1949

*Feb. 7, 8
*Apr. 12

GASTON BOUDREAU.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

*Criminal law—Murder—Evidence—Statements made to police after questioning—Whether made voluntarily—Whether incriminating or exculpatory—Admissibility—Criminal Code s. 259.*

While in custody, on a coroner's warrant, as a material witness, during the investigation of a murder case, appellant made two written statements to the police during the course of questions put to him by them. For the first statement, the usual warning was not given before accused had completed his verbal answers, but it was given before the written statement was signed. This statement contained an account of the movements of the appellant for some days before and after the day of the commission of the crime, which indicated that he could not have been concerned in the crime. It also contained admissions of his intimate relations with the wife of the murdered man. The second statement before which a warning was given, reiterated the substance of the first, but added a complete confession of the commission of the crime by appellant. The trial judge ruled that these statements were admissible in evidence and the majority in the Court of Appeal agreed with him.

*Held:* Estey J. dissenting, that both statements were voluntarily made and that the appeal should be dismissed.

*Held* also, that the first statement was incriminating and not exculpatory (The Chief Justice and Taschereau J. *contra*).

*Held* further, that the dictum in *Gach* v. *The King* [1943] S.C.R. 254 that "when a person has been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence, unless proper caution has been given" was obiter: *Ibrahim* v. *The King* [1914] A.C. 599 and *Prosko* v. *The King* 63 S.C.R. 226 followed. (The Chief Justice and Taschereau J. expressing the opinion that the *Gach* case had no application to the present case as, in their view, the first statement was exculpatory).

*Per* Estey J. (dissenting): The first statement was incriminating and the trial judge misdirected himself to the effect that the statement was exculpatory and not evidence against the accused. That though a warning was given prior to the second statement, it was immediately followed by questions and incidents which were not sufficiently disclosed by the evidence to justify a conclusion that the statement was voluntarily made.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), dismissing

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey and Locke JJ.

(1) 93 C.C.C. 55.

(Bissonnette J.A. dissenting) the appellant's appeal from his conviction, at trial before Coté J. and a jury, on a charge of murder.

*Hon. Lucien Gendron K.C.* for the appellant.

*Nöel Dorion K.C.* for the respondent.

The judgment of the Chief Justice and of Taschereau J. was delivered by

TASCHEREAU, J.:—The appellant Gaston Boudreau was charged with the murder of Joseph Laplante, and on the 26th of September, 1947, he was found guilty and condemned to be hanged. This conviction was upheld by the Court of King's Bench, Province of Quebec (1), Mr. Justice Bissonnette dissenting, on the ground that certain confessions made by the appellant were illegally admitted in evidence.

The main facts leading to these alleged confessions which are impugned, may be briefly stated as follows:

On the morning of May the 29, 1947, the body of Laplante was found on the highway, leading to Lake Castagnier, a small municipality near Amos, Abitibi, P.Q. The police authorities started immediately to investigate, and the Coroner's inquest, originally fixed for the 29th of May, was adjourned *sine die* by Coroner Brousseau until further evidence could be obtained. It was resumed on the 6th of June, 1947.

At first, Constable Lefebvre, Sergeant Dupont, Sergeant Massue, Detective Oggier and Dr. Roussel, legal medico expert for the Provincial Government, who had come from Amos and Montreal to try and solve the mystery of Laplante's death, which was obviously a brutal murder, had but very scant clues leading to the discovery of the author of this crime.

On Sunday, the 1st of June, Lefebvre, Oggier and Dr. Roussel went at Laplante's house where the body was exposed. There, they saw amongst others, Mrs. Laplante and Gaston Boudreau, the appellant in the present case. As Boudreau looked nervous, he was asked by Oggier to follow him, and was brought the same evening to Amos at the police headquarters. He was there put under the

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supervision of the jailer, in the Constable's room, and Sergeant Massue telephoned the Coroner to obtain the necessary authorization to detain him as an important witness. This authorization was given verbally on Sunday night, and the next morning, Massue received by mail a written authorization to detain Boudreau.

On that morning, Massue summoned Boudreau in his office and told him that he was held as an important witness. In view of the fact that Boudreau's friendship with Mrs. Laplante was publicly known, it was decided to ask him a few questions, and on Tuesday evening, at about eight thirty, Massue questioned him on his movements during the week of the murder. Without being warned, Boudreau said that he had left the previous Tuesday to go hunting at a place called Canton Vassal, and that he had taken with him a shot gun. He explained his run in the bush where he had sprung his traps, his return on foot the following Saturday to one Therrien's house, and then to his home in a taxi with one Carpentier. He also gave some information concerning his fire-arms, his cartridges and the result of his hunt. Massue then pursued further his investigation, and asked him about his relations with Mrs. Laplante. Boudreau freely told the circumstances in which he had met her, and the fact unknown to the police, that she was his mistress.

Boudreau was then asked if he was willing to repeat his statement so that it could be taken in writing, and he agreed without hesitation. Mr. Z. Bacon, secretary at the police headquarters, took down word for word Boudreau's statement. As the sheet of paper on which the answers were to be typewritten bore the regular warning, it was read to the accused before anything was committed to writing. Upon completion, the whole document including the warning, was read to the appellant who signed it after having been sworn by a Justice of the Peace.

Oggier continued his investigation. It was discovered that the pellets found in Laplante's skull were BB Gauge, shot very likely from a 12 gauge shot gun, the same calibre as the one found in Aubuchon's house and belonging to Boudreau. The cartridges he had in his house were also BB. This new evidence strengthened the detective's suspicions which at first were very slight, but were, nevertheless

still quite insufficient to charge Boudreau with murder. There was no direct evidence to link him with the commission of the crime.

On the 5th of June, when Oggier returned from Lake Castagnier with Massue, it was decided to call Boudreau back to obtain from him additional information. Massue told him that he was held as an important witness concerning Laplante's death, and *warned* him that he was not obliged to talk, but that if he wished to say anything, it could be used as evidence before the Court. Boudreau then volunteered to give further information. He gave additional details concerning his intimacy with Mrs. Laplante, and while he was talking, Massue left the office to get a glass of water, and the accused spontaneously admitted to Oggier, without any question being put to him: "I may as well tell you, I killed him." Oggier called Massue back, and in the presence of Oggier and Massue Boudreau told the whole story of how he killed Laplante. This statement was typewritten by an employee of the police, and sworn to by Boudreau.

The learned trial judge ruled that these statements were admissible in evidence, and the majority of the Court of Appeal (1) agreed with him.

The law concerning the admissibility of statements made to persons in authority, finds its application only when these statements are of an incriminating nature. The first statement made by the appellant on the 2nd of June to Massue, was not in my opinion of that character, and nothing can be found in it, which directly or indirectly tends to connect the appellant with Laplante's murder. In fact, Boudreau denied all participation in the offence, by telling all that he had done in the course of his hunting trip. His statement was exculpatory. The admission of his intimacy with Mrs. Laplante may at the most constitute a possible motive, but cannot in itself be considered as evidence of guilt. It does not show in the remotest way that the appellant was involved in Laplante's death.

Counsel for the appellant has cited the case of *Gach* v. *The King* (2). I do not think that the present case can be governed by that case, where the accused had made confessions of an incriminating nature. The Court (3)

(1) 93 C.C.C. 55.
(2) [1943] S.C.R. 250.
(3) [1943] S.C.R. 250.

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held that in view of the circumstances revealed by the evidence, the accused was entitled to the same protection, before being questioned by a person in authority, as if he had been in custody.

As to the second statement made on June the 5th, it is said in the dissenting judgment of Mr. Justice Bissonnette, that it was a logical sequence of the first one, and therefore became illegal, notwithstanding the warning by the police officers. With due respect, I do not agree with this contention. I fail to see anything in the first statement that could in any way influence the second one, and be an inducement for Boudreau to make it to the police. Boudreau spoke freely after having been warned, and I have no doubt that it is without fear and without a hope of advantage from the detectives, that he made the minutely detailed recital of this premeditated crime. The spontaneity of that part of the confession, dealing with the actual killing, establishes clearly its voluntary character, and this, with all the other circumstances shown at the trial, leaves no doubt in my mind, that the conclusions reached by the learned trial judge on the "voir-dire", were right.

I would dismiss the appeal.

KERWIN J.:—The first statement has been treated by the majority of the judges in the Courts (1) below as exculpatory and I understand that that is also the view in this Court of my lord the Chief Justice and my brother Taschereau. There is no doubt, however, that the statement affords a possible motive for the murder, and in my opinion that would be sufficient to warrant applying the rule, if it exists, that once a person is under arrest any statement given by him in answer to questions by those in authority is inadmissible unless preceded by a proper warning. It was argued that such a rule was laid down by this Court in *Gach* v. *The King* (2). Mr. Justice Taschereau, who spoke for the majority in that case, is of opinion that the decision does not apply but that is because, in his view, the first statement given by Boudreau was exculpatory. For the reason given, I am, with respect, unable to concur and it therefore becomes necessary to consider the Gach decision.

(1) 93 C.C.C. 55.

(2) [1943] S.C.R. 250.

I believe it is agreed that it was sufficient for the disposition of that appeal (1) to decide that the statement there in issue was given as a result of a threat and that the following statement, at page 254, was therefore unnecessary for the actual decision:—

> There is no doubt that when a person has been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence unless proper caution has been given. This rule which is found in Canadian and British law is based on the sound principle that confessions must be free from fear, and not inspired by a hope of advantage which an accused may expect from a person in authority.

This statement is couched in very broad terms and, if read in its widest sense, would prevent, for instance, the placing in evidence of any incriminating answers to questions put by a police officer to a person arrested at the scene of a crime immediately after its commission. It has been construed to change the law as it was considered to be prior to Gach,—by the Court of Appeal for Saskatchewan in *Rex* v. *Scory* (2), and by the dissenting judge in the Court of Appeal (3) in the present case and is really the basis of the appeal to this Court.

Again with great respect, I think it advisable that it should now be stated clearly what this Court considers the law to be. My view is that it has not been changed from that set out in *Ibrahim* v. *Rex* (4) and *Rex* v. *Prosko* (5). The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases, an important one.

In the present case the accused gave a second statement in which is repeated the admissions of his intimacy with the deceased's wife contained in the first statement but, in addition, contained an admission of the slaying. The second statement was made after a proper warning. The

(1) [1943] S.C.R. 250.
(2) 83 C.C.C. 306.
(3) 93 C.C.C. 55.
(4) [1914] A.C. 599.
(5) 63 S.C.R. 226.

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trial judge admitted both in evidence and notwithstanding that he admitted the first because of his view that it was exculpatory, I am not prepared to disagree with his conclusion as to either. The police were not compelled to tell the accused specifically that notwithstanding his first statement he was not obliged to make another, and the first contains nothing that is not incorporated in the latter.

The appeal should be dismissed.

RAND, J.:—The appellant Boudreau was convicted of murder and the point of dissent on which he comes to this Court is the improper reception of two written statements, the first containing an admission of intimacy with the wife of the murdered man and the second, in addition to a repetition and an elaboration of the first admission, a full confession of the deed itself. At the time of making them he was being held under a coroner's warrant as a material witness. There was no more than a suspicion against him when in the first conversation with police officers in which questions were asked him he purported to detail his movements on the two or three days before the death and admitted the intimacy. Having consented to make the statement in writing, a justice of the peace was summoned and the statement made out, signed and sworn to by him. Before the signing, the justice read out the words of the usual warning which happened to be printed across the top of the paper. Two days later, after a formal warning, a further discussion took place with two officers and while one of them was momentarily out of the room and after a reference had been made to his mother, Boudreau suddenly burst out with the words "j'aime autant vous le dire: c'est moi qui l'a tué." This was followed by details. He then, as in the first case, consented to have the statement put in writing, and a like course was followed as before.

The objection is that the first oral admission, without warning, of what, in my opinion, was, in the circumstances, an incriminating fact, nullified both statements: that, having committed himself so far, what followed was its compulsive sequence, unless, which was not the case, the warning on the second occasion had so specifically dealt with the previous statement as to efface any effect that might then have remained on his mind.

In support of this position, *Rex* v. *Gach* (1), is cited. Mr. Gendron argued that what was formerly a rule of practice under which the trial judge could and almost invariably did but was not bound to rule out confessions resulting from questions put to a person under arrest by one in authority without a warning has, by that decision, been converted into an inflexible rule of law; and it is pointed out that that view of it has been taken by the Court of Appeal for Saskatchewan in *Rex* v. *Scory* (2). The particular language from which this conclusion is drawn is that of Taschereau J. in the following paragraph:—

> There is no doubt that when a person has been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence unless proper caution has been given. This rule which is found in Canadian and British law is based on the sound principle that confessions must be free from fear, and not inspired by a hope of advantage which an accused may expect from a person in authority.

As the reasons of both Kerwin, J. and Taschereau, J. show, there was in the case clear evidence of a threat on the part of the officer, and the facts which might have called for such an examination of the rule as is suggested were not present. At the most, then, it could be only a dictum: but I am bound to say that I cannot take the language as intended to do more than to state the existing rule. It is, therefore, I think, a misinterpretation of this decision to treat it as having effected a significant change in the character of the rule, and the point as put to us by Mr. Gendron fails.

The cases of *Ibrahim* v. *Rex* (3), *Rex* v. *Voisin* (4) and *Rex* v. *Prosko* (5) lay it down that the fundamental question is whether the statement is voluntary. No doubt arrest and the presence of officers tend to arouse apprehension which a warning may or may not suffice to remove, and the rule is directed against the danger of improperly instigated or induced or coerced admissions. It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule. What the statement should be is that of a man free in volition from the compulsions or inducements of authority and what is sought is assurance that that is the

(1) [1943] S.C.R. 250.
(2) 83 C.C.C. 306.
(3) [1914] A.C. 599.
(4) (1918) 1 K.B. 531.
(5) 63 S.C.R. 226.

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case. The underlying and controlling question then remains: is the statement freely and voluntarily made? Here the trial judge found that it was. It would be a serious error to place the ordinary modes of investigation of crime in a strait jacket of artificial rules; and the true protection against improper interrogation or any kind of pressure or inducement is to leave the broad question to the court. Rigid formulas can be both meaningless to the weakling and absurd to the sophisticated or hardened criminal; and to introduce a new rite as an inflexible preliminary condition would serve no genuine interest of the accused and but add an unreal formalism to that vital branch of the administration of justice.

I do not mean to imply any right on the part of officers to interrogate or to give countenance or approval to the practice; I leave it as it is, a circumstance frequently presented to courts which is balanced between a virtually inevitable tendency and the danger of abuse.

The appeal must therefore be dismissed.

The judgment of Kellock and Locke JJ. was delivered by

KELLOCK, J.:—This appeal comes to this court upon the basis of the dissenting judgment of Bissonnette J. in the court below (1), which affirmed the conviction of the appellant by the Superior Court on a charge of murder. The questions raised involve the admissibility of two statements made by the appellant to police officers during the course of questions put to him by them on two different occasions. On the first occasion the usual warning was not given until the appellant had completed his verbal answers but it was given before his statement was committed to writing and signed by him. This statement contained a circumstantial account of the movements of the appellant for some days before and after the day upon which the crime was committed, which indicated that he could not have been concerned in the crime. It also contained admissions however, with respect to relations existing between the appellant and the wife of the murdered man.

The second statement reiterated the substance of the first, but added a complete and circumstantial account of the commission of the crime by the appellant. Mr. Justice

(1) 93 C.C.C. 55.

Bissonnette treated the first statement as having been made without a warning and he considered it inadmissible on the ground that it had been laid down by this court in the case of *Rex* v. *Gach* (1), that lack of warning in any case rendered a statement inadmissible as a matter of law. He was also of the opinion that the inadmissibility of the first statement rendered the second inadmissible, as in his view, the appellant ought to have been pointedly warned that notwithstanding he had made the first statement he need not say anything. The question is therefore raised as to whether or not, assuming the warning with respect to the first statement to have been insufficient, either statement was thereby rendered inadmissible as a matter of law, even although the learned trial judge, upon a consideration of all the relevant circumstances, was of opinion that in each instance the appellant had spoken voluntarily.

The governing principle is stated by Viscount Sumner in *Ibrahim* v. *The King* (2) as follows:

> It has long been established as a postive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *Regina* v. *Thompson* (3) . . .

At page 613 Viscount Sumner refers to the decision of the Court of Criminal Appeal in England in *Rex* v. *Knight and Thayre* (4), and quotes from the judgment of Channell J. at page 713, where the latter said with respect to answers to questions put by a constable after arresting:

> When he has taken anyone into custody . . . he ought not to question the prisoner . . . I am not aware of any distinct rule of evidence, that if such improper questions are asked the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answers to be given in evidence . . .

On the same page Viscount Sumner refers to an excerpt from the judgment of Channell J. in *Rex* v. *Boot and Jones* (5), where the latter said at p. 179:

> the moment you have decided to charge him and practically got him into custody, then, inasmuch as a judge even cannot ask a question, or a magistrate, it is ridiculous to suppose that a policeman can. But there is

(1) [1943] S.C.R. 250.
(2) [1914] A.C. 599 at 609.
(3) (1893) 2 Q.B. 12.
(4) (1905) 20 Cox C.C. 711.
(5) (1910) 5 Cr. App. R. 177.

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no actual authority yet that if a policeman does ask a question it is inadmissible; what happens is that the judge says it is not advisable to press the matter.

Viscount Sumner concludes:

And of this Darling J., delivering the judgment of the Court of Criminal Appeal observes the "principle was put very clearly by Channell J."

Lord Sumner at p. 614 refers to this view of the law as "a probable opinion of the present law, if it is not actually the better opinion", although their Lordships say that the final declaration as to the law on the subject should be left to the "revising functions of a general Court of Criminal Appeal."

In *Rex v. Colpus* (1), a decision of the Court of Criminal Appeal in England, in delivering the judgment of that court Viscount Reading C.J., said at 579:

We do not propose to say more in this case than that the principle laid down in *Reg.* v. *Thompson* (2) and approved in *Ibrahim* v. *Rex* (3) is the principle which is to be applied in the present case.

The case before that court involved statements made by the appellants before a military court of inquiry. These were admitted although there had been no warning, the court being of opinion that on all the evidence they were voluntary statements.

In the following year in *The King* v. *Voisin* (4), again a decision of the Court of Criminal Appeal, the appellant, in response to a request by the police, went to a police station where he made a statement which was taken down in writing. He was then asked whether he had any objection to writing down certain words, and upon his stating he had no objection, he wrote them. He was not cautioned at any time. It was contended at the trial that the words which he had written were inadmissible on the ground that the writing was obtained by the police without having first cautioned the appellant and while he was in custody. The writing was, however, admitted. The court followed the judgment of Lord Sumner in *Ibrahim's* case (5). At page 558 A. T. Lawrence J. said:

The question as to whether a person has been duly cautioned before the statement was made is one of the circumstances that must be taken

(1) (1917) 1 K.B. 574.
(2) (1893) 2 Q.B. 12.
(3) [1914] A.C. 599.
(4) (1918) 1 K.B. 531.
(5) [1914] A.C. 599.

into consideration, but this is a circumstance upon which the judge should exercise his discretion. It cannot be said as a matter of law that the absence of a caution makes the statement inadmissible.

I do not think it possible to regard this case as other than a case of a statement obtained from a person in custody as the result of questioning by the police and it was so dealt with by the court. There is, in my opinion, no room for distinction whether there be one or more than one question asked.

In 1922 the question came before this court in *Prosko* v. *The King* (1). In that case the appellant was in the custody of two American detectives for the purpose of being brought before the American Immigration authorities. A warrant for his arrest on a charge of murder had been issued in this country.

The appellant was told by the immigration officers that they were going to take up his case with the United States Immigration officials and have him deported to Canada, whereupon he said, "I am as good as dead if you send me there." Upon the officers asking "why", he gave the statement which was in question. No warning had been given to him. The Chief Justice, Idington, Anglin and Brodeur, JJ., followed and applied the principle laid down in *Ibrahim* v. *The King* (2), *The King* v. *Colpus* (3) and *The King* v. *Voisin* (4). In this case but a single question was asked. The case was treated by all the members of the court as one of answers made to questions by persons in authority without a warning having been given. It was held that the evidence was admissible. The court considered that the basic question to be answered was as to whether or not the statement had been voluntarily made. At page 237 Anglin J. said:

> The two detectives were persons in authority; the accused was in my opinion in the same plight as if in custody in extradition proceedings under a warrant charging him with murder. No warning whatever was given to him. While these facts do not in themselves suffice to exclude the admissions, as Duff J. appears to have held in *The King* v. *Kay* (5), they are undoubtedly circumstances which require that the evidence tendered to establish their voluntary character should be closely scrutinized.

In *Gach* v. *The King* (6), the appellant was charged with having unlawfully received certain ration books, knowing them to have been stolen. Certain police officers

(1) 63 S.C.R. 226.
(2) [1914] A.C. 599.
(3) (1917) 1 K.B. 574.
(4) (1918) 1 K.B. 531.
(5) (1904) 9 Can. Cr. C. 403.
(6) [1943] S.C.R. 250.

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called upon the appellant and told him that one Nagurski had stated that he had sold ration books to the appellant, that he could be prosecuted, and that in any event it would be better for him to hand them over. At the end of the conversation they told him that he was to accompany them to the police barracks to talk to an inspector. The inspector there told the appellant that he would, in all probability, be charged. He was then asked certain questions and made certain answers. No warning was given. The admissibility of these answers was challenged.

Kerwin J., who delivered the judgment of himself and Duff C.J., referred to *Ibrahim* v. *The King* (1) and *Sankey* v. *The King* (2), and held the evidence inadmissible as having been made after appellant had been told by the police that it would be better if he made a statement.

The judgment of Taschereau J., with whom Rinfret J., as he then was, and Hudson J. agreed, reached the same result. The judgment of the majority is based upon the judgments in *The Queen* v. *Thompson* (3), *Rex* v. *Knight and Thayre* (4), *Lewis* v. *Harris* (5), and *Rex* v. *Crowe and Myerscough* (6).

As already mentioned, the first two of the above four authorities are referred to by Viscount Sumner in *Ibrahim's* (1) case. In *The Queen* v. *Thompson* (3) there is no suggestion that any warning had been given. The statement, however, was not rejected on that ground but on the ground that the Crown had not satisfied the burden resting on it of establishing that the statement had been made voluntarily. That is all that the case is cited for by Taschereau J. Had the mere lack of warning been regarded as rendering the statement inadmissible, the strong court which decided *The Queen* v. *Thompson* (3), would undoubtedly have said so. They did not.

Again in *Rex* v. *Knight and Thayre* (4), the statement which the Crown tendered had in fact been preceded by a warning. It is not therefore in itself a decision as to

(1) [1914] A.C. 599.
(2) [1927] S.C.R. 436.
(3) (1893) 2 Q.B. 12.
(4) (1905) 20 Cox C.C. 711.
(5) (1913) 24 Cox 66.
(6) (1917) 81 J.P. 288.

admissibility or inadmissibilty where no warning is given. Taschereau J. quotes from the reasons for judgment of Channell J. at p. 713, including:

> When he has taken anyone into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. A magistrate or judge cannot do it, and a police officer certainly has no more right to do so.

Channell J. immediately adds, however, what is included in that which is quoted by Lord Sumner in *Ibrahim's* (1) case:

> I am not aware of any distinct rule of evidence, that if such improper questions are asked the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answer to be given in evidence and in my opinion that is the right course to pursue.

That is not to say that the rule is that all such answers are inadmissible, but that as a matter of discretion the judge may refuse to admit. That this is the correct view of what the learned judge says is shown by that part of his direction in *Rex* v. *Booth and Jones* (2), quoted by Lord Sumner in Ibrahim's case at p. 613:

> . . . the moment you have decided to charge him and practically got him into custody, then, inasmuch as a judge even cannot ask a question, or a magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet that if a policeman does ask a question, it is inadmissible—what happens is that the judge says it is not admissible to press the matter.

In *Rex* v. *Booth and Jones* (2), as in *Rex* v. *Knight and Thayre* (3), the statement tendered had in fact been preceded by a warning.

In *Lewis* v. *Harris* (4), the headnote to which is quoted by Taschereau J., a constable had observed a child coming out of a store on a Sunday, and finding out from her that she had made a purchase of candy, he went back into the store with her and asked the proprietor certain questions, the admissibility of which was in question on the appeal. In that case the fact was that the appellant was not in custody and the constable had not made up his mind to lay a charge. The case is therefore not in *pari materia* with the case at bar. In the course of his judgment Darling J. said at p. 71:

> A constable ought not, if he has made up his mind that whatever the answer may be he will arrest the person to whom he is speaking, to

(1) [1914] A.C. 599.
(2) (1910) 5 Cr. App. R. 177 at 179.
(3) (1905) 20 Cox 711.
(4) (1913) 24 Cox 66.

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ask that person an incriminating question. The law does not say that the answer must be excluded and that it is not evidence, but it has been frequently held that if that rule is infringed then the judge in his discretion may reject the evidence, and it is tolerably certain that if there is any sign that the evidence was unfairly obtained he would reject it. The true rule is that nothing must be done to hold out an inducement to a person, and no threat must be used to induce a person, to make an incriminating statement . . .

The last case to which Taschereau J. refers is *Rex* v. *Crowe and Myerscough* (1), a decision of Sankey J., as he then was. The question involved was as to the admissibility of a statement in answer to questions put by the police made by the appellant Myerscough before arrest and before the police had determined to arrest her. After she had made the answers orally, the appellant signed a written statement in which she said that "This statement has been read over to me. It is made quite voluntarily and is true". Sankey J. admitted the statement on the grounds, (1) that it had been made when she was not under arrest; (2) before it had been decided to arrest her; and (3) that she herself had said it had been made voluntarily. In the course of his judgment Sankey J. said what is quoted by Taschereau J., viz:

If a police officer has determined to effect an arrest, or if the person is in custody, then he should ask no questions which will in any way tend to prove the guilt of such person from his own mouth.

It is to be noted that Sankey J. does not say that if this rule is disobeyed and a statement is made, it is inadmissible as a matter of law.

It is clear therefore that in none of the cases referred to in the judgment of the majority in *Gach's* (2) case, is it laid down that a statement made by a person in custody in answer to questions but by a person in authority, is, as a matter of law inadmissible. On the contrary, the question is in all cases as to whether the Crown, as stated in *Rev. Thompson, supra,* has satisfied the onus that the statement has in fact been made voluntarily. While there may be expressions in the judgment of the majority in *Gach's* case, taken apart from the context, which might appear to extend the decisions, as pointed out by Atkinson J. in *Lorentzen* v. *Lydden & Co.* (3):

(1) (1917) 81 J.P. 288.
(2) [1943] S.C.R. 250.
(3) (1942) 2 K.B. 202 at 210.

Again and again judges have been told by the Court of Appeal and the House of Lords that words used in previous cases must be interpreted with reference to the facts before the court and the issues with which it was dealing.

In Gach's case it is plain from the judgment of the majority that the statement sought to be used in evidence had been made by the appellant after the officers had said to him "that it would be better for him to hand them over." In these circumstances all the members of the court were of opinion that it could not be said that the statement was voluntary.

I do not consider therefore that it can be said that anything said in *Gach's* (1) case can be taken as inconsistent with the previous decision in *Prosko's* (2) case by which the court was bound, even though it could be said that the court was not also bound to follow what was termed by Lord Sumner in *Ibrahim's* (3) case as a "probable opinion of the present law, if it is not actually the better opinion."

In the case at bar the second statement, which included the substance of the first, was held by the trial judge to have been voluntarily made. I think therefore that the appeal must be dismissed.

ESTEY, J. (dissenting):—The appellant's conviction for the murder of Joseph Laplante was affirmed by a majority in the Court of King's Bench (Appeal Side) in Quebec (4). Mr. Justice Bissonnette dissented on the bases as set out in the formal judgment:

1. L'illégalité dans l'obtention et la production de la première confession;

2. L'illégalité dans l'obtention et la production de la deuxième confession, particuliérement en raison de l'illégalité de la première;

3. L'inadmissibilité de la preuve des aveux ou confessions.

Mr. Justice Bissonnette was of the opinion that the first statement or confession was not exculpatory as the learned trial judge has construed it, and because no warning had been given it was in his opinion improperly admitted. He summarized his conclusions relative to the second statement under three headings, as follows:

Le premier, c'est que j'estime que la mise en garde sur la deuxième confession, même si elle a été faite, ne constituait pas, sous les circonstances de cette cause, un avertissement suffisant, car ce jeune homme ne

(1) [1943] S.C.R. 250.
(2) 63 S.C.R. 226.
(3) [1914] A.C. 599.
(4) 93 C.C.C. 55.

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pouvait alors ignorer qu'il avait déjà fait certains aveux et que tout ce qu'on lui demandait ce soir-là, c'était de circonstancier ce qu'il avait déjà dit. Il s'attache donc une présomption très forte que l'appelant pouvait se croire tenu, obligé, contraint de parler.

Le deuxième motif c'est que les deux confessions sont si intimement liées, que l'exclusion de l'une entraîne celle de l'autre, car le jury ne pouvait certes pas se détacher complètement de l'impression que la lecture de la première pouvait avoir dans son esprit, dans la considération du mobile du crime.

Comme troisième motif, je dirai, à la suite de M. le juge Anglin dans l'affaire Sankey, que si l'interrogatoire que l'on fait subir à un prévenu n'est pas, per se, illégal, il faut, d'autre part, bien s'assurer que la Couronne s'est acquittée de son obligation de prouver que les aveux sont libres, nullement entachés d'une contrainte physique ou morale quelconque. Et cette preuve, ajoutait le juge en chef Anglin, ne peut qu'exceptionnellement ressortir du seul fait du serment des officiers de police que l'inculpé a parlé librement.

The murder occurred Thursday, May 29, 1947, at Lac Castagnier about twenty-four miles from Amos in the Province of Quebec.

Detective Oggier arrived at Amos on Saturday, May 31st. He acquainted himself with the information already gathered by the Provincial Police and on Sunday he and Constable Lefebvre proceeded to Lac Castagnier. At Mrs. Laplante's they found a number of people, including Boudreau. Detective Oggier desired to question Boudreau "sur ses allées et venues," and "parce que j'avais des soupçons," and requested him to accompany them to Amos. At Amos the coroner was communicated with and Boudreau detained at the jail. On Monday morning, June 2nd, Detective-Sergeant Massue had Boudreau brought into his office and there informed him that he was held as a material witness. Boudreau said nothing when so informed and was taken back into custody. In fact no questions were asked and no statement made by Boudreau until Tuesday night, the reason for which is explained by Detective Oggier in the course of his evidence:

Q. Vous avez pas jugé à propos de lui parler de ses allées et venues?
R. Non, mon enquête était pas complète.
Q. Pourquoi pas commencer à le questionner?
R. J'avais pas assez d'informations sur la cause et j'ai cru bon de continuer mon enquête.

Detective Oggier continued his inquiries at Lac Castagnier and returned to Amos on Tuesday, June 3rd. That evening at about 8.30 Boudreau was brought into the office of Detective-Sergeant Massue where Massue and Oggier questioned him. No warning was given and the

conversation lasted about an hour. The statements made by Boudreau were in reply to questions, for the most part by Detective-Sergeant Massue. Boudreau there admitted ownership of a ·12 gun as well as a revolver and told the police that he had left his home about midday on Tuesday, May 27th, to go into the woods to check over his traps, and returned on Saturday, when he heard of the murder of Laplante. He also stated that he had visited and worked at Laplante's place. When questioned he admitted intimate relations with Mrs. Laplante but when pressed with regard thereto "il paraissait un peu gêné."

The officers acknowledged that his information relative to his relations with Mrs. Laplante, apart from some details, but corroborated that which they had already received. In fact as regards the entire interview Oggier deposed that they had received no new information of consequence but their suspicions were strengthened. As yet, however, they concluded that they did not have sufficient to justify the laying of an information and complaint.

Boudreau, after making these verbal statements to the officers, consented to make a statement in writing. Bacon, the secretary of the provincial police, was called to take down the statement and when completed Tessier, Deputy Prothonotary, was called. He ascertained that Boudreau could read, handed to him a copy of the statement which he followed as Tessier read it aloud. Boudreau thereafter signed it and pledged his oath thereto before Tessier.

Detective Oggier returned on Wednesday and Thursday to Lac Castagnier where he continued his investigation and returned again to Amos Thursday evening about 8.00 or 8.30. He and Detective-Sergeant Massue had further conversation and decided to again question Boudreau. Oggier's own explanation is as follows:

R. On a décidé tous les deux ensemble. J'ai rencontré le sergent Massue à son bureau et je lui ai fait part de mon enquête additionnelle au Lac Castagnier et on a décidé de le faire venir, de le mettre sur ses gardes et de voir s'il était décidé de nous donner d'autres informations.

D. Vous croyiez avoir une preuve contre lui et vous vouliez avoir une déclaration de lui?

R. Lui, parce que je voyais que sa premiére déclaration était pas complète.

Boudreau was brought into Massue's office at about 11.00 o'clock that night and there remained until about 1.00 o'clock in the morning. On this occasion prior to any

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questions being asked Massue warned Boudreau. As to why the warning was given Massue deposed: "Parce que nous étions plus convaincus que le mardi soir." Immediately he had given the warning Massue asked the appellant "s'il avait des informations nouvelles à nous donner." Oggier deposed: "Il s'est assis et il a pensé et il a commencé à conter la même histoire que la fois d'avant." He also deposed: "Le sergent Massue a posé plusieurs questions concernant les armes à feu et madame Laplante." The appellant's gun used in committing the murder, his revolver and some cartridges were shown to him during this interview. The sack and the box found near the scene of the murder may or may not have been shown to him. It was at this interview that Boudreau stated: "Messieurs, vous le savez pas combien que j'aime cette femme-là." At some time during the interview the appellant became and remained very nervous. After about half an hour Massue left his office to obtain a glass of water. As to what happened in his absence Oggier deposed:

> Je lui ai dit que j'avais vu son pére et sa mère et là il a dit: "J'aime autant vous le dire, c'est moi qui l'a tué." J'ai lâché un cri et j'ai dit: "Viens t'en de suite."

In reply to their further questions Boudreau gave them the details of the murder and consented to give a written statement. Then, as on Tuesday evening, Bacon was called, later Tessier, before whom the statement was signed and appellant pledged his oath thereto.

The learned trial judge admitted the first statement in evidence because, in his opinion, it did not implicate the appellant but was rather exculpatory in character. It did contain an alibi and an admission that appellant owned a ·12 gun. The greater part, however, described his relations with Mrs. Laplante, from which the jury might well find the motive that prompted the murder. In this aspect the statement implicated the appellant in the commission of the offence.

> If you have acts seriously tending, when reasonably viewed, to establish motive for the commission of a crime, then there can be no doubt that such evidence is admissible, not merely to prove intent, but to prove the fact as well. Ped Duff, C.J. in *The King* v. *Barbour* (1).

See also Lord Atkinson in *Rex* v. *Ball* (2).

(1) [1938] S.C.R. 465 at 469. (2) [1911] A.C. 47.

Then when both statements are read together the alibi is but a contradiction of his subsequent confession and to that extent is evidence that would be prejudicial to the appellant should any question of credibility arise in the mind of the jury. The learned trial judge, with respect, misdirected himself as to the significance of this statement as evidence against the appellant.

On Thursday evening Massue and Oggier again had the appellant, who was still under arrest, brought into the former's office, ". . . de voir s'il était décidé de nous donner d'autres informations . . . parce que je voyais que sa première déclaration était pas complète."

The important issue the learned trial judge had to determine was whether the confession "J'aime autant vous le dire, c'est moi qui l'a tué," made to Oggier was free and voluntary within the meaning of the authorities. These words are not in the written statement that followed. It is, however, what led up to the making of this confession that is vital in determining the issue, was it freely and voluntarily made. If in determining whether a confession is freely and voluntarily made the trial judge does not misdirect himself in law his finding should be accepted by an Appellate Court. It appears that in this case the learned trial judge, apart from his misdirection with regard to the first statement already dealt with, has misdirected himself in not considering the warning as given in relation to all the circumstances leading up to the making of this confession, including those before as well as those after the warning was given, and particularly as to whether, under all the circumstances, the effect of the warning as given had not been destroyed. It is the sufficiency of the warning under all the circumstances, the association of or connection between the two statements and the effect of the questions asked that are raised in the dissenting opinion of Mr. Justice Bissonnette.

The oft-quoted statement of the law by Lord Sumner in *Ibraham* v. *Rex* (1), reads as follows:

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

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

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In the *Ibrahim* case the accused was in custody when Major Barrett came up to him and without any thought of a prosecution asked, "Why have you done such a senseless act?" to which the accused replied, "some three or four days he has been abusing me; without a doubt I killed him." Nothing more was said and no warning or caution had been given. This confession was held to have been freely and voluntarily made and therefore admissible. In this connection it is important to observe the remarks of Lord Sumner relative to the question as asked:

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

In *Rex* v. *Voisin* (1), no warning was given and yet the evidence was admissible. There the murdered party had not been identified. The police had a parcel containing a portion of the remains on which appeared the words "Bladie Belgiam". Several persons, including the accused, were held for questioning. At the request of the police the accused wrote the words "Bladie Belgiam" in handwriting that resembled and spelling identical with that on the parcel. Lawrence, J. at p. 94 stated:

> In this case the appellant wrote these words quite voluntarily. The mere facts that they were police officers, or that the words were written at their request, or that he was being detained at Bow Street do not make the writing inadmissible in evidence . . . if the writing had turned out other than it did and other circumstances had not subsequently happened it is certain that he, like others who were similarly detained, would have been discharged.

In *Prosko* v. *The King* (2), the accused was held in custody by the United States immigration officials who explained to the accused that they were taking proceedings for his deportation to Canada. The accused then said, "I am as good as dead if you send me over there." A constable asked why and the accused in the course of his explanation included the confession tendered and admitted at his trial. No warning was given and yet the statement was held to be freely and voluntarily made and admissible in evidence.

These cases are illustrative of the principle that the statement must in every case be voluntary. The mere fact

(1) (1918) 13 Cr. App. R. 89. (2) 63 S.C.R. 226.

that the confession was made by one in custody in response to a question by one in authority without a warning given does not make it inadmissible.

Then there are the cases such as *Rex* v. *Knight & Thayre* (1), where a detective after warning the accused questioned him for nearly three hours. Throughout the first two hours the accused denied any knowledge of the fraud but during the last hour made the confession tendered as evidence. Channell, J. stated, at p. 714:

> The questioning was continued for a very long period, the man's denials were not accepted, and the impression conveyed by Shinner to the prisoner's mind may well have been this: "You will have to tell me that you did this thing, because I shall not let you go till you do so." This certainly cannot be said to be making a statement voluntarily. It may well be that an admission made immediately after a caution had been given by the person in authority would be admissible, but it does not follow that a suspended person can be cross-examined until the person putting the questions is satisfied.

These cases emphasize that whether the warning has or has not been given it must be determined under all the circumstances of each case if in fact the statement has been freely and voluntarily made.

There has developed a rule of practice that when the police or others in authority have either arrested the accused or made up their minds that he is the party whom they will prosecute then before being questioned he should be cautioned or warned in a manner that will explain his position much as a justice of the peace or magistrate does to an accused at the conclusion of the Crown's evidence at a preliminary inquiry under sec. 684(2). In *Gach* v. *The King* (2), it was the view of the majority of this Court that the warning under the circumstances of that case should have been given. The general language used has been construed to effect a change in the law. *Rex* v. *Scory* (3). The general language construed as effecting a change in the law was unnecessary to that decision. Moreover, that case does not purport to overrule *Prosko* v. *The King, supra,* nor any of the cases in which a statement has been received as voluntary although no warning had been given, nor does it purport to hold that a statement should be held to be voluntary where the warning has been given. In each case the confession must be affirmatively proven

(1) (1905) 20 Cox Cr. C. 711.
(2) [1943] S.C.R. 250.
(3) 83 C.C.C. 306.

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by the Crown to have been freely and voluntarily made before it can be received in evidence. The fact a warning has been given as well as its content is an important circumstance to be considered. *The Queen* v. *Thompson* (1).

The circumstances from the outset pointed to Boudreau and, as the police stated, caused them to be suspicious that he had committed the murder. He was taken into custody on Sunday but not questioned until Tuesday evening, when in reply to their questions he explained that at the time of the murder he was in the woods caring for his traps and did not hear of Laplante's death until he returned Saturday morning. He admitted ownership of a ·12 gun and his relations with Mrs. Laplante. The following Thursday evening the appellant was again brought into Massue's office to see if he had decided to give them further information and because, as Oggier stated, he did not think his first statement was complete.

The events of Thursday evening in these circumstances cannot be segregated from those of Tuesday evening. The questions asked on Tuesday evening, his alibi, his admission to ownership of a ·12 gun and his relations with Mrs. Laplante, the reasons why he was again questioned on Thursday evening, as well as the questions asked, and all the incidents of that evening are important factors. At the outset Thursday evening appellant was warned and immediately asked by Massue the question already stated, "s'il avait des informations nouvelles à nous donner," which directed the appellant's mind at once to what he had said Tuesday evening. Then what is of the greatest importance in this issue—apart from this first question, the showing of the equipment used in the commission of the murder to the appellant, the reference to his parents, the fact that other questions relative to the gun and his relations with Mrs. Laplante were asked, and the nervous condition of the appellant—is the evidence does not disclose what further questions were asked or what transpired in that office immediately prior to the appellant's confession. The events prior to and of that evening, including the actual words of the confession, "J'aime autant vous le dire, c'est moi qui l'a tué," were important factors in the circumstances.

(1) (1893) 2 Q.B. 12.

The passage already quoted by Lord Sumner in the *Ibrahim* case is an indication of the importance of the nature and character of the actual questions asked. The three authorities, *Ibrahim, Voisin* and *Prosko, supra,* as well as *Sankey* v. *The King* (1), all emphasize the importance of considering the details leading up to a confession.

I do not subscribe to the view pressed by counsel for the appellant that the warning necessarily should have included such words as would have informed the appellant that, notwithstanding that he had already made one statement, no matter what it contained he need not now make another or any statement. Had such words been included they, of course, would have been a factor. It is not, however, desirable that separate and distinct requirements should be specified designed to cover specific situations; rather the issue to be determined should remain in all cases, was the confession freely and voluntarily made. The existence of a previous statement and the circumstances under which it had been made may well be important in determining the issue in a particular case. It was important here because the same officers were present on each occasion. Immediately the warning was given the question asked directed the appellant's attention to his previous statement and appellant himself began by repeating the same history he had related on Tuesday evening. It was from this beginning on Thursday evening that events led up to the confession. A warning under such circumstances, when already he had given information in reply to questions and when immediately after the warning he is further questioned by the same parties in a manner that directed his mind to the information already given, is quite different in its effect from a warning given before any questions are asked.

The events of the two evenings upon all the facts of this case were intimately associated by the officers themselves as well as by the appellant and cannot be separated in considering the admissibility of the statements made on these respective occasions. The courts have under such circumstances always insisted that such confessions be

(1) [1927] S.C.R. 436.

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received with care and caution. The statement of Chief Justice Anglin in *Sankey* v. *The King, supra,* at p. 441, is appropriate:

> It should always be borne in mind that while, on the one hand, questioning of the accused by the police, if properly conducted and after warning duly given, will not *per se* render his statement inadmissible, on the other hand, the burden of establishing to the satisfaction of the court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown. *The King* v. *Bellos* (1); *Prosko* v. *The King* (2). That burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer, who obtained it, that it was made freely and voluntarily.

The learned trial judge's misdirection relative to the first statement caused him to eliminate and not to consider what transpired prior to the warning on Thursday evening. That which took place after the warning should have been placed before the learned trial judge in greater detail. As Chief Justice Anglin stated in *Sankey* v. *The King, supra,* at p. 441:

> We think that the police officer who obtained that statement should have fully disclosed all that took place on each of the occasions when he "interviewed" the prisoner . . .

The learned trial judge in proceeding to find that the Crown had discharged the onus of proof and established that the statement was freely and voluntarily made without these further details, in particular the questions asked, the incidents surrounding the showing of the equipment used in the commission of the murder, as well as all the other incidents of that half hour, constituted a failure to direct himself as to that caution and care with which evidence in such cases should be scrutinized.

The appeal should be allowed and a new trial directed.

*Appeal dismissed.*

Solicitors for the appellant: *Gendron* and *Gauthier.*

Solicitor for the respondent: *Noël Dorion.*

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(1) [1927] S.C.R. 258. (2) 63 S.C.R. 226.