## CONFESSIONS BY JUVENILES

In a previous issue[1] Keith Turner dealt with one type of problem which confronts one in calling a child as a witness in court.

Another problem which children give rise to is that of what the Crown must prove before an inculpatory statement made by a child can be admitted in evidence at his trial. What are the proper considerations for the court in determining whether or not a statement made by a juvenile is voluntary? Should the courts require that more care be taken by the police in dealing with children than with adults? To what extent should the courts require the parents to be present at the time statement is given?

In dealing with this problem one must start at the point that before an inculpatory statement can be tendered in evidence at the trial of an accused, the Crown must first establish that the statement was voluntary in the sense "that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority".[2] Moreover, the Crown must establish this beyond a reasonable doubt.[3]

Thus a promise to a juvenile that he can go home if he tells the police what they want to hear will render a statement inadmissible. But the inducement need not be express. For example, in *R.* v. *Cansdale*[4] Egbert J. rejected a statement taken from a "young girl" who was suddenly arrested, taken with her belongings into a patrol car, to the police station, unaccompanied by anyone else, and questioned by two burly detectives.

Three reported decisions illustrate the manner in which Canadian courts have applied the test of voluntariness in cases involving children.

The first of these decisions is *R.* v. *Boisjoly*[5] where the court upheld a decision of the trial judge rejecting as involuntary a statement taken in the following circumstances:

(a) The age of accused: 14 years, 4 months.
(b) His feeble and ill appearance.
(c) The build and size of the officers Lawton and Legault.
(d) The boy had suffered from fatigue, cold and hunger during the day and had seen two murders committed before his eyes by a companion.
(e) His arrest at a late hour, several hours before the statement, by many officers at the city limits of St. Jerome.
(f) The fact that he was handcuffed.
(g) His solitary detention for a long period before the interrogation, sitting in a chair.

1. Volume 1, p. 23.
2. *Boudreau* v. *R.* (1949), S.C.R. 262; *Ibrahim* v. *The King* (1914) A.C. 599, 609-10.
3. *The Queen* v. *Thompson* (1893), 2 Q.B. 12, *per* Cave J. at p. 15.
4. (1950), 2 W. W. R. 411.
5. 22 C.R., at p. 25.

(h) The comings and goings of police officers during that detention.
(i) The very late hour at which the statements were made.
(j) The fact that the statements were made by questions and answers.
(k) The bearing of the youth during the interrogation; sobbing and very nervous.
(l) The fact that his statement taken verbatim,, was not read over to him.
(m) The fact that he was not asked to sign and the unsatisfactory explanations by the police for these two latter omissions.
(n) The fact that the said statement was offered as an oral statement, when in fact it was a written statement, neither read over nor signed.
(o) The difference between the notes of Lawton and Legault on an important statement of accused.

The statement was rejected, notwithstanding the fact that the accused had been cautioned. Bissonnette J. said:[6]

> So, I may express the opinion that from the single fact that the accused has been warned, it does not follow that any statement that he may have made is admissible. If the circumstances show that he cannot comprehend what would be hardly comprehensible to an adult, upon the reading of a form incorrect in its language and its significance, the duty of the judge, in the light of extreme prudence, is to make sure of the free character of this statement, by noting the circumstances that warrant the presumption that this youth possibly had not the degree of intelligence necessary to warn him of the danger of a reply made without reflection.

In *R.* v. *Jacques*[7], Schreiber J. of the Quebec Social Welfare Court, rejected a confession at a trial of a delinquency charge against a juvenile aged 14 years and 6 months after considering the following factors:

1. The experience of this child on this occasion began with a journey of some 135 miles in silence, on November 2, 1957 at about 4.00 p.m.
2. That his personal belongings and certain articles of clothing, such as his belt, shoe laces, were taken from him on his arrival at headquarters.
3. He was imprisoned behind double, locked doors with a barred window, in a cell normally used for those detained on suspicion of murder.
4. He was under the constant watch of a permanent guard who could see him always.
5. During the entire length of his detention he did not receive one full meal.
6. He complained during this detention of a headache and stomachache and on one occasion medicine was brought for him, but with such delay that in the meanwhile he had time to fall asleep before receiving it.
7. He had to use a toilet in the sight of his guard.
8. He was detained for 48 hours, from the time of the leaving home, and about 44 hours, counting from the time of his arrival at headquarters, before his interrogation, without any good reason at all.
9. No opportunity was given to the boy to see a relative during all this time, even though the officer in charge of the case knew the address in Montreal of the boy's brother.
10. When finally he was led into the room where he was questioned, in tears and nervous, no one said a word until the child's tears stopped and then the first words spoken were the caution.

Then, the statement of the child, taken in the form of an interrogation, was taken down on the typewriter. It was read by Claude Jacques and out loud by Sergeant Legault and signed by the boy.

6. 22 C.R., at p. 33.
7. 29 C.R., at p. 249.

He held that the rights of a child ought to be protected more carefully than those of an adult because a child does not have the resistance, maturity or understanding of an adult to cope with a situation such as when he is questioned by the police. Schreiber, J. then recommended that the police do five things to ensure the admission of a child's statement:[8]

1. Require that a relative, preferably of the same sex as the child to be questioned, should accompany the child to the place of interrogation.
2. Give the child, at the place or room of interrogation, in the presence of the relative who accompanies him, the choice of deciding whether he wishes his relative to stay in the same room during the questioning or not.
3. Carry out the questioning as soon as the child and his relative arrive at headquarters.
4. Ask the child, as soon as the caution is given, whether he understands it, and if not, give him an explanation.
5. Detain the child, if there is a possibility of proceeding according to 3, above, in a place designated by the competent authorities as a place for the detention of children.

The third case is that of *R.* v. *Yensen*[9], where the accused, aged 14 and mentally retarded, was charged with murder. During a school recess accused was taken to the principal's office, at which time Sergeant Whitehouse said:

> I am Staff Sergeant Whitehouse from the Provincial Police. I am investigating the death of Mrs. Rose Kennedy. I want you to come to the police office because I want to ask you some questions.

Accused replied:

> If you want to ask me questions you will have to get my mother; I am only fourteen years old.

The Sergeant replied:

> You come along with me and I will see about that.

The police then drove accused to the police station, where, for two hours, and inspector spoke to him about sports, etc. He was subsequently cautioned, *inter alia* as follows:

> In the event that you are involved I must warn you that you may be charged. You do not have to say anything unless you wish to do so, but whatever you do say may be taken down in writing and given in evidence.

In reply to a question as to whether accused understood what had been said, he answered, "Yes."

McRuer, C. J. H. C., rejected the confession. Firstly he expressed the view that the police ought to have gone further than merely saying "You may be charged."[10] He stated:

> While, as I say, I do not dispose of this matter on that ground, I have very grave doubts as to the right to use a statement of a juvenile that might be used in the Juvenile Court in a trial that is held in consequence of the action of the Juvenile Court Judge in deciding that proceedings should be initiated by way of indictment unless great care is taken to give a full explanation to the accused that that is the course that events might take.

8. 29 C.R., at p. 268.
9. (1961), O.R. 703.
10. (1961), O.R., at p. 708.

Secondly, he held that despite the fact that accused stated he understood the caution, it was not properly explained to the accused. Applying his earlier decision in *R.* v. *Washer*[11] where he had rejected a statement given by a man under the influence of liquor, he stated:[12]

> Now, I think that to take a statement and use it in a court on a serious charge—and I was dealing with a murder charge in that case—where he was not possessed of his faculties to a sufficient extent that he could appreciate the consequences that would flow from the statement, would be quite wrong, and I adhere to what I said in that case, and I think it has considerable application to this case.

Chief Justice McRuer then quoted from the findings of the Royal Commission in England on Police Powers and Procedures as follows:

> Persons present during the taking of statements. In cases where the attendance of friends and legal advisers is open to no objection, the deponent should always be offered the option of having them present.

and commented:

> I would concur in that as being a rule of general application, but when one comes to deal with a juvenile, and especially a juvenile who has asked that his mother be present during the questioning, I think that that is a sound rule to follow.

He quoted Judge Schreiber's five rules and stated:

> I will not say that I concur that these are rules of law that are laid down by the cases; I do not think they are, but it does commend itself to me that if a child is to be questioned and invited to make a statement of such a character that may be used against him at his trial, especially a trial in the higher Court, a relative should be present; and certainly if the child asks for a parent to be present, the parent should have the opportunity of being present. I have not overlooked the fact that Sergeant Whitehouse said that he spoke to the accused's mother while the accused was being detained by Inspector McDermott, and told her that they were going to question him, and that she did not give any indication of desiring to be present. He did not invite her to be present, and, what is more, the question is whether the accused wanted her to be present or not, not whether the parent wished to be present.
>
> I would go one stage further than Judge Schreiber went in this case with reference to the caution. I do not think it is sufficient to ask a child if he understands the caution. I think the officer must be in a position, when he comes into Court, to support the statement, to demonstrate to the Court that the child did understand the caution as a result of careful explanation and pointing out to the child the consequences that may flow from making the statement.

The *Jacques* and *Yensen* cases therefore have expressed the view that a juvenile's parents ought to be given an opportunity to be present during a juvenile's interrogation. And in each of these cases the courts applied a subjective test of voluntariness by interpreting what motivated the accused to give the statement.

There are two chief criticisms of these two decisions.[13] The first one is that capacity of a person is not a consideration relevant in determining

11. (1948), 92 C.C.C. 218; O.W.N 393.
12. (1961), O.R., at p. 709.
13. They are dealt with by W. H. Fox in "Confessions by Juveniles" (1962-3), 5 C.L.Q. 459.

the voluntary nature of a statement. Rather, it is relevant only to the question of weight to be given to the statement; the only test of admissibility is whether there was any inducement.[14] The second criticism is that the presence of a parent might tend to discourage a child from telling the truth to the police. Mr. Fox in this connection gives as an illustration the unreported case of *Re R. M.*[15] where a 13-year-old boy described by the psychiatrists as being in the "bright-normal" range with an I.Q. of 113. He was charged with a delinquency in that he murdered a 7-year-old girl. Following the discovery of the girl's body, accused's mother warned him that if the police should come and question him, he was to say that he had been home all day, a fact which the mother knew not to be true. He was subsequently interviewed by the police, but it was only in a later interview, when his mother was not present, that he confessed. When the boy's father learned that he had confessed, the father threatened the detective. Mr. Fox comments:

> Undoubtedly, there must be countless other cases like *Re R. M.* coming before our courts from day to day in which there are strong reasons for believing that it would not be for the good of the child or in the interest of the community, that a parent or other relative should be present while a child is being interrogated or is being invited to make a statement to a person in authority. In such cases, it is submitted, it would be perfectly proper for the investigating officer, in the absence of the parent, to conduct his interrogation and take a statement from the child provided he complied, as far as possible, with the Judge's Rules, and those additional rules which have developed in English and Canadian case law surrounding the taking of such statements. And, as Rand, J. said in the *Boudreau* case (at p. 9 C.C.C. p. 435 (C.R.): It would be a serious error to place the ordinary modes of investigation of crime in a straitjacket of artificial rules; and the true protection against improper interrogation or any kind of pressure or inducement is to leave the broad question to the court.

In reply to the first criticism, it is submitted that the law is well established in Canada that capacity is a relevant consideration in determining the voluntary nature of a statement.[16]

Dealing with the second criticism, while the presence of some parents may deter a child from telling the truth, that fact in itself does not justify the admission of a statement made in the absence of a parent. The question of the effect of the presence of parents is irrelevant. The question in the *voir dire* is not, "Is the statement true?" It is, "Is it voluntary?"[17] And in determining the voluntariness, all the surrounding circumstances, including the mental capacity, must be considered.

---

14. *R.* v. *Spilsbury* (1935), 173 E.R. 82 *per* Coleridge, J. and *R.* v. *Pedersen* 114 C.C.C. 266 *per* Gale, J.
15. 5 C.L.Q., p. 466.
16. *R.* v. *Washer*, *supra*.
*R.* v. *Yensen*, *supra*.
*R.* v. *Booher* (1928), 3 W.W.R. 303, *per* Simmons C.J.T.D.
*R.* v. *Thauvette* (1938), O.W.N. 195, *per* Urquhart, J.
*R.* v. *Godwin* (1924), 2 D.L.R. 362, 371, *per* McKeown, C. J.
*R.* v. *Muirhead* (1952), 103 C.C.C. 365.
Norman Borins, "Confessions", 1 C.L.Q. 140, 151.
17. *R.* v. *Hnedish* (1958), 26 W.W.R. 685, *per* Hall, C.J.Q.B.
*R.* v. *Weighill* (1945), 1 W.W.R. 561, 83 C.C.C. 387.
*R.* v. *Mandzuk* (1945), 3 W.W.R. 280, 284, 85 C.C.C. 158, 162 *per* O'Halloran, J. A.
*R.* v. *Sim* (1954), 108 C.C.C. 380, 11 W.W.R. 227 *per* Boyd McBride, J.

I submit that a court must be careful before admitting a statement made by a juvenile, and in exercising this care the court ought to require proof to its satisfaction that the juvenile understood the seriousness of his position and the significance of what he was to say. Such evidence would have to be stronger if the juvenile is mentally defective. In order to exercise this care the Crown ought to be required to show that the juvenile's parents were offered an opportunity to be present during his questioning by the police.

I do not suggest that presence of parents is an absolute requirement for the admission of a statement. Such a requirement is in the same position as a caution. The *Boudreau* case made it clear that a caution is not essential to the admission of a statement. Yet it is still an important factor. Our courts will often reject statements given in the absence of evidence of a prior caution. That the presence of parents is in the same position as the requirement of a caution is clear from the part of the caution which states that the accused need not say anything. Both are designed to ensure the understanding of the accused's rights. If then, in any case the parents were not present, it is submitted that the Crown must clearly demonstrate that the juvenile understood his position.

One often hears the Crown attempt to justify the extension of rules of admission of evidence under the pretext that it is necessary to investigate crimes and ascertain the truth. Nevertheless, it is submitted that our courts must ever protect the liberty of the subject, so that justice will be done every time, not just most of the time.

PERRY W. SCHULMAN*

## RECENT CHANGES IN THE STATUS OF MARRIED WOMEN IN QUEBEC

Another phase of the internal "revolution" taking place within the Province of Quebec, Bill 16, sometimes called the "emancipator" of the Quebec woman, became law on July 1, 1964. The objective of the Bill was to give the married women of the province a greater legal capacity, relative to their husbands, than they had previously enjoyed. The extent of the changes made by the Bill will be the subject of this discussion.

Essentially, Bill 16 is concerned with the legal capacity of married women in three areas: care and raising of the family; private property of married women, and the right of married women to have independent jobs and salaries. In the first of these, the care and maintenance of the family, much needed changes have been implemented by the Bill.

*Of the firm of Schulman & Schulman, Winnipeg.