EVIDENCE

Admissibility of Confessions—Judges' Rules

The question of the admissibility in evidence of confessions made by accused persons to police officers has been raised and fully discussed by the High Court of Australia in a number of recent cases: *MacDermott* v. *R.*,[1] *R.* v. *Lee and others*,[2] *Basto* v. *R.*[3] and *Smith* v. *R.*[4] In *R.* v. *Bailey*[5] the South Australian Court of Criminal Appeal (Abbott and Ross JJ. and Piper A.J.) considered the result of these cases particularly in relation to previous South Australian authorities on the subject, and to the effect and application of the English Judges' Rules.

Bailey was arrested in Queensland and charged with obtaining a motor car in South Australia by false pretences. He was given the usual caution by the detective who charged him. The detective then proceeded to question him with respect to the murder of two women and a man in South Australia. The questioning lasted the whole day and during that time the police alleged that the accused made four statements to them in each of which he admitted connection with the murders to a greater extent than in the previous one. The final statement admitted causing the death of all three victims, and was dictated to a policeman who typed it. The accused signed it and also signed an admission that the statement was made voluntarily. But it was not until the prisoner made the third of his statements that he was cautioned in respect of the murder charge.

The objections to the admission of the confession evidence were (1) that the Crown had not proved that the evidence objected to was given voluntarily by the prisoner and (2) that in any event the trial judge should have excluded the evidence in the exercise of his discretion as unfair in all the circumstances, in particular in that the absence of a proper caution until too late constituted a substantial departure from the Judges' Rules, which are in force in Australia only in Victoria.

The Court accepted the general statement of the law relating to admissibility of confessions laid down by the High Court in *R.* v. *Lee*.[6] There is a rule of law:

"Such a statement may not be admitted in evidence unless it is shown to have been voluntarily made in the sense that it has been made by an exercise of free choice and not because the will of the accused has been overborne, or his statement made as the result of duress, intimidation persistent importunity or sustained or undue insistence or pressure, and such a statement is not voluntary if it is preceded by an inducement, such as a threat or promise, held out by a person in authority, unless the inducement is shown to have been removed."[7]

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1. (1948) 76 C.L.R. 501.
2. (1950) 82 C.L.R. 133.
3. (1954) 91 C.L.R. 628.
4. (1957) 97 C.L.R. 100.
5. [1958] S.A.S.R. 301.
6. 82 C.L.R. 133.
7. Ibid p. 141.

And a rule of discretion:

"If it is voluntary, circumstances may be proved which call for an exercise of discretion. The only circumstance which has been suggested as calling for an exercise of the discretion is the use of 'improper' or 'unfair' methods by police officers in interrogating suspected persons or persons in custody. . . . What is impropriety in police methods and what would be unfairness in admitting in evidence against an accused person a statement obtained by improper methods must depend on the circumstances of each particular case, and no attempt should be made to define and thereby to limit the extent or the application of these conceptions."[8]

The Court considered that the law which had hitherto applied in South Australia was that stated by the Full Supreme Court in *R.* v. *Lynch*[9] and supplemented by Napier J. in *Lenthall* v. *Curran*.[10] The tests propounded in the former of these cases, are taken from the language of Lord Summer delivering the judgment of the Privy Council in *Ibrahim* v. *R.*[11]; they contain expressions which may, it is submitted, be usefully considered as supplementary to the statements the High Court quoted above. In relation to the rule of law it is said that a statement is not voluntary if it has been obtained "by fear of prejudice or hope of advantage exercised or held out by a person in authority". With respct to the rule of discretion, the judge may exclude statements "if he thinks they were unguarded answers made under circumstances that rendered them unreliable or unfair, for some reason to be allowed in evidence against the prisoner". [12]

The Court in this case found that the Crown 'proved beyond reasonable doubt that the confessions were not obtained under such circumstances as to render them non-voluntary and so inadmissible as a matter of law'.[13] They also found that the trial judge had correctly refrained from exercising his discretion to reject the evidence. They found that 'whatever may be said in the Judges' Rules or in any direction issued to police officers in any of the Australian States, the matter is not to be finally judged by such rules or directions, but by the circumstances of every particular case and by the tests laid down in *R.* v. *Lee*[14] and by Street J. in *R.* v. *Jeffries*.[15]

They refused to adopt the argument of counsel for the appellant that the decision of the High Court in *Smith* v. *R.*[16] modified the principles stated in *R.* v. *Lee* by requiring some higher standard of fairness on the part of questioning police officers. In particular the judgment by Williams J. (which contained a full discussion of the effect of the Judges' Rules) was read as limited by the former case. The Court was unable to find in the evidence itself or any inference to be drawn from the time taken in questioning the accused any reason why it would be unfair to use his own statements against the prisoner.

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8. Ibid p. 150.
9. [1919] S.A.S.R. 325.
10. [1933] S.A.S.R. 248 at 262.
11. [1914] A.C. 599 at 609.
12. [1919] S.A.S.R. at 333.
13. [1958] S.A.S.R. at 315.
14. (1950) 82 C.L.R. 133.
15. (1947) 47 S.R. (N.S.W.) at p. 312.
16. (1957) 97 C.L.R. 100.

The case reiterates the view of the High Court that the exercise of the trial judge's discretion to reject confession evidence depends on the particular circumstances of the case, and affords an example of a contravention of the standards set by the Judge's Rules which was not considered unfair in all the circumstances.

PRIVATE INTERNATIONAL LAW

Jurisdiction in Nullity Suits—Choice of Law

Corlevich v. *Corlevich*[1] was an action by a husband for an order declaring his marriage to the respondent null and void upon the following facts:

In 1950 he went through a ceremony of marriage with the respondent in Italy; they migrated immediately afterwards to South Australia where they were both resident at time of the action. In 1943 the wife had married M. in Italy. She had lived with him until 1947 when he left her and went to Yugoslavia. He was then aged twenty-six. She received a letter from him in 1948 but heard no more of him until 1956 when a letter from her family in Italy spoke of him as still being alive. Expert evidence was called to establish that certificates of both ceremonies which were produced would be evidence of a valid marriage in an Italian Court, and further that the second ceremony would have no legal effect by Italian law and would be regarded as never having existed, without any proceedings being taken to declare it void (assuming that the husband was alive beyond question at the time of the ceremony).

Reed J. found that the onus was upon the plaintiff to show that M. was still alive at the date of the second ceremony, following the rule stated by Dixon J. in *Axon* v. *Axon*.[2] He found that this burden was discharged by the presumption of continuance of life as stated and limited in the same case.[3]

The case raises two questions of interest with respect to the private international law rules in nullity suits. The first concerns the jurisdiction of the Court.

This is assumed by Reed J.[4]: "The jurisdiction of this Court to declare the marriage void is clear, as both parties reside in this State; cf., for example, *Ramsay-Fairfax* v. *Ramsay-Fairfax* (*otherwise Scott-Gibson*)."[5] Strangely enough there does not seem to be any direct authority to this effect in relation to 'void' marriages.

A line of English cases have considered whether in the case of a *voidable* marriage there is a wider jurisdiction in the court than the rule applying to divorce proceedings that only the Courts of the domicil of the parties has jurisdiction: *Le Mesurier* v. *Le Mesurier*.[6] In *Inverclyde* v. *Inverclyde*[7] Bateson J. considered that the rule in

1. [1954] S.A.S.R. 131.
2. 50 C.L.R. 395 at p. 403-404.
3. ibid at p. 404-405.
4. [1958] S.A.S.R. at 135.
5. [1956] P. 115 at p. 133.
6. [1895] A.C. 517.
7. [1931] P. 29.