

CONFESSIONS

Confessions are potent instruments for securing two fundamental goals of the criminal justice system, namely the conviction of the guilty and the protection of victims and potential victims of crime. They may also have other positive values. They may, for example, have psychological benefits for the suspects who make them.

However despite the importance of their role, or perhaps because of it, confessions are among the most significant causes of miscarriage of justice. In several of the notorious cases that came to light some years ago the CA quashes convictions for murder and other serious offences in response to substantial doubts about the reliability of the confession evidence on which the defendants were convicted. Cases such as the Guilford Four, the Birmingham Six, Judith Ward, the Tottenham Three and others raised a variety of issues about the dangers of confession evidence and about the adequacy of the legal regime regulating the obtaining and use of such evidence.

- Infamous Miscarriages of Justice – Cardiff 2 (murder) Birmingham 6 (beaten) Guildford 4 (fabrication)

The meaning of confession

The term confession has an extended meaning in the law of evidence. In ordinary speech a confession is a frank admission of guilt, and in practice many confessions by suspects do consist of full acknowledgments of the commission of an offence. But the term is not restricted to this meaning.

S. 82(1) of PACE defines confession to include 'any statement wholly or partly adverse to the person who made it'. An adverse statement can be made in words or by non-verbal conduct, such as a nod of the head or holding up one's hands. Thus any incriminating statement falling short of a full acknowledgment of the commission of an offence is still treated as a confession for the purposes of the regulatory scheme established by PACE. It follows that a mixed statement, consisting of partly incriminating evidence and partly exculpatory elements, is also a confession for the purposes of PACE (the accused's statement may be a 'confession' under s. 82(1) even if it consists in the main of denials). However to qualify as a confession a statement must be adverse to its maker at the time it is made. A statement that is wholly exculpatory (=show or declare that someone is not guilty of wrongdoing) when made is not within the definition of a confession. Whilst containing admissions, a statement may still constitute a 'confession'

impact of P's lies was unquestionably adverse, the judge declined to treat P's lies as confession within the meaning of the Act.

Z (2003) – the meaning of 'confession' in PACE, s. 82(1), fell to be considered again. Z had set up a defense of duress to a charge of burglary. Crown counsel desired to cross-examine Z about the contents of an off – the – record statement that Z had later made to the police in which he appeared to suggest that the relevant threats had not been made until after the burglary had taken place. Because the off – the – record interview did not concern Z's own case, none of the conventional safeguards that accompany interrogation – a caution, a contemporaneous record of anything said and so on – had been observed by the police when this conversation took place. Z argued, inter alia, that the cross – examination on his interview ought to be excluded on the ground that it would not be admissible as a 'confession' under PACE s. 76. This introduced the question as to whether or not Z's statement, which was on its face exculpatory, ought nevertheless to be considered 'adverse' within the meaning of s. 82(1). On appeal it was argued that, following the decision of the **ECtHR in *Saunders v UK*** *Sat-Bhambra* can no longer be regarded as good law. Notably it was stated: 'Bearing in mind the concept of fairness in Art. 6, the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks, which are directly incriminating. Testimony obtained under compulsion, which appears on its face to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt on other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility.'

In light of this it was said that a confession should now be regarded as any statement that turns out to be self-incriminating, even if the accused's remarks were intended to be exculpatory at the time that they were made. In **Z** the CA accepted this argument. The judge rejected the literal interpretation of s. 82(1) adopted by the CA in *Sat-Bhambra* and *Park* and concluded: 'Prima facie one would have thought that the test is to be made at the time when it is sought to give statement in evidence...The prosecution bear the criminal burden of proving that the confession was not obtained in circumstances [contrary to s. 76(2)]. If therefore an accused is driven to make adverse statements by reason of oppression, why should he lose the protection of s. 76(2) just because, although he may have sought to exculpate himself, in fact he damned himself?'

- On appeal, *sub nom Hasan* (2005) (**Hasan [2005] UKHL 22**) the HL reversed the CA's ruling in **Z**. In *Hasan* the issues were inadvertent deception by the police and absence of almost all of the customary safeguards that accompany the interrogation of suspects, not outright compulsion. Lord Steyn asserted that:

A) Torture, inhuman or degrading treatment

'Torture' is not defined in PACE.

- 'Torture' is defined elsewhere in English law, namely for the purposes of the offence of torture, set out in s. 134 of the Criminal Justice Act 1988. That definition refers to the 'intentional infliction...of severe physical or mental pain and suffering by a public official, or by a person acting in an official capacity, in the performance...of his official duties.' This may be of help to the courts.
- Strasbourg jurisprudence on art. 3 of the Convention.

Greek Case – the European Commission of Human Rights defined 'inhuman treatment' as such treatment 'as deliberately causes severe suffering, mental or physical' and degrading treatment as treatment that 'grossly humiliates the individual before others or drives him to act against his will or conscience.

Republic of Ireland v UK (ECtHR) – in this case the Court was concerned with five techniques of interrogation practised for a short period in 1971 on a group of terrorist suspects in N. Ireland. The techniques were aimed at disorientation or sensory deprivation of the suspects and involved wall-standing, hooding, subjection to continuous noise, deprivation of sleep and deprivation of food and drink. The Court held that the techniques amounted to inhuman treatment because they caused intense physical and mental suffering and also led to acute psychiatric disturbances during interrogation. They were also degrading because they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

B) The use or threat of violence (whether or not amounting to torture)

'Violence' is not defined in PACE.

In the context of the law of assault, 'violence' can refer to any application of unlawful force to a person. If this applies without modification to s. 76 of PACE, it means that say, giving a person a single push is enough to render a subsequent confession by that person inadmissible.

Cross and Tapper suggest that 'violence' in this context must indicate more than a mere battery and should be construed as connoting a substantial application of force.

C) Other forms of oppression

At common law, oppression had a wide meaning. It denoted something, which 'sapped the accused's free will' so that 'he spoke when otherwise he would have remained silent'.

→ In **Fulling** When the CA had to determine what 'oppression' meant in *Fulling* no reference was made to s. 76(8). Instead the court referred to one of the meanings given to the word in the *Oxford English Dictionary* and claimed to derive assistance from a half sentence lifted from a sermon on self-deceit delivered by an eighteenth-century prelate, Bishop Butler. (The court looked at the ordinary meaning of the word).

The defendant was suspected of having acted in concert with her lover to obtain property by deception. After her arrest she at first remained silent, despite persistent questioning. She eventually confessed to the offence after allegedly being told by the interviewing officer that her lover had been having an affair with a woman occupying the cell next to the defendant. On appeal against conviction she argued that the confession should have been excluded on the ground that it had been obtained by oppression. She claimed to have been so distressed by the information that she had confessed in the hope that she could thereby escape from an intolerable situation.

The court had to decide if this conduct on the part of the police amounted to oppression. **The dictionary defined oppression as 'exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc.; the imposition of unreasonable or unjust burdens'** while the Bishop intoned: 'There is not a word in our language which expresses more detestable wickedness than oppression'.

Fulling: Definition

"'Oppression' in section 76(2)(a) should be given its ordinary dictionary meaning. The *Oxford English Dictionary* ...'Exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc.; the imposition of unreasonable or unjust burdens.'

CA: 'There is not a word in our language which expresses more detestable wickedness than oppression.'

The trial judge: (decided that there was no oppression) "the word oppression means something above and beyond that which is inherently oppressive in police custody and must import some impropriety, some oppression actively applied in an improper manner by the police."

Fulling: Court of Appeal: We find it hard to envisage any circumstances in which ...oppression would not entail some impropriety on the part of the interrogator. We do not think that the judge was wrong in using that test. What however is abundantly clear is that a confession may be invalidated

s. 76(4): 'The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence –

(a) of any facts discovered as a result of the confession'

s. 76 (5): 'Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or his behalf. -reference must not be made to any part of an excluded confession when adducing evidence resulting from it.

(6) Subsection (5) applies –

(a) to any fact discovered as a result of a confession which is wholly excluded in pursuance of this section; and

(b) to any fact discovered as a result of a confession which is partly so excluded, if the fact is discovered as a result of the excluded part of the confession.'

Example : if the police bully a suspect into confessing where the murder weapon is hidden, the weapon itself would still be admissible even if the confession were excluded under section 76(2) **provided that the weapon could be linked to the accused without referring to the inadmissible confession.** Thus, the murder weapon would be admissible in its own right if it were recovered from the suspect's tool shed or bore his fingerprints, etc, but not if it were found in the middle of a field and could not be connected to the suspect in any other way than through his knowledge of its location.

Fruit of the Poisoned Tree:

Police gain evidence unlawfully, which gives them a lead to evidence, which they **do** obtain lawfully.

What is the 'fruit of the poisoned tree' doctrine? An extension of the exclusionary rule established in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). **This doctrine holds that evidence gathered with the assistance of illegally obtained information must be excluded from trial.** Thus, if an illegal interrogation leads to the discovery of physical evidence, both the interrogation and the physical evidence may be excluded, the interrogation because of the exclusionary rule, and the physical evidence because it is the "fruit" of the illegal interrogation.

There is no 'fruit of the poisoned tree' doctrine in English law. Section 76(4)(a) makes clear that the admissibility of the subsequently discovered facts is not tainted by the exclusion of the confession. However the facts in question must satisfy the normal rules of admissibility, including of course the requirement of