Osgoode Hall Law Journal

Volume 8, Number 3 (December 1970)

Article 9

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In the recent judgment of the Supreme Court of Canada in *The Queen* v *John Wray* (pronounced June 26, 1970), Mr. Justice Spence, in his dissenting judgment, quotes the principle, *nemo tenetur seipsum accusare,* as being "the most basic principle in our criminal law".

The Wray case is of considerable interest and firmly establishes two evidentiary principles:

(a) The rule enunciated by former Chief Justice McRuer in *The King* v *St. Lawrence* [1949] O.R. 215 is accepted by the Supreme Court of Canada majority judgment as being a correct statement of the law in Canada. That rule states:

> "Where the discovery of the fact confirms the confession — that is, where the confession must be taken to be true by reason of the discovery of the fact — then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible."

(b) A trial Judge does not have a discretion to reject evidence, even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute.

The six Judge majority of the Supreme Court (Cartwright, C.J.C.; Hall, J. and Spence, J. dissenting) overturned a judgment of the Ontario Court of Appeal which had dismissed an appeal by the Attorney General for Ontario against the acquittal of John Wray upon a charge of non-capital murder. The Ontario Court of Appeal appeared to be so firmly convinced that such a wide judicial discretion to exclude admissible evidence did exist, counsel representing Wray was not called upon during the argument in that Court.

The trial of John Wray had taken place at Peterborough, Ontario, in October, 1968, and following the completion of the Crown's case, the presiding Judge, Mr. Justice Henderson, directed a verdict of not guilty.

Briefly stated, the evidence had established that, a few minutes after noon on Saturday, March 23, 1968, a hold-up took place at a service station near Peterborough, during which a young man working at the station was shot through the heart, dying almost instantaneously. A small amount of money, about $55.00, was taken from the till.

There were no eye witnesses to the shooting, but a 12-year-old boy working in the rear of the service station heard "a crack" after the deceased had gone to the front office of the station to see why two dogs had started to growl. The young boy found the deceased lying on the floor and, looking out the front window, saw someone running away from the scene carrying a rifle.

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An empty brass cartridge shell was located later by police from the parking area in front of the service station.

About the time of the shooting, a white Ford car was seen parked on a back road not far from the service station.

An examination of the murder bullet indicated that it had been fired from a 44-40 rifle.

Almost three months later, on June 4, 1968, at approximately 10:30 in the morning, an Ontario Provincial Police Inspector asked John Wray to accompany him to the O.P.P. headquarters at Peterborough and the accused agreed. A discussion took place and the accused was asked if he would take a lie-detector test, to which the accused replied: "I have nothing to hide, I will take the test."

The accused then went to Toronto with the Inspector, arriving about 2:30 in the afternoon, at the office of a private investigator, who had a polygraph machine. An interrogation then took place with both the private investigator and the police Inspector taking turns asking questions relating to the murder.

It was some time after 7:00 p.m. that the accused signed a statement in the form of questions and answers and, as pointed out in the dissenting judgment of Chief Justice Cartwright, that statement, if admitted, would have been evidence on which the jury could have convicted the accused of the charge against him.

The statement ended as follows:

"Q. What happened to the gun?
A. I threw it in the swamp.
Q. Where?
A. Near Omemee.
Q. Will you try and show us the spot?
A. Yes.
Q. Is there anything else you wish to add to this John?
A. Not now thank you.

(signed) JOHN WRAY
7:18 p.m."

Following the signing of this statement, the accused went with the police in a car and directed the police to a swampy area, approximately 15 miles from the scene of the shooting. They drove directly through the village of Omemee to get there. The accused told the police to look for a clearing and a large pine tree, and on the following morning, a short distance from a pine tree where the accused had taken the police, a rifle barrel and action were found. A piece of the stock was found further north. The rifle was found to be a Winchester 44-40 and expert evidence was adduced that the slug taken from the body of the deceased had been fired from the rifle found in the swamp and from no other weapon.

At the trial, a lengthy voir dire was held, following which the trial Judge found the statement to be not a voluntary one, and, accordingly, refused to permit it to be introduced in evidence. Having in mind the nature of the

interrogation which took place giving rise to the written statement, one could not seriously question the trial Judge's ruling in this regard.

The Crown then sought to introduce evidence to the effect that the accused had led the police to the swamp where the gun was found and, in so doing, relied upon the judgment in the *St. Lawrence* case. Mr. Justice Henderson agreed that, on the *St. Lawrence* principle, the evidence was admissible, but he accepted the argument of Mr. Carter for the defence that, as a trial Judge, he had an overriding discertion to exclude any evidence if, in his opinion, its admission would operate unfairly against the accused.

The ruling out of this evidence left such a fragmentary Crown case that the directed verdict of acquittal could do nothing but follow.

While the trial Judge based his ruling upon a concept of fairness to the accused, the Court of Appeal, without hesitation, expanded the discretionary concept and declared that any evidence could be excluded if, in the opinion of the trial Judge, its admission would be "calculated to bring the administration of justice into disrepute".

In delivering the majority judgment of the Supreme Court of Canada, Mr. Justice Martland dealt with this last proposition in the following way:

> "I am not aware of any judicial authority in this country or in England which supports the proposition that a trial judge has a discretion to exclude admissible evidence because, in his opinion, its admission would be calculated to bring the administration of justice into disrepute."

In dealing with the concept of "unfairness" to the accused, Martland, J. stated:

> "The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly."

In separate reasons delivered by Mr. Justice Judson, the issue is dealt with in the following way:

> "In this appeal we are clearly faced with the question whether we should make new law and give a trial judge a discretion to exclude relevant and admissible evidence if he thinks that it will operate unfairly against the accused or, according to his opinion, bring the administration of justice into disrepute. The reason given for the unfairness here is that the weapon was discovered partly as a result of the accused going with the police officers and pointing out the place where the weapon was concealed. In my opinion, there is no justification for recognizing the existence of this discretion in these circumstances. This type of evidence has been admissible for almost 200 years. There is no judicial discretion permitting the exclusion of relevant evidence, in this case highly relevant evidence, on the ground of unfairness to the accused."

During the course of the argument before the Supreme Court, it was advanced by the Crown that, if an accused is tried according to proper principles of law, and if the evidence adduced against the accused is clearly admissible in law, the trial could not be considered "unjust or unfair" to the accused.

In his dissenting judgment, the Chief Justice was, it is submitted, clearly wrestling with this problem.

In his reasons, he stated:

> "The evidence which the Crown sought to adduce, far from having only trifling weight, might well have been found by the jury to be decisive; it is implicit in the reasons of the Court of Appeal that they regarded it as of substantial weight. I have difficulty in defining the conditions which would render a trial conducted strictly according to law "unjust or unfair" to an accused but the difficulty of defining the circumstances which call for its exercise does not necessarily negative the existence of the discretion which we are considering. . . . Once it has been decided that the confession is inadmissible because of the manner in which it was obtained but that part of it becomes admissible in law because it is verified by the discovery of the murder weapon in the place in which the accused in the course of the confession stated it to be, the court is faced with a choice of deciding either that because it is relevant, of great weight and admissible in law it must be received or that because it was obtained or extorted by such means that to admit it would bring the administration of justice into disrepute in the minds of right-thinking men the presiding judge may in his discretion exclude it. The choice is a difficult one; but, not without hesitation, occasioned by the reasons of Davey C.J.B.C. quoted above and by the consideration that a murder should not go unpunished, I have reached the conclusion that the Court of Appeal were right in holding that the learned trial judge had a discretion to reject the evidence, relating to the involvement of the accused in locating the murder weapon, which he did reject, and consequently that the question of law on which leave to appeal was granted should be answered in the negative."

In delivering his dissent, Mr. Justice Spence clearly stated his views of the matter:

> "I am of the opinion that were the trial judge to have, as he very properly did, excluded as inadmissible the statement of the accused and yet have permitted the Crown to have adduced all the evidence as to the accused's accompanying the police officers and pointing out to them the place where the weapon had been thrown away, in accordance with the information which he had given to them in the excluding statement, it would not only have brought the administration of justice into disrepute but it would have been a startling disregard of the principle of British criminal law, *nemo tenetur seipsum accusare*. Surely no authority need be stated to establish that as the most basic principle in our criminal law."

This statement by Mr. Justice Spence, it is submitted, raises a very difficult question.

According to His Lordship, the administration of justice would have been brought into disrepute had the Crown been able to introduce in evidence the fact that it was the accused who led the police to an isolated swamp area 15 miles from the murder scene and, in effect, directly to the murder weapon.

Putting aside the facts in the Wray case for a moment, surely the administration of justice would be not only brought into disrepute, but subject to public condemnation if all the legally admissible evidence which might lead to the conviction of a cold-blooded killer was not tendered in court.

While it is certainly not the intent to advocate improper police tactics to obtain evidence, it is submitted that it must not be forgotten that the victims of crime and their families and the communities where crimes take place — these are all persons who must be considered as well. Surely, the concept of fairness can not be said to only extend to people accused of crime and, had the Supreme Court of Canada not overruled the judgment of the Ontario Court of Appeal, it is submitted that all the established rules of evidence would have become subject to an overriding discretion based upon what any particular court happened to feel was "fair" to an accused. The Crown, it is submitted, would have been placed in an impossible position. Could the Crown anticipate

that what is considered fair in Corner Brook, Newfoundland, would also be considered fair in Montreal, or Toronto, or Vancouver?

It is submitted that the concept of fairness or unfairness, as the case may be, is no basis to determine the admissibility of evidence and the Supreme Court has rightly rejected this uncertain test.

In the first paragraph of this comment, I indicated that Mr. Justice Spence had quoted as being the most basic principle in our criminal law the maxim *nemo tenetur seipsum accusare* — "no one is bound to accuse himself".

While this is certainly true in the sense that our system of criminal justice assumes an accused person to be innocent, and places upon the Crown the onus of proving guilt beyond a reasonable doubt, there are certainly many statutory provisions which conflict with that maxim and which can have a considerable bearing on subsequent criminal charges.

Perhaps the classic example in Canadian criminal jurisprudence can be found in the case of *Rex* v *Mazerall* [1946] O.R. 762, a judgment of the Ontario Court of Appeal. The accused was charged with conspiracy to commit an indictable offence, to wit a breach of The Official Secrets Act. The Crown introduced as part of its case certain admissions made by the accused before a Royal Commission. The Commissioners were expressly empowered to summon before them any person or witness and to require them to give evidence on oath. In the exercise of this authority, the Commissioners administered an oath to the accused and he was examined by counsel for the Commissioners and also by the Commissioners themselves. The questions put to the accused and his answers thereto were taken down in shorthand and extracts from a transcript of this evidence were put in as evidence by the prosecution on the trial of the accused. The evidence was important as forming a link in the chain connecting the accused with the conspiracy and its admission was strongly objected to by the defence at the trial. The trial Judge admitted the evidence and the accused was convicted.

The Court of Appeal for Ontario held that, since the accused had given evidence on oath before a Royal Commission duly appointed and acting within its authority, the Crown could introduce his sworn testimony as part of its case, and it was not necessary that the Crown first prove that the answers made by the appellant were "voluntary" in the sense that they were not induced by any threat or promise.

Mazerall had been arrested on February 15, 1946, and held in custody by the Royal Canadian Mounted Police, with no charges laid against him, and on February 27, he was brought before a Royal Commission, the members of which were The Honourable Robert Taschereau, and The Honourable R. L. Kellock, both Judges of the Supreme Court of Canada. Mazerall was sworn and examined by the Commissioners and by counsel representing the Commission and he was not represented by counsel.

It is, perhaps, of interest to note that the Crown in the Mazerall case was led by J. R. Cartwright, the former Chief Justice, who dissented in the Wray case.

At the trial, it was argued that, since Mazerall had, in effect, been forced to give evidence incriminating himself, the rules relating to the admissibility of confessions should apply and the statement be rejected as not being voluntary. Many arguments were advanced to support the view that the evidence ought not to be admitted, and the maxim quoted by Mr. Justice Spence was referred to at length during the argument, but the arguments were all rejected by the trial Judge.

It is also, perhaps, of interest to note that the trial Judge in the Mazerall case was the former Chief Justice of the High Court, J. C. McRuer, author of the recent volumes relating to the state of Civil Rights within Ontario.

The Mazerall case is, therefore, an example of a situation where a person has clearly incriminated himself, although perhaps it could perhaps be argued that he was not "forced" to do so.

There are today, however, many statutory provisions requiring persons to, in effect, incriminate themselves and, while these statutory provisions relate to matters in certain specified fields, the use which can be made of such testimony taken under oath is almost without limit.

While it is true that many persons summoned to give evidence under oath before various tribunals claim the protection of the provisions of the various Evidence Acts, the testimony given can, in many cases, provide valuable investigative leads. As in the Mazerall case, a Royal Commission can, likewise, provide a great aid to law enforcement officials.

The recent Royal Commission investigating the collapse of Atlantic Acceptance is a prime case in point.

Many criminal charges have been laid and persons successfully prosecuted as a direct result of evidence obtained under oath before the Royal Commission. It would be, indeed, an understatement to suggest that police investigators could have unearthed a fraction of the material gained by the use of subpoena before the Royal Commission.

It is hoped that the tribunals in Canada will not be placed in the position where they become a mockery, as they have in the United States. How can any person maintain confidence in an investigatory tribunal such as a Senate subcommittee investigating organized crime, when the likes of Frank Costello can sit before that tribunal day after day refusing even to acknowledge their own names, on the ground that it might tend to incriminate them.

It is perhaps trite to say that an innocent man has nothing to hide, and it is certainly not being suggested here that wider powers should be extended to the Crown to force people to incriminate themselves, but it is suggested that a balance of interests must be maintained. Surely, there can be nothing wrong with a jury finding out that John Wray knew where the murder weapon was hidden.