HOUSE OF LORDS SESSION 2004–05
[2005] UKHL 25

on appeal from: [2002] EWCA Crim 1943

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina
v.
Mushtaq (Appellant) (On Appeal from the Court of Appeal (Criminal Division))

ON
THURSDAY 21 APRIL 2005

The Appellate Committee comprised:

Lord Steyn
Lord Hutton
Lord Phillips of Worth Matravers
Lord Rodger of Earlsferry
Lord Carswell

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LORD STEYN

My Lords,

1. I have read the opinion of my noble and learned friend Lord Rodger of Earlsferry. I am in complete agreement with it. I would also make the order which Lord Rodger proposes.

LORD HUTTON

My Lords,

2. The facts of this case and the course of the appellant's trial have been fully set out in the opinion of my noble and learned friend Lord Rodger of Earlsferry and I gratefully adopt his account. The procedure adopted at the trial whereby the judge conducted a voir dire to decide whether the confession was admissible before it was put in evidence before the jury and the police officers were subsequently cross-examined before the jury when allegations of oppressive conduct were put to them, was described and approved in 1972 in paragraph 67 of the Eleventh Report of the Criminal Law Revision Committee (Cmnd 4991):

> "The fact that the judge has decided at the trial within the trial that the confession is admissible will not prevent the defence from cross-examining the witnesses for the prosecution, or themselves giving evidence, at the trial

> proper about the way in which the confession was obtained with the object of convincing the jury that they should pay no attention to it. Even if the same evidence is given as that given at the trial within the trial, this will not prevent the jury from taking a different view from that which the judge took at the trial within the trial – even on the question, for example, whether there was any threat or inducement. This is in accordance with the present law. It would be wrong in our opinion to make any provision designed to require the jury to accept the judge's finding that a confession was not obtained in the ways mentioned, as this would be to usurp their function of deciding what weight to give to the confession. But the relevance of the issue for the jury will be only as to weight; and they will be under no obligation to disregard a confession, believed by them to be true, if it should so happen that (differing from the judge) they think that the test for admissibility was not satisfied. We have no doubt that the purpose for which the jury should consider the way in which a confession was obtained should be only that of deciding what weight to give to it. This is the present law and it will remain the law under [clause 2 of the Draft Criminal Evidence Bill annexed to the Report]."

3. The law is clear that where a judge has ruled on a voir dire that a confession is admissible the jury is fully entitled to consider all the circumstances surrounding the making of the confession to decide whether they should place any weight on it, and it is the duty of the trial judge to make this plain to them. In *R v Murray* [1951] 1KB 391 the trial judge ruled on a voir dire that the confession was admissible and later in the trial refused to allow counsel for the prisoner to cross-examine the police witnesses again in the presence of the jury as to the manner in which the confession had been obtained, and in his summing up he told the jury that they must accept from him that the confession was a voluntary one obtained from the prisoner without duress, bribe or threat. On appeal the Court of Criminal Appeal quashed the conviction and Lord Goddard CJ stated at page 392:

> "The recorder was wrong in the course which he took. It was quite right for him to hear evidence in the absence of the jury and to decide on the admissibility of the confession; and, since he could find nothing in the evidence to cause him to think that the confession had been improperly obtained, to admit it. But its weight and

> value were matters for the jury, and in considering such matters they were entitled to take into account the opinion which they had formed on the way in which it had been obtained. [Counsel for the defence] was perfectly entitled to cross-examine the police again in the presence of the jury as to the circumstances in which the confession was obtained, and to try again to show that it had been obtained by means of a promise or favour. If he could have persuaded the jury of that, he was entitled to say to them: 'You ought to disregard the confession because its weight is a matter for you' …
>
> It has always, as far as this court is aware, been the right of counsel for the defence to cross-examine again the witnesses who have already given evidence in the absence of the jury; for if he can induce the jury to think that the confession was obtained through some threat or promise, its value will be enormously weakened. The weight and value of the evidence are always matters for the jury."

4. In the present case the material part of the direction by the judge to the jury was as follows:

> "Now I come on to deal with the question of a confession which is absolutely central and crucial to this case. In the course of the tape recorded interviews; and you heard part of them played, the defendant made statements which you may think were clearly adverse to his case. In short, he admitted, you may think, that he played a part in the conspiracy alleged and that he was paid to do so and in law; as in ordinary English language, an acknowledge of guilt of that kind is a confession. The defendant's case is that although he made the confession, it is not true and in deciding whether you can safely rely upon that confession you have to decide two matters. Firstly, did the defendant, in fact, make the confession? Well, that is not in issue in this case, is it? That he made it? So there is no difficulty about that. But if you are sure that he did make a confession, then you go on to consider the second question which you may think is the important one, are you sure that the confession is true and when deciding this you should have regard to all the circumstances in which it came to be made and consider whether there were any circumstances which might cast doubt upon its reliability. You should decide whether it should be made voluntary

> (*sic*) or was or may have been made as a result of oppression or other improper circumstances. Now it is right to say that a number of matters were put to Mr Whittick and Mr Finnegan which amounted, you may think, to very serious allegations of oppression and impropriety, those allegations were all denied and no evidence whatsoever has been called to support or to substantial that (*sic*) allegations. Nevertheless, it is for you to assess what weight should be given to the confession. If you are not sure for whatever reason that the confession is true, you must disregard it. If, on the other hand, you are sure that it is true you may rely on it even if it was or may have been made as a result of oppression or other improper circumstances."

This part of the direction was based on a model direction suggested by the Judicial Studies Board and the last three sentences were taken verbatim from that model.

5. The question certified by the Court of Appeal is:

> "Whether, in view of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, a Judge, who has ruled pursuant to Section 76(2) of the Police and Criminal Evidence Act 1984 that evidence of an alleged confession has not been obtained by oppression, nor has it been obtained in consequence of anything said or done which is likely to render unreliable any confession, is required to direct the jury, if they conclude that the alleged confession may have been so obtained, they must disregard it."

6. Mr McNulty's submission is that where the defendant makes the case that his confession was obtained by oppression or other improper conduct, then the judge, who will already have ruled on the voir dire that the confession is admissible, must direct the jury:

> "It has been suggested on the defendant's behalf that his confession in this case was compelled as a result of improper compulsion exerted upon him by the

> investigating officers. You should consider whether it was so obtained and you should disregard it unless you are sure that it was not made as a result of improper compulsion."

Mr McNulty's submission is based on article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

7. Before considering Mr McNulty's submission it is relevant to consider some of the common law principles relating to the admissibility of a confession and its consideration by a jury. It is clear that there are two principal reasons underlying the rule that a confession obtained by oppression should not be admitted in evidence. One reason, which has long been stated by the judges, is that where a confession is made as a result of oppression it may well be unreliable, because the confession may have been given, not with the intention of telling the truth, but from a desire to escape the oppression imposed on, or the harm threatened to, the suspect. A further reason, stated in more recent years, is that in a civilised society a person should not be compelled to incriminate himself, and a person in custody should not be subjected by the police to illtreatment or improper pressure in order to extract a confession: see *Wong Kam-ming v The Queen* [1980] AC 247,261 and *Lam Chi-ming v The Queen* [1991] 2 AC 212,220 E-G.

8. These two reasons also underlie the decision of the European Court of Human Rights in *Saunders v The United Kingdom* [1996] 23 EHRR 313 that the requirement of fairness contained in article 6 of the European Convention includes the right to silence and the right not to incriminate oneself. The Court stated:

> "68. The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6. Their rationale lies, *inter alia*, in the protection of the

> accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in article 6(2) of the Convention.
>
> 69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent …"

9. In the course of the submissions made to the House reference was made to the judgment of the Court of Criminal Appeal in *R v Bass* [1953] 1QB 680 and the judgment of the Privy Council in *Chan Wei Keung v The Queen* [1967] 2AC 160. In *R v Bass* (where Lord Goddard was also a member of the court) Byrne J stated at page 684:

> "It is to be observed, as this court pointed out in *Rex v Murray*, that while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge, he should direct the jury to apply to their consideration of it the principle as stated by Lord Sumner (viz, in *Ibrahim v Rex*), and he should further tell them that if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it."

10. In *Chan Wei Keung v The Queen* the Privy Council disapproved the ruling in *R v Bass* that where the judge has ruled that a confession is voluntary he should then tell the jury that if they are not satisfied that the confession was made voluntarily, they should give it no weight at all and disregard it. The Privy Council so decided for the reason stated by the High Court of Australia in *Basto v The Queen* [1954] 91 CLR 628,640:

> "That a statement may not be voluntary and yet according to circumstances may be safely acted upon as representing the truth is apparent if the case is considered of a promise

> of advantage being held out by a person in authority. A statement induced by such a promise is involuntary within the doctrine of the common law but it is plain enough that the inducement is not of such a kind as often will be really likely to result in a prisoner's making an untrue confessional statement."

In making this observation the High Court would, no doubt, have had in mind the way in which the common law had developed so that, as stated by the Criminal Law Revision Committee in paragraph 57 of their Report:

> "Any threat or inducement, however mild or slight, uttered or held out by a person in authority makes a resulting confession inadmissible. The authorities are firm that there is no exception even for trivial inducements."

11. However, it is clear from the judgment of the Privy Council, which approved the judgment of Lord Goddard in *R v Murray* [1951] 1KB 391, that the Board fully accepted and endorsed the principle that a jury are fully entitled to have regard to all the circumstances in deciding whether they should give any weight to a confession. And in the judgment of the Court of Appeal in *R v Burgess* [1968] 2 QB 112, applying the approach laid down in *Chang Wei Keung v The Queen*, Lord Parker CJ stated at pp 117-118:

> "The position now is that the admissibility is a matter for the judge; that it is thereafter unnecessary to leave the same matters to the jury; but that the jury should be told that what weight they attach to the confession depends on all the circumstances in which it was taken, and that it is their right to give such weight to it as they think fit."

This division of functions between the judge and the jury, admissibility a matter for the judge, weight a matter for the jury, is not only the law in the United Kingdom, it is the law in Australia (*Basto v The Queen* (1954) 91 CLR 628), in Canada (*R v McAloon* [1959] OR 441), and in the United States of America (*Lego v Toomey* (1972) 404 US 477).

12. In my respectful opinion Parliament in passing section 76(2) of the Police and Criminal Evidence Act 1984 (PACE) had no intention of altering the well established principle that the admissibility of a confession is a matter for the judge and the weight of the confession is a matter for the jury. The wording of section 76(2) is based on clause 2(2) of the draft Criminal Evidence Bill annexed to the Eleventh Report of the Criminal Law Revision Committee which states:

> "(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by the accused, it is represented to the court that the confession was or may have been made in consequence of oppressive treatment of the accused or in consequence of any threat or inducement, the court shall not allow the confession to be given in evidence by the prosecution (whether by virtue of this section or otherwise) except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) -
>
> (a) was not obtained by oppressive treatment of the accused; and
>
> (b) was not made in consequence of any threat or inducement of a sort likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof."

It is clear from paragraph 67 of the Report (set out in paragraph 2 above) that the Committee considered that the jury should only concern themselves with weight.

13. I consider that the position under the common law in relation to section 76(2) is correctly stated by Mirfield on *Silence, Confessions and Improperly Obtained Evidence* (1997) pp 51, 52:

> "It is the judicial function to decide all questions of admissibility relating to a confession, the jury function to determine whether or not the confession is true ……
>
> It would seem quite clear, in principle, that the voluntariness of the confession, as opposed to its truthfulness, is not an issue for the trier of fact. Of course, evidence of the circumstances in which the confession was

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

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

14. The law is clear that the judge, and not the jury, must determine disputed facts relating to the question whether a statement can be taken into account as evidence. In *Bartlett v Smith* (1843) 11 M&W 483,486 Alderson B said:

"Where a question arises as to the admissibility of evidence, the facts upon which its admissibility depends are to be determined by the judge, and not by the jury. If the opposite course were adopted, it would be equivalent

> to leaving it to the jury to say whether a particular thing were evidence or not."

And in *Minter v Priest* [1930] AC 558, 581-582, Lord Atkin said:

> "The question is one of admissibility of evidence: and on all such questions it is for the judge to decide after hearing, if necessary, evidence on both sides bearing on any contested question of fact relevant to the question."

If a judge directed a jury that, even if they were satisfied that a confession was true, they must exclude it from their consideration if they concluded that it might have been obtained by oppression, the jury, in my opinion, would not themselves be deciding what weight to give to the confession, rather they would be determining facts relevant to the question whether it could be taken into account as evidence.

15. Section 82(3) of PACE provides:

> "Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions being put or otherwise) at its discretion."

In *R v Sat-Bhambra* [1989] 88 Cr App R 55 the Court of Appeal held that where a judge had ruled under section 76(2) that a confession was admissible, he could subsequently decide to exclude the confession pursuant to section 82(3) if fresh evidence caused him to change his mind. But such a decision is taken by the judge on an assessment of the facts by him and not by the jury, and is not an exception to the principle that the jury are only concerned with the weight of a confession which is not excluded by the judge from their consideration.

16. Furthermore the division of functions has, as the Court of Appeal noted in its judgment in the present case, significant advantages for ensuring that justice is done. First, it ensures that if the judge rules that a confession is inadmissible, the jury will never become aware of that confession which, notwithstanding that it is inadmissible, the jury might have difficulty in putting out of their minds in deciding on guilt or innocence if they became aware of it. Secondly, because the evidence

given on the voir dire for the defendant is never revealed to the jury, the defendant is not inhibited in the voir dire from giving evidence which supports his case in relation to admissibility but which might well harm his case before the jury on the issue of guilt or innocence. Thirdly, in ruling that a confession is admissible, the judge will give reasons for his decisions which are open to scrutiny by an appellant court.

17. Mr McNulty's submits that where the defendant alleges that a confession has been obtained by oppression or other wrongful conduct there is a breach of article 6(1) unless the jury is specifically directed that they should reject and disregard the confession unless they are sure that it was not obtained by such conduct. Counsel bases this submission on the argument that unless such a direction is given the jury, who will be considering the weight to be given to the confession, may decide that the confession is true even if they are not sure that it was not obtained by oppression or other improper conduct and such a decision would constitute a breach of article 6(1) because, even if a confession is true, a defendant has a right not to be compelled to incriminate himself.

18. As I have observed in paragraph 8 the decision of the European Court in *Saunders v United Kingdom* (1996) 23 EHRR 313 recognises that there are two elements in the protection given to a defendant in respect of a confession. One element is that a confession obtained by oppression may be untrue and therefore reliance on it may lead to a miscarriage of justice. The other element is that, even if the confession is true, in a civilised society a person should not be compelled to incriminate himself against his will. The argument advanced by Mr McNulty is that both elements must be upheld and protected by the jury. He supports this argument by reference to Section 6 of the Human Rights Act 1998 which provides:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> …
>
> (3) In this section "public authority" includes –
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature,
>
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."

Counsel submits that if a jury accepts, and convicts in reliance on, a confession which they are satisfied is true where they are not satisfied that it was not obtained by oppression or other improper conduct, they will be acting in a way which is incompatible with the Convention right to a fair trial.

19. My Lords, I am unable to accept this submission. In my opinion it is artificial to regard the jury as a distinct tribunal or court to be viewed as separate from the trial judge or as a "public authority" separate and distinct from the court of which they form a part. I consider that in a trial conducted with a jury the "tribunal established by law" referred to in article 6(1) is the judge and the jury. In this mode of trial under the common law procedure it is the judge who protects the defendant's right not to incriminate himself by being compelled to make a confession (even if it is true) against his will, and the judge also protects the accused against the danger that a confession may go before the jury which may well be untrue because it was obtained by oppression or improper conduct. In addition the jury provide further protection to the defendant because they will be entitled to reject the confession as unreliable on the ground that there is a reasonable possibility that it is untruthful if (contrary to the view which the judge will have formed on the voir dire) they are not satisfied that it was not obtained by oppression or improper conduct. The division of functions, admissibility a question for the judge, weight a question for the jury, has been recognised throughout the common law world.

20. The European Court has made it clear that it is for national law to lay down rules relating to the admissibility of evidence. In *Schenk v Switzerland* (1988) 13 EHRR 242 the Court states in paragraph 46:

> "46. While article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.
>
> The court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr Schenk's trial as a whole was fair."

In *Miailhe v France (No 2)* (1996) 23 EHRR 491 the Court states in paragraphs 43 and 44:

> "43. It is not for the Court to substitute its view for that of the national courts which are primarily competent to determine the admissibility of evidence. It must nevertheless satisfy itself that the proceedings as a whole were fair, having regard to any possible irregularities before the case was brought before the courts of trial and appeal and checking that those courts had been able to remedy them if there were any.
>
> 44. The Court points out that in the instant case the ordinary courts did within the limits of their jurisdiction, consider the objections of nullity raised by Mr Miailhe and dismissed them. …"

21. English law lays down that the decision as to the admissibility of evidence, including the decision whether to exclude it because it was obtained unfairly, is to be taken by the judge alone and that the jury are only concerned with the weight of the evidence. This division of functions was considered and recognised to be fair by the European Commission of Human Rights in *G v United Kingdom* 9370/81 (1983) 35 DR 75. In its decision the Commission stated:

> "Nevertheless, where the sole evidence against an accused is acquired in circumstances where he is not provided with access to independent legal advice, and where the accused later denies the propriety of that evidence, the guarantee of a fair trial contained in article 6, para.1 of the Convention requires a procedure whereby the validity of the evidence and its fitness for inclusion in the trial must be examined.
>
> In this connection the Commission recalls that, although there are differing practices as to the availability of access to legal advice for persons arrested, but not yet charged with a criminal offence, in the various member states of the Council of Europe, and, as to the sufficiency of a confession as evidence for a conviction, the European systems of criminal law all incorporate various safeguards; either controlling the manner of obtaining evidence, or for assessing its subsequent probative value at the trial, where a defendant makes a substantial allegation of its impropriety.
>
> In the present case the applicant contended at his trial that his confession statement had not been made voluntarily. In particular, he alleged that he had been denied access to

his solicitor *and that he had been threatened by the investigating policeman.*

…

After hearing the evidence in question in the 'voir dire' procedure, the judge ruled that the applicant's confession statement had been given voluntarily and that the Judges' Rules had not been infringed during his questioning. This decision was not decisive for the outcome of the applicant's trial, however, since the judge's ruling extended only to the admissibility of the evidence, the probative value of which remained for the jury to evaluate when the witnesses were examined and cross-examined before them.

In these circumstances, the Commission finds that *the system of guarantees for evaluating the admissibility of challenged evidence,* the probative value of which was subsequently and separately examined by a jury, was such as to provide the applicant, who was represented by counsel throughout the proceedings, with a fair trial within the meaning of article 6, para.1 of the Convention." (emphasis added)

In my respectful opinion the guidance afforded by this decision is not weakened because the applicant did not expressly refer to the right against self-incrimination, but he did allege that the investigating police officer had threatened him. Moreover the Commission stated that it was considering "the system of guarantees for evaluating the admissibility of challenged evidence".

22. Therefore I consider that the division of functions does not offend article 6 of the European Convention and that the Court of Appeal was right to state in paragraph 34 of its judgment:

"In a criminal trial, it is the court acting collectively that has the shared responsibility of ensuring a fair trial. The judge and the jury are, by the system employed, given distinct functions to perform which will collectively protect the rights of the person standing trial. In fulfilling their distinct functions, both the judge and the jury must recognise the need to ensure that the accused receives a fair trial but that does not require the jury to take upon themselves functions that the law properly entrusts to the

> judge. Provided each fulfils its role the accused will receive a fair trial."

23. The question certified by the Court of Appeal is whether "in view of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms," a judge "is required to direct the jury, if they conclude that the alleged confession may have been [obtained by oppression] they must disregard it." I would answer this question in the negative because, for the reasons which I have given, I consider that the defendant's right not to incriminate himself against his will is protected by the judge and his right not to be convicted on the basis of a confession which may be untrue because it may have been obtained by oppression is protected both by the judge and also subsequently by the jury if the judge admits the confession.

24. Therefore I agree with the decision of the Court of Appeal that the last sentence of the judge's direction was a correct reflection of the law. However the Court of Appeal in paragraphs 39 and 40 of their judgment referred to the last sentence of the direction:

> "If, on the other hand, you are sure that it is true you may rely on it [even if it was or may have been made as a result of oppression or other improper circumstances]."

and stated that the jury would have received more assistance if the words in square brackets had been omitted. I also agree with this criticism because I think that the words might to some extent deflect the jury from concentrating on the question whether, if there was a reasonable possibility of oppression, it would be safe to rely on the confession as being truthful.

25. I would add that if, like the majority of the House, I had been of opinion that the judge's direction was a misdirection, I would have agreed with their view that as the appellant had given no evidence before the jury in support of his allegations of oppression, the reliance of the jury on the confession implicit in their verdicts was not unsafe.

26. For the reasons which I have given I would answer the certified question in the negative and would dismiss the appeal.

LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

27. For the reasons given by my noble and learned friend Lord Rodger of Earlsferry I also would answer the certified question in the affirmative and dismiss the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

28. On 23 April 2001 in the Crown Court at Kingston upon Thames, the appellant, Ashfaq Ahmed Mushtaq, was convicted of conspiring to defraud (count 1) and of possessing material designed or adapted for the making of a false instrument (count 3). Count 1 related to a conspiracy to defraud the major clearing banks and other financial institutions by manufacturing, selling and distributing counterfeit credit cards. Count 3 related to the appellant having in his custody or control an unembossed and unsigned credit card without lawful authority or excuse. The appellant was acquitted on count 2, which was a more serious charge relating to the possession of the credit card. On 20 April 2001 he was sentenced to a total of 3 years 6 months imprisonment. He has served his sentence.

29. In the course of the appellant's trial, the prosecution led evidence that various incriminating items with the appellant's fingerprints on them were found at an address at 32 Monega Road, which was said to be the centre of operations of the conspiracy in count 1. There was also evidence that, when the police searched the appellant's house, they found an incomplete credit card in his jacket. That was the subject of count 3. In addition, the prosecution sought to lead evidence of a statement which the appellant made to police officers who interviewed him at Snow Hill Police Station after the search of his home. In the statement the appellant gave a number of answers that amounted to a confession to count 1. He also admitted that he had the credit card, which was the subject of count 3, in his custody and control. His explanation was that he had found it in the street by chance two days before.

30. The appellant accepted that he had made the statements in the interview. Mr McNulty nevertheless made an application to exclude the evidence of those statements under section 76(2) of the Police and Criminal Evidence Act 1984 ("PACE"):

> "If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

For the sake of brevity, I shall, for the most part, refer to the means described in paragraphs (a) and (b) of section 76(2) as "oppression or any other improper means". Section 82(3) provides:

> "Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion."

Mr McNulty's submission was that the judge should not allow the appellant's answers to be given in evidence against him on the ground that the admissions were obtained as a result of oppression by police officers.

31. The background to this submission was the fact that, at the time of his arrest, the appellant's wife was critically ill in hospital. Her condition had caused her to become blind some seven days before. It was the appellant's practice to visit the hospital twice a day to give his wife food, as she had lost the ability to feed herself and she did not trust the hospital staff to provide her with food that complied with her

religious requirements. As a result of his arrest early in the morning, the appellant had missed his first visit of the day and did not wish to have his wife told the reason for his absence in case it might cause her anxiety that could aggravate her illness. The appellant had informed the police of these matters at the time of his arrest.

32. Before determining counsel's application, the judge held a voir dire. The police officers concerned were cross-examined to the effect that they had threatened to refuse bail and to exaggerate his involvement in the crime under investigation if he did not make full admissions in the absence of his solicitor. The appellant also gave evidence. Having considered the evidence, the judge rejected the section 76 submission and ruled that evidence of the interviews should be placed before the jury.

33. Subsequently, in the trial itself the police officers were examined and cross-examined in front of the jury and the same allegations were put to them as in the voir dire. The appellant did not give evidence.

34. In his summing up the judge directed the jury in these terms:

> "The defendant's case is that, although he made the confession, it is not true. And, in deciding whether you can safely rely upon that confession you have to decide two matters. Firstly, did the defendant, in fact, make the confession? Well, that is not in issue in this case, is it? – that he made it? So there is no difficulty about that. But, if you are sure that he did make a confession, then you go on to consider the second question which you may think is the important one: are you sure that the confession is true? And, when deciding this, you should have regard to all the circumstances in which it came to be made and consider whether there were any circumstances which might cast doubt upon its reliability. You should decide whether it should be made voluntary (*sic*) or was, or may have been, made as a result of oppression or other improper circumstances. Now it is right to say that a number of matters were put to Mr Whittick and Mr Finnegan which amounted, you may think, to very serious allegations of oppression and impropriety. Those allegations were all denied and no evidence whatsoever has been called to support or to substantiate that allegation. Nevertheless, it

> is for you to assess what weight should be given to the confession. If you are not sure, for whatever reason, that the confession is true, you must disregard it. If, on the other hand, you are sure that it is true, you may rely on it, even if it was, or may have been, made as a result of oppression or other improper circumstances."

Following the judge's summing up, containing these directions on the confession evidence, the jury convicted the appellant on counts 1 and 3.

35. The appellant was granted leave to appeal against his conviction on the ground that the last three sentences of the passage from the judge's summing up contained a misdirection inasmuch as the judge directed the jury that they could proceed in a manner that was incompatible with the appellant's right against self-incrimination under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) ("the Convention"). On 30 July 2002 the Court of Appeal (Criminal Division) (Kay LJ, Holland and Andrew Smith JJ) dismissed his appeal. On 19 September 2003 the court certified the following point of general public importance:

> "Whether in view of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, a judge, who has ruled pursuant to section 76(2) of the Police and Criminal Evidence Act 1984 that evidence of the alleged confession has not been obtained by oppression, nor has it been obtained in consequence of anything said or done which is likely to render unreliable any confession, is required to direct the jury, if they conclude that the alleged confession may have so been obtained, they must disregard it."

The House granted leave to appeal.

36. The point of principle raised by the certified question and argued before the House is indeed of general importance. But I cannot help noticing at the outset that, since the appellant did not give evidence and the police officers denied all the suggestions of oppressive behaviour in conducting the interview that were put to them in cross-examination, it appears that there was actually no evidence of oppression before the

jury. If that was indeed the position, there was no need for the judge to give any direction on what the jury should do if they found that there was, or might have been, oppression. I return to the point below. Since, however, the question of law has been fully argued, the House should deal with it.

37. The starting point is the proposition that only admissible evidence should be placed before the jury. Some evidence is, by its very nature, inadmissible in law and so, when objection is taken to the leading of such evidence, the judge can rule on it without having to carry out any factual investigation. Evidence of a confession is different, however, since the admissibility of that evidence depends on whether the confession was voluntary. The position is now regulated by section 76(2) of PACE. Where the admissibility of a confession is challenged, the judge cannot allow it to be given in evidence against the defendant except in so far as the prosecution proves to the judge beyond reasonable doubt that it was not obtained by oppression or other improper means. Therefore, where the defendant objects to the alleged confession being given in evidence, witnesses are examined on a voir dire, in the absence of the jury, to establish the circumstances. The appropriate prosecution witnesses are examined and cross-examined on the matter and the defendant himself may give evidence and be cross-examined on it. The judge then decides whether to admit or exclude the confession. If the confession is excluded, the jury hears nothing about it. Where the judge decides that the confession is to be given in evidence, if the defendant's counsel wishes, the circumstances in which it was obtained will again be explored in evidence before the jury so that they can decide what weight or value to attach to it: *R v Murray* [1951] 1 KB 391, 393 per Lord Goddard CJ; *Chan Wei Keung v The Queen* [1967] 2 AC 160, 172D – E per Lord Hodson. There are sometimes greater or lesser differences between the evidence as led and considered by the judge in the voir dire and the evidence given in the trial which the jury have to consider.

38. These aspects of the system as it presently operates are not in dispute. Similarly, the advantages of that system for a defendant are not in doubt. Where the judge decides to exclude the confession, the voir dire procedure avoids any risk that the jury might be prejudiced by hearing disputed evidence about the defendant having made a confession, even if they were subsequently told to disregard it. Often the only person who can speak to the circumstances, apart from the police officers, will be the defendant. The voir dire system allows him to give his evidence on this limited but important matter as to the admissibility of the confession, without infringing his right to elect not

to give evidence in the trial of the general issue: *Wong Kam-ming v. The Queen* [1980] AC 247, 257 per Lord Edmund Davies, citing with approval *Chitambala v. The Queen* [1961] R. & N. 166, 169 – 170, per Clayden AFCJ. Moreover, even where the confession is admitted, the circumstances can be explored again in evidence before the jury who can be invited to take them into account in deciding the weight and value to be attached to the statement. To that extent, at least, the defendant gets a second bite at the cherry.

39. The appellant submits, however, that the present practice is defective because the jury is limited to considering the circumstances for the purpose of deciding the weight and value to be attached to the confession. Rather, they should be directed that, if, having heard all the evidence, they find that the confession was, or may have been, obtained by oppression or any other improper means, they must disregard it.

40. For the Crown Mr Perry submitted that such a direction would amount to an invitation to the jury to determine afresh the admissibility of the evidence of the confession. As was recognised by Parliament in enacting section 76(2), that question was one for the judge alone. Before admitting the confession, he had to be satisfied to the criminal standard that it had not been obtained by oppression or other improper means. This was a tougher test than in many comparable systems. Moreover, if, after the judge had made his ruling in favour of admitting the evidence, circumstances emerged which led him to change his mind, then he had power, under section 82(3) of PACE, to take such steps as were necessary to prevent injustice. As Lord Lane CJ explained in *Sat-Bhambra* (1989) 88 Cr App R 55, 62

> "He may, if he thinks that the matter is not capable of remedy by a direction, discharge the jury; he may direct the jury to disregard the statement; he may by way of direction point out to the jury matters which affect the weight of the confession and leave the matter in their hands."

Given the available safeguards, the approach advocated by the appellant was unnecessary and might cause difficulties where a co-defendant sought to rely on the confession. More importantly, it was wrong in principle. In a trial, the role of the jury was to determine the facts on the basis of the evidence that had been admitted, not to determine whether the evidence should have been presented to them. More particularly,

they were concerned with determining what weight and value they should attribute to confession evidence, rather than with deciding whether it should have been admitted in the first place. Therefore, if, having considered all the circumstances, including any which pointed to the confession having been obtained by oppression or other improper means, the jury decided that what the defendant had said was true, they should indeed be free to take it into account. Directing the jury that they had to ignore such evidence would perplex them and run counter to the aim that verdicts should be based on the real facts of the case as revealed by the evidence.

41. My Lords, when considering the competing submissions, it is as well to bear in mind that the direction proposed by the appellant would be unlikely to affect the outcome of many cases, precisely because the test applied by the judge under section 76(2) is so strict. The judge can admit confession evidence only where he is satisfied beyond a reasonable doubt that it was not obtained by oppression or any other improper means. If there is anything in the evidence that gives rise to a reasonable doubt, he must exclude the confession. So the proposed direction would bite only where, despite the judge's view that, beyond a reasonable doubt, the confession was not obtained by oppression or any other improper means, the jury decided that it was, or might have been, obtained in that way. This is not likely to happen in a large proportion of cases.

42. It is important to notice that the Crown argument does not depend on any supposition that the jury will have come to a mistaken view as to the way that the confession was obtained. On the contrary, the Crown's contention is that in cases where the jury have *rightly* concluded that the confession was obtained by oppression or other improper means, they are to be told that they can still rely on it if they think that it is true.

43. Mr Perry argued that the appellant's proposed approach would involve the jury in decisions as to the admissibility of evidence. That argument is not, strictly speaking, accurate and, put that way, it may tend to conceal the true nature of the alteration in the roles of the judge and jury that may be involved. The decision as to whether the evidence should be admitted is for the judge and for the judge alone. It is taken by him at the end of the voir dire. If he rules that the confession should be given in evidence, the relevant evidence is admitted and led by the prosecution. The jury play no part in that step. In an ideal world, perhaps, the judge's decision to admit the confession would mean that the jury were not concerned at all with the circumstances in which it had

been made. But, as Lord Justice Clerk Thomson observed in *Chalmers v HM Advocate* 1954 JC 66, 83, this seems to be a situation where logic must yield, since the jury cannot be asked to accept as an item of evidence a statement made by an accused, while being prevented from considering the circumstances under which it was made. So the jury must be able to take account of those circumstances in deciding what weight and value to attach to the confession. The appellant wants to go a significant step further. He seeks a direction that, if the jury come to the conclusion on the evidence that the confession was, or may have been, obtained by oppression or some other improper means, they *must* disregard it. In so far as the direction is one to disregard the evidence that has been admitted, it is no different from the kind of direction which, very importantly, Lord Lane CJ envisaged that the judge might give if, after admitting the evidence of a confession, he changed his mind and directed the jury to disregard it: *Sat-Bhambra* (1989) 88 Cr App R 55, 62. The difference is, however, that the trigger for the proposed direction is not the judge's but the jury's assessment of the circumstances in which the confession was obtained. Moreover, the effect of the proposed direction is that the jury must disregard a confession which has been admitted by the judge and given in evidence and which they might be disposed to accept as true. Viewed in that way, the proposed direction encroaches upon, rather than increases, the jury's freedom to assess and deploy the evidence placed before them.

44. At various points during the hearing before the House, it was emphasised that under the present system if a jury think that a confession was, or may have been, obtained by oppression, they are unlikely to accord it any weight or value. So there was no real difference between a situation where a jury give no weight or value to a confession in this way and one where they are told that they must disregard it. For all practical purposes, the present system achieved what the appellant was seeking.

45. That argument falls short if the rule against admitting an involuntary confession is not based simply on its potential unreliability. And it is indeed clear that, according to the more modern analysis at least, the rule rests on a rather wider basis. Giving the opinion of the Privy Council in *Lam Chi-ming v The Queen* [1991] AC 212, 220E – F, Lord Griffiths said:

> "Their Lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only

> upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody. All three of these factors have combined to produce the rule of law applicable in Hong Kong as well as in England that a confession is not admissible in evidence unless the prosecution establish that it was voluntary."

Therefore, even if a jury would be unlikely to rely on a confession which they considered had been obtained by compulsion, the question still remains whether, having regard to the principle that a man cannot be compelled to incriminate himself and having regard to the importance attached to proper behaviour by the police, the jury are *entitled* to rely on a confession which they consider was, or may have been, obtained by oppression or other improper means.

46. Since the three considerations mentioned by Lord Griffiths lie behind section 76(2), it respectfully seems to me that it is inconsistent with the very purpose of that provision to affirm that the jury are entitled to rely on a confession in such circumstances. Under section 76(2), if an objection to a confession is raised, the judge must exclude it unless he is satisfied beyond a reasonable doubt that it was not obtained by oppression or any other improper means. The evidence is excluded because, for all the kinds of reasons explained by Lord Griffiths, Parliament considers that it should not play any part in the jury's verdict. It flies in the face of that policy to say that a jury are entitled to rely on a confession even though, as the ultimate arbiters of all matters of fact, they properly consider that it was, or may have been, obtained by oppression or any other improper means.

47. In my view, therefore, the logic of section 76(2) of PACE really requires that the jury should be directed that, if they consider that the confession was, or may have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it. In giving effect to the policy of Parliament in this way, your Lordships are merely reverting to the approach laid down by the Court of Criminal Appeal (Lord Goddard CJ, Byrne and Parker JJ) in *R v Bass* [1953] 1 QB 680. Giving the judgment of the court, Byrne J quoted the well-known words of Lord Sumner in *Ibrahim v R* [1914] AC 599, 609:

> "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, 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. The principle is as old as Lord Hale."

He then added, at p 684:

> "It is to be observed, as this court pointed out in *Rex v Murray* [1951] 1 KB 391, that while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge, he should direct the jury to apply to their consideration of it the principle as stated by Lord Sumner, and he should further tell them that if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it."

It seems clear that the court saw the direction to disregard the confession in such circumstances as part and parcel of the jury's exercise of attributing the appropriate weight to the confession: in circumstances where they found that it had not been voluntary, for reasons going back to the time of Lord Hale, they should give it no weight and should disregard it.

48. I recognise, of course, that in adopting this approach, the House is departing from the law as laid down by the Privy Council in *Chan Wei Keung v The Queen* [1967] 2 AC 160 where the judgment of Byrne J in *R v Bass* was first criticised through the medium of the judgments in the High Court of Australia in *Basto v The Queen* (1954) 91 CLR 628 and then disapproved. I recognise, equally, that the approach in *Chan Wei Keung v The Queen* has not hitherto given rise to difficulties in practice. Nevertheless, for the reasons which I have given, it appears to me that the approach which I have indicated is required in a system which contains section 76(2) of PACE.

49. If there were any doubt about the proper approach, however, it would be removed by article 6(1) of the Convention, the relevant part of which provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

It is well known that among the rights implied into article 6(1) is a right against self-incrimination. It is equally well established that this implied right may be modified or restricted to serve a legitimate aim in the public interest. *Brown v Stott* [2003] 1 AC 681 may serve as authority for both propositions.

50. At the hearing of the appeal the Crown did not dispute the existence of the implied right against self-incrimination under article 6(1), nor did they argue that, in the present case, it should yield to any countervailing public interest. Rather, the Crown's contention was that the Convention right had been fully respected by the operation of sections 76(2) and 82(3) which gave the judge full power to prevent the jury from using a confession that might have been obtained in violation of the right against self-incrimination, while leaving the evaluation of the evidence to the jury. When the judge and jury performed their respective, distinct, roles in this way, the court as a whole complied with the requirements of article 6(1).

51. In support of his submission Mr Perry referred to the decision of the European Commission of Human Rights in *G v United Kingdom* (Application No 9370/81) (1983) 35 DR 75, which antedates section 76(2) of PACE. The applicant went to a police station along with his girlfriend who was to be interviewed on an unspecified matter. He was arrested and questioned about a burglary. He made a confession, but he claimed that he had done so because the police had refused to let him see his solicitor and had eventually said that he would not be allowed to see him until he had made a confession. At the applicant's trial, the evidence relating to the obtaining of the confession was heard by the judge on a voir dire. At the end of the voir dire the judge ruled that the applicant's confession statements had been given voluntarily and that the Judges' Rules had not been breached. He accordingly admitted them. The Commission held that there had been no breach of article

6(1). Referring to the judge's decision to admit the evidence, the Commission said at p 80:

> "This decision was not decisive for the outcome of the applicant's trial, however, since the judge's ruling extended only to the admissibility of the evidence, the probative value of which remained for the jury to evaluate when the witnesses were examined and cross-examined before them.
>
> In these circumstances, the Commission finds that the system of guarantees for evaluating the admissibility of challenged evidence, the probative value of which was subsequently and separately examined by a jury, was such as to provide the applicant, who was represented by counsel throughout the proceedings, with a fair trial within the meaning of article 6, para 1 of the Convention."

As can be seen from this passage, the question which the Commission were considering was whether the procedure adopted at the trial provided an adequate guarantee for evaluating the admissibility of challenged evidence. They decided that it did. The applicant had not advanced any argument relating to the right against self-incrimination implied in article 6(1). This is perhaps not surprising since the existence of the implied right only really became clear some years later in *Funke v France* (1993) 16 EHRR 297, *Murray v United Kingdom* (1996) 22 EHRR 29 and *Saunders v United Kingdom* (1996) 23 EHRR 313. However that may be, the fact is that the Commission did not deal with the right against self-incrimination and so the decision does not afford guidance in the circumstances of the present case.

52. Before the Court of Appeal, and in his written case before the House, Mr McNulty sought to argue that the jury, as a separate entity, fell to be regarded as a "public authority" for the purposes of section 6(3) of the Human Rights Act 1998. It is, however, for the court, comprising both the judge and jury, that the United Kingdom government is responsible in international law before the European Court of Human Rights. This can be seen from the well-known cases where the European Court has considered allegations of bias on the part of a jury and the way that the judge dealt with them. It is accordingly appropriate to treat the court made up of both judge and jury as the public authority for the purposes of section 6: *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546.

53. In terms of section 6(1) of the 1998 Act it is therefore unlawful for the judge and jury to act in a way which is incompatible with a defendant's right against self-incrimination as implied into article 6(1). Here the judge directed the jury that, if they were sure that the appellant's confession was true, they might rely on it, "even if it was, or may have been, made as a result of oppression or other improper circumstances." This was a direction that, in reaching their verdict and so, for article 6(1) purposes, determining the criminal charges against the appellant, the jury were entitled to take into account a confession which they considered was, or might have been, obtained by oppression or any other improper means in violation of his right against self-incrimination. Such a direction was an invitation to the jury to act in a way that was incompatible with the appellant's right against self-incrimination under article 6(1). As such, the direction was itself incompatible with that right.

54. It follows, both on the basis of section 76(2) when viewed without regard to the Convention and on the basis of the appellant's article 6(1) Convention right against self-incrimination, that the judge misdirected the jury when he said that, if they were sure that the confession was true, they might rely on it, even if it was, or might have been, made as a result of oppression or other improper circumstances.

55. It is only fitting to acknowledge that, in giving this direction, the judge was following the guidance from the Judicial Studies Board that was current at the time. That guidance was modified to reflect the comments of the Court of Appeal in this case. Clearly, neither version will afford appropriate guidance in the light of the decision by the House today. Having indicated the approach which should be applied in principle, I would not usurp the function of the Judicial Studies Board by attempting to draft model directions to give effect to that approach. I would only observe that there is often no dispute that, if what the defendant said happened did indeed happen, the confession should be excluded under one or other of the paragraphs in section 76(2) of PACE. The only real dispute is as to whether the defendant's account as found in the evidence is true. In such a clear-cut case it may well be enough for the judge to indicate that, if the jury consider that the confession was, or may have been, obtained in the way described by the defendant, they must disregard it.

56. Mr McNulty submitted that, if the House reached the view that there had been a misdirection in relation to the confession, the appellant's conviction could not be regarded as safe and should

accordingly be quashed. Like the Court of Appeal, I would reject that submission.

57. As I mentioned at the outset, this was a case where the appellant chose not to give evidence. The only defence evidence was about his wife's illness: it came from her and, in the form of a statement, from a consultant neurologist. There was accordingly no evidence from the appellant or from any witness for the defence about the circumstances in which he had come to make the confession. The only evidence about the interview in which he made the confession was from the police officers, DC Whittick and DS Finnegan, and from the records relating to the interview which gave the times when various stages began and ended. Many allegations of improper conduct were put to the officers in cross-examination: for example, that they had coached the appellant as to what he should say in the fifteen-minute gap before the interview began; that they had threatened to make out that the appellant was the Mr Big of the organisation and that he would get a heavier sentence; that they had threatened to object to bail for the appellant, with all the particular repercussions arising from his wife's illness. It would be fruitless to narrate all of the allegations since they were all denied, despite what the judge described as "vigorous" cross-examination. In his summing up the judge went through the evidence of DC Whittick and DS Finnegan in considerable detail, but at the end he said this:

> "Well, I have gone through that in some detail because it is right that you should be reminded of the evidence and in doing so I have referred to threats and inducements allegedly made and given by Mr Whittick and allegedly permitted by Sergeant Finnegan and those allegations were very forcefully put to the officers and they were very strenuously denied, you may think. It is easy enough, you may think, to make allegations of this kind, but the question you have to ask yourselves here is: where is the evidence to support them? The only evidence called for the defence, apart from a non-controversial statement that was read out, was that of Mrs Mushtaq and, of course, she was not able to give evidence as to threats or inducements, was she? So ask yourselves: where is the evidence? Of course, the prosecution have to prove their case, but there it is."

58. Mr McNulty did not challenge this passage in the summing up. What it shows is that in this case there was no evidence whatever of

oppression, or of any other improper means, for the prosecution to disprove or for the jury to consider. The direction to the jury as to what they might do if they found that the confession had been obtained by oppression or any other improper means was, accordingly, unnecessary and unduly favourable to the appellant. In those circumstances, the fact that the judge did not go further in his direction cannot possibly affect the fairness of the appellant's trial or the safety of his conviction.

59. For these reasons, I would answer the certified question in the affirmative and dismiss the appeal.

LORD CARSWELL

My Lords,

60. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Hutton and Lord Rodger of Earlsferry. I am in full agreement with the conclusion which they have reached, that the appeal should be dismissed, but because they have followed slightly differing routes to that conclusion and would give different answers to the certified question, I wish to express my own reasoning in short compass.

61. It has long been recognised that the content of a confession made by an accused person has to be evaluated with great care in order to determine whether it can safely be accepted as an admission against his interest. The approach of the law to that evaluation has varied over the years and the rules applied by the courts have to be kept under review to ensure that they reflect the standards accepted by each generation.

62. It has to be borne in mind that a confession which has been properly obtained may nevertheless be untrue. The unhappy example of Judith Ward (*R v Ward* [1993] 1 WLR 619) serves as a reminder of this. Conversely, if a confession has been obtained by means which the law condemns as improper, it is quite possible that it may nevertheless be true – a fact which would cause no surprise to anyone with experience of criminal practice. Improper compulsion creates a risk, however, that the confession may be untrue, which makes it unsafe to rely upon it, and the more considerable the compulsion or oppression, the greater the risk

that the confession is unreliable. One may add to this risk the two further factors which have influenced the law in rejecting confessions obtained by compulsion, the right against self-incrimination and the need to exercise a degree of controlling discipline over undesirable police practices.

63. The stage which the long process of development of English criminal law governing confessions has reached is the statutory provision contained in section 76(2) of the Police and Criminal Evidence Act 1984 ("PACE"), which is mirrored in the Police and Criminal Evidence (Northern Ireland) Order 1989, art 74(2) (SI 1989/1342 (NI 12)):

> "If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

For convenience I shall use the term "oppression" in this opinion as a compendious term to include all of the exclusionary matters set out in paragraphs (a) and (b) of section 76(2).

64. Oppression is not defined in PACE but its meaning has been discussed in a number of decided cases, summarised in *Archbold, Criminal Pleading, Evidence and Practice,* 2005 ed, paras 15-358 to 15-360. For present purposes I am content to use the definition propounded by Lord MacDermott in an address to the Bentham Club in 1968 and adopted by the Court of Appeal in *R v Prager* [1972] 1 WLR 260, 266:

> " … questioning which by its nature, duration or other circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent."

65. Central to the issues in this appeal is a proper understanding of the respective roles of the judge and jury in dealing with evidence which the prosecution seeks to adduce of confession statements made by accused persons. As Lord Hutton has emphasised throughout his opinion, admissibility of a confession is a matter for the judge, while the jury's concern is with the weight to be given to its contents. I do not understand Lord Rodger of Earlsferry to cast any doubt on the universality of application of this principle.

66. I fully agree with the conclusion reached by both Lord Hutton and Lord Rodger of Earlsferry, affirming that contained in paragraph 41 of the judgment of the Court of Appeal, that the verdict was not unsafe and that the appeal should accordingly be dismissed. The issue of more immediate importance, which is defined in the certified question, is the direction which a trial judge should give a jury in a case such as the present, and I shall focus on that issue.

67. The certified question is posed in the following terms:

> "Whether in view of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms a Judge who has ruled pursuant to section 76(2) of the Police and Criminal Evidence Act 1984 that evidence of the alleged confession has not been obtained by oppression, nor has it been obtained in consequence of anything said or done which is likely to render unreliable any confession, is required to direct the jury, if they conclude that the alleged confession may have been so obtained, they must disregard it."

In order to answer this it is necessary to consider, not only the direction given by the judge, which derives from the specimen directions recommended by the Judicial Studies Board, but the type of direction which has found favour in previous decided cases. One must then determine whether any of these fully satisfies the requirements of the

common law, section 76(2) of PACE and article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). I may say at once that, for the reasons which I shall give, I consider that the JSB direction, both in the form adopted by the judge and in its amended form, should not in my view be regarded as sufficient to meet those requirements. I also think that the decisions of the Privy Council in *Chan Wei Keung v The Queen* [1967] 2 AC 160 and the High Court of Australia in *Basto v The Queen* (1954) 91 CLR 628 should no longer be followed. In its narrowest terms, I think that the question is whether it is sufficient for a judge to warn the jury that they may consider that they should give no weight to a confession and disregard it if they conclude that it may have been obtained as the result of oppression; or whether the judge must go further and direct them that if they so conclude they are *required* to disregard it.

68. In my opinion the requirements of the common law, if they stood alone, would be satisfied by returning to the wording of the direction set out in the decision of the Court of Criminal Appeal in *R v Bass* [1953] 1 QB 680, in which Byrne J, giving the judgment of the court, stated at page 684:

> " … while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge he should direct the jury to apply to their consideration of it the principle as stated by Lord Sumner [in *Ibrahim v Rex* [1914] AC 599, 609], and he should further tell them that if they are not satisfied that it was made voluntarily, they should give it no weight at all and should disregard it."

In order to accommodate to the wording of section 76(2) of PACE a reference to oppression would have to be substituted for the word "voluntarily".

69. One may observe that the *Bass* direction is not expressed in mandatory terms, and it cannot in my opinion be said that the common law authorities require a judge to go so far as to direct the jury that they *must* give such a confession no weight and disregard it. It was argued on behalf of the appellant that such a mandatory direction is required both by section 76(2) of PACE and by article 6 of the Convention. I would not myself accept that section 76(2) of PACE requires the judge

to direct the jury to disregard a confession which was or may have been obtained by oppression, as Lord Rodger of Earlsferry has stated in paragraph 47 of his opinion. It seems to me that the reference to the court in that subsection is intended to mean the judge. I therefore am of opinion that section 76(2) does not deal with the jury's function in considering the weight to be attached to a confession.

70. I therefore turn to consider article 6(1) of the Convention, which requires a fair hearing (itself a basic principle of the common law), and to the jurisprudence of the European Court of Human Rights which expands on the requirements of that provision. Section 6(1) of the Human Rights Act 1998 makes it unlawful for a public authority, which is defined in section 6(3) as including a court or tribunal, to act in a way which is incompatible with a Convention right.

71. In the case-law of the European Court of Human Rights, as developed in its decisions in *Funke v France* (1993) 16 EHRR 297, *Murray v United Kingdom* (1996) 22 EHRR 29 and *Saunders v United Kingdom* (1996) 23 EHRR 313, it has become accepted that the right not to incriminate oneself is a constituent element of a fair procedure under article 6(1) – see, in particular paragraph 69 of the Court's judgment in *Saunders v United Kingdom.* This principle is, of course, clearly recognised as part of the common law: see, eg, *Lam Chi-Ming v The Queen* [1991] AC 212, 220, per Lord Griffiths.

72. The issue then resolves itself into asking whether in the light of that principle it is compatible with the Convention right to a fair hearing contained in article 6(1) for the possibility to be left open that the jury may take into account a confession made by an accused person and rely upon it in assessing his guilt on a charge of a criminal offence if they consider that the content is true, notwithstanding the fact that they consider that it has been or may have been obtained as the result of oppression.

73. My Lords, I find myself impelled to the conclusion that it is not so compatible. When a confession has been obtained by oppression, that is a form of the compulsion which the European Court of Human Rights has stated firmly constitutes a breach of the right of an accused person not to incriminate himself. If, as the law holds, it is open to a jury to accept and act upon a confession in circumstances where it has been or may have been obtained as a result of oppression, then it seems to me inescapable that that is incompatible with his article 6 rights. It

must follow that the direction given by the judge in the present case and the amended model direction recommended by the Judicial Studies Board will not suffice to meet these requirements.

74. I do not consider that this conclusion constitutes an invasion of the principle that admissibility of a confession is a matter solely for the judge and that the jury is not concerned with that, but only with the weight to be attached to it. I would regard the court for the purposes of section 6(3)(a) of the Human Rights Act 1998 as being a composite of the judge and the jury, each with its own functions. If the result of the process of discharge of its function by either constituent element is the use against an accused person of a confession obtained as a result of oppression, that is incompatible with his article 6 rights. Such a conclusion in my view does not invest the jury with any function in relation to admissibility of the confession and leaves the respective roles of the judge and jury distinct and inviolate. If a piece of evidence is inadmissible, it is ruled out and is not part of the evidence in the case. As such it will not go before the jury at all and will not be considered by it. A confession of the nature with which we are concerned will have been admitted by the judge's prior ruling and so does form part of the evidence placed before the jury and considered by them. If they consider that it may have been obtained by oppression, a view which they are entitled to adopt notwithstanding the judge's earlier ruling, then by virtue of the judge's direction it must be disregarded and may not be given any weight. That does not in my opinion amount to giving the jury a say in the admission of evidence or detract from the integrity of the principle that it is the province solely of the trial judge.

75. I therefore consider that the judge should direct the jury in more prescriptive terms than the *Bass* direction, to the effect that unless that they are satisfied beyond reasonable doubt that the confession was not obtained as a result of oppression, they must disregard it. I would answer the certified question in the affirmative, although, for the reasons I have given, I would dismiss the appeal.