PROCEDURAL PROBLEMS IN CHALLENGING CONFESSIONS

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In criminal trials in Papua New Guinea judges of the Supreme Court are frequently required to rule on defence objections to the admission of confessional statements. The imperative rules of evidence governing the admissibility of such statements are well settled and so too are the principles regulating the judicial discretion to exclude confessions which, although made voluntarily, are said to have been unfairly or improperly obtained.[1] There are, however, a number of related procedural matters which as the much publicised trial in 1972 of persons charged with the wilful murder of the East New Britain District Commissioner[2] amply demonstrated, may still cause difficulty. This article collates and analyses the available case law relating to these problems in *Papua New Guinea*.

I. *The Voir Dire in Papua New Guinea*

In a jury trial it is the practice for the judge to determine the admissibility of a confession in the absence of the jury upon a *voir dire*. Then if the confession is admitted the jury decides its weight. However the *voir dire* procedure is not entirely appropriate in Papua New Guinea where there is no trial by jury. The judge alone has the dual responsibility of determining both admissibility and weight. Strict adherence to the *voir dire* procedure would mean that confessional evidence may have to be adduced twice, firstly when the question of admissibility is being canvassed

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1 The leading cases are the High Court appeals: *Smith* (1957) 97 CLR 100 and *Wendo* (1963) 109 CLR 559. Important also are the Papua New Guinea Supreme Court decisions: *Amo and Amuna* [1963] PNGLR 22, *Toronome and Tombarbui* [1963] PNGLR 55, *Skelly* [1965-66] PNGLR 105, Minai [163] PNGLR 195, *Sirkuras* [1964] PNGLR 18, *Demana Harina* [1965-66] PNGLR 144, *Josep Kom* [1967-68] PNGLR 435, *Ginitu Ileandi* [1967-68] PNGLR 496 and *John Loe* [No. 1] [1969-70] PNGLR 12.

2 *William Taupa Tovarula* Sup. Ct. (1972) No. 711.

and secondly during the course of the trial if the judge has to admit the confession. This was done in 1956 in *Smith*[3], a wilful murder trial before the then Chief Justice Sir Beaumont Philips. On appeal to the High Court of Australia Webb J. criticised this procedure when he observed:

> But I must say that I fail to see why his Honour should have separated his functions to the extent of permitting each of the police witnesses to be twice cross-examined on the same subject matter. To say the least that appears to me to have been unnecessary[4].

However, Williams J. in the same case[5] seemed to approve the course followed by Phillips C.J. The other members of the High Court, McTiernan and Taylor JJ. expressed no opinion on this point. Unfortunately, therefore, the appeal affords no authoritative guidance as to the correct procedure but it has become the general practice of Supreme Court judges since *Smith*[6] to avoid the danger of repetition of evidence by taking the confession subject to objection and then ruling on its admissibility after evidence bearing on that particular issue has been adduced. This, for instance, was the course adopted by Ollerenshaw J. in 1962 in *Toronome Tombarbui*[7] where his Honour expressed the view that in a non-jury trial exact compliance with the *voir dire* procedure "would be, in many cases, a time-wasting affectation."[8]

II. *The Status of Evidence on the Voir Dire*

Nevertheless, as Ollerenshaw J. went on to acknowledge in *Toronome Tombarbui*[9], departure from the *voir dire* procedure leaves unresolved the question of the status of the evidence adduced in challenging the admissibility of the

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3 1956, unreported. Referred to in *Toronome Tombarbui* [1963] PNGLR 55, 56.

4 (1957) 97 CLR 100, 132.

5 Ibid, at 118.

6 (1957) 97 CLR 100.

7 [1963] PNGLR 55.

8 Ibid., at 56.

9 Ibid.

confession. His Honour said:

> It may be that in the event of the admission of the confession so that the evidence given of and concerning it upon, what I may call the *quasi voir dire*, becomes evidence in the trial itself, there would be, possibly, some evidence given in the course of the *voir dire*, which, notwithstanding the admission of the confession itself, would not be admissible in the trial. This problem, if problem it be, to my mind is readily resolved by Counsel objecting, at the appropriate stage, to such evidence as evidence in the trial. In as much as the value of the confession, notwithstanding its admission still is an open question and evidence of the circumstances in which it was made is admissible in the trial for the consideration of the judge as a jury in determining what weight should be attached to it, the quantum of evidence admissible upon the *voir dire* but inadmissible in the trial usually would be small[10].

This is a rather more indulgent view than that of Mann C.J. in *Amo and Amuna*[11], a case decided in the preceding year. There the learned Chief Justice decided that proceedings upon a *voir dire* could not be regarded as a separate collateral proceeding and that evidence taken on the *voir dire* is, without repetition, before the judge for all purposes. Even if the confession is ultimately rejected "the evidence upon which that decision is based must be on the Court record and before the Court."[12]

The question of the status of evidence taken on the *voir dire* is particularly important when the accused himself has given evidence in those proceedings and has made an admission of guilt. Does the admission form part of the Crown case on the issue of guilt? In 1963 in *Minai*[13] Smithers J. ruled that

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10 Ibid.

11 [1963] PNGLR 22. Both this case and *Toronome Tombarbui* were recently referred to with approval by Meares J. in *Ex parte Whitelock; Re MacKenzie and Anor*. [1971] 2 NSWLR 534.

12 Ibid., at 27.

13 [1963] PNGLR 195.

it did not. The learned judge pointed out that the exclusion of involuntary confessions or confessions improperly obtained is based not only on their potential unreliability but also on the ground of public policy aimed at discouraging unfair methods of interrogation.[14] This latter ground, his Honour argued, had been recognised by the legislature for New Guinea when it enacted the *Evidence Act* 1951. The Act repealed an earlier provision whereby non-voluntary confessions might be admitted if the judge was of the opinion that the inducements held out to the accused where not likely to lead to an untrue confession[15] and enacted s.3 (corresponding to s.68 of the *Evidence and Discovery Act* 1913 - 1964 in Papua) which reads as follows:

> No confession which is tendered in evidence on any criminal proceeding shall be received if it has been induced by any threat or promise by some person in authority, and every confession made after any such threat or promise shall be deemed to have been induced thereby, unless the contrary is shown.

Smithers J. explained the relevance of s. 3 as follows:

> ... if an admission of guilt made by the prisoner on the *voir dire* is admissible on the issue of guilt the prohibition in section 3 ceases to be effective in every case in which the evidence of a guilty but truthful person is material on the issue of voluntariness. There are of course many more of such persons to be found in this Territory than in more sophisticated places.[16]

His Honour was of opinion that to give effect to the policy of the law, both statutory and common law, one of two courses must be adopted. Either criminating questions must be excluded on the *voir dire* or incriminating answers given

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14 Ibid., at 199, 200.

15 *Evidence Act* 1934-1964, s.15.

16 [1963] PNGLR 195, 199, 200.

on the *voir dire* must be treated as inadmissible when considering the issue of guilt. Smithers J. had no doubts that incriminating answers should be excluded in all cases where the confession had been ruled inadmissible. If the judge was not satisfied the confession was voluntary he could not be satisfied that the admission on the *voir dire* was voluntary. Furthermore if the confession though voluntary were excluded because it was obtained unfairly then the incriminating answers made on the *voir dire* should also be excluded as a matter of discretion.

Smithers J. was less emphatic concerning criminating questions. His difficulty here was s.6 of the *Evidence Act* 1934-1964 which provides, *inter alia,* as follows:

> (1) Every person charged with an offence shall be a competent but not compellable witness for himself in any proceeding in connection with the offence.
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> ....
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> (3) A person charged with an offence shall not be called as a witness by the prosecutor; but every such person being a witness may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged.

Probably, His Honour conceded, the *voir dire* must be treated as a "proceeding in connection with the offence" within the meaning of ss.(1) and therefore the effect of ss.(3) on its ordinary interpretation would be to expose the accused to criminating questions on the *voir dire.* However, such an interpretation would defeat the policy embodied in s. 3 and therefore s.6(3) should perhaps be read so as not to apply to the *voir dire.* Smithers J. argued as follows:

> It may be that in this Territory a question to the accused as to his guilt is not admissible on the *voir dire.* Until the Crown has proved that a confession is voluntary, the confession may not be received in evidence. While the *voir dire* remains undecided the voluntariness of the original confession remains in issue. It may be said that if it is true to say that an admission of guilt forced from the accused on the *voir dire* is to be considered as tainted with the same quality of non-voluntariness as the confession which is in issue, should it be found to be non-voluntary, then the admission cannot be received on the issue of the *voir dire.*

If this view is valid then unless or until the *voir dire* is determined in favour of the prosecution, it cannot be said that the admission sought from the accused is itself voluntary.[17]

In 1966 Minogue J., as he then was, remarked extra-judicially[18] that the law on these matters could not yet be regarded as settled and Smithers J's views have not been specifically endorsed by other judges in subsequent cases. However the learned Chief Justice has now reached the same conclusion as Smithers J. for in the *voir dire* proceedings in the recent trial of *William Taupa Tovarula and Thirteen Others*[19] he ruled that counsel for the Crown would not be permitted to ask the accused criminating questions on the *voir dire*[20]. Whether such questions were excluded as a matter of law or as a matter of judicial discretion unfortunately does not appear from the published rulings in that case. It is submitted that they would not be inadmissible as a matter of law. This would be contrary to the plain meaning of s.6. There is some authority in Queensland, where the evidence legislation is in materially the same terms, suggesting that if an accused person is asked any question on the *voir dire* which may tend to incriminate him he should be invited to claim privilege.[21] With respect, it is difficult to understand what would be the basis of such a claim because the evidence legislation there, as in Papua New Guinea, would seem to have removed the privilege against self-incrimination absolutely.[22]

The better view, it is submitted, is that criminating

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17 Ibid., at 201. The same argument would apply in Papua where the legislative provisions are in materialy the same terms. See: *Evidence and Discovery Act* 1913-1964 ss.58 and 68.

18 See: "The Law of Evidence" in *Fashion of Law in New Guinea* (Brown, ed.).

19 Sup. Ct. (1972) No. 711.

20 Ibid.

21 *Criminal Code* s.618A. *Gray and Ors.* [1965] QD. R 373, 377, 378 and *Toner and Ors.* [1966] QWN 44. *Evidence and Discovery Act* 1967-1962 s.7.

22 *Wright* [1969] SASR 256.

questions on the *voir dire* are strictly admissible but the trial judge has a discretion to exclude them and to exclude at the trial admissions made in response to them. The judge always has a discretion in the interests of justice to "disallow evidence if the strict rules of admissibility would operate unfairly against the accused."[23] There are two reasons why the discretion should be invoked here. Firstly, as Bray C.J. has recently pointed out in the South Australian Case of *Wright*,[24] "to allow a cross-examination of the accused on the *voir dire* with the object of showing that he committed the crime would tend to deter him from entering the witness box to prove some maltreatment, threat, inducement, impropriety or unfairness on the part of the police."[25] Chamberlain J. in the same case thought this argument showed far too much solicitude for the guilty but honest accused[26] but on the other hand if the evidence is not excluded the policy of the law relating to the rejection of confessions improperly obtained would be at least partially frustrated. Secondly there is a more general but, it is submitted, a more cogent reason for excluding such evidence - the danger that the fair trial of the accused may be, or appear to be, prejudiced. In the words of Professor Cross:

> ... the attitude of judges and counsel towards the conduct of the trial could hardly be unaffected by the accused's admission on the *voir dire* that he committed the crime charged.[27]

This was said with reference to a jury trial. The possibility of prejudice to the accused in a trial by judge alone is more immediate. Perhaps when the *voir dire* is over the judge may by virtue of his training and experience be able to put out of his mind what the accused has said. However why assume this would always be the case? It is a large assumption and a doubtful justification for permitting the

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23 *Kuruma* [1955] AC 197, 204.

24 [1969] SASR 256.

25 Ibid., at 264.

26 Ibid., at 271.

27 See Cross, *Evidence* (1967) 57 and Australian edition (1970) 71.

Crown to seek admissions on the *vire dire*.

III *The Voir Dire and Cross-Examination as to Previous Convictions*

A related procedural problem arises when the Crown seeks to ask the accused giving evidence on the *voir dire* not whether he committed the offence charged but whether he had previously been convicted of other offences. This occurred recently in the trial of *William Taupa Tovarula and Thirteen Others*[28] when the Crown applied for leave to cross-examine one of the accused, Thomas Painuk, as to his previous convictions. Painuk in the course of his examination-in-chief on the *voir dire* had alleged serious improprieties on the part of Sub-Inspector Watkins, one of the police officers who had interrogated him. The relevant statutory provision was again s.6. Sub-sections (1) and (3) of that section have been quoted above and ss.(4) reads, *inter alia*, as follows:[29]

> A person charged with an offence and called as a witness in pursuance of this Ordinance shall not be asked or required to answer any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged or that he is of bad character unless---
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> ....
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> (b)..... the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution...

Minogue C.J. first ruled that a hearing on the *voir dire* is a "proceeding in connection with the offence" within the meaning of ss.(1) and accordingly that an attack by an accused person during the *voir dire* on the character of a prosecution witness rendered him liable to cross-examination as to previous convictions. The learned Chief Justice further ruled, following the decision of the House of Lords in *Selvey*

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28 Sup. Ct. (1972) No. 711.

29 The corresponding provision in Papua is s.58(1)(v) of the *Evidence and Discovery Act* 1913-1964. There is a general discussion of the operation of this provision in *Pointon and Constable* [1967-68] PNGLR 395.

v. *D.P.P.*[30], that he had a discretion to disallow such cross-examination when the accused gives evidence at the trial and that there is a like discretion when he gives evidence on the *voir dire*, the trial within the trial. His Honour reasoned as follows:

> It has been pointed out by counsel for the Crown that there appears to be no case on the situation where character is sought to be brought into issue on a *voir dire*, and it was also pointed out that the reason for the existence of discretion is to secure a fair trial for the accused and to ensure that he will not be unduly prejudiced before a jury by allowing material to be considered by them, the prejudicial effect of which may well outweigh its probative value.
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> On the *voir dire*, in my view, the situation is somewhat different. The issue here is not guilt or innocence of the accused; it is the voluntariness or otherwise of what is set up as confessional material, and in my view I should pay regard to what was said by their Lordships in the *Selvey case* - to the general maxim: is it fair in all the circumstances to allow cross-examination of the accused to be entered upon. In this particular case, or rather in this trial generally, I have announced earlier that I would allow a wide and free-ranging cross-examination where the Crown evidence was to be tested, and as far as I can recall I have given full effect to that policy.
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> In this particular case some very serious allegations have been made against the police officer concerned, Sub-Inspector Watkins - allegations which if true would, and I think should, detract seriously from his standing as a police officer. It seems important to me that I should know what sort of man is making these allegations; what credibility should I give him? By way of example, assume that he had a conviction or convictions for perjury - of course I am not saying that is the case but assuming that to be so - surely the court should be able to be made aware of that fact in assessing whether his allegations of threats of brutality are proven.

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30 [1968] 2 WLR 1494.

> In the result in this case I have decided to allow the cross-examination which Mr. Brennan seeks. I think fairness to both parties in this trial demands it of me and I think that is the ideal which I shall seek because the Crown deserves fair treatment just as does the accused - I am not saying to the same extent, because there are special rules throughout the criminal law for the protection of the accused. But I do not see that there is any rule here compelling me to disallow this cross-examination and I think there is every reason why I should allow it.[31]

One may wonder at the apparent absence of any earlier case law on this point. Presumably in other jurisdictions with corresponding legislation it is not uncommon for accused persons with criminal records to allege in *voir dire* proceedings that confessions have been obtained by police oppression.[32] Perhaps in such cases the Crown has declined to seek leave to cross-examine either under the misapprehension that the equivalent of s.6 does not apply to the *voir dire* because it was thought unfair to the accused. Certainly that accused may, as a result of Minogue C.J.'s ruling, be placed in an invidious position. In order to have the confession excluded, he may, as a practical matter, have to go into the witness-box and there impugn the conduct of the police in obtaining it. He thereby runs the risk of having his previous convictions made known to the judge. This may do him no great harm in a jury trial where the jury, the tribunal of fact, can assess his credibility without the embarrassment of knowledge of what transpired during the *voir dire*. However in Papua New Guinea the situation is quite different because the judge must determine the general issue as well as questions of admissibility of evidence. Of course, as Minogue C.J. pointed out, it is necessary for the judge during the *voir dire* to make some assessment of the accused's credibility before deciding whether his allegations against the police have been sustained.

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31 *William Taupa Tovarula and Ors*. Sup. Ct. (1972) No. 711, 3.

32 Accused persons have generally been deterred from testifying on the voluntariness issue because of fear of cross-examination as to previous convictions. For a discussion of the American cases, see: Meltzer, "Involuntary Confessions: The Allocation of Responsibility between Judge and Jury" 21 *Univ. of Chicago L. Rev.* 317 (1954).

Knowledge of previous convictions may assist in making this assessment. Suppose, however, that the previous convictions were not for offences of dishonesty, such as Minogue C.J. postulated. If for instance, an accused person on his trial for wilful murder gives evidence on the *voir dire* to the effect that a police officer coerced him into confessing, would an application by the Crown to cross-examine as to a previous conviction for wilful murder be granted? Surely even an intimation at that stage of the trial that the accused had been convicted of such an offence would be extremely prejudicial. It is submitted that in these circumstances counsel for the accused would have good grounds for seeking a new trial before another judge.[33]

In a non-jury jurisdiction this problem does not a admit of any easy solution. Two competing considerations are relevant. Firstly the accused's previous convictions, provided they are of a fairly serious character, must always bear on credibility because they suggest that he has an interest in escaping conviction this time, if necessary by making unfounded allegations against the police. Secondly there is a danger that however adept a judge may be in acting as judge at one stage of the trial and jury at another the previous convictions which come to his knowledge when inquiring into the question of admissibility of the confession may prejudice him against the accused on the general issue. The only solution, by no means a perfect one, seems to be to refuse leave to cross-examine as to previous convictions on the *voir dire*. As Minogue C.J. indicated such a rule would put the police at some disadvantage but it would reinforce the policy of the law excluding confessions improperly obtained. The accused would not be deterred from going into the witness box on the *voir dire* by the prospect of having his previous convictions made known to the judge.

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33 See: *Sirakuras* [1964] PNGLR 18. The accused, whom the trial judge, Smithers J. described in his judgement as an "ignorant primitive native" (p. 20), had, while in custody, made a statement to the police which inculpated him in a wilful murder. At his trial in Madang, it was submitted on his behalf that the statement had not been voluntarily made and was therefore inadmissible. The accused was not called on the *voir dire* but Smithers J. still rejected the statement on the ground that the Crown through its witnesses had not proven voluntariness to the requisite degree. If the accused had been called on *voir dire* and cross-examined as to previous convictions it would have become known to the (Footnote 33 continues next page).

IV. *Conclusion*

The case law in this difficult area of criminal procedure is still rather meagre and inconclusive. While the judge in Papua New Guinea continues to exercise the functions of both judge and jury the problems will remain. It is important, however, that the judicial approach to them be consistent. The cases reviewed in this article do show a fair measure of consistency but this may not always be so because the conflicting policy considerations relevant in this context may be weighted differently by different judges.[34] In the writer's view an appropriate weighting would lead to the following conclusions:

> (a) The Crown should not be permitted to ask the accused criminating questions on the *voir dire*.
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> (b) The Crown should not be permitted to prove on the trial any incriminating answers made by the accused on the *voir dire*.
>
> (c) The Crown should not be granted leave to cross-examine the accused on the *voir dire* as to previous convictions.

These propositions are couched in terms of judicial discretion not as exclusionary rules of evidence. It is submitted that only if future cases show a diversity of judicial opinions on these matters would there be a need to give them the force of law by amending the evidence legislation.

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33 (cont.)

judge that the accused had recently been released from the local corrective institution having served a sentence of eight years for another wilful murder. Smithers J. ultimately convicted Sirakuras on other evidence and when informed by the Crown of the previous conviction intimated that if this had become known to him on the *voir dire* he would have directed a re-trial before another judge.

34 Contrast the approaches of Bray C.J. and Chamberlain J. in *Wright* [1969] SASR 256 and the various judges of the Supreme Court of Canada in *De Clera* (1968) 70 DLR (2nd) 530.