Indexed as:

R. v. Erven

Keith Bruce Erven, appellant;
and
Her Majesty The Queen, respondent.

[1979] 1 S.C.R. 926

Supreme Court of Canada

1978: March 9, 10 / 1978: December 21.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, APPEAL DIVISION

Criminal law — Evidence — Rights of the accused — Voir dire — Extent of procedural safeguards necessary to have inadmissible statements withheld from the trier of fact.

The appellant was alleged to have been part of a large scale operation to traffic in hashish. The plan was that the hashish was to be cached on the Cape LaHave Islands, just off the coast of Nova Scotia, and to be taken from there by helicopter to the mainland for packaging and resale. The appellant was a passenger on one of these flights but there was no direct evidence that he was aware of the nature of the cargo. Subsequent to the flight, appellant and another passenger were questioned by uniformed R.C.M.P. officers and they and others were arrested shortly thereafter. During the time they were in custody they were interviewed by two officers and according to the evidence of one of these officers "as a result of conversation with the accused and with some of the co-accused" they went to a cottage and removed some articles (clothing and toiletries) which they brought to the jail. Some of these were given to the accused "because he requested them". It was clear that the trial judge regarded this evidence as important and he commented that the acceptance of the clothing was unexplained and that the cabin from which the clothes had been taken was where some 1765 1/4 lbs. of cannabis resin had been found. Appellant was convicted in the County Court Judges Criminal Court, without a jury, on a charge of having in his possession cannabis resin for the purposes of trafficking. The Appeal Division dismissed his subsequent appeal.

The interview when the accused and the other passenger were confronted by two uniformed R.C.M.P. officers was admitted into evidence by the judge without a voir dire objection of counsel. Only one of the officers testified and the accused did not. That officer testified that he and his colleague had merely been investigating complaints from a person suspicious of what was going on. The trial judge regarded an affirmative response by the appellant to one of the constable's questions as an adoption by him of his companion's false story. Although the exact words were not disclosed the fact of the subsequent

conversations regarding the clothing was also admitted without a voir dire again over the objection of counsel.

Held (Martland, Ritchie and Pigeon JJ. dissenting): The appeal should be allowed.

Per Laskin C.J. and Spence, Dickson and Estey JJ.: This appeal affords an opportunity for further clarification of the question of the admissibility of statements made by an accused to persons in authority. The question essentially is whether a voir dire is always required in respect of such statements or whether no voir dire is needed if the statement is "obviously volunteered". A voir dire is clearly necessary if the statement in question is made to police during investigation of a crime just as it is necessary for statements made after the accused is in custody, after he has been charged and after a decision to charge him has been reached. The view that a voir dire is unnecessary where the statement is "volunteered" or obviously volunteered is unsound. Quite apart from doubt as to whether the "voluntariness" test does encourage practical efficiency in the conduct of trials, other interests must be considered viz. the assurance of a full hearing of the evidence of both sides on the issue of voluntariness; the maintenance of the rights of the accused; and the integrity of the functional distinction between the voir dire and the trial itself. There is no justification for engrafting upon the general rule, amply borne out by the authorities, any exceptions, particularly one expressed in such terms as "obviously voluntary" or volunteered".

Per Beetz and Pratte JJ.: The issue is whether the trial judge erred in admitting into evidence two verbal statements without holding a voir dire which in both instances had been requested by counsel for the defence. The first statement was made to a police officer in the presence of another constable and of another person; the accused was then under surveillance and the police officer did not know that he was investigating an important criminal operation that was to lead to the arrest of the appellant; shortly after the conversation, upon being instructed to do so, the police officer proceeded to the arrest of the appellant. This first statement was not admissible in evidence unless it was proven to have been made voluntarily [Ibrahim v. The King, [1914] A.C. 599]. Such proof is normally made on a voir dire and a request for a voir dire should not be denied save in rare circumstances which were not present here. However, the failure to hold a voir dire that should have been held is not necessarily fatal since the statement may otherwise have been proven to have been made voluntarily. This is not the case here where there was an almost complete dearth of evidence as to the circumstances in which the statement was made. The statement should therefore not have been allowed. In the light of the evidence, this is not a case where resort should be had to s. 613(1)(b)(iii) of the Criminal Code. As to the second statement, our unanimous decision not to disturb the decision of the trial judge was announced in Court at the hearing.

Per Martland, Ritchie and Pigeon JJ. dissenting: It is established that the burden rests on the Crown to satisfy the trial judge that all statements made by an accused which it seeks to introduce in evidence against him have been freely and voluntarily made. Where, as here, a voir dire is requested, the trial judge should require one to be held. The failure to hold a voir dire in this case did not however occasion any substantial wrong or miscarriage of justice or vitiate the trial as the circumstances were such as to make the voluntary nature of the statements self evident. The sole purpose of a voir dire is to determine whether such a statement was made voluntarily and the necessity for holding such an inquiry is to be determined by the circumstances under which the statement is made. The only statements which can be challenged as improperly introduced are those made prior to the appellant's arrest. There is however other ample evidence to support the finding of guilt. In any event the case is one in which s. 613(1)(b)(iii) of the Criminal Code should be invoked.

Cases Cited

Piché v. The Queen, [1971] S.C.R. 23; Ibrahim v. The King, [1914] A.C. 599 (P.C.); Prosko v. The King (1922) 63 S.C.R. 226; Boudreau v. The King, [1949] S.C.R. 262; Comm'nrs. of Customs and Excise v. Harz, [1967] 2 W.L.R. 297; Boulet v. The Queen, [1978] 1 S.C.R. 332; Powell v. The Queen, [1977] 1 S.C.R. 362; R. v. Gauthier, [1977] 1 S.C.R. 441; R. v. Spencer (1973), 6 N.S.R. (2d) 555; R. v. Rushton (1974), 20 C.C.C. (2d) 297 (Ont. C.A.); R. v. Sweezey (1974), 20 C.C.C. (2d) 400 (Ont. C.A.); R. v. Armstrong, [1970] 1 C.C.C. 136 (N.S.S.C., A.D.); R. v. Toulany (1973), 16 C.C.C. (2d) 208 (N.S.S.C., A.D.); Thiffault v. The Queen, [1933] S.C.R. 509; R. v. Baschuk (1931) 56 C.C.C. 208; R. v. Fitton, [1956] S.C.R. 958; R. v. Dietrich, [1970] 3 O.R. 725 (Ont. C.A.), leave to appeal refused [1970] S.C.R. xi; D.P.P. v. Ping Lin, [1976] A.C. 574 referred to.

APPEAL from a judgment of the Supreme Court of Nova Scotia, Appeal Division [(1977), 21 N.S.R. (2d) 653.], dismissing an appeal from conviction, by judge sitting without a jury, on a charge of possession of cannabis resin for the purpose of trafficking contrary to s. 4(2) of the Narcotic Control Act. Appeal allowed, Martland, Ritchie and Pigeon 33. dissenting.

David F. Walker, Q.C., for the appellant.
E.G. Ewaschuk and R. Fainstein, for the respondent.

Solicitors for the appellant:	Walker & Taylor, New Germany, Nova Scotia.
Solicitor for the respondent:	S.M. Froomkin, Ottawa.

The judgment of Laskin C.J. and Spence, Dickson and Estey JJ. was delivered by

DICKSON J.:— Not long ago, this Court put an end to the difficulties which had plagued trial judges in attempting to distinguish inculpatory statements from exculpatory statements for the purpose of applying the voir dire rules. The Court held that exculpatory statements made to a person in authority by an accused would be subject on voir dire to the same requirements as inculpatory statements: Piché v. The Queen [[1971] S.C.R. 23.] The present appeal affords an opportunity for further clarification and rationalization in determining the admissibility of statements made by an accused to persons in authority.

The Court is called upon to decide the extent of the procedural safeguards necessary to support the substantive rights of the accused to have inadmissible statements withheld from consideration by the trier of fact. The question essentially is whether a voir dire is always required in respect of statements made by an accused which the prosecution seeks to introduce in evidence, or whether, as the Crown contends, no voir dire is needed if the statement is "obviously volunteered." The issue has not previously arisen for decision in this Court, but there are many dicta which support the conclusion that a voir dire is always needed. Many of the cases appear simply to assume the necessity of a voir dire as consistent with the basic principles governing the admission of statements made in response to questions from police officers or from other persons in authority.

The Principle

The classic formulation of the applicable principle is that of Lord Sumner in Ibrahim v. The King [[1914] A.C. 599 (P.C.).], at pp. 609-10:

> It has long been established as a positive rule of English criminal law, that no statement

> by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, 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. The principle is as old as Lord Hale.

That statement of the rule has been adopted in decisions of this Court: see Prosko v. The King [(1922), 63 S.C.R. 226.], Boudreau v. The King [[1949] S.C.R. 262.]; Piché v. The Queen, supra.

The rule in England is expressed in 11 Hals. (4th ed.), para. 410, in these words (footnotes omitted):

> It is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression. In order to render such extra-judicial admissions or confessions admissible the prosecution must prove affirmatively to the satisfaction of the trial judge that they were not induced by any promise of favour or advantage, or by the use of fear, threats or pressure by a person in authority. It is not sufficient for the prosecution to show that the person in authority had not intended to extract a confession or that there had been no impropriety on his part; what is necessary is to show, as a matter of fact, that the statement in question had not been obtained in consequence of something said or done by him which amounted to an express or implicit threat or promise to the defendant.

The first sentence of the foregoing passage derives from the Judges' Rules published in 1964 (Home Office Circular No. 31/1964, p. 5, reprinted in "Practice Note," [1964] 1 W.L.R. 152 at p. 153). It is said to be "overriding and applicable in all cases." The Judges' Rules are, of course, merely administrative instructions which do not have the force of law in this country nor, indeed, in England, but it is of importance that the sentence to which I have referred was adopted as a correct statement of the law by Lord Reid, speaking for a unanimous House of Lords in Commissioners of Customs and Excise v. Harz [[1967] 2 W.L.R. 297.]

I think it can now be taken to be clearly established in Canada that no statement made out of court by an accused to a person in authority can be admitted into evidence against him unless the prosecution shows, to the satisfaction of the trial judge, that the statement was made freely and voluntarily: Boulet v. The Queen [1978] 1 S.C.R. 332.], Powell v. The Queen [[1977] 1 S.C.R. 362.], Piché v. The Queen, supra.

Procedure on Voir Dire

Accepting that a burden rests upon the Crown to show affirmatively that the statement sought to be introduced was voluntary, how does the Crown go about discharging that burden? In my experience, the usual procedure has been for the Crown, before adverting to the statement, to request the trial judge to retire the jury. In the absence of the jury the Crown calls witnesses, normally the police officers to whom the statement was made or given, and any other police officers who might have been in a position to threaten or to offer hope of advantage to the accused. These witnesses testify affirmatively to statements made and to the absence of threat or promise. They are cross-examined. The defence then calls its witnesses, including frequently the accused, and they are cross-examined. Then follows argument of counsel, and the ruling of the trial judge as to whether the statement is voluntary and, therefore, admissible. There is, in every sense, a trial within a trial. Once admitted, the statement goes to the jury who must then pass upon whether the statement was, in fact, made and the weight, if any, to be given to it.

Function of the Voir Dire

It is axiomatic that the voir dire and the trial itself have distinct functions. The function of the voir dire is to determine admissibility of evidence. The function of the trial is to determine the merits of the case on the basis of admissible evidence. The voir dire is conducted in the absence of the jury, who should not be informed, at any time, of the subject matter of the voir dire. The accused may testify on the voir dire while remaining silent during the trial. Evidence on the voir dire cannot be used in the trial itself. The fundamental nature of this functional separation was recently reaffirmed by this Court in The Queen v. Gauthier [[1977] 1 S.C.R. 441.]. Mr. Justice Pigeon, speaking for the majority, stated that the procedure is similar whether or not the trial is before a jury, and he emphasized the necessity for a voir dire in both cases, at p. 450:

> ... For this reason I fail to see how it could be decided that in a trial without a jury, a voir dire is unnecessary, and statements made by the accused may be admitted in evidence without a preliminary decision as to whether or not they were freely and voluntarily made. Furthermore, no one appears to suggest that in a trial without a jury a voir dire is unnecessary. But if this is so, how can it be maintained that the rules are different? [emphasis added]

In a later passage, Pigeon J. also expressed his view that the holding of a voir dire is an essential requirement (at p. 451):

> In deciding as it did in the case at bar, the Court allowed the accused to testify on the voir dire on a portion of the case that suited his purposes, while avoiding cross-examination on the rest and preventing the prosecution from referring to it. This can hardly be described as formalism; it touches one of the most basic aspects of the administration of justice, namely the rule that any judgment must be based exclusively on the evidence presented at the trial. If it were to be held that in a trial without a jury it is not essential to hold a voir dire, and the judge may admit evidence of statements made by the accused, provided he rules on their admissibility at the end of the trial, I would not agree, but I would consider it less objectionable than a voir dire that does not respect the basic rule, namely that it is a trial within a trial, and accordingly the evidence produced therein is to be used on the voir dire only, even though the same judge presides at the voir dire and decides on the merits. [emphasis added]

The courts have formulated strict standards governing the admissibility of statements in order to safeguard carefully the rights of an accused person. The principles focus on the jury trial, but they apply equally to trial by a judge alone.

The Court of Appeal Decision

It would seem to follow, as a matter of simple logic, that if the Crown fails to establish that the statement was not obtained by fear of prejudice or hope of advantage held out by a person in authority, it has failed to discharge the burden upon the Crown and the statement should be ruled inadmissible. In the case at bar, however, the trial judge, sitting without a jury, notwithstanding a request of defence counsel, refused to hold a voir dire in respect of two statements made by the appellant Erven to police officers. In upholding the conviction, the Appeal Division of the Supreme Court of Nova Scotia adopted what had been said earlier by Macdonald J.A. of that Court (16 N.S.R. (2d) 422-427) in respect of a statement given to the police by one Mayer, a co-accused of Erven, when Mayer's conviction was under appeal. The points taken by Mr. Justice

Macdonald were: (i) when questioned by the police, the accused was not under arrest, nor even under the threat of arrest; (ii) in the opinion of Mr. Justice Macdonald, the conversation by the accused with the police officer was entirely voluntary and "even if a voir dire had been held such would surely have been found to have been made voluntarily and hence admissible in evidence." Mr. Justice Macdonald quoted from an earlier judgment of the appeal Division (R. v. Spencer [(1973), 6 N.S.R. (2d) 555.]) in which the view was taken that the holding of a voir dire would have been an "unnecessary farce" and the law does not require that a judge hold a "wholly useless voir dire" when the result would have been the same if the magistrate had held a voir dire.

Two issues arise from the Court of Appeal decision, one substantive as to the scope of the general rule, and one procedural as to how the general rule is to be put into practice in the course of the trial. I will deal with the substantive issue first.

Investigatory Stage

I cannot accept the view that a voir dire is unnecessary (or required only where special circumstances cast doubt on voluntariness) if the statement in question is made to police during investigation of a crime, rather than after the accused is in custody, or after he has been charged, or a decision to charge him has been reached, see, e.g.: R. v. Rushton [(1974), 20 C.C.C. (2d) 297 (Ont. C.A.).]; R. v. Sweezey [(1974), 20 C.C.C. (2d) 400 (Ont. C.A.).]; R. v. Spencer, supra; R. v. Armstrong [[1970] 1 C.C.C. 136 (N.S.S.C., A.D.).]. Such statements of the accused enjoy no exemption from the requirement of proof of voluntariness before admission into evidence. As Martin J.A. stated, in words I would adopt, in R. v. Sweezey at p. 413:

> I conclude that the rule with respect to proof of voluntariness is not confined to statements made by a person in custody or charged or about to be charged with an offence. I am consequently of the view that a statement made by a person to a police officer conducting an investigation with respect to a suspected offence must be shown to have been made voluntarily before it is admissible against that person in a criminal trial in which he is an accused. The words "statement by an accused" used by Lord Sumner in Ibrahim v. The King, [1914] A.C. 599, in my view, refer to a statement made by a person who is an accused in a criminal trial when the statement is sought to be introduced against him rather than to the fact that he was an accused at the time he made the statement.

As Idington J. stated in the decision of this Court in Prosko v. The King, supra, at p. 234:

> It is the inducement exercised by the officers in charge that is to be guarded against and not the accidental circumstances of an arrest and the bearing thereof on the mind of one accused that has to be guarded against.

The voluntariness rule is one of broad and general application. It applies with as much force to statements made during investigation as to statements made after the accused person is in custody. The procedure does not vary depending upon the stage at which the statement is made. Such a distinction would be fraught with difficulties in its application. Is the test subjective or objective? Where is the line to be drawn when investigation, discovery, custody, and arrest are a rapid continuous series of events? Practical considerations provide an additional reason which dictates the rejection of this distinction. The opportunities for abuse by delaying arrest are obvious. I should note in passing that even cases supporting a special rule for statements made at the investigative stage generally require a voir dire where counsel expressly contests the admissibility of the statements, as counsel did in the present case: see R. v. Sweezey, supra, at p. 417.

"Volunteered"

Nor can I accede to the second proposition which found favour with the Appeal Division, namely, that a voir dire is unnecessary where a statement is "obviously voluntary" or "volunteered", or where the voluntariness of a statement is "apparent from the circumstances under which it was made", or when it can be "abundantly established in some other way", absent a voir dire: see R. v. Spencer, supra; R. v. Sweezey, supra; R. v. Toulany [(1973), 16 C.C.C. (2d) 208 (N.S.S.C., A.D.).]

No doubt the "obviously voluntary" test derives from a desire to encourage practical efficiency in the conduct of trials. On that point alone, there are grounds for some doubt as to the efficacy of the test. However, there are also other interests which must be weighed in the balance along with efficiency--(i) the assurance of a full hearing of the evidence of both sides on the issue of voluntariness; (ii) the maintenance of the rights of the accused; and (iii) the integrity of the functional distinction between the voir dire and the trial itself. It is in the light of each of these interests, as well as that of trial economy, that the proposed test for a voir dire ought to be measured.

Hearing All the Evidence

In my respectful opinion, no judge at trial nor appellate judge should decide any issue on hearing only one side of the matter. It is trite in civil law that anyone having the duty to decide anything must hear both sides before reaching a decision. The obligation is not any less in criminal law. Unusual prescience would be required to determine that a statement is obviously voluntary before the accused has had a chance to call witnesses, testify, and present argument, and where all the persons involved have not been called as required by Thiffault v. The Queen [[1933] S.C.R. 509.].

What would occur if a statement could be admitted without a voir dire where the context did not cast doubt on its voluntariness? The testimony of the Crown witness outlining the circumstances surrounding the statement might give no indication of any involuntariness. Defence witnesses might be prepared to give contrary testimony which might be believed over that of the Crown witness. The defence witnesses, however, could not be called at this point, as they can only be called after the Crown has concluded its case. Thus no evidence up to this point would have cast any doubt on the voluntariness of the statement, and it would be admitted into evidence for consideration by the jury. Even if the statement were later excluded, the harm would be done: see R. v. Armstrong, supra. As Dennistoun J.A., speaking for the Manitoba Court of Appeal in R. v. Baschuk [(1931), 56 C.C.C. 208.], said at p. 209:

> Once the confession was read to the jury it was hopeless for the accused to call witnesses to show it was not a voluntary statement. The damage was done and could not be undone.

All surrounding circumstances must be examined on a voir dire. Although the main point of decision in Boudreau v. The King, supra, was that the absence of a warning would not bind the hands of the court so as to compel it to rule out a statement, Kerwin J. said, at p. 267: "All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected." The last words of the last defence witness to testify in respect of the statement may establish that it was involuntary.

Rights of the Accused

An accused may testify on a voir dire without prejudice to his privilege not to take the stand before the jury. He may be examined and cross-examined with regard to the statement allegedly given by him to one in authority, but not upon his innocence or guilt.

It is a most important right of the accused to call witnesses and present argument separately on the issue of the admissibility of a statement directly after the Crown's evidence on this matter has been adduced. This right would be totally lost if a statement of the accused could be admitted without a voir dire as part of the Crown's evidence because nothing in that evidence cast doubt on its voluntariness. An accused has the right to testify in the absence of the jury on the issue of voluntariness alone. On the voir dire he is permitted to testify on the issue of the voluntary nature of his statement without prejudice to his right not to testify on the main issue. The testimony of the accused may be the only evidence which indicates involuntariness. If a voir dire is not held, and the accused exercises his right not to testify on the main issue, the evidence negating voluntariness will never be revealed to the trial court nor to an appellate court. If the judge denies a voir dire, the accused may have to become a witness on the issue of whether the statement is voluntary, but he thereby is improperly exposed to Crown examination on the main issue of guilt or innocence. The effect of limiting the voir dire to cases where there is evidence of involuntariness is to obligate the accused to adduce such evidence, thereby relieving the Crown of a burden which properly rests on the Crown and placing an unwarranted evidential burden upon the accused.

The Distinction between Voir Dire and Trial

The essential separation between proceedings on a voir dire and those in the trial itself would be undermined if a voir dire were held only where doubt was cast on the voluntariness of a statement by evidence given in the trial itself. As Kaufman says in The Admissibility of Confessions (2nd ed.), at p. 51, "... to say that a statement may have been admissible without a voir dire because it was voluntary is putting the cart before the horse." The importance of keeping all evidence of a statement from the jury unless the statement is admitted in evidence is expressed by Kaufman in the following passage (at p. 52):

Despite these last two judgments [John v. The Queen, [1971] S.C.R. 781 and R. v. Bohack (1971), 6 C.C.C. (2d) 457 (Ont. C.A.)], it would still appear that a voir dire must be held, and where the Crown attempts to tender a statement without first requesting a trial within the trial, the Court must order it proprio motu. This may create a problem where the jury was made aware of the existence of a statement. In that case, the Court should proceed with the voir dire, but if the statement is rejected, a mistrial may be in order.

Can it ever be said that an answer given in response to questions asked by a police officer in circumstances of compulsive authority, as in the case at bar, are "volunteered?" One immediate objection to the introduction of an exception related to "obviously voluntary" or "volunteered" is the likelihood of confusing the word (i) "voluntary", which has a well-recognized and technical connotation when used in relation to statements given by accused persons to those in authority (variously expressed, but generally taken to mean free of fear of prejudice or hope of advantage) with the word (ii) "volunteered", which is a word of common parlance implying spontaneity. Yet, as pointed out in "Developments in the Law: Confessions" (1966), 79 Harv. L. Rev. 935, 1103, the Canadian concept of voluntariness, unlike the one prevailing in Scotland, does not imply spontaneity. Rand J. made this clear in R. v. Fitton [[1956] S.C.R. 958.], at pp. 962-3, where he said: "The Chief Justice of Ontario, speaking for the majority of the Court of Appeal, has treated the expression 'freely and voluntarily' used in Boudreau v. The King, as if it connoted only a spontaneous statement, one unrelated to anything as cause or occasion in the conduct of the police officers; but with the greatest respect that is an erroneous interpretation of what was there said."

Statements should not slip in without a voir dire under the pretext that they form part of the res gestae: see R. v. Spencer, supra; R. v. Toulany, supra. The rules regarding res gestae are substantive rules regarding hearsay and the admissibility of evidence. They do not affect the procedure by which decisions are to be made regarding admissibility of statements made to persons in authority. Statements constituting part of the res gestae are admissible as exceptions to the general rule excluding hearsay. As with all statements by an accused, they are subject to the general requirement of voluntariness. In order to determine whether they are voluntary, as well as whether they are, in fact, part of the res gestae and other-wise admissible, such statements must be considered by the judge on a voir dire in the absence of the jury.

The Efficient Administration of Criminal Justice

I suspect that in a trial by judge sitting without a jury there is a tendency, in what is thought to be the interests of trial economy, to lose sight of the distinction between voir dire and trial. The distinction is just as important when the judge is sitting alone (and assumes also the jury function of trier of fact) as when he is presiding at a trial with jury, and the same rules apply so far as the voir dire is concerned: R. v. Gauthier, supra. The distinction between a "formal" and an "informal" voir dire was firmly rejected by this Court in Powell, at p. 368, where Mr. Justice de Grandpré said:

> I note that for the second time the learned appeal judge uses the expression "formal voir dire". I assume that this is a slip of the pen because no voir dire at all was held and, in any event, I cannot see any difference between an informal voir dire and a formal one.

It is sometimes urged that the holding of a voir dire results in delay and, therefore, a loss in trial economy. I have some doubt whether trial economy would be achieved by recognition of an exception, expressed in terms of "volunteered" or "obviously voluntary", to the general requirement of a voir dire. The normal response, if a voir dire were denied, would be an appeal, with consequent cost in time and money. Accepting, arguendo, that a voir dire entails delay in the judicial process, it does not necessarily follow that efficient administration of justice should be sought at the expense of the legitimate rights of an accused.

It must be sound policy to have rules of practice which are clear and uncomplicated. This is particularly true in the field of criminal law. Rules should be such as to be easily applied in the great variety of cases and circumstances which daily come before the courts. In my respectful view, a rule requiring a voir dire only after there is some evidence suggesting involuntariness is neither clear nor easily applied.

If a statement is, in fact, "volunteered", this means merely that voluntariness is easier to establish than in other cases. It does not mean there is a different procedure to determine voluntariness. The voir dire in such a case may take only a few minutes. On the other hand, where the initial impression is that the statement was voluntary, other evidence on the voir dire may point to quite the opposite conclusion. Either way, the rights of the accused will be protected and the efficient administration of justice enhanced by the holding of a voir dire.

Further, I would not want to say that counsel may not expressly waive the holding of a voir dire in a proper case where all precautions have been taken: see Powell v. The Queen, supra, at p. 368; R. v. Sweezey, supra, at p. 416; R. v. Dietrich [[1970] 3 O.R. 725, leave to appeal refused [1970] S.C.R. xi.], at pp. 734-7 (Ont. C.A.) (leave to appeal to this Court dismissed [1970] S.C.R. xi). I do not express any concluded view on the matter of waiver, however, as there is no suggestion that defence counsel waived voir dire in the case at bar.

The Cases

Generally speaking, the authorities appear to be against any exception to the general rule requiring a voir dire. In the recent case of Boulet v. The Queen, supra, it was affirmed that previous statements made under oath by the accused during a judicial proceeding are admissible without proof of voluntariness, and that therefore no voir dire is required in respect of such statements. The Court, speaking through Mr. Justice Beetz, contrasted the situation where a statement is made out of court to a person in authority and clearly envisaged that the admissibility of such a statement would always be decided in the absence of the jury, on a voir dire, (at p. 343):

> The courts have long made a distinction between statements made by the accused out of court to persons in authority and those which are made in a judicial proceeding. The first are admitted in evidence once the presiding judge had decided alone, without the jury, after a voir dire, that they were freely and voluntarily made, the onus of proving these conditions being on the prosecution: R. v. Warickshall Rex v. Baldry; Ibrahim v. Rex; Piché v. The Queen; Powell v. The Queen. [emphasis added]

While the decision in Powell v. The Queen, was carefully restricted to what was necessary to decide the outcome of that case, it nevertheless established a stringency in the need for a voir dire which is consistent only with its requirement in all cases where voluntariness must be established. In his reasons, Mr. Justice de Grandpré quoted the Court of Appeal's view of the matter, at p. 367:

> In our view, it would have been preferable for the trial judge to have conducted a formal voir dire, then ruling on the voluntariness of the statement [...]; but it is perfectly plain from his reasons for judgment that he directed himself to that question and considered the statement to be voluntary.

and then de Grandpré J. stated.

> I am unable to accede to the proposition that if a trial judge directs himself to the question of the voluntariness of a statement and is satisfied on the whole of the evidence of the guilt of the accused, there is no need for a voir dire.

In Powell this Court also expressly rejected the contention that a voir dire was only needed where counsel for the accused objected to the admission of the evidence. Mr. Justice de Grandpré stated, at p. 368:

> The Crown further submits that, the evidence of Constable Fisher having been received without any objection by counsel for the accused, this silence amounts to an admission that the statement was voluntary. Although the point was mentioned by Hall J.A., it was not dealt with in the Court of Appeal. For my part, I do not believe that this submission is well founded. While I might be ready to accept in a proper case that counsel for an accused may well waive the holding of a voir dire, I see a considerable difference between an expressed waiver surrounded by all the precautions indicating that the question has been examined in depth and mere silence on counsel's part. The heavy onus resting on the Crown certainly cannot be displaced in such an informal fashion.

In a comment on Powell, (1976), 18 Crim. L.Q. 404, Professor, S.I. Bushnell noted that the case dealt with four questions:

(1) Must all statements made by an accused to a person in authority pass the test of voluntariness?
(2) Need there be a voir dire for those confessions to which the rule applies?
(3) Is there any obligation on the defence to object to the voluntariness of a confession in' order to require a voir dire?
(4) In a case in which there should have been a voir dire, and none was held, can s. 613(1)(b) (iii) of the Criminal Code be applied?

In discussing the second question, he stated, at p. 411:

> (2) Need there be a voir dire in all cases?
>
> The answer, following Powell, must also be a yes, except when there has been an express waiver. Spencer had called it a wise precaution to have a voir dire until the limits of Piché v. The Queen were clarified. The clarification has now occurred in Powell. Sweezey and Rushton must be considered overturned on this point.

In a more recent article in (1978), 20 Crim. L.Q. 312, Professor Ratushny said, at p. 324:

> In Powell v. The Queen the court clearly established that all statements made to a person in authority must pass the test of voluntariness on a voir dire in the absence of an express waiver on the part of the accused. Moreover, there is no obligation on the part of defence counsel to object where the necessity for such a voir dire has been overlooked.

I do not think the Crown can take any comfort from John v. The Queen, supra. In John, the point here in issue was expressly not decided because, in any event, there was sufficient admissible evidence of the accused's guilt to apply the provisions of s. 529(1)(b)(iii) (now s. 613(1)(b)(iii)).

In my opinion, it is always necessary to hold a voir dire to determine the voluntariness of a statement made by an accused out of court to a person in authority. Only in this way can fairness to the accused be assured. To require a voir dire only if doubt is cast on the voluntariness of a statement by the circumstances under which it was made, as determined from evidence given in the trial proper, would not only shift a burden to the accused but also, in other respects, cause him significant prejudice. One must be realistic with the jury process. If the statement is subsequently ruled inadmissible, the jury will, nevertheless, at least be left with the knowledge that a statement was made by the accused which has flow been excluded. This is bound to arouse suspicion as to its content. If evidence of the context of the statement is allowed to be given for some time before anything casts doubt on its voluntariness, the jury will know something, and perhaps much, of its content. Prejudice will surely result. Such a limited requirement would destroy the fundamental distinction between the function of the voir dire, which is to determine voluntariness, and that of the trial proper, which is to determine guilt.

I can see no justification for engrafting upon the general rule, which is remarkably free of qualifications, any exception and, particularly, one expressed in such terms as "obviously voluntary" or "volunteered." Attempts in the past to water down the rule have not met with success and, in my opinion, the present attempt should also be repelled.

The Facts

I turn now to the evidence in the case. I do not think the evidence is of great importance because it is not

the task of this Court nor, with respect, the task of any appellate court to make an independent judgment as to whether a particular statement is voluntary. If the true rule is, as I conceive it to be, that the voluntary nature of a statement given to a person in authority can only be determined in a voir dire, then it is undisputed that the judge at trial failed to hold a voir dire, though requested to do so. I do not think it can be seriously contended that the statements admitted in evidence without a voir dire were not of importance on the issue of guilt.

The facts are these. The accused was alleged to have been part of a large-scale operation to traffic in hashish. The plan called for the hashish to be cached on the Cape LaHave Islands, just off the coast of Nova Scotia, and to be transported by helicopter to an isolated cottage at Beech Hill, on the mainland, for packaging and later resale. On August 21, 1974, one Robson made three trips transporting hashish by helicopter from Cape LaHave Islands to the cottage. On the first of the trips, the appellant Erven and one Mayer were passengers. The helicopter picked them up at Crescent Beach, on the mainland, and transported them to the Islands. Upon arrival at the Islands, the appellant and Mayer disappeared for two or three hours, during which time Robson loaded the hashish into the aircraft and made two trips to the cottage, where the hashish was unloaded. After the helicopter had been loaded by Robson for the third and final time, the appellant and Mayer reappeared and were taken back to Crescent Beach, where they were dropped off. The helicopter continued its flight to the cottage. During the flights, the hashish was packed in large wrapped bags and transported in the luggage compartment of the aircraft, out of sight of pilot and passengers. There is no direct evidence that the appellant was aware of the nature of the cargo.

Immediately after the appellant and Mayer returned to Crescent Beach, they were confronted by two uniformed R.C.M.P. officers, Botham and Gaudet, who began asking questions. In response, Mayer indicated that he and the appellant were involved in a Search and Rescue operation, as well as collecting soil samples from the Cape LaHave area. In reply to a question by Constable Botham, the appellant acknowledged that he was engaged in the same operations. He gave the same address in Vancouver, British Columbia, as Mayer. The appellant and Mayer were later picked up at the beach by a red Maverick automobile, driven to the beach by a Miss Hale, but driven, on leaving, by the appellant. The trial judge found, as a fact, that the red Maverick was a rented vehicle in the same of one of the persons involved in the narcotics operation.

The appellant and the others were arrested shortly after leaving the beach. During the time the appellant and several co-accused were in custody, they were interviewed on August 27, 1974 by two officers, Berry and Melbourne. According to Constable Melbourne, "as a result of conversation with the accused and with some of the co-accused," he and Constable Berry went to the cottage at Beech Hill and removed some articles of clothing and toiletries. They brought these articles to the jail and gave various of them to the accused, "because he requested them." The importance of this evidence to the trial judge is expressed in the following passage from his judgment:

> ... it seems to me that the acceptance by the accused of these three items of clothing is some evidence which is unexplained and which connected the accused with the whole operation. It is perhaps convenient to point out, at this point, that a very large quantity of cannabis resin, some seventeen hundred, sixty-five and a quarter pounds was found in eighty-nine packages in the cabin at Beech Hill from which the clothes were removed. Indeed, it was at this point the general evidence indicates that the resin was being packaged by two persons who are not before me in this trial.

The accused was tried without a jury in the county Court Judges' Criminal Court, on a charge of unlawfully having in his possession cannabis resin, for the purposes of trafficking.

The interview on Crescent Beach when the accused and Mayer were confronted by two uniformed police officers, Botham and Gaudet, was admitted into evidence by the trial judge without a voir dire, as I have indicated, despite the objection of defence counsel. Constable Botham was the only officer to testify. The accused did not testify. According to Constable Botham, he and Constable Gaudet did not, at that point, know the nature of the operation they had discovered. However, they were, he testified, investigating complaints from a person who was very suspicious of what was going on. The trial judge regarded the affirmative response of the appellant to Constable Botham's question as an adoption by the appellant of Mayer's false story that the appellant and Mayer, and the helicopter, were just engaged in collecting soil samples.

Although the exact words were not disclosed, the fact of the conversations on August 27, 1974, respecting the clothing and the result of those conversations, was also admitted without a voir dire, again over the objection of defence counsel.

The appellant was convicted and sentenced to five years' imprisonment. The Appellate Division dismissed the appeal. Three main grounds of appeal were advanced in the Appellate Division. It was contended that the trial judge erred in admitting without a voir dire the statements made by the appellant to the police on August 21 and August 27, 1974, and that the judge erred in the wrongful use of hearsay evidence. On this last point, MacKeigan C.J.N.S. said:

> Dealing first with the last, I respectfully think the learned judge erred in admitting and referring in his decision to hearsay evidence by a police constable that the red Maverick car driven from the beach by the appellant was rented, and even more seriously erred in saying in his decision, with no evidence to support it, that the vehicle had been rented 'in the name of one of the persons involved in the series of circumstances to which I have related.' The judge did not specify which of Carr, Robson, Mayer or Miss Hale had, as he understood rented the car.

Carr was one of those found packaging the hashish in the cottage. The learned Chief Justice continued:

> I do not, however, look upon this error as fatal. The wrongfully imputed rental of the car does not constitute a vital or indispensable link between the appellant and Carr or Robson. Without it, strong and ample evidence connects the appellant with Robson and his handling of the hashish in the helicopter and at the cottage-including his unexplained presence on the helicopter, his adoption, if admissible, of Mayer's false story that they were just engaged in collecting "soil samples", and his acceptance, if admissible, of some clothing picked up at the cottage. I am of opinion that no substantial wrong or miscarriage of justice occurred and that the learned judge's conclusion would necessarily have been the same had he not made this mistake. Section 613(1)(b)(iii) may properly be applied.

The Appeal Division, in sustaining the conviction, applied s. 613(1)(b)(iii) of the Criminal Code, and in so doing relied upon (1) the unexplained presence of the appellant on the helicopter; (2) the appellant's adoption, if admissible, of Mayer's false story that they were just engaged in collecting soil samples; (3) the appellant's acceptance, if admissible, of clothing picked up at the cottage.

Conclusion

For the reasons expressed earlier, in my opinion a voir dire should have been held to determine the admissibility of the appellant's statement to police at the beach on August 21, 1974. During argument of this

appeal, counsel for the Crown was advised from the Bench that the Court did not need to hear him with respect to the request for clothing. I therefore say nothing further with respect to August 27 and the clothing. Consideration of that aspect is not, in my view, essential to the outcome of the appeal, for it cannot be said with assurance that no substantial wrong or miscarriage of justice occurred from the denial of a voir dire in respect of the earlier August 21 "beach" statement. In light of the importance of that evidence as affecting credibility, I do not believe this to be a proper case for the application of s. 613(1)(b)(iii). That is not to say that the failure to hold a voir dire will in every case provide grounds for ordering a new trial. As with every other case where inadmissible evidence is admitted at trial, consideration has to be given to the importance of the evidence improperly admitted in light of the whole of the case. When one considers, however, the function of a voir dire, and the interests at stake in the holding of a voir dire, it will be but rarely that the admission of such statements will have caused no substantial wrong or miscarriage of justice, such that the appellate court may apply s. 613(1)(b)(iii).

I would therefore allow the appeal, set aside the decision of the Appeal Division of the Supreme Court of Nova Scotia, and order a new trial.

The judgment of Martland, Ritchie and Pigeon JJ. was delivered by

RITCHIE J. (dissenting):— This is an appeal from a judgment delivered by MacKeigan, C.J.N.S., on behalf of the Appeal Division of the Supreme Court of Nova Scotia, whereby he dismissed the appellant's appeal from a conviction entered by His Honour Judge R.F. McLellan sitting without a jury on a charge of possession of cannabis resin for the purpose of trafficking, contrary to s. 4(2) of the Narcotic Control Act.

This appeal is brought pursuant to leave granted by this Court on the following question of law:

> Did the Nova Scotia Supreme Court, Appeal Division, err in holding that the trial Judge did not err in refusing to hold a voir dire in respect of the voluntariness of statements allegedly made by the accused to officers of the Royal Canadian Mounted Police on August 21 and August 27, 1974 and in admitting such statements accordingly?

The circumstances giving rise to this prosecution are somewhat complex, but the background indicating involvement on the part of the appellant is described in the reasons for judgment of the learned trial judge which were in this regard adopted by the Court of Appeal. From these reasons I excerpt the following passages with respect to which it can be said that there is no dispute:

> It is clear from the evidence before me that there was evolved a very sophisticated high grade operation, the object of which was to import a large quantity of cannabis resin into this country. I, of course, am not involved with the importing aspect but the whole of the evidence makes it abundantly clear that the importation was the first step in what led to the charges to which I have referred and has led to the charge before the accused. At some point the cannabis resin was cached on Cape LaHave Island and it was transported from there to a cottage in the Beech Hill area in Lunenburg County. The accused's connection with this matter, if any, arises out of the transportation aspect to which I have referred. It was accomplished by the use of a helicopter, a rented helicopter, which made three trips between a point on Cape LaHave Island and a cleared out area adjacent to a cottage in or near Beech Hill. This transportation was accomplished in three trips made on August 21st, 1974. ...
>
> By prior arrangement with somebody, the helicopter which was engaged by one of the

principals or one of the subordinates in the scheme which involved the transportation of this drug, picked up the accused and one, Mayer, from a point on Crescent Beach on August 21st, 1974. The accused and Mayer were transported to a point on Cape LaHave Island. They disembarked from the helicopter and reappeared, at least as far as the evidence goes, only to join the aircraft after the last of the cannabis resin had been stored aboard the aircraft, entered the aircraft and were deposited by the helicopter at or near the same point on Crescent Beach where they had been picked up. There is no evidence, at least no direct evidence, that either of these men which of course includes the accused, had any hand or part in the loading of the aircraft. I accept the evidence that on the last occasion, that is the occasion of the third trip required to transport the forbidden substance, the forbidden substance was all stored in the compartment at the rear of the helicopter. While the accused and Mayer were on the beach, they were interviewed by Constable Botham of the Royal Canadian Mounted Police.

The interview which ensued was admitted by the trial judge without the holding of a voir dire notwithstanding the objection of counsel for the defence and this constitutes one of the alleged errors referred to in the order granting leave to appeal to this Court. The relevant evidence describing this interview is to be found in the following testimony given by Constable Botham of the R.C.M. Police:

Q. Alright, well now witness, you were questioning these two men, that is Mayer and the accused, about the circumstances under which they were on the beach and were in the proximity of the boat and motor, is that correct?
A. Yes.
Q. And were they under arrest at that time?
A. No.
Q. And what was your general purpose in being in the area that day?
A. Well the initial reason we had there was because the person that called was very suspicious of what was going on.
Q. Alright, you were investigating.
A. Complaints.

An objection followed from the accused's counsel and the witness then continued:

Q. Yes, would you continue Cst. Botham, you met these chaps and what happened?
A. After finding out their names I also obtained their addresses in Vancouver, B.C. as 132 Ontario Street. This applied to both Mr. Mayer and Erven. Mr. Mayer indicated that he was a commercial artist; Mr. Erven, the accused, indicated he was a truck driver working with Wells Fargo. We had some conversation for I would say approximately five minutes. During that time Marcel Patrick Mayer, after being asked what he was doing in the area, stated he was working with search and rescue and that he was in this area to collect soil and water samples from the Cape LaHave Island area. After that, I asked Bruce Keith Erven if this was what he was doing as well and he said, 'Yes'.

Upon it being suggested to Constable Botham in cross-examination that some other member of the R.C.M. Police had told him to say what he did about the reference to soil samples and water samples, he made the following answers:

A. Actually at the time didn't realize it was important. I didn't realize any of this was important at the time. But I couldn't add it to my notes four hours later when I found out it could have been. [The italics are my own.]
Q. Now let me ask you these questions. You didn't think it was important so I take it you didn't read the notes back to Mr. Mayer or Mr. Erven on any occasion?
A. No, I did not. Initially I had no idea of what was even going on. [The italics are my own.]
Q. No. And so your question Mr. Erven was in relation to what Mr. Mayer said he was doing?
A. Yes. Mr. Mayer did ninety per cent of the talking, or more.
Q. Mr. Mayer, in other words, virtually
A. Gave the story. I just asked Mr. Erven if he was doing the same thing and he indicated he was.
Q. How did he indicate it?
A. 'Yes'.

And later in the cross-examination the Constable said:

Q. Certainly you have no knowledge that anything that Mr. Erven told you as to name, address or occupation or where he was staying at that time, is incorrect?
A. Not at that time, no.
Q. No, at any time, as far as his name or his address or the place he was staying on August 21, 1974, did you ever subsequently find out that any of that was incorrect?
A. No I did not.
Q. No, and you never found out that what he said about his occupation was incorrect?
A. I have not made any inquiries to determine otherwise if it is incorrect.

I think it to be established that the burden rests upon the Crown to satisfy the trial judge that all statements made by the accused which it seeks to introduce in evidence against him have been freely and voluntarily made and where, as here, counsel for the accused objects to the admission of such statements without the holding of a voir dire, the trial judge should require one to be held, but his failure to do so in this case did not occasion any substantial wrong or miscarriage of justice or vitiate the trial as the circumstances were such as to make the voluntary nature of the statements self evident and no basis was suggested in argument upon which the appellant's answers might have been held to be otherwise than voluntary had a voir dire in fact been held. Apart from the fact that the statements were made to police officers, no evidence was adduced casting any doubt on the voluntary nature of the answers.

The principle was recently restated by de Grandpré J., speaking on behalf of this Court in Powell v. The Queen [[1977] 1 S.C.R. 362.], where he observed at pp. 366 and 367:

> It is conceded by the Crown that in principle before a statement of any kind can be admitted in evidence against a person accused, it must be shown by the prosecution to the satisfaction of the trial judge to have been freely and voluntarily made by that accused person. This principle, of course, has been repeatedly stated by this Court, particularly in Sankey v. The King, [1927] S.C.R. 436, Piché v. The Queen, [1971] S.C.R. 23, John v. The Queen, [1971] S.C.R. 781, and R. v. Gauthier, a judgment of June 26, 1975, still unreported.

In the Powell case, the accused was charged with having assaulted a woman and a statement which he had made to a constable which placed him at the scene of the assault was admitted by the trial judge, who was sitting alone, without the holding of a voir dire. In finding that the trial judge was wrong in so admitting the statement, Mr. Justice de Grandpré observed, at p. 366:

> Was the statement admissible without a voir dire? It must first be remembered that the conversation reported in the above quotation took place in a context. When the police officers first made the accused aware of the purpose of their investigation, they were met with a flat denial that he had been in the vicinity of the hotel. Again, a few minutes later, upon being charged and cautioned by the police officers, he denied involvement. It is only when Constable Melvin was busy attending to some other duties that the impugned conversation took place. Later on, that same night, when questioned by detectives, the accused twice repeated having no knowledge of the occurrence.

Later in the same judgment the learned judge observed that these circumstances clearly show "that the rule had to be applied without question".

It will readily be seen that the context in which the statements were made by the accused at Crescent Beach differs in all material respects from that in the Powell case. Here, when the police questioned Erven and his companions they were not aware of any crime having been committed by anyone but were acting on suspicion resulting from a telephone tip from someone who was very suspicious of what was going on at the beach. The two men being questioned were not under arrest and no crime was at that time being investigated.

In my view, the reasons for judgment of Mr. Justice de Grandpré in Powell reaffirm the rule that the sole purpose of a voir dire is to determine whether the statement sought to be introduced against the accused was made voluntarily and that the necessity for holding such an inquiry is to be determined by the circumstances under which the statement is made. The matter was clearly put by Mr. Justice Rand in the case of Boudreau v. The King [[1949] S.C.R. 262.], where he said at p. 269:

> The cases of Ibrahim v. Rex, [1914] A.C. 599, Rex v. Voisin, [1918] 1 K.B. 531, and Rex v. Prosko, 63 S.C.R. 226 lay it down that the fundamental question is whether the statement is voluntary. No doubt arrest and the presence of officers tend to arouse apprehension which a warning may or may not suffice to remove, and the rule is directed against the danger of improperly instigated or induced or coerced admissions. It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule. What the statement should be is that of a man free in volition from the compulsions or inducements of authority and what is sought is assurance that that is the case. The underlying and controlling question then remains: is the statement freely and voluntarily made?

The historical origins of the rule making it necessary to ensure that the trial judge is satisfied as to the voluntary character of all statements made by the accused has its origins in early inquisitorial practices when torture was far from unknown in order to extort a confession and bribery frequently employed to the same end.

The nature of the burden of proof resting upon the Crown in order to establish the voluntariness and therefore the admissibility of statements made by an accused person has long been accepted as it was stated by Viscount Sumner in Ibrahim v. The King, supra, at p. 609 where he said:

> It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, 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.

The statements made by the accused at Crescent Beach in the present case are limited to his having given his address and occupation and having agreed when he was asked whether he was engaged like his companion in working for search and rescue and in collecting soil samples. I can think of no way in which doubt could be cast on the voluntariness of the first statement as to his address and occupation and although I am satisfied that the second statement was untrue, I do not think that this affects its admissibility. The mere fact that an untrue statement may be exculpatory does not of itself, in my opinion, make it inadmissible under the judgment of this Court in Piché v. The Queen [[1971] S.C.R. 23.]. It was stated more than once in the majority judgment in that case that the initial question to be determined in deciding whether or not such statements should be admitted was whether or not it was voluntarily made. In a case tried with a jury when such a statement has been admitted after holding a voir dire, the question of its truth is a separate issue for the jury to determine and, as is pointed out by Mr. Justice Pigeon in the case of R. v. Gauthier [[1977] 1 S.C.R. 441.], the issues of truth and voluntariness in such cases are to be treated as severable even where the trial is conducted by a judge sitting alone.

It was contended on behalf of the appellant that the fact that the statements in the present case were made to police officers who were obviously persons in authority is enough to raise a doubt as to whether they were obtained from him by fear of prejudice or hope of advantage, and while it may frequently be the case that questioning by police officers could affect the voluntariness of the answers, I think the matter is best viewed in light of what was said by Mr. Justice Rand in The Queen v. Fitton [[1956] S.C.R. 958.], at pp. 963 and 964 where he said:

> The accused was not at the time under formal arrest although he had been requested to stay in the police station and, for the greater part of the time, remained in the general office, and the earlier questions were such as the police might have addressed to any person in the remotest way drawn into the enquiry. Questions without intimidating or suggestive overtones are inescapable from police enquiry; and put as they were here, they cannot by themselves be taken to invalidate the response given. The question still remains: was the statement made through fear or hope induced by authority?

The statements made by Erven at Crescent Beach were in answer to questions such as the police might have addressed to any person in the remotest way drawn into the inquiry. They were not made by a person who was under arrest or in custody and I find no suggestion of intimidation or suggestive overtones in anything which the police asked of the accused. Furthermore, it appears to me to be unrealistic to treat Constable Botham as having held out any fear of prejudice or hope of advantage to Erven in relation to the commission of any offence, particularly as he did not realize that the conversation was important and "initially ... had no idea of what was going on". Even if a voir dire had been held, there was, in my opinion, nothing which could raise a doubt in the mind of the trial judge as to the voluntary character of the answers given by the accused.

The order granting leave to appeal to this Court is not limited to the statements made by the appellant at Crescent Beach on August 21, but also puts in question the admissibility of statements allegedly made by him while in custody on August 27. This Court was, however, of opinion that the exchange between the appellant and the police while he was in custody when he accepted the items of his clothing which had been found in

the cabin at Beech Hill, was admissible without a voir dire and it was stated at the hearing that it was not necessary to call on the respondent in this regard.

It is thus apparent that the only statements which are now challenged as having been improperly introduced without the holding of a voir dire are those made by the appellant to Constable Botham at Crescent Beach. These statements were limited to the appellant giving his address in Vancouver and his having said "Yes" when asked whether he was engaged, as Mayer had claimed to be, in work with search and rescue collecting samples in the area.

As I have indicated, I do not think that the learned trial judge erred in admitting the conversation at Crescent Beach without the holding of a voir dire, but even if he had been in error in this regard, it appears to me from a careful reading of his judgment that the statements made by the appellant at that time did not play an essential part in the reasoning which led to his finding that the appellant was guilty of possession of cannabis resin.

The learned trial judge found that the appellant and his friend Mayer had made two or three trips to and from LaHave Island in the helicopter which was carrying the drug and he further made the following finding concerning the clothing found at the cabin where the cannabis resin was stored:

> It seems to me that the acceptance by the accused of these three items of clothing is some evidence which is unexplained and which connected the accused with the whole operatIon.

The two items of evidence to which I have last referred afford ample material to support the finding of guilt and whatever doubt may be cast on the admissibility of the brief words spoken by Erven at the beach, I am satisfied that the judge's verdict would have been the same if these words had been excluded from the evidence and that their admission occasioned no substantial wrong or miscarriage of justice. I am therefore in any event of opinion that this is a case in which s. 613(1)(b)(iii) of the Criminal Code should be invoked.

I would accordingly dismiss this appeal.

The judgment of Beetz and Pratte JJ. was delivered by

PRATTE J.:— I agree with my brother Dickson that the appeal should be allowed, but I come to this conclusion on narrower grounds. I feel obligated to express my views separately.

The issue is as to whether the trial judge erred in admitting into evidence two verbal statements allegedly made by appellant to officers of the R.C.M.P. without holding a voir dire which in both instances had been requested by counsel for the defence.

The first statement was made to Const. Botham of the R.C.M.P. on August 21, 1974, when in the course of a conversation that lasted approximately five minutes, appellant answered questions as to his name, his address and the reason for his presence on the beach. This conversation took place in the presence of another constable, and of one Mayer, who was appellant's companion in the venture; after this conversation, the two constables kept appellant and Mayer under surveillance for about one and a half hours and then proceeded to their arrest.

We know little about the circumstances of the conversation between Const. Botham and appellant. Of the four witnesses to this conversation, only Botham gave evidence; he said that at the time he did not know that

he was investigating an important criminal operation and that appellant was to be arrested shortly after the conversation. There is no evidence as to the actions of the other constable prior to and during the conversation between appellant and Botham.

In my opinion, the statement made on the beach by appellant to Const. Botham was not admissible in evidence unless it was proven by the prosecution to have been made voluntarily (Ibrahim v. Rex [[1914] A.C. 599.], at p. 609).

The normal procedure for determining the voluntariness of a statement of the accused is through a voir dire and, the onus being on the Crown to prove voluntariness, a request for a voir dire should not be denied save in rare circumstances, where, for instance, the request would be clearly frivolous or would constitute a demonstrable abuse of process.

In the case at bar, the trial judge refused to hold a voir dire because he was of the view that the voluntariness of the statements of the appellant had been established by the decision of the Nova Scotia Supreme Court, Appeal Division in R. v. Mayer [(1976), 16 N.S.R. (2d) 404.]. Whatever be the merits of the decision in Mayer, it was not concerned with the statement here in question. Whether a statement is voluntary or not is essentially a question of fact to be determined by the trial judge who hears the case. In D.P.P. v. Ping Lin [[1976] A.C. 574.], Lord Salmon spoke thus at p. 606:

> ... In deciding whether an alleged confession or statement was free and voluntary and should be admitted in evidence, it is useless, just as it is in an accident case, to search for another case in which the facts seem to be similar and treat it as binding. Facts vary infinitely from case to case. The judge's task is to consider the evidence before him, to assess its implications and to decide the case on his view of that evidence in the light of the basic established principle.

I am therefore of the opinion that the trial judge erred in refusing to hold a voir dire as to the voluntariness of the first statement of August 21, 1974.

But it does not necessarily follow that such error on the part of the trial judge be fatal and the statement necessarily inadmissible. The holding of a voir dire is only a means to an end and a statement should not be held to be not voluntary for the sole reason that no voir dire was held. The substantive issue always is whether the statement has been proven to have been made voluntarily. There are some situations where the failure to hold a voir dire which should have been held, while a technical breach of a rule of procedure, would entail no practical effect because the statement would otherwise have been proven to be voluntary; for instance, in R. v. Spencer [(1973), 16 C.C.C. (2d) 29.], Chief Justice MacKeigan said at p. 36:

> ... Even if a voir dire had been held, the statement would have had to have been held to be voluntary. This was shown in subsequent evidence by the accused and his friends who said nothing to dispute the circumstances but only disputed exactly what was said and by whom: the accused indeed admitted being asked the question about the carton of hashish but claimed: "No, I think I said, 'Yeah, let's go.' " --rather than the police version of his reply, namely: "Yes, that's all", or "Yes."

The situation in the case at bar is entirely different; there is an almost complete dearth of evidence as to the circumstances in which the statement of August 21 was made. The evidence does not indicate whether or not there was any inducement or threat. The mere fact that the appellant was only under surveillance and not

yet under arrest cannot be the determining factor in establishing the voluntary nature of the statement.

It has also been suggested to us that the statement should be admitted in evidence because it was volunteered by appellant. I cannot agree. A statement that is volunteered is one that is not asked for. The verb "to volunteer" means: "To communicate (information, etc.) on one's own initiative', (Shorter Oxford English Dictionary). It is clear that the voluntary nature of a volunteered statement would be much easier to prove than that of a statement which, while not volunteered, is nevertheless voluntary. But in both cases, the rule in Ibrahim is applicable. In the case at bar, the evidence does not support the conclusion that the appellant took the initiative to communicate to Const. Botham information as to his name, his address and also as to the reasons for his presence on the beach.

I am therefore of the opinion that the statement of August 21, 1974 has not been proven to have been made voluntarily and should not have been allowed in evidence. I am further of the view that the rest of the evidence is not so strong against the appellant as to permit me to say that the error of the trial judge resulted in no miscarriage of justice. This is therefore not a case where we should exercise our discretion under art. 613(1)(b)(iii) of the Criminal Code.

As to the statement of August 27, our unanimous decision not to disturb the decision of the trial judge was announced in Court at the close of the argument for the appellant.

I would therefore dispose of this appeal in the manner proposed by my brother Dickson.

Appeal allowed, new trial ordered, MARTLAND, RITCHIE and PIGEON JJ. dissenting.