Unid. V – Confissão e Chamamento do co-réu

Facultativa:
MIRFIELD, Peter. *Silence, confessions and improperly obtained evidence*, Oxford, Clarendon, 2003, p.52-64.

V

Silence, Confessions and Improperly Obtained Evidence

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CLARENDON PRESS · OXFORD

Thus, the judge is free to 'trump' the defence where the defence has not taken the admissibility point. This is a rather unlikely outcome, except, perhaps, in cases of accused persons not legally represented. It follows that subsection (3) has particular significance for summary trials.

It would seem quite clear, in principle, that the voluntariness of the confession, as opposed to its truthfulness, is not an issue for the trier of fact. Of course, evidence of the circumstances in which the confession was made may go to the former issue as well as to the latter. Hence, it is open to the accused to cross-examine before the jury witnesses who gave evidence on the *voir dire*.[1] Equally, the accused himself is entitled to give evidence before them about the circumstances in which the confession came to be made. It by no means follows, as the Court of Criminal Appeal held in *Bass*,[2] that the jury should be directed by the judge that, if not themselves satisfied that the confession was made voluntarily, they should disregard it. There seems to be no good reason for the accused to have two bites of the cherry in relation to the issue of admissibility. Fortunately, the law does not now seem to be as stated in *Bass*. There are five pre-Act decisions, two in the Privy Council and three in the Court of Appeal,[3] which expressly or impliedly reject the *Bass* view. Their effect is that the jury should be directed to consider the evidence of the circumstances in which the confession[4] was made in deciding upon the weight and value to be attached to that confession. In other words, the jury may perfectly properly convict on the basis of a confession they believe to have been acquired by, say, oppression, as long as they believe it to be true. None of this powerful authority has been called into question in any reported decision under the 1984 Act,[5] and it seems clear that the law, in this respect, remains unaltered.

The Meaning of 'Confession'

Section 76(2) and (3) are both predicated upon the item of evidence in question being a 'confession'. Section 82(1) defines that term to *include* 'any statement wholly or partly adverse to the person who made it . . . whether made in words or otherwise'. It is to be noted that this definition is not, on the face of it at least, exclusive. The two key phrases are 'wholly or partly adverse' and 'made in words

[1] See *Murray* [1951] 1 KB 391.

[2] See [1953] 1 QB 680, at 684–5. A similar view was taken in a number of cases in the late 1950s and early 1960s, on which see MacKenna [1967] Crim.LR 336.

[3] *Chan Wei Keung* [1967] 2 AC 160; *Ragbo Prasad* [1981] 1 WLR 469; *Burgess* [1968] 2 QB 112; *Ovenell* [1969] 1 QB 17; *McCarthy* (1980) 70 Cr.App.R 270. See also *Ajodha* v. *State* [1982] AC 204, at 221 (*per* Lord Bridge) for a *dictum* to similar effect. An argument that the statement of the law to be found in *McCarthy*, at 272, supported the *Bass* view was rejected in *Ragbo Prasad* [1981] 1 WLR 469, at 473.

[4] See also the Australian cases of *Basto* (1954) 91 CLR 628 and *MacPherson* (1981) 37 ALR 81, at 88, to similar effect.

[5] Wolchover and Heaton-Armstrong, *Confession Evidence* (1996), at para. 4.157, refer to the unreported case of *Brown* (1990), and suggest that it restores the rule in *Bass*. It is difficult to believe that, if *Brown* is authority for that proposition, it will be followed.

or otherwise'. Before considering their significance, however, we need to be aware of the position so far as judicial confessions are concerned.

Judicial Confessions

It is established that both a plea of guilty[6] and an informal admission made in earlier judicial proceedings[7] are, *prima facie*, admissible in later proceedings.[8] Where a plea of guilty has been withdrawn, the power of the court to exclude evidence more prejudicial than probative has been acknowledged to be of great significance. Indeed, it was said in *Rimmer* that the occasions on which such evidence would be admitted would be rare.[9] So, where the plea has been withdrawn because the legal elements of the offence were initially misunderstood, as, for example, where a person charged with handling stolen goods did not realize that he could not be guilty merely by virtue of having been in possession of goods which were, in fact, stolen, the probative value of the plea will be low, yet its prejudicial potential great. Nonetheless, there will be some cases in which the probative value of the plea is sufficient to allow evidence of it to be adduced.[10] The law shows no equivalent tenderness to the accused so far as informal admissions in earlier judicial proceedings are concerned. For example, inculpatory statements at an abortive earlier trial for the same offence are freely admissible,[11] though, in principle, the probative value/prejudicial effect discretion is available.

With regard to all judicial confessions, the voluntariness rule in section 76(2) is potentially applicable. However, given that any such confession will have been made in open court before a judge, it is most unlikely that either head of the rule will apply in fact.[12]

A number of statutes provide for the examination of citizens under the compulsion of punishment for failure to answer satisfactorily. There are significant difficulties, in some of the examples, with regard to the admissibility of statements made under that kind of compulsion, but in this work such issues are more conveniently dealt with as part of the treatment of the accused's right to silence or privilege against self-incrimination, so the reader should consult that part of the book.[13]

Admissions Falling Short of Full Confessions

As we have seen, section 82(1) specifically includes within the definition statements which are 'partly adverse' statements. It was pointed out in *Sat-Bhambra*[14] that this phrase was no doubt included in order to make it clear that the holding in *Customs and Excise Commissioners* v. *Harz and Power*[15] is good law under the

[6] *Rimmer* [1972] 1 WLR 268.

[7] *McGregor* [1968] 1 QB 371.

[8] See, generally, Pattenden (1983) 32 ICLQ 812.

[9] See [1972] 1 WLR 268, at 272.

[10] See, e.g., *Hetherington* [1972] Crim.LR 703.

[11] *McGregor* [1968] 1 QB 371, at 377.

[12] See n. 8 above, at 828, for suggestions about circumstances in which the rule might apply.

[13] See Ch. 9, text to nn. 8–52 below.

[14] (1988) 88 Cr.App.R 55, at 61.

[15] [1967] 1 AC 760.

Act. The House of Lords decided, in *Harz and Power*, that no distinction was to be drawn between full confessions of guilt and admissions falling short thereof. In Lord Reid's words, '[i]n similar circumstances one man induced by a threat makes a full confession and another induced by the same threat makes one or more incriminating admissions. Unless the law is to be reduced to a mere collection of unrelated rules, I see no distinction between these cases.'[16] For these purposes, it is equally wrong to seek to draw a more limited distinction between an acknowledgment in express words of the truth of some essential part of the guilty fact charged, on the one hand, and an acknowledgment of some subordinate fact, not directly indicative of guilt, on the other. Such a distinction was favoured by Wigmore,[17] but has little to commend it. For example, it would lead to the conclusion that the accused's admission that he believed particular goods to be stolen would constitute a confession, while an admission that he bought them in a public house at an absurdly low price would not. Though this intermediate possibility was not explicitly canvassed in *Harz and Power*, it is clear that at least some of the incriminating statements which the prosecution sought to adduce in that case could not be said to amount to admissions of facts in issue.[18] The same seems to be true of the post-Act case of *Smith*.[19]

Statements on Their Face Exculpatory

Statements which are, on their face, exculpatory are rather more problematical. There are several reasons for this. First, the prosecution will have no reason to seek to adduce evidence of the accused's apparently exculpatory statements unless they have inculpatory value at trial. For example, the accused's denial that he was present at the scene of an offence of violence will have such value when, at trial, he admits presence but denies participation. It follows that, if the exculpatory statement in question was brought about by, say, oppressive behaviour of the police, its admission in evidence at trial would allow the prosecution an advantage it would not have gained had a confession or partial admission followed such behaviour.

Secondly, there is a widely held doctrinal view that truly exculpatory statements cannot amount to confessions because they are not caught by the hearsay rule.[20] Where the prosecution seeks to adduce a confession or admission, it relies upon the truth of that confession or admission, but where the statement is *ex facie* exculpatory, it places no such reliance.[21] This view is not, however, universally held.[22] As a matter of history, it is not clear whether the rule making confessions

[16] [1967] 1 AC 818. [17] See *Evidence* (3rd edn., 1940), iii, § 821.

[18] See [1967] 1 AC 760, at 772–3.

[19] [1994] 1 WLR 1396. The Court of Appeal was simply satisfied that the statements in question were adverse to the accused.

[20] Leading modern English proponents of this view are *Cross and Tapper on Evidence* (8th edn. 1995)—see 676–8—and Andrews and Hirst, *Criminal Evidence* (2nd edn. 1992), para. 19.04. An ingenious variant of this view is put forward by Smith [1995] Crim.LR 280.

[21] See *Mawaz Khan* [1967] 1 AC 454.

[22] See, e.g., Elliott and Wakefield [1979] Crim.LR 428.

prima facie admissible grew up as an exception to the hearsay rule or developed separately from it. Certainly, there are indications of an incipient exclusionary rule for confessions at quite an early stage in the history of the law of evidence,[23] perhaps as early as the first part of the seventeenth century.

As a matter of principle, the argument for intimate connection with the hearsay rule would seem to depend upon the propositions, first, that confessions, as statements against interest, are, unlike other statements made outside court, likely to be reliable, and, secondly, that it is only when a confession is made in circumstances which call its reliability into question that there is any reason to exclude it. The second proposition is extremely vulnerable, whatever may or may not be the merits of the first.[24] There are reasons other than fear of unreliability for excluding confessions. We have seen that the so-called protective and disciplinary principles, particularly the former, have attracted support.[25] An entirely tenable view of the oppression head of the exclusionary rule is that its concern is not the danger of unreliability, but the need to protect the accused from being subjected to unacceptable behaviour designed to persuade him to confess. It may cogently be argued that the protective principle lets the exclusionary rule out of the umbrella of hearsay, so that there is no reason for the law here to take its cue from the hearsay rule. If so, the important point is that the accused is no less in need of protection in respect of his apparently exculpatory statements acquired in breach of his rights, where used to inculpatory effect, than in respect of his *ex facie* inculpatory ones.

Thirdly, a more functional argument has been put forward. It is said to be implausible that a suspect faced with overreaching police conduct or otherwise subjected to pressure to confess 'will falsely tell [the police] what [they] do not want to hear, namely a denial'.[26] One doubts that this claim makes sufficient allowance for the variability of human reaction to pressure. Though it will usually be clear that the police are seeking a confession and nothing else, a given suspect may hope that a particular exculpatory answer will divert the police from the immediate pressure. For example, the putting forward of an alibi might be expected to lead the police to check its veracity, so terminating the interview for the time being. Nor does it seem reasonable to suppose that the suspect will always respond to pressure in an entirely rational way. In *Wattam*,[27] the accused, a murder suspect, had offered to the police in quick succession three contradictory versions of an alibi. At trial, he admitted that he had been staying near the scene of the murder at the time of its commission and gave an explanation of why he had failed to tell the police.

A fourth problem is that the line between statements inculpatory when made and those exculpatory at that time is not an easy one to draw, while, if it is

[23] Some of the relevant materials are collected in Mirfield, *Confessions* (1985), at 42–50.

[24] Modern experience suggests that the first proposition may itself be doubtful—see Ch. 12, text to nn. 140–90 above.

[25] See Ch. 2, text to nn. 55–74 above.

[26] *Cross on Evidence* (7th edn., 1990), 609. The argument is not put forward in the 8th edn., 1995.

[27] (1952) 36 Cr.App.R 72.

necessary to consider whether or not a statement is hearsay before considering the application of section 76, a further element of complexity is added. The line-drawing problem has agitated the Canadian courts very much more than the English ones. In the leading Canadian case, *Piché*,[28] there was an informative division of opinion in the Manitoba Court of Appeal about whether the accused's statement to the police was inculpatory or exculpatory at the time it was made. The accused was charged with the murder by shooting of her common-law husband. In a detailed statement to the police, she had said that she had left him asleep in their home at 1.50 a.m. on the night in question. She had gone on to refer generally to her husband's harsh treatment of her and, more specifically, to his conduct that night; he had accused her of infidelity and 'given her hell'. Finally, she had revealed that she knew something about his guns—the shot which had killed him had been fired from one—and that she knew how to load them. All three elements of her statement were capable of being helpful to the prosecution. They revealed opportunity, for she had been at the house during the period when, as other evidence showed, her husband must have died. His reported behaviour towards her, not least on the night in question, demonstrated that she had a motive, while what she had said about the guns suggested that she was quite capable of using one to kill him. For those reasons, Freedman JA (dissenting) took the view that her statement was inculpatory. Monnin JA answered the first point by saying that it was only the other evidence adduced at trial which fixed the time of death, so her remarks about the time she had left the house were not inculpatory when made. As regards his alleged behaviour, this gave her no less of a motive simply to leave the house than to kill him. Though Monnin JA said nothing about her knowledge of the guns, he must have concluded that this too was not inculpatory.

It is difficult to say which of the two views in *Piché* is to be preferred. If one were to stick to the notion that what has been said counts as an admission only if it is an acknowledgement *in express words* of some *essential part of the guilty fact charged*, Piché would not be regarded as having confessed. Yet we have seen that English law seems to have set its face against the notion that the matter stated must be an essential part of the guilty fact.[29] Furthermore, once one abandons the express words requirement, thereby opening up the issue of the adversity of statements to implication and inference, one gets into the morass of difficulty associated with so-called implied assertions in the law of hearsay. A majority of the Supreme Court of Canada seems to have had these various difficulties firmly in focus when deciding that it was better not to seek to draw the relevant line at all. In the words of Hall J:[30]

> the time is opportune for this Court to say that the admission in evidence of all statements made by an accused . . ., whether inculpatory or exculpatory, is governed by the same rule

[28] [1970] 1 CCC 257 (Manitoba Court of Appeal); (1970) 11 DLR(3d) 700 (Supreme Court of Canada).

[29] See text between nn. 14 and 19 above.

[30] (1970) 11 DLR(3d) 700, at 709–10.

> and thus put to an end the continuing controversy and necessary evaluation by trial Judges of every such statement which the Crown proposes to use in chief or on cross-examination as being either inculpatory or exculpatory.

Though *Wattam*[31] seemed to provide at least inferential support for the proposition that the English common law was in line with Canadian law on this point, the weight of authority on the statutory law indicates that statements which were exculpatory when made are not caught by section 76. However, that authority is much less clear about the line which divides what is caught from what is not. The two leading cases are *Sat-Bhambra*[32] and *Park*,[33] but, before we deal with them, mention should be made of one contrary case.

In *Ismail*,[34] the Court of Appeal seems to have endorsed the view that the oppression head of the exclusionary rule was applicable to an interview relating to three complaints of indecent assault, during which the accused made no admissions. In that interview, he had denied knowing the person who eventually became his co-accused, had denied having gone to the complainants' house, and had claimed that he had been with his fiancée at the time of the assaults. By the time of trial, he had withdrawn both the denials and the claim. Plainly, the earlier statements were adverse as he stood in the witness box, but had not been adverse or inculpatory, either on their face or as a matter of what Ismail intended, when made. Though the prosecution seems to have conceded that the contents of the interview had been rendered inadmissible by police oppression, no comment was offered by the court indicating that that concession had been wrongly made.

The present issue had been first addressed in *Sat-Bhambra*,[35] though that case itself was eventually decided on another ground. The Court of Appeal 'inclined to the view that purely exculpatory statements are not within the meaning of section 82(1)',[36] its reasons being that:[37]

> [t]he words of the section do seem prima facie to be speaking of statements adverse on the face of them. The section is aimed at excluding confessions obtained by words or deeds likely to render them unreliable, *i.e.* admissions or partial admissions contrary to the interests of the defendant and welcome to the interrogator. They can hardly have been aimed at statements containing nothing which the interrogator wished the defendant to say and nothing apparently adverse to the defendant's interests.

Specific reliance is placed here upon the notion that unreliability is the only concern of section 76, a notion which can easily be challenged by reference to other authority, for example the statement of Lord Griffiths in *Lam Chi-Ming*, which is referred to a little later in this Chapter.[38] However, even putting that to one side, it is to be noted that *Sat-Bhambra* offers us two possible glosses upon the words 'wholly or partly adverse' in section 82(1). The first requires adverse to be present on the face of the statement or that it contain something apparently adverse

[31] (1952) 36 Cr.App.R 72.

[32] (1988) 88 Cr.App.R 55.

[33] (1993) 99 Cr.App.R 270. See also *Jelen and Katz* (1989) 90 Cr.App.R 456.

[34] [1990] Crim.LR 109, transcript through LEXIS.

[35] (1988) 88 Cr.App.R 55.

[36] *Ibid.* 61 (*per* Lord Lane CJ).

[37] *Ibid.*

[38] [1991] 2 AC 212, at 220—see text at n. 49 below.

to the accused's interests. The second is that, to be relevantly adverse, it must contain something which the interrogator wished the accused to say. In fact, these two glosses will not always point in the same direction. For example, Piché's statement that she left the victim at 1.50 a.m. sleeping at home would seem to carry no adversity on its face, yet, if the police knew, when they interviewed her, roughly the timeframe in which the victim had died, it might well have been welcome to them, though obviously not as welcome as a full confession to murder.

Nonetheless, in *Park*,[39] a case which *does* seem to be binding authority in favour of the view that section 82(1) does not comprehend statements which were exculpatory when made, it was said that 'some assistance can be gained'[40] from the words of Lord Lane CJ in *Sat-Bhambra* which are quoted above. The court in *Park* then went on to offer a rather different gloss upon section 82(1), for it endorsed a statement contained in *Archbold* that 'section 82(1) was not aimed at statements which the maker intended to be exculpatory and which were exculpatory on their face, but which could later be shown to be false or inconsistent with the maker's evidence on oath'.[41] Three points should be made about this formulation. First, it is put in terms of exculpation, rather than the absence of adversity. Secondly, the intention of the maker of the statement becomes relevant. Thirdly, it seems that the statement must be exculpatory *both* on its face *and* in intention in order to be outside the subsection. It is clear that the effect of what the accused said and his intention may diverge. Thus, if we vary the facts of *Piché* such that the police are aware of the time of the victim's death and tell Piché that he died between certain times, we would find a statement that she had left him sleeping in the house at a time within the relevant limits to be inculpatory on its face, by demonstrating opportunity, yet exculpatory in intention, by virtue of the claim that the victim was alive when Piché last saw him.

It may be concluded that the distinction between partly adverse statements and those not adverse at all is far from clear. Of course, there will be many cases where the statement in question is on its face neither adverse nor inculpatory, where it was not intended to be inculpatory and where its content was not at all welcome to the police. But there will certainly be others where no such concordance is to be found. So either the test will have to be refined by the courts or a different tack altogether will have to be taken, perhaps by the House of Lords.

Where *Sat-Bhambra* and *Park* do prevent the defence seeking to have the accused's statement excluded under section 76(2), it may have recourse instead to section 78(1). Under the subsection, the court has power to exclude any 'evidence on which the prosecution proposes to rely' because of its anticipated adverse effect on the fairness of the proceedings. That evidence need not be confessional in nature, as was expressly recognized in *Park* itself.[42]

[39] (1993) 99 Cr.App.R 270. See also *Sander*, unreported, 1 Mar. 1996. [40] *Ibid.* 274.
[41] See now Archbold, *Criminal Pleading, Evidence and Practice*, 1997 edn., i, para. 15–341.
[42] (1993) 99 Cr.App.R 270, at 275. See also *Okafor* [1994] 3 All ER 741, at 747; *Kerawalla* [1991] Crim.LR 451.

Conduct

Conduct is clearly capable of being the functional equivalent of an oral or written statement. So while one suspect might respond to a question asking him if he had committed a given offence by replying, 'Yes', another might simply nod the head. Equally, one suspect might describe in words where the police would find the deceased's body, while another might take the police there and point it out. The words of section 82(1), in stating that a confession includes any statement, 'whether made in words or otherwise', must encompass the person who nods the head or takes the police to the body.

Though there was Scottish authority confirming that conduct equivalent to a statement was caught by the Scots exclusionary rule,[43] only the old case of *Jenkins*[44] was capable of supporting the same proposition in English law and, even then, not unequivocally. There is no authority yet concerned directly with this aspect of section 82(1), but there is a post-Act Hong Kong case in the Privy Council with strong persuasive value. In *Liu Shu-Ling*,[45] the accused, having made a full oral confession to the murder of a woman by strangulation, acceded to a police request to participate in a re-enactment of his crime. With a policewoman playing the part of the deceased, he was able to demonstrate by his actions (which were video-recorded) how he had carried out the killing. The Privy Council could see no reason for distinguishing those facts from a situation where the accused, in the course of confessing orally, might break into a physical representation of some point or other, which situation it was clear would amount to the giving of a confession. It pointed out that many illiterate people might find it easier to demonstrate an action, rather than attempt to describe it in words. It should be added that there are strong *dicta* in the later Hong Kong Privy Council case of *Lam Chi-Ming*[46] to the same effect as *Liu Shu-Ling*.

Less clear is the limit of the inclusion of conduct within the régime of confessions. The nod of the head, the taking to the body, and the re-enactment of the crime all involve assertive conduct equivalent to words. In each case, the accused must have intended, by his conduct, to assert some guilty fact. Many other kinds of conduct may be potentially inculpatory, yet without there being present that intention to assert guilt. Two obvious examples are flight and tears. One inference we may feel able to draw from the fact that the suspect, when confronted, ran away or burst into tears is that he did so from a consciousness of guilt. Yet, it seems unlikely that he *intended*, by his flight or tears, to indicate his guilt.

Whether or not apparently non-assertive conduct of the kind exemplified by tears and flight should be encompassed by the exclusionary rule is rather a similar issue to whether or not words on their face exculpatory should be encompassed. Once again, strict adherence to the notion that a confession is a kind of (admissible) hearsay will probably lead to a conclusion that tears and flight do

[43] *Chalmers* v. *Lord Advocate* [1954] JC 56. See also *Beere* [1965] Qd.SR 370.
[44] (1822) Russ. & Ry. 492. [45] [1989] AC 270. [46] [1991] 2 AC 212.

not count as confessional, though the precise ambit of the hearsay rule is again problematical here.[47] Furthermore, if the reliability principle is paramount, it is hard to conceive of an argument for bringing tears and flight within the confessions rule. For example, when a suspect responds to oppressive police conduct by bursting into tears, it is hardly likely that those tears are false ones. They may, of course, be unreliable in the sense that they do not, in fact, flow from a consciousness of guilt, but rather, say, from simple fear. However, this reliability problems is one of interpretation of the meaning of tears, and it is no more likely to arise where unlawful pressure has been brought to bear upon the suspect than where it has not. The same would appear to apply to flight.

The protective and disciplinary principles both suggest that the régime for confessions *should* apply. Oppressive conduct leading to tears or flight is no less objectionable than that which leads to a verbal admission, and the suspect is potentially disadvantaged in both situations. It is noteworthy that there is judicial endorsement, in the specific context of confessions through conduct, of the protective and disciplinary principles. Thus, in *Lam Chi-Ming*, Lord Griffiths, following the earlier statement of Lord Hailsham in *Wong Kam-Ming*,[48] said:[49]

> Their Lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody.

However, there are three obvious problems with an expansive view of confessions by conduct. First, it is well-established that the confessions régime proper does not apply to the giving of fingerprints or of certain body samples, for example breath or blood, in response to oppressive police conduct, though it is right to add that evidence acquired in this way may be excluded as a matter of judicial discretion.[50] So, once again, a line needs to be drawn. It would seem that this particular line does not pose the greatest difficulty, for the cases of tears and flight differ significantly from those of fingerprints and body samples. The tears and flight, if relied upon at all as evidence of guilt, are the functional equivalents of oral statements which demonstrate a consciousness of guilt. That cannot be said of the fingerprints or body samples. And in those cases, any inference of guilt is drawn not from the conduct itself (giving the fingerprints or body sample) but from its product (the fingerprint or body sample).

The second problem is that, as we have already seen, the weight of authority with regard to statements on their face exculpatory suggests that they are outwith the exclusionary rule, and it might, therefore, be thought strange to take a more expansive view of confessions in the case of conduct. The answer to this point may be that conduct such as tears and flight is, if inculpatory at all, inculpatory at the time, so that the analogy with words exculpatory on their face is inexact.

[47] Especially after *Kearley* [1992] 2 AC 228. [48] [1980] AC 247, at 261.
[49] [1991] 2 AC 212, at 220. [50] See, now, s. 78 of the 1984 Act.

Finally, the very wording of section 82(1) presents a problem. It refers, it will be recalled, to statements 'made in words or otherwise'. It is not easy to see how it can be said that the distraught suspect *makes* a statement in tears. The effect, then, of the subsection may well be to allow the exclusionary rule to encompass only conduct intended to be assertive of some fact.

Statement Showing Mode of Speech, Writing, or Expression

Just as conduct may sometimes be equivalent to words, so may words be equivalent to conduct. In some cases, the substantive content of speech or text may not matter, but rather the manner in which it is spoken, written, or expressed. For example, the accused's tape-recorded words may show him to have a strong regional accent or a stammer. Such modes of speech may be relevant to the issue of guilt or innocence because, say, the complainant has testified that her attacker had such an accent or stammer. So, once more, the question must be whether the manner in which a statement is made or expressed is caught by the definition in section 82(1).

The well-known case of *Voisin*[51] is authority at common law on the present point. The trunk of a murdered woman, together with a piece of paper bearing the words, 'Bladie Belgiam', had been found in a parcel. Voisin, without first being cautioned, had been asked to write out the words 'Bloody Belgian'. He agreed, but in fact wrote 'Bladie Belgiam'. The Court of Criminal Appeal held that the piece of paper upon which the words were written was admissible in evidence, the exclusionary rule being inapplicable because Voisin's decision to write down those words had not been induced by any threat or promise. Implicitly, it reasoned that the piece of paper was confessional, for, had it been otherwise, the presence or absence of a threat or promise would have been irrelevant. However, Lush J expressed in argument another view:[52]

> There is a difference between the admissibility of a statement and the admissibility of handwriting. A statement may be made under such circumstances that the true facts are not brought out, but it cannot make any difference to the admissibility of handwriting whether it is written voluntarily or under the compulsion of threats.

Once again, if one has solely the problem of unreliability in view, there seems to be no reason why a case with facts like those of *Voisin* should be encompassed by the exclusionary rule.

Yet Lush J did not deliver a separate judgment in *Voisin*, so it must be taken that the common law of confessions did encompass cases like it. If so, the 1984 Act may well have changed the law. For these purposes, one must distinguish a case, like *Voisin* itself, where no acknowledgment of guilt or any guilty fact is contained in the words used from a case where there is such an acknowledgment. Thus, had Voisin made a written statement that, 'I killed that bladie Belgiam', it would contain both incriminating elements. Section 76 appears to separate out those two elements. According to section 76(4):

[51] [1918] 1 KB 531. [52] *Ibid.* 533.

The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence—

(a) ...

(b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.

In the case, just posited, with facts departing slightly from *Voisin*, it would seem that, had the statement been obtained by oppression, the prosecution would, nonetheless, be entitled to use the 'Bladie Belgiam' part of it. Appropriate editing would do the trick, However, section 76(4)(b) does not seem to cover the actual facts of *Voisin*, for the sole relevance of the words written down was to show that he expressed himself in a particular way. Hence, there seems to be no impermissible part caught by the rest of section 76, with the result that section 76(4)(b) is not needed in order to save the manner of expression element.[53] This must be because Voisin's words would not count as a statement for the purposes of section 82(1). For completeness, it is right to add that the discretion, under either section 78(1) or 82(3), would be available to the judge, in an appropriate case with facts similar to *Voisin*, for both apply to 'evidence' and are not restricted to 'confessions'.

'Mixed' Statements

We have seen that it is a matter of some importance and difficulty whether or not an *ex facie* exculpatory statement of the accused counts as a 'confession' for the purposes of section 82(1) of the 1984 Act where the prosecution seeks to use it for its inculpatory effect against him. A connected issue, conveniently dealt with as another preliminary matter, arises where the accused *himself* wishes to rely upon something exculpatory which he said to the police during the course of his interrogation.

Where the accused's statement to the police was wholly exculpatory, the hearsay rule dictates that it cannot be used by the accused himself as evidence of its truth. However, there is clear authority to the effect that such a statement, if made when taxed with incriminating facts, is admissible in evidence to show his attitude at the time when he made it, and, indeed, it seems to be the general practice of the prosecution to adduce such evidence during the presentation of its own case,[54] so no question of rebutting an allegation of recent fabrication will have arisen. This would seem to constitute a mysterious and anomalous exception to the rule against narrative.[55]

[53] The contrary view which I expressed in *Confessions*, n. 23 above, 91–2, I now believe to be wrong.

[54] The leading case is *Pearce* (1979) 69 Cr.App.R 365. See also *Storey* (1968) 52 Cr.App.R 334; *Donaldson* (1976) 64 Cr.App.R 59; *McCarthy* (1980) 71 Cr.App.R 142; *Tooke* (1989) 90 Cr.App.R 417. For earlier authority, see Gooderson [1968] *Camb. LJ* 64, at 66–70. See also *Phipson on Evidence* (14th edn., 1990), para. 12–63.

[55] *Phipson ibid.*, describes it as anomalous. See also *Cross and Tapper*, n. 20 above, 307. Gooderson, n. 54 above, 68–70 takes a more favourable view.

A rather different situation arises where the statement in question is partly inculpatory and partly exculpatory. May the prosecution adduce the inculpatory parts alone, or is the accused entitled to insist that the exculpatory ones are also brought out?[56]

Again, we need to refine the question. One must first be clear about the *extent* of any admission made by the accused. So, if he said in a handling case, 'I admit I had possession of the goods, but I had no idea that they were stolen', the full statement would show that he was making a partial admission only. The part which denies *mens rea* has, at least potentially, a double significance, for it may also be regarded as *positive* evidence of lack of *mens rea*. Of course, delimitation of the extent of the confession made will not always be straightforward, but the prosecution must inevitably be required to put before the trier of fact all the material needed for carrying out that task. This must be the point which James LJ had in mind when he said in *Donaldson*:[57]

When the Crown adduce a statement relied upon as an admission, it is for the jury to consider the whole statement including any passages that contain qualifications or explanations favourable to the defendant, that bear upon the passages relied upon by the prosecution as an admission, and it is for the jury to decide whether the statement viewed as a whole constitutes an admission. To this extent the statement may be said to be evidence of the facts stated therein.

Though put in terms of *whether or not* the statement constitutes an admission, rather than in terms, also, of precisely *what* the statement does admit, the overall effect is clear.

Until quite recently, there was a clash in the authorities about whether or not the proper evidential significance of the exculpatory parts of such 'mixed' statements went beyond delimitation of the inculpatory parts.[58] On one view, the hearsay rule entailed that, considered positively, the exculpatory parts had no evidential force. If so, the accused's denial of guilty knowledge in the case of handling suggested above would not be evidence of its truth, and, logically, the trier of fact would have to be told that that was the case. On the other view, it was better for the law to make an exception here to the strict application of the hearsay rule. Directions to use evidence for some purposes, but not for others, are always difficult to follow and, sometimes, unfathomable.

The latter argument was supported judicially on more than one occasion, and it has now been endorsed by the House of Lords in *Sharp*.[59] In the result, *Sharp*

[56] For a recent, helpful treatment, see Birch [1997] Crim.LR 416. But cf. *Western* v. *DPP* [1997] 1 Cr.App.R 474.

[57] (1977) 64 Cr.App.R. 59, at 65.

[58] The leading cases were: *McGregor* [1968] 1 QB 371; *Storey* (1968) 52 Cr.App.R 334; *Sparrow* [1973] 1 WLR 488; *Barbery* (1975) 62 Cr.App.R 248; *Donaldson* (1977) 64 Cr.App.R 59; *Pearce* (1979) 69 Cr.App.R 365; *McCarthy* (1980) 71 Cr.App.R 142; *Newsome* (1980) 71 Cr.App.R 325; *Duncan* (1981) 73 Cr.App.R 359; *Leung Kam-Kwok* (1984) 81 Cr.App.R 83; *Hamand* (1985) 82 Cr.App.R 65.

[59] [1988] 1 WLR 7, at 15. For earlier authority, see, e.g., *Sparrow* [1973] 1 WLR 488, at 492 (*per* Lawton LJ) and *Duncan* (1981) 73 Cr.App.R 359, at 364 (*per* Lord Lane CJ). See also Elliott and Wakefield, n. 22 above.

decides that the exculpatory parts of 'mixed' statements adduced by the prosecution are fully admissible in evidence. The House expressed its wholehearted agreement with the following statement of Lord Lane CJ in *Duncan*:[60]

> it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state.

There are a number of subsidiary points to which reference should be made. First, it may be appropriate for the trial judge rather to detract from the force of his comment that the exculpatory parts are evidence in the case, by drawing a distinction between the likely weight of the incriminating and self-serving parts. Again, the House of Lords in *Sharp* endorsed what Lord Lane CJ had said in *Duncan*, namely that:[61]

> where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence.

So the accused who does not testify is in a double bind, so far as his exculpatory remarks are concerned; they are weak because they favour him and weaker still because he does not support them by giving direct evidence.

Though both *Duncan* and *Sharp* were concerned with written statements signed by the accused, it was decided in *Polin*[62] that the principle which they establish is no less applicable to a series of questions (from the police) and answers (from the accused).

A third point is that the courts have not been troubled by the wording of section 76(1) of the 1984 Act, even though it might be thought capable of changing the law. That subsection permits the accused's confession to be given in evidence 'against him'. It could be argued that the exculpatory parts are not given in evidence against him where the prosecution is not seeking to rely upon their inconsistency with the defence he now raises, but, rather, the defence is seeking to have the whole thing put before the jury. One answer is that section 76 is concerned only with the confessional aspects and that it is the common law which lets in the exculpatory parts for the accused. A second is, of course, that, as we have seen, post-Act authority tells us that exculpatory statements are not confessions at all. In any event, there is now clear authority that the common law remains unchanged. In *Aziz*, the House of Lords declined an invitation to overturn *Sharp* and, indeed, gave that case a ringing affirmation, expressly stating that it did recognize an exception to the hearsay rule.[63]

[60] (1981) 73 Cr.App.R 359, at 365.
[61] *Ibid.* See also *Donaldson* (1977) 64 Cr.App.R 59, at 65.
[62] [1991] Crim.LR 293.
[63] [1996] 1 AC 41, at 48–50. See also *Polin* [1991] Crim.LR 293; *Grayson* [1993] Crim.LR 864; *Lobban* v. R. [1995] 1 WLR 877, at 883; *Western* v. *DPP* [1997] 1 Cr.App.R 474.

Confessions of Third Parties

We may next collect together a number of points about the use of confessions of third parties as evidence either for or against the accused. The element which binds together these points is that it is the hearsay rule and exceptions to it which provide the essential evidential basis for the impermissibility or permissibility of any such use. We need to distinguish between confessions made by third parties who are on trial with the accused and those made by third parties who are not.

Confessions of Non-accused Third Parties

Where a non-accused third party's statement solely exculpates the accused, it is plainly hearsay and not caught by any exception to the hearsay rule. It is, it follows, inadmissible in evidence. Furthermore, it is well established that a third party's statement inculpating himself in the crime with which the accused is charged is equally inadmissible for the latter, notwithstanding that, as a statement against interest, it might be thought to carry with it a presumption of reliability.[64] As a matter of logic, then, the defence cannot 'piggy back' that part of a third party's statement which exculpates the accused on to the part which inculpates the third party. There is no possibility of a doctrine equivalent to that approved in *Sharp*, and, indeed, there is Court of Appeal authority ruling out any such doctrine.[65]

Confessions of Co-accused Exculpating the Accused

Plainly, the out-of-court statement of a co-accused exculpating the accused is no less caught by the hearsay rule than the equivalent statement of any other person. More difficult is the case where, on its face, it simply inculpates the co-accused but where its effect is to exculpate the accused. For example, it may be that only one of them could have committed the offence or that, purely by virtue of strengthening the case against the co-accused, it tends to weaken that against the accused. Of course, if it does inculpate the co-accused, the prosecution will itself have reason enough to seek to have it brought in evidence as a confession, and, once in evidence, it may redound to the benefit of the accused. Problems arise where, for some reason, the prosecution does not seek to rely upon it or where it does so seek but is prevented by reason of it being excluded, whether by rule or discretion, by the judge.

There are two separate problems here. If the accused may call evidence of the co-accused's confession when the prosecution may not, protection of the co-accused's interests will be undermined. In this respect, it is but one aspect of a wider issue, that is the extent to which the purposes of the exclusionary rule and

[64] See *Turner* (1975) 61 Cr.App.R 67; *Blastland* [1986] AC 41; *Callan* (1993) 98 Cr.App.R 467.
[65] *Campbell* [1995] 1 Cr.App.R 522; *Rogers* [1995] 1 Cr.App.R 374.