NOT FOR GENERAL PUBLICATION

THE USE OF SECTION 26L OF THE EVIDENCE ACT (N.T.) AND THE VOIR DIRE

(By Justice Phillip Rice)

Section 26L of the Evidence Act came into operation on 1st August 1984. The section itself provides:-

> "26L. DETERMINATION OF ADMISSIBILITY BEFORE JURY EMPANELLED
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> A court dealing with a matter on indictment may, if it thinks fit, hear and determine, before the jury is empanelled, any question relating to the admissibility of evidence and any question of law affecting the conduct of the trial."

The purpose of my paper is to deal with Section 26L and voir dire examinations which are required in order to determine questions of the admissibility of evidence and, independently, any question of law affecting the conduct of the trial before a jury is empanelled.

The section is short and succinct. By its terms its application is confined to the criminal law: there needs to be "a matter on indictment" before the section can be invoked. Next, the section reposes in the court a discretion, for it employs the expression "a court ... may, if it thinks fit". It then gives the court power to "hear and determine, before the jury is empanelled:-

Recent experience has indicated that section 26L should be invoked more often with this object in mind as a simple means of avoiding unnecessary public expense and inconvenience. In my view it is important that those appearing in the criminal court should be aware of the usefulness of this section and the desirability of evidentiary matters being determined by way of a hearing on the voir dire and other questions of law being determined in advance of the trial proper.

Without the section, the right is always accorded to an accused to challenge the admissibility of evidence and for any question of law affecting the conduct of the trial to be determined by the trial judge in the absence of the jury; but the section is designed to have conditions precedent to the admissibility of evidence and questions of law affecting the conduct of the trial to be determined in advance of the actual trial before the jury is empanelled.

In the Northern Territory it is customary for the indictment to be presented on the very day that the trial is to commence. I am unaware of the reason for this practice but, subject to correction by the commentator on my paper, I should have thought that an accused person is entitled to know within a reasonable time in advance of his or her trial the exact terms of the indictment so that proper consideration may be given to such questions as whether or

One thing is clear, however, and that is that questions relating to the admissibility of evidence can be dealt with under the section; and it is well known from a practical point of view that a voir dire examination can last, not a matter of hours or a matter of days, but indeed a matter of weeks. I have in mind the case in the Northern Territory some years ago which became enshrined as the Huckitta murder case, where a voir dire examination extended for several weeks during the course of the actual trial. More recently, in the case of R v Scanlon, the jury was empanelled on the first day of the trial but in the course of which was obliged to withdraw but attend daily while the examination on the voir dire proceeded. It lasted four or five days which, on my estimate, resulted in public expense of over $3,000. This could have been avoided had counsel directed their minds to the section.

A variety of matters involving the admissibility of evidence is likely to arise during the course of any trial but the question of the admissibility of confessional material provides the most frequent example. There are other instances as well. It may be known, for example, in advance of a trial that a particular witness will claim to be privileged from answering a particular question or a whole series of questions, and it will become necessary for a judge to determine questions of privilege. Admittedly this type of evidence may be comparatively rare but in

Although I know no French, the old practice under which witnesses deposed to preliminary or incidental issues were required to take a different oath known as the "voir dire" from that sworn by those giving evidence which was submitted to the jury. I have not consulted Stringer on Oaths for the purposes of this paper because it is unavailable to me but in my experience the present oath administered for this purpose is precisely the same as that administered to a witness at the actual trial.

In The Queen v Williams (1976) 14 S.A.S.R. 1 Wells J. at p.2 made the following general observations in relation to a voir dire hearing:-

> " It must never be forgotten that a hearing on the voir dire before the Crown opening - commonly referred to as a trial within a trial - stands apart from the usual and regular conduct of a criminal trial, in general, and the mode of dealing with objections to evidence, in particular.
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> The regular method of dealing with objections is for counsel who intends to object to wait until an offending question (or answer) is asked (or given), or is imminent, and to make his objection accordingly. There are obvious reasons why, speaking generally, that is the most practical and effective way to raise, debate, and determine disputes over admissibility. In almost every case, the relevance of a disputed item of evidence to a fact in issue or to credibility can be decided only by having regard to all the evidence already received and the structures of the forensic issues that have formed themselves up to that point; for that evidence and those structures anticipation of either or both is a poor substitute.
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> But experience has shown that occasions may arise when an item of evidence sought to be excluded is of such importance, and occupies such a prominent place in relation to the whole, that a miscarriage of justice

> If no such material is to be gathered from the depositions, but the trial judge decides to act upon the assurance of counsel, it would only be in the exceptional case that the Crown, and not the accused, would be called on to begin. But if the trial judge is referred to material in the depositions that suggests the need for one or other of the inquiries, or both, the course that naturally suggests itself is that the Crown should call its evidence first."

Section 26L, which expressly reposes a discretion in the court, would appear to reflect His Honour's views on that aspect; but according to Mason J. (as he then was) "the better view is that the accused is entitled to such an examination once the issue of voluntariness arises." (MacPherson v The Queen) (1981) 147 C.L.R. 512 at 534.)

Questions relating to the admissibility of evidence which might arise under the section include at least some of those alluded to in Wendo v The Queen (1964) 109 C.L.R. 559, which also deals with the standard of proof required on a voir dire hearing. In a joint judgment, Taylor and Owen JJ. said at p.572:-

> "In criminal trials, as in civil cases, questions of fact frequently arise which must be determined by the trial judge before he decides whether to admit evidence for the consideration of the jury. Confessional statements are but one illustration of the type of evidence the tender of which may give rise to preliminary questions of fact which the judge must decide for himself. Other illustrations were given by Lord Denman C.J. in Doe v Davies (1847), 10 Q.B. 314; where his Lordship said at p.323: 'There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus an oath, or its equivalent, and competency, are conditions precedent to admitting viva voce evidence; and the apprehension

> voluntarily made. This means substantially that it has been made in the exercise of his free choice. If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary."

It is well settled that the legal burden of proving that the confession is voluntary rests on the prosecution (see R v Thompson (1893) 2 Q.B. 12; R v Lee (supra) at p.144; R v Batty (1963) V.R. 451.) In Australia, the standard of proof applicable is proof on the balance of probabilities (Wendo v R (1963) 109 C.L.R. 559).

This Court has not adopted the Judges' Rules but has applied the general test which commended itself to the High Court in R v Lee (supra) at p.154 viz:-

> "It is a question of degree in each case, and it is for the presiding judge to determine, in the light of all the circumstances, whether the statements or admission of the accused have been extracted from him under conditions which render it unjust to allow his own words to be given in evidence against him ... The obligation resting upon police officers is to put all questions fairly and to refrain from anything in the nature of a threat, or any attempt to extort an admission. But it is in the interests of the community that all crimes should be fully investigated with the object of bringing malefactors to justice, and such investigations must not be unduly hampered. Their object is to clear the innocent as well as establish the guilt of the offender. They must be aimed at the ascertainment of the truth, and must not be carried out with the idea of manufacturing evidence or extorting some admission and thereby securing a conviction. Upon the particular circumstances of each case depends the answer to the question as to the admissibility of such evidence." (Per Street J. (as he then was) in R v Jeffries (1947) 47 S.R. (N.S.W.) 284, at pp.311, 312.)"

In addition to these fundamental principles, it is important that the trial judge and counsel alike keep in mind the authoritative precepts relating to the conduct of a hearing on the voir dire laid down by Gibbs C.J. and Wilson J. in MacPherson v The Queen (supra), the headnote which reads:-

> " At a trial for murder where the accused was not represented, evidence was given by police officers of confessions which they said the accused had made. The accused put to the police in cross-examination that he had made no confession but that they had made threats to induce him to confess. The trial judge did not inform the accused of his right to ask for the voluntary nature of any confession he may have made to be determined on voir dire in the absence of the jury, and he did not conduct a voir dire. The accused was convicted.
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> Held, that the suggestions made by the accused in cross-examination raised a real question concerning the voluntary nature of the confessions, and although the accused had denied making a confession and had not sought a voir dire, the judge should have held a voir dire to determine whether any confession that may have been made had been voluntary."

Their Honours at pp.522-525 make the following pertinent observations:-

> " We are unable to see any distinction for present purposes between a case in which an accused who denies having made any confession alleges that he was subjected to inducements or pressure, and one in which the accused who also denies the making of a confession alleges that he was treated unfairly or improperly. In our opinion a voir dire should be held in both cases. The test stated by Bray C.J., that the Crown must prove that there was no confession improperly induced, is not the correct one. The condition of the admissibility of a confession is that it was voluntarily made, and the judge must be satisfied on the balance of probabilities that this condition was fulfilled before he admits the

does not advance the cause of justice to allow a voir dire which is used merely as a fishing expedition, or a means of testing in advance the evidence of the Crown witnesses. And the trial judge has a discretion to keep the examination and cross-examination of witnesses on a voir dire within reasonable bounds. Nevertheless, the duty of the judge is to ensure that the confession is not admitted until the fact that it was voluntary has been established.

In the present case the learned judges of the Court of Criminal Appeal considered that there was no obligation on the trial judge to advise the applicant that he might object to the confessional evidence, and might seek to test its admissibility on a voir dire. It was suggested that a judge who advised an accused person in this way would be assuming the role of an advocate, and that in any case he could not effectively advise the accused on such a matter, and that if the accused were persuaded to seek a voir dire the result might be to his disadvantage. It was pointed out that it remains doubtful to what extent an accused person who gives evidence on a voir dire may be cross-examined, and to what extent the evidence which he gives on the voir dire will be admissible on the trial. This is no doubt true. The Judicial Committee, in Wong Kam-Ming v The Queen [1980] A.C. 247, decided, by a majority, that on a voir dire an accused may not be asked, in cross-examination, whether a confession, which he alleged was made involuntarily, was true, and held that R v Hammond (1941) 28 Cr. App. R 84 was wrongly decided. In Burns v The Queen (1975) 132 C.L.R. 258, at p.263, three members of this Court agreed with the view taken in R v Hammond that evidence that shows that a confession, if made, was true is relevant to the question whether it was made, but noted that it has been suggested that there are strong reasons why the judge on the voir dire should exercise his discretion to prevent the accused from being cross- examined as to his guilt. In Wong Kam-Ming v The Queen it was further held that if the accused gives evidence at the trial, he may be cross-examined to show that he has departed from the evidence which he gave on the voir dire, provided that the impugned confession has been held to be admissible but not otherwise. These questions remain to be decided in this Court. However, there should be no difficulty in explaining to an accused person (in the absence of the jury) that it is necessary for the judge to hear evidence in the absence of the jury to enable him to decide whether the evidence of the confession should be admitted, that the accused may cross-examine the Crown witnesses and give and call evidence himself on the issue of voluntariness, that if he does give evidence he may be cross-examined, and that his answers

It will be seen from the concluding passage, that the issue of identity provides yet another area for the application of the procedure provided by section 26L.

In order to secure the objects for which section 26L is designed, I strongly recommend that a copy of the indictment intended to be put to the accused on his arraignment should be made available to defence counsel within a reasonable time in advance of his intended arraignment. If, then, any objection to the admissibility of evidence is to be raised, or that a question of law affecting the conduct of the trial needs to be argued in advance of the trial proper the trial judge can then be informed in good time to avoid the necessity of having jurors in attendance unnnecessarily. Upon the arraignment of the accused the judge can then deal with such matters as might arise under section 26L by conducting a trial on the voir dire or hear argument on the law.