In

Those Rules remained in operation up to early 1964 when they were replaced by new Rules made by the judges of the Queen's Bench Division. The new Rules came into operation, in England, on Monday January 27, 1964.

In Zondo and Others v The Queen, 3, our then Court of Appeal said that the Judges' Rules are administrative directions enforced by the police authorities as tending to the fair administration of justice. It further said that the new Judges' Rules of England have not been applied in this country "as policemen have not been administratively enjoined to follow them." In Zambia, therefore, we still operate under the pre-1964 Rules. That this is so was confirmed in 1972 by Chomba, J., (as he then was) in Chileshe v the People, 14, and more recently, in 1976, by the Supreme Court in Zeka Chinyama and Others v the People, 15.

The Judges' Rules applicable to Zambia are as follows:

- (1) When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.
- (2) Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions or any further questions, as the case may be.
- (3) Persons in custody should not be questioned without the usual caution being first administered.

- (4) If the prisoner wishes to volunteer any statement, the usual caution should be administered. The caution should end with the words "be given in evidence".
- (5) The caution to be administered to a prisoner when he is formally charged, should therefore be in the following words :

"Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence."

Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

- (6) A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such cases he should be cautioned as soon as possible.
- (7) A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purposes of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear

as to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

- (8) When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read those statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the persons charged desire to make a statement in reply, the usual caution should be administered.
- (9) Any statement made in accordance with the above rules should, whenever possible, be taken down in writing, signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

As Lewey, C.J., pointed out in R v Cheusi Kapini, 16, it is well to remember the all-important consideration in relation to a statement alleged to have been made by an accused person:

"It is not the form used nor the exact words of the caution, but the question whether or not the statement was a voluntary statement. That is the matter as to which the judge or magistrate has to be satisfied and the admission or rejection of the statement is entirely in his discretion, and must depend upon the circumstances of each case. "

Breach of Judges' Rules

The Judges' Rules have not the force of law, they are directions which the police should observe as tending to the fair administration of justice. It is important that they should be observed, because

it is always within the discretion of the judge to exclude a statement obtained in contravention of the Rules.

Because Judges' Rules are not rules of law, the Federal Supreme Court held in R v Milison, 17, that a statement by an accused person made otherwise than in conformity with the Judges' Rules, is not necessarily inadmissible in evidence but that the trial Judge has a discretion whether or not to admit it. Recently, the Supreme Court of Zambia said in Zeka Chinyama and Others v the People, 15, that breach of the Judges' Rules does not render evidence, and in particular a confession, automatically inadmissible. they are rules of practice indicating what conduct on the part of the police officers the courts will regard as unfair or improper.

4. Corroboration

As we have already observed, a voluntary confession of guilt is sufficient to warrant a conviction without any corroborative evidence. 18 .

In Watson v R, 19 , the only evidence against the appellant was his confession. Spencer-Wilkinson, the then Chief Justice of Nyasaland (Malawi) observed:

"There is a series of decisions in the East African Court of Appeal in which it has been consistently held that a person ought not to be convicted upon his confession alone unless there is some corroboration or, if there is no corroboration, then with extreme caution. It is noteworthy, moreover, that confessions referred to in East African cases are confessions made to a magistrate. I do not think the East African decisions are binding upon this court, and I feel that I ought to follow the English authorities upon this point. The following passage, however, from Taylor on Evidence appears to me to lend colour to the view that although a person can legally and properly be convicted upon his confession alone this should only be done with great caution. At page 546 in the 12th Edition, paragraph 268, it is said, 'Whether on ordinary indictments for felony or misdemeanour extra-judicial confessions uncorroborated by any other proof of the Corpus Delicti are of themselves sufficient to justify a conviction of the prisoner has been gravely doubted. In each of the English cases usually cited in favour of the sufficiency of this evidence some corroborative circumstances will be found.'

As far as I have been able to see from the authorities available to me, this last sentence is correct and in almost all the cases where a person has been convicted on his confession alone, there has been some pointer in the evidence tending to confirm his guilt."

And later on, at page 562, the learned Chief Justice continued :

"I do not wish it to be thought that I am laying down any rule to the effect that an accused person's confession must necessarily be corroborated. There may well be cases in which the court would feel it perfectly safe to convict upon confessions alone, but the circumstances of the present case raised a considerable doubt in my mind as to the weight to be attached to the Accused's confession, and for this reason I came to the conclusion that the conviction could not stand. "

Watson's Case, 19 , was followed by Scott, J., in The People v Hamainda, 20, where, on a charge of stock theft, the evidence against the accused consisted mainly of a confession alleged to have been made by him. In the circumstances of the case, Scott J., was not satisfied that it would either be correct or safe to rely on the confession alone. He then said:

"While I reject the contention of the defence that the accused never made such a statement, and that it must have been compiled by the police or made by some other person, it may be significant that the accused alleges that he could not have committed

this particular offence because he was in prison on the date in question. Whether, at the time the statement was made, this accused, an ordinary villager, appreciated the date of allegation, I do not know, but the State Advocate when cross-examining the accused, asked no questions about this claim which, in effect, amounts to a plea of alibi, nor had the State endeavoured to disapprove this assertion by evidence in rebuttal. I do not, in this case, consider that the prosecution evidence is so strong that reliance can be placed wholly and solely upon Ex. A (i.e. the confession) and the subsequent statement on arrest. There is no corroboration and nothing to satisfy me that not only were these statements made, but they must have been true. "

It must be noted that in Hamainda's case, 20 , the issue was not trustworthiness of the confession as a condition precedent to admission in evidence but what weight, if any, was to be placed upon the confession. As very little or no weight was to be put on the confession, corroborative or some other supporting or confirming evidence became necessary. Otherwise, a confession duly made and satisfactorily proved is, as a general rule, sufficient to warrant a conviction. This principle was recently reaffirmed by the Supreme Court of Zambia. 21 .

In Albert Chiseko Banda v the People, 22 , the then Court of Appeal for Zambia said:

"We are fully satisfied that it is possible and proper in a proper case to convict on an uncorroborated confession. In this particular case, there was no evidence whatsoever against the appellant except his confession."

See also Anishi Banda & Another v the People, 23 ,

But, of course, what weight is to be placed on one confession will vary in degree from that to be put on another. Certain confessions, although legally admitted in evidence, might carry so little weight that little or no reliance ought to be placed upon them. In such cases, it would not be safe to convict solely on a confession in the absence of some corroborative or supporting or confirming evidence. However, the legal position with regard to homicide cases does not appear to be entirely clear. There seems to be a great body of opinion in favour of the view that in such cases, there ought to be evidence aliunde which establishes the commission of the corpus delicti. As Dixon C.J., aptly put it in an Australian case:

"A confessional statement may be voluntary and yet to act upon it might be quite unsafe; it may have no probative value."

In the Irish case of R v Unkles, 24 , which concerned an electoral offence, Fitzgerald, J., said:

"The second point which was pressed on seems to have been rested on this - that the statement, or as it

was called, the confession, made by the Defendant to O'Connell could not be relied on by itself alone to prove the corpus delicti. I confess that during the discussion I was, and still am, unable to appreciate this objection. It could not be contended that the statement was inadmissible and it is clear law that the accused may be convicted even in capital cases on his statement, if satisfactorily proved. In Stone's case, 25, the body was found in Marybone Park, and Stone was convicted of the murder on the evidence of the two fellow-prisoners..... to whom he confessed to the murder, and he was convicted."

It is obvious, particularly from the citation of Stone's case, 25, that when Fitzgerald spoke of a confession being sufficient to justify conviction even in "capital cases" he was referring to capital cases where corpus delicti is proved by evidence independent of the confession. That this is so is confirmed by a subsequent passage in his judgment (in the same case) which is couched in the following terms:

"We were, however, pressed with an illustration drawn from the criminal law, viz., that where the charge is murder the prisoner cannot be convicted on his confession alone, unless the fact of murder has been established by the finding of the dead body. The rule is one rather of judicial practice than part of the law of evidence, and is thus put by Lord Hale: 'I would never convict any person of murder or manslaughter, unless the facts were proved to be done, or at least the body found dead.' This rule seems to have had its origin in cases where the charge of murder depended on the fact of the disappearance of the party alleged to have been murdered; such as that mentioned in, 1 leach, 26, where three men were

convicted of the murder of one, Harrison, and a few years afterwards it appeared he was still alive. It would perhaps be at present more correct to define it thus, that a party accused of homicide ought not to be convicted on his own confession merely, without proof of the finding of the dead body, or evidence aliunde that the party alleged to have been murdered is in fact dead. I have adverted to this line of argument though in my opinion it has no bearing on the case before us. "

The majority decision in R v Unkles, 24, was followed by R v Sullivan, 18, a case that concerned an unlawful publication. After reviewing authorities in Sullivan's case, palles C.B. observed:

"All those cases are authorities that an uncorroborated confession is sufficient to sustain a conviction for larceny, and no case is to be found in the books which establishes the contrary proposition. And it is to be observed that they are not in any way inconsistent with the statement of Lord Hale to which I have referred. The second portion of the passage cited from Lord Hale refers to homicide only: 'I would never convict any person of murder or manslaughter unless the facts were proved to be done, or at least the body was found dead,' and it does, I think lay down a proposition which has been acted upon ever since; whether as a matter of judicial practice, as stated by Fitzgerald, J., or as a caution which was the view of Maule J., in Reg. v Burton, 27, or as part of the law of evidence, does not affect the question here, but whichever it may be, it is now settled - that in no such case ought a confession to be acted upon, without evidence of the corpus delicti, by proof of the act done or of the body being found dead; and I think, found dead under such circumstances which raise a presumption that the deceased came by his death by unlawful means."

NOTES

1. Per Eyre C.B. in Warwickshall's case (1783) 1 Lea 263.
2. Baldry's case (1852) 2 Den. 430.
3. Zondo and Others v The Queen (1963-1964) Z.& N.R.L.R. 97 at p. 109.
4. Ibrahim v The Queen (1914) A.C. 599 at p. 608.
5. R v Lee (1950) 82 Crim. L. R. 133 at p. 149.
6. Muwowo v The People (1965) Z.R. 91 at p. 95.
7. See Victorian Evidence Act, 1928, s. 141 and New Zealand Amendment Act, 1950, s. 3.
8. R v Gardner (1932) N.Z.L.R. 1648.
9. R v Cornelius (1936) 55 Commonwealth L.R. 235.
10. Cowen's and Carter's Essays on the Law of Evidence, 1956 edition at p. 55.
11. The People v Habwacha (1971) S.J.Z. 17 at p. 25.
12. Mandevu v R. (1962) R & N. 298 at p. 304.
13. Archbold, Criminal Pleading Evidence and Practice 39th Ed. para. 1379a.
14. Chileshe v the People (1972) Z.R. 222.
15. Zeka Chinyama & Others v the People, S.C.Z. Judgment No. 27 of 1976.
16. R v Cheusi Kapini (1953) N.R.L.R. 234.
17. R v Millison (1957) R & N. 136; see also Mandevu v R (1962) R & N 298 at p. 304.
18. R v Sullivan (1887) 16 Cox 347; R v Sykes (1930) 80 Cr. App. R. 233; Masalule v The King (1939) R.C.A. 174.
19. Watson v R. (1960) R & N. 560 at pp. 561-62.
20. The People v Hamainda (1972) Z.R. 310
21. See Chilufya v the People S.C.Z. Judgment No. 65 of 1975
22. Albert Chiseko Banda v the People C.A.Z. Judgment No. 15 of 1968.
23. Amishi Banda & Another v the People, S.C.Z. Judgment No. 41 of 1970.
24. R v Unkles (1873) Ir. R. 8 C.L. 50 at p. 57.

25. Stone's case Dy. 214b; 73 E.R. 474.
26. 1 Leach 264n.
27. Reg. v Burton, Dears c.c. 282.

CHAPTER V

ADMISSIBILITY OF CONFESSIONS

1. Whole Confession

It has not been possible to find a Zambian authority on this sub-heading. However, it is submitted that English law would be of very high persuasive value should such a case arise here.

According to Phipson, the whole of a confession must in general be given in evidence, including parts favourable to the prisoner, though the jury are entitled to believe only such parts as they judge to be true. 1. Many years ago, Lord Ellenborough made the following observation:

"It is a rule of law that when evidence is given of what a party has said or sworn, all of it is evidence (subject to the consideration of the jury, however, as to its truth), coming, as it does, in one entire form before them; but you may still judge to what parts of the whole you can give credit; and also whether that part which appears to confirm and fix the charge does not outweigh that which contains the exculpation". 2.

Under the rule, whenever the prosecution relies upon a confession which is properly admitted as a whole, the accused may rely on such self-serving portions of it as there may be although they may not carry as much weight as the exculpatory parts. It was said in R v McGregor, 2A, that the whole of a confession, including any part which excuses the offence, should be put in evidence. In R v Higgins, 3, the position was put in these terms:

"What a prisoner says is not evidence unless the prosecutor chooses to make it so, by using it as part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner as well as against him."

If the confession implicates others, then their names cannot be omitted, but such confession is only evidence against the maker. Separate trials may be ordered where the charge is joint. Unless other crimes form part of the main transaction or are relevant to show identity, confessions relating to such crimes will be inadmissible. 4.

There is an area which merits a separate discussion namely, the legal position of exculpatory statements. Such statements are made by an accused person with the manifest intention of asserting his innocence. In Zambia, as in England, there does not seem to be any authority on the crisp question whether an apparently exculpatory statement can be relied on by the prosecution even if it was not made voluntarily. 5. Recently, in the case of Piche v R, 6, the Supreme Court of Canada answered this question in the negative holding by a majority, after a conflict of authority in Canada and the United States, that the prosecution cannot make use of any statement which was not given by the accused voluntarily. In the South African case of Rex v Viljoen, 7, a soldier on a charge of arson was asked by a policeman whether he had been

setting fire to the building in question, to which he replied "Can you blame me? We are fighting up North and our friends here are being killed...." The Appellate Division came to the conclusion that such statement was not an out-and-out acknowledgement of guilt, and was, therefore, receivable in evidence as it was not a confession. In an earlier South African case of Rex v Hanger, B, De Villiers, J.A., said:

"I am quite clear that a confession within the meaning of those sections is a confession of guilt - a statement by a person inculpatating himself, alone or together with others, in the commission of the offence. A statement exculpating himself, as in the present case, can under no circumstances be regarded as a confession."

It is submitted that even with regard to a statement which is partly a confession and partly an exculpation, the accused would be entitled to raise an objection to its admission in evidence on the ground that it was beaten out of him or obtained as a result of some other form of inducement. And, once such an objection is taken, a trial within a trial must follow unless the prosecution does not press to have it adduced in evidence.

Whenever a confession is ruled inadmissible, it is not competent for the prosecution to cross-examine the accused upon it. 9.

2. Burden and Standard of Proof

(a) Burden of Proof

It is settled law that the burden of proving the facts constituting the condition precedent to the admissibility of confessions rests upon the person seeking to tender them in evidence. Such person will invariably be the prosecutor.

In Zondo and Others v The Queen, 10, Conroy, C.J., reaffirmed that it is trite law that when the prosecution seeks to put in a confession the burden rests on the prosecution to establish, beyond a reasonable doubt, that the confession was made freely and voluntarily. As we shall shortly see, the accused has a light burden (i.e. the burden applicable to civil cases) to show the trial court that its discretion ought to be exercised in his favour.

(b) Standard of Proof

As we have just seen under the preceding sub-paragraph, the standard of proof required is one that is applicable to criminal cases, namely, proof beyond a reasonable doubt.

But as Lord Goddard, C.J., put it in the English case of R v Summers, 11, the phrase "beyond a reasonable doubt" does not mean "absolute certainty" but evidence

that satisfies the jury (or the trier of facts) so that they feel sure.

Until the middle of 1976, the position regarding the standard of proof to be applied in respect of the exercise of the court's discretion to accept or exclude evidence of a voluntary (hence admissible) confession was rather vague. In that year, however, the Supreme Court of Zambia said in Zeka Chinyama and Others v The People, 12, that on the issue of admissibility it must be shown beyond reasonable doubt that the statement was voluntary but that with regard to the exercise of its discretion, the (trial) court must be satisfied on a balance of probabilities that the discretion to exclude evidence (of the confession) ought to be exercised. The point is well illustrated by Charles J., in Zondo's case, 10, at page 102 as follows:

" The onus in respect of exclusion on that ground rests upon the accused, not the Crown, since the former seeks the exercise of the court's discretion by excluding legally admissible evidence, and proof that a statement was made voluntarily, that is, free from any material inducement whereby the accused's will to remain silent was overborne, leaves little scope for a statement unfairly obtained being admissible. That has been held to be the correct approach by the High Court of Australia in The King v Lee, 12A, an approach with which I respectfully agree."

3. Trial within a Trial

In Zambia, it is settled law that whenever the prosecution seeks to put in evidence a confession alleged to have been made by the accused, it is the duty of the court hearing the case to find out first of all whether the accused objects to such confession being admitted in evidence, and, if so, on what grounds. These are

usually allegations to the effect that the confession was not a free and voluntary one; often times the accused alleges that he was beaten, threatened, forced, pressurised or in some way induced by the person in authority, invariably the police, to make a statement. It is then the duty of the trial court to hold what has come to be known as "a trial within a trial" before allowing the confession to be put in evidence. This procedure of trial within a trial is confined only to the limited issue of whether the statement is or is not voluntary. 13. Under the procedure, the prosecution will adduce evidence regarding the circumstances under which the alleged confession or statement was taken, the accused or his advocate being afforded an opportunity to cross-examine the prosecution witnesses. At the close of the case for the prosecution on this limited issue, the accused will be entitled, if he so desires, to give evidence either on oath or unsworn and to call witnesses, if any. Usually the accused has no witnesses to call since the recording of statements from accused persons is invariably done at a police station where in the majority of cases only police officers would be present (as potential prosecution witnesses). But if the accused's allegation is that he was physically assaulted and medical evidence to that effect is available, then medical witnesses may be called to testify at the trial within the trial; the trial court will then give a formal ruling on the issue of voluntariness, 14.

The procedure of "trial within a trial" is sometimes criticised on the ground that where the trier of facts is also the trier of law, as is the case in Zambia, the accused in respect of whom a confession is admitted after

he has given evidence that is disbelieved is thereby likely to be prejudiced when he later gives evidence in the main trial. The logic, of course, is that if the accused's evidence at the trial within the trial is found by the trial court to be unreliable, there would be a tendency to believe that his evidence given in relation to the case as a whole, when he is put on his defence, would equally be unreliable. Where an accused gives evidence on the general issue, however, a court is not entitled to reject all of his evidence out of hand because it disbelieves, say, a portion thereof, and this equally applies to the evidence of any witness. A fortiori, a court cannot reject the accused's subsequent evidence on the general issue simply because it disbelieves his evidence on the issue of voluntariness in the trial within the trial. The case is then decided on the totality of the evidence before the court including, of course, the probative value and effect of the admitted confession.

In countries which employ the jury system, the question whether a statement is voluntary is for the judge. And so, whenever the admissibility of such a statement is challenged upon the ground that it is involuntary, it is the duty of the judge alone to rule on it. Evidence on this issue is then heard and a ruling made in the absence of the jury. 15. If the judge rules that the statement is admissible, defence counsel is entitled to cross-examine police witnesses again in the presence of the jury as to the circumstances in which the statement was obtained. 16.

It sometimes happens that the accused denies having made any statement to the police and alleges that the statement attributed to him was

simply manufactured by the police in order to "fix" him. In Eliyoti Chilenga v The Queen, 17, it was held that a denial that the accused ever made the statement should not be the subject of a trial within a trial but that it should be dealt with as one of the general issues.

A similar approach was made in Nyambe Mwiya and Another v The People, 18. In that case the second appellant denied that she had made certain statements imputed to her; in her unsworn statement she made no reference to having fixed her thumb print to anything, but in cross-examination of the police officer who alleged he had recorded her statement, it was put to him that he had simply asked her to thumb print a paper. By a majority, the Court of Appeal for Zambia held that where an accused alleges that he made no statement at all this, like any other traverse of the prosecution case, is one of the issues in the trial and should not be the subject of a trial within a trial. Obviously, the case was simply treated by all three members of the court as a straight-forward denial that the statement had been made without regard being had to the fact that the appellant had been "asked to thumb print a paper".

Recently, however, in Tapisha v The People, 19, the Supreme Court of Zambia held that where any question arises as to voluntariness of a statement or any part of it, including the signature, then because voluntariness is, as a matter of law, a condition precedent to the admissibility of the statement, this issue must be decided as a preliminary one by means of a trial within a trial. In that case the applicant was convicted

of theft. Part of the evidence for the prosecution was that of a police officer to whom the applicant was alleged to have made a free and voluntary statement. Objection was taken on the ground that the statement was made as a result of beatings, and a trial within a trial was commenced. When this trial within the trial was almost concluded it was established that the applicant would allege that he made no statement but that he was forced to sign his name in a note book. The trial magistrate thereupon discontinued the trial within the trial on the ground that a denial that a statement was made is a matter for the general issues and not for a trial within a trial. After reviewing authorities, the Supreme Court said at page 226:

"Nyambe Mwiya, 18, is not, however, authority for the course adopted by the learned magistrate in the recent case. As we have said, that case was treated as a case of a simple denial that the statement had been made; the case before us is an objection based on an allegation that no statement was made as a result of force, altered later to the allegation that no statement was made but that the appellant had been forced to write his signature in a note book. We know of no case in which this allegation has been held to be one of the general issues; in all the cases in which reference has been made to this kind of situation the contrary has been assumed. For instance, in Manjoro v R, 20, Clayden, D.C.J., disapproved Mambilina, 21, in so far as it decided that on a mere denial of the making of a statement there should be a trial within a trial, went on to say at page 706:

'In fact in that case the accused also maintained that he was assaulted to make him thumb print the statement. So there was some indication of an alternative allegation that if anything was said force was used. For that issue

these had to be a total will to confess.
This is in accordance with the principle that voluntariness is a condition precedent to admissibility. As it could equally be put on the basis that a signature or thumb print is an essential part of a statement where it is tendered as a document, and that the whole must be shown to be voluntary."

And later on the same page, the court continued:

"Where any question arises as to the voluntariness of a statement or any part of it, including the signature, then because voluntariness is, as a matter of law, a condition precedent to the admissibility of the statement, this issue must be decided as a preliminary one by means of a trial within the trial.

Thus, if the accused alleges that he was forced to sign a blank piece of paper, or a document the contents of which were not made by him, the question of voluntariness has been raised and must be decided as a preliminary issue. But if the accused admits that he signed a blank piece of paper quite voluntarily, without being forced or induced, simply because he was asked to do so, the matter is part of the general issues."

The court said that had the trial within the trial been concluded and the alleged confession excluded as a result, the remainder of the evidence was nevertheless of such weight that, if left unanswered, it would unquestionably have resulted in a conviction. In those circumstances, the applicant could not therefore argue that he was placed in the position where he was obliged to go into the witness box in order to meet the allegation that he made a voluntary confession, when without the irregularity he might have elected not to give evidence on the general issues.

Tapisha's case, 19, was followed in Nyambe v The People, 22, where the appellant was alleged to have made a confession to a police officer. At the appellant's trial, objection was taken to the confession on the ground that the appellant had been forced to sign a statement not made by him and the learned trial judge ruled that no trial within the trial was necessary. On appeal the Supreme Court held that in all the circumstances of the case, they were unable to say that had the learned trial judge considered the issue of voluntariness in a trial within a trial he must inevitably have held that the confession was admissible for that and other reasons, the conviction was not upheld. Thus, the law in Zambia is that where the accused at his trial repudiates or retracts his alleged confession on the ground that it is not voluntary or, alleges that he made no statement to a person in authority but that he was forced to sign or thumbprint a blank piece of paper or a piece of paper on which was already written a statement manufactured by a person in authority, then a trial within a trial must be conducted unless the prosecution chooses not to produce the alleged confession.

It is necessary to consider the effect of failure to conduct a trial within a trial resulting in the admission in evidence of a statement attributed to an accused person but which he challenges on the ground of involuntariness. This question arose in the East African case of M'Murairi s/o Kategwa, 23, where the East African Court of Appeal said

"It must be presumed that in each of these cases this court was satisfied that in fact no injustice had been caused. This court has, however, not always been entirely consistent in its treatment of the statements irregularly admitted. When the court has been satisfied that all the relevant evidence has been heard and considered by the trial judge (though not necessarily at the right time) and that

his conclusion thereon was the only reasonable one, it has taken the substance of the statement into consideration as part of the evidence in the case...."

The conclusion reached in that case was that the only criterion to be applied was whether the irregularity had, in fact, prejudiced the accused. Accordingly, failure to comply with the correct procedure for trial within a trial is a curable irregularity provided that the trial court had considered all the relevant evidence, though not necessarily at the right time, and its conclusion is the only reasonable one.

The reasoning in M'Murairi's case, 23, was adopted by Blagden, J., as he then was, in Mambilina v R, 21, and received the approval of the Supreme Court of Zambia in Tapisha's case, 19.

4. Judge's Discretion

It is trite law that even where a confession is held to be free and voluntary, the judge, in his discretion, may nevertheless exclude it if it was obtained in circumstances unfair to the accused, for instance, if there has been a breach of the Judges' Rules, 24. Moreover, notwithstanding that the statement was both voluntary and obtained in accordance with the Judges' Rules, the judge may exclude it in the exercise of his residual discretion to exclude any evidence if the strict rules of admissibility would operate unfairly against an accused person. 25.

In R v Malison, 26, the High Court of the then Northern Rhodesia held that a statement by an accused person made otherwise than in accordance with the Judges' Rules is not necessarily inadmissible

in evidence. But as we have just seen the judge has a discretion either to admit such a confession or to reject it. In Nalishua v The People, 27, Baron, J.P., as he then was, delivering the judgment of the court made a reference to The People v Nelson Habwacha, 25, and then said:

"In the course of a review of the authorities in Habwacha's case, 25, I cited a dictum of Lord Parker, C.J., in Callis v Gunn, 28, which sets out the proper approach to the question of voluntariness and, the exercise of the court's discretion, namely that the court always has a discretion to exclude any evidence if its admission would operate unfairly against an accused, and in the case of an alleged confession there is the further principle that the confession must be shown to have been voluntary. In considering what circumstances would be unfair Lord Parker used the expression

' in an oppressive manner by force or against the wishes of an accused'.

It must be stressed also that it is not only when there has been a breach of the Judges' Rules that the question of discretion arises; the principles of fair conduct are principles in their own right independently of the Judges' Rules. As Briggs, F.J., said in Mbopoleghe v R, 29, at page 519:

' But the principles of fair conduct underlying the Judges' Rules always existed independently of them... ' and at page 520:

' The issue must always be whether the accused was so unfairly or improperly treated in all the circumstances that the evidence ought to be rejected.'

In the present case there was the clearest possible impropriety

on the part of the police officer in questioning the appellant when in custody without administering a caution, and in questioning him throughout that night and the following day before finally obtaining a statement on the evening of the 5th. It was incumbent on the learned judge to consider whether this was a proper case for the exercise of his discretion, but it is apparent that he considered only the question of voluntariness; we are forced to this conclusion by the complete absence of any reference to discretion, and by the concluding words of the ruling, 'Accordingly, (the statement) will be admitted...'. The failure to consider the matter of his discretion constitutes a serious misdirection."

It seems clear that the unfair conduct that Lord Parker talked about in Gunn's case, 28, namely, "in an oppressive manner by force against the wishes of an accused" does not, with due respect, bring into play the exercise of the judge's discretion, for the simple reason that such conduct amounts to an inducement and therefore goes to voluntariness. As it has already been observed in Chapter III inducement may be open or veiled. Although it was said in Zondo and Three Others v R, 24, that "prolonged questioning by the police does not, in itself, infer undue pressure", 30, it is submitted that the better view should be that such prolonged questioning tends to weaken the accused's will as he is likely to feel that the making of a statement would quickly put an end to such an ordeal. In such circumstances the prolonged questioning, it is submitted, amounts to a veiled inducement and a statement obtained in consequence of it should attract the procedure of a trial within a trial in order to determine its voluntariness or otherwise. As Charles, J., put it in R v John Kahyata, 30,

"The most devious forms of inducement which vitiate confessions are physical torture and prolonged questioning under the so-called third degree process whereby the will of a suspect not to incriminate himself is broken."

In Petrol v The People, 31, the Supreme Court of Zambia held that where the facts found by the court amount to a rejection of the allegations that the circumstances surrounding the taking of a statement were unfair or improper, the question of the exercise of the court's discretion does not arise.

The leading case on the subject of the exercise of a judge's discretion with regard to confessions was decided by the Supreme Court of Zambia in 1976. That case is Zeka Chinyama and two Others, 32, where it was said that in practice, when dealing with an objection to the admissibility of an alleged confession the trial court will first satisfy itself that it was made freely and voluntarily; if so satisfied, the court in a proper case must then consider whether the confession should in the exercise of its discretion be excluded, notwithstanding that it was voluntary and therefore strictly speaking admissible, because in all the circumstances the strict application of the rules as to admissibility would operate unfairly against the accused. The court continued at page 4 :

"We have said 'in a proper case'. The position is not - as argued before us - that the court must automatically in every case make a decision whether or not in the exercise of its discretion to exclude the confession. For instance,

where the only impropriety alleged, or suggested by the evidence, is assaults inducing the confession, once the court has rejected this allegation and satisfied itself that the confession was voluntary, there remains no ground on which the court's discretion could properly be exercised. This was the position in Sekeleti v The People, 33, where we said:

'In the present case no question of discretion arises; the only improprieties alleged were the assaults, and once the court expressed itself to be satisfied that these alleged assaults did not take place there was no basis for the exercise of its discretion.' "

And at page 6, the court continued:

"The precise position of the Judges' Rules is important. Their breach does not render evidence, and in particular a confession, automatically inadmissible; they are rules of practice indicating what conduct on the part of police officers the courts will regard as unfair or improper. Since in practice most cases in which the issue of the court's discretion arises involve alleged improprieties by police officers, the issue has come to be associated with breaches of the Judges' Rules, and no other impropriety is alleged here; but for completeness it should be said that the principles of fair conduct underlying the Judges' Rules are principles in their own right independently of those rules, and that unfair or improper conduct on the part of people other than police officers can equally lead to the exclusion of evidence in the discretion of the court."

Thereafter the court said that the circumstances in which the discretion to exclude a confession made to a police officer falls to be considered are when such confession has been held to have been voluntarily made but there has been a breach of

the Judges' Rules or other unfair conduct surrounding the making of the confession, either on the part of a police officer or of some other person, which might indicate to a judge that there is danger of unfairness. The test as to whether the discretion should be exercised is whether the application of the strict rules of admissibility would operate unfairly against the accused.

Whether, in any given case, the application of the strict rules of admissibility would operate unfairly must depend on the facts of that case.

In Kuruma, s/o Kaniu v R, 34, Lord Goddard, C.J., said at page 239:

"No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused."

In R v Payne, 35, the appellant was asked at the police station whether he was willing to be examined by a doctor specifically for the purpose of ascertaining whether he was suffering from any illness or disability. The appellant was told that it was no part of the doctor's duty to examine him in order to give an opinion as to his unfitness to drive. The appellant consented to be examined by a doctor, who thereafter gave evidence that the appellant was under the influence of drink to such an extent as to be unfit to have proper control of a car. On appeal Lord Parker, C.J., said:

".... while such evidence from the doctor in circumstances such as these was clearly admissible, nevertheless the chairman in the exercise of his discretion ought to have refused to allow that evidence to be given on the basis

that if the accused realised that the doctor would give evidence on the matter he might refuse to subject himself to examination."

As already indicated the discretion does not fall to be exercised in every case, where in the words of Glayden F.J., (cited with approval in Zeka Chinyama's case, 32, at page 12) "every circumstance which might conceivably be regarded as (indicating unfairness) has been considered in the very decision that the confession was voluntary" the question of the exercise of the court's discretion does not arise. In that case the Supreme Court said at page 8 :

"It can thus be seen that there are many types of case in which the question may arise of the exercise of the discretion to exclude; we are concerned here with only one type, namely where the evidence in question is a statement alleged to have been made by the accused to a police officer. The circumstances in which the reception of evidence would operate unfairly against an accused will depend on the facts of the particular case and do not lend themselves to precise definition. But the dicta in Callis v Gunn, 36, and Payne, 35, would seem to suggest the following as a general principle:

'that the discretion ought to be exercised in favour of the accused where, but for the unfair or improper conduct complained of, the accused might not voluntarily have provided the evidence in question or the opportunity to obtain it by the accused to a police officer. The circumstances in which the reception of evidence would operate unfairly against an accused will depend on the facts of the particular case and do not lend themselves to precise definition. But the dicta in Callis v Gunn, 36, and Payne, 35, would seem to suggest the following as a general principle:

of the accused where, but for the unfair or improper conduct complained of, the accused might not voluntarily have provided the evidence in question or the opportunity to obtain it.'

The critical factor is the voluntary provision of the evidence or the opportunity to obtain it, by the accused himself, and seems to be the basis of the distinction between cases like Kuruma, 34, and cases like Payne, 35; it would otherwise be difficult to see why, if the admission of evidence which a man has been tricked into providing would operate unfairly against him, it would not be equally unfair to admit evidence which had been stolen or otherwise illegally obtained. The answer would seem to lie in the fundamental rule of English law that a man cannot be required to incriminate himself."

NOTES

1. Phipson on Evidence, 11th Ed. para. 813.
2. See Mills on Circumstantial Evidence, 5th Ed. pp. 98, 99.
- 2A. R v McGregor (1966) 1 Q.B. 371.
3. R v Higgins (1929) 3 C & P. 603 at p. 604; see also R v McGregor (1968) 1 Q.B. 371; (1967) 2 All E.R. 267.
4. Phipson on Evidence, 11th Ed. para. 813.
5. Cross on Evidence, 4th Ed. p. 482.
6. Piché v R (1970) 11 D.L.R. (3rd) 709.
7. Rex v Viljoen (1941) A. D. 366.
8. R v Hanger (1928) A.D. 459.
9. Sanka v The Queen (1955) R. & N. 532 (a decision of the then High Court of Nyasaland).
10. Zondo & Others v The Queen (1963 - 1964) Z. & N.R.L.R. 97 at p. 100.
11. R v Summers (1952) 1 All E.R. 1059.
12. Zeka Chinyama and Others v The People S.C.Z. Judgment No. 27 of 1976, at pp 9 & 10.
- 12A. The King v Lee (1956) 34 A.L.J. 223.
13. See Eliyoti Chilenga v The Queen (1959) S.J.N.R. 94 and Mambilina v R (1962) R & N. 507.
14. Solo v The People (1967) Z.R. 99.
15. R v Francis and Murphy, 43 Cr. App. R. 174; R v Richards (1967) 51 Cr. App. 266.
16. R v Murray (1951) 1 K.B. 391.
17. Eliyoti Chilenga v The Queen (1959) S.J.N.R. 94.
18. Nyambe Mwiya and Another v The People (1968) S.J.Z. 173.
19. Tapisha v The People (1973) Z.R. 222.
20. Manjoro v R (1963) R & N. 703.
21. Mambilina v R (1962) R & N. 507.
22. Nyambe v The People (1973) Z.R. 228.
23. M'Murairi o/o Kategwa v R (1956) 23 E.A.C.A. 400.
24. See Zondo & Others v The Queen (1963-1964) Z & N.R.L.R. 97 at p. 100.
25. See The People v Nelson Habwacha (1971) S.J.Z. 17, and Phipson on Evidence 11th Ed. para. 792.

27. Nalishua v The People (1972) Z.R. 26.
28. Callis v Gunn (1963) 3 All E.R. 677.
29. Mbopaleghe v R (1960) R & N. 503.
30. R v John Kayata (1963-64) Z. & N.R.L.R. 84 at p. 85.
See also R v Anaines (1963) R & N. 938 where it was said
that confessions extracted by persistent questioning
after arrest, cannot be excluded on that ground alone.
31. Petrol v The People (1937) Z.R. 145.
32. Zeka Chinyama and Two Others v The People S.C.Z. Judgment
No. 27 of 1976.
33. Sकेleti v The People S.C.Z. Judgment No. 36 of 1974.
34. Kuruna, s/o Kaniu v R (1955) 1 All. E.R. 236.
35. R v Payne (1963) 1 All E.R. 848.
36. Callis v Gunn (1963) 3 All E.R. 677.

CHAPTER VI

INADMISSIBILITY OF CONFESSIONS

1. Involuntary Confessions

We have already observed that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been made freely and voluntarily 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. 1. The basis upon which involuntary confessions are rejected is the danger that the prisoner may be induced by hope or fear to incriminate himself falsely. In R v Shino Mupaya, 2, the accused was charged with manslaughter. During the case for the prosecution a police witness sought to put in evidence a statement made by the accused in answer to the formal charge, and after the usual formal warning and caution had been given. In cross-examination this witness admitted that the accused had clearly indicated to him his wish to see a solicitor before he could make a statement. Woodman J., held that the statement having been taken in spite of the fact that the accused said he wanted to see a solicitor before making it could not be regarded as completely free and voluntary and was therefore inadmissible in evidence. With due respect to the trial judge in that case, it is submitted that the fact of the police officer's refusal to allow the accused to see his solicitor prior to the making of the statement did not go to

voluntariness in the absence of any inducement. There is, in point of fact, nothing in the report to even suggest that the accused was in any way induced by the Police Officer. Assuming that there was absence of inducement, that was a proper case in which the learned trial judge could have exercised his discretion in favour of the accused.

2. Consequential Discoveries

However, if in consequence of an inadmissible confession, or information unduly or unfairly obtained from the accused, the property or the instrument of the crime, or the body of the person murdered, or any other material fact, has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The accused's statement as to his knowledge of the place where the property or other article was to be found being thus confirmed by the fact of discovery, is shown to be true, and not to have been fabricated in consequence of any inducement.

In R v Warwickshall, 3, a woman charged as an accessory after the fact to theft and as a receiver of stolen goods was improperly induced to make a confession in the course of which she said that the property in question was in her lodgings where it was in fact found, the court held that the exclusion of a confession "forced from the mind by the flattery of hope, or by the pressure of fear" was not based on any breach of public faith the might be involved in its reception, but was due to the fact that the confession comes in such a questionable shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it. The court then said:

"this principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession or whether it arises from any other source; for a fact, if it existed at all, must exist invariably in the same manner whether the confession from which it derives be in other respects true or false. Facts thus obtained, however, must be fully and satisfactorily proved without calling in aid any part of the confession from which they may have been derived."

But in R v Gould, 4, the accused made an inadmissible confession which contained a reference to the whereabouts of a lantern. The lantern was subsequently found and both Tindall, C.J., and Parke C, held that the relevant part of the statement could be given in evidence, and the policeman accordingly stated that the accused told him he had thrown the lantern into a certain pond.

Gould's case, 4, was followed by Chamba, J., as he then was, in The People v Chanda, 5,. In that case, three accused were charged with the offense of murder which, at the close of the prosecution case, was reduced to manslaughter. At the end of the case the second and third accused were acquitted but the first accused was convicted of the reduced charge. During the course of evidence, the learned trial judge found that the statements of the first accused had been obtained by the police as a result of an improper inducement. He then said at page 126:

"The evidence of Sub-Inspector Kajoba and Detective Assistant Inspector Sanda is that the first accused led them to the scene after questioning and that they found the body of the deceased there. This boils down to the fact that as a result of information improperly obtained from the first accused, the police found the deceased's body. On the authority of Gould's case, 4, that part of the warn

and caution statement which directly relates to the discovery of the body and only that, becomes receivable because it cannot be untrue. I accept it"

Nokes' 6, approach on this subject is cautious. But Archbold, 7 says that -

"In R v Warwickshall, 3, at page 300, the court stated: 'Facts thus obtained, however, must be fully and satisfactorily proved without calling in the aid of any part of the confession from which they may have been derived' but of R v Gould, 4, and R v Garbett, 8. The view (and it is submitted that it is the better view, see R v Treacy, 9,) expressed in R v Warwickshall, 4, was supported by Erle J. in R v Berriman, 10, where in referring to the prosecution's desire to ask a witness whether the search which resulted in the discovery of a child's remains was implemented in consequence of the defendant's answers to improper questions put by the examining magistrate, he said 'No. Not in consequence of what she said. You may ask him what search was made and what things were found, but under the circumstances, I cannot allow the proceedings to be connected with the prisoner.' "

The practice concerning the admissibility of factual evidence obtained as a consequence of an inadmissible confession is that the prosecution witness concerned may simply be asked by the prosecutor what search, if any, was made and what things were found. It is thus competent to prove that the accused stated that the thing would be found by searching a particular place, and that it was accordingly so found; but it would not, in such a case of confession improperly obtained; be competent to inquire whether he confessed that he had concealed it there. The question that arises is whether so much of the confession as relates distinctly to the fact discovered by it may be given in evidence, on the ground that that part of the statement, at least, cannot be false, 10A.

Before concluding this sub-heading, it is necessary to discuss the admissibility of evidence (other than that of confessions), obtained as a result of an unlawful or unfair act. According to Cross, 11, the English authorities on the admissibility of evidence procured in consequence of an illegal search or other unlawful act, are uniformly in favour of its reception although there are not many of them.

In Kuruma v R, 12, the accused was charged in Kenya with being in possession of ten rounds of ammunition contrary to emergency regulations of that country. The ammunition was alleged to have been found in his pocket by two police officers who (it was assumed) had no power of search under the regulations. Evidence of the illegal search was admitted in evidence and the accused was convicted. The Court of Appeal for East Africa as well as the Judicial Committee of the Privy Council dismissed appeals against conviction. In giving the opinion of the Board, Lord Goddard C.J., said:

"In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."

Commenting upon some Scottish authorities he said:

"If for instance some admission of some piece of evidence, e.g. a document, had been obtained from a defendant by trick, no doubt the judge might properly rule it out."

And later on he said:

"In their Lordships' opinion when it is a question of the admission of evidence strictly, it is not whether the method by which it was obtained is tortious but excusable, but whether what has been obtained is relevant to the issue being tried."

Their Lordships pointed out that they were not qualifying in any degree whatsoever the rule of law with regard to the admission of confessions.

In 1976, the Supreme Court of Zambia decided what may be considered in this country as the leading case on the matter. The case is Stanley Nyanbe Lisuaniso v The People, 13, where the applicant had been convicted of official corruption. The applicant, a police officer, was approached by the driver of a car (the complainant) which had been impounded on account of defective tyres. The applicant told the complainant to come to his house so that the matter could be discussed "properly". When the complainant visited the applicant's house, the applicant demanded payment of K100 as consideration for the release of the car adding that if the matter went to court, the complainant would pay a lot of money. Thereafter the complainant reported the matter at the Police Force Headquarters where, by arrangement, he was handed K80 in bank notes which were marked for ease of identification. Date and time were fixed for the applicant to be paid at his home. Then three police officers, one independent witness and the complainant, proceeded to the applicant's house at the appointed time which was after sunset. The police and the independent witness remained outside while the complainant entered the applicant's house and as soon as the applicant accepted payment of the K80, the complainant signalled to the waiting police, who immediately

came and asked if the applicant had any money; he replied in the negative. The police officers then sought permission to search the house but this was refused. A search warrant had earlier been obtained by falsely swearing that at the time the application for the warrant was being made, the cash in question was already in the applicant's possession. Search was made and on finding the marked K80 in cash, the applicant was arrested for, and charged with, official corruption. At the applicant's trial the defence was that the falsely sworn search warrant was invalid and the resultant search illegal. It was argued that anything discovered as a result of an illegal search and seizure was inadmissible in evidence. The argument was repeated during the hearing of the application by the Supreme Court.

Many authorities in the Common Law countries were reviewed by the Supreme Court, including, for instance, the Scottish case of Larrie Muir, 14, where evidence of milk bottles obtained as a result of an illegal search by Inspectors employed by the Scottish Milk Marketing Board was held inadmissible by reason of the fact that the illegal search had been made, not by policemen possessing a "large residuum of common law discretionary powers", but by privately employed inspectors. Lord Justice-General Lord Cooper, who delivered the unanimous judgment of the court, carefully reviewed Scottish authorities and after citing some dicta from the House of Lords, he said:

"It seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict.

- (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and
- (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any mere formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action for damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand the interest of the state cannot be magnified to the point of causing all the safe-guards for the protection of the citizen vanish, and of offering a positive inducement to authorities to proceed by."

One of the other cases referred to was R v Doyle, 15 a Canadian case in which it was held that evidence obtained by execution of an illegal warrant was admissible. In a careful judgment, Wilson, C.J., said at page 353:

"I think the evidence is admissible so long as the fact so wrongly discovered is a fact - apart from the manner it was discovered - admissible against the party."

The learned Chief Justice then examined the relationship between the confession doctrine (i.e. the admissibility of facts obtained, as a result of an inadmissible confession) and the question of evidence procured through illegal searches and seizures. After

making an analysis that was later elaborated by Wigmore, he said that the reason why improperly induced confessions were excluded was because they could not be depended upon to be true, whereas properly discovered in consequence of inadmissible confessions or as a result of an illegal search was admitted as evidence because it was a fact - a relevant fact.

The Supreme Court came to the following conclusion in Liswaniso's case, 13:

"On the authorities, it is our considered view that (the rule relating to involuntary confessions apart) evidence illegally obtained, e.g., as a result of an illegal search and seizure ... is, if relevant, admissible on the ground that such evidence is a fact (i.e. true) regardless of whether or not it violates a provision of the constitution (or some other law). In our view the evidence of search and seizure of the currency in the case now under consideration, although based upon an irregular search warrant, was rightly admitted by the trial court because that evidence was a relevant fact. But we wish to make it abundantly clear that any illegal or irregular invasions by the police or anyone else are not to be condoned and anyone guilty of such an invasion may be visited by criminal or civil sanctions...."

3. Ambiguous Confessions

A confession should be unequivocal. Thus, where it is equivocal or in any way ambiguous, the court may quash a conviction founded thereon. In Enotiades v The People, 16 Pickett, J., as he then was, said that the statement "Yes I am in trouble" was ambiguous.

A remark "just my bad luck" is not necessarily evidence of guilt, for it might be merely disappointment at being charged, 17.

In Daniel Chisenga v The People, 18, the accused when charged said: "It is true". This was held to be equivocal. Similarly, the accused's statement "Yes I stole" was held to be equivocal in The People v Zulu, 19, upon the charge of burglary and theft.

And an admission made in court of the possession of an offensive weapon is not an admission of being in possession of it without lawful excuse.

4. Subsequent Confessions

As we have seen previously in Chapter III, under the sub-heading of "Duration of Inducement", it is settled law that where two (or more) confessions are made and the first is held not to have been freely and voluntarily made, the second (or any other subsequent statement) would equally be inadmissible, even though there has been no fresh inducement, unless it is shown that the previous inducement has ceased to operate on the mind of the accused, 20.

The question arises as to whether a voluntary confession made after verdict is admissible in evidence at a subsequent trial.

It would appear that a person who makes a voluntary confession after his acquittal cannot be prosecuted again for the offence in respect of which he has been acquitted in spite of the fact that the confession relates to that very offence. The basis for this lies upon the principle of "autrefois acquit."

In the South African case of Rex v Zunqu, 21, the accused was convicted of robbery which had taken place nearly ten years before

the case was tried. It seems that after conviction the case was reviewed. The reviewing judge was of the opinion that there should have been a reasonable doubt as to the accused's guilt on the ground of mistake identity. The Attorney-General then requested that the evidence should be allowed of a conversation, subsequent to the conviction, wherein the accused had confessed to the crime, but the court on review, held that this would be going too far and would be unfair to the accused. The conviction and sentence were then set aside. This decision has been criticised on the ground that the judge could have heard the evidence of the confession under a statutory provision and could then have found that the conviction was in accordance with substantial justice, 22. To recall the words of Bagulay, J., in the Indian case of Chwa Hum Htive v King - Emperor, 23:

"it must be remembered that the acquittal of a guilty accused is just as much a miscarriage of justice as the conviction of an innocent person."

It is submitted, however, that in Rex v Zungu, 21, the decision of the learned judge would have been competent but for the existence of the statutory provision which ought to have been invoked.

NOTES

1. See Ibrahim v R (1914) A.C. 599, at p. 609 approved in Commissioners of Customs and Excise v Harz (1967) 51 Cr. App. R. 123 at p. 155.
2. R v Chima Mupeya (1951) 5 N.R.L.R. 127.
3. R v Warwickshall (1783) 1 Leach 263.
4. R v Gould (1840) 9 C & P. 364.
5. The People v Chanda (1972) Z.R. 116 at pp. 124-126.
6. Nokes, An Introduction to Evidence, 3rd Ed. at pp. 297-98.
7. Archbold Criminal Pleading Evidence and Practice, 39th Ed., para. 1407.
8. R v Garbett (1847) 2 C & K. 474.
9. R v Treacy (1945) 30 Cr. App. R. 93.
10. R v Berriman (1854) 6 Cox 388.
- 10A. See R v Butcher (1798) 1 Lea, n.
11. Cross on Evidence, 4th Ed. p. 281.
12. Kuruma v R (1955) A.C. 197.
13. Stanley Nyambe Liswaniso v The People, S.C.Z. Judgment No. 58 of 1976.
14. Larrie Muir's case (1950) Scots L.T. 37.
15. R v Doyle (1888) 12 Ont. R. 347.
16. Enotiades v The People (1965) Z.R. 144.
17. R v Schofield, 12 Cr. App. R. 91.
18. Daniel Chisenga v The People S.J.Z. Judgment No. 7 of 1965 at p.20.
19. The People v Zulu (1965) Z.R. 75.
20. See Nalishwa v The People (1972) Z.R. 26 at p. 27.
21. Rex v Zungu (1939) N.P.D. 299.
22. See The Law of Evidence, 3rd Ed. -by C. Norman Scoble at p. 271.
23. Chwa Hum Htive v King-Emperor (1926) I.L.R. 46A p. 1186.

CHAPTER VII

ABUSE AND USE OF CONFESSIONS

1. Abuse of Confessions

Due to the frailties of human nature it so happens that sometimes confessions are abused.

It is easy to imagine a policeman or a detective who has been laboriously on the track of a criminal for a long time fully confident that the man has done it. After infinite pains he thinks he has got his man and in the bona fide belief arrests him, or arranges his arrest. Then in the excited moment of his triumph, he finds himself short of one piece of necessary evidence which he may then be tempted to obtain from him by using unorthodox methods, such as threats of violence, actual violence, promises or some subtle form of inducement aimed at the breaking down of the suspect's will. sometimes the suspect or accused may be found so unaccommodating as not to supply a ready-made confession; the police officer concerned may then fall into the temptation to invent one for his convenience so that he could secure a conviction. This type of impropriety may well be common place among some police officers who feel that their chances of promotion to high ranks are mainly dependent upon the number of convictions they can secure as a result of their investigations or the part they play leading to successful prosecutions, although it is only fair to say that police training in no way encourages this aspect.

But, of course, the criminal law, resting on judicial decisions, as well as Judges' Rules, safeguards suspects and accused persons from alleged confessions. Invariably, however, police officers endeavour to follow the Judges' Rules.

In R v Kabutu, 1, Charles J., observed:

'The application of the law relating to incriminating statements is, no doubt, one which places a heavy burden on the police in conducting their investigations. Nevertheless, it is, in my opinion, of constitutional importance, far transcending the proof of guilt of guilty individuals, that it be not whittled down and that it be applied by the courts strictly; to do otherwise will open the door to the Inquisition and the Gestapo, and to the Police usurping the functions of the courts. It is also pertinent to recall the remarks of Cave J., in Regina v Thompson, 2:

'I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which are nonetheless repudiated by the prisoner at the trial. It is remarkable that it is often of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory: but when it is not clear and satisfactory the prisoner is not infrequently alleged to have been born of penitence and remorse, to supplement it with confession and this desire itself vanishes as soon as he appears in a court of justice.' "

And in Zondo and Others v The Queen, 3, Charles J., said that according to authorities cited in that case, the basis upon which evidence of an incriminating statement is excluded in the absence of proof of the condition of admissibility is not that the law presumes the statement to be untrue in the absence of such proof, but because of the danger which induced confessions or admissions present to the innocent and the due administration of justice. That danger has been aptly pointed out by the American authority on evidence, Professor Wigmore, 4, in the following language:

"The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds readiness to resort to bullying and to physical force, and torture. If there is a right to an answer, there soon seems to be a right to the expected answer - that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately the innocent are jeopardised by the encroachment of a bad system."

The learned judge went on to say that as the history of recent years alone suffices to show, the danger referred to in that statement is such as to render it of constitutional importance that the courts adhere strictly to the law governing the admissibility of self-incriminating statements against accused persons. Not to do so will open the door to the methods of Gestapo, to "brainwashing" and to the police usurping the functions of the courts.5.

2. Effect of Confessions on Police Investigations

In some cases once the police have obtained a confession from a suspect, they feel contented and carry out no further investigations that may throw more light upon the case under investigation. The result of such dereliction of duty is, of course, that once the alleged confession is successfully challenged in court, the entire case collapses. A number of such cases might otherwise result in convictions if proper investigations were carried out.

In the preceding chapter, we saw that even when alleged confessions are held inadmissible, facts discovered in consequence of such confessions are receivable in evidence.

The point cannot be over-emphasised that the police should at all times do their competent best in the carrying out of criminal investigations regardless of whether or not an alleged confession has been obtained from the suspect or accused person. In this way, the number of acquittals in relation to persons who might otherwise be convicted, would be minimised. If, through shoddy investigations, the otherwise guilty persons get away with it, this undoubtedly, tends to offer encouragement to such persons to indulge in further criminal activities, thereby increasing the already existing problems that lie in the path of our relentless war to combat crime.

3. Probative Value of Confessions

Voluntary confessions of guilt heal all flaws in a prosecution. They save infinite time and trouble. It is, therefore, little wonder that police officers long for them in their activities as for manna in the wilderness, 5.

In *Muhammad v The People*, 6, Dennis J., said at pages 109 - 110;

"If an accused person knows the truth and chooses to tell it to the police, then, prima facie and subject always to the rules and principles governing such matters, the police would be entitled to put it before the court.

I see no reason here for any great surprise, as was mentioned in the evidence, that the appellant should have appeared happy to speak at that stage, when he had, so to speak, decided to get it off his chest.

I will not read it all in detail but would refer to Professor Granville Williams at page 334 of the same 1966 volume of the Criminal Law Review:

'The police are remarkably successful in obtaining incriminating statements by means of interrogation, and this very success naturally awakens dark suspicions. But it is certainly not necessary to suppose that unfair methods have been used. When an offender has been caught in incriminating circumstances, he often judges it better to confess and plead guilty, hoping thereby to get a lighter sentence. Moreover, (and this is a fact too little understood by those who express alarm when confessions are made to the police), a guilty person who finds himself detected often wishes to confess in order to obtain relief from the feeling of guilt. The point cannot be better expressed than in the words of Wigmore, 7.

'The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction. At that moment, he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief is to fly in the face of human nature.' "

There appears to be two schools of thought as to the evidential value of confessions. One of these affirms the slender value of confessions and urges the greatest caution in their use. The other asserts that confessions are the best kind of evidence.

It is common cause that confessions vary in value according to the circumstances in which they are made. Some are clearly trustworthy while others are worthless.

With regard to the two diametrically opposed schools of thought, the explanation would appear to lie in the mixture of good and bad qualities likely to be present in all attempts to use confessions. It is thus necessary to distinguish between the confession as a proved fact and the process of proving an alleged confession.

When the making of a confession is a completely proved fact and its authenticity is beyond doubt and conceded, it is then incontrovertible that such confession is the best sort of evidence. As Erle, J., said in R v Baldry, 8:

"I am of the opinion that when a confession is well proved, it is the best evidence that can be produced."

Professor Ndulo, 9, says that -

"It is not right to ignore the fact that there are people who very much support confessions and would like them tolerated if not encouraged. They argue that the abolition of confessions would increase the crime wave. After the Miranda Case, 10, some prominent Americans, Richard Nixon among them, accused the United States Supreme Court of emptying the prisons of criminals, they claimed law enforcement would never again be effective, 11. They regard confessions as an instrument of law enforcement that has for long and quite reasonably been thought worth the price paid for it".

However, the process of proving an alleged confession is on a different footing. Where a confession is conceded by the accused, no problem arises. But where it is challenged the procedure of trial within a trial is invoked. The exponents who attach slender value to confessions argue, inter alia, that eagerness on the part of those engaged in the pursuit of evidence upon which to secure conviction and punishment of an accused may lead them to exaggerate what was said to him by the accused; eagerness to carry favour with persons in authority may lead the defendant himself to make a confession; proof may be too easily procured; the danger of mistake arising from misapprehension or the malice of prosecution witnesses; the infirmity of the memory of the witnesses; self-delusion; the desire to shield a guilty party or friend; the impulses of despair from the pressure of strong and apparently incontrovertible presumption of guilt; the hope of pardon - these and many other instances - may operate to produce unfounded confessions of guilt, 12.

It is submitted that the cases which attach slender value to confessions are few and far between, Wignmore, 4A, states the position in the following terms:

".... as it is impossible to determine beforehand the real weight of any confession, and as the accused has ample opportunity of offering any facts affecting the weight of the confession, it is entirely unnecessary to bar out all confessions whatever by broad and artificial tests, merely on account of this slender and rare risk of falsity. To employ an anomalous occurrence as the basis of indiscriminate exclusion is not reasonable ...

Again the notion that confessions should be guarded against and discouraged is not a benefit to the innocent but a detriment. A full statement of the accused person's explanations, made at the earliest moment, is often the best means for him of securing a speedy vindication. The circumstances of the suspicion may often be disposed of by a simple explanation, so clear and convincing that immediate release follows as a matter of course; while the clues which the innocent accused may be able to furnish will be equally serviceable in securing that evidence against the real culprit which a delay may frequently render unavailable."

This may well be true. An innocent person may be in the position to make a completely exculpatory statement: it would then be wiser to speak; he might not be in that position where, for instance, he is accused falsely and is unable to put forward an alibi in cases of mistaken identification, etcetra.

NOTES

1. R v Kahyata (1963-1964) Z. & N.R.L.R. 84 at p. 86.
2. Regina v Thompson, (1893) 2 Q.B. 12.
3. Zondo and Others v The Queen (1963-1964) Z. & N.R.L.R. 97 at p. 108.
4. Wigmore, Vol. 4 section 2250.
- 4A. ibid para. 867.
5. See C. G. L. Du Cann, Miscarriages of Justice at p. 149.
6. See also Muwondo v The People (1965) Z.R. 91 at p. 108.
7. Wigmore on Evidence, 3rd Ed. 111 para. 851.
8. R v Baldry 2 Den Cr. C. 446.
9. See Zambia Law Journal, Vol. 5, 1973 at p. 103.
10. Miranda v Arizona (1966) 16 Led, 2d; 384 U S 436.
11. R. Clark, Crime in America at p. 293.
12. See Hills on Circumstantial Evidence, 5th Ed. at p. 93; Wigmore, 111 3rd Ed. at pp. 357 and 358 and C. N. Scoble, The Law of Evidence at p. 250.

CHAPTER VIII

CONCLUSION

The interests of justice and fair play make it imperative that there should be procedural safeguards surrounding the interrogation and the taking of statements from accused persons or those suspected of having committed a crime.

Quite apart from the Judges' Rules, courts in some countries will not admit alleged confessions made to the police in the absence of an independent witness; in others confessions must be made before, say, a magistrate or a justice of the peace; and, in some, it suffices that confessions are made to or before a police officer of a specified rank. In addition to such safeguards, courts have a discretion, in certain cases, to exclude an otherwise voluntary confession, on the ground of improprieties on the part of persons in authority, such as breach of the Judges' Rules or where the strict rules of admissibility of such evidence would operate unfairly against an accused person.

In the famous American case of Miranda v Arizona, 1, the Supreme Court of the United States held that during police interrogation, proper procedural safeguards must be employed to protect the constitutionally enshrined principle against self incrimination. Unless other satisfactory means are adopted, the court said that the following are required:

- " (i) prior to any questioning the person must be warned that he has the right to remain silent;
- (ii) that any statement he does make may be used in evidence against him;
- (iii) that he has the right to the presence of an attorney either retained or appointed;
- (iv) the safeguards can only be disregarded if the defendant waives his rights, such waiver being made voluntarily, knowingly and intelligently; and further if at any stage of interrogation he indicates he wishes to consult with his lawyer there can be no more questioning. "

The protection given to a defendant in the United States of America namely, the constitutional positive right to counsel, would appear to be more far reaching than the English position.

On August 10, 1960, the Canadian Bill of Rights came into force. Section 2(c)(ii) of that Bill says that -

"No law of Canada shall be construed or applied so as to deprive a person who has been arrested or detained of the right to instruct counsel without delay."

That provision was applied in Brownridge v R, 2, where the accused was arrested on suspicion of drunken driving. He indicated to the police he would only take a breath test if given an opportunity to consult with his lawyer. This request was initially denied. But at a later stage, he did consult with a lawyer but not until after he had given a sample of breath to the police. The accused was prosecuted and convicted. On appeal,

the Supreme Court of Canada quashed the conviction and said that the criminal code of Canada "should not be construed or applied so as to deprive a person who has been arrested or detained of the right to retain and instruct counsel without delay", with the proviso that such request should not be acceded to unless bonafide and not for the purpose of time wasting. Although the principle in Brownridge's case, 2, was further extended in the case of Balkan, 3, to the right to instruct and consult a lawyer in private, it would appear, on the authority of Hogan's case, 4, that section 2(c) (ii) of the Bill of Rights does not render evidence obtained after refusal of a suspect's request for his lawyer, inadmissible per se.

Obviously, in any system of criminal law a line is of necessity drawn between the needs of criminal investigation and the need to protect individual rights. The position of that line will differ from country to country and from time to time, 5.

In Zambia, the writer is aware of a few unreported cases in respect of which suspects and accused persons have, at their request, been allowed to make statements to the police in the presence of their counsel. An accused, or a suspect, may, as a matter of common law, consult with his counsel before making a statement to the police. As earlier indicated in R v Chima Mupfya, 6, the accused's statement made to a police officer was rejected since the accused's request to see a solicitor before making it had not been acceded to.

In a recent incident, a suspect asked the police to have his lawyer present during interrogation but, although the lawyer went to the police station, he was not allowed to attend the interrogation, possibly on the ground that that would be an unnecessary hindrance in the administration of justice. The matter was thereafter pursued administratively.

It is said that the only practical way to assist the police and therefore to ease the pressure on the courts is to insist upon a requirement that policemen obtaining confessions should bring the confessors before a magistrate for their confessions to be confirmed and reduced to writing. 7. This is already a requirement in countries such as South Africa and Tanzania, to mention but a few.

In an article titled "Confessions - Tainted Evidence", 8, Professor Ndulo, advances certain suggestions that he considers might make our rules less susceptible to abuse and thereby deter police officers from employing improper interrogation methods, the object of the exercise being to encourage them to conduct fuller investigations into crime. In one of these he says:

"In fact it is consistent with our national philosophy of Humanism to suggest rules that are aimed at tightening the rules of confessions. For it shows our concern for the common man. Educated people - aware of their rights - know they do not have to answer questions. Experienced criminals also know these things. The rich have lawyers and the police know they will call lawyers and do not often try to interrogate powerful or wealthy people. It is the common man who is often poor and ignorant that the police will try to take advantage of".

In the draft Criminal Evidence Bill prepared by the Law Development Commission of Zambia, 9, it is provided that -

"6.(1) A confession made by any person to a member of the police security or armed forces shall not be admissible in evidence at a criminal trial unless it was made in the presence and hearing of an independent person who can understand the language used by the maker

(3) In this section -

.....

.....

'independent person' means a person who is not a police officer or a member of the armed forces and who has no interest special to him, to serve in the proceedings. "

In conclusion, this chapter endeavours to focus attention on what safeguards there are, or should be, in order to protect the individual by minimising the risk of abuse of police powers whenever the police interrogate suspects or accused persons.

In the light of the contents of this work, the writer considers that -

- (a) When a confession is well proved, it is the best evidence that can be produced;
- (b) (i) the making of confessions before a senior police officer, as is the case in Kenya, does not, with due respect, seem to be a sufficiently appropriate method in so far as the safe-guarding of the interests of suspects or accused persons are

concerned, since by the very nature of their duties, the interests of the police invariably lie with the prosecution;

- (ii) the Law Development Commission of Zambia has made a practical approach in their Draft Bill on Criminal Evidence, 9, by seeking to provide that for a confession to be admissible in evidence, it should be made in the presence and hearing of an independent witness who can understand the language used by the maker. The Draft Bill goes further and excludes from the category of an "independent person" a police officer, a member of the armed forces or anyone who may have an interest of his own to serve in the proceedings. It is submitted that clause 6 of the Draft Bill, if accepted and enacted, may go a long way in reducing the incidence of temptation on the part of the authorities concerned from indulging in certain improprieties.
- (iii) The most ideal situation would appear to lie in a requirement, as is the case, for instance, in Tanzania, that confessions should be made before a magistrate (or some such judicial officer); such a confession should be reduced in writing and signed, or thumb-printed, by the maker and witnessed by the magistrate before whom it is made.

In this way, it is hoped that the procedure of a trial within a trial would be a rare occurrence.

This method of recording statements from suspects and accused persons might not be entirely foolproof as it is conceivable that the police, etcetra, could induce the maker beforehand to supply a "voluntary" statement once he is before a magistrate. Perhaps it might be advisable that a set of interrogations be conducted by the magistrate concerned along such lines as: "have you been subjected to any physical violence or threat of it , promise, any other form of inducement" etcetra. Thereafter the magistrate would then administer the usual caution.

Some practical problems might arise where a station has one magistrate only since he would later have to recuse himself from hearing a case in respect of which he has recorded the accused's confession but the accused pleads not guilty. This then would necessitate the sending of another magistrate from another station in order for him to hear and determine such a case.

- (c) The Judges' Rules should continue to be observed. They were not laid down by judges in any spirit of censure on the police; on the contrary, they were laid down in order to assist the police in what must obviously be onerous and, indeed, dangerous duties performed in the interests of the nation.

- (d) At the end of the day, even an otherwise admissible confession might be excluded in the exercise of a judge's discretion if the confession was obtained, for instance, as a result of a breach of any of the Judges' Rules, or if the strict rules of evidence relating to admissibility might operate unfairly against the accused.

NOTES

1. Miranda v Arizona, (1966) 16 Led, 2d, 384 u.s. 436
2. Brownridge v R (1972) 28 D.L.R. 30
3. Balkan (1974) 13 C.C.C. 20, 482.
4. Hogan's case 18 C.C.C. (2d) 65.
5. See New Law Journal, Vol. 125 No. 5726 (of November 20, 1975) at p. 1109.
6. R v Chima Mupeya, 5 N.R.L.R. 127.
7. See The Rhodesian Law Journal Vol. 4 1964 at p. 6.
8. See Zambia Law Journal, Vol. 5, 1973 at pp. 108 & 109.
9. Criminal Evidence Bill, 1976, clause 6.(1) & (3).

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16. Roscoe Criminal Evidence, 16th Ed.
17. Scooble The Law of Evidence, 3rd Ed.
18. Stephen Digest 36.
19. Taylor Evidence 11th Ed. Vol. I
20. Wigmore Evidence, Part III, 3rd Ed. Vol. 4,
21. Wills Circumstantial Evidence, 5th Ed.

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3. Amichi Banda and Another v The People C.A.Z. Judgment No. 41 of 1970.
4. Anandagoda v R (1962) 1 W.L.R. 817.

B.

1. Baldry's Case (1852) 2 Den 430.
2. Balkan's case (1974) 13 C C C 20, 482.
3. Brownridge v R (1972) 28 D.L.R. 30.

C.

1. Callis v Gunn (1963) 3 All E.R. 677.
2. Chingowe v The People, S.C.Z. Judgment No. 10 of 1977.
3. Chileshe v The People (1972) Z.R. 222.
4. Chilufya v The People, S.C.Z. Judgment No. 65 of 1975.
5. Chisokola v The People (1972) Z.R. 46.
6. Commissioners of Customs and Excise v Harz and Power (1967) 1 A.C. 760; (1967) 51 Cr. App. R. 123.
7. Chwa Hum Htive v King Emperor (1926) 1 L.R. 46A

D.

1. Daniel Chisenga v The People S.J.Z. Judgment No. 7 of 1965.
2. David Biloya and Another v The People S.C.Z. Application Nos. 141 & 171 of 1975.
3. Deokinanan v R (1969) 1 A.C. 20

E.

1. Edward Kunda v The People, S.J.Z. No. 47 of 1971.
2. Eladio Chola and Another v The People, S.C.Z. Judgment No. 154 of 1976.
3. Eliyoti Chilenga v The Queen, S.J.N.R. No. 94 of 1959.
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F.

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G.

1. Swisayi and Dube v R (1963) R & N. 331.

H.

1. Hall v Regina (1971) 1 All E.R. 322.
2. Hogan's Case, 18 C C C (2d) 65.

I.

1. Ibrahim v R (1914) A.C. 599.
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1. Kangachepe Zondo and Others v The Queen, (1963-1964) Z. & N.R.L.R. 109.
2. Kayuni v R, S.J.N.R. No. 47 of 1960; (1960) R & N. 508.
3. Kirkstall Brewery Co. v Furnace Ry. L.R. 9 Q.B. 468.
4. Kuruma s/o Kaniu v R (1955) 1 All E.R. 236; (1955) A.C. 197.

L.

1. Larrie Muir's case (1950) Scots L.T. 37
2. Lawrence Kabwe v The People, Ndola Criminal Case No. L.O. 1725 of 1976; S.C.Z. Appeal No. 212 of 1976

M.

1. Mambilina v R (1962) R & N 507.
2. Mandevu v R (1962) R & N. 298
3. Manjoro v R (1963) R & N. 703.
4. Masalule v The King (1939) R.C.A. 174.
5. Mbopeleghe alias Kayuni v R S.J.N.R. No. 47 of 1960; (1960) R & N. 508.
6. Miranda v Arizona (1966) 16 Led 2d; 384 U.S. 436.
7. M'Murairai s/o Kategwa v R (1956) 23 E.A.C.A. 480.

M. (contd.)

8. Musinga Jean Pierre v The People, S.C.Z. Judgment No. 14 of 1976.
9. Muwowa v The People (1965) Z.R. 91
10. Mwape v The People S.C.Z. Judgment No. 8 of 1976.

N.

1. Nalishwa v The People (1972) Z.R. 26.
2. Nyambe Mwiya and Another v The People, S.J.Z. No. 173 of 1966

O.

Nil

P.

1. Pakala Narayana Swami v The Emperor (1939) 1 All.E.R. 396.
2. Parkes v The Queen (1976) 3 All. E.R. 322
3. Petrol v The People (1973) Z.R. 145
4. Piché v R (1970) 11 D.L.R. (3rd) 709.

R.

1. Regina v Burton, Dears C.C. 282
2. Rex v Becker (1929) A.D. 171
3. Rex v Haggerty and Others, 6 Celebrated Trials, 19.
4. Rex v Singombe and Siababwa (1931-1948) N.R.L.R. 33.
5. Rex v Viljoen (1941) A.D. 366.
6. Rex v Warwickshall (1783) 1 Leach c.c. 263.
7. Rex v Zungu (1939) N.P.D. 299.
8. Roy Mulolo v The People, HNA. Judgment No. 541 of 1975.
9. R v Abraham Erumesi (1959) N.R.L.R. 253.
10. R v Ananias (1963) R & N. 938.
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