1956

*Oct. 3, 4
*Oct. 24

HER MAJESTY THE QUEEN .....APPELLANT;

AND

ROBERT FITTON .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Appeals to Supreme Court of Canada—Questions of law alone—Admissibility of confession—Court of Appeal holding confession inadmissible on mistaken ground of law—The Criminal Code, 1953-54 (Can.), c. 51, s. 598(1)(a).

Where a Court of Appeal orders a new trial on the ground that a statement by the accused was wrongly admitted at the trial, and there is dissent on this point, there is a right of appeal by the Crown if the difference of opinion between the majority and the minority was based, not on any question in respect of the evidence or the inferences to be drawn from it, but on differing views of the law applicable to the situation, and different interpretations of decided cases; the question of the admissibility of the statement is in such circumstances one of law alone.

Kerwin C.J. and Cartwright J. (dissenting) were of opinion that there was no dissent in the Court of Appeal on any question of law.

Evidence—Confessions—Admissibility—Test of voluntary nature of statement—Effect of decisions—Questioning by police officers—Suggested "cross-examination"—Intimation that previous statement not believed.

The decision in *Boudreau v. The King*, [1949] S.C.R. 262, did not extend in any way the rule laid down in *Ibrahim v. The King*, [1914] A.C. 599 at 609, as to the admissibility of confessions in evidence at the trial. It is still the law that a statement is admissible in evidence if it is shown to have been voluntary "in the sense that it has not been obtained . . . either by fear of prejudice or hope of advantage exercised or held out by a person in authority", and the Crown need go no further than this, even in a case where questions have been asked by the police of a person in custody. In particular, the Crown is not required to show that the statement was not otherwise influenced by the course of conduct adopted by the police, or that it was "self-impelled" in any sense other than that it was not induced by fear or hope.

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.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Locke, Cartwright, Fauteux, Abbott and Nolan JJ.

Held: There was nothing in the circumstances to make either the oral statement or the written one that followed it inadmissible in evidence, and the trial judge had rightly admitted them both.

Criminal law—Trial judge's charge to jury—Whether defence adequately put to jury—Murder.

The accused was charged with the murder of a young girl by choking her, the theory of the Crown being that the killing took place during the commission of a rape. The principal ground of defence, based on a statement made by the accused to the police, was that sexual intercourse had taken place with the full consent of the girl, and that the act that resulted in her death had taken place some time later, and was in no way connected with the act of intercourse.

Held: This defence had been adequately put to the jury by the trial judge, and there was no ground for interfering with the conviction.

APPEAL by the Attorney-General for Ontario from the judgment of the Court of Appeal for Ontario (1) ordering a new trial on an indictment for murder. Appeal allowed and conviction restored.

W. B. Common, Q.C., and *W. C. Bowman, Q.C.,* for the appellant.

D. G. Humphrey, and *J. G. J. O'Driscoll,* for the accused, respondent.

THE CHIEF JUSTICE (*dissenting*):—The respondent's conviction of murder was set aside by the Court of Appeal for Ontario (1) and the Attorney-General for that Province now appeals based on the dissent of Roach J.A. on two points, as to one of which Aylesworth J.A. agreed with him. The majority ordered a new trial on both grounds. As to the question of the admissibility of the oral and written statements of the accused, my view is that the dissent was on a question of fact and therefore we are without jurisdiction. According to my interpretation of the reasons in the Court of Appeal there is no difference as to the law, but merely as to its application to the circumstances. The evidence on the *voir dire* was uncontradicted and, in my opinion, the reasons of the majority and minority in the Court of Appeal are based on conflicting views as to the proper inferences to be drawn from that evidence. Such inferences are questions of fact.

However, the majority of the members of this Court read the reasons delivered in the Court of Appeal differently and are of opinion that this Court has jurisdiction. Since

(1) [1956] O.R. 696, 115 C.C.C. 225, 24 C.R. 125.

1956

THE QUEEN v. FITTON

Kerwin C.J.

that is to be the judgment of the Court, I conceive that I should do what I would not otherwise do—express my opinion upon both points. I am unable to discern any error in the trial judge's charge and particularly that he had not presented all aspects of the accused's defence to the jury. As to the other point, in view of the decision of this Court in *Boudreau v. The King* (1) I deem it unnecessary to restate the law as there enunciated, and applying that rule I agree with Roach J.A. that the trial judge correctly interpreted and applied it.

As the majority of the Court are of opinion that there is jurisdiction, the appeal is accordingly allowed and the conviction restored.

TASCHEREAU J.:—The respondent was convicted by the Honourable Mr. Justice Treleaven and a jury at the Toronto assizes on April 27, 1956, on the following indictment:—

> The jurors for our Lady the Queen present that Robert George Fitton on or about the 18th day of January in the year 1956, at the city of Toronto in the county of York, murdered one Linda Lampkin, contrary to the Criminal Code.

The respondent was found guilty and sentenced to be executed, but the Court of Appeal, Mr. Justice Roach dissenting, allowed the appeal and directed a new trial (2). The majority of the Court reached the conclusion that there had been misdirection of the jury by the learned trial judge in matters of law under ss. 201 and 202 of the *Criminal Code,* and that the theory of the defence was not adequately explained to the jury.

The Chief Justice of Ontario, Laidlaw J.A. and Schroeder J.A. held that the oral admission and the signed statement of the respondent were improperly admitted at the trial, and allowed the appeal and also directed a new trial on this ground. Mr. Justice Aylesworth (dissenting on this ground) as well as Mr. Justice Roach, held that the learned trial judge did not err in law in holding that the oral admission and the signed statement of the accused were admissible in evidence at the trial, and would have dismissed the appeal on this point.

(1) [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81.
(2) [1956] O.R. 696, 115 C.C.C. 225, 24 C.R. 125.

Her Majesty the Queen now appeals to this Court pursuant to the provisions of s. 598 (1) (*a*) of the *Criminal Code*, which reads as follows:—

598. (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under paragraph (*a*) of section 583 or dismisses an appeal taken pursuant to paragraph (*a*) of section 584, the Attorney General may appeal to the Supreme Court of Canada

(*a*) on any question of law on which a judge of the court of appeal dissents.

The evidence might be summarized as follows:—

At approximately 9 p.m. on January 18, 1956, the respondent, who is an employee of a cartage agency under contract with the Post Office Department, took the deceased Linda Lampkin for a ride in his mail truck, and two hours later left her dead body on Commissioners Street in south central Toronto. When the body was discovered, the underclothing was ripped and torn, and it is in evidence that this young girl of 13 years old, had been the subject of sexual intercourse. Around her neck was a deep groove in the flesh tissue, which corresponded in size to the width of a scarf which she was wearing. The evidence reveals that she died of asphyxia due to strangulation.

After having discovered the body, the Toronto police force, as a result of their investigation, took the respondent Fitton into custody the next morning. During the day, Fitton made oral admissions and signed a statement, and it is the admission of this statement, which has been allowed by the trial judge, which is the first point in issue in the present appeal.

I must admit that I am at a loss to understand the contradictory position taken by the respondent on this matter. This written statement was admitted without objection, and constitutes the only defence raised by the respondent. It is now said that it has been illegally admitted as not having been made freely and voluntarily. With this last contention I cannot agree, and I fully share the views of my brother Fauteux who holds that it was admissible and that this case must be governed by the rules laid down by this Court in *Boudreau v. The King* (1).

(1) [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81.

1956

THE QUEEN v. FITTON

Taschereau J.

I am also of the opinion, for the reasons given by my brother Fauteux, that the rejection or admissibility of this statement is not merely a question of fact, but raises a question of law, conferring jurisdiction on this Court, in view of the dissenting opinions in the Court below.

I further endorse what has been said by Mr. Justice Roach in his dissenting judgment as to the exposition of the theory of the defence by the trial judge, and as to the use that could be made of the expert evidence of Dr. McLean and as to the obligation of the jury to reject any of his opinions which he was not qualified as an expert to give.

I would allow the appeal and restore the conviction.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.:—The rule on the admission of confessions, which, following the English authorities, was restated in *Boudreau v. The King* (1), at times presents difficulty of application because its terms tend to conceal underlying considerations material to a determination. The cases of torture, actual or threatened, or of unabashed promises are clear; perplexity arises when much more subtle elements must be evaluated. The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them.

The inference one way or the other, taking all the circumstances into account, is one for drawing which the trial judge is in a position of special advantage; and unless it is made evident or probable that he has not weighed the circumstances in the light of the rule or has misconceived them or the rule, his conclusion should not be disturbed.

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

(1) [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81.

interpretation of 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" (1) 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.

But it was with an enlarged view of what that case decided that the Chief Justice held the questions, express or implied, of the police officers, taken to be of the nature of cross-examination, that is, as I understand it, that they suggested several items of his earlier statement to be false, and put without a warning, *ipso facto*, as having "instigated" it, ruled out the statement. In this I think he has, and in a matter of law, erred. The accused was not at the time under formal arrest although he had been requested to stay in the police station and, for the greater part of the time, remained in the general office, and the earlier questions were such as the police might have addressed to any person in the remotest way drawn into the enquiry. Ques-

(1) *Boudreau v. The King, supra,* at p. 269.

1956

THE QUEEN v. FITTON

Rand J.

tions without intimidating or suggestive overtones are inescapable from police enquiry; and put as they were here, they cannot by themselves be taken to invalidate the response given. The question still remains: was the statement made through fear or hope induced by authority?

The rules adopted in England relating to this matter express, no doubt, the wisdom of long experience; but they in fact contemplate questioning after the arrest has been decided on and a warning given; and there is discretion in the trial judge to admit a statement notwithstanding their non-observance. In this country they have no other force than what their innate good sense may suggest in individual determinations, as considerations to be kept in mind in weighing the total circumstances.

On the *voir dire* no attempt was made by counsel to show by cross-examination either coercion or inducement, and it was frankly conceded that the admission of the evidence, if not facilitated, was not seriously challenged for the reason that the statement contained the only evidence upon which the defence intended to rely. Not only, then, was the testimony of the officers accepted by the trial judge and unopposed on behalf of the accused, but its admission was looked on as for the benefit of the defence. In that situation I should say that there is nothing to warrant a finding that the statement was not shown to have been voluntary; and the ruling in appeal, on this view, also, is on a question of law.

I am, therefore, in agreement with Roach J.A. and Aylesworth J.A. that the admission of the statement by the trial judge should not have been disturbed.

The second ground of dissent was from the holding of the Court that the charge was inadequate in presenting the case for the defence. That defence was extremely simple and it was contained in two or three sentences of the statement. It was to the effect that after the sexual intercourse had taken place and after the accused had proceeded on his route to another mail-box,

> she started kibitzing around again and I just went out of my head. I grabbed her by the scarf and she just went limp. She didn't breathe no more, then I continued with the rest of my mail run.

The act causing death was thus represented to have been completely divorced from the sexual act. The trial judge, after making it clear that the jury could believe any part of the evidence and disbelieve any other part, applied this rule to the statement. He contrasted this direct evidence with the circumstantial facts which could be held to show that death from strangulation had been immediately connected with the act of intercourse; and his final reference to the statement was in these words:

> Now gentlemen, as I see it, if I may put this very briefly to you, I would think that you would take that statement of the accused, consider it very carefully, and if you conclude that it is the truth or if you really have an honest doubt as to whether it is the truth or not, he is entitled to the benefit of that doubt and you would not find him guilty of murder but guilty of manslaughter.

Counsel urged before us that this paragraph in some way deals with strangulation accompanying ravishment but I cannot so construe it. It is, strictly, more favourable to the accused than was justified: in effect it says, if you think the circumstances of tightening the scarf were as he puts them, you are to find manslaughter. This rules out intent in the act within s. 201(*a*)(ii) or (*c*) of the *Criminal Code*.

I think we must credit the jury with ordinary intelligence. The defence had been elaborated to them by counsel, it was set forth on the statement which they had in the jury-room and they were told how to deal with it. There was no complication in the facts or their interpretation or in the distinction between the two views of the facts put to them, and I have not the slightest doubt that they came to their verdict with an intelligent appreciation of both.

I would, therefore, allow the appeal and restore the conviction.

The judgment of Locke and Nolan JJ. was delivered by

NOLAN J.:—The respondent was convicted of murder at a trial before a judge sitting with a jury. On appeal to the Court of Appeal for Ontario the appeal, by a majority judgment, was allowed, the conviction quashed and a new trial ordered (1). This is an appeal by the Attorney-General for Ontario pursuant to the provisions of s. 598 (1) (*a*) of the *Criminal Code*.

(1) [1956] O.R. 696, 115 C.C.C. 225, 24 C.R. 125.

1956

THE QUEEN v. FITTON

Nolan J.

At about 7.45 p.m. on January 18, 1956, the deceased, Linda Lampkin, left a dancing-school at 40 Wellesley Street East in the city of Toronto and at approximately 8.30 p.m. she boarded a Jane Street bus at Jane and Bloor Streets and shortly afterwards left it at Jane and Annette Streets. At approximately 8.45 p.m. a young girl was seen talking to the driver of a Royal Mail truck at Jane Street and St. John's Road.

The respondent was employed by the Bacon Cartage Company Limited as a Royal Mail truck-driver and his route on the day in question covered the area in which the deceased was last seen alive. The respondent turned in his truck at the Bacon Cartage garage at 104 Berkeley Street at 10.57 p.m., although his usual time was between 9.30 and 10 p.m.

At approximately 11.05 p.m. on January 18, 1956, the body of the deceased was found on Commissioners Street in the city of Toronto. Her wool skirt and underslip were pulled up around her waist. The three pairs of underpants she was wearing were torn, exposing her thighs and genitalia, and her brassiere was torn, exposing her breasts. One shoe was missing. A red truck, similar to the one driven by the respondent, was seen, during the evening of January 18, parked on Commissioners Street in the vicinity of the place where the body was found.

A *post-mortem* examination disclosed that the deceased had been a virgin and that death had been caused by asphyxia due to strangulation resulting from the application of extreme force to a silk scarf which was knotted around her neck. There was a mark almost encircling the neck which showed a complete ring of bruising, with the exception of a gap under the right ear where the bruising was reduced. It was the opinion of the pathologist that such force would have to be applied for several minutes to cause death. The deceased had been the subject of a completed act of sexual intercourse. There was a tear in her hymen and in her vagina which, in the opinion of the pathologist, would have caused great pain. Her face was dark with acute congestion of blood and there were tiny

haemorrhages in the skin of the face, the forehead, the ears and the mucous membrane of the eyes. Bloodstained froth had issued from the nose and mouth.

On the morning of January 19, 1956, two officers of the Toronto police force went to the Globe and Mail garage, at which time the respondent was putting mail-bags into a truck. The truck was searched and a paper bag containing two apples, a bobby pin and a tube of lipstick were found inside. This lipstick was, in evidence, identified and admitted by counsel for the respondent to have been the property of the deceased. The respondent was observed to be collapsing or fainting.

The respondent was taken by Detective Sergeant O'Driscoll and Detective Coghill to police headquarters, where he was interrogated by Detective-Sergeant O'Driscoll, and a T-shirt, a pair of trousers and a windbreaker were taken from the person of the respondent. An examination of the clothing disclosed that there was human blood on the trousers and the leather jacket. The detective-sergeant told the respondent that he was "investigating the rape and murder of a girl by the name of Linda Lampkin" and that she lived on Brookside Avenue. This was the first time her name had been mentioned. The respondent said that he knew the deceased and that the last time he saw her was about 5.15 in the afternoon of January 17. He denied that he had seen her on January 18. He gave an account of his movements on January 18 until he stopped work at night. The discussion, which contained no reference to Linda Lampkin, lasted until approximately 9 a.m. and no caution was given. The discussion was not taken down in writing. O'Driscoll and Coghill left to be present in court at 10 a.m. and the respondent was left in the custody of Detective Smith, who told the respondent that he wanted to get on paper a record of his movements on January 18. Detective Smith had typed about one paragraph when he was relieved by Detective Sergeant Simmonds, who typed the statement as it was related to him by the respondent. When it was finished the respondent read it, made certain changes and signed it. No objection as to its admissibility was made at trial and it was admitted in evidence.

1956

THE QUEEN v. FITTON

Nolan J.

In his statement the respondent said that about the end of June he had met the deceased when he was collecting mail on his route and about a week later had taken her, at her request, for a drive around part of his route; that he had seen her three times since then, but only to say "hello". The statement relates his movements during January 18 and concludes by stating that he did not know anything about a lipstick or how it got in the truck.

Detective Sergeant Simmonds then asked the respondent for a list of the box clearances on his route, which was given and typed on a sheet of paper, which was admitted at trial. He had a sandwich and milk brought in for the respondent for lunch.

At approximately 5 p.m. Detective Sergeant Simmonds and Detective McNeely again interviewed the respondent, who had been kept in the main detective office since the morning interview. What took place at this afternoon interview is described in the evidence of Detective Sergeant Simmonds:—

> We took our coats and hats off and hung them up and Detective McNeely and I went up to the accused and I told him, I said, "I want to have another word with you. Would you come over to the office with us?" He stood up and followed us out. We went over to the small room off the main detective office and into the office there.
>
> I told the accused to sit down and he sat down at a desk, at a chair opposite a desk, and I said to him, I said, "You know who I am. I was talking to you this morning" or words to that effect. I said, "This is Detective McNeely, my partner." I then sat down at the desk opposite him and Detective McNeely sat to my right.
>
> I said to the accused man, "Bob, you have been sitting in the office here this afternoon and I haven't seen you since I left you around noon when you told me where you were last night and your movements last night." I said, "You have had all afternoon to think over where you were last night."
>
> He said, "What I told you this morning was true." I said, "Well, it no doubt was true as far as your work with the post office was concerned but," I 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 I said, "I have received information to the effect that you were seen last night with Linda Lampkin at St. John's Road and Jane about 8.45 p.m."
>
> He was sitting in the chair, which has arms on it, and he had his elbows on the arms and his hands crossed in front of him and he was looking at me and at this moment he looked down to the floor, he put his head down. I was just about to say something else to him when McNeely spoke up, and McNeely said to him, "Yes, Bob, we have been working since 5 o'clock this morning. It may be necessary for us to take you out

with us in the police car and have you show us just how you do your work in the west end in the area that you work in. There may be other witnesses out there—we don't know—who may have seen things. We don't know. But the lipstick that was found in your truck this morning has been identified." He then said, "And along with this information that we obtained this afternoon, it indicates that you may have been seen with Linda Lampkin last night. We don't believe what you have been telling us."

At this point the accused who was still looking at the floor paused and —or he just seemed to just sit there, he didn't say anything, and at this point he said, "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."

At this moment I said, "Just a minute, Bob," and I pulled the drawer open in the desk and there was a pad of what we call caution sheets in the drawer and I put them on the table. I wrote some detail on the top of this caution sheet which has a printed form at the top, including the fact that I was at headquarters and the date and my name, the name of the accused and his age, and the charge. And I read from the sheet to the accused man.

The learned trial judge ruled that the inculpatory oral statement made in the course of this interview,

I was just thinking of my wife and 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.

was voluntary and admissible in evidence.

As soon as the respondent had made this statement he was immediately stopped, charged with the murder of the deceased and cautioned.

The written statement was obtained by question and answer and was written down in longhand by Simmonds. When it was completed the respondent was asked to read it aloud, including the caution, which he did, and then he signed it.

In the written statement the respondent said that he had seen the deceased on the evening of January 18; that she had come over to his truck and asked if she could go for a ride, he had said she could and she had gotten into the truck.

The statement further says:

I parked up on Gooch Ave. to empty my small mail bag and tie up my big one and she started necking and then I had intercourse with her and then I went on a ways and did my other box and she started kibitzing around again and I just went out of my head, I grabbed her by the scarf and she just went limp. She didn't breathe no more, then I continued with the rest of my mail run and dropped my mail off and drove down to

1956

THE QUEEN v. FITTON

Nolan J.

Cherry St. and took in my CODs I had left. She still wasn't breathing so the best thing I thought was to get rid of her. I drove to Commissioner St., I don't know Commissioner St. very well, I took her out of the truck and put her on the ground there. Then I took the truck back to Berkeley St. and went home.

At about 8.10 p.m. Detectives Simmonds, McNeely and Sellar drove the respondent out to the west end of the city to try to find the missing shoe. It was found underneath a truck on a vacant lot in the downtown area on Berkeley Street. A broken compact was found in the shoe. The girl's wallet was found by the police stuck in a sewer-grating on a street in the vicinity of a garage where the mail trucks were stored.

The learned trial judge held that the last-mentioned written statement was voluntary and it was admitted in evidence.

The majority judgment of the Court of Appeal for Ontario (Pickup C.J.O. and Laidlaw and Schroeder JJ.A.), reversing the learned trial judge, held that (1):

> . . . 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.

It is contended by counsel for the respondent that this Court has no jurisdiction to entertain the appeal on the question of the admissibility of the second statement, as it is not a strict question of law, but rather a question of fact, or at least a question of mixed law and fact. Section 598 (1) of the *Criminal Code*, under which the appeal on this ground is taken, reads as follows:

> 598. (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under paragraph (*a*) of section 583 or dismisses an appeal taken pursuant to paragraph (*a*) of section 584, the Attorney General may appeal to the Supreme Court of Canada
>
> (*a*) on any question of law on which a judge of the court of appeal dissents, or
>
> (*b*) on any question of law, if leave to appeal is granted by a judge of the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced or within such extended time as the judge may, for special reasons, allow.

(1) [1956] O.R. at pp. 714-5.

If the decision as to the admissibility of the oral and second written statements turned upon the inferences to be drawn from the evidence, it would seem clear, from the decisions of this Court, that that was not a question of law alone and consequently this Court would be without jurisdiction.

In a case in which a statement is received in evidence over the objection of counsel for the accused and the point is raised that the statement is not free and voluntary, having been obtained by fear of prejudice or hope of advantage held out by a person in authority, the Court must weigh the evidence and determine the credibility of the witnesses. The correctness of such a decision could not, I think, be raised before this Court on an appeal on a question of law alone.

In the present case entirely different considerations arise. The statements were admitted in evidence without objection. Indeed, it may be said that the second statement contained the defence of the respondent to the charge. No conflict arose as to the manner in which the statements were obtained, no suggestion was made that they had been improperly instigated or induced, and that they were free and voluntary appears to have been unchallenged.

In other words, the voluntary nature of the statements was not in dispute at trial. There was no evidence of any previous threat or promise and nothing in law to warrant their exclusion. To hold them to be inadmissible would, in my view, be contrary to established legal principles and would raise a question of law alone.

Assuming that this Court has jurisdiction to hear the appeal as to the admissibility of the oral and second written statements of the accused, it remains to be determined, as a question of law alone on which there has been dissent, whether they were properly admissible in evidence.

It was contended by the respondent in this Court that the statements obtained by the police officers were not freely and voluntarily made, but were obtained as a result of cross-examination calculated to induce admissions.

On the other hand the Crown contended that, even though there was cross-examination (which was not conceded), failure to give a warning, or other violation of the

1956

THE QUEEN v. FITTON

Nolan J.

usual rules relating to the proper securing of statements, such violation or failure does not, of itself, necessarily render such statements inadmissible.

In *Regina v. Gavin et al.* (1), it was held (*per* Smith J.) that when a prisoner is in custody the police have no right to ask him questions. This decision was overruled by the Court of Criminal Appeal in *Rex v. Best* (2), which was a case in which, while the prisoner was in custody and had been cautioned, he was searched and a sum of money was found in his possession. The constable thereupon asked the prisoner where the money came from. Lord Alverstone C.J. at p. 693 said:

> There is no ground for interfering in this case. It is quite impossible to say that the fact that a question of this kind has been asked invalidates the trial. There are many cases in which the prisoner is entitled to give an explanation as to anything found on him, and the question might give him an opportunity of saying and shewing that the thing found was his own property. In our opinion *Reg. v. Gavin* is not a good decision, and it is commented on in a note printed at the end of the report. The decision has certainly not been followed to its full extent. As set out in the report the statement of the law is too wide and requires qualification.

In *Rex v. Voisin* (3), the Court of Criminal Appeal considered the effect of the decision in *Rex v. Best, supra,* and at p. 539 A. T. Lawrence J. said:—

> We read that case as deciding that the mere fact that a statement is made in answer to a question put by a police constable is not in itself sufficient to make the statement inadmissible in law. It may be, and often is, a ground for the judge in his discretion excluding the evidence; but he should do so only if he thinks that the statement was not a voluntary one in the sense above mentioned, or was an unguarded answer made in circumstances that rendered it unreliable, or unfair for some reason to be allowed in evidence against the prisoner.

In the present case there was no evidence of inducement or coercion, no evidence of threat or promise of reward.

In my view it would be quite impossible to discover the facts of a crime without asking questions of persons from whom it was thought that useful information might be obtained. Indeed, such questions might give the suspected person an opportunity of demonstrating that the suspicion of guilt attaching to him was without foundation. The questioning must not, of course, be for the purpose of

(1) (1885), 15 Cox C.C. 656.
(2) [1909] 1 K.B. 692, 2 Cr. App. R. 30, 22 Cox C.C. 97.
(3) [1918] 1 K.B. 531, 13 Cr. App. R. 89, 26 Cox C.C. 224.

trapping the suspected person into making admissions and every case must be decided according to the whole of the circumstances.

The question of the admissibility of a statement made by an accused person was fully discussed in the judgment of this Court in *Boudreau v. The King* (1). In that case the appellant Boudreau was convicted of murder and the point of dissent on which he came before this Court was the improper reception of two written statements, the first containing an admission of intimacy with the wife of the murdered man and the second, in addition to a repetition and an elaboration of the first admission, a full confession of the deed itself. At the time of making them the appellant was held under a coroner's warrant as a material witness. There was no more than a suspicion against him when, in the first conversation with police officers in which questions were asked him, he purported to detail his movements on the two or three days before the death and admitted the intimacy. Boudreau having consented to make the statement in writing, a justice of the peace was summoned and the statement was made out, signed and sworn to by him. Before the signing the justice read out the words of the usual warning, which were printed across the top of the paper. Two days later, after a formal warning, a further discussion took place with two police officers and, while one of them was momentarily out of the room and after a reference had been made to his mother, Boudreau suddenly burst out with the words: "J'aime autant vous le dire, c'est moi qui l'a tué." The second statement was put in writing, with the consent of the appellant, and was signed and sworn to by him. The trial judge ruled that these statements were admissible in evidence and the majority of the Court of King's Bench, Appeal Side, Province of Quebec, agreed with him.

In this Court, Kerwin J. (as he then was), at p. 267, states that the fundamental question is whether a confession of an accused offered in evidence is voluntary and goes on to point out that the mere fact that a warning was given is not necessarily decisive in favour of admissibility, but, on the other hand, the absence of a warning should not bind

(1) [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81.

1956

THE QUEEN v. FITTON

Nolan J.

the hands of the Court so as to compel it to rule out a statement. Accordingly, the presence or absence of a warning is a factor and, in many cases, an important one.

Rand J., at p. 269, points out that no doubt arrest and the presence of officers tend to arouse apprehension which a warning may or may not suffice to remove. The rule is directed against the danger of improperly instigated, or induced, or coerced admissions and the statement should be that of a man "free in volition from the compulsions or inducements of authority".

Kellock J., at p. 276, states that in all cases the question is whether the Crown has satisfied the onus that the statement has, in fact, been made voluntarily and that in none of the cases is it laid down that a statement made by a person in custody, in answer to questions put by a person in authority, is, as a matter of law, inadmissible.

In *Boudreau v. The King* the Court followed the governing principle as stated by Viscount Sumner in *Ibrahim v. The King* (1):

> It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

The principle laid down in *Ibrahim v. The King* was followed by this Court in *Prosko v. The King* (2), where, at p. 237, Anglin J. pointed out that the two American detectives who had the custody of the appellant were persons in authority and that the appellant was in the same plight as if in custody in extradition proceedings under a warrant charging him with murder and that no warning had been given, and that while these facts did not, in themselves, suffice to exclude the admissions, they were undoubtedly circumstances which required that the evidence tendered to establish their voluntary character should be closely scrutinized.

Applying the principles contained in the authorities to the facts of the present case, I am of the opinion that the statements were properly admissible in evidence.

(1) [1914] A.C. 599 at 609.

(2) (1922), 63 S.C.R. 226, 37 C.C.C. 199, 66 D.L.R. 340.

It was contended by the respondent that there was misdirection and non-direction amounting to misdirection on the part of the learned trial judge in that he had failed to lay the theory of the defence adequately before the jury and failed to direct the jury as to how the law in relation to murder should be applied to the facts that they might find.

The majority of the members of the Court of Appeal, that is Pickup C.J.O. and Laidlaw, Aylesworth and Schroeder JJ.A., upheld this contention. The appeal was allowed and a new trial was directed.

Roach J.A., dissenting, held that there was no misdirection or non-direction amounting to misdirection by the learned trial judge in such matters of law and that there was no failure to lay the theory of the defence adequately before the jury and no failure to direct the jury as to how the law in relation to murder should be applied to the facts, and would have dismissed the appeal.

The main theory of the defence is that the respondent had sexual intercourse with the deceased with her consent and, although the act of sexual intercourse was completed, the deceased was not sexually satisfied and wanted it repeated; that she then commenced to annoy the respondent and that, without intending to do her any harm, he grabbed her scarf and "she just went limp". This theory is based upon the evidence that there was haemorrhaging from injury to her private parts and consequently the deceased was not dead when the act of sexual intercourse took place. Put shortly, the intercourse and strangling were independent acts.

The Crown contended that the deceased had been raped and strangled and that the act of strangulation was done in furtherance of the act of rape.

In my view, the real problem which presented itself to the jury was the difficulty in reconciling the written statement of the respondent with the other evidence in the case. In other words, did the respondent cause the death of the deceased under the circumstances as set out in his statement, or did her death ensue as a result of bodily harm intentionally inflicted by him to facilitate the act of sexual intercourse?

1956

THE QUEEN v. FITTON

Nolan J.

I agree with the opinion of Roach J.A. that the learned trial judge placed the two opposing theories fairly before the jury, so that they could not fail to understand the issue they had to decide. I am further in agreement with Roach J.A. that the fact of haemorrhaging is equally consistent with the Crown's theory that the respondent was throttling the girl while he was attempting, or engaging in, the act of intercourse as it is with the theory of the defence that the intercourse was completed and the strangling occurred subsequently.

The defence that the act of sexual intercourse was voluntary on the part of the deceased was rejected by the jury and, in view of the evidence relating to the disarray of the clothing of the deceased when her body was found, the pathological evidence as to the description of her injuries, together with the photographs which were entered as exhibits at the trial showing the condition of her neck and head, in my opinion it was properly rejected.

At the trial objection was quite properly taken to the evidence of the pathologist, Doctor McLean, where he stated that the deceased had been raped. This was a matter for the jury, but, on cross-examination, the doctor made it quite clear that he was not prepared to venture an opinion, based on his medical observations, as to whether the deceased had or had not consented to having sexual intercourse with the respondent.

I have nothing further to add to the reasons of Roach J.A. on the appeal on the ground of misdirection.

In the result, in my view, the charge was adequate and there was no misdirection or non-direction amounting to misdirection and, in any event, no substantial wrong or miscarriage of justice has occurred.

I would allow the appeal and restore the conviction.

CARTWRIGHT J. (*dissenting*):—On April 27, 1956, the respondent was convicted before Treleaven J. and a jury at the Toronto assizes of having murdered one Linda Lampkin on or about January 18, 1956. He appealed, and applied for leave to appeal, to the Court of Appeal on a number of grounds. His appeal was heard on June 18 and 19, 1956, the Court being composed of Pickup C.J.O. and Laidlaw, Roach, Aylesworth and Schroeder JJ.A. At the conclusion

of the argument the learned Chief Justice announced that the appeal was allowed, the conviction quashed and a new trial directed, with Roach J.A. dissenting, and that written reasons would be delivered later. These were delivered on June 27 (1).

Pickup C.J.O., with whom Laidlaw and Schroeder JJ.A. agreed, was of opinion that the appeal should be allowed on two grounds, (i) that the Crown had failed to show that an oral statement made by the respondent to two police officers between 5 and 6 p.m. on January 19 and a written statement made by him immediately afterwards were free and voluntary; and that the erroneous admission in evidence of these statements was in itself sufficient to require the quashing of the conviction, and (ii) that, even assuming for the purpose of dealing with the sufficiency of the charge of the learned trial judge to the jury that the statements were admissible, the learned trial judge had failed to lay the theory of the defence adequately before the jury and had failed to direct them as to how the law in relation to murder should be applied to the facts as they might find them.

Roach J.A. was of opinion (i) that the learned trial judge was right in holding that the written statement referred to above was admissible, and, while he does not say so expressly, it is, I think, implied in his reasons read as a whole that he was also of opinion that the oral statement which preceded it was admissible, (ii) that, while not saying that the charge of the learned trial judge was a perfect charge, he was satisfied "that it was entirely adequate; that there was no misdirection and no non-direction amounting to misdirection, and that in any event no substantial wrong or miscarriage of justice has occurred".

Aylesworth J.A. agreed with the reasons and conclusion of Pickup C.J.O. on the ground of the inadequacy of the charge to the jury; but as to the admissibility of the statements he said (2):—

> I do not, however, agree that the statements given to the police by the appellant were inadmissible. On the contrary, I think they were admissible and were properly received in evidence at the trial. I concur in the reasons of my brother Roach in this respect and I have nothing to add to those reasons.

(1) [1956] O.R. 696, 115 C.C.C. 225, 24 C.R. 125.

(2) [1956] O.R. at p. 735.

1956

THE QUEEN v. FITTON

Cartwright J.

It would appear from the paragraph quoted that Aylesworth J.A. read the reasons of Roach J.A. as deciding that the oral as well as the written statement was admissible. In the result Aylesworth J.A. agreed with the order proposed by Pickup C.J.O.

On June 28, 1956, the Attorney-General for Ontario gave notice of appeal to this Court. In the view which I take of this case it is necessary for me to deal only with the point relating to the admissibility of the statements made by the respondent and therefore I quote only those parts of the notice of appeal which refer to that point. These are as follows:—

> In regard to the second statement of the Respondent filed as Exhibit 53 at the trial [*i.e.*, the written statement referred to above], the Chief Justice of Ontario, Laidlaw and Schroeder, JJ.A., held that the learned trial Judge erred in law in holding that the said statement was admissible in evidence at the trial and allowed the appeal also on this ground.
>
> Mr. Justice Roach and Mr. Justice Aylesworth (dissenting on this ground) held that the learned trial Judge did not err in law in holding that the said statement was admissible in evidence at the trial.
>
> The Attorney-General for Ontario appeals to the Supreme Court of Canada upon the following grounds: . . .
>
> 2. There was dissent on a question of law by the Honourable Mr. Justice Roach and the Honourable Mr. Justice Aylesworth from the majority judgment of the Court of Appeal for Ontario which erred in law in holding that the trial Judge erred in holding that the second statement of the Respondent, filed as Exhibit 53 at the trial, was admissible in evidence at the trial.

Counsel for the respondent moved at the opening of the hearing before us to quash the appeal on the ground that ground of appeal no. 2, quoted above, did not raise a strict question of law alone. The Court decided to hear the argument of the motion with the argument of the appeal.

In my opinion the motion should be granted. After reading all the evidence and everything that was said by counsel and by the learned trial judge during the hearing and disposition of the issue raised as to the admissibility in evidence of the oral and written statements above referred to and everything said on the point in the reasons for judgment delivered in the Court of Appeal I am unable to discern any dissent on, or indeed any difference of opinion as to, any point of law. The difference of opinion was as to whether the proper inference to be drawn from the evidence

as to the primary facts leading up to and surrounding the making of the statements was that the Crown had satisfied the onus of showing that the statements in question were freely and voluntarily made. In the circumstances of the case at bar the question whether or not that inference should be drawn was, in my opinion, one of fact.

The evidence of the witnesses on the *voir dire* as to what I have called the primary facts was not conflicting nor was its veracity attacked in cross-examination and all of the learned judges in the Courts below have proceeded on the basis that it contained an accurate account of what occurred. The effect of that evidence is set out in some detail in the reasons delivered in the Court of Appeal (*vide* [1956] O.R. 696). I propose to give a comparatively brief summary of it.

The lifeless body of Linda Lampkin was found on Commissioners Street late in the evening of January 18, 1956, and the police immediately commenced an investigation. At about 7 a.m. on January 19, police officers visited the place in which a truck which had been driven by the respondent on the previous evening was standing. They examined the truck and found in it a bobby-pin and a lipstick said to have belonged to the deceased. On seeing the lipstick the respondent collapsed and the officers rendered some assistance to him. When he had recovered his composure Sergeant-Detective O'Driscoll and Detective Coghill asked him to accompany them to police headquarters. On arrival there he was questioned by these two officers in a small room, called the interrogation-room, until about 9 a.m. During this period police officers took from him a windbreaker, a shirt, a pair of pants, scrapings from his finger-nails and some hairs taken from his head and body. Shortly after 9 a.m. these detectives left and Detective Simmonds proceeded to obtain a statement from the respondent which was later typewritten and was signed by the respondent about noon. There was nothing in this statement of an incriminating character. It contained a denial of having seen the deceased on January 18. Just after this statement was signed and completed, Sergeant-Detective O'Driscoll and Detective Coghill entered the interrogation-room, and Detective Simmonds left them there with the

1956

THE QUEEN v. FITTON

Cartwright J.

respondent. They remained for a short time. The respondent was given a sandwich and a glass of milk for lunch. The respondent was kept in the general detective office during the afternoon, under close supervision, while Detective Simmonds and Detective McNeely continued their work of investigation elsewhere. About 5 p.m. they returned to headquarters and again took the respondent into the interrogation-room where he had been in the morning. They told the respondent that they had been working since 5 o'clock in the morning, that they had been working pretty hard, that they had received information that he was seen with the deceased on the previous day about 8.45 p.m., that it might be necessary for them to take him out with them in the police car to the west end in the area that he worked in, that there might be other witnesses out there who might have seen things, that the lipstick that was found in his truck had been identified and that they did not believe what he had been telling them. It was at this point that the respondent made the oral incriminating statement. He was at once formally cautioned and then made the longer statement which was reduced to writing and signed by him.

After a full recital of this evidence, the learned Chief Justice of Ontario quotes from the judgment delivered in this Court in *Boudreau v. The King* (1), and continues (2):—

> The principle as set forth in that case is a positive rule of English criminal law. It has been applied in many subsequent cases to which I need not refer, because the ruling which ought to be made by the Court depends on the evidence and particular circumstances disclosed therein in each case. I simply direct my mind and consideration to the fundamental question: Were the statements in question in the instant case freely and voluntarily made?

After a further review of the facts and another reference to the *Boudreau* case the learned Chief Justice continues (3):—

> 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

(1) [1949] S.C.R. 262 at 269, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81.

(2) [1956] O.R. at p. 712.

(3) *Ibid.* at pp. 714-5.

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. opens the portion of his reasons dealing with this point as follows (1):—

> In my opinion the learned trial judge was right in holding that it was admissible. The question before him and now before this Court may be stated thus: Was that statement freely and voluntarily made or was it obtained from the appellant either by fear of prejudice or hope of advantage exercised or held out to him by the detectives? If it was a free and voluntary statement it was admissible: if it was not it should have been barred.
>
> There can be no doubt as to the rule.

The learned justice of appeal then refers to *Ibrahim v. The King* (2), quoting a passage on which, amongst others, the judgments in this Court in *Boudreau's Case* were founded. He stresses the fact that the respondent had not given evidence on the *voir dire,* attaches great weight to the caution given immediately before the taking of the written statement, points out that there had been no threats or promises and in concluding says (3):—

> 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?*

On reading and rereading the reasons of Pickup C.J.O. and Roach J.A. I look in vain for any difference as to the applicable law.

It was suggested in argument that the learned Chief Justice of Ontario had held as a matter of law that the fact, if established, that police officers "cross-examined" the respondent while in *de facto* custody and under suspicion required the trial judge as a matter of law to reject the statements. I can find no such ruling in his reasons. He regarded the fact that certain questions were put as one of the relevant circumstances to be weighed in deciding the question before the Court which he had already accurately described in words, which I have quoted above, which do not differ in any matter of substance from those used by Roach J.A.

(1) [1956] O.R. at pp. 724-5. (2) [1914] A.C. 599 at 609.
(3) [1956] O.R. at p. 726.

1956

THE QUEEN v. FITTON

Cartwright J.

There is no suggestion in any of the reasons that the learned trial judge misdirected himself on the law on this branch of the case. His conclusion on the evidence before him was that the statements were shewn to be voluntarily made. The minority in the Court of Appeal reached the same conclusion but the majority were of the contrary opinion. It is not relevant to inquire which conclusion I would have reached on the evidence, for such a conclusion is one of fact and not of law.

No doubt there may be cases in which the question whether a statement made by an accused is admissible in evidence becomes one of law; but, in my opinion, the case at bar is not such a case. I conclude that we are without jurisdiction to deal with ground 2, quoted above from the notice of appeal of the Attorney-General. This being so it follows that the appeal cannot succeed as it is clear from the portion of the reasons of the learned Chief Justice of Ontario secondly quoted above that in dealing with this ground the majority decided that the erroneous admission of the statements in question was in itself sufficient to require the directing of a new trial.

If, contrary to the view that I have expressed, it could be asserted that (i) there is a difference of substance between the statement of the principles of law which are to be applied in determining whether a statement by an accused is admissible made by Pickup C.J.O. and that made by Roach J.A. and (ii) that there was error in the former statement, it would not follow that so far as this ground of appeal is concerned the appeal should be allowed and the conviction restored. Before restoring the conviction this Court would, at least, have to be satisfied that it could safely be affirmed that but for the supposed error in law the majority in the Court of Appeal would necessarily have concluded that the statements were admissible. As is pointed out by Lord Sumner in *Ibrahim v. The King, supra,* at pp. 609-10, the question whether it has been shewn by the prosecution that the statement of an accused was voluntary 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 is one of fact to be

decided by the trial judge. The Court of Appeal has jurisdiction to weigh the evidence as to the circumstances surrounding the making of the statement and to substitute its decision for that of the trial judge. This Court has no jurisdiction to re-weigh the evidence and substitute its opinion for that of the Court of Appeal. In view of the rule that the onus of proving a statement by an accused to have been voluntary in the sense mentioned rests upon the prosecution, I find difficulty in accepting the view that it can ever be said as a matter of pure law that the question whether that onus has been satisfied must be answered in the affirmative. However in view of the conclusion which I have reached above as to our lack of jurisdiction in this case, I do not pursue these questions further.

I would quash the appeal.

FAUTEUX J.:—This is an appeal from a majority judgment of the Court of Appeal for Ontario (1) setting aside the conviction of the respondent for the murder of one Linda Lampkin and ordering a new trial. The appeal is taken under the provisions of s. 598(1)(*a*) of the *Criminal Code* and the questions of law as to which a dissent is alleged are (i) whether, as held by Pickup C.J.O., with the concurrence of Laidlaw and Schroeder JJ.A., Roach and Aylesworth JJ.A. dissenting, a written statement, filed as ex. 53, and an oral statement immediately prior thereto, both made by the respondent, were illegally admitted in evidence, and (ii) whether, as held by Pickup C.J.O., with the concurrence of Laidlaw, Aylesworth and Schroeder JJ.A., Roach J.A. dissenting, the trial judge failed to lay the theory of the defence adequately before the jury and direct them as to how the law in relation to murder should be applied to the facts.

Dealing with question (i): it is the submission of counsel for the respondent that this Court has no jurisdiction to entertain this ground of appeal for the reason that it does not involve a question of law in the strict sense, but a pure question of fact or at the most a question of mixed law and fact. With this submission I am unable to agree. Whether or not evidence is admissible is always a question to be determined in the light of what the law is with respect to

(1) [1956] O.R. 696, 115 C.C.C. 225, 24 C.R. 125.

1956

THE QUEEN v. FITTON

Fauteux J.

the particular nature of the evidence tendered. While as to certain subject-matters of evidence such as confessions, this determination requires a prior examination of the facts which, if judicially found to be within the rule of law governing the admission of such evidence, will render the same admissible, any question as to what the rule is in the matter involves a question of law in the strict sense. Hence a divergence of views between the majority and minority members of a Court of Appeal as to what the law is clearly gives jurisdiction to this Court to examine the point and satisfy its statutory duty to determine the matter. With reference to the rule of law governing the admissibility of the extrajudicial admissions made by the respondent in the present instance, Roach J.A., for the minority, said (1):—

> There can be no doubt as to the rule. It was stated by Viscount Sumner in *Ibrahim v. The King,* [1914] A.C. 599 at 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."
>
> * * *
>
> 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,* [1949] S.C.R. 262 at 270 *et seq.,* 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81. 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.)

On the other hand, Pickup C.J.O., for the majority, stated (2):—

> 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,* at p. 269. The admissions must be self-impelled and the statement must be the statement of a man "free in volition from compulsions or inducements of authority".

(1) [1956] O.R. at pp. 725-6. (2) [1956] O.R. at p. 714.

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. and Laidlaw and Schroeder JJ.A., this statement of the rule is too narrow and in addition to proving that the statement has 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. The merit of each of these views of the law is, of course, foreign to the consideration of our jurisdiction to entertain this ground on appeal, for it is the precise point which this Court will have to determine on the appeal itself. The above difference in the statement of the law applied is essentially what gives jurisdiction to this Court. It may be added, before parting with the consideration of this preliminary objection, that none of the cases invoked by the respondent supports it or conflicts with the views here expressed.

On the merits of ground (i): as to what the law is in the matter, I agree with the views held by Roach and Aylesworth JJ.A. As I read the reasons for judgment of the majority in this Court in *Boudreau v. The King, supra,* I find nothing to suggest an intention to modify the rule of law as stated by Viscount Sumner. With respect to the English "Judges' Rules" as to questions put by police officers, it has been repeatedly and again recently said that they are administrative rules for the guidance of police officers but not rules of law and that a breach thereof does not *per se* render the statement inadmissible if the true test of voluntariness laid down by Viscount Sumner is met: *Regina v. Wattam* (1); *Regina v. May* (2); *Regina v. Bass* (3); *Regina v. Harris-Rivet* (4). As to all the evidence in

(1) (1952), 36 Cr. App. R. 72 at 77.
(2) (1952), 36 Cr. App. R. 91 at 93.
(3) (1953), 37 Cr. App. R. 51 at 56.
(4) (1955), 39 Cr. App. R. 176 at 183.

1956

THE QUEEN v. FITTON

Fauteux J.

this case and particularly that related to the circumstances prior to and contemporaneous with the impugned statements, it is extensively reviewed in the reasons for judgment of Roach J.A. in the Court below (1), and need not likewise be related here. In brief, while the law-enforcement officers were apprising the respondent at police headquarters, where he had agreed in the morning to accompany them, that, as a result of further investigation, they could not believe some of the declarations he had there made in the morning, he was preoccupied in mind, eventually breaking his silence by saying:—

> I was just thinking of my wife and 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.

He was immediately stopped and informed that he was arrested on a charge of murder, and having been given the customary warning, he proceeded to make the declarations reduced in writing in ex. 53, which he signed. The above attitude and utterances of the respondent are no evidence that his mind was in any way affected by fear of prejudice or hope of advantage. On the evidence, led in the cross-examination of the police officers relating the event, the thoughts of the respondent throughout the day had been directed to his wife and children, and he was explaining that it was on account of them that he had made, in the morning, some false declarations. Indeed it was never suggested by counsel for the respondent at any stage of the trial, including that of the procedure on *voir dire,* nor can it be implied from any of the questions or answers appearing in any part of the whole of the evidence, that the impugned statements were not voluntary in the sense indicated by Viscount Sumner or that the burden of the Crown to meet that particular test had not been discharged. As the issue was tried before, and left to, the jury, these impugned statements, on the unchallenged information given at the hearing before this Court by counsel for the respondent, were represented by the defence to be voluntary in any sense of the word and truthful. The submission that these particular statements were inadmissible was raised for the first time for the purpose of the appeal, not in the original, but in a supplementary notice of appeal. That these statements were voluntary under the rule stated by Viscount Sumner

(1) [1956] O.R. at p. 715.

is not challenged by the majority in the Court below which found it necessary to hold as a matter of law that the statement of the rule was too narrow and, on the law they applied, found as a fact, not that fear of prejudice or hope of advantage was exercised or held out by the police, but that the course of conduct they adopted precluded any conclusion that the statements were self-impelled. Assuming that it could be said that the conduct of the police in the circumstances of this case was not in accordance with the "Judges' Rules", it was, particularly under the authorities above quoted, within the discretion of the trial judge, if otherwise satisfied that the test of voluntariness stated by Viscount Sumner had been met, to admit these statements in evidence. Again, while the defence objected successfully to the admissibility of certain declarations made subsequent to the signing by the accused of ex. 53, it did not invite the Court to reject the impugned statements. And if, on the view the trial judge formed on the *voir dire*, the occasion arose for him to exercise this discretionary power, I find it impossible to say that he failed to do so judicially in admitting them in evidence.

Dealing with question (ii): the theory of the Crown was that Linda Lampkin had been strangled in furtherance of the act of rape. The theory of the defence, contained in the statement filed as ex. 53, was that, sexual intercourse having taken place with her full approval and consent, Linda Lampkin not being sexually satisfied began to annoy the accused who then grabbed her scarf without intending any harm, "and she didn't breathe no more". The evidence with respect to the condition both of the body of the victim and of her clothing is violently inconsistent with any suggestion of consent on her part. On the evidence, the cause of death was asphyxia due to strangulation resulting from the forceful tightening during a continuous period of 3 to 5 minutes of a knotted scarf she had around her neck, producing thereby a deep groove in the flesh-tissue corresponding in size to the width of the scarf. The fact that

1956

THE QUEEN v. FITTON

Fauteux J.

death actually occurred subsequent to the rape does not necessarily show that this forceful and continuous tightening of the scarf, which brought death by strangulation, was divorced from the act of rape. As Roach J.A. puts it (1):—

> That theory [the theory of the defence] rested on the foundation that the act of sexual intercourse was voluntary on her part and that she wanted it repeated. Remove that prop from beneath that theory and it would collapse. It was her persistence, so the accused said, in wanting the act repeated that caused him to take hold of the scarf. That was his explanation. If that explanation should be rejected then he must have taken hold of it for some other purpose. What was that other purpose? That other purpose, according to the Crown's theory, was to overpower her so that against her will he could have sexual intercourse with her.
>
> That the accused killed the girl there was no doubt. He said so. What the jury had to decide was: Did he slay her under the circumstances contained in his explanation or did her death ensue as the result of bodily harm intentionally inflicted by him to facilitate him in having sexual intercourse with her?

Weak as it was, the theory of the defence was put to the jury and I agree with Roach J.A. that the two opposing theories were fairly and squarely explained to them in such a manner that they could not fail to understand the issue they had to decide according to law.

There remains to consider two other grounds of appeal raised by the respondent before the Court of Appeal and with which the majority did not find necessary to deal in view of their conclusions as to the two points already heretofore considered. It is the respondent's submission that the learned trial judge failed to instruct the jury (i) as to what use could be made of the expert evidence of Dr. Chester McLean and (ii) of their obligation to reject any of his opinions which he was not qualified as an expert to give.

These objections are dealt with in the reasons for judgment of Roach J.A. and I am in respectful agreement with the manner in which he disposed of them.

I am also of the opinion that, on all the evidence in this case, no jury properly instructed could, if true to their oath, return any other verdict than that the accused was guilty as charged.

I would allow the appeal, set aside the judgment of the Court of Appeal for Ontario, and restore the verdict of the jury.

(1) [1956] O.R. at pp. 732-3.

1956

THE QUEEN v. FITTON

ABBOTT J.:—A question which has caused me some difficulty is that raised by respondent in his motion to quash the appeal, namely, whether or not, in connection with the ground of appeal relating to the admissibility of certain oral and written statements made by respondent, there was dissent on a question of law. I have reached the conclusion that there was.

As to the admissibility of the incriminating oral and written statements made by the accused, in his reasons in the Court below, Roach J.A. (speaking for himself and Aylesworth J.A.) has stated the rule of law to be applied in the following terms (1):—

> Was that statement freely and voluntarily made or *was it obtained from the appellant either by fear of prejudice or hope of advantage exercised or held out to him by the detectives?*

(The italics are mine.)

It is to be noted that he has used the precise words of the rule as laid down by Lord Sumner in *Ibrahim v. The King* (2), with the exception that he has substituted the words "the detectives" for "a person in authority".

The Chief Justice of Ontario, speaking for the majority and referring to the rule in question, held that (3):—

> 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,* at p. 269. 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".

This difference between the dissenting judgment and that of the majority is in my view clearly a question of law, which gives this Court jurisdiction.

Moreover, referring to the statements made by the respondent, Roach J.A. said (4):—

> The appellant did not give evidence either on the *voir dire* or in defence to the charge. To put it otherwise he has not at any time said in evidence that in making the statement he felt under any compulsion or that it was induced by any fear of prejudice or hope of advantage held out to him. When he blurted out the words "I was just thinking of my

(1) [1956] O.R. at p. 724.
(2) [1914] A.C. 599 at 609.
(3) [1956] O.R. at p. 714.
(4) *Ibid.*, at pp. 725-6.

1956

THE QUEEN
v.
FITTON

Abbott J.

wife and kids", and so forth, he was immediately stopped by the detectives and cautioned. He said he understood that caution. If he understood it then he understood that he was not obliged to say anything, because in administering the caution to him he was told "you are not obliged to say anything unless you wish to do so". In my respectful opinion the statement could be held inadmissible only on the theory that he did not understand the caution, in the face of his statement, not denied, that he did, or that, though he understood it, he still felt under some compulsion induced by some improper external stimulus to make it.

I do not think it should now be held that he did not understand the caution, in the face of his statement that he did. If he understood it then I can see no room for the suggestion that, despite his understanding, he still felt some compulsion. It would have been quite a different matter if, on the *voir dire,* he had gone into the witness-box and stated either that he did not understand the caution or that, understanding it, he nevertheless made the statement because he was fearful that if he did not he would be prejudiced, or hoped that if he did it might be to his advantage. In the absence of such a complaint or explanation coming out of his mouth, to hold now either that he did not understand the caution or that, understanding it, he felt under some compulsion, would in my respectful opinion be to act on sheer speculation, and would not be justified by the evidence.

It was not suggested on cross-examination of the officers on the *voir dire,* in the argument submitted by counsel for the accused to the trial judge, or in the argument presented to this Court, that what the detectives said to the appellant with respect to the information they had obtained that afternoon was not true and that by pretending that they had such information they had tricked the accused into making an admission of guilt. If I understood the argument of counsel for the appellant in this Court it was simply this, that when the detectives told the accused that as a result of their investigations they had received some information to the effect that he had been seen with the deceased on the previous night at St. John's Road and Jane Street, and that they did not believe what he had told them to the contrary in the morning, they thereby invited him to make some reply. I concede that that is so. It is true that what the detectives said consisted of affirmative statements and was not interrogatory, but I think there could have been no other reason for them to make those statements than to invite a reply. The detectives did not know what the reply might be. It might be a denial or an explanation, or it might be an admission. Let me assume for the moment that the detectives hoped that it would be an admission of guilt. The fact remains that they made no threats that may have raised any fear in the mind of the appellant, nor did they hold out any promise or hope of advantage if he admitted his guilt nor did they suggest to him that he might be prejudiced if he did not.

As I read this passage, the learned judge has held that in his opinion there was no evidence to justify a finding that the respondent's statements were obtained from him "either by fear of prejudice or hope of advantage exercised or held out to him" by the two detectives. This is a question of

1956

THE QUEEN v. FITTON

Abbott J.

law upon which I share his view. I am therefore in agreement with Roach and Aylesworth JJ.A. that the statements in question were properly admitted by the trial judge.

As to the other ground of dissent, I am in respectful agreement with Roach J.A. that there was no misdirection and no non-direction amounting to misdirection. There is nothing which I could usefully add to his reasons for judgment.

I would allow the appeal and restore the conviction.

Appeal allowed and conviction restored.

Solicitor for the appellant: Clarence P. Hope, Toronto.

Solicitors for the respondent: Humphrey & Locke, Toronto.

---

*PRESENT: Kerwin C.J. and Rand, Kellock, Cartwright and Fauteux JJ.