Privy Council Appeal No. 16 *of* 1963

Billy Max Sparks – – – – – – – – – *Appellant*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF BERMUDA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH DECEMBER, 1963

Present at the Hearing:

VISCOUNT RADCLIFFE

LORD MORRIS OF BORTH-Y-GEST

LORD UPJOHN

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

The appellant was arraigned before the Supreme Court of Bermuda on a charge of indecently assaulting contrary to section 324(1) of the Criminal Code a small girl who was just under the age of four. On the 12th February 1963 after a trial lasting some days before Abbott C. J. and a jury of twelve the jury by a majority found the appellant guilty. He was sentenced to two years imprisonment. By special leave granted by an Order in Council dated the 30th May the appellant appeals against his conviction. At the conclusion of the hearing before the Board their Lordships stated that for reasons which would be given at a later date they would humbly advise Her Majesty that the appeal should be allowed and the conviction set aside. Their Lordships now give their reasons.

The main questions which arise for determination are (i) whether evidence was admissible of a statement made by the small girl to her mother shortly after the assault, the girl not being a witness at the trial (ii) whether certain statements (involving admissions or confessions) made by the appellant to police officers or made in their hearing were rightly admitted in evidence and (iii) whether if such statements ought not to have been admitted the appeal should be allowed.

On the date of the alleged offence (3rd November 1962) the small girl (Wendy Sue Bargett, then aged three years and nine months) was at about 8.0 p.m. taken by her mother, Mrs. Bargett, in a motor-car to a place called the Bermuda Bowl. The mother went bowling and left the little girl asleep on the back seat of the car. The car doors were unlocked. The windows were closed save that the louvres were left open to let in some air. According to her mother the girl was old enough and had sufficient knowledge and intelligence to be able to open the doors of the car had she wished to do so. Visits were paid to the car from time to time either by the mother or by a friend of the mother in order to see how the girl was. At about 9.0 p.m. or 9.15 p.m. at which time it was raining quite hard she was seen to be " very fast asleep ". At about 9.30 p.m. when the friend went to the car one of its rear doors was open and the girl was not there. It was not then raining. A search in the vicinity was made and the mother was then told that the girl was missing. The police were informed at about 9.47 p.m. and arrived at about 10.0 p.m. In the course of the search which they made two pairs of panties which the girl had been wearing were found on the ground under or near a car in the car park. That was at about 10.15 p.m. At about 10.40 p.m. the

police received information over the police-car radio as a result of which they went to the house of Sergeant Cochrane where the girl then was. The police took her back to the Bermuda Bowl and restored her to her mother. The mother found some blood on the girl's finger and body. In reference to what then took place the mother later gave evidence before the examining Magistrate. She gave evidence of what her girl had said to her. The mother's evidence before the examining Magistrate included the following passage:—

> " I lifted up her dress and I found blood on her body. I do not recall Wendy Sue saying anything to me at that time. But she did say that I should have looked the other way, I do not know what she meant. Then I asked her who took her out of the car. I asked this and she said that she did not know. I then asked her what did the person look like, and she said that it was a coloured boy. She did not say anything more after that."

At the trial evidence as to what the girl had said and her statement that " it was a coloured boy " was held to be inadmissible. On behalf of the appellant, who is not coloured but white, it is submitted that the statement should have been held to be admissible.

The girl was then taken to hospital and was examined by a doctor who found that she was bleeding from the vagina and had scratches and a stretch tear of the hymen. The doctor's view was that nothing larger than a finger had passed through.

The evidence concerning the movements of the appellant (a staff sergeant serving in the United States Air Force who was 27 years of age and a married man with three children) was as follows. He had come off duty at the airport at 4.45 p.m. He went with some friends to a bar and there had some drinks. With a friend (Sergeant Donovan) he then went to a certain Inn where they had drinks. They met Sergeant Cochrane who invited the appellant to his house to celebrate his (Sergeant Cochrane's) birthday. The appellant went in Sergeant Cochrane's car to Sergeant Donovan's house and on the way drank some neat sloe gin from a bottle. At Sergeant Donovan's house the appellant had another drink. Before going on duty that day the appellant had left his own motor-car at Sergeant Donovan's house. The appellant then went in his own car from Sergeant Donovan's house to Sergeant Cochrane's house. He arrived there at about 8.45 to 9.0 p.m. He then seemed to be very drunk. He did not stay long and he was later seen by Sergeant Cochrane backing his car away from the house. He was next seen at the Bermuda Bowl. The evidence concerning the time when he was there seen was divergent. A witness (Mrs. Klemmer) said that she saw the appellant at the Bermuda Bowl between 9.0 and 9.10 p.m. She said that he was drunk. Another witness (Mr. Richardson) said that he saw the appellant driving his car from one of the parking places near to the Bermuda Bowl and said that in the process the appellant's car touched another car. That witness put the time at about 9.15 or 9.20 p.m. Another witness (Mr. Simms) said that he saw the appellant at the Bermuda Bowl some time between 9.50 p.m. and 10.10 p.m. That witness said that the appellant was obviously very drunk and that he almost fell down when he came in the door and then turned and went out again. The appellant then arrived again at Sergeant Cochrane's house. The party there was still going on though most of the guests had left. One witness (Neberman) said that at some time between 10.0 p.m. and 11.0 p.m. the appellant arrived at Sergeant Cochrane's house. The witness said that there was a girl some 10 or 15 feet behind the appellant and that the girl seemed to be following the appellant. The witness considered that the appellant was drunk: his face was flushed, his gait unsteady and his words slurred. The appellant called out for Sergeant Cochrane and went into the house. An airman (Cameron) came out from the house, picked up the girl and took her in to the house. The girl's dress was dry. The appellant was wet from head to foot. Neberman and Cameron then took the girl down the street in the hope of finding someone who knew the girl. Failing to find anyone who knew her they returned to the house and communicated with the police who thereafter came to the house and took the girl away. The appellant told Neberman that the girl had followed him from some place by a church. The appellant himself gave evidence at the

trial concerning his movements during the evening. His recollection of what happened at Donovan's house was not clear. He remembered driving his car after that though he did not know where he had driven to—but remembered ending up at the Cochrane's house and speaking to Sergeant Cochrane and Mrs. Cochrane. He did not remember leaving Cochrane's house but his next recollection after speaking to Mrs. Cochrane was of his car becoming stuck. He said " I don't remember getting out of the car but I do remember being on the way back to Cochrane's house. While on the way back there, I saw a little girl in the road very near Cochrane's house. She was crying and said something about her mummy. I took her inside Cochrane's house. There were people there who came out and helped me get my car out." Cameron also gave evidence. The appellant told him that he (the appellant) did not know whose the child was but that she had followed him up the road from in front of the church. The appellant then asked those in the house to help him to get his car out of a ditch. Some of those in the house went in a car to the appellant's car which was stuck in a ditch. At one stage in the recovery of the car the assistance of a truck to pull it was obtained. The appellant reached his home at about 11.55 p.m. The evidence of the appellant's wife was that he was pretty drunk, that he was swaying on his feet, that his speech was not clear and that his clothes were covered with mud from his knees down. At the trial she stated in her evidence that she had expected the appellant to be home at about 6.0 p.m. or 6.30 p.m. and that she had had a telephone conversation with Sergeant Cochrane at about 7.0 p.m., another with Sergeant Donovan at about 8.0 p.m., and further telephone conversations with Sergeant Cochrane or with Cameron at about 9.0 p.m., then at about 9.45 p.m., then at about 11.0 p.m. and again at about 11.45 p.m.

The appellant was due to be on early morning duty at the airport on Sunday the 4th November. He rose at 5.0 a.m. He drove his car to Sergeant Donovan's house and was then driven by Sergeant Donovan in the latter's car to the airport. He reported there at 6.45 a.m. He considered however that owing to his drinking on the night before and owing to his lack of sleep he was not qualified to "work" any air traffic. Following upon an intimation over the telephone from his wife to the effect that the police wished to see him he returned home.

At 12.30 p.m. two police officers (Det. Const. Oliver and Det. Const. Leng) went to the appellant's home. They saw him in the presence of his wife. He was told that it was understood that he had found a child the evening before and he was asked if he would make a statement as to the circumstances in which he had found her. He agreed to do so. It was the evidence of Det. Const. Leng that the appellant maintained that as he had been drunk the night before he could not remember what had happened. The evidence of the appellant was likewise to the effect that he told the police officers of the defects of his recollection as to the previous evening which resulted from his having been drunk. Det. Const. Leng said that the appellant's wife helped him with details as to times. The statement that the appellant gave was as follows:—

> " On the evening of Saturday, Nov. 3rd. 1962, between 8.30 and 9.00 p.m. I went to a party at the residence of S/Sgt. Cochrane on Khyber Pass, Warwick. I had a few drinks I had been drinking earlier and I was pretty high.
>
> I left the party in my car and set off along Spice Hill Road. After about ¼–½ mile I ran into a ditch and spent some time trying to get out. I then set off to walk back to the party for help. At the church just west of Cochrane's I saw a little girl, I think she was standing still, she was crying and saying something about her mother. I thought she possibly belonged to someone at the party and so I took her to the house. I told the people there I had found her near the church then tried to arrange for help to get my car out. I remember Clayton Cameron asking the number of the police then I left. I did not go back in the house again.
>
> As far as I can figure it, it must have been close to 10 p.m. when I found the girl and I just got the impression she was lost and frightened."

It was the view of the learned Judge that it was beyond dispute that it was the

appellant's wife who was able to provide the information regarding the times at which the appellant had been at various places.

Shortly after giving his statement the appellant retired to bed. At about 2.30 p.m. the police officers returned to the house. They said that certain things about the appellant's movements of the previous night were not clear to them. They did not proceed to specify what it was that was not clear and they did not at that time put any questions to the appellant. Instead they requested him to accompany them to police headquarters. The appellant told them that he did not know how he could help further as the police officers already knew of his condition on the previous night. He agreed however to do as they wished and having dressed he drove his car to the police headquarters. Thereafter he was questioned for some time and various oral statements were made by the police officers to him. In the end at some time between 5.0 p.m. and 5.20 p.m. he signed a written statement. That statement contained admissions. Though his wife had twice telephoned the police headquarters during the afternoon in order to speak to him she had not been enabled to do so. After the appellant signed the statement he was charged with the offence of indecent assault and he made a reply. For a third time his wife telephoned. He was then made available at the telephone and said something to his wife. After that he made an oral request to the police.

At the trial the prosecution sought to give evidence in regard to the written statement and in regard to the oral statements made by the appellant at police headquarters. The defence submitted that they were not admissible because they had not been voluntarily made. It became necessary therefore for the prosecution to satisfy the Judge that the statements were admissible. It is manifest that careful enquiry had to be made in order to determine whether the statements were voluntary. In his own home at the end of the morning the appellant had told the police of his excessive drinking during the previous evening and of the inadequacies of his recollection. He had made a statement which suggested his complete innocence. Yet at police headquarters at the end of an afternoon of questioning and talk he signed a written statement which contained not only positive admissions of guilt but also an account of events which was seemingly based upon detailed recollection. What then had been happening during the afternoon? Was there anything to account for so complete a change? Had the appellant in the morning been prevaricating? Had he by the end of the afternoon quite freely decided that he would confess to things that he had well known all along that he had done? Why had the appellant been asked to go to the police headquarters when at his own home he had already made a statement? Was anything said to the appellant during an afternoon of questioning to persuade him to make some new statement? Were any inducements held out to the appellant? If so did they lead him to make statements which were not voluntary and which were not based upon his own knowledge? These were among the many questions which clearly required to be investigated. The learned Judge adopted the correct and recognised procedure. In the absence of the jury he heard the evidence that either side wished to call. The police officers gave evidence. The appellant gave evidence and so did the appellant's wife. It then became the duty and the responsibility of the learned Judge himself to come to a conclusion. He ruled that the evidence was admissible. It is the correctness of that ruling that has been challenged.

There was no doubt as to the vital importance of the ruling for it was recognised by the prosecution that unless the statements were admitted there was no evidence upon which the appellant could have been convicted. It would seem therefore that if the learned Judge had rejected the evidence the trial would then have ended and the appellant would have been acquitted and discharged.

On the basis of his ruling that the evidence should be admitted the learned Judge, after the return of the jury, quite properly allowed all the evidence to be given as to the making of the statements. Full cross-examination was permitted so that the jury after hearing all the evidence that prosecution or defence might call could be invited to consider what weight should be given to the statements or to consider whether any weight at all should be given to them

or whether they should not be disregarded. (See *R. v. Murray* [1951] 1 K.B. 391). In the course of his evidence at that stage one of the police officers acknowledged when being cross-examined that their purpose in taking the appellant to police headquarters had been " to get him to admit " the offence: another police officer denied that that had been the purpose.

In order to examine the submission that the learned Judge should not have admitted the statements their Lordships must refer to some of the evidence which was given in regard to them on the voir dire in the absence of the jury. Before doing so their Lordships will revert to the first main question which arises in this appeal.

The defence submitted at the trial that the mother should be permitted to recount what the girl had said to her. The alleged utterance was made very shortly after the girl was restored to her mother. That was probably within 1½ hours of the time when the girl left the motor-car. The words if spoken were probably spoken at the earliest opportunity for the making of a complaint to the mother who was the person to whom it would be natural to voice a complaint. There was no suggestion that the girl made a complaint when in the company of anyone at Sergeant Cochrane's house. The mother would clearly be giving hearsay evidence if she were permitted to state what her girl had said to her. It becomes necessary therefore to examine the contentions which have been advanced in support of the admissibility of the evidence. It was said that " it was manifestly unjust for the jury to be left throughout the whole trial with the impression that the child could not give any clue to the identity of her assailant." The cause of justice is however best served by adherence to rules which have long been recognised and settled. If the girl had made a remark to her mother (not in the presence of the appellant) to the effect that it was the appellant who had assaulted her and if the girl was not to be a witness at the trial, evidence as to what she had said would be the merest hearsay. In such circumstances it would be the defence who would wish to challenge a contention, if advanced, that it would be " manifestly unjust " for the jury not to know that the girl had given a clue to the identity of her assailant. If it is said that hearsay evidence should freely be admitted and that there should be concentration in any particular case upon deciding as to its value or weight it is sufficient to say that our law has not been evolved upon such lines but is firmly based upon the view that it is wiser and better that hearsay should be excluded save in certain well-defined and rather exceptional circumstances.

It was urged on behalf of the appellant that the desired evidence could have been given because the words of the girl (if uttered) formed part of the *res gestae*. Though this contention was abandoned at the trial it was re-adopted in the argument before their Lordships. Their Lordships cannot accept it. The issues which were raised at the criminal trial were whether the prosecution could prove that the girl had been indecently assaulted and could prove that she had been assaulted by the accused. A statement made some time after the assault could not be said to be any part of the assault or to form any part of the narrative in respect of the assault.

If the girl had been old enough to give evidence and if she had given evidence and if the mother had given evidence as to a complaint made to her by the girl shortly after the alleged assault the latter evidence would not be evidence which proved the truth of anything that the girl had said. If admitted it would be received on the basis that it tended to show consistency in her conduct and consistency with the evidence given by her in court: it would relate to her credibility. In *The Queen v. Lillyman* [1896] 2 Q.B. 167 Hawkins J. in giving the judgment of the Court said in reference to evidence of that nature:— " It clearly is not admissible as evidence of the facts complained of: those facts must be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains ". In his judgment Hawkins J. stressed that it is the duty of a Judge to impress upon the jury in every case

where evidence of a recent complaint is given that they are not entitled to make use of the complaint as any evidence whatever of the facts in reference to which it was made. Similarly if it be supposed that the girl had in the presence and hearing of the accused made some remark which accused him and if evidence of the making of the remark had been admitted that again would not be on the basis that the remark proved the truth of what had been said but on the basis that the subsequent remarks or behaviour of the accused might have some evidential value. (See *R. v. Christie* [1914] A.C. 545). In fact the girl neither gave evidence nor did she say anything in the presence of the appellant. Their Lordships can see no basis upon which evidence concerning a remark made by her to her mother could be admitted.

Even if any basis for its admission could be found the evidence of the making of the remark would not be any evidence of the truth of the remark. Evidence of the making of the remark could not in any event possess a higher probative value than would attach to evidence of the making of a complaint in a case where the complainant gives evidence or to evidence of an accusation made to or in the presence of an accused. Nor can the principle of the matter vary according as to whether a remark is helpful to or hurtful to an accused person.

In regard to the submission that the words alleged to have been spoken by the girl to her mother formed part of the *res gestae* it is apposite to refer to what was said by Lord Normand in delivering the reasons of the Board in *Teper v. The Queen* [1952] A.C. 480. At page 486 Lord Normand said:—

> " The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost. Nevertheless, the rule admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they form part of the *res gestae*. The rules controlling this exception are common to the jurisprudence of British Guiana, England and Scotland. It appears to rest ultimately on two propositions, that human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words, and the dissociation of the words from the action would impede the discovery of truth. But the judicial applications of these two propositions, which do not always combine harmoniously, have never been precisely formulated in a general principle. Their Lordships will not attempt to arrive at a general formula, nor is it necessary to review all of the considerable number of cases cited in the argument. This, at least, may be said, that it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement: *The Queen v. Bedingfield* 14 Cox C.C. 341, *O'Hara v. Central S.M.T. Co.* [1941] S.C.363 ".

Their Lordships do not think that it is possible to say that the words alleged to have been spoken by the girl were so clearly associated with the assault upon her, in time, place or circumstances, that they were a part of the assault.

Their Lordships must also reject a further submission which was made that evidence of the speaking of the words could be given as evidence which identified the assailant. As was said by Lord Normand in *Teper v. The Queen* at page 488:—

> " The special danger of allowing hearsay evidence for the purpose of identification requires that it shall only be allowed if it satisfies the strictest test of close association with the event in time, place and circumstances. ' Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained. It would be very dangerous to allow evidence

> to be given of a man's words and actions, in order to show by this extrinsic evidence that he identified the prisoner, if he was capable of being called as a witness and was not called to prove by direct evidence that he had thus identified him': *Christie's* case, per Lord Moulton ".

Their Lordships were referred to certain observations at page 161 in *R. v. Wallwork* [1958] 42 C.A.R.153 but do not consider that those observations are to be interpreted in any sense contrary to what was said by Lord Normand in the passage above cited or to what was said in *R. v. Lillyman* (*supra*). There is no rule which permits the giving of hearsay evidence merely because it relates to identity.

Their Lordships pass to a consideration of the question whether certain statements made by the appellant to the police officers or made in their hearing should have been admitted in evidence. The contrast between the statement made by the appellant in his own house in the morning (as to which no question arises) and that made at police headquarters in the afternoon has already been noted. Was the latter made freely and voluntarily? It was for the prosecution to establish that it was. As Lord Sumner said in his speech in *Ibrahim v. The King* [1914] A.C. 599 at 609.

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

It became the obligation of the learned Judge to consider whether the appellant had made voluntary statements. Unless it was shown to the satisfaction of the learned Judge that the statements were voluntary (in the sense referred to by Lord Sumner) he could not admit them. The appellant was entitled to have the determination of the learned Judge as to their admissibility.

The procedure to be followed when a question arises as to whether to admit a statement is well settled. (See *R. v. Francis & Murphy* [1959] 43 C. A. R. 174). If objection is made to admissibility it is for the Judge to hear evidence in the absence of the jury and then to rule whether an alleged confession should or should not be admitted. He ought not to admit it if on the view which he forms of the circumstances of the making of a confession he does not consider that it was a voluntary one.

As has already been stated, when the point was reached at the trial when the question of the admissibility of certain statements arose, the learned Judge proceeded to hear evidence in regard to the circumstances of their origin. He heard the evidence of three police officers who had been at police headquarters. The appellant then gave evidence and after him the appellant's wife. There was a sharp conflict as to many important matters between the testimony given by the three police officers and that given by the appellant. It became the responsibility of the learned Judge to reach a conclusion as to what evidence he accepted and to base his ruling upon his conclusion. In fact what the learned Judge did was to assume that the appellant's version of his interview with the police on the afternoon of Sunday the 4th November was the true one and to base his rulings on that assumption. In acting on the assumption that the appellant's evidence was true he stated that he was in no way impugning the integrity of the police. In giving his ruling he said:—

> " I should emphasise, as I endeavoured to do at the beginning of this ruling, that I have dealt with this matter on the basis of the accused's own story, supplemented as it is in some respects by that of his wife. I must also emphasise that my dealing with this important question in this way does not mean that I accept the accused's story in preference to that told by the prosecution witnesses. For me to do that would be to usurp the functions of the jury. I merely add that to deal with this matter in this way seems to be the method most fair to the accused ".

With every respect the learned Judge would not be usurping the functions of the jury. He was deciding in the absence of the jury whether certain

evidence was admissible evidence for the jury to hear. It was for him to reach such conclusions of fact as were needed as the basis of his decision as to the admissibility of the statements made by the appellant. If they were inadmissible then the jury ought not to have heard them at all. If they were held by the learned Judge to be admissible it was still open to the prosecution and the defence to allow the jury to hear the testimony as to the circumstances under which they came into being so that the jury, forming their own opinion as to the testimony, could decide what weight to give to the statements or could decide not to give any weight at all to them for the reason that they (the jury) were not satisfied that they were voluntary statements. An accused person is however entitled in the first place to have evidence excluded if on the view of the facts which is accepted by the learned Judge at the trial it is not shown that the evidence is legally admissible. Thus in *R. v. Francis & Murphy* [1959] 43 C.A.R. 174 it was held that where objection is taken to the admissibility of an alleged confession it is essential that the Judge should hear evidence in the absence of the jury and give a ruling whether the confession should be admitted or not. In that case a learned Recorder had said that he would not rule on the issue of admissibility until all the evidence relating to the alleged confessions had been put before the jury. In giving judgment in the Court of Criminal Appeal Lord Parker C.J. said:—" It is quite clear that a prisoner is entitled both to a ruling on admissibility from the Judge and also to hear the verdict of the jury on the weight and value of the confession." The Court said that there should be no departure from what had always been the settled practice.

When at the preliminary stage evidence is heard by a Judge in the absence of the jury the prosecutor must show affirmatively to the satisfaction of the Judge that a proffered statement was not made under the influence of an improper inducement. (See *The Queen v. Thompson* [1893] 2 Q.B. 12: the authority of that decision was recognised by their Lordships Board in *Kuruma v. The Queen* [1955] A.C. 197, at 205).

Having heard evidence on the voir dire the learned Judge had to rule in regard to four alleged statements made by the appellant. He excluded a short oral observation alleged to have been made by the appellant to the police. He admitted (*a*) a written statement signed by the appellant and recorded between 5.0 and 5.20 p.m. (*b*) certain words spoken thereafter over the telephone by the appellant to his wife (*c*) certain words of request addressed thereafter by the appellant to the police.

As the learned Judge decided to base his ruling upon an acceptance of the evidence given by the appellant it will be sufficient to record the substance of it. Although there was a sharp contrast between what the appellant said and what some or all of the police officers said, the ruling which was given was based upon and must now be tested upon an acceptance of the appellant's evidence. The general effect of it may be summarised. The appellant was questioned by the police officers. They told him that they had witnesses who could prove that he had been at the Bermuda Bowl the previous evening. The appellant had said that because of his drunken condition he had not remembered where he had been for most of the time the previous evening but he said that if witnesses saw him at the Bermuda Bowl then he must have been there. One of the police officers asked him whether he would not make a statement. His reply was "A statement about what? I can't remember anything." Then he was told that a statement was wanted from him to avoid embarrassment to his family and his friends: and that the further the investigations went the more publicity there would be and more people would know about it. Then one of the police officers said to him " We could get you for drunken driving, hit and run, leaving the scene of an accident and molesting the child. All we want is a statement about the child. We have spoken to this girl, she is no dumbell, she knows who did this to her." That was a clear suggestion that the girl either had in some way identified the appellant or that the police knew that she could. The appellant then made a request. Saying that his own son aged four would recognise anyone who had harmed him he asked that the little girl should see him. He was told that that " would be too hard on her ". The appellant did not know what was the offence that had been

committed against the girl. He assumed that it was rape and when he protested against being accused he was told that the offence was not as serious as that. Then one of the police officers, in the presence of the others, " reconstructed " the crime to him, saying " You were at Bermuda Bowl and saw a little girl—possibly she was relieving herself and you took her in your car and drove up Spice Hill Road, parked and indecently assaulted the child, couldn't get your car started, took the girl with you to the party." The appellant's reaction was that if that was what had happened it would seem strange to take the girl to a place where twenty-five people would know him. He was asked to confess. He said that he did not remember where he had been: he asked them for proof and accepted what they told him. Eventually he signed a statement at one stage saying " If you say I did it I guess I did it." At another stage during the questioning one of the police officers had said:—" Listen Sparks, we can prove this and will prove it." After a caution the written statement was made. At the end of it one of the police officers suggested that the appellant should say something by way of apology to the girl's parents: the words " I'm very sorry and ashamed " came as a result. The evidence of the appellant showed that there were various reasons why he made the statement: (i) because one of the police officers told him that if he made a statement there was a possibility that he would not be prosecuted in the civil courts but in the military courts (ii) because one of the police officers told him that it would be the worse for him if he did not make a statement for then he would be prosecuted in addition for the motoring offences (iii) in order to avoid publicity (iv) in order to prevent embarrassment to his family and friends for one of the police officers in suggesting that he should confess had asked him to " think of the embarrassment " to his wife and others which would result from every step that the police would have to take (v) in order to enable his wife to leave the Island for one of the police officers had told him that if there was an investigation and trial his wife would have to remain. The reason he had signed the confession although in his evidence he said that he was quite sure that he had not assaulted the girl was, as he stated it, " because I got to the point where I believed them " and because " I accepted what they told me as proof ".

The actual making of the statement, after the appellant had said that he would make one, was according to the appellant the result of a process of assisted composition. In respect of it the appellant said:—

> " It is not in my words and it is not a true statement. I first began by asking ' Where shall I start? ' I was told ' Start at the Bowling Alley '. I said ' I saw the little girl and gave her a ride '. I think Oliver said ' How did she get in the car? ' I said ' Hell, I don't know, maybe I just opened the door and she got in '. Then I carried on with the statement saying ' I drove up Spice Hill Road, parked the car and molested her '. Leng asked ' What do you mean, molested her? ' I said ' Hell, I don't know what am I supposed to have done to her? '. Leng said ' You put your finger in her ' and I said ' O.K. damn it, I put my finger in her.' Leng said ' Front or back? ' I said ' Hell, I don't know '. I don't believe I said ' I took hold of her and put my finger between her legs '. I consider the statement which I signed as correct to be a complete fabrication. I believe, I now say, that I did say ' I thought that by leaving her there she'd get home '. Then Oliver asked ' Do you want to say any more ' and I said ' I am very sorry and ashamed '."

The statement was in the following form:—

> " Billy Max Sparks, South Shore, Warwick Parish, W/A Staff Sergeant U.S.A.F. No. 28777195; 27 years states:—
>
> I have been told that I am not obliged to say anything unless I wish to do so, but whatever I say will be taken down in writing and may be given in evidence.
>
> *(Signed)* Billy M. Sparks.
>
> On Saturday the third of November, 1962, while drunk, I was at the Bermuda Bowl parking lot and did give a little girl a ride in my car. I

remember her walking to me in the parking lot and I believe I just opened the car door and she climbed in, I don't know.

I remember driving along Spice Hill Road, and I either parked or ran off the road, I don't know which. I took hold of her and put my finger between her legs. I tried to get the car started, I tried to push it but it wouldn't start. I don't know how I got to the party. I guess I must have walked. The girl was with me when I got to the party. I thought that by leaving her there she'd get home, I'm very sorry and ashamed.

(*Signed*) Billy M. Sparks.

(*Witness*) M. Leng."

" The above statement was recorded by me at Police H.Q., Prospect, between 5 p.m. and 5–20 p.m. at the dictation of the person making it. I read it over to him and asked him if he wished to make any corrections. He said it was correct and signed it.

(*Signed*) T. A. Oliver, D/C."

While the questioning of the appellant was proceeding his wife had telephoned police headquarters. She telephoned again later and the appellant was then allowed to speak to her. He said to her " Honey they said I did it, I guess I did it." Being then asked by his wife whether the police had any proof he said " All the proof in the world." In his evidence he said that he used those words because—" I considered the police had all that proof." The prosecution desired and were allowed to give evidence to the effect that the appellant said to his wife—" Honey I did it."

After the appellant had been charged with the offence of indecent assault (as he was within a few minutes of signing the written statement at police headquarters) he made the request that he should be detained so as not to have to face his family and friends. The prosecution were allowed to give evidence of this request.

Their Lordships consider than an acceptance of the appellant's evidence must lead to the view that he signed the written statement and spoke the words above referred to because he was persuaded by the police (who must in the present case be regarded as persons in authority) that it could be proved that it was he who had assaulted the girl even though he himself had no knowledge or recollection of having done so and because he was persuaded that in such state of affairs it would be better for him to sign a confession. On an acceptance of the appellant's evidence there were various inducements which were held out to him. These were all rather linked together. The significance of them was that they pointed collectively to the advantages that would result from a confession. The suggestion was that whether he confessed or not he would be convicted but that if he confessed there would in many ways be less unpleasant consequences. The learned Judge considered that the holding out of a possibility that after a confession the matter would be dealt with in the military courts rather than in the civil courts could not be held to be an inducement in view of an answer made by the appellant that he considered that the military courts would have been more severe. But that left out of account the circumstances that if he confessed and if the military courts dealt with the matter that would be a course that he would prefer for there would then be an avoidance of publicity, there would be less embarrassment for family and friends, and there would be freedom for his wife to leave the Island. Their Lordships consider that these were very real inducements.

The learned Judge considered that any inducement flowing from the suggestion that if the appellant did not make a confession in regard to the assault charge he would not only be prosecuted for the assault but also for the motoring offences was not an inducement connected with the assault charge. Their Lordships cannot accept this reasoning. The inducements were held out by the police in reference to the assault charge and in reference to the way in which the proceedings on the assault charge would be conducted. In any event the motoring episodes were said by the police to form a part of the events of the previous evening and it was the suggestion of the police that the

appellant's participation in those events included at one time the offence of the assault and at another time certain motoring offences (Compare *R. v. Hearn* [1841] Car & M.I.109).

Though the learned Judge considered that some inducements had been held out he considered that they were not calculated or likely to make the appellant's confession an untrue one. What has to be considered however is whether there were inducements or other circumstances which showed that the statement was not a voluntary one and in any event if a ruling was being given " on a basis of the accused's own story " it was of the essence of his story that he did not think that he had assaulted the girl and only made a statement because the police persuaded him that he had assaulted her and because they led him to believe that it would be better for him if he did make a statement. In his speech in *R. v. Ibrahim* (*supra*) Lord Sumner at page 611 cited *R. v. Baldry* [1852] 2 Den. 430 and said " It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence Judges have thought it better to reject it for the administration of justice ". Lord Sumner had pointed out that the rule which excludes evidence of statements made by a prisoner when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of policy. That it is a rule admits however of no doubt. The learned Judge further considered that such inducements as he thought had been held out did not continue to operate at the time of the making of the statement: his reason for this conclusion was that the appellant admitted that he had been properly cautioned. It is of course clear that if an inducement is held out which does not in fact induce the admissibility of a statement is not affected by the circumstance that words of inducement have been uttered. There may be many facts or circumstances which tend to show that the effect of some inducement has been entirely dissipated and removed (see *R. v. Smith* [1959] 2 Q.B. 35).

Their Lordships cannot however agree that in the circumstances of the present case an acknowledgment (in the recognised wording of a caution) by the appellant that he was not obliged to say anything unless he wished to do so was any indication that inducements no longer continued to operate. In fact the caution marked the moment when the persuasions the promises and the inducements became effective. Though the appellant understood that he could if he wished remain silent he was (on his evidence) made to believe that for the price of his confession he could purchase advantage. When he was cautioned the inducements were not withdrawn. Rather had the time for decision arrived as to whether he would avail himself of the benefits promised. The prospects before him as they were made to appear to him were alternative: on one basis while he himself would suffer punishment the troubles of his family and his friends would be diminished: on another basis not only would he himself suffer punishment but he would face all possible charges and his family and friends would be confronted with the utmost embarrassment.

For the reasons which they have set out their Lordships conclude that the written statement signed by the appellant and recorded between 5.0 and 5.20 p.m. was not shown to have been a voluntary statement and accordingly was not admissible. The considerations which have been discussed in reference to it are applicable also in respect of the telephone conversation between the appellant and his wife and in respect of the request made by the appellant to the police.

Their Lordships pass finally to consider whether the result of these conclusions is that the appeal should be allowed. It was submitted by the respondent that as the jury heard evidence in full as to all the circumstances of the making of the statements and accordingly heard all the witnesses examined and cross-examined and as the learned Judge gave the jury a careful direction (citing the words of Lord Sumner in *Ibrahim v. The King* (*supra*)) to the effect that unless they were satisfied that a statement or confession was voluntary they must reject it and disregard it and give it no weight whatsoever and as the learned Judge told the jury that the statements or confessions were " the only evidence " against the appellant and as the jury (albeit by a majority) found the appellant guilty it must be considered accordingly that the majority of the jury held that the statements (which in this connection presumably

means all of them) were voluntary statements. The respondent submitted that on this view it should be held that there was no miscarriage of justice and that the principles which guide their Lordships Board in criminal cases should lead to the conclusion that the appeal should be dismissed. Their Lordships cannot accept this reasoning. For the reasons already given their Lordships reject the submission that it should be held that there was no prejudicial result or miscarriage of justice for the reason that the jury were invited to disregard the challenged statements unless they considered that they were voluntary. The appellant was entitled in the first place to have the ruling of the learned Judge based upon his assessment of the evidence. In such a situation a Judge cannot sidestep his function and cause decision to devolve solely on the jury. The learned Judge did not do that: what he did was to assume acceptance of the appellant's evidence. On that assumption the statements were not shown to have been voluntary ones.

It was common ground at the trial and was frankly so conceded by the prosecution that if the disputed statements were not admissible there was no evidence upon which a conviction could be sought. Indeed the learned Judge said in his summing-up that if the confessions had not existed the appellant " would never have appeared in Court anywhere ". It must follow that if the statements had not been admitted the jury would have had to have been directed to return a verdict of not guilty. If therefore the statements ought not to have been admitted the result was that the appellant was denied the certainty of acquittal. Though their Lordships are not a Court of Criminal Appeal and do not exercise all the revising functions of such a Court the circumstances of the present case are such that the admission of the statements had the result of depriving the accused of the protection of the law. In *Ibrahim's* case (*supra*) in speaking of the practice of their Lordships' Board in criminal cases Lord Sumner said (see page 615):—" There must be something which in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which in general tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future." On the view which their Lordships take in the present case " the protection of the law " would have produced the result that the exclusion of the appellant's statements now in question must have been followed by a ruling that there was no evidence against him and by a direction to acquit. In *Ibrahim's* case a private soldier who was arrested immediately after a murder had been committed was asked by an officer some ten or fifteen minutes later " Why have you done such a senseless act? ": the private soldier made a reply which contained an admission. Two arguments against the admissibility of the reply were presented. It was said that the reply was not a voluntary statement but was obtained by pressure of authority and fear of consequences. That point failed. Secondly it was said that the reply was that of a man in custody in answer to a question put by a person having authority over him as commanding officer and having custody of him through the subordinates who had made him prisoner. In regard to that point the Board, not being a Court of Criminal Appeal, did not find it necessary to intimate what they considered that the rule of English law (the principles of which applied in the case) ought to be. Lord Sumner said (see page 617):—" Their Lordships think that the jurisdiction which they exercise in appeals in criminal matters involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter." Apart from the evidence of the reply made by the private soldier in custody there was a body of other evidence which established his guilt. Having reviewed it Lord Sumner said (see page 618):—" It appears to their Lordships that a clearer case there could hardly be, and that it would be the merest speculation to suppose that the jury was substantially influenced by the evidence of what Ibrahim said to Major Barrett. If not impossible, it is at any rate highly improbable, that this should have been so, and when the preponderance of unquestioned evidence is so great, their Lordships cannot in any view of the matter conclude that there has been any miscarriage of justice, substantial, grave, or otherwise." The result was therefore that even if the reply of the private soldier was inadmissible in evidence on the ground that it was made by

him in answer to his officer in whose custody he was, its admission, having regard to all the other evidence and all the circumstances, was not such a violation of the principles of natural justice as would entitle the soldier to have his conviction set aside.

In the present case the appellant was not in custody. If his statements were not shown to have been voluntary and so ought to have been excluded the result was that there was no evidence on which a jury could convict and the case would have ended at the close of the case for the prosecution.

In *Teper v. The Queen* (*supra*) their Lordships Board advised that the appeal should be allowed although there was some evidence against the appellant apart from the evidence which it was held had been wrongly admitted. In delivering the reasons of the Board Lord Normand said that there were several circumstances pointing to the appellant's guilt and that it could not have been said that there was no legal evidence to support a verdict of guilty. He said (at page 492):—" Their Lordships have therefore in the end to decide whether the appellant has shown that the improper admission of the hearsay evidence of identification was so prejudicial to the appellant, in a case where the rest of the evidence was weak, that the proceedings as a whole have not resulted in a fair trial. The test is whether on a fair consideration of the whole proceedings the Board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant." In the present case it was acknowledged that without the challenged statements there was an absence of any weight in the scale against the appellant.

Their Lordships have therefore humbly advised Her Majesty that the appeal should be allowed. There will be no order as to costs.

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In the Privy Council

BILLY MAX SPARKS

v.

THE QUEEN

DELIVERED BY
LORD MORRIS OF BORTH-Y-GEST

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