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Citation Information

Grimaud, Gerald C.. "Declercq v the Queen: A Confession's Reliability on Voir Dire." *Osgoode Hall Law Journal* 8.3 (1970) : 559-566.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol8/iss3/8>

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DECLERCQ V THE QUEEN: A CONFESSION'S RELIABILITY ON VOIR DIRE¹

BY GERALD C. GRIMAUD*

The history of liberty has largely been the history of observance of procedural safeguards.—FRANKFURTER

A Comparative View of the Existing Law

In June of 1968 the Supreme Court of Canada, in a six to three decision, upheld the Ontario Court of Appeal by deciding that truthfulness may be treated as a criterion of voluntariness of a confession by a trial judge sitting without a jury and on a voir dire.² The facts of the DeClercq case are as follows: The accused was convicted for indecently assaulting an eleven year old girl. Police interrogation resulted in the accused making a confession. At the trial without a jury the admissibility of the statement was objected to. While testifying in the voir dire, the accused was handed the statement and asked by the judge whether or not it was true. The defense objected by saying "the question of whether the statement is true or is not is not material here." The trial judge overruled the objection and the accused answered, "Yes, Your honor . . . except for a few details, I would say the statement is correct."

The general rule is that before a confession will be admitted into evidence it must be ruled by the trial judge as having been voluntarily made, "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."³

Two broad issues arise in this case: firstly, what are the limitations of a trial judge in taking over the questioning of a witness; secondly, and of primary importance in this note, should the accused be asked a question as to the trustworthiness of a confession on voir dire and must the question be answered?

Concerning the question of a trial judge's powers to ask questions of a witness, a score of cases could be discussed. However, since it is a secondary issue and one which, it appears, shows little promise, this note shall be limited to one Ontario case which, it is suggested, generally demonstrates the courts'

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¹ [1968] S.C.R. 902, 70 D.L.R. (2d) 530.

² *Ibid.*

³ *Ibrahim v The King* [1914] A.C. 599 at p. 609, applied by the Supreme Court of Canada in *Boudreau v The King* [1949] 3 D.L.R. 81, S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427; the landmark decision in the United States is *Brown v Mississippi* 297 U.S. 278 (1936).

attitude. In *Conner v Brant*, Meredith, C.J.O. explains the very broad powers a trial judge enjoys:

It does not admit of doubt that the learned Judge was acting within his right in questioning the witness for the purpose of clearing up anything that his former testimony had left doubtful, and indeed as to any relevant matter as to which further information not brought out by counsel was desired, in order to enable the learned Judge to reach a proper conclusion as to the facts. When and how far such course should be taken must necessarily depend much upon the circumstances of the particular case and the sound discretion of the Judge, and I know of no rule which forbids in such a case the putting of leading questions to the witness.⁴

Hodgins, J.A. agrees by saying:

It would be a backward step to impose fetters upon the discretion of a Judge as to the mode in which he may proceed to elicit facts which he desired to ascertain. . . .⁵

The following comments on the DeClercq case will be restricted to the issue of whether or not it is proper and wise to ask and demand a witness to answer the question whether or not his confession is true when the accused takes the stand in a *voir dire*. On this subject the Canadian law is essentially the same as the English law,⁶ in contrast to the law on this issue in the United States.⁷

Both Canadian and United States' Supreme Courts hold that the only criterion necessary to be considered by a trial judge in *voir dire* when ruling upon the admissibility of a confession is whether or not the statement was voluntarily made by the accused to someone in authority. However, the two great Courts differ as to what factors are relevant to the question of voluntariness. The Canadian position is that truthfulness of the statement may be relevant to the question of voluntariness although not necessarily directly relevant to the issue of admissibility as an additional criterion juxtaposed with voluntariness. Chief Justice Cartwright, of the Supreme Court of Canada, in a majority opinion writes:

The question to be determined is whether or not the statement was voluntary and not whether or not it is true. On the other hand, an assertion by the accused that the statement is untrue may logically have a bearing in determining whether or not it was voluntary.⁸ [The authorities referred to do not suggest] that the question put

⁴ 31 O.L.R. 274 at pp. 279-280 (1914).

⁵ *Ibid.*, at p. 286.

⁶ The Ontario Court of Appeal, in *R. v LaPlante* [1958] O.W.N. 80, followed the English case *R. v Hammond* [1941] 3 All E.R. 318. That Court, Laskin, J.A. (as he then was) dissenting, felt bound to follow the LaPlante decision when it gave judgement in the DeClercq case, [1966] 1 O.R. 674, 2 C.C.C. 190, and, as above mentioned, the Supreme Court of Canada upheld the Ontario Court of Appeal in the DeClercq case. The Ontario Court could have easily distinguished DeClercq from both Hammond and LaPlante: in the latter two cases there was a jury; also, unlike DeClercq, it was not the trial judge who asked the question of the accused. Further, it ought to be noted, the Saskatchewan Court of Queen's Bench argued convincingly that that aspect of the Hammond case which dealt with the admissibility of the confession is *obiter dicta*: *R. v Hnedish* 26 W.W.R. 685, 29 C.R. 347 (1958).

⁷ In *Rogers v Richmond* 365 U.S. 534 (1960) Mr. Justice Frankfurter, delivering the opinion of the Supreme Court of the United States, struck down the Connecticut rule of evidence which, like the DeClercq Rule, was that reliability of a confession could be a factor in deciding whether or not a confession was voluntary. In 1964 the Supreme Court of the United States reaffirmed Rogers by saying that voluntariness must be decided without regard to its truth or falsity: *Jackson v Denno* 378 U.S. 368 at pp. 376-377.

⁸ *Supra* footnote 1, at p. 906 (S.C.R.) and at pp. 532-533 (D.L.R.).

to the accused as to the truth of his statement was permissible on any ground other than its bearing on the question of his credibility.⁹

The position taken by the United States' Supreme Court is simply stated as being that truthfulness of the accused's statement is not relevant to either the issue of admissibility or voluntariness and therefore any question which solicits from a witness on voir dire an answer concerned with the reliability of a confession is improper.¹⁰

Relevant to Credibility?

When a trial judge attempts to decide whether or not a confession was voluntarily made by the accused he is often faced with no better evidence than the accused's word against the word of the police who interrogated him. The lack of further evidence to help decide this important question of fact which may allow the confession in or out of the general pool of evidence and all that that implies must surely be frustrating to a conscientious judge. It is only natural, therefore, that he look for signs which would help him establish the quality of the witness' credibility since it is obvious that the honesty of either the accused or the police is wanting. The question that naturally must be answered is this: is the question as to the reliability of the confession helpful in determining the credibility of the accused in the voir dire as Chief Justice Cartwright alleges?

When the accused is asked on voir dire whether or not the confession is true his answer would essentially be either that it is or that it is not. What inferences may be drawn from either response? First, where the statement is said to be untrue: there is a possibility that the alleged pressures on the accused were actual and in order to relieve himself of those pressures the accused made a false confession; however, there is a real possibility that if the accused is lying about the reliability of the confession he is also lying as to any alleged pressures he experienced. Second, where the accused admits the confession is true: it may be simply another instance of the common occurrence of an accused freely confessing without any pressures upon apprehension by the police, but on second thought deciding to plead not guilty at trial; however, if the accused would offer such damaging testimony his veracity ought to be confirmed and increased reliance should be placed upon his credibility when the accused alleges involuntariness of the confession.¹¹ It is submitted, therefore, that for a judge to solicit an answer from the accused as to whether or not the confession is true would not help the court in deciding upon the accused's credibility. Rather, it would tend to confuse the issue. This being the case, it seems that appellate courts are merely allowing, through the use of yet another judicial fiction, the trial judge to admit incriminating statements into evidence when they are reliable, without strict regard to voluntariness. As a result, reliability, not voluntariness, is essentially the criterion for admissibility although the courts would hesitate to plainly so state for fear the police would view it as a license to resort to the use of excessive pressures as a matter of policy and less thorough investigative practices. Surely, once a trial judge

⁹ *Ibid.*, at p. 907 (S.C.R.) and at p. 534 (D.L.R.).

¹⁰ *Supra* footnote 7.

¹¹ cf. Graburn, L.K., "Truth as the Criterion of the Admissibility of Confessions", 5 *Criminal Law Quarterly* 415 at p. 421 (1963).

knows a confession is true he will likely rule it admissible except, possibly, in extreme cases. In order to admit the statement into evidence he must, according to law, rule it voluntary — obviously a result oriented decision once reliability is known. So as to avoid this confusion and questionable procedure the Supreme Court of the United States takes the opposite position to that taken by the Canadian stating the following reasons:

We are barred from speculating — it would be an irrational process — about the weight attributed to the impermissible consideration of truth and falsity which . . . may well have distorted, by putting in improper perspective, even . . . findings of historical fact [voluntariness]. Any consideration of this “reliability” element was constitutionally precluded, precisely because the force which it carried with the trial judge cannot be known.¹²

Appellate Jurisdiction?

Chief Justice Cartwright held that since it is for the trial judge to decide whether or not the confession was voluntary it is not for an appellate court to decide upon the method he will employ to make his findings:

While, in my opinion, the learned trial judge ought not to have put the question and ought not to have required an answer after the objection of counsel, I find myself unable to say that the course [the trial judge] followed constituted an error in law. It was . . . a mistaken exercise of discretion but . . . in an appeal to this Court in a criminal case, our jurisdiction . . . is limited to dealing with questions of law in the strict sense.¹³

Query: what is the difference between a question of law and a question of law in the strict sense? Are not all rules of evidence questions of law designed to avoid undue prejudices and confusion of issue? Justice Hall, also of the Supreme Court of Canada, dissenting in the DeClercq case agreed with the dissenting opinion of Justice Laskin of the Ontario Court of Appeal. These dissenting jurists were of the opinion that courts of appeal *do* have the jurisdiction to limit the trial judge’s powers of discretion by simply handing down a rule of evidence to go along with present policies of exclusion:

. . . the question whether a confession is true, even if relevant to the issue of its voluntariness (and, hence, admissibility), involves resort to a line of inquiry that goes to much beyond the issue for which it is invoked as to make it improper either to initiate it or pursue it.¹⁴

Encroachment on the Rule Against Self-Incrimination?

It is submitted that the DeClercq Rule encroaches upon the accused’s right not to be forced to incriminate himself. Consider a trial: The accused may wish not to testify in the trial proper so as not to incriminate himself, a long standing common law and statutory right. A confession is introduced as evidence. Its admissibility is objected to and a voir dire is held so as to decide whether or not it was voluntarily made. There is no evidence of involuntariness unless the accused takes the stand since he was the individual alone with the police during interrogation. However, because of the mere threat of being asked whether or not the confession is true, he will often decide

¹² *supra* footnote 7 at p. 545, per Justice Frankfurter giving the opinion of the court.

¹³ *supra* footnote 1, at p. 909 (S.C.R.) and at pp. 535-536 (D.L.R.).

¹⁴ *supra* footnote 1, at p. 918 (S.C.R.) and at p. 543 (D.L.R.), Justice Hall favorably quoting Justice Laskin when Justice Laskin was a member of the Ontario Court of Appeal.

not to take the stand and thus lose an opportunity to expose any undue pressures exercised by the police. However, if the accused does take the stand on voir dire so as to clarify the issue of voluntariness — not the issue of his guilt — being asked the very question which he cannot be forced to answer at the trial proper is surely contrary to the rule against self-incrimination. The reason the rule against self-incrimination has held prominence for so long is because of the danger of an accused conveying bad impressions while testifying and the need to preserve our system against the grave dangers of Inquisition and Star Chamber tactics:¹⁵

History shows that government bent on a crusade, or officials filled with ambitions have usually inclined to take short-cuts. The cause being a noble one (for it always is), the people being filled with alarm (for they usually are), the government being motivated by worthy aims (as it always professes), the demand for quick and easy justice mounts. These short-cuts are not as flagrant perhaps as a lynching. But the ends they produce are cumulative; and if they continue unabated, they can silently rewrite even the fundamental law of the nation.¹⁶

Thus, the preservation of such safeguards as the rule against self-incrimination is no light concern and it is recognized in the Canadian Bill of Rights in the following terms: "No law of Canada shall be construed or applied so as to authorize a court . . . to compel a person to give evidence if he is denied protection against self-incrimination. . . ."¹⁷ It is suggested that an accused is, essentially, *compelled* to give evidence in voir dire for it is usually he, and he alone, who can give evidence as to why a confession is not admissible. If this does amount to compellability he is guaranteed "protection against self-incrimination" and thus is able to plead section two of the Canadian Bill of Rights as one tried in the United States is able to plead "The Fifth".¹⁸

Broad Policy Considerations

Deciding how to treat a true but involuntary confession at trial must, in essence, depend upon this question: why are involuntary confessions inadmissible? Generally speaking, there seems to be at least two basic policies and often they are not compatible. First, the need to convict the guilty. Second, the need to preserve individual and public confidence and respect for authority (*viz.* the police). The courts of both Canada and the United States, of course, consider each of these policy considerations of extreme importance. However, when considering the DeClercq issue, the position taken by the Canadian

¹⁵ For a good survey on the value and rationale of the rule against self-incrimination see G. Arthur Martin, "Privilege Against Self-Incrimination Endangered" 5 *Canadian Bar Journal* 6 (1962). "The controversy over the admissibility of confessions goes far back into Anglo-American jurisprudence — from the time of the Court of the Star Chamber, where any confession, no matter how extracted from the accused, was admissible, until the period of the mid-thirties when the test [in the United States] had evolved to that of the reliability of confessions.", Note, 28 *Brooklyn Law Review* 160 at pp. 160-161 (1961-1962).

¹⁶ Justice William O. Douglas of the United States Supreme Court, 28 *Notre Dame Lawyer* 497 at pp. 497-498 (1953).

¹⁷ Statutes of Canada, 1960, c. 44, section 2(d).

¹⁸ In *The Queen v Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473. The Supreme Court of Canada held a portion of the Indian Act to be contrary to the Canadian Bill of Rights and therefore ineffective. It is suggested that the same could be forcibly argued with regard to any law (e.g. *Canada Evidence Act* and even possibly DeClercq) which might be construed so as to force one to incriminate himself.

Supreme Court demonstrates an emphasis on the former. This, it is suggested, is at the expense of the latter. It is argued that the rationale behind the rule of evidence which requires confessions to be voluntary continues to be that which was expressed by Lord Chief Justice Campbell in 1856:

[A confession] shall not be induced by improper threats or promises, because, under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon.¹⁹

And thus, it logically follows, once reliability is confirmed the confession ought to be admitted. However, the United States Supreme Court believes that it is more important that police methods of interrogation be regulated than it is to convict the guilty:

. . . convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system — a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.²⁰

It is interesting to note that the recently completed *Report of the Canadian Committee on Corrections*²¹ makes no mention of the issue in DeClercq even though admissibility of confessions obtained by police questioning was studied by the Committee.²² Query: was there too much controversy attached to the issue? If so, that is precisely the reason the Committee ought to have dealt with the question. Surely, there were those on the Committee who had strong feelings on the broad policy considerations. The Vice-Chairman, G. A. Martin, wrote in 1962:

. . . those who suggest the defendant ought to be obliged to criminate himself take the short term view, they are concerned with direct and immediate results. Those who favor the retention of the privilege [against self-incrimination] are concerned with more enduring values.²³

The majority of the Committee must have disagreed with Mr. Martin for "the Committee has not seen fit to make any recommendations with respect to the admissibility of incriminating statements."²⁴ The Report is more concerned, when dealing with confessions, with the conviction of the guilty than the "more enduring values."²⁵ Although the Committee admits that "oppressive or unacceptable conduct on the part of the police in obtaining a statement

¹⁹ *R. v Scott* 169 E.R. 909 at p. 914; see *Report of the Canadian Committee on Corrections* (The Queens Printer, Ottawa, 1969) p. 50. However, note *Ibrahim v R.* [1914] A.C. 599 at p. 611 — "It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice."

²⁰ *supra* footnote 7, at pp. 540-541; see also *Lisenba v California* 314 U.S. 219 at p. 236 (1941).

²¹ Often referred to as the Ouimet Report, *supra* footnote 19.

²² *Ibid.*, at pp. 50-54.

²³ *supra* footnote 15, at p. 8.

²⁴ *supra* footnote 19, at p. 53.

²⁵ This is alleged because of the statement on page 50, *Ibid.*: "Proof of voluntariness is required because of the danger that a confession, extorted by threats or promises exercised or held out by a person in authority, may be untrue."

can result in loss of confidence in the police by the community"²⁶ the DeClercq Rule survives the Report unmentioned. It is submitted that the system which does not guard against encroachments upon that most valuable asset of the criminal law — community respect for authority — tends to alienate not only the poor and criminal elements but also those who place a high value on freedom and fair play for both themselves and others. "These groups include intellectuals, bohemians, and to an increasing extent, the young."²⁷

Another aspect to police public relations is individual respect for authority as distinct from community respect. That is, if society truly intends to "convert" the deviant offender to the ways of lawful society police must avoid any semblance of hypocrisy:

The first contact the law violator has with civil authority is the police officer. The first impression based on personal experience that he gets of our judicial process results from his first encounter with the police. . . . If a police officer resorts to brutality, if he fails to advise an offender of his legal rights or worse still if he deprives a suspect of what he knows to be his legal rights, he is guilty of grave wrongdoing and helps to thwart the efforts of others in the correction field.²⁸

Of course, many will justify their support of the DeClercq Rule by saying that "judicial checks" on the police are not effective; that police departments may raise their professional standards of conduct by internal administrative methods of discipline rather than by "altering the outcome of randomly selected criminal prosecutions."²⁹ It is said that "surely justice is done *if* the [involuntary confession] is admitted *and* those who improperly obtain it are subjected to either civil or criminal proceedings or both."³⁰ (emphasis added). It is easy to agree with this last *a priori* statement but the "if" employed is a sizable IF. The question is: what incentives do police have to prefer fairness to law enforcement? The threat of discipline or of a criminal charge for doing their duty (as they see it)? No! "Surely", it is logical for them to reason, "the criminal was not fair to his victim and we have no duty to be fair to the criminal." This attitude, although not taking into account the first and most fundamental right of the accused — the right to be presumed innocent until proven guilty in a court of law — is understandable in police circles. Clearly, therefore, the only realistic alternative is to exclude all involuntary confessions, even when their reliability has been confirmed, thereby depriving the police of any incentive to use force or promises. Judicial checks may well be ineffective in the short term. However, over the long term the high standards set by the courts will, it is submitted, provide an atmosphere and a yardstick by which police conduct may be measured and controlled.

²⁶ *Ibid.*, p. 54.

²⁷ Packer, Herbert L., *The Limits of the Criminal Sanction* (Stanford, 1968), at p. 283.

²⁸ Maloney, A. M., "The Court and the Police Functions in the Developing of Effective Canadian Corrections", 2 *Criminal Law Quarterly* 164 at p. 176 (1959-1960).

²⁹ *supra* footnote 27, at p. 189; cf. "Interrogations in New Haven: The Impact of Miranda," 76 *Yale Law Journal* 1519 (1967): this article gives an account of a study which purports to demonstrate that within one year after an attempt at judicial control of police conduct — *Miranda v Arizona* 384 U.S. 436 (1966) — there was little noticeable change in police practices.

³⁰ *supra* footnote 11, at p. 423.

Conclusion

Considering the serious ambiguity to the assertion that reliability of a confession is helpful in determining the credibility of the accused on voir dire (this being the whole foundation on which DeClercq is based), the apologetic mood of the majority ("It was a mistaken exercise of [the trial judge's] discretion but . . ."), the uncontrolled prejudicial effect of the question, the threat posed to the rule against self-incrimination, and the grave danger of continuing the disaffection of the poor, the criminal deviant, the intellectual, and the young, Parliament should seriously consider the infamous DeClercq Rule. Surely, if a country such as Canada, where there is no large criminal class, cannot sacrifice some law enforcement short-cuts so as to attain higher standards of fairness there is little hope for mankind ever realizing the due process ideal. And finally, this author strongly suggests that if in the future an accused is asked a question concerning the reliability of his confession while testifying in voir dire the defense counsel ought to seriously consider directing the accused not to answer by pleading "The Second" section of the Canadian Bill of Rights.