counterpart remains free to form partnerships, companies and trusts with his wife and children.

This situation could lead to a reconsideration of the whole question of incorporation of professional practices, which would enable the professional man to achieve a spread of income, and to enjoy lower rates of taxation as well as superannuation benefits and organizational advantages. Perhaps it is significant in this regard to recall that the English Royal Commission on the Taxation of Profits and Income decided against special taxation concessions for professional men on the ground that there was no law to prevent professional men from securing taxation advantages by incorporation. They added, however:

> that a number of professions do impose such a ban by internal regulation as a matter of their members' good professional conduct . . .[but] it does not follow that, as times change, such regulations may not have to be adjusted to meet the change; even though the adjustment may mean the abandonment of a conception that seemed unchallengeable in times of less heavy personal taxation.[25]

ANN RIORDAN

THE QUEEN v. AMAD[1]

Criminal Law—Evidence—Voire Dire—Discretion of trial judge to exclude evidence obtained by improper means—Exercise of discretion notwithstanding sworn evidence by accused that admissions were true—Evidence Act 1958 section 149

Lord Brampton once quipped—'After arresting, a constable should keep his mouth shut, but his ears open', and Mr Justice Smith's decision in *Amad's* case certainly lends support to that remark. Amad was indicted for the murder of Reginald Shannon, whom it was alleged he had killed during a fight in December 1961. His counsel applied on *voire dire* to have excluded police evidence of certain admissions Amad had made to them during four interrogations at Russell Street.

It appears that Amad was picked up and taken to police headquarters, where he was subjected to two lengthy interrogations wherein his truthfulness was challenged at every step. Eventually, when he was confronted with evidence of the falsity of his alibi, he broke down and made some damaging admissions. He was then cautioned for the first time and asked whether he wished to make a statement. He did not. However, later in the same evening his sister, having been advised by the police that he had not made a statement, advised him to do so. He then made the admissions obtained during the third and fourth interrogations, the latter resulting in a written statement which he signed. Amad testified on *voire dire* that these admissions were true. They were, in substance, little more than

[25] Para. 627 of the Final Report of the Royal Commission on 'The Taxation of Profits and Income'. (Cmd. 9474.).

[1] [1962] V.R. 545. Supreme Court of Victoria; Smith J.

what he had admitted during the second interrogation; but there were many inconsistencies in detail between the verbal and the written statements. Both the third and fourth interrogations were carried out in accordance with the Commissioner's Standing Orders relating to the procedure to be adopted by police officers in handling suspected persons.

Counsel's application to exclude this evidence was based on two grounds. First, it was submitted that Amad's admissions, including the written statement, were not made voluntarily, and second, that even if they were, they should be excluded by the court in the exercise of its discretion. In support of the first ground of application Amad gave evidence of police violence, but His Honour found it unnecessary to formulate any conclusion as to this aspect of the case because, voluntary or not, there were grounds for excluding the evidence under the 'discretion rule'.[2]

This rule has been stated by Dixon C.J. in the following terms:

> Here as well as in England the law may now be taken to be, apart from the effect of such special statutory provisions as section 141 of the *Evidence Act* 1928 (Vict.),[3] that a judge at the trial should exclude confessional statements if in all the circumstances he thinks that they have been improperly procured by officers of the police, even although he does not consider that the strict rules of law, common law and statutory, require the rejection of the evidence.[4]

According to Dixon C.J. the rule is derived 'almost certainly from the strong feeling for the wisdom and justice of the traditional English principle expressed in the precept *nemo tenetur se ipsum accusare*'.[5] That such feeling has found judicial expression in a rule of evidence can be attributed to what Lord Sumner called 'the growth of a police force of the modern type',[6] possessing both the power and the opportunity to squeeze admissions out of suspected persons if it chooses to do so. The legal justification for the rule is probably the power of the Court of Criminal Appeal to quash a conviction on the grounds of a substantial miscarriage of justice.[7]

The criterion which determines the exercise of the rule is whether or not the admission of the evidence would cause any unfairness to the accused.[8] In deciding what amounts to unfairness the Courts have always attached major importance to the question of whether the police have acted improperly in their handling of the accused person, so as to obtain from him an admission that he might not otherwise have made, or, as Lawrence J. put it, 'an unguarded answer made under circumstances that made it unreliable'.[9] Here the practice has been for the Courts to use as a

[2] *Ibid.* 550. [3] Now s. 149 Evidence Act 1958.
[4] *McDermott v. The King* (1948) 76 C.L.R. 501, 515 *per* Dixon J.
[5] *Ibid.* 513. Also *The King v. Lee* [1950] V.L.R. 413, 433 *per* Barry J.
[6] *Ibrahim v. Rex* [1914] A.C. 559, 610.
[7] *The King v. Lee* (1950) 82 C.L.R. 133, 148.
[8] *The King v. Lee* [1950] V.L.R. 413, 435 *per* Smith J. This test was approved by the High Court in *The King v. Lee* (1950) 82 C.L.R. 133, 145.
[9] *Rex v. Voisin* [1918] 1 K.B. 531, 539.

guide certain rules promulgated for the guidance of police officers in handling suspects, and to treat a breach of these rules as a matter of impropriety which could justify the exclusion of the admission at the Court's discretion. Known in England as 'the Judges' Rules',[10] they are in Victoria substantially embodied in the Commissioner's Standing Orders.[11] The legal significance of these rules was considered in *Rex v. Voisin.*[12]

> These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice.

In *Amad's* case the breach submitted as justifying the exercise of the Court's discretion was the police cross-examination of Amad after he was taken into custody and before he was cautioned.[13] The Crown contended that there was no cross-examination in the strict sense, but His Honour ruled that for the purposes of the Standing Orders any questioning directed towards obtaining a confession or overcoming mental resistance to making an admission amounted to cross-examination, and was improper.[14] He then held that in view of this impropriety it would be unfair to admit the evidence obtained during the cross-examination because, having regard to the age of the accused, it was almost inevitable that he would try to escape from the pressures and anxieties of the police interrogation by resorting to false denials and inventions. When these were proved false, the resulting impairment of his credit might cause the jury to reject truthful evidence given by him in his own defence.[15]

But His Honour went even further than this in that he also rejected the evidence obtained during the third and fourth interrogations, in spite of the fact that these interrogations were conducted properly and Amad had already testified on *voire dire* as to the truth of the admissions he had made. This evidence was rejected by His Honour on two grounds.[16] First, he felt that Amad would not have made the statements were it not for the fact that the police had already obtained damaging admissions from him during the preceding improper cross-examination. Second, he thought that owing to the inconsistencies between the latter statements, it would be impossible for Amad to give evidence without avoiding conflict with one or both of these accounts, thus subjecting him to a dangerous disadvantage.

Finally, it was argued by the Crown that section 149 Evidence Act 1958[17] prevented the Court from using its discretion in this case. However,

[10] *Halsbury's Laws of England* (3rd ed. 1953) x, 470-472.
[11] Police Standing Orders, No. 634.
[12] [1918] 1 K.B. 531, 539 *per* Lawrence J. Also *Cross on Evidence* (1958) 440, 441.
[13] Police Standing Order No. 634 Rule 3 reads 'Persons in custody should not be questioned without the usual caution being first administered'.
[14] [1962] V.R. 545, 548. [15] *Ibid.* 548. [16] *Ibid.* 549.
[17] S. 149 reads, insofar as it is material here:
'No confession . . . shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge . . . is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made; . . .'.

it has been ruled by the High Court that this section comprehends only confessions in the strict sense, that is, complete admissions of guilt, and that it does not apply generally to extra-judicial statements made by accused persons.[18] Smith J. held that Amad's admissions were not confessions within this definition, and hence the section could not apply.

It is submitted, with respect, that this decision represents a more extensive application of the Standing Orders than the High Court has intimated should be adopted.[19] It appears more in line with a number of English authorities which adopt the view that the judge has an obligation rather than a power to reject evidence obtained in contravention of the Judge's Rules.[20] In Australia, the High Court has strongly resisted any tendency to treat the exercise of the discretion as an obligation rather than a power.[21]

Their reasoning was stated thus in *Lee's* case:

> No question of discretion can arise unless the statement in question is a voluntary statement in the common law sense. . . . The protection afforded by the rule that the statement must be voluntary goes so far that it is only reasonable to require that some subsantial reason should be shown to justify a discretionary rejection of a voluntary statement.[22]

It is apparent from this that the first question to be asked in determining whether an admission should be admitted is whether or not it was made voluntarily. If it was voluntary, then 'substantial reason' must be shown by the defence if it is to be rejected. What constitutes 'substantial reason' is, of course, a question of fact to be determined according to each particular case. Nevertheless, it appears from *Amad's* case that Mr Justice Smith's 'substantial reason' justifying the rejection may be far less substantial than the reason the High Court might require.[23]

Another point arising from the case that may have far reaching consequences is His Honour's ruling as to when a person is to be regarded as 'in custody'.[24] Smith J. held that for the purposes of the discretion rule:

[18] *The King v. Lee* (1950) 82 C.L.R. 133, 146. [19] *Ibid.*

[20] *Rex v. Grayson* (1921) 166 Cr. App. R. 7; *Rex v. Taylor* (1923) 17 Cr. App. R. 109, where it was held that *Grayson* lays down the rule that evidence obtained by cross-examination in custody is inadmissible; *Rex v. Thomas Dwyer* (1932) 23 Cr. App. R. 156, where the conviction was quashed because the person in custody had been asked a question without being cautioned; *Rex v. Brown and Bruce* (1931) 23 Cr. App. R. 56, where the suspect was cautioned but the conviction was quashed because of improper questioning. However, it seems that a different approach has been indicated more recently: *Reg. v. Bass* [1953] 1 Q.B. 680.

[21] 'The growth of rules of practice and their hardening so that they look like rules of law is a process that is not unfamiliar. . . . No rule of law has yet been established either here or in England imposing either upon the judge at a criminal trial or upon the Court of Criminal Appeal the duty of rejecting confessional statements if they have been obtained in breach of the "Judges' Rules". . . . ' *McDermott v. The King* (1948) 76 C.L.R. 501, 513-515 *per* Dixon J. [22] (1950) 82 C.L.R. 133, 150, 154.

[23] This view is supported by dicta in *Lee's* case to the effect that if the accused states in evidence that this admission was true, even though improperly obtained, 'that would be a good reason, though not a conclusive reason, for allowing the evidence to be given'. *The King v. Lee* (1950) 82 C.L.R. 133, 153.

[24] This is important because after a person is in custody he may not be questioned or cross-examined by the police, regardless of whether he has been cautioned. Orders 634 (3) and 636.

> a person is to be regarded in custody, not only after formal arrest, but also where he is in, say, a police vehicle, or on police premises, and the police by their words and conduct have given him reasonable grounds for believing, and caused him to believe, that he would not be allowed to go should he try to do so.[25]

Thus as soon as Amad was bundled into the police car he was technically in custody, and thereafter it was improper to ask him questions. Although the definition of custody has never before been extended to cover persons in police vehicles, it seems that such an extension is justified by authority even though it may severely hamper police investigation. His Honour relied primarily on a statement made by Williams J. in *Smith v. The Queen*[26] that 'if the police act so as to make him [the accused] think that they can detain him he is in their custody'. In that case, and in the cases Williams J. cited,[27] the accused was on police premises before the question of custody became relevant. However, it does not seem unreasonable to bring within the definition persons who are not actually on police premises, but who are nevertheless in the 'company' of the constabulary.[28]

Amad's case is one of two Supreme Court decisions in 1962 expressing dissatisfaction with police methods of taking and recording admissions. The other is *Ex parte Molinari,*[29] where Sholl J. expressed concern over the antiquated and fallible methods by which the police obtain and record statements made by suspected persons.[30] As a consequence, police investigations in the future may be severely hampered, but the only persons to blame are the police themselves, or rather 'a few police officers acting improperly, [who] necessarily affect the standing and creditibility of all in the eyes of a tribunal which has to deal with an allegation of police intimidation'.[31] It has always been an axiom of British justice, and one which the Courts will not hesitate to preserve, that 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction'.[32] But such a trend should not be taken too far, for 'no responsible person is unmindful of the need for proper investigation of crime and the speedy apprehension of criminals'.[33] One can only hope that *Amad's* case will lead to a revision, or at least a tightening up, of police methods of handling suspects.[34]

H. McM. WRIGHT

[25] [1962] V.R. 545, 546. [26] (1957) 97 C.L.R. 100, 129.
[27] *Reg. v. Bass* [1953] 1 Q.B. 680; *Chalmers v. H.M. Advocate* [1954] S.L.T. 177.
[28] *Lewis v. Harris* (1913) 110 L.T. 337. Also Browlie, 'Police Questioning Custody and Caution' [1960] *Criminal Law Review* 293.
[29] *The Queen v. Governor of Metropolitan Gaol Ex parte Molinari* [1962] V.R. 156.
[30] *Ibid.* 168-169. [31] *Ibid.* 169.
[32] *Hawkins' Pleas of the Crown* (8th ed. 1824) ii, c. 46, s. 34.
[33] *The King v. Lee* [1950] V.L.R. 413, 433 *per* Barry J.
[34] For a recent discussion of these matters, in a universal context, see 'The Police and Protection of Human Rights—a United Nations Seminar' June, 1963 *New South Wales Bar Gazette* 3.