HORVATH v. THE QUEEN

44 C.C.C. (2d) 385

Supreme Court of Canada
Martland, Ritchie, Spence, Pigeon, Beetz, Estey and Pratte, JJ.

February 20, 1979

Evidence — Confessions and admissions — Voluntariness — Non-consensual hypnosis — Accused charged with murder of mother — Accused 17 years of age interrogated and cross-examined for two and a half hours by two officers — Next day accused questioned for four hours by skilled interrogator — Psychiatric evidence that accused repressing memory of killing but second officer able to bring out memory through "irresistible appeal" to accused and through hypnosis — Accused while in light hypnotic state making confession in monologue overheard by officer — Confession repeated to officer once accused out of hypnosis and repeated again to first two officers — Hypnosis not intentional on part of officer — Judge describing accused's condition as one of complete emotional disintegration — Whether statements properly excluded — Whether fear of prejudice or hope of advantage sole test for involuntariness — Whether oppression ground for excluding statement — Whether use of non-consensual hypnosis ground for exclusion.

Evidence — Confessions and admissions — Voluntariness — First statement involuntary — Tainting of subsequent statements — Statement made while young accused in state of non-consensual hypnosis — While under hypnosis accused able to remember events previously repressed — Statement repeated shortly after accused out of hypnosis to officer who was hypnotist and then to other officers — Whether use of hypnosis taints subsequent statements — Whether such statements properly excluded.

The accused was charged with murder as a result of the killing of his mother. He was 17 years of age and on the night of the arrest was questioned for two and a half hours but his statement contained nothing inculpatory. This interrogation was conducted by two officers who "hammered" him with questions during the period. The trial Judge held that this statement had been obtained in an atmosphere of oppression or threat and excluded it. The next day the accused was taken to another officer who was a skilled interrogator and a polygraph operator. No polygraph test was administered. However, this officer was with the accused for four hours except for three brief intervals. This interrogation was tape recorded as were the periods when the accused was left alone during which he engaged in monologues. He was unaware these were being listened to. A psychiatrist who listened to this tape testified that initially the accused through hysterical amnesia or repression was unable to remember the events of the killing but that he also had a strong wish to unburden himself. However, the officer was apparently able to make the accused remember both because of his almost irresistible appeal to the accused to unburden himself and through hypnosis. The officer's voice had a hypnotic quality which, the psychiatrist testified, put the accused into a light hypnotic state. The officer, who testified that he did not intend to use hypnosis, left the room and the accused while under hypnosis gave a monologue in which he admitted killing the deceased. The officer returned and the accused repeated this confession. During this second statement the accused was no long under hypnosis. The officer left again and returned with the other officers who had first interrogated the accused who told the accused they just wanted to put down in writing what he had

said. This was the third statement. The trial Judge referred to

the accused's state of mind at the end of the four-hour interrogation as a complete ***[page386]*** emotional disintegration. The psychiatrist considered the repression of the memory of the killing "involuntary" but its revival under hypnosis as "voluntary". He testified further that the accused suffered from a personality disorder. As well, the psychiatrist testified that what the accused said while under hypnosis was the truth as he saw it. The trial Judge stated in excluding the second and third statements that the element of hypnosis had tipped the balance against admitting those statements. The accused was acquitted at trial but on appeal by the Crown to the British Columbia Court of Appeal a new trial was ordered on the ground that the second and third statements should have been admitted. On appeal by the accused to the Supreme Court of Canada, held, Martland, Ritchie and Pigeon, JJ., dissenting, the appeal should be allowed and the acquittal restored.

Per Spence, J., Estey, J., concurring: No special emphasis should be placed on the existence of hypnosis in determining that the second and third statements should be excluded. The real reason for their exclusion was the finding by the trial Judge that at the conclusion of the interrogation there was a complete emotional disintegration on the part of the accused. A statement may be held to be involuntary and thus inadmissible notwithstanding it was not obtained through hope of advantage or fear of prejudice held out by a person in authority. Statements should not be admitted which are not voluntary in the ordinary English sense of the word because they were induced by circumstances, other than threats or promises, such as existed in this case. To be admissible the statement must be voluntary and "voluntary" means, inter alia, "of free will". Whether or not there has been oppression by persons in authority in a particular case so that the requisite free will no longer exists will depend on many circumstances. In this case a 17-year-old accused of unstable character was "hammered" in cross-examination by two impressive police officers and then taken by a skilled interrogator through an examination which left him in a condition of complete emotional disintegration. No statement made by an accused under those circumstances could be imagined to be voluntary.

Per Beetz, J., Pratte, J., concurring: The trial Judge properly concluded that it was the element of hypnosis which rendered the accused's statements inadmissible. The hypnosis was clearly induced by the police officer albeit unwittingly. Nevertheless, the accused never agreed to undergo hypnosis and in fact was unaware he was about to do so. The fact that the use of hypnosis, without the accused's consent, was inadvertent on the part of the officer did not remove the objective element of moral violence involved in the process nor did it alter the impact on the accused's mind. Nothing the accused said under hypnosis was voluntary in the legal sense. The traditional rule of admissibility, that a statement obtained by hope of advantage or fear of prejudice exercised, held out or inspired by a person in authority is involuntary is not limitative. The principle behind the rule is the principle of voluntariness and may justify an extension of the rule to situations where involuntariness has been caused otherwise than by promises, threats, hope or fear if it is felt that other causes are as coercive and serious enough to bring the principle into play. In particular the principle behind the rule justifies its extension to cover the circumstances of this case. The statement was involuntary because a person in authority was instrumental in bringing about a state of hypnosis and made an appeal to speak which, given his abnormal state, was irresistible. Furthermore, voluntariness implies an awareness of what is at stake in making a statement to a person in authority, a matter which was very much in doubt when the accused was under hypnosis.

Finally, voluntariness is incompatible with actual violence. While in this case ***[page387]*** there was no physical violence, through the use of an interrogation technique involving certain physical elements such as an hypnotic quality of voice and manner the officer gained unconsented access to what in a human being is of the utmost privacy, the privacy of his own mind. This was a form of violence more subtle that physical violence but no less efficient than, for example, the administering of sodium amytal by force.

While the second and third statements were not made while the accused was under hypnosis both were tainted by the circumstances which preceded them, and in particular by the involuntariness of the statement made under hypnosis in the course of the monologue. The second statement was made just after the accused came out of hypnosis and just after the psychological defence mechanism of hysterical amnesia which had repressed memory of the killing had broken down at the cost of the accused going through a state of extreme emotional turmoil. The breaking down of this defence, the short time between the end of the hypnotic state and the beginning of the second statement, the correlation between the monologue and the statement and the fact that the same officer was the hypnotist and the recipient of the statement led to the conclusion that this statement was contaminated by the factor of hypnosis which remained determinative of the whole issue.

As to the third statement, it was directly related to and a culmination of the second statement. It too was not proved voluntary. The third statement found its polluted source in the second statement, which itself had its source in the equally polluted monologue made under hypnosis. In view of this it was unnecessary to consider the doctrine of oppression as it relates to confessions. Whether or not it amounts to oppression, hypnosis that is not consented to, induced by a person in authority, is sufficient by itself to render a statement involuntary, at par with threats, promises and violence.

Finally, the fact that, according to the psychiatrist, what the accused said under hypnosis was true was not relevant in the circumstances nor determinative of the issue. While the untrustworthiness of a confession extorted by threats or promises has been advanced to explain the rejection of improperly obtained confessions, the basic reason is the accused's absolute right to remain silent either completely or partially. Moreover, the accused's absolute right to remain silent includes not only the right to censor any information which is in his conscious mind but also the right to control the administration of artificial processes whereby unconsciously held information might emerge into consciousness. The use of such interrogation techniques on unwilling suspects is a dehumanising process and should be proscribed.

Per Martland, J., Ritchie and Pigeon, JJ., concurring, dissenting: The Court of Appeal properly found that the trial Judge erred in excluding the second and third statements. The statements were not obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority which is the test for admissibility of confessions. It was unnecessary to consider in this case whether the grounds for ruling a statement to be inadmissible should be expanded to include oppression since the accused's statements were not prompted by oppressive conduct. He had a strong desire to unburden himself. To exclude a statement there must have been some conduct on the part of persons in authority which is improper or unjustified.

As to the question of hypnosis, the objection to the admissibility of anything said by the accused while under hypnosis is not against the conduct of persons in ***[page388]*** authority when the statement was made. Rather, the objection would arise because of the accused's condition at that time which would make the statement involuntary. But once this condition had ceased then there could be no objection to any subsequent statements, such as the second and third statements in this case. Cases where subsequent statements have been excluded because an earlier statement was inadmissible have all considered whether an earlier threat or promise continued to have effect when a later statement was made. Accordingly, this question could not arise in this case where there was no evidence of threats or inducements.

[Naniseni v. The Queen, [1971] N. Z. L.R. 269; Ibrahin v. The King, [1914] A.C. 599; Boudreau v. The King (1949), 94 C.C.C. 1, [1949] 3 D.L.R. 81, [1949] S.C.R. 262; R. v. Fitton (1956), 116 C.C.C. 1, 6 D.L.R. (2d) 529, [1956] S.C.R. 958, 24 C.R. 371; revg 115 C.C.C. 225, [1956] O.R. 696, 24 C.R. 125, *consd*; Com'rs of Customs and Excise v. Harz, [1967] 1 A.C. 760; R. v. Prager, [1972] 1 All E.R. 1114; R. v. Isequilla, [1975] 1 W.L.R. 716; R. v. Smith, [1959] 2 Q.B. 35; Lewis v. Harris (1913), 24 Cox. C.C. 66; McDermott v. The

King (1948), 76 C.L.R. 501; R. v. Priestly (1966), 50 Cr. App. R. 183; 51 Cr. App. R. 1; Prosko v. The King (1922), 37 C.C.C. 199, 66 D.L.R. 340, 63 S.C.R. 226; R. v. Pitt, [1968] 3 C.C.C. 342, 68 D.L.R. (2d) 513, 66 W.W.R. 400; R. v. Booher (1928), 50 C.C.C. 271, [1928] 4 D.L.R. 795, [1928] 3 W.W.R. 203: Leyra v. Denno (1954), 347 U.S. 556; Sparks v. The Queen, [1964] A.C. 964; R. v. Williams (1968), 52 Cr. App. R. 439; R. v. Logue, [1969] 2 C.C.C. 346, [1968] 2 O.R. 671; R. v. Gauthier (1975), 27 C.C.C. (2d) 14, 64 D.L.R. (3d) 501, [1977] 1 S.C.R. 441, 33 C.R.N.S. 46, 10 N.R. 373; DeClercq v. The Queen, [1969] 1 C.C.C. 197, 70 D.L.R. (2d) 530, [1968] S.C.R. 902; R. v. Wray, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673, [1971] S.C.R. 272, 11 C.R.N.S. 235, *refd to*]

APPEAL by the accused from a judgment of the British Columbia Court of Appeal allowing a Crown appeal from his acquittal on a charge of murder.

D. D. G. Milne, for accused, appellant.

R. D. Shartz, for the Crown, respondent.

MARTLAND, J. (dissenting):— This is an appeal from a judgment of the Court of Appeal for British Columbia which allowed an appeal by the Crown from the acquittal of the appellant following a trial by a Judge and jury. The Court of Appeal held that the trial Judge had erred in law in refusing to admit in evidence two statements made by the appellant to a police officer. A new trial was ordered.

During the morning of June 16, 1975, the appellant's mother, Anna Horvath, was murdered in her own bed by having her skull struck repeatedly with a blunt instrument. About midnight of the same day, the appellant, who was 17 years of age at the time, was arrested for suspicion of murder, given the usual police warning, and was taken to detention cells. He was there interrogated for about two hours and one-half by two R.C.M.P. officers. No confession of any kind was made at that time. ***[page389]***

The next day at about noon, the appellant voluntarily underwent an interview which lasted some four hours with an R.C.M.P. polygraph operator, Staff Sergeant Proke, although no actual polygraph test was conducted. There is a complete taped transcript of what was said during the four hours. During the interview, the officer left the appellant alone in the interview room three separate times. During these three periods, the appellant reflected aloud in what the trial Judge called monologues or soliloquis.

During the first monologue, the appellant vowed to avenge his mother. During the second monologue, the appellant asked his mother why she had asked him to kill her and he confessed having killed her by hitting her over and over again. When the officer returned after the second monologue, the appellant repeated the confession to him, and told him he had used a baseball bat and had disposed of it in a certain location. During the third and last monologue, the appellant asked his mother's forgiveness for having disclosed the incident.

Following the interview, the appellant provided the R.C.M.P. investigating officers with a written signed confession. He also accompanied them in a police car to the location where he had disposed of the baseball bat, a towel, gloves and socks, all of which were recovered.

The Crown sought to introduce as evidence in the case the statement made by the appellant to Sergeant Proke, following the second monologue, and also the written statement made at the end of the interview. A voir dire was held. The trial Judge requested Dr. Stephenson, a psychiatrist who had been called by the Crown, to listen to the entire tape of the interview. He did so and prepared a written report which was

received in evidence by consent.

The trial Judge refused to receive the two statements in evidence. In making that decision he appears to rely upon a judgment of the Court of Appeal of New Zealand in Naniseni v. The Queen, [1971] N.Z.L.R. 269, and, in particular upon the following passage from the judgment of Turner, J., who delivered the judgment of the Court, at p. 274:

> But in our opinion the word 'voluntary', where used to describe the essential characteristic of an admissible confession, must be taken to signify that the will of the person making the confession has not been overborne by that of any other person. If the factor which is set up as rendering the confession not voluntary is something in the nature of threats, violence, force, or other form of compulsion, to use the words of our own Evidence Act, or, to adopt the enumeration of Dixon, J. in R. v. McDermott, (1948) 76 C.L.R. 501, 'du- ***[page390]*** ress, intimidation, persistent importunity, or sustained or undue insistence or pressure', whatever is alleged as an inducement must have been brought to bear on the prisoner by some other person, and to have influenced him to make the confession.

A summary of the reasoning which led to the refusal to admit the statements is contained in the judgment of the Court of Appeal, as follows:

> I turn now to some of the things said by the trial Judge in making his ruling to reject those two statements. He tells us that the tape was what he called auditioned by the psychiatrist, Dr. Stephenson, whom he described as a respected and well-known practitioner. He goes further and says, "As to Dr. Stephenson's evidence, the credibility of it is impeccable". I quote now in part from what the trial Judge said when giving his ruling.
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> > "What Dr. Stephenson said, and it was unequivocal and not questioned by the Crown, was that following the first soliloquy and continuing throughout until the end of the second soliloquy ... the interrogatee, namely, the accused Horvath, was in a light hypnotic state. Throughout the second soliloquy, I assume that the accused thought he was alone. When Proke came back into the room, after the second soliloquy, he had heard in it things which assured him what he had already firmly surmised. Dr. Stephenson notes that at that point Proke started re-examining, and it was then that the young man came out of his hypnotic state".
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> The trial Judge then read two extracts from the written report of Dr. Stephenson which were admitted in evidence at the trial by consent, and those two paragraphs read as follows:
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> > "'It is axiomatic that a person under hypnosis (whatever its depth) cannot be forced to do or say anything to which he has not already given tacit consent. In my opinion, this subject had a very strong basic wish to unburden himself and his ambivalence over it is expressed in monologues 2 & 3.
> > "'In my opinion his initial denial was based on involuntary repression of the painful material and not mere concealment. Therefore, when the painful material becomes conscious, his telling of it is essentially a voluntary act, even though there is a strong possibility he was in a light hypnotic state up to the end of the second monologue. In my opinion, by the time he begins to relate his mother's death wish he is in full and voluntary control of his faculties and remained so until the end of

> the tape.'"

That is the end of the extract from the psychiatrist's report. The trial Judge continues:

> "I accept that last paragraph, of course. After the end of the second interview, and after Sergeant Proke started again to question him he came out of the hypnotic state, but he had been in a state of total emotional disintegration."

(The trial Judge was careful to point out that the phrase "emotional disintegration" was his phrase and not that of Dr. Stephenson.) ***[page391]***

Then after some references to authorities on this subject, the trial Judge continued:

> "Had Dr. Stephenson not given the evidence of an hypnotic state, I would have, with some misgivings, have admitted this statement. It is the accumulation of all the factors, and I have dealt with those, plus the factor of the subject having been, for a sizeable part of the interview, in an hypnotic state immediately before the confession came out, that have caused me to reject the statement. This ruling is given with very real regret that police work as skilful as this should end in frustration of its purpose."

Again the trial Judge said:

> "It is the factor of hypnotism which has tipped the balance against admission in this case."

The trial Judge did not criticize the questioning technique used by Sergeant Proke in his interview with the appellant. He says of it that it was "the most skilful example of police interrogation that has ever come to my attention in 36 years as a lawyer and a Judge".

Sergeant Proke testified that he did not attempt to hypnotize the appellant. The appellant did not give evidence either at the voir dire or at the trial.

The Court of Appeal, unanimously, held that the trial Judge had erred in refusing to admit the statements. MacFarlane, J.A., who delivered the judgment of the Court, said:

> Turning then to what I consider the principal ground of appeal, it is important, in my opinion, to remember that in cases of this sort the tribunal of fact is the jury. Our law has determined that there is one aspect of fact with relation to statements by accused persons which falls within the province of the Judge in the first instance. The scope of the Judge's duty and responsibility in that connection is, however, a limited one. If statements by an accused are admitted in evidence, it ultimately is the responsibility of the jury to decide what weight, if any, shall be given to them. The extent of the field in which the Judge must make findings of fact is, in my opinion, firmly established in our law.

He referred to the judgment of the Privy Council in Ibrahim v. the King, [1914] A.C. 599, and the judgments of this Court in Boudreau v. The King (1949), 94 C.C.C. 1, [1949] 3 D.L.R. 81, [1949] S.C.R. 262, and in R. v. Fitton (1956), 116 C.C.C. 1, 6 D.L.R. (2d) 529, [1956] S.C.R. 958. He went on to say:

> It is therefore clear, and I must say it again, that the function of the Judge so far as the facts are concerned is to determine whether the Crown has proved beyond reasonable doubt that the statement by the accused person was a voluntary statement in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out (or I insert inspired) by a person in authority. ***[page392]***

After reviewing the reasons given by the trial Judge for refusing to admit the statements he concluded:

> Now tying the law as I tried to state it very briefly before I referred to the facts of this case, it is, in my opinion, clear that the trial Judge applied a wrong test in determining whether these two statements should be allowed to go before the jury. Assuming that he was right in finding that there was an emotional disintegration, the evidence is clear that the statements were not obtained by hope of advantage or fear [or] prejudice exercised, held out, or inspired, by a person in authority.
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> The question whether any weight should be attached to confessions made in the circumstances which I have described is a question for the jury, and not a question for the Judge, in my opinion. The judge exceeded the scope of the functions which the law gives to him and I am afraid invaded the field of the jury.

In my opinion, MacFarlane, J.A., correctly stated the law to be applied in Canada in determining the admissibility of a statement to a police officer by an accused person. The question as to whether a broader rule of exclusion than that stated by Viscount Sumner in the Ibrahim case ought to be applied was raised and met in the Fitton case. The facts in that case were as follows:

> The accused, having been taken to the police station early in the morning, and there given an account of his movements on the previous evening, was left there all day, not formally under arrest. About 5 p.m. the police officers returned and told the accused that they had been working all day on the case (one of murder) and that they had discovered further facts indicating that what he had told them in the morning was untrue. The accused thereupon "blurted out" a damaging statement, whereupon he was stopped and given a formal warning in respect of a charge of murder, after which he made a statement, obtained in the form of question and answer, that was reduced to writing and signed by him.

The trial Judge admitted the oral statement and the written statement in evidence. On appeal, the Court of Appeal for Ontario held that the statement was inadmissible [115 C.C.C. 225, [1956] O.R. 696, 24 C.R. 125]. Aylesworth, and Roach, JJ.A., dissented. The Crown then appealed to this Court on the basis that the dissent was on a question of law. Kerwin, C.J.C., and Cartwright, J., were of the opinion that the dissent was on a question of fact, and, thus, the Court was without jurisdiction. The other seven members of the Court took the opposite view. The issue of law is delineated in the judgment of Fauteux, J., (as he then was), at pp. 16-7 C.C.C., pp. 542-3 D.L.R., p. 984, as follows:

> With reference to the rule of law governing the admissibility of the extra-judicial admissions made by the respondent in the present instance, Roach J.A., for the minority, said:
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> "There can be no doubt as to the rule. It was stated by Viscount Sumner ***[page393]*** in Ibrahim v. The King, [1914] A.C. 599 at p. 609 as follows: '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.'" ...
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> "There is no positive rule of evidence that if improper questions are asked of a prisoner in custody the answers to them are, merely on that account, inadmissible. The cases are reviewed by Kellock J. in Boudreau v. The King, 94 Can. C.C. 1, [1949], 3 D.L.R. 81, S.C.R. 262. I do not review them here. In determining whether the answers made are admissible or not, the Court inevitably must come back to the primary question: Were they made voluntarily in the sense described in the rule as laid down by Viscount Sumner, supra." (The italics are mine.) ...
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> On the other hand, Pickup C.J.O., for the majority, stated [115 C.C.C. at p. 239, [1956] O.R. at p. 714] "In my opinion, the Crown does not discharge the onus resting upon it by merely adducing oral testimony showing that an incriminating statement made by an accused person was not induced by a promise or by fear of prejudice or hope of advantage. That statement of the rule of law is too narrow. The admissions must not have been 'improperly instigated or induced or coerced': per Rand J. in Boudreau v. The King, supra. The admissions must be self-impelled, and the statement must be the statement of a man 'free in volition from the compulsions or inducements of authority'": per Rand J. in Boudreau v. The King, supra. [p. 239]
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> Thus it appears that Roach J.A., with the concurrence of Aylesworth J.A., held the view that the decision of this Court in Boudreau v. The King did not change the law as stated by Viscount Sumner and that a declaration made by an accused is a voluntary statement if 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. In the view of Pickup C.J.O., Laidlaw and Schroeder JJ.A. this statement of the rule is too narrow and in addition to proving that the statement had not been obtained by fear of prejudice or hope of advantage, the prosecution must further show that the statement was not otherwise influenced by the course of conduct adopted by the police, that it must be self-impelled, failing which it is not a voluntary one in the sense required by law.

Having concluded that an issue of law was raised by the dissent of Roach and Aylesworth, JJ.A., Fauteux, J., went on to say that he agreed with the views expressed by those Judges. On this point, Kerwin, C.J.C., was in agreement, as were all the other members of the Court except Cartwright, J., who did not express any view on this point.

Rand, J., in the Fitton case had this to say, at pp. 5-6 C.C.C., p. 533 D.L.R., pp. 962-3 S.C.R.:

> 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 ***[page394]*** what was there said. The language quoted must be read primarily in the light of the matters that were being considered. As the opening words show, there was no intention of departing from the rule as laid down in the authorities mentioned; the phrase "free in volition from the compulsions or inducements of authority" means free from the compulsion of apprehension of prejudice and the inducement of hope for advantage, if an admission is or is not made. That fear or hope could be instigated, induced or coerced, all these terms referring to the element in the mind of the confesser which

> actuated or drew out the admission. It might be called the induced motive of the statement, i.e., to avoid prejudice or reap benefit. As Professor Wigmore intimates, the terms promise or threat may be reduced to the word "inducement", but that again may raise a question of meaning; and the justification of the illustrative use of other words is that together they indicate the general conception of influence of a certain kind producing the admission. Even the word "voluntary" is open to question; in what case can it be said that the statement is not voluntary in the sense that it is the expression of a choice, that it is willed to be made? But it is the character of the influence of idea or feeling behind that act of willing and its source which the rule seizes upon. Nothing said in Boudreau v. The King was intended to introduce a new quality of that influence.

In other words, to render a statement of the accused to a police officer inadmissible there must be the compulsion of apprehension of prejudice or the inducement of hope of advantage whether that apprehension or hope be instigated, induced or coerced.

The rule as to admissibility of a confession, in England, is stated in Halsbury's Laws of England, 4th ed., vol. 11, p. 231, para. 410, as being:

> 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.

The footnote points out that this statement is contained in the introduction to the Judges' Rules and that it was approved by Lord Reid in Com'rs of Customs and Excise v. Harz, [1967] 1 A.C. 760 at pp. 818 and 821.

The word "oppression" appeared for the first time in the Judges' Rules in 1964. "Oppressive questioning" was defined in R. v. Prager, [1972] 1 All E.R. 1114, as [at p. 1119] "questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have remained silent'".

None the less, in that case leave to appeal from conviction was refused. One of the grounds for the application was based upon ***[page395]*** the alleged inadmissibility of a statement made by the accused to police officers. The police officers had questioned the accused on three occasions in one day, from 9:15 a.m. to 12:30 p.m., from 5:45 p.m. to about 7:40 p.m. and from 7:40 p.m. to 11.30 p.m.

In R. v. Isequilla, [1975] 1 W.L.R. 716, the facts and conclusions are set out in the headnote as follows:

> The defendant was the passenger in a car which stopped outside a bank. Three police officers, two of whom were armed, came towards the car. One police officer chased the driver, the second jumped into the car and placed handcuffs on the defendant and the third, holding a gun, went to the near side of the car. The defendant reached down to a briefcase at his feet. A police officer took the case and, on opening it, found an imitation gun and a note written by the defendant, which stated, "Keep calm. Hand over (STERLING)3,000 or I'll blow your head off." The defendant was asked what the articles were for; he began to cry, saying that he had been stupid. He was taken to the police car and, still crying, he repeated

> that he had been stupid, that he was short of money and was trying to get some from the bank. He was cautioned. He was obviously frightened and, on the journey to the police station and at the police station, he became more and more hysterical. He made a confession statement. At his trial, the defence contended that the statement was not admissible in evidence. The judge ruled that the police had acted properly and the statement was admissible. The defendant was convicted and appealed.
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> On the question whether the confession statement was inadmissible because (1) the police officers' conduct was such as to amount to an inducement although that was not their intention and they had acted properly; and (2) the defendant's mental state was such as to deprive him of the capacity to choose freely whether to confess or not:--
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> Held, dismissing the appeal, (1) that a confession statement was inadmissible where there had been an improper or unjustifiable inducement by someone in authority making threats or promises; that fright caused by a justified violent arrest made by police officers carrying guns could not be an improper inducement and, accordingly, the defendant's fear caused by the police officers' acts and words during the arrest was not a ground for ruling that the confession statement was not voluntary (post, pp. 721H -- 722G).
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> Dictum of Lord Campbell, C.J., in Reg. v. Scott (1856) Dears & B. 47, 58; Naniseni v. The Queen [1971] N.Z.L.R. 269 and Reg. v. Richards [1967] 1 W.L.R. 653, C.A. applied.
>
> (2) That the fact that the defendant was frightened and crying and later became hysterical was not a mental state that rendered the confession statement unreliable or untrustworthy so that it should be excluded ...

In the judgment, following references to authorities, including Naniseni v. The Queen, referred to by the trial Judge in the present case, the Court of Appeal, at pp. 720-1 said this:

> Those cases, and there are many others, all as it seems to us proceed on this basis, that to rule a confession out as being inadmissible at law it must be shown it was not voluntary in the sense that it was procured by inducement of some form, either threats or promises offered by a person in authority at ***[page396]*** the particular situation in which the confession was made. The rule has not, as we see it, substantially changed over the years except in the following respects. In the first place this century has probably shown a more generous attitude to the suspect in the application of the rule; by that I mean that although the principle has remained the same, the courts have perhaps been over-generous in accepting as an inducement for present purposes something which would be unlikely to induce the average man.
>
> Furthermore, the conception of the confession being made or the inducement offered in the presence of a person in authority has been extended to the point where the authority in question is perhaps minimal, but the principle is not affected.
>
> The only possible addition to the principle which one finds in the English books at the present time is that exemplified in the recent case of Reg. v. Prager [1972] 1 W.L.R. 260, where it is established that interrogation by police officers if carried on to the point of oppression may be held to have destroyed the will of the suspect who was being interrogated, and thus prevented a subsequent confession from being treated as a voluntary confession. That is I think another example of the confession ceasing to be voluntary because of some failure on the part of authority to observe the rules which naturally must govern situations of this kind.

The Court later went on to say [at pp. 721-2]:

> In the first place we accept what Mr. Denny, for the Crown, has said, which to some extent has been made out by the reference to authority included in this judgment, that under the existing law the exclusion of a confession as a matter of law because it is not voluntary is always related to some conduct on the part of authority which is improper or unjustified. Included in the phrase "improper or unjustified" of course must be the offering of an inducement, because it is improper in this context for those in authority to try to induce a suspect to make a confession. Counsel for the Crown says, and we agree, that if one looks to the authorities there is no case in the books which indicates that a confession can be regarded as not voluntary by reason of the present grounds, unless there is some element of impropriety on the part of those in authority. That seems to be the case, and we can see no justification for extending the principle today.

I have already said that the law as to the admissibility of a statement by an accused person to a police officer was settled in the Fitton case. Counsel for the appellant has invited the Court to expand the grounds for ruling a statement to be inadmissible. This is not an appropriate case in which to consider "oppression" as defined in the English rule because the trial Judge made no finding of oppression by Sergeant Proke. As is pointed out by the Court of Appeal, he would have admitted the statement had it not been for the evidence of Dr. Stephenson of an hypnotic state. In this connection the doctor's report is significant. I repeat these passages:

> It is axiomatic that a person under hypnosis (whatever its depth) cannot be forced to do or say anything to which he has not already given tacit consent. In my opinion, this subject had a very strong basic wish to unburden himself and his ambivalence over it is expressed in monologues 2 & 3. ***[page397]***
> In my opinion his initial denial was based on involuntary repression of the painful material and not mere concealment. Therefore, when the painful material becomes conscious, his telling of it is essentially a voluntary act, even though there is a strong possibility he was in a light hypnotic state up to the end of the second monologue. In my opinion, by the time he begins to relate his mother's death wish he is in full and voluntary control of his faculties and remained so until the end of the tape.

The appellant's statement was not prompted by oppressive conduct. It was not forced from him. He had "a very strong basic wish to unburden himself".

I agree with the statement in the Isequilla case, already cited, that to exclude the statement there must have been "some conduct on the part of authority which is improper or unjustified".

Since preparing the above reasons I have had the opportunity to consider the reasons of my brother Beetz and I would like to make a few additional comments,

The Crown did not seek to introduce in evidence the statements made by the appellant while he was in, what Dr. Stephenson describes as "a light hypnotic state". The two statements which the Crown sought to introduce in evidence were made after he was "in full and voluntary control of his faculties". Had the Crown sought to introduce the statements made while the appellant was in a light hypnotic state, it is clear that they would not have been admitted by the trial Judge, but the refusal to admit them would not have been because of threats or inducements by a person in authority but because the appellant, at the time those statements were made, was not in a condition which would make it safe to admit them.

Reference has been made to the judgment of Lord Parker, C.J., in R. v. Smith, [1959] 2 Q.B. 35 at p. 41, where he says:

> The court thinks that the principle to be deduced from the cases is really this: that if the threat or promise under which the first statement was made still persists when the second statement is made, then it is inadmissible. Only if the time-limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement.

All of the cases, to which reference has been made, which consider the proposition stated above, are cases which had to consider whether a threat or promise which rendered an initial statement inadmissible continued to have effect when a later statement was made. The question was whether the later statement was tainted because of what had occurred prior to the making of an earlier statement. ***[page398]***

In my opinion that question does not arise in the present case. There is no evidence of threats or inducement which led to the making of a statement. The objection to the possible admission of the statement made while in a light hypnotic state is not against the conduct of persons in authority when that statement was made. The objection would arise because of the condition of the appellant at that time which would make the statement involuntary. That condition did not continue because, as Dr. Stephenson testified, when the appellant began to relate his mother's death wish he was in full and voluntary control of his faculties. The condition of the accused, in a light hypnotic state, which would have excluded the statement then made, no longer continued at the time the statements, in issue in this case, were made. In my opinion, the case is comparable to that in which a statement is made while in a state of shock. The fact that that statement might be inadmissible would not preclude the admission of a later statement made after the state of shock had ceased to exist. The only test to be applied as to the admissibility of the later statement would be whether the condition which rendered the first statement inadmissible had ceased. In the present case, Dr. Stephenson's evidence establishes that the light hypnotic state had ended before the later statements were made.

I would dismiss the appeal.

RITCHIE, J., concurs with MARTLAND, J.

SPENCE J.:— I have had the opportunity to read the reasons for judgment being delivered by Mr. Justice Martland. I have, however, come to a different conclusion and such conclusion entails a rather detailed examination of the evidence adduced as to the investigation of the offence and, more particularly, the whole contact between the appellant and the police officers.

The trial took place before Gould, J., an experienced trial Court Judge, and he conducted a very lengthy voir dire after which he gave reasons for his ruling in detail and with precision.

I take the facts, which I shall outline hereafter, from Gould, J.'s reasons for such ruling, as they appear in the Appeal Case.

The appellant was a 17-year-old youth charged with murdering his mother. The appellant's mother had been discovered by her common law husband, in the late afternoon of June 16, 1975, lying on her bed "with her head bludgeoned into a pulp". Her son, the appellant, was arrested at about midnight on his return to the apartment where his mother had been found earlier. It appeared from the evidence that the appellant had

taken a set of ***[page399]*** keys for his so-called step-father's, Molnar's, car, which set of keys the late Mrs. Horvath kept in a dresser in her bedroom. He then had gone to Molnar's place of work and taken the automobile without Molnar's knowledge, picked up three young ladies and, in driving about Vancouver with them, got into two minor accidents in each case leaving the scene without giving his name. The appellant later in his statements averred that he feared to go home with the damaged automobile and so did not arrive until midnight.

Within about 20 minutes after his arrest, interrogation of the appellant commenced at the police station. That interrogation proceeded from 12:20 a.m. until 3:10 a.m. without a break. It was carried out by two R.C.M.P. constables, Delwisch and Charlton, each of whom sat at an end of a table with the appellant sitting between them in the centre of the table. Gould, J., in his ruling, described this interrogation in these words:

> Delwisch, I thought, was particularly honest to the Court in describing the whole technique of the interrogation. It was hot and furious. The technique followed was for one, at one end of the table, to put a question and then the other officer put another one. To use a phrase used by defence counsel, they hammered him with shots from both sides, and that, for just under three hours. They emphatically accused him of lying, accused him again and again of lying, and told him at one time with reference to his demeanour and way of answering questions, in effect (I think the words were used) "to pack up that nonsense".
>
> Delwisch is an imposing officer in size, with a firm personality. He is six-foot three, and weighs some 225 pounds.
>
> Charlton is an older man, experienced, positive personality, and I have no hesitation in speculating that both these officers were a great deal more positive that night in that interview room than they were in Court, and in Court they were both well possessed of the situation and well able to look after themselves.
>
> Now, fairness is not a test whether or not a statement is voluntary, but this statement was obtained in a manner of questioning, which in my view, was oppressive.

He then made his ruling thereon in these words:

> The facts, in outline, were put to Dr. Gordon Stephenson, psychiatrist called by the Crown, and he was asked what he thought would be the mental state of the interrogatee towards the end of the interview. He said that the thought that there would have been an atmosphere of oppression so great as to give the interrogatee a sense of being threatened. I agree. Cross-examination in interrogation, of course, is not fatal. Accusing an interrogatee of not telling the truth, trying to persuade him to change his ways and tell the truth are not fatal. But I exclude the first examination on the grounds of the method used, the age of the accused, the circumstances of the day he had been through, the hours of the morning, the length of the interrogation, the technique used. It is that combination of circumstances which ***[page400]*** leads me to hold that the first statement was obtained in an atmosphere of oppression which may have spilled over, in the accused's mind, to an atmosphere of threat. Either, in my view, oppression or threat, is sufficient to exclude the statement. I am also of the view that if I have doubts, I should favour then the position of exclusion rather than admission. However, in this instance I am not waivering. I am firm in my opinion that, for the reasons I have given, the statement is inadmissible.

The appellant was then left for the remainder of the night, that is, from 3:10 a.m. on, in his cell. There is no doubt that the appellant was properly treated at this time. Between 9:00 a.m. and 10:00 a.m. on June 17th, the

police officers took the appellant to the flat where the fatality occurred and permitted him to change his clothes, he having been wearing police provided cover-alls after his arrest and until that time. He was then taken to the R.C.M.P. headquarters in Vancouver ostensibly for a polygraph test which he had consented to undergo. He waited outside a Sergeant Proke's office while one of the constables briefed Proke, an action which would seem to have taken about one hour. He then entered Sergeant Proke's office shortly after noon and was there until 4:16 p.m. During that time, there was no attempt made to administer a polygraph test. Sergeant Proke was an officer of the R.C.M.P. and had been trained with great skill in interrogation techniques and he proceeded on what Gould, J., described as "the most skilful example of police interrogation that has ever come to my attention in 36 years as a lawyer and Judge". Gould, J., described that examination in some detail:

> Let me sweep away some underbrush first of all. There was no match between the interrogator and the interrogatee in mental strength. It was a case intellectually of a cat manoeuvering a mouse. This is not a criticism. In fact, to have a police officer as intellectually adroit as this one interrogating prisoners, is, I think, highly desirable -- a matter of congratulation rather than any criticism.
>
> In that sense it was unfair because there was no doubt as to who in the scene was the cat and who was the mouse; but police interrogation is not a sporting event such that one is interested in a fair match between the contestants. Of course, in many cases, there is a vast difference in intellect between the interrogator and the interrogatee. I have seen cases where the difference has run very much the other way.
>
> Part of the technique used, and I will not do it justice with the short description I am going to give it, was this: Horvath said that he could remember nothing about his mother's death; that he was troubled with something locked away in his mind. He denied it, of course, at first, but that did not last too long. Staff Sergeant Proke very adroitly ingratiated himself early in the interview with this man. It was a quite different atmosphere from the usual "you did" -- "I didn't" technique of interrogation. Then when what was described by Dr. Gordon Stephenson as Horvath's hysterical amnesia was unshakingly stubborn, the officer commenced asking the accused as ***[page401]*** to whether he could not see something, could not he see an image of his mother in bed with blood around her. Now, that was no trickery because that is the way his mother had been found. It is a true statement, and Proke kept putting this up, and from the tape, it is clear that he brought about in this young man, under these circumstances, within the four hours and four minutes involved, a complete emotional disintegration. I do not say that in criticism. Under appropriate circumstances that might be the culminating success of an interrogation, and, were it not for one factor, which I am going to come to, might have successfully culminated this interrogation. That is a factor number one. One only has to listen to the tape to come to that conclusion. The phrase "emotional disintegration", by the way, is my phrase, not that of Dr. Gordon Stephenson. Something that I suspected, from the tape, was quite outside of my field, thus I was anxious to get help on it from an expert. That is the reason why I asked Dr. Gordon Stephenson to listen to the tape and give me the benefit of his views. That was the matter of hypnosis.

It is a strange and rather puzzling story. The interview may be divided into three phases. During the first phase, Sergeant Proke proceeded to question the appellant, and I shall refer to his techniques hereafter, and then left the appellant alone. Although the appellant was unaware of it, a sound taping device picked up not only Sergeant Proke's questions and the appellant's answers but any words that the appellant might have uttered during the time when he thought he was alone in the room after Sergeant Proke had left it. Those

words, and there were many, were referred to by both Dr. Stephenson, to whom reference shall be made later, and the learned trial Judge, as soliloquies, and the appellant's soliloquy after the first questioning by Sergeant Proke was described as a disclaimer of any guilt in the murder of his mother plus an avowal of vengeance upon whoever had been guilty. Thereafter, Sergeant Proke returned to the interrogation room, knowing, of course, of the words that had been spoken in his absence and which he had overheard and proceeded further with his type of questioning. This second set of questioning was followed again by Sergeant Proke's departure and a second soliloquy and in that soliloquy the appellant recited a story that his mother had begged him to kill her and finally he had acquiesced in her demands and also that he had promised his mother that he would not reveal that his mother had made such a request.

Following the second soliloquy, Sergeant Proke returned to the room and further carried on his questioning, then again departed and left the appellant alone and the third soliloquy occurred. In that soliloquy, the appellant begged his mother's forgiveness for having revealed the secret of her request that he should kill her. Again, upon the return of Sergeant Proke, there was reference made in the conversations between the appellant and Sergeant ***[page402]*** Proke to what had been said in these monologues. Thereafter, the officers proceeded to put into a statement the story they had obtained from the appellant in this fashion.

Later, the appellant accompanied the police officers to a point in an area described as Burnaby Mountain and there, at the appellant's direction, the police officers recovered a baseball bat, two socks and two gloves. At the trial, it was proved that there was a small amount of hair on one of the socks and some blood on the baseball bat which, however, could not be typed. Nothing was shown on the gloves. The only way that any of these three items could be associated with the appellant was (a) from the appellant's statement, and (b) from the evidence which was given at the trial that he did so accompany the officers and so indicate the position of where the articles were found. The statement was, as I shall show, excluded by the learned trial Judge.

When the Crown requested a voir dire to determine the admissibility of this statement, evidence in reference thereto was given not only by police officers but by Dr. Gordon H. Stephenson, a physician holding a specialist's certificate in psychiatry who was on the staff of Vancouver General Hospital, a professor of psychiatry, and consultant to the provincial Attorney-General's Department. As I have said, Dr. Stephenson was called by the Crown. He had examined the appellant on July 23rd, that is, some five weeks after the offence. Dr. Stephenson's evidence upon examination by the Crown was that he found nothing which would indicate a distortion or disorder of the appellant's thought processes which would render the appellant incapable of appreciating the nature and quality or the consequences of his acts, nor was there anything in the appellant's thought stream that would indicate that he had any difficulty in knowing an act to be wrong. Dr. Stephenson gauged the appellant's intelligence as being within the normal range. This evidence given by Dr. Stephenson in conjunction with and in answer to a most general question was most evidently addressed to the issue of sanity under the provisions of s. 16 of the Criminal Code, yet there had been no defence of insanity adduced and the evidence was given on a voir dire in the absence of the jury purportedly for the purpose of determining whether a statement made by the appellant was admissible.

Doctor Stephenson did continue to give other evidence which indicated that the appellant suffered from what he termed a personality disorder describing it as a sociopathic personality and the appellant's past history as described by the appellant to him "indicated a tendency toward impulsiveness, hedonism, that is to ***[page403]*** say, an impulsive indulgence in immediate pleasures without regard for future consequences, immediate satisfaction without regard to future consequences, a certain amount of emotional blunting which I felt verged on callousness, a grandiose boastfulness and a recklessness of consequences".

It was quite evident that upon hearing the evidence of Dr. Stephenson the learned trial Judge was perplexed

and perhaps irritated and at his suggestion, Dr. Stephenson, over a week's adjournment, took the complete tapes of Sergeant Proke's examination of the appellant and the appellant's three soliloquies and read them over and then prepared a report for submission to the Court. Following this, Dr. Stephenson again testified, being examined by the Crown, and gave much most significant evidence. Dr. Stephenson was of the opinion that Sergeant Proke skilfully played upon his subject's (the appellant's) feelings and latent pleasures to bring the material into consciousness. He was of the opinion that the appellant's first soliloquy was not a denial of guilt because of an intention to hide it but was rather the involuntary repression of painful memories and that when Sergeant Proke, by skilful questioning, brought into consciousness those memories, the appellant recounted them in his soliloquy as a voluntary act. Doctor Stephenson said that, whether deliberately or not, Sergeant Proke's manner and voice took on an hypnotic quality and that the appellant slipped into a mild hypnotic state which lasted through the first two soliloquies. Sergeant Proke, in his evidence, had denied that he had intended to hypnotize the appellant. It was Dr. Stephenson's view that the appellant's answers were voluntary but it must be remembered that they were voluntary only under the circumstances which I have most briefly described. In referring to the effect of hypnosis, Dr. Stephenson said:

> It is axiomatic that a person under hypnosis (whatever its depth) cannot be forced to do or say anything to which he has not already given tacit consent. In my opinion, this subject had a very strong basic wish to unburden himself, and his ambivalance over it is expressed in monologues two and three -- and "ambivilence", my lord, means a divided opinion.

A Doctor Stephenson gave his opinion that what was said by the appellant in each of the three soliloquies or, as they were sometimes called, monologues, was "the truth as he saw it". Doctor Stephenson agreed, upon cross-examination, that the appellant was, during the interview, always under a very considerable degree of emotional stress and that it was fair to say that the interrogator, there referring to Sergeant Proke, was suggesting in ***[page404]*** very strong terms that the appellant ought to face or reveal things that he was hiding or supposedly hiding from the interrogator, that the interrogator was trying to get this individual to reveal incriminating material about himself, and finally, that despite his earlier answer, which I have quoted, he agreed with counsel for the appellant that the person in an hypnotic state was more susceptible to the power of suggestion than he would be normally. In his ruling, the learned trial Judge depended much upon the hypnosis, saying, in part:

> Had Dr. Stephenson not given the evidence of an hypnotic state, I would have, with some misgivings, have admitted this statement. It is the accumulation of all the factors, and I have dealt with those, plus the factor of the subject having been, for a sizeable part of the interview, in an hypnotic state immediately before the confession came out, that have caused me to reject the statement. This ruling is given with very real regret that police work as skillful as this should end in frustration of its purpose.

I place no such emphasis on the existence of any hypnosis but rather I rely on all of the circumstances which I have outlined and I rely particularly on the specific finding of the learned trial Judge who had heard all of the evidence including that given by Constables Delwisch and Charlton, Sergeant Proke and Dr. Stephenson, and who, in the ruling which I have cited, found that under the circumstances within the four hours and four minutes involved the complete emotional disintegration of the appellant had been brought about. It was really for this reason that the learned trial Judge ruled that the statement as well as the other supporting material such as the tapes of the questioning and soliloquies were inadmissible, and it is for this reason I am of the opinion that the appeal from the judgment of the Court of Appeal for British Columbia should be allowed and that the judgment of the learned trial Judge restored.

McFarlane, J.A., in giving the reasons for the Court of Appeal for British Columbia, quoted the oft-cited statement of Lord Sumner in lbrahim v. The King, [1914] A.C. 599 at p. 609:

> 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.

It is my strong opinion that Ibrahim and the many cases which followed have not and need not be considered to have reduced the words "free and voluntary" in the test as to the admissibility of a statement made by the accused to only meaning that the statement has not been induced by any hope of advantage or fear or ***[page405]*** prejudice, and it is my view that a statement may well be held not to be voluntary, at any rate, if it has been induced by some other motive or for some other reason than hope or fear. It is for that reason that I shall examine a review of the cases which I think have given rise to this view that the word "voluntary" has such a narrow and confined meaning.

Let us turn first to Ibrahim. It should first be observed that the major part of the judgment of the Judicial Committee in Ibrahim is concerned not with admissibility of a statement at all but with a complex, and for our purposes irrelevant, consideration of the jurisdiction of the Court in Hong Kong to try a charge that a murder was committed in China. Secondly, the advice tendered to His Majesty was to be upon the very narrow ground that there had not been shown any clear departure from the requirements of justice or violation of the principles of natural justice causing substantial and gross injustice.

The facts in the Ibrahim case are most revealing. Members of an Indian Regiment stationed in China were sitting around under the street lights in a town on a hot summer night. A junior officer entered the group of private soldiers, charged one Ibrahim with gambling, abused him with offensive language, searched him, took away some small amount of money, and ordered him confined to the lines. Shortly thereafter, the sentry saw a man go into the camp itself to the rifle rack and gave an alarm. A shot was fired, the junior officer fell dead, a bullet having passed through his body. A man was seen a few paces away standing behind a tree and pointing his rifle in the direction where the junior officer had been shot. He was seized, proved to be Ibrahim, with his own service rifle in his hand and it had been recently fired. Ibrahim was arrested and within 15 minutes of the occurrence a major arrived to find Ibrahim in custody and in bonds sitting on the step of the guardroom. The major said to Ibrahim, "Why have you done such a senseless act?" The major said nothing else. He did not threaten Ibrahim in any way. He offered no inducement of any kind nor did anybody else to his knowledge or in his presence. Lord Sumner, in his reasons, said [at p. 608]:

> In truth, except that Major Barrett's words were formally a question they appear to have been indistinguishable from an exclamation of dismay on the part of a humane officer, alike concerned for the position of the accused, the fate of the deceased, and the credit of the regiment and the service.

It must be very plain that under those circumstances there could be no inducement of any kind, whether it was an inducement which raises a hope of advantage or fear of prejudice, or ***[page406]*** any other kind of an inducement. Lord Sumner, at the end of his opinion, shows how very important the question was, when he said [at p. 618]:

> It appears to their Lordships that a clearer case there could hardly be, and that it would be the merest speculation to suppose that the jury was substantially influenced by the evidence

of what Ibrahim said to Major Barrett.

Although many Courts seem to have done so, I do not regard such an authority as Ibrahim as indicating that the natural meaning of the word "voluntary" should be confined to cases of hope of advantage or fear of prejudice.

The next reference to which I shall refer is Boudreau v. The King, a decision of this Court reported in (1949), 94 C.C.C. 1, [1949] 3 D.L.R. 81, [1949] S.C.R. 262. There, the accused, while in custody in the Province of Quebec under a coroner's warrant during the investigation of a murder case made two written statements to the police during questions put to him. The first statement was made prior to any caution having been given to him and was simply an account of his movements during the few days surrounding the killing and was totally exculpatory in character except that it did indicate an illicit association between the accused and the wife of the deceased man. The second statement was made after the accused had been given what was described as a proper warning, although the propriety of it today might be the subject of some doubt. In that statement, the accused reiterated the substance of his earlier statement but suddenly said, "I may as well tell you, I killed him". Thereupon, the one constable called the second constable back into the room and the accused told the whole story of how he killed the deceased man. A statement was type-written by the police and sworn to by the accused. The reasons given by all the members of the Court are chiefly concerned with whether or not a warning given after an earlier statement had been taken without warning was sufficient unless it ruled out any compulsion resulting from the giving of the first statement. Rand, J., said at pp. 8-9 C.C.C., p. 88 D.L.R., pp. 269-70 S.C.R.:

> The cases of Ibrahim v. The King, [1914] A.C. 599, R. v. Voisin, [1918] 1 K.B. 531, and Prosko v. The King, 66 D.L.R. 34, 37 Can. C.C. 199, 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 ***[page407]*** 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? Here the trial Judge found that it was.
>
> It would be a serious error to place the ordinary modes of investigation of crime in a strait-jacket of artificial rules; and the true protection against improper interrogation or any kind of pressure or inducement is to leave the broad question to the Court. Rigid formulas can be both meaningless to the weakling and absurd to the sophisticated or hardened criminal; and to introduce a new rite as an inflexible preliminary condition would serve no genuine interest of the accused and but add an unreal formalism to that vital branch of the administration of justice.

Those words have been held by some to be such a limitation to the narrow meaning of the word "voluntary" and by others to permit an interpretation of the word in accordance with its ordinary English meaning. I prefer the latter view.

Again, it is to be noted that in Boudreau there were none of the extraordinary circumstances which surround the statement made by the appellant in the present case. There was no long and skilful questioning. There was not, first, the bombardment by officers over the course of some hours of most accusatory statements followed

by most skilful exhibition of suggestive questioning by a person specially trained in a psychological technique. There was simply the blurting out in the middle of an exculpatory statement of a most inculpatory sentence. Kellock, J., at pp. 14-5 C.C.C., pp. 93-4 D.L.R., pp. 275-6, quotes Darling, J., as he then was, in Lewis v. Harris (1913), 24 Cox C.C. 66 at p. 71. I stress Darling, J.'s words, "'and it is tolerably certain that if there is any sign that the evidence was unfairly obtained he would reject it'".

The next case in this Court which is relied on most strongly by the Crown and which I admit causes me more difficulty than any other is R. v. Fitton (1956), 116 C.C.C. 1, 6 D.L.R. (2d) 529, [1956] S.C.R. 958. There, a driver of a postal delivery truck was charged with the sexual assault and murder of a 13-year-old girl. The body of the girl had been found on the east side of Toronto near the harbour shortly after 11 o'clock in the evening of January 18th. On the early morning of January 19th, the police officers went to the garage where the mail collector's truck was kept. There, in the presence of the accused man, they carefully examined that truck and found a bobby pin and a lipstick, both of which were subsequently identified as being the property of the dead girl. The accused nearly fainted upon witnessing this discovery. He was assisted by the police officers and then taken to headquarters. At headquarters, the police officers informed him of the ***[page408]*** crime which they were investigating and of such evidence as might involve him. The accused, during the course of about two hours, gave to the police officers a verbal resumé of his whereabouts the previous evening and made no reference to having seen the deceased girl at all. The police officers then left the accused in custody at police headquarters and throughout the whole day carried on further investigation.

After their departure, the verbal resumé was reduced to a typewritten statement which the accused read over and signed. The police officers returned from their investigation, again took the accused to the interview room, informed him they had been working on the case and said, "We have been out going over the area in the west end of the city where you worked and we have been working pretty hard this afternoon" and that they had some information to the effect that the accused had been seen with the deceased girl on the previous evening. They informed the accused that the lipstick that had been found in the truck had been identified as that of the deceased girl and that they had other information which indicated that he had been seen with the girl the previous night, and concluded, "We do not believe what you told us this morning". The accused then blurted out, "I was just thinking of my wife and my kids. I didn't mean to do it. She started kibitzing around and I grabbed her by the scarf and she didn't breathe no more".

The officer immediately stopped the accused, cautioned him and asked the accused if he understood the caution, and the accused having agreed that he did so understand, the officer asked the accused if he wished to make a statement. The accused indicated that he did and thereafter the long statement in question and answer form was written out in long hand by a detective, read over by the accused and signed. That statement was a complete outline of all the circumstances surrounding the crime. The accused later went with the officers in an attempt to recover several of the items which had been in the possession of the deceased girl including her shoes.

The police amassed a lot of other evidence and the accused was charged.

At trial, when the statement of the accused was produced by the Crown, no objection was made to its admissibility. As Rand, J., pointed out at p. 7 C.C.C., p. 534 D.L.R., p. 964 S.C.R., the production of the statement, if not facilitated, was not seriously challenged for the reason that the statement contained the only evidence upon which the defence intended to rely, for, feeble as it ***[page409]*** was, the accused, referring in that statement to the victim, said she was "kibitzing around" and his grabbing her by the scarf was the only evidence upon which the defence could show anything but a clear case of murder.

However, in the Court of Appeal [115 C.C.C. 225, [1956] O.R. 696, 24 C.R. 125], the fifth ground of appeal taken by counsel for the accused, then appellant, was set out in these words:

> The statement made by the accused should not have been admitted in evidence. The accused was subjected to a kind of cross-examination and persistent questioning in an attempt to elicit the statement. He was in custody from about 6:30 a.m., and not until about 5 p.m. was any caution given to him, and that was done only after he had made an incriminating admission.

The Court of Appeal for Ontario found, by a majority judgment, that that statement was inadmissible and directed a new trial. The majority judgment was given by Pickup, C.J.O., who said at p. 239 C.C.C., p. 714 O.R.]:

> In my opinion, the Crown does not discharge the onus resting upon it by merely adducing oral testimony showing that an incriminating statement made by an accused person was not induced by a promise or by fear of prejudice or hope of advantage. That statement of the rule of law is too narrow. The admissions must not have been "improperly instigated or induced or coerced': per Rand J. in Boudreau v. The King, supra. The admissions must be self-impelled, and the statement must be the statement of a man "free in volition from the compulsions or inducements of authority". The statement must be "freely and voluntarily made". Applying that principle to the particular facts in this case, I have reached the conclusion that the Crown has failed to show that the oral statement made by the appellant, or the written statement made by him immediately afterwards, was free and voluntary. Therefore the learned Judge, in my opinion, should not have admitted either of those statements in evidence. The erroneous admission in evidence of these incriminating statements is in itself sufficient to warrant this Court directing a new trial.

Roach, J.A., however, gave a dissenting judgment which was adopted upon appeal to this Court in which judgment the most careful analysis was made of all the evidence, not only in reference to the statement made by the accused man but as to the mass of other incriminating evidence. One cannot help but feel that a jury was as little affected by the production of the statement of the accused as Lord Sumner felt the jury in Ibrahim was affected by the production of Ibrahim's statement. Roach, J.A., was concerned with the manner of the police interrogation of the accused man, and he said at p. 251 C.C.C., pp. 726-7 O.R.:

> I am not suggesting that it is in any circumstances advisable or proper for a police officer to say to an accused: "I do not believe what you have told me." That is just a polite way of saying "You are a liar". What I am saying is that in this case the use of that language did not result in the statement, ***[page410]*** made after he was duly cautioned, being inadmissible. There is nothing in what he said before he was cautioned that is not included in his statement, except the excuse for having misled the officers by what he said in the morning.

As I have said, the Crown appealed to this Court and this Court by a majority judgment were of the view that the statement was admissible. Rand, J., made specific reference to Pickup, C.J.O.'s citation from Boudreau v. The King, which was a statement made by Rand, J., in that Boudreau case, and regarded Pickup, C.J.O., as being of the opinion that that meant that only spontaneous statements unrelated to anything as cause or occasion in the conduct of the police officers could be admitted but regarded such an interpretation of Boudreau as being in error. Looking at the words "free in volition from the compulsions or inducements of

authority" as meaning free from the compulsion of apprehension of prejudice and the inducement of hope for advantage, Rand, J., said that it was a character of the influence of idea or feeling behind that act of willing and its source which the rule seizes upon, and further holding that questions without intimidating or suggestive overtones are inescapable from police inquiry and by themselves could not be taken to invalidate the response given.

So, in Rand, J.'s view, the question was whether the statement had been made through fear or hope induced by authority. I am ready to admit that such a reading of the reasons of Rand, J., would seem to support a narrow construction of the word "voluntary" but those words must be understood in the light of the evidence in that particular case and I point out that Nolan, J., in his reasons in the same case, stressed [at p. 30 C.C.C., p. 555 D.L.R., p. 972 S.C.R.] "In the present case, there was no evidence of inducement or coercion, no evidence of threat or promise of reward", and also noted [at pp. 30-1 C.C.C., p. 556 C.C.C., pp. 972-3 S.C.R.]: "The questioning must not, of course, be for the purpose of trapping the suspected person into making admissions and every case must be decided according to the whole of the circumstances". (The emphasis is my own.)

In my respectful opinion, the judgment of this Court in Fitton must be limited so as not to rule admissible statements made by the accused when not induced by hope of advantage or fear of prejudice but which are certainly not voluntary in the ordinary English sense of the word because they were induced by other circumstances such as existed in the present case.

Courts of late in the United Kingdom, in New Zealand and in ***[page411]*** Australia have been concerned with the question of oppression and the learned trial Judge in his ruling placed much reliance on the decision in New Zealand of Naniseni v. The Queen, [1971] N.Z.L.R. 269. There, although the statement was held to be admissible, it was said that a confession is voluntary if it has been made by the accused, his will in making it not being overborne by the will of some other person by means of some inducement. That Court was ready to accept the doctrine of oppression but held that the oppression must be by some third party and could not be merely self-induced involuntariness.

Although some of the statements are illuminating, the case is of little value in the present circumstances where, of course, an inducement was made by a third party, the skilled and persistent Sergeant Proke.

In McDermott v. The King, in the High Court of Australia, reported in (1948), 76 C.L.R. 501, Dixon J., as he then was, said at p. 511:

> At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made. This means substantially that it has been made in the exercise of his free choice. If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary.

In the particular case, the statement was found not to have been subject to pressure.

The Judges' Rules dealt with oppression and in R. v. Priestly (1966), 50 Cr. App. R. 183, Sachs, J., as he then was, made a ruling which he referred to subsequently in R. v. Algernon Watson. The statement made in the Priestley trial is outlined in a note reported in 51 Cr. App. R. 1. I quote the following excerpt:

> There I mentioned that I had not been referred to any authority on the meaning of the word "oppression" as used in the preamble to the Judges' Rules, nor would I venture on such a definition, and far less try to compile a list of categories of oppression, but, to my mind, this word in the context of the principles under consideration imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary.... Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ***[page412]*** ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world.

It is exactly this issue with which I am concerned in the present case. The requirement to establish the admissibility at trial of a statement made by an accused person to persons in authority has been oft cited as simply that it is free and voluntary. Those are both ordinary English words and I think mean roughly the same thing. The Shorter Oxford English Dictionary defines "voluntary" as "arising or developing in the mind without external constraint ...; of actions: performed or done of one's own free will, impulse, or choice; not constrained, prompted, or suggested by another". Other definitions might be cited but they are to the same effect. As I have shown, there has been repeatedly throughout the cases emphasis on the fact that the statement must be voluntary and often such words as "of free will" are added. Here, the appellant was 17 years of age. He was of a most unstable character, diagnosed by the Crown psychiatrist as being a sociopathic personality who had boasted that he owned three fine automobiles, that he had been the manager of one department of a large company, who had said to a youth who was his friend that he was so anxious to obtain a fine car that he would take the money from his mother and even kill her, and then this boy is hammered in cross-examination by two most impressive police officers and then taken by a skilled and proved interrogation specialist and, with what the psychiatrist described as the most suggestive of questions, taken through a three-phase examination so that the learned trial Judge characterized his condition at that time as one of "complete emotional disintegration". It is my strong view that no statement made by that accused under those circumstances can be imagined to be voluntary, and I do not find anything in the authorities which I have analyzed which would show me that the law is otherwise.

For these reasons, I would allow the appeal and restore the acquittal upon the verdict of the jury.

PIGEON, J. concurs with MARTLAND, J.

BEETZ J.:— I have had the advantage of reading the reasons of my brothers Martland and Spence. I reach the same conclusion as my brother Spence but on narrower grounds confined to the matter of hypnosis.

The issue is whether a confession is tainted because the accused was under hypnosis immediately prior to but not at the time of the confession and, while under hypnosis, made a previous confessional statement which was involuntary. ***[page413]***

I The voir dire

On June 16, 1975, appellant's mother was murdered in her bed. In the early hours of June 17th, following his arrest for suspicion of murder, 17-year-old Horvath was interrogated for about two hours and one-half by

R.C.M.P. members Delwisch and Charlton. Horvath made certain declarations concerning his whereabouts on June 16th, the taking of the car of his mother's common law husband and his involvement in two car accidents; but through the end of the interview he denied having killed his mother. These oral declarations are hereafter referred to as the first statement.

On the same day, Horvath was interviewed by Staff Sergeant Proke, an R.C.M.P. polygraph operator. The interview began at noon and lasted approximately four hours. It took place in a room equipped with a polygraph ("lie detector") a listening device and a one-way glass permitting observation from an adjoining room where what was said by Sergeant Proke and Horvath in the interrogation room could be heard and was entirely tape recorded. From this adjoining room, Corporal Delwisch witnessed most of the interview.

During the first portion of the interview, which lasted about two hours, Sergeant Proke advised Horvath that he was a police officer and might have to give evidence in Court if Horvath acknowledged involvement in the murder; he also told Horvath that he neither had to answer any question nor take the polygraph test. Horvath said he wished to defer the polygraph test. In reply to Sergeant Proke's questions, Horvath gave some outline of his background, relationship with his mother, father, brother, stepfather (his mother's common law husband) and gave an account of events from Sunday, June 15th, to Tuesday, June 17th, but without reference to the death of his mother. Sergeant Proke said repeatedly to Horvath that he was trying to block things from his mind. Corporal Delwisch described the method as a psychological approach in that Sergeant Proke was talking to Horvath in a soothing manner, trying to win his confidence.

A few minutes after two o'clock, Sergeant Proke went into the observation room leaving Horvath alone for a little less than 10 minutes. Horvath then went into what Corporal Delwisch described as a trance or semi-trance and began his first monologue or soliloquy. In this first monologue, Horvath swore to avenge his mother's murder.

Sergeant Proke returned to the interrogation room and spoke with Horvath for about one hour. He suggested to Horvath that ***[page414]*** sodium amytal or sodium pentothal so-called "truth serums" could be used to eliminate suspicion. Horvath indicated some preference for hypnosis and said he wanted to see a psychiatrist; he stated he would like to see a psychiatrist in any event before consenting to the truth serum treatment. Sergeant Proke replied that a meeting with a psychiatrist could easily be arranged; he ultimately talked Horvath out of the idea of seeing a psychiatrist and using hypnosis but I do not think it is an exaggeration to say, as defence counsel submitted to the trial Judge, that Sergeant Proke put himself in the position of the accused's psychiatrist.

After further conversation with Horvath, Sergeant Proke left the examination room at about 3:15 p.m. and Horvath began his second monologue in which he confessed his involvement in his mother's death saying he had hit her several times. Corporal Delwisch described this second monologue as a trance of a type resembling that of the first monologue.

Sergeant Proke re-entered the interrogation room at about 3:25 p.m. and Horvath repeated to him what he had said in the second monologue. This oral declaration is hereafter referred to as the second statement.

Sergeant Proke asked Horvath whether he would be willing to repeat to the police officers in charge of the investigation what he had just told him. Horvath indicated that he would.

Sergeant Proke left the interrogation room and, in a third and relatively brief monologue, Horvath begged his mother's forgiveness for having told of the incident.

Sergeant Proke came back to the interrogation room with Corporals Delwisch and Sisterson and asked Horvath whether he was still willing to repeat to them what he had told him. Horvath agreed and left with the two corporals. Between 4:25 p.m. and 5:45 p.m. he gave a written signed confession hereafter referred to as the third statement.

Doctor Stephenson, a psychiatrist who had examined Horvath and had been called by the Crown, listened to the entire tape of the interview at the request of the trial Judge, Gould, J., and prepared a written report in the form of notes a summation of which was received in evidence by consent and reads as follows:

> Up to the point of the subject's first solitary monologue, he was presenting a normal defence against his accusers.
> The first monologue indicates he is up to this point, unaware he had any part in the murder.
> ***[page415]***
> Sensing that there is hidden material behind the monologue, and probably also sensing that, having given vent to an emotional reaction to his mother's death, the subject is more vulnerable, the interrogator skillfully plays upon the subject's feelings, and his ... "and his" means the subject's -- latent pressure to bring the hidden material into consciousness.
> The subject recalls a screen memory of seeing his mother dead, and the way is opened for further recall. Whether deliberately or not -- I am not able to say -- the interrogator's manner and voice take on an hypnotic quality, and the subject's manner of response strongly suggests he is slipping into an hypnotic state. During the second monologue, subject's voice is low, monotonous and, compared to the first monologue, emotionally low-key. He recites the provocation by his mother, his resistance, and finally acquiescence to her demands. It appears he had promised her not to reveal her request that he kill her. But so great is the pressure to unburden himself -- so great is the pressure to unburden himself he violates her "death-bed command".
> Having ventilated his distress, he then admits to attacking her -- he then admits to attacking her and reveals her request. "...

In the third monologue, he begs his mother's forgiveness for betraying her death-bed wish, and tells how he resolved to "keep his head up" and take whatever consequences come so as not to cause his stepfather, John (mother's common-law husband) further grief by revealing that his mother apparently preferred death to going on.

> That's my summation, my lord, and my opinion is as follows: "The emotional pressures on the subject were immense -- there were three main sources -- mother's death, her "death-bed command", and the distress his stepfather John (who appears to be the one person who had shown him consistent affection) would experience, should he fail to honour her command. As a result he blots out the memory of the episode by hysterical repression -- a common psychological defence mechanism (involuntary) against intolerable stress. With it went the emotional accompaniment of the stress, and thus he appears cool and unconcerned. That is, until the interrogator makes an almost irresistible appeal to him to unburden himself. Following his abreaction -- an abreaction my lord, means a strong emotional response to a situation -- he is vulnerable to hypnotic suggestion and the memory begins to break through his resistance, and he confesses his actions.

Doctor Stephenson was examined and cross-examined. I find it necessary to quote substantial parts of his testimony:

Q Is this a voluntary confession?

A It is axiomatic that a person under hypnosis (whatever its depth) cannot be forced to do or say anything to which he has not already given tacit consent. In my opinion, this subject had a very strong basic wish to unburden himself, and his ambivalence over it is expressed in monologues two and three "... and "ambivalence" my lord, means a divided opinion.

In my opinion his initial denial was based on involuntary repression of the painful material, and not mere concealment. Therefore, when the painful material becomes conscious, his telling of it is essentially a voluntary act, even though there is a strong possibility he was in a light hypnotic state up to the end of the second monologue. ***[page416]***
In my opinion, by the time he begins to relate his mother's death-wish ... "(that is in the course of the second statement)" he is in full and voluntary control of his faculties, and remained so until the end of the tape.

. . . . .

Q Now, would you explain as well, Doctor, what you mean by a light hypnotic state?

A Well, an hypnotic state is a state of -- how can I best describe this now -- is a sort of dreamy state in which the patient, or the individual is in a state of somewhat altered consciousness, but is not unconscious, with his environment, but his general condition is, I suppose, the best way one can describe it, is dreamy, and a light hypnotic state is one in which the dreaminess or alteration in consciousness is very slight. This might not even be apparent to the casual observer because the individual would be, to all intents and purposes, normal. His eyes would be open. He would in all probability be sitting quietly and not moving very much, but his eyes would be open and he would be conversing in a fairly normal fashion. The usual indication of an hypnotic state is an alteration in the individual's stream of speech. His speech characteristically becomes lower in volume, monotonous in tone, and the emotional accompaniment to the speech is pretty low-key or neutral.

Doctor Stephenson was asked to comment on the veracity of the content of the tape:

> ... following the first soliloquy, I have no way of knowing for sure, or no way of expressing a valid opinion about the truthfulness of his statements except to say that following the first soliloquy, he did, in my opinion, begin to slip into this slight hypnotic state and in all probability, the responses he gave to the interrogator at that point --

THE COURT: Yes?

A -- were in the main, the truth as he knew it, especially those which deal with the emergence of the repressed memories.

Now, during the second monologue, the second soliloquy, I have no reason to think

that the subject was not expressing the truth as he saw it. You will recall that he was at that point pleading with his mother, and in that situation, I see no reason to doubt that his statements, verbal productions were genuine and unfeigned, and at the end of that monologue, and as the questioning proceeded, again I have no way of knowing whether he was at that point being truthful or not. I may say that following the -- upon the resumption of questioning after the second soliloquy, I am of the opinion that he was very soon in full possession of his faculties.

Staff Sergeant Proke had suggested the use of narcoanalysis to Horvath and Dr. Stephenson was cross-examined at some length on the comparative effects of a sodium amytal injection and hypnosis.

Doctor Stephenson said that sodium amytal is a barbiturate. In a so-called amytal interview, it was administered intravenously, produced a mild drowsiness and reduced inhibitory controls. The subject would then become able to discuss certain subjects he could not otherwise voluntarily talk about because of the inten-***[page417]*** sity of emotion which they elicited. Doctor Stephenson agreed with the trial Judge that someone having something to hide would be "a bit of an idiot" if he took that test. He said that the state of a person under the influence of sodium amytal was not a hypnotic state. He was asked whether there was any real difference between a "four-hour shot of Sergeant Proke" and a shot of sodium amytal:

A All right, my opinion from listening to the tape is that Sergeant Proke is an extremely skillful interviewer, and his attitude towards the interview was one of gentleness and persuasion, rather than coercion. In my opinion, this did tend to allay a great deal of the anxiety that the subject would have experienced or would normally be experiencing, but I can't say that the long interview by Sergeant Proke is exactly comparable to an amitol interview.

Q Well, sir, I'm not interested in the interview itself. I am interested in the effect, and I repeat the question to you, once more, Doctor, that really the effect, the overall effect of Sergeant Proke's examination was exactly the same, as far as this individual was concerned, as if he had had a shot of this amitol or whatever you want to call it, psychologically in this kid's mind, he was able to produce, reproduce things that he wasn't mentally or psychologically capable of doing voluntarily?

A It is certainly true that he was -- that as a result of the interview, he was able to bring back into consciousness material which he had forgotten by repressing it.

Q And this is because the man had -- so that really, I come back to that same question again, and using it in layman's language, really a shot of Sergeant Proke was basically the same thing as a shot of this truth serum, so far as the reaction in the individual was concerned, i.e., the accused?

A Essentially, yes. Essentially.

Doctor Stephenson disagreed with the proposition put to him that Sergeant Proke had been able to break Horvath's will to resist, "because if you don't know something, you can't resist pressure to tell it":

Doctor Stephenson then said:

A After the first solioquy. It was at this -- it was at this point, in my opinion, that the -- that the subject began to experience a light hypnotic state. Now, I am unable to say whether Sergeant Proke did this deliberately or whether it was simply his manner of questioning that produced it, but in my opinion, at this point, after the first soliloquy, the subject did experience a light hypnotic state and this is an ideal situation in terms of ordinary therapeutic setups, this is an ideal situation for the recall of suppressed -- I'm sorry, repressed material, repressed material meaning material that the individual cannot recall because he has pushed it out of his mind involuntarily. Okay, under a -- under a -- under a light hypnotic state, the individual can recall incidents which he has forgotten in terms of a -- a hysterical amnesia and this is what began to happen at that point. ***[page418]***

Q ... You stated at a certain stage in the interview that the interrogator makes an almost irresistible appeal to the accused.

THE COURT: Appeal to what?

MR. MILNE: To unburden himself ...

Q What was the status of that man's or the accused's mind when this irresistible appeal was made, in your opinion? ...

A Yes. Well, the individual's state of mind at -- at that point, would be one of extreme emotional turmoil. He has just come through a very intense emotional experience, and --

MR. MILNE:

Q Yes?

A And therefore, he would be, of course in a state of very emotional turmoil.

Q Could I use the term then he would be very vulnerable?
A Yes.
Q To suggestion?
A Vulnerable to suggestion, yes.

Q To the extent of almost an irresistible position at that time?

A Under these particular circumstances, there would be a very strong impulsion to unburden himself, yes.

Q And this would be the result of the inducements made by the questioner, is that correct?

A I suppose you could call them inducements, pleadings. I take it when you use the term "inducements", you are using it in the sense of a promise of some sort?

THE COURT: Contractual sense.

MR. MILNE:

Q Contractual sense?

THE COURT: I will give you something if you do something for me.

A Not in that sense, my lord.

Counsel for the defence referred to the resumption of questioning by Sergeant Proke following the second monologue, that is to the second statement, and ventured the opinion that the material was revealed while Horvath "was still under a considerable degree of emotional stress":

Q An hypnotic state?

A No, because I think I said earlier, in my opinion, at the point where Staff Sergeant Proke re-entered the room and began to question him again, that had the effect of, in a colloquial sense, bringing him out of it. Now, one must remember this was a very light hypnotic state, but the effect of a change of -- change of the situation, the re-entry of another individual into the room, the re-commencement of conversation between the two, in my opinion had the effect of removing whatever degree of hypnotic state existed up to that point, and so my opinion is ***[page419]*** that the material which he gave to the interrogator, as recorded on page 59, "(that is in the course of the second statement)" was given in a state of full consciousness and awareness.

The last question and answer of the cross-examination by counsel for the defence were as follows:

Q Doctor, one more question. Is a person in an hypnotic state more susceptible to the power of suggestion than he would be normally?

A Yes.

The last part of Dr. Stephenson's interrogation was by the Court:

Q Is there any similarity between being in a light state of hypnosis and being drunk?

A No, my lord.

THE COURT: There is no similarity?

A No, no, there really isn't. Being drunk is simply a state of reduced inhibition, and

light state of hypnosis is much more complex than that.

Staff Sergeant Proke testified that he had not attempted to hypnotize Horvath; he had attended lectures by psychiatrists who used hypnosis and he was aware of what could be done through hypnosis but he had never himself studied it or attempted to practice it.

The defence called no evidence on the voir dire.

II Judgments of the Courts below

The learned trial Judge ruled that the first statement was inadmissible because it had been "obtained in an atmosphere of oppression which may have spilled over, in the accused's mind, to an atmosphere of threat". The Crown did not appeal from that ruling.

In the course of argument, the learned trial Judge expressed the view that the second statement was not tainted by the first. He said that if it was tainted, it was "tainted from within", not by the first interview with R.C.M.P. members Delwisch and Charlton.

The trial Judge finally ruled the second statement inadmissible apart from any relationship with the first statement, because of the factor of hypnosis:

> Now, as to the interrogation by Staff Sergeant Proke, there was no overt inducement used in the interview, no overt threat used.
>
> Had Dr. Stephenson not given the evidence of an hypnotic state, I would have with some misgivings, have admitted this statement. It is the accumulation of all the factors, and I have dealt with those, plus the factor of the subject having been, for a sizeable part of the interview, in an hypnotic state immediately before the confession came out, that have caused me to reject ***[page420]*** the statement. This ruling is given with very real regret that police work as skillful as this should end in frustration of its purpose.
>
> Neither counsel was able to give me any case dealing with hypnotism occurring during a police interrogation. It is the factor of hypnotism which has tipped the balance against admission in this case. It is not necessary to deal with the relationship, if any, between the first and second statements, because both statements are rejected on their internal content, regardless of any relationship that the first may have had to the second.

As for the third statement, it was ruled out because it flew directly from the second statement and was vitiated by the same factor:

> **THE COURT**: Well, I think you reached the conclusion -- you see, at the end of the Proke interview, Proke then says would you now say to two other officers -- by the way, the same two that have examined the lad in the early hours of the morning -- would you now say to them what you have just said to me. Of course, if the obtaining of the second statement is defective, the third statement is only a projection of the second. He was -- I use the vernacular -- he was dead by the time he finished the second statement. He had made the admission and confessed, so then, of course, he could hardly say, "No, I just confessed to you, but I won't say the same thing to somebody else, 'so the third statement falls because of it is founded so much on the second". Now, the third is a written statement?
>
> MR. SHANTZ: Indeed it is.

> **THE COURT**: That must fall, too. It falls with the second, from which it directly flows. If follows naturally on, is a culmination of the second. If the second is defective, the third cannot stand.

The British Columbia Court of Appeal held that the second and third statements were admissible. McFarlane, J.A., speaking for himself and McLean and Bull, JJ.A., relied upon Ibrahim and The King, [1914] A.C. 599, among other authorities, and upon Viscount Sumner's often quoted words (at p. 609):

> 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.

McFarlane, J.A., concluded his reasons for judgment as follows:

> ... the evidence is clear that the statements were not obtained by hope of advantage or fear of prejudice exercised, held out or inspired, by a person in authority.
>
> The question whether any weight should be attached to confessions made in the circumstances which I have described is a question for the jury, and not a question for the Judge, in my opinion. The Judge exceeded the scope of the functions which the law gives to him and I am afraid invaded the field of the jury. ***[page421]***
>
> In those circumstances the error is one of very considerable substance, and it is my opinion that this appeal must be allowed, the acquittal set aside, and a new trial ordered.

In my respectful opinion, it was the trial Judge, Gould, J., who was right in ruling Horvath's second and third statements inadmissible.

III Lack of consent to hypnosis

Horvath's state of hypnosis began at some point in time after his first monologue while he was being interrogated by Sergeant Proke; he remained in that state until Sergeant Proke re-entered the interrogation room at the end of the second monologue. Following the first monologue, the interrogator sensed that Horvath was more vulnerable and his manner and voice took on an hypnotic quality to which Horvath did in fact respond by slipping into a state of light hypnosis.

The conclusion is clear in my opinion that this was induced hypnosis in the sense that Sergeant Proke was instrumental in bringing it about, albeit unwittingly.

There is no evidence that Horvath was aware he was about to undergo hypnosis and that he had agreed to be put in that state. What evidence there is indicates the contrary: although Horvath had himself mentioned hypnosis, it was hypnosis at the hands of a psychiatrist, not hypnosis by Sergeant Proke; furthermore, Horvath had just refused to participate in two other special forms of interrogation, a polygraph test and a narcoanalysis treatment; these forms of interrogation, together with induced hypnosis, present certain elements of artificiality, technicality and external intervention which are somewhat out of the ordinary and they should never be used without the subject's full and unequivocal consent. Yet, Horvath found himself submitted without his consent to such a special form of interrogation and, in the course of his second monologue and while under hypnosis, made an inculpatory statement which unlatched the others.

In my view, the use of hypnosis by Sergeant Proke in those circumstances would have been highly improper had it not been inadvertent. But this inadvertence did not remove the objective element of moral violence involved in the process nor did it alter the impact on Horvath's mind.

IV Involuntariness of statement made under hypnosis

Doctor Stephenson's expert opinion was uncontradicted. He was described by the learned trial Judge as a respected and well-known practitioner whose evidence was impeccable as to credibili- ***[page422]*** ty. We are bound by these findings. On the other hand, it was not for the expert but for the trial Judge to decide whether Horvath's statements were free and voluntary and therefore admissible. Also, and as is understandable in a subject as complex as hypnosis, Dr. Stephenson's testimony is not so free from ambiguity and even contradiction with respect to voluntariness that it does not call for interpretation.

I propose to summarize what I understand to be the essence of Dr. Stephenson's testimony and draw my own conclusions; this summary should be read in context however and I refer to those parts of the evidence quoted above.

While under hypnosis, Horvath was not unconscious or incapable to communicate with his environment but he was in a sort of dreamy state of altered consciousness; he could not be forced to do or say anything to which he had not already given tacit consent; but he was not either in a state of full consciousness and awareness; he was not presenting a normal defence against his accusers; nor was he in full and voluntary control or possession of his faculties. Horvath's hysterical amnesia or repression of the memory that he had killed his mother had been involuntary but he also had a strong basic wish to unburden himself and was ambivalent about it. Once he had become conscious of the painful material through hypnosis and because of the interrogator's almost irresistible appeal to unburden himself, the telling of it was essentially a voluntary act although he was in a light hypnotic state up to the end of the second monologue. There was no reason to doubt that what Horvath said under hypnosis was the truth as he then knew it although he was more susceptible to the power of suggestion than he would normally be. There is no similarity between a state of light hypnosis and drunkenness. Narcoanalysis produced through the use of sodium amytal is distinct from hypnosis but (as it seems) not to the point of a total absence of similarity; under narcoanalysis, emotional controls are less inhibited than they are in a fully conscious state and the subject is assisted to say what he was not able to say voluntarily because of the emotional intensity of it. The long interview by Sergeant Proke was not exactly comparable to an amytal interview but, having regard to the over-all effect of the interview and the reaction of the subject, "a shot of Sergeant Proke" was essentially the same as a shot of the truth serum.

Doctor Stephenson's use of the words "voluntary" and "involuntary" is rather confusing to me and it may be that he used them in some psychiatric or medical sense rather than in their or- ***[page423]*** dinary or legal sense. According to Dr. Stephenson, Horvath's "initial denial was based on involuntary repression of the painful material". Hypnosis had enabled him to recall the painful memory. "Therefore, when the painful material becomes conscious, his telling of it is essentially a voluntary act, even though there is a strong possibility that he was in a light hypnotic state up to the end of the second monologue".

I hope I do not distort Dr. Stephenson's testimony but what he said apparently amounts to this: it was hypnosis which had rendered possible the passage from involuntariness to voluntariness or which had caused the emergence of voluntariness together with the recall of a repressed memory. I find this paradoxical to say the least given the fact that, while under hypnosis, Horvath was in a dreamy state of altered consciousness, not in full and voluntary control or possession of his faculties, labouring under extreme emotional turmoil,

greatly vulnerable to suggestion and to an appeal to unburden himself which was almost irresistible and which in fact was not resisted. Horvath had been ambivalent about the telling of the inculpatory material. Yet he had resolved the ambivalence and begun to speak while he was still under the spell.

In my opinion, nothing that Horvath said under hypnosis was voluntary in the legal sense.

In typical legal fashion, the test of voluntariness is expressed negatively in the Ibrahim rule by reference to instances of involuntariness: a statement obtained by hope of advantage (a promise), or fear of prejudice (a threat), exercised, held out or inspired by a person in authority, is involuntary in the eyes of the law.

The question arises as to whether the enumeration in the rule of instances of involuntariness is a limitative one.

It cannot be limitative since the rule is a Judge-made rule and anything said by a Judge beyond what is necessary to decide the issue is obiter. Furthermore, the principle which inspires the rule remains a positive one; it is the principle of voluntariness. The principle always governs and may justify an extension of the rule to situations where involuntariness has been caused otherwise than by promises, threats, hope or fear, if it is felt that other causes are as coercive as promises or threats, hope or fear and serious enough to bring the principle into play.

In my view, the principle behind the rule justifies that the rule be extended to cover the circumstances of the case at bar.

It does not take much of a promise or a threat to render a confession inadmissible and it is certainly not required that the hope ***[page424]*** of advantage or fear of prejudice raised by the promise or the threat be almost irresistible. It seems to me that if a mere threat or a mere promise are considered to have such an impact on mind and will as to render involuntary the confession of an accused who is not under induced hypnosis, whose state of consciousness has not been altered, who is in full and voluntary control and possession of his faculties and who is therefore quite capable to resist suggestion, then Horvath's statement made under hypnosis in the circumstances described above was a fortiori involuntary even though the cause of involuntariness was neither hope of advantage nor fear of prejudice.

The statement was involuntary because Sergeant Proke, a person in authority, had been instrumental in bringing about the state of hypnosis and had made an appeal to speak which, given this abnormal state, was almost irresistible.

Furthermore, voluntariness implies an awareness of what is at stake in making a statement to a person in authority. This is the reason for the customary police warning. Horvath was in control of his faculties when Sergeant Proke cautioned him at the beginning of the interview but, under hypnosis, he ceased to be in a state of full consciousness and awareness. His awareness of what was at stake in making any statement is very much a matter of doubt.

Finally, voluntariness is incompatible not only with promises and threats, but with actual violence. Had Horvath made a statement while under the influence of an amytal injection administered without his consent, the statement would have been inadmissible because of the assault and, presumably, because also of the effect of the injection on his mind. There was no physical violence in the case at bar. There is not even any evidence of bodily contact between Horvath and Sergeant Proke. But through the use of an interrogation technique involving certain physical elements such as an hypnotic quality of voice and manner, a police

officer has gained unconsented access to what in a human being is of the utmost privacy, the privacy of his own mind. As I have already indicated, it is my view that this was a form of violence or intrusion of a moral or mental nature, more subtle than visible violence, but not less efficient in the result than an amytal injection administered by force.

I feel that I am not precluded from reaching my conclusions by any of the leading authorities. The rule in Ibrahim was adopted and followed by this Court in Prosko v. The King (1922), 37 C.C.C. 199, 66 D.L.R. 340, 63 S.C.R. 226; Boudreau v. The King (1949), 94 ***[page425]*** C.C.C. 1, [1949] 3 D.L.R. 81, [1949] S.C.R. 262, and R. v. Fitton (1956), 116 C.C.C. 1, 6 D.L.R. (2d) 529, [1956] S.C.R. 958, It is true also that in Fitton this Court declined to broaden the rule of exclusion stated by Viscount Sumner in Ibrahim. But Fitton must be read in the light of the facts of that case which had nothing to do with hypnosis anymore than the facts in Ibrahim, Prosko and Boudreau. The highly exceptional nature of a confession made under hypnosis was never considered in any of those cases. Nor do I understand Fitton to mean that the rule in Ibrahim ought to be construed as a statutory enactment: no Judge-made rule, however authoritative and deserving of respect could ever have such an effect nor give such an effect to another Judge-made rule. For the reasons stated above, unconsented hypnosis induced by a person in authority ought in my view to be added to the motives of exclusion mentioned in Ibrahim for it is covered by the principle which inspired the rule; the wording of the rule could not exhaust the fecundity of the principle.

As for judicial authorities dealing specifically with hypnosis, they are very few. I know of only two reported Canadian cases. The more recent one has no bearing on the case at bar: R. v. Pitt, [1968] 3 C.C.C. 342, 68 D.L.R. (2d) 513, 66 W.W.R. 400. The earlier case of R. v. Booher (1928), 50 C.C.C. 271, [1928] 4 D.L.R. 795, [1928] 3 W.W.R. 203, is more to the point although it involves post-hypnotic suggestion: a confession made to a detective was excluded because the Crown had failed to discharge the onus that the accused was not under the influence of mental suggestion exercised by a "criminologist" retained by the Crown, who claimed to have hypnotic powers and who had paid several visits to the accused for the purpose of obtaining a confession.

In the United States, cases having to do with narcoanalysis are somewhat less rare than those related to hypnosis and the general tendency is against admissibility: Robert S. Spector and Teree E. Foster, Admissibility of hypnotic statements: Is the law of Evidence Susceptible, 38 Ohio State L.J. 567 (1977); D. Keith Lowther, Should Statements Made during Drug Interview Be Admissible into Evidence in Criminal Cases? 7 U.W.L.A. Law Rev. 222 (1975). The case of Leyra v. Denno, Warden (1954), 347 U.S. 556, is of some interest although the Supreme Court of the United States did not actually confront the issue of hypnosis.

Horvath's second monologue being involuntary, its impact on the second and third statements must now be assessed. ***[page426]***

I Tainting of post hypnotic statements

In its factum, counsel for the Crown takes the position that the second and third statements which he seeks to have declared admissible were not made under hypnosis.

The question is whether the second and third statements were tainted by the circumstances which preceded them and more particularly by the involuntariness of the statement made under hypnosis in the course of the second monologue.

The principle relating to the tainting of a second statement by a first statement has thus been formulated by

Lord Parker, C.J., in R. v. Smith, [1959] 2 Q.B. 35 at p. 41:

> The court thinks that the principle to be deduced from the cases is really this: that if the threat or promise under which the first statement was made still persists when the second statement is made, then it is inadmissible. Only if the time-limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement.

In that case, the second statement had been given some nine hours after the first involuntary statement, to a different person and after the customary caution. It was held that the original inducement had dissipated and the second statement was admissible.

The Judicial Committee followed the same principle without discussing it in Sparks v. The Queen, [1964] A.C. 964 at p. 989. There the accused had made a written confession after which he was allowed to speak to his wife over the telephone his conversation being heard by the police. He thereafter requested to be detained so as not to face his family and friends. The Judicial Committee found the written statement inadmissible and also ruled against the admissibility of the telephone conversation and the request made to the police for the considerations which had led to the exclusion of the written statement.

In R. v. Williams (1968), 52 Cr. App. R. 439, the accused had made two written statements, the first on June 7th and the second, confirming the first, on July 18th. The first statement had been obtained by the promise of a person in authority. Judge Rogers found the second statement inadmissible, holding that the effect of a promise is perhaps harder to dissipate than that of a threat.

The principle has been applied in Canada by the Ontario Court of Appeal in R. v. Logue, [1969] 2 C.C.C. 346, [1968] 2 O.R. 671. The accused had signed a first involuntary statement on March ***[page427]*** 16th and a second statement on March 17th. Kelly, J.A., who delivered the unanimous judgment excluding them both said at p. 351:

> If the questioned statements were made subsequent to the making of a statement which was admissible there is some weight to the contention that, having made a voluntary statement, the accused would be disposed to continue voluntarily giving information by way of statements. But the converse does not hold. Subsequent statements made after a statement which was made under duress or by reason of inducements would not be evidence of the voluntary nature of the earlier statement. It might well be that the influence of the circumstances which made the earlier statement inadmissible might have assisted to taint the subsequent statement which, taken by itself, would appear to be voluntary.

The principle was taken for granted by three members of this Court in Boudreau although they did not agree on its application. Boudreau had signed two written statements, the first on a Tuesday and the second on the following Thursday. The first was found by the majority to be admissible although it had not been preceded by the usual warning. Rinfret, C.J.C., and Taschereau, J. (as he then was), who concurred in the result, did not agree with the majority that the first statement was inculpatory. They also expressed the view, in an obiter dictum, that the first statement had not influenced the second. Estey, J., dissenting, held both statements inadmissible, the second because it had been influenced by the first. While Estey, J., was in dissent, his views on tainting were not contradicted by the majority and the disagreement of Rinfret, C.J.C., and Taschereau, J., on this point was clearly not a disagreement in principle but on the application of the principle to the facts of

the case, a matter which they did not discuss in any detail. Among the factors which Estey, J., took into consideration with respect to tainting were the connection between the two statements, the fact that the accused's mind had been directed to the first statement, and the fact that the same police officers had been present on each occasion.

One or more of these factors are mentioned in the cases dealing with tainting, but of all the factors, the interval of time between the two statements is of prime importance.

In the case at bar, the second statement made by Horvath began just as he was coming out of hypnosis and within a very few minutes, perhaps two or three, after Horvath had made, under hypnosis, the inculpatory statement contained in the second monologue. In the course of the second monologue, Horvath had been able to recall and express a memory so intolerable that the immense emotional pressure generated by it had triggered a psy-***[page428]*** chological defence mechanism powerful enough to produce hysterical amnesia. This psychological defence had just been broken down at the cost of the subject going through a state of extreme emotional turmoil. The breaking down of this defence, the exceedingly short time between the end of Horvath's hypnotic state and the beginning of the second statement, the correlation between the second monologue and the second statement, the fact that Sergeant Proke was both the hypnotist and the recipient of the second statement lead me to the inescapable conclusion that the second statement, although given while Horvath was no longer under hypnosis, was contaminated by the factor of hypnosis which remains determinative of the whole issue.

If Horvath's second statement was not tinted, I cannot conceive of any that could be.

Horvath's third statement is not reproduced in the case. With respect to its content, I rely on the trial Judge who said that it was a projection of the second; I understand this to mean that it was essentially the putting into writing of the content of the second statement, with more or less detail. This is what Corporal Delwisch said to Horvath in the presence of Sergeant Proke and before the third statement: "We just want to get down in writing, John, what you already told Sergeant Proke here." Corporal Delwisch wrote the confession and testified that it was an eight-page statement and that the usual police warning was given and written on the statement.

Now the third statement was not received by Sergeant Proke, but by Corporal Delwisch, one of the recipients of the first statement. Sergeant Proke was not present. On the other hand, Corporal Delwisch was reintroduced to Horvath by Sergeant Proke and Horvath's mind was clearly directed to the second statement when he made the third: just before he started the third statement, Sergeant Proke, the hypnotist, had asked Horvath in the presence of Corporal Delwisch: "Are you still willing to repeat to them (Corporal Delwisch and another R.C.M.P. officer) what you told me?". Horvath began to make the third statement approximately 50 minutes after the second.

Keeping in mind that the burden to prove voluntariness rests with the Crown, I have no difficulty in concluding that the Crown has not discharged the burden and in agreeing with the trial Judge that if the second statement was defective, the third could not stand: it was a culmination of the second.

In other words, the second monologue and the second and third statements were part of a continuous and very short process. ***[page429]***

Each stage of the process aroused the other in quick succession. The third statement found its polluted source in the second statement and the second statement in the equally polluted source of the second monologue

uttered under hypnosis. Both statements are as vitiated as their source and equally involuntary and inadmissible.

VI Oppression

I agree with my brother Martland that this is not a case for considering whether "oppression", within the meaning of the English Judges' Rules, ought to be recognized as a ground for excluding a confession. Not only did the learned trial Judge not make any finding of oppression with respect to the Proke interview but, in the course of argument, he expressed the view that, by contrast with the first statement the Proke interview involved no element of oppression:

> **THE COURT**: There is obviously no element of oppression here; quite to the contrary. There was an element of confidence and tremendous confidence on the subject to the interrogator. In fact, the subject felt very highly of the interrogator and said I couldn't lie to that man, so the oppression aspect you can forget about it.

While it might be argued that the inducement of unconsented hypnosis by a person in authority is a subtle and covert form of oppressive treatment, I am not prepared to say whether or not the learned trial Judge was in error on this point, for it seems to me inappropriate to consider the still undefined and possibly broad ground of oppression on the narrow basis of the unusual circumstances of this case. Whether or not it amounts to oppression, unconsented hypnosis induced by a person in authority is quite sufficient by itself to render a statement involuntary, at par with threats, promises and violence.

VII Veracity and other matters

Some psychiatrists apparently believe that a subject under hypnosis remains capable of fabricating and deceiving and that the reliability or veracity of his response is difficult to ascertain even for the skilled hypnotist: Spector and Foster, op. cit. However, we must accept Dr. Stephenson's opinion that in this case there was no reason to doubt that Horvath was telling the truth as he saw it during his second monologue. By way of consequence (and although Dr. Stephenson did not say so explicitly), Horvath's second and third statements must have been true to the extent at least that they coincided with the second monologue. ***[page430]***

One of the policy reasons most frequently advanced for holding inadmissible confessions obtained by threats or promises is the untrustworthiness of such confessions. But the sole purpose of the voir dire remains to determine voluntariness and admissibility. At that stage, the veracity of the confession and the guilt of the accused are in principle irrelevant: R. v. Gauthier (1975), 27 C.C.C. (2d) 14, 64 D.L.R. (3d) 501, [1977] 1 S.C.R. 441. The principle is qualified only in two circumstances. The first is where the accused has testified in the voir-dire and his answer to the question whether his statement was true might assist the trial Judge in weighing the evidence in order to determine whether or not the statement was voluntary: DeClercq v. The Queen, [1969] 1 C.C.C. 197, 70 D.L.R. (2d) 530, [1968] S.C.R. 902. DeClercq has no application in the case at bar where the accused did not testify in the voir dire. The second qualification is where the discovery of certain facts revealed by the confession confirms the confession; then, that part of the confession which led to the discovery of the facts, which was confirmed by the discovery of the facts and without which the facts could not be brought before the jury is admissible, but further than that, no part of an otherwise involuntary confession is admissible: R. v. Wray, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673, [1971] S.C.R. 272. The rule in Wray was complied with in the case at bar.

Apart from the untrustworthiness of confessions extorted by threats or promises, other policy reasons have also been advanced to explain the rejection of confessions improperly obtained. But the basic reason is the accused's absolute right to remain silent either completely or partially and not to incriminate himself unless he wants to. This is why it is important that the accused understand what is at stake in the procedure. In a voir dire, voluntariness not veracity governs admissibility. Doctor Stephenson's expert opinion as to the truthfulness of Horvath's confessions is accordingly not determinative of the issue of admissibility.

I wish to add that the accused's absolute right to remain silent includes not only the right to censor any information which is on his conscious mind but also the right to control the administration of artificial processes whereby unconsciously held information might emerge into consciousness. In this sense, the accused has the absolute right to censor his unconscious mind as well as his conscious one. The police must take the accused as they find him, and if it so happens that he suffers from hysterical amnesia, he has the right not to be cured against his will by the use of extraordinary means, however desirable his cure might be from a police or medical point of view. ***[page431]***

It would appear that hypnosis and narcoanalysis are used on a consensual basis by certain police forces as well as by the defence and it has been argued that they can serve useful purposes: Spector and Foster, op. cit.; Lowther, op. cit.

I refrain from commenting on such practices short of noting that even the consensual use of hypnosis and narcoanalysis for evidentiary purposes may present problems: under normal police interrogation, a suspect has the opportunity to renew or deny his consent to answer each question, which is no longer the case once he is, although by consent, in a state of hypnosis or under the influence of a "truth serum".

But the use of such interrogation techniques on unwilling suspects is a dehumanising process and should in my view be proscribed.

I also refrain from expressing any view on confessions obtained while the accused is under the effect of alcohol: there was no drunkenness in the case at bar and, according to the uncontradicted evidence of Dr. Stephenson, there is no similarity between a state of light hypnosis and drunkenness.

VIII -- Conclusion

In the result, I agree with the learned trial Judge that "it is the factor of hypnotism which has tipped the balance against admission in this case".

I would dispose of the appeal as is proposed by my brother Spence.

ESTEY, J., concurs with SPENCE, J.

PRATTE, J., concurs with BEETZ, J.

Appeal allowed; verdict of acquittal restored.