THE STATUS OF CONFESSIONS IN OUR MODERN LEGAL SYSTEM

1. The Point of View of the Policeman

M. F. E. Anthony and Arthur Moss*

In discussing this subject it might be well to read section 455 of the Criminal Code which refers to the admissibility of "any admission, confession or statement"; to limit the discussion to confessions only could serve no useful purpose and would likely confuse the main issue and restrict the argument. We do not intend to so restrict ourselves.

Firstly, the policeman who asks "What is the law on this subject?" runs into a great deal of difficulty. The only section in the Code is s.455 which reads:

> Nothing in this Act prevents a prosecutor from giving in evidence at a preliminary inquiry any admission, confession or statement made at any time by the accused that by law is admissible against him.

This does not help much. It raises the question of what is by law admissible? There is nothing in the Code or the Canada Evidence Act which assists him. The senior officer, whose problem it becomes are in a little better position than the police officer because they have access to more text books and law reports. The question is not an easy one to answer. Without going into a detailed study of the history of the subject (which the length of this article does not permit) we note that Blackstone has this to say, in 1795: "Under a statute of 7 W.III c.3, the confession of the prisoner, taken out of court before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty unguarded confessions made to persons having no such authority, ought not to be admitted under this statute." He goes on to say: "And, indeed, even in cases of felony at common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence."[1]

Broom and Hadley in their Commentaries[2] on the Laws of England say, in connection with mode of proof at trial:

> An admission or confession made by the accused is likewise admissible in evidence against him if freely and voluntarily made—neither induced by a threat of evil, nor by the holding out of any benefit to him.

"Voluntarily made" is explained by Mozley and Whiteley:[3]

> A confession of crime made by an accused person, without any promise of worldly advantage held out to him as obtainable by confession, or by any harm threatened to him if he refuses to confess, the promise or threat being made by a person in authority. Such a confession is always admissible in evidence against the party.

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[1] Blackstone's Commentaries, vol. iv, p. 356.
[2] Broom and Hadley's Commentaries on the Laws of England (1875) vol. ii, p. 62[illegible]
[3] Mozley and Whiteley, Law Dictionary (6th ed. 1950).

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We must remember when reading Blackstone that in his day there were no police forces as we know them and his comments regarding confessions should and no doubt would be modified considerably when we consider the changes in status of the lowliest citizen from his day to ours; and when we consider the organization of the modern police forces and their reasonably high ethics plus their strict codes of discipline coupled with the higher standard of general education now in effect. We must also remember with the advances in education, higher standards of living, the complexities of modern civilization, that the duties of the policeman have become more and more complicated, particularly when you consider the multitude of laws, dominion, provincial and municipal, which he is called upon to enforce. To perform these duties successfully the police officer requires energy, physical fitness, sound common sense, good judgment, and a working knowledge of the law. He must never lose sight of the rights and privileges of the individual and must see to it that no one, including himself, abuses those rights and privileges. In particular he must have knowledge of the laws in relation to the subject under consideration.

In this connection we have the "Judges' Rules" for the guidance of police officers. These rules may be found in many text books and in many judgments on the subject, so we need not repeat them. However we must not forget that the rules are not the law of the land except insofar as they have been adopted by the courts. Archbold emphasizes this:

> Inasmuch as the Judges' Rules are not rules of law but only rules for the guidance of the police, the fact that a prisoner's statement is made by him in a reply to a question put to him by a police officer after he has been taken into custody without the usual caution being first administered does not of itself render the statement inadmissible as evidence.[1]

There is no doubt that the judges make the laws. Particularly is that so in this subject. For example we may point out the decision in *R.* v. *Gach*[2] where the law in Canada was materially altered by the decision. This decision was clarified in *R.* v. *Boudreau*[3]. There does seem to be a tendency to reverse the rulings of this kind, particularly as the personnel of the courts change. Mr. C. C. Savage Q.C. has written a well-prepared annotation upon this subject, but even when police officers know of the existence of his article[4] they find that it has been prepared for those who have had legal training. All that has been said thus far indicates the difficulty facing a police officer when he endeavours to determine the law upon the subject.

THE USEFULNESS OF CONFESSIONS

Many young inexperienced policemen seem to think that when a prisoner has made a statement admitting that he has committed an offence with which he is charged that the case is "all wrapped up" and no further investigation is needed. This is, of course, wrong and no experienced police officer would be guilty of taking this attitude. The actual value of a confession is to enable the policeman to investigate further and thus be enabled to place before the

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[1] Archbold's Criminal Pleading (33rd ed.), p. 416, item 685
[2] *R.* v. *Gach* [1943] S.C.R. 250.
[3] *Boudreau* v. *R.* [1949] S.C.R. 262.
[4] (1950), 96 C.C.C.

court all the relevant facts. If we do not do this we fail in our duty to the courts and the public. It may also, in the performance of this duty, save the officer considerable time by showing the investigator the location of possible exhibits, the existence of direct or corroborative evidence, and thus eliminate routine drudgery. Statements made by an accused person are most valuable, when they are made immediately upon arrest, in that they may after being checked, lead to the release of a person who has been suspected of complicity in the crime.

RESTRICTIONS PLACED ON CONFESSIONS BY THE COURTS

As a general rule it is not considered ethical for peace officers to criticize the courts, but in an article of this nature we feel we should be allowed a certain amount of latitude.

When a policeman takes a confession he is faced with the problem that he does not know what court or judge will try the case. What difference does that make? It makes a great deal of difference because so few of our magistrates and judges think alike on this subject that there is a marked inconsistency in the interpretation of the common law rules of evidence and the Judges' Rules. The result is disturbing to a police officer and it does not help him in the proper understanding and execution of his duties.

Speaking specifically of the restrictions placed on confessions we quote section 19 of the Criminal Code:

> Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

The principle goes back many years, and as one writer in 1835 put it: "Every subject knows the law or may know it if he pleases." In his book, Criminal Law, The General Part, Dr. Glanville Williams points out that "the rule is capable of causing hardship, but in outline it is found to be necessary in all legal systems."[8] Its justification is the effect it has in compelling people to learn the standards of conduct required of them. As Holmes expressed it: "public policy sacrifices the individual to the general good."

Then we have s.4(5) of the Canada Evidence Act:

> The failure of a person charged, or the wife or husband of such person, to testify shall not be made the subject of comment by the judge, or by counsel for the prosecution.

This, no doubt, is based upon the recognized principle that an accused person is not required to give evidence against himself.

Surely then, as a matter of logic, if ignorance of the law is no excuse for committing an offence then ignorance, by a person in custody, of his fundamental right or privilege to refuse to answer questions or to refuse to make any statement should not be an excuse for refusing to admit in evidence a statement made by a person in ignorance of his rights in this connection.

When the question is raised as to the admissibility of a confession it is usual to hold a voir dire and often a statement is ruled inadmissible which, if admitted, would have favoured the accused; in such a case there is no other

[8] Glanville Williams, Criminal Law, The General Part (1953), p. 115.

way to get the statement before the court. It must not be forgotten that the policeman who is to give evidence is charged with the responsibility of telling the whole truth, and yet may by legal rulings be prevented from telling facts which would help the accused.

METHODS USED BY LAW ENFORCEMENT OFFICERS IN SECURING CONFESSIONS FROM PERSONS IN CUSTODY

A policeman in endeavouring to find the solution to a crime is surely justified in using all lawful means to find that solution and to determine who was responsible together with all relevant evidence. This naturally includes the questioning of suspects and accused persons.

In every occupation or profession there will always be found some individual who does not abide by the rules and who believes the end justifies the means. In spite of this we would say that in our years of experience (and they have been many) as constables, investigators, executive officers and instructors, there have been very few cases in which confessions, admissions, or statements have been obtained unfairly. Police officers are well aware of the rights of the individual, including the rights guaranteed by law since the Magna Carta. It is part of the officer's oath of office: "and that while I continue to hold the said office, I will to the best of my skill and knowledge faithfully discharge all the duties thereof according to law." We do not believe any self-respecting police officer would do anything which would conflict with this oath.

THE JUDGES' RULES

The Judges' Rules would be very helpful if all our courts gave them the same interpretation. Here again the police have to contend with the divergent views of various judges. The best example is furnished by Rule 5 which reads:

> The caution to be administered to a prisoner, when he is formally charged, should therefore be in the following words: Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence. Care should be taken to avoid any suggestion that the answers can only be given in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

This seems straightforward enough but we have the spectacle of the courts and the departments of the Attorney General in the various provinces not paying attention to the rules, but setting up their own rules in relation to the warning.

The Criminal Code, s.454(1) directs a justice holding an inquiry to address a formal warning to the accused: "Having heard the evidence, do you wish to say anything in answer to the charge . . . " This is virtually the same wording as used in the old Code.

On Sept. 1, 1913, members of the R.N.W.M.P. in Saskatchewan were advised that two cases in the Supreme Court at Moose Jaw, and one at Saskatoon, were dismissed owing to material evidence for the prosecution, in the form of statements given by the accused, being thrown out because of the absence of a proper warning. The warning that "Anything you say may be taken

down in writing and used as evidence at your trial" was held insufficient. The directive issued on that occasion stipulated that the following warning must be given after the accused has been arrested and the offence has been fully explained:

> Having heard the charge on which you are arrested, you are not bound to say anything but whatever you do say may be taken down in writing and used as evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise or favour and nothing to fear from any threat which may be held out to you to induce you to make any admissions or confession of guilt, but whatever you may there after say may be used against you at your trial, notwithstanding such promise or threat.

Members of the force were instructed to carry with them a copy of this circular when on duty and to make the warning therein when making an arrest. They were also cautioned to have the warnings given through an interpreter if the prisoner was a foreigner.

It will be noted that the warning is almost identical with the one laid down by the Code which is to be read by a justice in the course of the preliminary inquiry. The R.C.M.Police in their latest instructions give the following directions:[5]

> (21) *Warning to prisoner on arrest*—Every prisoner, as soon as he is arrested should be warned that he does not have to say anything regarding the crime he is alleged to have committed, unless he wishes to do so.
>
> (22) Members of the Force will use the warning set forth hereunder when executing arrests, with the proviso, that those provinces which have agreements with the Federal government for this Force to undertake the enforcement of law and order, should the Attorney-General of the Province or provinces decide that the words "against you" should be added, his ruling will be final in such province.
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> 'You need not say anything. You have nothing to hope from any promise or favour and nothing to fear from any threat, whether or not you say anything. Anything you do say may be used as evidence at your trial.'
>
> (a) The Department of Justice has ruled that although there is very little reason for considering the words "against you" as a threat, the words are considered to be of little importance and may be omitted in the future when a warning is given to an accused person on arrest.

In Ontario, June 22, 1936, the then Deputy-Attorney General issued a long circular memorandum under the heading of "Admissibility of Statements given to the police" and included the following with regard to cautions:

> When a person arrested has been charged with an offence, he should immediately be cautioned. The caution should be in the following words: "You are charged with . . . . . Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

This circular was embodied in a police order issued to the members of the Ontario Provincial Police. In October of 1940 a circular was issued to all ranks of the force by the Commissioner which embodied the Judges' Rules and the above warning with the instruction that the rules were administrative directions the observation of which the police authorities should enforce on their subordinates, as tending to the fair administration of justice.

This warning was used by most police departments in Ontario and was used until early in 1954. In April 1954 a new set of standing orders was issued by the Provincial Police and Standing Order 53 quoted the Judges' Rules and instructed that members of the Force will therefore give the usual caution or warning whenever a suspected person or prisoner desires to make a statement. A

[5]C.C.M. Chapter IX, 103, 1 Oct. 50.

recognized form of such caution is given as:

> Name . . . . . You are (or may be) charged with . . . . . Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence.

It is to be noted that the words "will be taken down in writing" have been omitted.

In the Province of Manitoba the recognized form of warning is:

> You need not say anything. You have nothing to hope from any promise or favour and nothing to fear from any threat whether or not you say anything. Anything you do say may be used as evidence at your trial.

In this province a warning that has proved acceptable to Alberta Courts is as follows:

> You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing and may be given in evidence. You must clearly understand that you have nothing to hope from any promise of favour and nothing to fear from any threat which may have been held out to induce you to make any admission or confession of guilt.

J. L. Salterio K.C. in an article entitled "Form of Warning to the Accused"[10] pointed out that the various forms in existence caused confusion. He ended his article as follows:

> Yet members of the police force are expected to give a *proper* warning to the accused. Without some guiding rule to prescribe the form to be followed when obtaining a confession, the lot of a police officer, and for that matter the accused, is not a happy one. It has been said that there are more things wrought by prayer than this world dreams of; in the meantime the following form of prayer might be offered to the members of the police:
>
> Dear Lord, hear my petitions as I pray
> That long enough I live to see the day
> When one accused of crime will make admission
> Which will not be regarded with suspicion.
> When I have tracked down the elusive clue
> I'm damned if I don't warn them, damned if I do
> So prithee, let me wake some blessed morning
> To find the Code *prescribe* the proper warning.

We appreciate the views of the writer and have ourselves made even stronger and more forceful statements.

Commenting further on the disadvantages of the Judges' Rules, it is generally accepted by most, if not all, of the police departments in Canada, to be routine procedure to warn a person immediately upon arrest, or when during investigation, it has been decided to arrest. This is as a result of the Judges' Rules. Nevertheless we have the practice severely criticized by Mr. Justice Beck;

> In practice it undoubtedly has the general effect of stopping the prisoner from saying anything and thus is lost the benefit, whether it be to the crown or the prisoner, of a spontaneous free and voluntary explanation which many times would be given promptly and before opportunity for deliberation or consultation.[11]

We have seen many examples of what Mr. Justice Beck had in mind. An accused person has, after being warned, refrained from making an exculpatory statement which would in all probability have cleared up the question of *mens rea* or at least have lessened the severity of the offence. Innocent men could save themselves time, anguish and money in defending themselves in court against the accusations.

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[10] Form of Warning to the Accused (1949), 27 Can. Bar Rev. 67, at p. 75.

[11] *R. v. O'Neill* (1916), 25 C.C.C. at p. 332.

Another point which arises in this connection is the position of the policeman who is dealing with a skilled criminal whose knowledge of the laws relating to confessions often exceeds that of the police. This type of prisoner will make an exculpatory statement which is known to be a tissue of lies but which must be presented by the policeman under oath. It is often accepted by the jury as sworn testimony of accused because counsel for the defence will not object to its admissibility nor will he cross-examine on it. The clever criminal may use the policeman as a defence witness without encountering the dangers of cross-examination.

Now to discuss the question of possible changes in the Judges' Rules and the law relating to confessions. It is clear that the judges, particularly in this field, do make the law. Is it then too much to ask the Supreme Court of Canada to make rules (clear and defined) along the lines of the English Judges' Rules? Could not the Criminal Code be amended to give them statutory authority to do so? It does seem peculiar, to say the least, that notwithstanding s.9 of the Interpretation Act[12], there is a different law regarding the admissibility of statements by the accused in different provinces.

In making such rules we would suggest that where a warning is required to be given, it be in the following words:

> You are not obliged to say anything unless you wish to do so but whatever you say may be used as evidence.

Surely this simple warning could be understood by the most uneducated individual and could not be considered to be a threat. The safeguards against threat or promise would still be available to counsel.

Another change we would suggest is that s.455 of the Code be amended by striking out the three words of the section, "admissible against him" and subsitituting therefor "admissible as evidence in the charge or charges for which he is being tried."

Another suggested change is in Rule 2. It now reads "When a police officer has made up his mind to charge . . . ." The system here is not the same as the English as the charge is laid at the police station there. Anything he says is taken down by the arresting officer. Here the charge is not formally laid until the information is read by a justice. We would therefore suggest that "arrest him for an offence" would be the proper wording.

Attached hereto is a copy of a letter, dated June 24, 1930 and written by Sir John Anderson, sometime Secretary of State for England. His comments are of interest.[13]

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[12] R. S. C., 1952, c. 158.

[13] ROYAL COMMISSION ON THE POLICE POWERS AND PROCEDURE

Home Office,
Whitehall,
24th June, 1930.

Sir,

I am directed by the Secretary of State to say that he has had under his consideration that Part of the report of the Royal Commission on the Police Powers and Procedure, namely Chapter vi, paragraphs 160-194 inclusive, in which the Commissioners draw attention to the evidence they had received which seemed to show that there were marked divergences of opinion among Police officers as to the proper construction to be placed upon what are known as the Judges

It should be remembered that the authors of this article are laymen who have not had the privilege of attending law school, but who have had experience as constables, investigators, executive police officers, instructors, and prosecutors. The views expressed are gained from practical experience and we hope they may be of some assistance in obtaining clarification of this important subject.

Rules and suggest that this matter be brought to the notice of His Majesty's Judges for any action which they may deem advisable.

In accordance with the suggestion of the Royal Commission, the Secretary of State has communicated with His Majesty's Judges and the purpose of this circular, which is issued with their approval, is to remove any difficulties or divergencies of opinion as to the meaning of the Rules such as may have existed in the past. For convenience of reference the Judges Rules are here set out as follows:—

(1) When a Police Officer is endeavoring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.

(2) Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions or any further questions, as the case may be.

(3) Persons in custody should not be questioned without the usual caution being first administered.

(4) If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of the usual caution should be omitted, and that the caution should end with the words "be given in evidence".

(5) The caution to be administered to a prisoner when he is formally charged, should therefore be in the following words: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence." Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

(6) A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such case he should be cautioned as soon as possible.

(7) A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

(8) When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other person charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

(9) Any statement made in accordance with the above rules, should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

No particular difficulty appears to have arisen with regard to Rules (1) and (2), but the Royal Commissioners say that divergencies and conflicting views are prevalent as to how Rule (3) should be reconciled with the first sentence of Rule (7).

Upon this point His Majesty's Judges have advised as follows:—

Rule (3) was never intended to encourage or authorize the questioning or cross-examination of a person in custody after he has been cautioned, on the subject of the crime for which he is in custody, and long before this rule was formulated, and since, it has been the practice for the Judge not to allow any answer to a question so improperly put to be given in evidence: but in some cases it may be proper and necessary to put questions to a person in custody after the caution has been administered, for instance, a person arrested for a burglary may, before he is formally charged, say, "I have hidden or thrown the property away" and after caution he would be properly asked "Where have you hidden or thrown it?"; or a person, before he is formally charged as a habitual criminal, is properly asked to give an account of what he has done since last came out of prison. Rule (3) is intended to apply to such cases and, so understood, is not to

conflict with and does not qualify Rule (7) which prohibits any question upon a voluntary statement except such as is necessary to clear up ambiguity.

The Royal Commissioners next draw attention to the fact that the expression "Persons in custody" is used in Rule (3) whereas the expression "Prisoner" is used in the four subsequent Rules and say that they have found some difference of opinion as to whether these two terms are intended to be synonymous. His Majesty's Judges advised upon this point as follows:—

"Prima facie the expression 'persons in custody' in Rule (3) applies to persons arrested before they are confined in a Police Station or Prison but the Rule equally applies to prisoners in the custody of a gaoler. The terms 'persons in custody' and 'prisoners' are therefore synonymous for the purpose of this rule."

As regards any difficulties that may have arisen as to the proper form of caution (a) at any time before the formal charge is made, and (b) immediately before the formal charge is made, the Judges say:—

"With regard to the form of caution it is obvious that the words in Rule (5) are only applicable when the formal charge is made and can have no application when a violent or resisting prisoner is being taken to a police station. In any case before the formal charge is made, the usual caution is, or should be, 'You are not obliged to say anything but anything you say may be given in evidence'.

In the Secretary of State's opinion this is a simple, emphatic and easily intelligible form of caution which may be properly used at any time during the investigation of a crime at which it is necessary or right to administer a caution. For example, where a person is being interrogated by a police officer under Rule (1) whether at a police station or elsewhere and a point is reached when the officer would not allow that person to depart until further inquiry has been made and any suspicion that may have been aroused has been cleared up, it is in the opinion of the Secretary of State desirable that such a caution should be administered before further questions are asked. When any form of restraint is actually imposed such a caution should certainly be administered before any questions or any further questions, as the case may be, are asked. When it comes to cautioning a prisoner immediately before he is formally charged, the form prescribed in Rule (5) should be used.

Attention is drawn by the Royal Commissioners to the fact that the word "crime" is used in Rules (1) and (2) and the word "offences" in Rule (8) and that some Police Forces have attached importance to this. The Judges point out that for the purpose of these Rules the words "crime" and "offences" are synonymous and include any offence for which a person may be apprehended or detained in custody.

The Secretary of State would remind the police that the Judges' Rules were formulated for the purpose of explaining to police officers engaged in the investigation of crime the conditions under which the Courts would be likely to admit in evidence statements made by persons suspected of or charged with crime. Such officers will usually be experienced police officers and it is quite impossible to lay down a code of instructions which will cover the various circumstances of every case. They should bear in mind, however, the purpose for which these Rules were drawn up, namely, to ensure that any statement tendered in evidence should be a purely voluntary statement and therefore admissible in evidence. In carrying out their duties in connection with the questioning of suspects and others they must, above all things, be scrupulously fair to those whom they are questioning, and in giving evidence as to the circumstances in which any statement was made or taken down in writing, they must be absolutely frank in describing to the Court exactly what occurred, and it will then be for the Judge to decide whether or not the statement tendered should be admitted in evidence.

I am, Sir,
Your obedient servant,
John Anderson.

N.B.—The foregoing letter relates primarily to the procedure proper to be followed in investigating crime, for instance, in the matter of administering cautions. The preceding references to the administration of cautions before formal charging do not, of course, exclude the administering of the caution immediately after a charge has been accepted, taken down and read to the accused, in which event both the form of question and the form of caution set out in Rule (5) should be used.