The admissibility of secondary confessions

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Summary

Difficult questions about admissibility arise if a suspect makes an involuntary confession to the police that is followed by a later apparently voluntary confession, but which is somehow connected to the first involuntary confession. The problem is that not only could the reason for the inadmissibility of the primary confession still exist at the time the secondary confession is made, but also that the accused could consider himself or herself bound by the primary confession. This would effectively deprive the accused of the choice of whether or not to make the secondary confession and would therefore render it involuntary. Except for asking whether a secondary confession was voluntarily made, the next most important question is whether anything happened to cause the accused to believe that he or she was not bound by his or her primary confession. Both questions can be answered by considering certain identifiable objective factors.

1 Introduction[1]

It often happens that a suspect makes a confession to the police as a result of undue influence, and this is later followed by a secondary confession which is normally made to a magistrate. When considered in isolation, the secondary confession is usually made without apparent undue influence, except for the fact that it is somehow connected to the primary inadmissible confession.[2] The question arises as to whether the circumstances that disqualified the primary confession should have any bearing on the admissibility of the secondary

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[2]The facts in *R v Gumede* 1942 AD 398; *R v Jacobs* 1954 2 SA 320 (A); *S v Jika* 1991 2 SACR 489 (E); *S v Mjikwa* 1993 1 SACR 507 (A); *S v Colt* 1992 2 SACR 120 (E). In *R v Gumede* 408, Tindall JA explains the situation: 'It is clear in my judgment that the confessions to the magistrate must be regarded as substantive confessions, and, having regard to what happened before the magistrate, as *prima facie* voluntary and made without inducement. At the same time, it is clear that the previous experiences of the accused while detained at the store must be considered in order to ascertain whether the confessions before the magistrate, though *prima facie* voluntary, may in fact have been induced by ill-treatment or undue influence.'

confession (hereinafter also referred to as the derivative confession). It can be said that the secondary confession will usually be inadmissible when there is a sufficient connection with the circumstances that caused the primary confession to be made as a result of undue influence.[3]

The danger that undue influence could still be present at the time of making a secondary confession is, however, not the only issue in determining the admissibility of a secondary confession. The mere fact that a primary confession was made is often just as important in determining the admissibility of a secondary confession. In most cases the accused would consider himself, or herself, bound by the primary confession, and this would effectively deprive the accused of the choice of whether to make a secondary confession and therefore render it involuntary. In this way any undue influence that caused the primary confession to be made is still indirectly responsible for the making of the secondary confession. It often happens that because the accused is under the impression that he or she had already let the cat out of the bag as a result of the first confession, the prosecution is enabled to build upon the original wrongdoing. Apart from asking whether a secondary confession was made without undue influence, it is therefore equally important to ask whether anything happened that caused the accused to believe that he or she was not bound by his or her primary confession.

Secondary confessions have not been given much attention by either commentators or the courts in South Africa.[4] Cases that have considered the admissibility of secondary confessions have apparently done so by asking whether the secondary confession was made without undue influence. Although some cases have specifically mentioned certain factors to consider when determining the admissibility of a secondary confession, it can hardly be said that these factors give a full picture of the issues involved when determining the admissibility of secondary confessions. The purpose of this article therefore is not only to point out and discuss the principle objective factors that would indicate continuing undue influence as far as secondary confessions are concerned, but also to consider the factors that would indicate whether an accused had made an independent choice when he or she made a secondary confession. In other

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[3] In *R v SGT* [2010] 1 SCR 688 paras 63-64, Fish J explains in a dissenting judgment by the Supreme Court of Canada: 'The confessions rule serves to exclude involuntary statements made to persons in authority. The derived confessions rule is a corollary of the confessions rule. It excludes statements that are so closely connected to inadmissible confessions as to be "tainted" by association and, for that reason, inadmissible as well. The derived confession rule thus excludes statements that, while not inadmissible when considered in isolation, are excluded because of their temporal or causal connection to another statement found by the court to be inadmissible. This occurs whenever "either the tainting features which disqualified the first confession continued to be present or ... the fact that the first statement was made was a substantial factor contributing to the making of the second statement": *R v I (LR) and T (E)* [1993] 4 SCR 504 at 526.'

[4] The leading case in this regard dates back to 1942 – see *R v Gumede* (n 2).

words, factors that would indicate whether the accused considered himself or herself bound by the fact that a primary but inadmissible confession was made, even though undue influence might strictly speaking not be present at the time of making a secondary confession.[5]

The article therefore aims to suggest the manner in which South African courts ought to deal with the admissibility of secondary confessions by pointing out and considering certain objective factors that could indicate continuing undue influence or a lack of independent choice. These factors have been reduced after considering South African, Canadian and English jurisprudence as far as secondary confessions are concerned.[6] English law has been included not only because it is the common law of the South African Law of Evidence, but also because their courts have dealt with the admissibility of secondary confession in a number of recent cases. The Canadian Law of Evidence also has its roots in English law and their Supreme Court has extensively and fairly recently dealt with the admissibility of secondary confessions.[7]

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[5]For current purposes the requirements of the Constitution of the Republic of South Africa, 1996 as far as the admissibility of confessions are concerned will not be considered and the discussion will focus on the two essential statutory requirements for admissibility of confessions, namely, voluntariness and undue influence. A determination in this regard is essentially a subjective inquiry and it is submitted that the majority of cases where the admissibility of a derivative confession could be questioned will focus on these requirements. The requirements of the Constitution apply in addition to the normal requirements for the admissibility of confessions and a decision whether or not to exclude such evidence in terms of the exclusionary rule embodied in s 35(5) of the Constitution is essentially an objective inquiry that considers additional factors, eg, the *bona fides* of the police – see Schwikkard and van der Merwe *Principles of evidence* (2009) (3rd ed) para 12 7 2 1 and para 17 4 4 1. When deciding whether a statement was given freely and voluntarily and without undue influence, *bona fide* police conduct cannot, however, repair possible involuntariness or undue influence – *cf* the facts in the case of *S v Tjiho* 1992 1 SACR 639 (Nm). Also, a finding that the statutory requirements for admissibility were not complied with, would result in the automatic exclusion of the relevant statement, whereas the exclusionary rule in the Bill of Rights provides for discretion. For a discussion of possible constitutional grounds for excluding a later confession in the American context, see Henning *et al Mastering criminal procedure Vol 1: The investigative stage* (2010) 269, where the cases of *Oregon v Elstad* 470 US 298 (1985) and *Missouri v Seibert* 542 US 600 (2004) are discussed. See further Godsey 'Rethinking the involuntary confession rule: Towards a workable test for identifying compelled self-incrimination' (2005) 93 *Cal LRev* 465; Said 'Coercing voluntariness' (2010) 85 *Ind LJ* 1; Milhizer 'Confessions after *Connely*: An evidentiary solution for excluding unreliable confessions' (2008) 81 *Temp LRev* 1; Schonwald 'Eating the poisonous fruit: The Eighth Circuit will not exclude derivative evidence from a *Miranda* violation' (2004) 69 *Mo LRev* 1183; Thaman '"Fruits of the poisonous tree" in comparative law' (2010) 16 *Sw J Int'l L* 333; Cheney '*Colorado v Connely*: Is free will no longer a criteria for the voluntariness of an accused's waiver and confession under *Miranda*?' (1987) 11 *Law qand Psychol Rev* 153.

[6]American jurisprudence on the matter was also researched and considered, but because the issue remains controversial in the United States, only a limited number of principles could be reduced.

[7]See *R v SGT* (n 3).

2 Differential treatment of admissions and confessions in South Africa

It is necessary to explain the difference between admissions and confessions in terms of South African law because no such distinction is made in the foreign jurisdictions referred to later in this article. This explanation is also included to place the requirements for the admissibility of admissions and confessions into perspective, since this article focuses on the admissibility of secondary confessions. It might, however, happen that the admissibility of a secondary admission is questioned and similar principles could be applied to resolve the matter.

In South Africa, the artificial distinction made between admissions and confessions has not escaped criticism.[8] When an admission is made, the accused admits one or more facts in dispute, but not all the facts. A confession, on the other hand, is seen as an admission of all the facts in issue. All the elements of a specific crime are admitted and therefore it does not contain any exculpatory part or defence.

In the case of admissions, the requirement of 'freely and voluntarily' has a restricted meaning and an admission will be found to be involuntary only if it has been induced by a promise or threat from a person in authority.[9] Confessions, on the other hand, essentially have to be made freely and voluntarily whilst the maker is in his or her sound and sober senses and without having been unduly influenced thereto.[10] The requirement of undue influence is elastic and goes beyond the ambit of voluntariness, which is restricted to an inducement, threat or promise coming from a person in authority.[11] In effect, it covers 'all cases in which external influences have operated to negative the accused's freedom of volition'. Schwikkard and Van der Merwe[12] point out that in practice the inquiry as to whether a confession was freely and voluntarily made is of little relevance, because it is subsumed in the inquiry as to whether the confession was made without undue influence. A convincing argument can be made for why the 'person in authority' requirement in the case of admissions should be eliminated or replaced by a wider definition, but a discussion in this regard is beyond the scope of this article.[13]

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[8]Generally, see Schwikkard in Woolman *et al Constitutional law of South Africa* (Original Service: 11-07) (2nd ed) 52-31.

[9]See s 219A of the Criminal Procedure Act 51 of 1977; Schwikkard and Van der Merwe (n 5) para 16 7 1.

[10]Section 217(1) of the Criminal Procedure Act 51 of 1977. About the history of and reason for these requirements – see *R v Gumede* (n 2) 412.

[11]*R v Barlin* 1926 AD 459 at 462-463.

[12](N 5) para 17 4 2. Also see *S v Radebe* 1968 4 SA 410 (A); *R v Kuzwayo* 1949 3 SA 761 (A).

[13]See, in general, Schwikkard and Van der Merwe (n 5) para 16 7 1.

3 What does 'undue influence' mean?

It is useful to consider the meaning of the requirement that a confession must be made without undue influence, since this is necessary for a proper understanding of why certain factors are relevant when considering the admissibility of a secondary confession. This will also show how our courts have generally approached the admissibility of a secondary confession; inquiries in this regard have focussed upon undue influence at the time of making a secondary confession. However, a full consideration of the interaction between the factors that would indicate undue influence and the factors that would indicate whether the accused had made an independent choice at the time of making a secondary confession have never been made.

'Undue influence' occurs where some external factor nullifies the accused's freedom of will.[14] Examples include the promise of some benefit or an implied threat or promise. A promise or threat will be found to have been made if a person, by means of words or conduct, indicates to an accused that he or she will be treated more favourably if he or she speaks or less favourably if he or she does not speak. Whether such promise or threat was made will depend on the facts of each case. The mere existence of a promise or threat does not necessarily establish undue influence. A subjective test is used to assess the influence on the accused's statement in terms of which the threat or promise must have been operative on the mind of the accused at the time when the statement was made.[15] The subjectivity of the test makes it impossible to specify what would constitute a threat or promise. It is a question of fact and the circumstances of each individual case will have to be taken into consideration in determining whether the will of the accused was swayed by external impulses improperly brought to bear upon it, which are calculated to negative the apparent freedom

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[14] See, in general, Schwikkard and Van der Merwe (n 5) paras 16 7 1 and 17 4 4; Zeffertt and Paizes *The South African law of evidence* (2009) (2nd ed) 534 and the cases referred to by them. For an informative discussion in this regard in the Australian context – see *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34 para 237.

[15] However, objective factors cannot be discarded and will more often than not play an essential role in determining any possible undue influence. In *S v Mpetha (2)* 1983 1 SA 576 (C) 585C-D Williamson J explains: 'It is his will as it actually operated and was affected by outside influences that is the concern ... Obviously, if in a particular case there is evidence of factors which a court thinks are objectively calculated or likely to influence the will of a person, then from a purely pragmatic point of view it will not be easy for the prosecution to satisfy the court that there is no reasonable possibility of these factors in fact having had an influence subjectively on the particular accused. Conversely, if there are factors which the court thinks are not objectively calculated or likely to influence the will of an accused, then it will, practically speaking, not be easy for the defence to persuade a court that there is a reasonable possibility that these factors in fact subjectively influenced the will of the particular accused ... An improper influence which is trivial must be ignored; so also an improper influence, which, though not trivial in itself, is shown in fact not to have had any meaningful influence on the will of the accused.'

of volition. The court in *S v Mpetha (2)*[16] held that the term 'negative' was not intended to connote a degree of impairment of will so high that in reality there was no act of free will at all. The criterion was held to refer to the improper bending, influencing or swaying of the will, and not to its total elimination as a freely operating entity. In the end the state must prove beyond a reasonable doubt that this was not the case.[17]

When a court considers whether an apparently voluntary but secondary confession was also made without undue influence, it will therefore have to look at the entire chain of events in order to decide whether each is part of the same transaction. If this is the case it would be a strong indication that the accused was influenced to make the secondary confession. If the events can, however, be separated, this would indicate an absence of undue influence.[18] As was explained above, objective factors will often be the guiding force in order to establish whether an accused was unduly influenced to make a confession. This is even more so in a situation where an accused makes a secondary confession without apparent undue influence. There are certain factors which are clear indicators of the continuance of possible undue influence, but before these factors can be discussed, it is useful to look at the way in which the admissibility of secondary confessions are dealt with elsewhere.[19]

4 Admissibility of secondary confessions under Canadian law

The leading case on the admissibility of secondary confessions in Canada is *R v I (LR) and T (E)*.[20] In this case the Supreme Court of Canada had to determine

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[16]See, in general, *S v Mpetha (2)* (n 15) 578H-585H.
[17]See *R v Jacobs* 1954 2 SA 320 (A) 323A.
[18]In *R v SGT* (n 3) para 66, Fish J captures the essence here in a dissenting judgment by the Supreme Court of Canada: 'In short, derived confessions are inadmissible not because there are themselves involuntary statements made or given to a person in authority, within the meaning of *Ibrahim v The King* [1914] AC 599 (PC), and its progeny, but because they are "tainted", or contaminated, by *another inadmissible statement*. The governing principle was well and succinctly put this way by Bastarache J, speaking for the majority in *R v G (B)*, [1999] 2 SCR 475 para 23: "Ultimately, what matters is that the court is satisfied that the degree of connection between the two statements is sufficient for the second to have been contaminated by the first". And the sufficiency of the required connection must be determined by the trial judge on a *voir dire*.'
[19]For current purposes the position in Canada and England will be elaborated upon, since it provides the most useful guidelines as far as the admissibility of secondary confessions in South Africa are concerned, but the issue has also arisen in other jurisdictions. In Australia, eg, if an admission is rendered inadmissible, another admission made subsequently may also not be admissible because the prosecution is unable to negate a causal link – see *R v JF* [2009] ACTSC 104 paras 46 and 72. In America the situation is approached from a constitutional perspective, but as was explained above, this issue is beyond the scope of this article – see (n 5).
[20][1993] 4 SCR 504.

the appropriate principles which are applicable to determine the admissibility of a secondary confession in circumstances where such a confession followed an inadmissible primary confession. The relevant facts were that the appellant was charged with the murder of a cab driver. His great aunt, a woman whom he considered to be his mother, accompanied him to the police station after his arrest. The police informed them that there would be time to contact a lawyer on their arrival at the police station but, on their arrival, both were taken to an interview room where the investigating officer began taking a statement over the course of four and a half hours. A statement was made without the advice of a lawyer. At the request of the appellant he later met with his lawyer for half an hour. The next day, the appellant informed the investigating officer that he had information to add to his earlier statement. He spoke to his lawyer immediately prior to making the statement. He indicated that he did not want a lawyer or other adult present and made a second statement that included an exchange about the plan the appellant and his co-accused had to murder the deceased.

The admissibility of this second statement formed the main issue on appeal. Sophinka J points out[21] that the admissibility of the second statement depends on the reasons for the inadmissibility of the first statement. The first statement was excluded because neither the appellant nor his great aunt understood the consequences of the appellant's confession to the police or the full extent of the jeopardy in which the appellant found himself. The confession was therefore *inter alia* inadmissible because it was involuntarily made.[22]

Sophinka J next considers the admissibility of the second statement in view of two aspects:

(1) Was the statement admissible when considered independently of the first statement and the circumstances surrounding it?
(2) Was the statement admissible when considered in conjunction with the first statement?

As far as the first question is concerned, the learned judge comes to the conclusion that the statement was voluntarily made.[23] The appellant exercised his right to counsel prior to making the second statement and he spent half an hour

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[21]Paragraph 517.

[22]In this sense a free will can only be exercised in the context of a full understanding and appreciation of one's rights – see the remarks made by Sophinka J para 528. *R v Turgeon* [1993] 1 SCR 308. Although it cannot be concluded that there is a general principle that a failure to advise someone of his or her right to legal representation amounts to undue influence, it could be a factor taken into consideration when deciding whether a statement was made without undue influence – see Schwikkard and Van der Merwe (n 5) para 17 4 4 and the cases referred to by them. This would be so where the circumstances of a specific case indicate that it would be highly probable that if a person had been advised of his or her right to legal representation, he or she would have exercised it.

[23]Paragraph 525.

with his counsel the evening before. He also spoke with his counsel on the phone immediately prior to making the statement.

Sophinka J points out, however, that the principles which determine the admissibility of the second statement, when considered in conjunction with the first statement, are directly influenced by the grounds for the exclusion of the first statement. He notes:[24]

> Under the rules relating to confessions at common law, the admissibility of a confession which had been preceded by an involuntary confession involved a factual determination based on factors designed to ascertain the degree of connection between the two statements. These included the time span between the statements, advertence to the previous statement during questioning, the discovery of additional incriminating evidence subsequent to the first statement, the presence of the same police officers at both interrogations and other similarities between the two circumstances ... No general rule excluded subsequent statements on the ground that they were tainted irrespective of the degree of connection to the initial [in]admissible statement.

The court is of the opinion[25] that a secondary confession would be involuntary if either of the tainting features which disqualified the primary confession continued to be present[26] or if the fact that the primary confession was made was a substantial factor contributing to the making of the secondary confession.[27] The fact that a warning had been given or that the advice of counsel had been obtained between the two confessions was a factor to be considered, but it was not determinative.[28] Such circumstances would, for example, have little

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[24] Paragraph 526. Sophinka J refers to the following cases for authority: *Boudreau v The King* [1949] SCR 262; *Horvath v The Queen* [1979] 2 SCR 376; *Hobbins v The Queen* [1982] 1 SCR 553. He also refers to *Cross on evidence* (1990) (7th ed) 619 where the learned author summarised the common law on this point: 'It had become well-established in the old law that a confession which, considered in isolation, appears to satisfy the conditions for being voluntary, might nevertheless be excluded if preceded by an earlier involuntary confession. It would be so excluded if either the factors tainting the earlier confession continued to apply, or if the fact of having made such a confession could itself be regarded as precipitating its successor.' The leading case in this regard is *R v Smith* [1959] 2 All ER 193, although the court's finding in that case is difficult to comprehend – see Mirfield *Silence, confessions and improperly obtained evidence* (1997) 107.

[25] Paragraph 526.

[26] The following are therefore potentially 'tainting features' (see para 526): the time span between the statements, advertence to the previous statement during questioning; the discovery of additional incriminating evidence subsequent to the first statement; the presence of the same police officers at both interrogations; and other similarities between the two circumstances.

[27] This could happen where the fact of the first statement produces a 'strong urge to explain away incriminating matters in a prior statement' (para 527) or where the second statement was a 'continuation of the first' (para 531); or where, in view of the first statement, 'the rationale for further restraint in self-incrimination was gone' (para 532).

[28] Paragraph 527.

effect where the secondary confession was induced by the fact of the first.[29] Sophinka J further points out that an explanation of one's rights may also have no effect where there is a strong urge to explain away incriminating matters in a prior statement.[30] It could further be argued that it would be unlikely that the accused's lawyer will be able to say with certainty that the first statement will be inadmissible and would therefore advise his client to say nothing.

Ultimately the court *inter alia* excludes the secondary confession because of the following reasons:[31] Not only was there a close temporal relationship between the statements, but the secondary confession was a continuation of the first, and the first confession was a substantial factor leading to the making of the secondary confession. The court points out that the statements were taken less than a day apart by the same officer and there was no evidence that the police in the interval between the two statements had gathered further evidence tending to incriminate the appellant to which he might have been asked to respond. There was further continued advertence by the police officer throughout the secondary confession to information given in the first statement.

The court comes to the conclusion that all the evidence in the case points to the fact that the secondary confession was causally connected to the first. The appellant wanted to add something to his first statement and the facts show that the police were operating from the perspective that the facts were already on the table. The relative lengths of the statements reflect this view. (The first statement lasted some five hours, the second only half an hour). The court finally points out that communication with counsel cannot be said to have the determinative effect that it would have had if it had taken place before the first statement. The exculpatory nature of his second statement suggests that he wanted to give credence to what he said in the first statement, namely that he was merely a bystander to the murder. It can be said that once the first statement was given, there was no further reason for restraint in self-incrimination.

The principles enunciated in *R v I (LR) and T (E)*[32] have been confirmed in later decisions by the Supreme Court of Canada.[33] In *R v G (B)*[34] the accused went to a police station, and after he was warned, made a confession to the police in which he admitted to engaging in various acts of a sexual nature with his

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[29]Sophinka J refers to Estey J in *Boudreau v The King* (n 22) para 527 at 285 where he states: 'A warning under such circumstances, when already he had given information in reply to questions and when immediately after the warning he is further questioned by the same parties in a manner that directed his mind to the information already given, is quite different in its effect from a warning given before any questions are asked'.
[30]Paragraph 527.
[31]Paragraphs 530-531.
[32](N 20).
[33]See *R v G (B)* (n 18) and *R v SGT* (n 3).
[34](N 18).

young cousin. The accused was subsequently charged, and a court ordered an assessment of his mental condition in terms of the Canadian Criminal Code.[35] During this assessment, the accused made a confession (the 'protected statement') to a psychiatrist when the latter asked him to explain the confession he had made to the police. The defence requested a second assessment. Both psychiatrists' reports noted the limited mental capacity of the accused, but nevertheless concluded that he was fit to stand trial. The reports also indicated that the accused was very accommodating towards those in authority and that his answers were unreliable in an anxiety-producing situation. At trial, following the victim's testimony, the prosecution sought to introduce the accused's confession to the police. Based on the psychiatric assessments, the trial judge ruled it inadmissible.[36] The accused later testified and denied any sexual activity with the victim. The question was whether the prosecution could introduce the 'protected statement' made to the psychiatrist for purposes of challenging the credibility of the accused.[37]

The Canadian Supreme Court confirmed the rule that, assuming that a primary confession to the police is inadmissible, a secondary confession will also be inadmissible if the degree of connection between the two statements is sufficient for the second to have been contaminated by the first.[38] The court ruled that the secondary confession was inadmissible because of its degree of connection with the prior inadmissible confession. The statement to the psychiatrist resulted directly from the confrontation of the accused with his previous statement. No additional information was further obtained. The court states that since the second statement existed only because of the first, it was unnecessary to consider whether the tainting factors continued to exist, although in this case they were still present to some extent.

It is useful to take note of the dissenting judgment in this case.[39] The dissenting judgment rejects the accused's contention that his statement to the psychiatrist should be inadmissible, since there was no indication that this statement was an involuntary confession.

They are further of the opinion that the accused was not deprived of his right to choose whether to confess or not.[40] More importantly, the secondary confession could not be inadmissible because of its links to the earlier inadmissible police confession.[41] The dissenting judgment is of the opinion that

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[35]RSC 1985.
[36]The psychiatric assessments also called into question the accused's ability to understand the consequences of his statement and its possible use in court – see para 6.
[37]Paragraph 14.
[38]See from para 21.
[39]*Per* L'Heureux-Dubé, Gothier and McLachlin JJ (delivered by McLachlin J) – see from para 54.
[40]See para 59.
[41]See from para 60.

the connection between the accused's statement to the psychiatrist and the earlier statement to the police does not meet either branch of the test for the inadmissibility of a secondary confession as stated in the case of *R v I (LR) and T (E)*.[42] This was so because the tainting features which disqualified the primary confession were no longer present, and the primary confession did not effectively deprive the accused of the choice of whether to make the secondary confession.

McLachlin J points out that the substantial connection between the two statements required by the law to establish involuntariness is therefore not present in the case. She notes that to assert that every statement similar to or derived from an inadmissible confession thereby becomes inadmissible is to undermine the rationale of choice that lies at the heart of the confessions rule and the doctrine of derivative exclusion.[43] Connectedness or similarity between a prior inadmissible confession and a subsequent confession renders the subsequent confession inadmissible only if it rises to the level of showing that the connection may have rendered the secondary confession involuntary.[44] A secondary confession cannot be inadmissible merely because it 'arose out of the first' or where the primary and secondary confessions 'are one and the same'.[45] In this case the fact that the secondary confession contained no additional information, and that it was merely an assertion of the truth of the primary confession is not enough, by itself, to render the secondary confession inadmissible. A secondary confession cannot also be inadmissible merely because it is 'contaminated' by or 'exists only because of' the prior inadmissible confession.

The dissenting judgment would have allowed the secondary confession for the following reasons: The time span between the first and second confessions was long – about one year – during which time the accused consulted with a lawyer;[46] there was no large amount of subsequently discovered evidence acting as a practical compulsion to confess; the circumstances and people involved with the two statements were also entirely different; the purpose and nature of the

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[42](N 20). The test is mentioned at n 24 above.

[43]See para 64. 'To assert that every statement similar to or derived from an inadmissible statement thereby becomes inadmissible is to undermine the rationale of choice that lies at the heart of the confessions rule: *R v Herbert* [1990] 2 SCR 151 at 173. It would make virtually all second confessions inadmissible, regardless of the circumstances, since second statements almost always will have reference in some derivative way to prior statements. It would prevent an accused who has made an inadmissible first statement from making an admissible second statement, even where this is to his or her advantage. And it would disadvantage the search for truth and the proper administration of justice, all in the absence of the self-incrimination and abuse rationales that underlie the rule that involuntary confessions should be excluded.'

[44]McLachlin J remarks: 'In short, the inquiry is whether the first inadmissible confession effectively deprived the accused of the choice of whether to make the subsequent confession, rendering it involuntary and hence inadmissible' (para 63).

[45]See para 65.

[46]See para 66.

meeting with the psychiatrist was explained to the accused by his mother and the psychiatrist did not act in a deceptive or coercive way, even though he did refer to the accused's first statement. In the end the accused was never deprived of his right to choose whether to make the statement or not.

Although the dissenting judgment is not without merit, it is submitted that its view fails to take proper account of the so-called 'cat is out of the bag' argument.[47] Where a suspect is reminded about what he or she had said in a primary confession at the outset of making a secondary confession, it is more than probable that he or she would consider himself or herself bound by his or her first inadmissible confession and it would therefore be very difficult to disprove undue influence in such a case. The fact that a long time had elapsed between the statements and the mere fact that the accused spoke to a lawyer is not enough to render a secondary confession voluntary. Perhaps the majority view seems narrow in the sense that the secondary confession was excluded just because the accused was confronted with a previous inadmissible confession. This apparently shows that they failed to take other possible factors pointing towards possible voluntariness into account. It is submitted, however, that there were no such factors present in the case.

A recent decision by the Supreme Court of Canada restated the test for the inadmissibility of a secondary confession. In *R v SGT*[48] a minor complained to a school teacher that the accused, her stepfather, had touched her in a sexually inappropriate manner on separate occasions during the time she spent at his home. The accused was interviewed by the police and, at the conclusion of the interview, wrote out an apology to the victim on a police statement form. The accused was subsequently charged with sexual assault. More than five weeks after his initial interview, the accused sent an e-mail to his former wife in which he *inter alia* apologised to the victim for a second time. At his trial, the accused's first statement to the police was ruled inadmissible because the police had offered an inducement by implying that the accused would not be charged if he apologised. Credibility was the main issue at trial and the contents of the e-mail played a crucial role in the trial judge's decision. The important question was whether the e-mail was sufficiently connected to the first statement to also make it inadmissible. The Supreme Court affirmed the test put forward in *R v I (LR) and T (E)*[49] and decided that there was no such connection between the statements.[50]

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[47] See above at the introduction to this article for the context of the argument.
[48] (N 3).
[49] (N 20).
[50] Charron J states at para 38 the reasons for the conclusion: 'In terms of the time span between the statements, the initial apology was made on May 27 ... while the e-mail was sent over five weeks later ... The inducement as held out by the police ... was the suggestion that SGT may not be charged if he apologized. However, by the time SGT sent the e-mail, he had been charged notwithstanding his apology ... It is therefore far from obvious on what basis the inducement could

The test put forward in *R v I (LR) and T (E)*[51] must be accepted and captures the essence of the issues involved when it has to be determined whether circumstances that disqualified a primary confession should have any influence on the admissibility of a secondary confession. A secondary confession will therefore be inadmissible if either the tainting features which disqualified the primary confession continued to be present or if the fact that the primary confession was a substantial contributing factor to the making of the secondary confession.

5 Admissibility of secondary confessions under English law

Under English law, the admissibility of confessions[52] may be challenged on four possible grounds:[53] firstly, in terms of section 76(2)(a) of the Police and Criminal Evidence Act of 1984, where the confession was or might have been obtained by oppression of the person who made it;[54] secondly, in terms of section 76(2)(b) of PACE, where the confession was or may have been obtained 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 in consequence thereof;[55] thirdly, in terms of section 78 of PACE, if it appears to the court that, having regard

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still be operative in the accused's mind ... Additionally, there was no advertence to the previous inadmissible statement in the e-mail ... Finally, the two statements were made to different persons in entirely different circumstances.'

[51](N 20).

[52]In terms of s 82(1) of the Police and Criminal Evidence Act of 1984 (hereafter referred to as 'PACE') a confession 'includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise'.

[53]See generally Richardson (ed) *Archbold criminal pleading: Evidence and practice* (2010) para 15-350; Murphy *Murphy on evidence* (2009) (11th ed) 330; Tapper *Cross and Tapper on evidence* (2010) (12th ed) 632; Dennis 'The admissibility of confessions under sections 84 and 85 of the Evidence Act 1995: An English perspective' (1996) 18 *Sydney LRev* 34.

[54]See also s 76(8) of PACE, stating that: 'In this section "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)'. See Richardson (ed) (n 53) para 15-358 for a discussion of the meaning of 'oppression'.

[55]See Richardson (ed) (n 53) para 15-361 - 15-365 for a discussion in this regard. This indicates, first of all, that a causal link has to be shown between what is said and done and the confession. Secondly, the words create an objective test, in a sense hypothetical, since they relate not to the confession, but to any similar confession as the one the accused had made. In *R v Barry* 95 Cr App R 384 CA it was said that s 76(2)(b) requires the judge to adopt a three-step process: (1) to identify what was said or done, in other words, to take into account everything said and done by the police; (2) to ask whether what was said and done was likely in the circumstances to render unreliable a confession made in consequence, the test being objective; and (3) to ask whether the prosecution have proved beyond reasonable doubt that the particular confession was not obtained in consequence of the thing said or done. The matter should be approached in a common sense way rather than on any refined analysis of causation concepts.

to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it,[56] and fourthly, in terms of the common law, where evidence can be excluded in the discretion of the trial judge so as to protect the accused from an unfair trial.[57]

Most of the recent English cases that have dealt with a situation where a primary confession is inadmissible, but where a secondary confession is apparently admissible, have been decided in terms of section 78 of PACE and not in terms of the old authorities.[58] In *R v Neil*[59] the court reviewed the authorities on the matter[60] and came to the conclusion that where there is a series of interviews and the court excludes one on the grounds of unfairness, the question of whether a later interview which is, in itself, unobjectionable, should also be excluded is a matter of fact and degree. It is likely to depend on whether the objections leading to the exclusions of the first interview were of a fundamental and continuing nature, and, if so, if the arrangements for the subsequent interview gave the defendant a sufficient opportunity to exercise an informed and independent choice as to whether he should repeat or retract what he said in the excluded interview or say nothing.[61]

In this case, N was asked to go to a police station following his involvement in a stabbing incident. At his request he spoke privately to a lawyer, in whose presence he then told officers that he had not only witnessed the incident, but also gave the knife to the perpetrator and helped to drive him away. An officer then took a witness statement from him. N signed the statement and was then cautioned, arrested and kept in custody overnight. The following day a properly conducted interview took place. At trial, the judge excluded the first witness

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[56]See, in general, Richardson (ed) (n 53) para 15-452.

[57]Section 82(3) of PACE preserves the common law – see Richardson (ed)(n 48) para 15-535. For current purposes, only the first two grounds are relevant, since the last two grounds for exclusion basically deal with a situation that should be dealt with in terms of s 35(5) of the Constitution of the Republic of South Africa 1996.

[58]This is most probably because s 78 of PACE is of broader application – see, in general, Richardson (ed) (n 53) para 15-453. As far as the old authorities are concerned, see (n 24).

[59][1994] *Crim LR* 441 CA.

[60]See *R v Canale* 91 Cr App R 1 CA; *R v Gillard and Barret* 92 Cr App R 61 CA; *R v McGovern* 92 Cr App R 228 CA; *Y v DPP* [1991] *Crim LR* 917 DC; *R v Glaves* [1993] *Crim LR* 685 CA.

[61]Quoted with approval by the Court of Appeal in *R v Nelson and Rose* [1998] 2 Cr App R 399 CA 409. See also *R v Wood* [1994] *Crim LR* 222 CA; *R v Conway* [1994] *Crim LR* 838 CA. Wolcher and Heaton-Armstrong *Wolcher and Heaton-Armstrong on evidence* (1996) 4-093 put it as follows: 'Was the effect of the inducement or other vitiating statement or event or the oppressive conduct capable of being "cured" or – neutralised – by countervailing correctives? Was it in fact cured such that when the inadmissible confession was repeated later the repetition became admissible? Was the original vitiating factor spent or neutralised or are there reasons to believe that it tainted or contaminated the later confession? In short, was there what has been referred to in common parlance as a "knock-on effect"?'

statement under section 78 of PACE because of breaches of the Codes of Conduct,[62] but did not exclude the subsequent interview. As a consequence, N was found guilty of possession of an offensive weapon. N appealed his conviction on the ground that the judge should have excluded the interview as well as the statement. The Court of Appeal allowed his appeal, stating that the judge should have exercised his discretion to exclude the evidence, since N would have considered himself bound to the admissions in his first statement. The circumstances of the second interview were insufficient to provide him with a safe and confident opportunity of withdrawing the admissions. There was no evidence that he had had the opportunity to take legal advice between the first and second interviews.

In both England and Canada the courts have essentially kept to the common law position as far as the admissibility of secondary confessions are concerned. A secondary confession which, considered in isolation, appears to have been made freely and voluntarily and without undue influence, might nevertheless be excluded if either the factor tainting the primary confession continues to apply or if nothing happens to cause the accused to believe that he or she is not bound by his or her primary confession. It is necessary to consider some obvious objective factors that could help to decide these two issues.

6 Objective factors indicating continuing undue influence and independent choice

6.1 Undue influence

As was explained above,[63] objective factors will be the guiding force in order to establish not only whether undue influence could still be indirectly operative through the medium of a primary confession, but also whether the accused had a sufficient opportunity to exercise an informed and independent choice as to whether he or she should have made a secondary confession. A court will therefore have to look at the entire chain of events in order to decide whether each is part of the same transaction and therefore influenced the accused to make a secondary confession, or whether they can be separated and hence had no significant influence on the accused's decision to make a secondary confession. It is a question of fact. The following factors will be important considerations when deciding whether the secondary confession was made without undue influence:

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[62] See the Code of Practice for the Detention and Treatment and Questioning of Persons by Police Officers, laid down in terms of section 66 of PACE.
[63] See (n 15).

6.1.1 Whether the accused had alleged possible undue influence

It would be difficult for an accused on appeal to allege undue influence with a secondary confession where he or she did not specifically state in his or her evidence that such undue influence caused him or her to make a secondary confession.[64]

6.1.2 The proximity in time and space of the two confessions

Although the time duration between the primary involuntary confession and the secondary apparently voluntary confession will usually indicate a lack of undue influence with the secondary confession, this will not necessarily be the case.[65] In *S v Mjikwa*,[66] for example, the Appellate Division determined that evidence of a pointing out which was made nine hours after an inadmissible confession was incorrectly allowed by the trial court. The court stated that it was probable that the appellant was asked to point out certain places because of the content of his inadmissible confession and that it was just as likely that his reason for making the confession also caused him to undertake the pointing out. The court was further of the opinion that it could hardly be said that the involuntariness with which the confession was made could disappear within mere hours. The connection with regard to both applicability and timing was simply too great to reach such a conclusion. Relevant factors here would be the completeness of the questions and answers in the primary statement, the extent to which the content of the statements overlap, the timing and setting of the first and the second statement, the continuity of police personnel, and whether the authorities basically treated the second interview as a continuation of the first.[67] Mirfield[68] points out that where there has been a series of interviews, with only short gaps between them, and where all the statements except the last were affected by improprieties, it will be extremely hard to convince a court that a confession obtained at a final, and properly conducted interview, should be admissible.

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[64]See the remarks made by Tindall JA in *R v Gumede* (n 2) 410-411. In *Nelson and Rose* (n 61) 410A-B the court notes in this regard: 'It is significant that at the trial neither in her evidence in chief nor in cross examination did she suggest that the reason why she told the damaging lies that she admittedly did tell during the two subsequent interviews was because she felt trapped by the lies that she had told at the first interview'.

[65]In *R v SGT* (n 3) para 81 Fish J points out: 'Moreover, the improper inducements present when the inadmissible statement was given to the police – notably, the promise of leniency in exchange for a showing of remorse – were still operative. It was long ago recognized that promises of this type have a more enduring effect than threats: F Kaufman *The admissibility of confessions* (1979) (3rd ed) 146.'

[66](N 2) 501.

[67]See the remarks made by Souter J in *Missouri v Seibert* (n 5) para V.

[68](N 24) 106, with reference to *R v Ismail* [1990] *Crim LR* 109 and *Burut v Public Protector* [1995] 2 AC 579.

6.1.3 Whether the circumstances and people involved with the two confessions were the same

It must especially be taken into consideration if the same police officers were present at both interrogations.[69]

6.1.4 Whether the accused still had visible injuries at the time of the secondary confession

If an accused exhibited serious or fresh injuries at the time of making a secondary statement, this would strongly suggest that the undue influence that caused the accused to make the primary statement to be made was still present.[70]

6.1.5 Whether the accused was exposed to excessive interrogation and detention

Where an accused was detained and subjected to a long, constant and excessive interrogation process by the police that was mainly directed at extracting a confession from him or her and to basically persuade him or her to go and make a statement, this would be a strong indication that undue influence was still operative on his or her mind at the time a secondary confession was made.[71] Under such circumstances it can often be asked how the initial unwillingness of an accused to make any statement was eventually broken down. Prolonged detention can itself act as an undue influence that will still operate on the mind of a suspect when making a secondary confession. In this regard a relevant question is whether an accused had made a statement after the police took him to a make a statement or whether he or she made such a statement out of his or her own accord and after having being released from custody.[72]

6.1.6 Whether the accused had denied his or her guilt in a secondary confession and gave a reason for the primary confession

If the accused had denied his or her guilt in a secondary confession and gave a reason for the primary confession it would clearly be in favour of allowing a secondary confession.[73]

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[69] See the remarks made by Sophinka J in *R v I (LR) and T (E)* (n 20) 526.
[70] See in this regard *S v Matlou* 2010 2 SACR 342 (SCA).
[71] See, eg, the facts in *R v Gumede* (n 2); *S v Zulu* 1998 1 SACR 7 (SCA); *S v Twala* 1991 1 SACR 494 (N).
[72] See *S v Mpetha (2)* (n 15). See also *Leyra v Denno* 347 US 556 (1954).
[73] *Y v DPP* [1999] *Crim LR* 917.

6.2 Independent choice

When considering whether the accused had a sufficient opportunity to exercise an informed and independent choice as to whether he or she should repeat or retract what he or she said in a primary excluded confession or say nothing, the first important question would be whether legal advice had been obtained at the time of the secondary confession. Here it would be very important to know what advice the accused had received between the confessions. If, for example, he or she had been informed by the police, a lawyer or friends that nothing he or she had said earlier could be used in evidence against him or her, this would indicate an absence of undue influence. He or she might therefore be persuaded that his or her situation had not been rendered hopeless by his or her earlier statement.[74]

A related question here is whether the authorities had advised the accused that his or her primary confession may not be admissible and that he or she, therefore, need not speak solely out of a belief that the cat was out of the bag.[75] If, however, the accused was reminded about what he or she said in his or her primary confession at the outset of making the secondary confession, this would be a factor pointing towards the continuation of possible undue influence, since he or she would have considered himself or herself bound to what he or she said in his or her primary confession. It would be very difficult to disprove continuing undue influence in such circumstances.[76] This will also be the case where there was an amount of subsequently discovered evidence in the case that acted as a practical compulsion to confess a second time.[77]

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[74] In Re *RPS* 653 P 2d 964 (1981), eg, the accused had, by the time he confessed for a second time, already appeared in court with his lawyer in order to seek to have the earlier confession suppressed. In *R v McGovern* (n 60) the Court of Appeal held that a second confession should also have been excluded since it was tainted by the first inadmissible confession in the sense that the second interview was a direct cause of the first interview and the accused's lawyer had not been informed of the breach of s 58 of PACE. If she had been, she might have prevented the second interview from taking place.

[75] See *Oregon v Elstad* (n 5) 316.

[76] See, in general, Mirfield 'Successive confessions and the poisonous tree' (1996) *Crim LR* 554. See the facts in the cases of *R v Glaves* (n 60); *R v McGovern* (n 60); *R v Wood* (n 61). Even if one is not prepared to accept the view that original misconduct still indirectly has an effect when a suspect is confronted with a statement that he or she had already made at the outset of making a second statement, the unfairness inherent in such a situation cannot be denied. Mirfield (n 24) 107 remarks in this regard: 'One can see the validity of an argument that, even though the original conduct had ceased to have any direct effect, it would be unfair, at trial, to make the accused suffer the disadvantage of having used against him a second confession which had been obtained from him at a time when he would have assumed that he was already condemned out of his own mouth'. The second statement could then possibly be excluded in terms of s 35(5) of the Constitution. It is submitted, however, that the crucial question would still be whether anything happened before making the second statement that caused this belief to disappear.

[77] See *R v G (B)* (n 18) para 66. See the reasoning by the minority in the decision by the Grand Chamber of the European Court of Human Rights in *Gäfgen v Germany* (App No 22978/05, 2010-06-01) paras 6-8.

7 Conclusion

When a court has to decide on the admissibility of a confession which repeats the substance of an earlier inadmissible confession, it can be said that the secondary confession is subject to precisely the same requirements for admissibility as the primary confession. The only difference is that the circumstances surrounding the primary inadmissible confession, and leading up to the secondary confession, will have to be taken into account insofar as they point to the existence, or continued existence, of undue influence. To do otherwise would allow the police to freely circumvent the requirements for admissibility by knowing that any misconduct used to obtain an initial confession would not prevent a subsequent confession from being admitted.[78] It can therefore be said that the secondary confession will usually be inadmissible if there is a sufficient connection with the circumstances under which the primary confession was made. The essential question here is whether anything caused the undue influence associated with the primary confession to cease to exist. Often, however, certain factors will confirm the existence of such undue influence. Although a subjective test is used to determine the existence of undue influence at the time a confession was made, objective factors will play an important part in determining whether any possible undue influence was present. There can be no general rule that excludes a later confession on the ground that it was tainted, irrespective of the degree of connection to the primary inadmissible confession and no singular factor can be determinative in deciding the admissibility of a secondary confession. More often than not, however, the admissibility of the secondary confession will depend upon whether the accused had a sufficient opportunity to exercise an independent choice as to whether he should repeat what he had said in the primary inadmissible confession. In such a case the more important issue is not undue influence in the normal sense, but rather whether anything happened that caused the accused to believe that he or she was not bound by the primary inadmissible confession.

[78] Emson *Evidence* (2010) (5th ed) 275.