78/76

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v GAY

Young CJ, Gillard and Murray JJ

17-18, 21-22 July, 16 September 1975

[1976] VicRp 59; [1976] VR 577 [Note: The report of this case omits certain passages]

EVIDENCE – ADMISSION OF NOTES AS REBUTTAL OF RECENT INVENTION – EVIDENCE OF ACCUSED'S FLIGHT AND HIS FINANCIAL DEALINGS – FACTORS TENDING TO ADMISSION OF GUILT.

G. was apprehended in Queensland on 11th May 1971. Sgt. Daly of the Queensland police corroborated admissions made by G. in an interview with arresting Victorian police. On re-examination Daly said he recorded the conversation in an official notebook which was kept in chronological order and was regularly inspected. The particular page of the notebook was admitted, as was the whole book, without objection, its purpose presumably being to rebut any allegation that no such interview took place and/or that Daly fabricated the entry as to the particular day. G. was found guilty of an armed robbery. Evidence was led of G. fleeing to England in 1970 after the apprehension of the co-accused, McInerney, and of fleeing to Queensland in 1971 after another co-accused Apap was caught. Evidence also led that prior to the robbery G. was in somewhat impecunious circumstances but shortly afterwards expended large sums of money whilst using a false name. It was argued that this evidence was too prejudicial to be admitted.

HELD: Appeal refused.
(i) Admission of Notes
1. The notebook would not have been admissible in evidence merely to corroborate Sergeant Daly. If, however, it appeared to His Honour that the cross-examination had raised an imputation of recent fabrication on the part of Sergeant Daly it was open to His Honour to admit the book into evidence for a limited purpose, namely to rebut that imputation. In such a case a statement to the same effect as the account given in the witness box, if made contemporaneously with the event or shortly thereafter, became admissible.
***Fox v General Medical Council* (1960) 1 WLR 1017 at pp1024-5; (1960) 3 All ER 225 at p230, (PC); and**
***Nominal Defendant v Clements* [1960] HCA 39; (1960) 104 CLR 476, applied.**

2. Thus it appeared that during his charge to the jury His Honour correctly described the use that the jury could make of that part of Sergeant Daly's notebook which contained a reference to his interview with the accused. It was clear that His Honour regarded the exhibit as having been received in order to rebut a suggestion that Sergeant Daly had recently invented his evidence and no misdirection had been shown in what His Honour said to the jury.

(ii) Evidence of Flight by Accused and his Financial Dealings
3. Evidence which has little probative value but which is also for some extraneous reason prejudicial to an accused is often excluded by a judge in the exercise of his discretion. In relation to the evidence of the applicant's alleged flights the only prejudicial aspect of the evidence lay in its probative value. Flight may be tantamount to an admission of guilt. Evidence which tends to prove the guilt of an accused person is always prejudicial in that sense but that is no ground for its exclusion. In the present case, apart from what probative value the evidence had, there was no element of prejudice.
***R v McKenna* (1956) 73 WN (NSW) 345, applied.**

4. The relevance of evidence, insofar as it depended on a question of degree, was essentially a matter for the trial judge to determine. The trial judge had heard it unfolded and had heard it tested in cross-examination. In the present case counsel for the defence actually succeeded in obtaining from two of the investigating police officers the concession that in their opinion the evidence did not disclose a significant change in the applicant's financial circumstances after the robbery. But the opinion of the police officers did not conclude the matter. The question of relevance was essentially one for the trial judge to determine and its weight was a matter for the jury. In the present case His Honour thought that the evidence was relevant and there was no basis for saying that he was wrong in so thinking.

THE COURT: ... It seems clear that the notebook would not have been admissible in evidence merely to corroborate Sergeant Daly. See *Fox v General Medical Council* (1960) 1 WLR 1017 at pp1024-5; (1960) 3 All ER 225 at p230, PC. If, however, it appeared to His Honour that the cross-examination had raised an imputation of recent fabrication on the part of Sergeant Daly it was open to His Honour to admit the book into evidence for a limited purpose, namely to rebut that imputation. In such a case a statement to the same effect as the account given in the witness box, if made contemporaneously with the event or shortly thereafter, becomes admissible (*Nominal Defendant v Clements* [1960] HCA 39; (1960) 104 CLR 476). The judgment of Dixon CJ in that case contains a passage which should be quoted in full. His Honour said (at p479):-

> 'If the credit of a witness is impugned as to some material fact to which he deposes upon the ground that his account is a late invention or has been lately devised or reconstructed, even though not with conscious dishonesty, that makes admissible a statement to the same effect as the account he gave as a witness if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or reconstruction. But, inasmuch as the rule forms a definite exception to the general principle excluding statements made out of court and admits a possibly self-serving statement made by the witness, great care is called for in applying it. The judge at the trial must determine for himself upon the conduct of the trial before him whether a case for applying the rule of evidence has arisen and, from the nature of the matter, if there be an appeal, great weight should be given to his opinion by the appellate court. It is evident however that the judge at the trial must exercise care in assuring himself not only that the account given by the witness in his testimony is attacked on the ground of recent invention or reconstruction or that a foundation for such an attack has been laid by the party but also that the contents of the statement are in fact to the like effect as his account given in his evidence and that having regard to the time and circumstances in which it was made it rationally tends to answer the attack. It is obvious that it may not be easy sometimes to be sure that counsel is laying a foundation for impugning the witness's account of a material incident or fact as a recently invented, devised or reconstructed story. Counsel himself may proceed with a subtlety which is the outcome of caution in pursuing what may prove a dangerous course. That is one reason why the trial judge's opinion has a peculiar importance.'

Moreover, the approach suggested by Windeyer J in that case is a useful practical guide to a problem of this kind. His Honour said (at p494):

> 'The kind of imputations and allegations that – if sufficiently clearly made – will let in prior consistent statements are: First, that the witness's testimony is a recent fabrication, in the sense of being invented at or after a particular time. Evidence that he said the same thing before that time becomes admissible. Secondly, that his testimony was the result of some motive, bias, influence or moral duress operating from some particular time and not before. Evidence that he said the same thing before that time becomes admissible. The two situations quite obviously overlap and in many of the cases in which the evidence was admitted elements of both operated.'

(See also *Flanagan v Fahy* (1918) 2 IR 361)

Later in his judgment (at p495) Windeyer J said:

> 'If ... a witness's silence or omission to mention some circumstance, on an occasion when he might have done so, is made the basis for a suggestion – as it often may be – that he has invented it since that occasion, then evidence is admissible that on a still earlier occasion he did speak of it.'

(See also *R v Coll* (1869) 24 LR Ir 522; *R v Benjamin* (1913) 8 Cr App Rep 146).

In *Transport & General Co Limited v Edmondson* [1961] HCA 86; (1961) 106 CLR 23 the High Court said it was for the trial judge to determine whether the witness's credit had been impugned by the cross-examiner. Here again the remarks of Windeyer J in the earlier case at p495 are of value:

> 'It is for the trial judge to decide whether there has been an attack on the evidence of a witness of such a character as to let in his earlier consistent statements. The trial Judge not only hears counsel's questions. He hears the tone of them and is conscious of the suggestion they would convey to the jury. It is not enough that a witness has been cross-examined as to credit, however much his credibility may appear to have been shaken there must be an imputation, clearly made and not unequivocably disclaimed, that the witness is not speaking from his own recollection of events, but is recounting a story subsequently made up by him or for him. Furthermore, the statement which is sought to use to dispel this imputation must be made in such circumstances that it logically does

> so. For if evidence be attacked as a recent fabrication, the attack is not repulsed by proving another statement, itself the product of pressure or of a motive to falsify. And, finally, if evidence of an earlier statement be received, the grounds for doing so should be made clear to the jury lest they should regard it as evidence of the facts stated.'

In the present case the course adopted by counsel for the defence had the effect that His Honour was not called upon to give a formal ruling. If he had done so, the basis upon which he admitted the pages would have been stated. Of course, it is not necessary that cross-examining counsel should allege expressly that a witness's evidence is a recent concoction: it is sufficient if a foundation is laid for a subsequent comment to that effect. By the time the notebook was tendered the pattern of the defence was quite clear, namely that various police officers had wilfully conspired to fabricate a number of confessions of guilt by the applicant and that they had done so because they were aware that without such confessions they did not have sufficient evidence to warrant charging him.

Moreover, the defence might well have believed that Sergeant Daly's evidence was an afterthought. First, the evidence of Sergeant Daly's conversation with the applicant after the record of interview was taken was not referred to by the prosecutor in his opening address. Secondly, Sergeant Daly had not given evidence in the Magistrates' Court. Having regard to the nature of the evidence this, to say the least, is somewhat surprising. Thirdly, notice of Sergeant Daly's evidence was only given to counsel for the defendant on the very day that the witness gave his evidence, that is apparently 11th June 1974, the trial having commenced on 3rd June. Fourthly, it was elicited from Sergeant Daly in cross-examination that he had only come to Melbourne from Queensland on Thursday, 6th June, and had then remained in the company of Victorian police officers who were engaged in investigating the crime and were to be called as witnesses at the applicant's trial.

Thus a situation existed in which an application might have been made by the prosecutor to introduce evidence to rebut the suggestion that Sergeant Daly had recently concocted his evidence. If such an application had been expressly made counsel for the accused might perhaps have been asked whether in fact he did make such an allegation and failing a disclaimer by counsel the evidence might have become admissible. See *Edmondson's Case* (*supra*) at pp29-30, although the course suggested by Jordan CJ might need to be followed somewhat cautiously in a criminal trial. It may be observed that if application had been made and if the statement of evidence which Sergeant Daly said had been prepared about a week after 11th May 1971, contained an account of the interview that statement also might have been received in evidence.

It was, in our opinion, clearly open to His Honour to admit the notebook for the limited purpose of rebutting the imputation of recent fabrication. However, it was submitted that even if the book were admissible if His Honour considered that imputation of recent fabrication had been made, it was not admissible unless His Honour in fact turned his mind to the question whether such an imputation had been made. We are not satisfied that this submission is correct standing by itself.

If a trial judge does not in fact turn his mind to the problem it is almost inevitable that he will not admit the document upon the relevant limited basis and this will be revealed by the use to which he permits the document to be put. If, on the other hand, he does properly limit the use to which the document is put and properly directs the jury it will be difficult to escape the conclusion that he did in fact turn his mind to the relevant problem. In the present case an examination of what His Honour said does, we think, show that he had turned his mind to the question.

The significance of the reference to 'recent' invention for present purposes is simply that the entry from the notebook did not and could not rebut a suggestion that Sergeant Daly had invented the whole story in May 1971, and had at that time made a false entry in his notebook. (Cf. *R v Boland* [1974] VicRp 100; (1974) VR 849 at p375). But in spite of an argument advanced by Mr Redlich that all that had been suggested by counsel's cross-examination of Sergeant Daly was that he had 'invented' his evidence as distinct from had invented it recently, which argument was used to destroy the only basis upon which the entry could have been received, we cannot find in the cross-examination either before or after the pages from the notebook were admitted in evidence any suggestion that the 'interview' had been invented in 1971 or that the entry in the notebook although made at that time was false. It should be noted that further cross-examination permitted to counsel took place after he had sought specific instructions upon the admissibility of the notebook. If it were really to be suggested that the evidence has been invented in May 1971, that

was surely the time when that would have been expressly put to Sergeant Daly. Accordingly, the argument that it was suggested that Sergeant Daly's evidence was invented in May 1971, must be rejected.

During the course of his charge His Honour said:—

> 'The general rule of law is that a self-serving statement made by a witness out of court is not admissible in evidence. There is, however, an exception to that rule. Where the evidence of a witness about a matter is attacked in such a way that you might think that the witness has recently invented his evidence, then evidence is admissible to show that the witness has not recently invented it. Thus Sergeant Daly gave evidence of a conversation held by him on 11th May 1971, at the Southport police station with the accused. In answer to Sergeant Daly's inquiry, the accused said that he had no complaints about his treatment by police. When cross-examined by the accused's counsel, it was put to Sergeant Daly that such a conversation did not take place. That question might have led you to conclude that Sergeant Daly's evidence of the conversation was a concoction, recently invented. To meet that attack upon Sergeant Daly's credibility, the record of the conversation made by him in his notebook was admitted in evidence, and that is Exhibit 93. The statement, however, in his notebook is not evidence of the truth of its contents, but it is evidence that you may use tending to disprove that Sergeant Daly had invented his evidence about his conversation with the accused.'

This passage states correctly the basis upon which Sergeant Daly's notebook was admissible. At a later stage in the charge His Honour summarized, quite accurately, Sergeant Daly's evidence and concluded,'You will recall what I said about the use you can make of that notebook, Exhibit 93'. Finally, in the course of summarizing the Crown's case His Honour said:—

> 'The Crown says that Sergeant Daly's evidence is very important; if you accept his evidence as truthful, it gives the lie to the accused's assertion that the record of interview was fabricated. Sergeant Daly said he asked questions of the accused at the request of Mr Ainley. He saw the accused on his own. Now, the Crown says, if Lalor and Green had behaved in the way the accused said they did, it is unlikely that they would have left the accused alone with Daly, who was going to ask him about their own conduct towards him. If they had cheated, if they had done anything wrong, you would have expected Lalor and Green to be there to intimidate the accused and to fabricate the whole matter. The accused, it is said, told an untruth when he said that Sergeant Daly asked him about the behaviour of the Queensland police, because, first, Sergeant Daly denied that that was the question which he asked; secondly, that was put to Sergeant Daly after it was put by the accused's counsel to him that he did not speak to the accused at all. And you remember that it was after that the sergeant's notebook was admitted in evidence to show that his evidence was not a recent invention.'

The use to which, in the circumstances, Sergeant Daly's notebook could properly have been put may be briefly stated. It could only have been admitted to meet a suggestion that Sergeant Daly's evidence was a late invention and if so admitted it could clearly be used to rebut that suggestion. Thus it could be used to reach a conclusion that Sergeant Daly had not recently invented his evidence that he had had an interview with the applicant, and that he had not recently invented the substance of what was said at that interview. If the entry in the notebook tended to rebut the suggestion that Sergeant Daly had recently invented the fact that he had had an interview, it equally tended to rebut the suggestion that he had recently invented the substance of the interview. If after considering the evidence of the entry in the notebook the conclusion were reached that Sergeant Daly had not recently invented either the fact that he had had an interview or the substance of what was said at the interview, there being no other attack on Sergeant Daly's veracity, the conclusion might readily be reached that Sergeant Daly was telling the truth, that an interview had taken place and that the substance of what was said at the interview was contained in what Sergeant Daly said in evidence.

Thus it appears that during his charge to the jury His Honour correctly described the use that the jury could make of that part of Sergeant Daly's notebook which contained a reference to his interview with the accused. It is clear that His Honour regarded the exhibit as having been received in order to rebut a suggestion that Sergeant Daly had recently invented his evidence and no misdirection has been shown in what His Honour said to the jury."

2. Flight by Accused and his Financial Dealings

In this Court counsel for the applicant only faintly pressed the submission that the learned judge ought, in the exercise of his discretion, to have excluded the evidence of the applicant's departure for England in December 1970 and his departure for Surfers Paradise in March 1971,

and also the evidence that in questioning McInerney the police had questioned him in relation to his financial dealings since the robbery. Clearly such a submission could not have been taken very far. Evidence which has little probative value but which is also for some extraneous reason prejudicial to an accused is, of course, often excluded by a judge in the exercise of his discretion. But in relation to the evidence of the applicant's alleged flights the only prejudicial aspect of the evidence lay in its probative value. Flight may be tantamount to an admission of guilt: see *R v McKenna* (1956) 73 WN (NSW) 345. Evidence which tends to prove the guilt of an accused person is always prejudicial in that sense but that is no ground for its exclusion. In the present case, apart from what probative value the evidence had, there was no element of prejudice.

The evidence given in relation to the questions asked of McInerney was to establish the fact that probably the applicant, who was a friend of McInerney, had heard of the questions asked of McInerney or of his accountant and his desire to avoid similar questioning by the police was the reason for his sudden departure to the United Kingdom. It was submitted by the Crown that it was because of the enquiries made of McInerney and his accountant and McInerney's subsequent arrest that the applicant departed to England.

In relation to the evidence of the financial dealings of the applicant and his wife before and after the robbery it was submitted on behalf of the applicant that the evidence showed that the applicant was a man who had, or at all events had had, other sources of income such as bookmaking and commissions on car sales and that the evidence was of so arguable a nature that it bordered on the irrelevant and ought to have been excluded by the learned trial judge. Alternatively, it was submitted that when the case for the Crown had concluded and all the evidence could then be examined His Honour should have discharged the jury.

But the relevance of evidence, insofar as it depends on a question of degree, is essentially a matter for the trial judge to determine. The trial judge has heard it unfolded and has heard it tested in cross-examination. In the present case counsel for the defence actually succeeded in obtaining from two of the investigating police officers the concession that in their opinion the evidence did not disclose a significant change in the applicant's financial circumstances after the robbery. But the opinion of the police officers does not conclude the matter. The question of relevance was essentially one for the learned trial judge to determine and its weight was a matter for the jury. In the present case His Honour thought that the evidence was relevant and there is, in our opinion, no basis for saying that he was wrong in so thinking.

While it is no doubt true that a mere consideration of a man's personal balance sheet which discloses an excess of liabilities over assets will not necessarily form a safe starting point from which to reason, the evidence here was directed to the aspect of cash flow and it is this aspect which may well have evidentiary value.

It was further submitted that His Honour's charge was unbalanced in that it failed to put or to put adequately the case made by the defence on the matters of the accused's financial betterment and his alleged flights. His Honour's charge extended over part of three days and was a full and detailed one. The defence case relating to the alleged financial betterment of the applicant was dealt with as was the applicant's case on his departure for Queensland, and his failure to answer his bail. His Honour reminded the jury that the accused denied that he had tried to escape by the back door when the police called at his flat and put the accused's version of that incident to them. His Honour dealt fully with the applicant's statement from the dock and with the evidence of Mrs Gay, and he put very fully the applicant's version of the trip to England. It cannot, therefore, be said with justification that the charge was either unbalanced or failed to deal adequately with the evidence or with the way the case, both for the Crown and for the defence, was put.

But the submission relating to the grounds presently under consideration which was most strongly pressed was that the learned Judge misdirected the jury in relation to the use to which the jury could put the evidence relating to the applicant's financial dealings and to his alleged flights. It was submitted that, following upon the reasons given in the High Court when refusing special leave to appeal in *Burns v The Queen* [1975] HCA 21; (1975) 132 CLR 258 His Honour ought to have directed the jury that the evidence relating to the applicant's financial affairs and to his flights could not be taken into account in considering whether the applicant had made the statements attributed to him in the record of interview and whether these statements were

true. In *Burns' Case* the only evidence other than admissions made in a record of interview was the financial betterment of the accused after the robbery. In the presentation of the Crown case it was submitted that the evidence of Burns' financial betterment went to prove the veracity of the record of interview. This was challenged by Burns and his advisers, but the Full Court and the High Court held that the evidence of his betterment could be used to support such a finding. Furthermore, Barwick CJ, Gibbs and Mason JJ were of the view that no further direction as to how the evidence could be used was necessary. In the course of giving judgment their Honours said:—

> 'It is clear and elementary law that once a confessional statement has been admitted into evidence its weight and probative value are matters for the jury. It is for the jury to determine whether the alleged confession was made and whether it was true in whole or in part. Unless the jury are satisfied that so much of a confession as tends to show the guilt of the accused was true they cannot treat it as proof of guilt. However, a confessional statement may be only one piece of the evidence against the accused and the jury are entitled to consider all the relevant evidence together in deciding upon their verdict. The nature of the direction necessary to be given properly to instruct the jury as to the use of evidence of an alleged confession must depend upon all the circumstances of the case.'

That statement covers the position of the evidence in this case. The Crown relied upon the conduct of the applicant as supporting the evidence of his admissions in order to satisfy the jury of his guilt. Later, their Honours said:

> 'We have already said that when the evidence that an accused person has made a confession is not the only evidence in the case the jury are entitled to consider the whole of the evidence in deciding whether or not they are satisfied of the guilt of the accused. Any evidence that has been admitted at the trial and is relevant to the question whether the accused made the confession may be considered by the jury in relation to that question.'

The real basis of the submission was, however, that the evidence relating to the applicant's financial dealings and his flights was not relevant to a consideration of the question whether the applicant gave the answers recorded in the record of interview. It was submitted that the jury may have used the evidence in an erroneous way, namely to show that many of the applicant's recorded answers were true in fact and that this tended to show that he had made them. Secondly, it was submitted that the evidence insofar as it may have caused suspicion of the applicant was not relevant in considering whether the applicant made the answers attributed to him. The propositions of logic underlying these submissions are, of course, true. Where facts allegedly stated by an accused person in an interview with the police are true but were known to the police at the time of the interview their appearance in the record is nothing to the point in the context of an allegation by the accused that the record of interview was deliberately concocted by the police in an attempt to fabricate sufficient evidence to secure a conviction. Nor would evidence tending to show that an accused was or might he the guilty party be logically relevant in determining the question of credit involved in deciding whether he did or did not make the admissions attributed to him.

But the directions given to a jury and the question whether a special direction was necessary must be considered in the light of the circumstances of each case and it is necessary to examine what was said by His Honour and to consider the question whether any further direction was desirable or indeed practicable.

His Honour directed the jury that in deciding the case against the accused they should have regard to the whole of the evidence. He then dealt fully with the types of considerations which could be taken into account in determining the question of credibility. Before reading the record of interview, His Honour reminded the jury that it was a matter for them to decide whether the applicant did make it and whether he accepted or adopted it and whether the statements in it were true. His Honour dealt with the arguments advanced by the Crown as to why the jury should accept the record of interview. None of these arguments includes a reference to the suspicious nature of the financial dealings of the applicant or to his alleged flights save the final few lines which read:

> 'It' (the Crown) 'says, finally, the contents of the record of interview are borne out by the documents. The contents contain admissions which are consistent with the accused's spending and the flights, and it is submitted that therefore you should accept the record of interview as being a true record of what happened, what the accused said, and that he adopted it, and what is contained in it is true.'

His Honour drew the jury's attention to the arguments advanced by the applicant's counsel in

submitting that the jury should reject the record of interview, which arguments highlighted the fact that the facts contained in the alleged answers of the applicant were all known to the police at the time.

The passage which was relied on most heavily by counsel for the applicant is contained in the redirection given by His Honour pursuant to a request made by counsel for the applicant. His Honour directed the jury that if they were satisfied beyond reasonable doubt that the applicant's assets and income were insufficient to meet his liabilities before the robbery and that after the robbery he expended large sums of money there was still a third step which was necessary namely that the money expended after the robbery came from the robbery and not from any other source. His Honour concluded his redirection by saying:

> 'But I must tell you this: that is not the sole way in which the Crown puts its case against the accused. That evidence, of course, must be used by you in conjunction with all the other evidence; and in deciding whether these facts are true, you take into account all the other evidence and you take into account that he made the record of interview; you take into account his actions of avoiding the police and fleeing, and then absconding bail. But you take the whole lot into consideration in determining whether or not the case has been proved beyond reasonable doubt. You see, whether or not it has been proved or whether or not he made that record of interview and whether it was a truthful one, may be supported by what he did, that is, those various actions of leaving Victoria and, going overseas, and absconding from bail, and the like, and also by what you think of this matter of his financial betterment. One might help to prove the other, and the other might help to prove the other. In other words, proof of his financial betterment you might find from his other actions. And it is all a matter for you.'

It is clear that His Honour did not direct the jury in terms that the fact that the record of interview contained answers alleged to have been made by the applicant which revealed facts which were in fact true was a matter which could be used to support the conclusion that the applicant made those answers. Indeed it is difficult to see how His Honour could have given such a direction in view of the lengthy cross-examination of the police officers and the argument advanced by the applicant's counsel that a strong indication that the record of interview had been concocted was that it only contained reference to facts which were already known to the interrogating police who, in fabricating the record, frequently referred to documents in their possession.

In the reasons of Barwick CJ, Gibbs and Mason JJ in *Burns v The Queen* (*supra*) their Honours said:

> 'Where it is the case for the accused that the circumstances which pointed inconclusively to the guilt of the accused suggested to the police that he was guilty and led the police to fabricate a confession, the jury may not be assisted in deciding whether the confession was made, but rather distracted from the real question, which is essentially one of credibility, by considering the fact that these suspicious circumstances did exist. However, it is not possible to lay down any general rule as to whether the jury may consider other evidence, pointing to the guilt of the accused, in deciding whether an alleged confession was made; that must depend on all the facts of the particular case.'

In the present case it was open to the jury to use the financial and other evidence in at least three ways in considering whether the record of interview was genuine or fabricated.

First, one argument advanced by the Crown was that the evidence, looked at as a whole, presented a picture of a man who, having taken part in a large and highly successful robbery and having every reason to think that he is in no danger of apprehension, sees that a net is closing in upon him and after making various attempts to avoid interrogation, when finally apprehended realizes that his position is hopeless and, perhaps with a feeling of some relief that the tension of the chase is over, is prepared to speak. In other words, the jury might properly use the whole of the evidence relating to the accused's financial betterment and his flights to assist them in concluding that in all the circumstances it was likely that he had made the admissions alleged. Secondly, putting a construction on the applicant's statement from the dock which is most favourable to him, it may be said that he claimed that the police asked no serious questions of him and did not even bother to interrogate him closely upon the matters which appeared in detail in the record. Upon this basis it was open to the jury to have regard to the evidence of the applicant's financial dealings and his alleged flights in determining whether they believed the applicant's version that the police, despite their knowledge, in effect asked no questions of him. Thirdly, on the other hand, the evidence was heavily relied upon by the defence to demonstrate that most, if not all of the collateral facts

set out in the record of. interview, were known to the police who admitted that without further evidence they did not might well be tempted to fabricate the admissions allegedly made.

It was, therefore, quite correct for His Honour to direct the jury that in determining whether they believed that the applicant made the answers attributed to him they could have regard to the other evidence in the case. Furthermore, there is nothing in the judgments of the High Court in *Burns v The Queen* to require a direction in this case different from that which the learned trial judge gave. These remaining grounds of appeal must, therefore, also fail.

[The Court proceeded to consider the appeal against sentence and varied the sentence imposed.]

Solicitor for the applicant: George Madden, Public Solicitor.
Solicitor for the Crown: John Downey, Crown Solicitor.
