

FULL COURT—(LATHAM, C.J., DIXON and WILLIAMS, JJ.)  
(Sydney and Adelaide: August 23, September 22.)

McDERMOTT v. THE KING.

*Criminal law—Evidence—Confession—Admissibility—Answers to interrogation by police—Judge's discretion to exclude—Judges' Rules (Eng.) 1912.*

Upon a criminal trial, the Judge has a discretionary power to exclude confessional statements, apart from the strict rules of law governing admissibility of evidence.

*Per* Dixon, J.—The Judge should exclude such statements if in all the circumstances he thinks they have been improperly procured by the police.

*Per* Williams, J.—Such statements should be excluded where there are circumstances which would make it unfair to admit the evidence against the accused.

APPLICATION FOR SPECIAL LEAVE TO APPEAL.

On 26th February, 1947, at the Supreme Court at Bathurst, one McDermott was convicted of having murdered one Lavers at Grenfell (N.S.W.), on 5th September, 1936, and an appeal against the conviction was afterwards dismissed by the Court of Criminal Appeal (Davidson and Street, JJ., Jordan, C.J., dissenting).

McDermott applied to the High Court for special leave to appeal, on the ground that evidence of answers given by him to questions by a police officer while he was in custody at the police station at Dubbo was wrongly admitted.

*Barwick, K.C., and Vizzard* for the applicant.

*Crawford, K.C., and Tonking* for the Crown.

*Cur. adv. vult.*

The following written judgments were delivered:—

LATHAM, C.J.—This is an application for special leave to appeal from a decision of the Court of Criminal Appeal in New South Wales. The applicant, Frederick Lincoln McDermott, was convicted of murdering one William Henry Lavers on 5th September, 1936. At the trial before Herron, J., evidence was admitted of answers given by McDermott to questions by police officers while he was in custody. He was asked whether he had said to certain persons that he had killed Lavers. He admitted that he had said so. It was not suggested that there had been any promise or threats or any violence or fraud or pressure on the part of the police. Objection was taken at the trial to the admission of this evidence, because the statement was made by the accused while he was in custody and because, it was said, it was obtained by what was described as "cross examination." The Court of Criminal Appeal (Davidson and Street, JJ., Jordan, C.J., dissenting) dismissed the appeal, and an application is now made to this Court for special leave to appeal.

In this case we have to consider only the law of New South Wales. The law in Victoria, for example, is different—*Cornelius v. The King*, 55 C.L.R. 235, [1936] A.L.R. 278. In *R. v. Jeffries*, [1947] S.R. (N.S.W.) 284, it was held that a verbal confession made to police officers by an accused person while he was in custody was admissible, but that the trial judge had a discretion to reject a confession or other incriminating statement made by the accused if, though the statement could not be held to be inadmissible as evidence, in all the circumstances it would be unfair to use it in evidence against him. Examples of such unfairness would be afforded by irresponsibility of the accused on the occasion when the statement was made, or failure on his part to understand and appreciate the effect of questions and answers. Special leave to appeal to this Court was refused in *Jeffries' Case*. We are now asked to reconsider the decision in *Jeffries' Case*. In view of *Ibrahim v. R.*, [1914] A.C. 599 at pp. 611 *et seq.*: *Hough v. Ah Sam*, 18 C.L.R. 452, where *R. v. Rogerson*, 9 S.C.R. (N.S.W.) 234 was expressly approved: and *R. v. Voisin*, [1918] 1 K.B. 531 at pp. 538-539, I see no reason for reconsidering the decision in *Jeffries' Case*, that the rules of the common law and the Crimes Act 1910 (N.S.W.), sec. 410, do not render statements by a person inadmissible simply because he was in custody at the time when he made the statement. The rules of the common law requiring that a statement made to a person in authority

## McDERMOTT v. THE KING

by a person who is actually charged or is about to be charged with the commission of a crime must be shown to be voluntary before it can be admitted in evidence provide extensive protection to an accused person.

It was further argued that at least there was a rule that persons in custody should not be "cross-examined." The authority for this contention was found in rule 7 of what are known as the Judges' Rules 1912, which may be found in *Archbold* (31st ed.), p. 370; *Phipson on Evidence* (8th ed.), p. 251; and *R. v. Jeffries*, [1947] S.R. (N.S.W.) 284. Rule 7 is in the following terms:—

A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said.

The Judges' Rules are not rules of law, even in England—*R. v. Voisin* (*supra*). The reference in the Judges' Rules to cross-examination is a reference to cross-examination about a voluntary statement which a prisoner has already made. The questions which were asked in the present case were not cross-examination in this sense. Thus, even if these rules were binding as rules of law, they do not in this case support the arguments of the applicant. In my opinion the application should be refused.

DIXON, J.—This is an application for special leave to appeal from an order of the Supreme Court of New South Wales sitting as a Court of Criminal Appeal. The order, which was made by Davidson and Street, JJ. (Jordan, C.J., dissenting), dismissed an appeal by a prisoner from a conviction of murder. The notice of motion in this Court was not given until nearly fifteen months after the decision of the Supreme Court. This fact ought not to pass unnoticed because, although it has not affected the Court's decision upon the present application, delay is a matter to be taken into consideration when special leave is sought, and it is not difficult to imagine cases in which it might prove a determining factor.

The ground upon which reliance is placed in support of the application is that at the trial certain confessional statements to the police attributed to the prisoner ought to have been excluded but were admitted in evidence by the learned Judge who presided, Herron, J.

The prisoner was convicted on 26th February, 1947, upon a charge of murdering one William Henry Lavers at Grenfell on 5th September, 1936. Lavers was a farmer who conducted a roadside store about twelve miles outside Grenfell on the road to Forbes. In front of the store were some petrol pumps or bowser from which he supplied petrol to passing motor drivers. On the morning of Saturday, 5th September, 1936, he rose about a quarter to 6, dressing in his working clothes and wearing slippers. He said he would feed the horses. He was not seen again. A couple of hours later it was noticed that there was blood on the petrol bowser and upon the cement where it stood, and blood and hair upon the detachable pump-handle belonging to the bowser. The hose pipe was lying on the ground. There were the fresh marks of the wheels of a car that appeared to have drawn up at the bowser. The theory was formed that the deceased had been called to supply a passing car with petrol and that the occupant or occupants of the car had attacked him, possibly because they could not pay him, and had carried away his senseless or lifeless body in their car. Evidence was given at the trial from which the jury might conclude that the prisoner and another man named McKay had driven in a ramshackle car on the previous day, 4th September, from somewhere near Forbes along the road past the deceased's store to a camping reserve five miles beyond it, and that they had returned very early on the morning of 5th September. They were engaged in shearing at various places in the vicinity. On 15th December, 1944, the police questioned the prisoner and obtained a written statement from him. He had been living with a half-breed Maori woman named Florrie Hampton and leading a nomadic existence. It appeared that in bouts of intoxication she became excited and abusive, and in that state had been heard to accuse the prisoner

## McDERMOTT v. THE KING

[DIXON, J.]

of having killed Lavers for a few drops of petrol. The statement of the prisoner, which was received in evidence, is concerned for the most part with the manner in which the prisoner's movements were to be accounted for at and about the time of Lavers' disappearance, but portion of it deals with these accusations of Florrie Hampton, and explains them as drunken abuse suggested by the fact that the prisoner had told her that McKay had been questioned about the matter. But at the trial evidence was given by one witness of a drunken altercation between Florrie Hampton and the prisoner in which the latter appeared to admit participation in the crime. In response to her repeated allegations that the prisoner had murdered Lavers, had driven to a reserve, and had cut up his body and buried it in some sheep yards, the prisoner replied, according to this testimony, that he was not the main one, that "Scotty" hit him first, that the prisoner hit him with the handle. Another witness of a similar altercation ascribed to the prisoner a statement that of course he did as Florrie stated (repeating her words). No doubt the interpretation of this reply was for the jury, but it reads more like a piece of sarcasm than an acknowledgment of guilt.

In the meantime, on 10th October, 1946, the police had taken the prisoner to the police station at Dubbo and there questioned him. He was then charged with murder. The evidence of what took place at this interview was objected to but it was admitted. The application for special leave turns upon the propriety of admitting it in evidence.

Shorthand notes were taken at the interview of what was said, and with these before him the policeman who took them gave an account of what occurred. At the beginning the detective in charge informed the prisoner that since their previous interview many inquiries had been made, and said that he wanted to tell the prisoner now that he was not obliged to say anything or answer any questions, as anything he said might be used in evidence. To this the prisoner replied that he understood and knew that as far as he was concerned it was a serious matter. After that the detective addressed to him a series of questions concerning his movements from 5th to 7th September, 1936, and subsequently. He began by dealing with two cheques the prisoner had received bearing those respective dates. They might have proved material in fixing his movements. These questions took the form of simple inquiries as to facts and circumstances. There is nothing to suggest an attempt to obtain answers prejudicial to the prisoner, or answers which confirmed the detective's opinion or suspicions, or to insist on a reply or to beguile or entrap the prisoner. After he had dealt with the subject of his movements the detective put one or two other questions. He then turned to the prisoner's replies to Florrie Hampton's statements, made at various times in the presence respectively of three people, two of whom gave evidence, as has already been stated. As to the first person, the prisoner was asked whether in his presence he had said to Florrie Hampton that he would do her in the same as the other fellow. To this he answered, "I suppose I did." As to the second person, the prisoner was asked whether, in her presence, Florrie Hampton had not said in the course of a quarrel with him, "You killed Lavers, cut his body up and buried it in some sheep yards." The prisoner replied that she was always saying that. He was next asked whether he had not then said, "I killed Lavers for two gallons of petrol; we had no money to pay for the petrol, so I hit him on the head with the crank handle and we put him in the car and drove out to Grenfell to the sheep yards and buried him there." The prisoner replied, "Yes, that's what comes of saying too much; if I had not said that I would not be in this trouble." As to the third person who had heard Florrie Hampton's statements to the prisoner, the detective asked the latter whether, in that person's presence, he had said he killed Lavers. To this the prisoner replied, "Yes, but if Florrie had kept her mouth shut I would not be here now." Then the prisoner asked whether the detectives had seen McKay and whether he had said that the prisoner had done it. After receiving an affirmative reply to the first and a negative reply to the second of these questions, the prisoner, in answer to the next inquiry,

## McDERMOTT v. THE KING

which related to the disposal of the body said that he did not want to say any more then, and he declined to make a statement in writing.

The questioning seems to have occupied less than an hour. It is clear enough that the police had decided to lay a charge of murder before the questioning took place, though it was antecedently conceivable that, with the aid of the cheques, the prisoner might have made a sufficiently plausible case to induce them again to hold their hands. They had not, however, formally arrested him. Four detectives saw him at Dubbo and told him that they wanted him at the police station. He made no demur and they took him there in a police car.

In ruling that the evidence should be admitted, Herron, J., began by saying that an examination by police of an accused person after his arrest is not inadmissible as a matter of law, and the statements made by the accused on such an interrogation are not inadmissible provided that they are voluntarily made. His Honour went on to say that that did not end his function, because he had a discretion for the exercise of which he must make well-defined inquiries. Herron, J., found that (i) a proper caution had been administered to the prisoner before the questions were asked; (ii) he was not unwilling to be questioned and make an answer; (iii) there was no insistence or pressure by the police officers; (iv) the matters inquired about pertained to an investigation by the police, and it was an investigation of an event occurring ten years before. He was of opinion that there was nothing in the actual questioning which should cause him to exclude the evidence of the confessional statements.

In considering whether the decision of Herron, J., to admit the evidence should be sustained, it is important to distinguish between the imperative rules of law requiring the rejection of confessional statements unless made voluntarily and the so-called discretion of the Court to exclude evidence of such statements if the manner in which they were obtained is considered to have been improper.

The imperative rules of law are founded upon the principles of the common law, but in New South Wales they are in part embodied in a statutory provision—sec. 410 of the Crimes Act 1900.

At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made. This means substantially that it has been made in the exercise of his free choice. If he speaks because he is overborne his confessional statement cannot be received in evidence, and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement was made—*per* Cave, J., in *In re Thompson*, [1893] 2 Q.B. 12 at p. 17. The expression "person in authority" includes officers of police and the like, the prosecutor and others concerned in preferring the charge. An inducement may take the form of some fear of prejudice or hope of advantage exercised or held out by the person in authority—*Ibrahim v. R.*, [1914] A.C. 599, 609-10; *R. v. Voisin*, [1918] 1 K.B. 531 at pp. 537-8. That is the classical ground for the rejection of confessions and looms largest in a consideration of the subject. In New South Wales it has been formulated in the statutory provision that has been mentioned—sec. 410 of the Crimes Act. Possibly that provision extends the common law rule: for it includes untrue representations made to the accused person as well as threats and promises held out to him by persons in authority. By its third sub-section it removes any doubt created by the decisions in *R. v. Drew*, (1837) 8 C. & P. 140, 173 E.R. 433, and *R. v. Morton*, (1843) 2 Moo. & R. 514, 174 E.R. 367, holding that to tell a prisoner that what he said would be taken down and used for or against him at his trial amounted to an inducement. See, however, *R. v. Baldry*, (1852) 2 Den. 430, 442, 445, 169 E.R. 568, 574. Section 410 does

## McDERMOTT v. THE KING

[DIXON, J.]

not derogate from the common law rule, which remains applicable except in so far as the section applies—*Attorney-General v. Martin*, (1909) 9 C.L.R. 713. The extreme applications which were made at one time of the principle that confessions obtained by the use by persons in authority of hope or fear were inadmissible gave this head of inducement an importance which has tended to obscure other forms of inducement. It is, perhaps, doubtful whether, particularly in this country, a sufficiently wide operation has been given to the basal principle that to be admissible a confession must be voluntary, a principle the application of which is flexible and is not limited by any category of inducements that may prevail over a man's will.

But, as the prisoner's Counsel conceded, it is plain that the present case cannot be brought within the operation of the imperative rules of exclusion, common law and statutory. Certainly the fact that the prisoner was questioned by the police is not enough, even if he were in custody. The warning was given, there was no importunity, no pressure, nothing to overbear the accused man's will.

The application for special leave is based upon the view that the learned Judge possessed a discretion to exclude the statements, and that he erroneously exercised this discretion in deciding to admit them. The view that a judge presiding at a criminal trial possesses a discretion to exclude evidence of confessional statements is of comparatively recent growth. To some extent the course of its development is traced by Lord Sumner in *Ibrahim's Case*, [1914] A.C. at pp. 611-614. In part, perhaps, it may be a consequence of a failure to perceive how far the settled rule of the common law goes in excluding statements that are not the outcome of an accused person's free choice to speak. In part the development may be due to the fact that the judges in 1912 framed or approved of rules for the guidance of the police in their inquiries—see *R. v. Voisin*, [1918] 1 K.B. at p. 539; Archbold's *Criminal Pleading* (28th ed.), p. 406—and not unnaturally have sought to insist on their observance. In part, too, it may be due to the existence of the jurisdiction of the Court of Criminal Appeal to quash a conviction if the Court is of opinion that on any ground whatsoever there was a miscarriage of justice. But whatever may be the cause, there has arisen almost in our own time a practice in England of excluding confessional statements made to officers of police if it is considered upon a review of all the circumstances that they have been obtained in an improper manner. The abuse of the power of arrest by using the detention of an accused person as an occasion for securing from him evidence by admission is treated as an impropriety justifying the exclusion of the evidence. So is insistence upon questions or an attempt to break down or qualify the effect of an accused person's statement so far as it may be exculpatory. The practice of excluding statements so obtained is supported by the Court of Criminal Appeal in England, which will quash convictions where evidence has been received which in the opinion of that Court has been obtained improperly, that is in some such manner.

It is acknowledged that the rules drawn up by the judges at the request of the Home Secretary as guides for police officers have no binding force upon the courts.

These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice—*R. v. Voisin*, [1918] 1 K.B. at p. 539.

Nevertheless, the tendency among English judges appears to be strong to treat them as standards of propriety for the purpose of deciding whether confessional statements should be received.

It is apparent that a rule of practice has arisen, deriving almost certainly from the strong feeling for the wisdom and justice of the traditional English principle expressed in the precept *nemo tenetur seipsum accusare*. It may be regarded as an extension of the common law rule excluding voluntary statements. In referring the decision of the question whether

## McDERMOTT v. THE KING

a confessional statement should be rejected to the discretion of the judge, all that seems to be intended is that he should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused. The growth of rules of practice and their hardening so that they look like rules of law is a process that is not unfamiliar. It has occurred with the rule relating to cautioning juries to require corroboration of the testimony of an accomplice. This rule, being one of practice, seemed to Cussen, J., not to bind Victorian courts. Indeed, he considered it inapplicable—*Peacock v. R.*, (1911) 17 A.L.R. 566 at 584. *Sed dis aliter visum.*

Australian courts have not entirely accepted nor entirely rejected the English rule or practice with respect to the "discretionary" exclusion of confessional statements obtained "improperly." The State of Victoria, because of sec. 141 of the Evidence Act 1928, stands, perhaps, in a special position.

In New South Wales the same strictness has not been observed with respect to the interrogation by a police officer of persons who have been arrested, or whom the officer has decided to arrest, upon a criminal charge—*per Jordan, C.J., Bales v. Parmeter*, [1935] 35 S.R. (N.S.W.) at p. 189; *Jeffries v. R.*, [1946] 47 S.R. (N.S.W.) 284; *R. v. Hokin*, (1922) 22 S.R. (N.S.W.) 280.

The practice in South Australia has been stated thus by Napier, C.J.—

Up to the present it has not seemed necessary to the Judges of this Court to insist upon a strict observance of the rules, approved by the Judges in England, for the guidance of the police when interrogating persons in custody or suspected of crime—see *Archbold* (26th ed.), p. 390—or to make a general practice of rejecting or discountenancing evidence of answers obtained by the interrogation of persons in custody—see *R. v. Winkel*, (1911) 76 J.P. 191; and *R. v. Brown and Bruce*, (1931) 23 Cr. App. R. 56. In so far as our practice varies in this respect from that of the Courts in England, I think that it has the sanction of the High Court in *Hough v. Ah Sam*, (1912) 15 C.L.R. 452 at p. 455; and of the Privy Council in *Ibrahim v. Rex*, [1914] A.C. 599 at pp. 612-613 and p. 614—*Lenthall v. Curran*, [1933] S.A.S.R. 248 at p. 260.

As to Queensland—see *R. v. Zerafa*, (1935) St. R. Qd. 227; and *R. v. Cross*, (1946) St. R. Qd. 65.

This Court is now invited to lay it down that the practice now obtaining in England must be followed, and in particular that the judges' rules must be accepted as a standard of propriety. To do so would be to go beyond the function which this Court so far has exercised in appeals by special leave in criminal matters. No rule of law has yet been established either here or in England imposing either upon the judge at a criminal trial or upon the Court of Criminal Appeal the duty of rejecting confessional statements if they have been obtained in breach of the "judges' rules," or if they have been obtained by questioning the accused after he has been taken into custody or while he is "held," though held unlawfully. In some circumstances the Court of Criminal Appeal may consider that such a method of obtaining admissions implies a miscarriage. A judge at the trial may adopt in advance the same view and reject the statements as improperly procured. But that is all. Here as well as in England the law may now be taken to be, apart from the effect of such special statutory provisions as sec. 141 of the Victorian Evidence Act 1928, that a judge at the trial should exclude confessional statements if in all the circumstances he thinks that they have been improperly procured by officers of police, even although he does not consider that the strict rules of law, common law and statutory, require the rejection of the evidence. The Court of Criminal Appeal may review his decision, and if it considers that a miscarriage has occurred it will allow an appeal from the conviction.

But the facts of the present case do not bring it within any rule established in Australia which requires the rejection of the confessional statements complained of. The fact that the police intended to arrest the prisoner, that they virtually held him in custody and delayed for an hour making the charge, and that they asked him questions, are not in

## McDERMOTT v. THE KING

[DIXON, J.]

themselves enough to require that the statements the prisoner made to them should be excluded. The character of the questions, the absence of any insistence or pressure in putting them, the fact that no questions were put directed to breaking down or destroying the prisoner's answers or statements, and the fact that there was no attempt to entrap, mislead or persuade him into answering the questions, still less into answering them in any particular way, these are all matters which negative such a degree of impropriety as to require the exclusion of the testimony as to the prisoner's admissions.

Herron, J., took all the relevant considerations into account and reached a conclusion in which there appears to be nothing erroneous or unsound.

For these reasons special leave to appeal should be refused.

WILLIAMS J.—This is an application for special leave to appeal by one F. L. McDermott, who was convicted at the sittings of the Central Criminal Court on 26th February 1947 of the murder of W. H. Lavers at Grenfell on 5th September 1936. McDermott appealed to the Supreme Court of New South Wales sitting as the Court of Criminal Appeal under the Criminal Appeal Act 1912, but his appeal was dismissed by a majority (Davidson J. and Street J., Jordan C.J. dissenting).

The ground on which special leave to appeal is sought is that a certain part of a confession was wrongly admitted in evidence at the trial. The confession consisted of a number of answers given by the appellant to questions asked by the police at Dubbo Police Station on 10th October 1946. These questions were asked after the police had decided to arrest the appellant for the murder of Lavers. After the appellant had been cautioned that he need not answer any questions and that anything he said might be given in evidence, he was asked whether during a quarrel between him and a woman called Florrie, who was living with him as his wife, which occurred in the presence of another woman, Doretta Williams, Florrie had accused him of killing Lavers, cutting his body up and burying it in the sheep yards. The accused said, "Yes, she is always saying that to me." The police then asked, "Did you then say, 'I killed Lavers, I hit him on the head with the bowser handle, we had no money to pay for the petrol. We took him away in the car and buried him in the sheep yards at Grenfell?'" to which he answered, "Yes, and if I had not said that I would not be here now." He was then asked whether he would tell the police what he had done with the body, but replied that he would not say any more.

A confession can only be admitted in evidence against an accused person if it is proved to the satisfaction of the Judge that it is a voluntary confession. In *Phipson on Evidence* (8th ed.), p. 248, it is stated that in criminal cases a confession made by the accused voluntarily is evidence against him of the facts stated. But a confession made after suspicion has attached to, or a charge been preferred against him, and which has been induced by any promise or threat relating to the charge and made by or with the sanction of a person in authority, is deemed not to be voluntary and is inadmissible. This rule of the common law is now embodied in and possibly extended by sec. 410 of the Crimes Act (N.S.W.) 1900. It was not contended that McDermott's confession was inadmissible at common law or under this section.

But it was contended that although a confession may not have been induced by any untrue representation made to the accused or by any threat or promise held out to him by the prosecutor or some person in authority, the Court still has a discretion to refuse to admit a confession or part of a confession if in all the circumstances of the case it would be unfair to admit the evidence against the accused. In *Ibrahim v. R.*, [1914] A.C. 599, Lord Sumner delivering the judgment of the Privy Council referred (at p. 610) to this ground "in so far as it is a ground at all" for excluding a confession as a ground of more modern growth. His Lordship then discussed the decisions relating to this ground and made it clear that it is one which leaves the matter to the discretion of the trial judge

## McDERMOTT v. THE KING

"depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case." Under modern conditions the persons who put the questions are almost invariably the police, and in England the Judges' Rules lay down for the police rules of conduct the disregard of which will usually lead the presiding judge to reject the evidence—*R. v. Voisin*, [1918] 1 K.B. 531 at pp. 539-540. But these rules "are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice." They have not the force of law even in England, and they certainly do not form any part of the positive criminal law of New South Wales. But I see no reason to doubt the opinion of the Supreme Court that the trial judge may exclude a confession on this modern ground where there are any circumstances which would make it unfair to admit the evidence.

It was contended that the answers of the accused objected to should have been rejected on the ground that they were made in answer to questions put to him not to obtain information but by way of cross-examination. In *R. v. Gardner*, (1916) 114 L.T. 78 at p. 79, Avory J., speaking for Lord Reading C.J., himself and Lush J., said that the "police have been constantly told that a prisoner after being arrested and charged must not be cross-examined." But the mere asking by the police of a question which would only be asked in cross-examination at the trial does not in my opinion amount to cross-examination of the accused by the police. A cross-examination for this purpose would be an examination intended to break down the answers of the accused to questions put by the police to which they had received unfavourable replies. It might have been unfair for the police to have asked McDermott to admit the contents of a conversation which took place in the presence of the woman Florrie and Doretta Williams if the Crown had not intended to call them as witnesses, and this would have justified the trial Judge in excluding the answers. But Doretta Williams was called as a witness by the Crown. The woman Florrie was not called but, as Davidson J. pointed out,

She appears to have been a drunken and dissolute person whose evidence would be of no value. The appellant's answers to her statements in the presence of other people were the important factors. Furthermore, the appellant accepted throughout the statements of . . . Doretta Williams, who were called as witnesses, as being true, merely claiming that his own agreement with them was of an ironical nature and not true. But this aspect of the matter was one for determination by the jury.

It is manifest from the reasons given by the trial Judge for admitting the answers of the accused to the questions of the police with some exceptions, that His Honour considered that he had a discretion to reject any of the answers if he was not satisfied that in all the circumstances it would be fair to the accused to admit them. He said that he required to be satisfied that the accused was properly cautioned, that he knew that he need not answer the questions unless he wished to do so voluntarily, that he answered the questions voluntarily, that he was not cross-examined by the police, and that the questions asked were matters pertaining to the investigations by the police. As His Honour said there are cases in which the border line of fairness is crossed by the police in their zeal to investigate a crime and in those cases the confession should be rejected. But His Honour held that the present was not such a case and admitted the evidence. The exercise of his discretion was subject to review and was reviewed by the Court of Criminal Appeal. By sec. 6 of the Criminal Appeal Act that Court is directed to allow the appeal if it is of opinion that on any ground whatsoever there was a miscarriage of justice. There would only necessarily have been such a miscarriage if the appellant had in fact been cross-examined by the police, and it was part of the law of New South Wales that where an accused who has been or is about to be arrested is cross-examined by the police his answers are inadmissible. But, as Davidson J. pointed out in *R. v. Jeffries*, 47 S.R. 284 at pp. 298-299, there is no such law. It is for the trial Judge in the exercise of his discretion to see that the questioning was not carried to



## McDERMOTT v. THE KING

[WILLIAMS, J.]

an improper length, and if it was to exercise his discretion and reject the answers as unfair to the accused and as having been obtained under such circumstances that to admit them might lead to a miscarriage of justice.

This application is in all substantial respects similar to the application for special leave to appeal in *R. v. Jeffries*. On that application this Court, which consisted of five Judges, refused special leave to appeal. It would be seldom that the circumstances would be sufficiently special to justify this Court granting special leave to appeal where as here the true basis of the application is that the discretion of the trial Judge was wrongly exercised. In the present case, since the matter has been argued at length, I am prepared to say that I see no reason to disagree with the way in which Herron J. exercised his discretion.

In my opinion special leave to appeal should be refused.

*Special leave refused.*

[Solicitors—For the applicant, William Lander; for the Crown, F. P. McRae Crown Solicitor.] B. F. McN.

FULL COURT—(LATHAM, C.J., RICH and DIXON, JJ.)  
(Brisbane: July 23.)

## BISCHOF v. TROTTER.

*National security—Landlord and tenant — Grant or transfer of lease—Premium prohibited—As condition of lease or proposed lease—National Security (Landlord and Tenant) Regulations, reg. 33.*

An offence against regulation 33 of the National Security (Landlord and Tenant) Regulations is committed when a person requires the payment of money other than rent on the basis that if such money is paid a lease will be granted and not otherwise. And this is so whether a lease is actually granted or not.

## APPEAL.

Herbert Carl Bischof laid a complaint against Mardon John Trotter, charging the defendant that he did require a sum of money other than rent in consideration of a grant of a lease of prescribed premises at Moray Street, New Farm, Brisbane, in contravention of the National Security (Landlord and Tenant) Regulations. The complaint was heard on 16th June, before Mr. J. A. Murray, S.M., when evidence was given of the conversation set out in the judgment hereunder. The Magistrate found, *inter alia*, that the defendant was the agent for the letting of flats known as Clifton Court and Hasely Court, and that on 23rd February the defendant required one Brenda Williams to pay £68 in consideration of a lease to be granted of a flat at Hasely Court or Clifton Court, and that Brenda Williams declined to pay the amount and no lease was granted. The complaint was dismissed, on the ground that no lease was granted.

The complainant appealed to the High Court, and the Magistrate stated a case for the High Court upon the question: Was I right in law in dismissing the complaint?

*Fahey and Moynihan* for the complainant appellant.

*Casey* for the defendant respondent.

The judgment of the Court was delivered by

LATHAM, C.J.—The evidence in this case shows that the defendant said to Brenda Williams, who was in search of a flat for a friend who was her employer, that a flat was becoming vacant at Hasely Court or Clifton Court, but that there was a little matter of a premium of £68 to pay. Mrs. Williams asked: "Is that rent in advance or do I get anything back for it?" Respondent said: "No. You will have to pay that to get possession of the flat. The flat isn't vacant to-day, but I can arrange it for you on those terms." Mrs. Williams said: "I don't think we could manage it, and if you don't mind let the matter slide." Upon that evidence, the Stipendiary Magistrate found: (a) That the respondent at all relevant