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CONFESSIONS AS PROOF OF INNOCENCE

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I. INTRODUCTION

IN recent years, a number of criminal cases have been reported in which defendants have sought to rely upon the confessions of their co-defendants as proof of their own innocence. The co-defendant may perhaps have admitted that he alone was responsible, or that he and some third party were responsible. His confession may have been made to the police or to some other person. In one case, the father of a girl charged with robbery covertly tape-recorded admissions made to him by one of her two co-defendants. These admissions were damning to that co-defendant, but tended to exonerate the girl.[1]

In some such cases, the prosecution may adduce one defendant's confession as part of their own case. If they do so, there is nothing to prevent the other defendant from exploiting this to his own advantage. The prosecution may, however, be prevented from adducing evidence of the confession; or they may be unaware of it; or they may perhaps choose not to adduce it, because it is inconsistent with the case they wish to put forward.[2]

A number of questions can be raised in connection with evidence of this kind. Can a defendant adduce such evidence where the prosecution do not? If so, can he do so in all cases, or does it depend on *why* the prosecution have not adduced that evidence? Can he at least cross-examine his co-defendant on it, if the latter gives evidence inconsistent with it at the trial? Should separate trials be considered in such cases? Finally, to what extent is the present law satisfactory, and how, if at all, might it be reformed?

After several years of uncertainty and inconsistency at Court of Appeal level, the recent decision of the House of Lords in *R.* v. *Myers*[3] has at last provided definitive answers to some of these

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[1] *R.* v. *Campbell and Williams* [1993] Crim.L.R. 448 (p. 154, below). Cases may arise in which one defendant has personally recorded another defendant's admissions by such means. The principles involved would be the same.

[2] The general rule is that the prosecution cannot be compelled to lead evidence in their possession. Such evidence must, however, be disclosed to the defence if it undermines the prosecution's case.

[3] [1997] 3 W.L.R. 552.

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questions; but by expressly declining to answer a much broader question certified for their consideration by the Court of Appeal, their Lordships left a number of issues frustratingly unresolved. *Myers* and the cases preceding it merit careful analysis; but it may be helpful to begin with a brief summary of the principles governing the admissibility of confessions and of hearsay statements generally.

II. Admissions and the Hearsay Rule

Where A claims that B has made admissions to him prior to the trial, this clearly represents a form of hearsay. Hearsay remains prima facie inadmissible in criminal proceedings,[4] but the common law has long recognised an important exception to this rule in the case of admissions made by parties to the proceedings. The statutory provisions which now govern confessions in criminal cases have been developed from this common law exception.

It is widely supposed that admissions or confessions are admissible, despite being hearsay, because a person would not be likely to admit anything adverse to his case unless it were true.[5] As Sir John Smith has pointed out, however, it is difficult to explain this particular exception to the hearsay rule on the basis of such a rationale.[6] If reliability were indeed the rationale, one would expect admissions made by third parties to be admissible on the same basis as admissions made by parties to the proceedings, but it is clear that they are not.[7] Furthermore, if reliability were the rationale, there could be no logical objection to the use of an admission for the purpose of proving the guilt of any other parties incriminated by it, and yet it is clearly established that a pre-trial admission can be invoked only against the party who made it.[8] The true rationale of the exception would appear to be that advanced by Morgan:[9]

> The admissibility of an admission made by the party himself rests not upon any notion that the circumstances in which it was made furnish the [court or jury] means of evaluating it fairly, but upon the adversary theory of litigation. A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under the sanction of an oath.

[4] This is no longer true in civil cases: Civil Evidence Act 1995, s. 1.
[5] See for example Criminal Law Revision Committee, 11th Report, *Evidence (General)*, Cmnd. 4991 (1972) at para. 53; and see also *R.* v. *Myers*, *per* Lord Hope at p. 569.
[6] J.C. Smith, "Exculpatory Statements and Confessions" [1995] Crim.L.R. 280.
[7] *R.* v. *Turner (Bryan)* (1975) 61 Cr.App.R. 67; *R.* v. *Blastland* [1986] A.C. 41; *R.* v. *Callan* (1993) 98 Cr.App.R. 467.
[8] *R.* v. *Lake* (1977) 64 Cr.App.R. 172.
[9] *Basic Problems of Evidence* (1962) p. 266. (cited by Smith, *op. cit.*, at p. 282).

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In other words, a party to the proceedings cannot invoke the hearsay rule so as to exclude evidence of his own statement. This would also explain why an incriminating statement made by a defendant can be invoked against him, even if he did not realise at the time that it would be incriminating at all, whereas a full, open and unqualified admission of guilt, made by a third party, remains prima facie inadmissible.[10]

III. Confessions: the Statutory Framework

The law relating to the admissibility of confession evidence under English law is primarily governed by section 76 of the Police and Criminal Evidence Act 1984. This has largely supplanted the common law rules which previously governed informal admissions in criminal cases.[11] Section 76(1) provides that an accused person's confession may be given in evidence against him in so far as it is not excluded by the court in pursuance of that section. Section 76(2) then imposes restrictions on admissibility where the *prosecution* proposes to adduce evidence of a confession. The court must exclude such evidence unless the prosecution can prove that the confession was not obtained by oppression or as a result of something said or done which was likely in the circumstances to have rendered any confession unreliable. There is no express reference anywhere in section 76 to the position of the co-defendant, but the fact that the prosecution are referred to only in section 76(2) tends to suggest that section 76(1) was intended to have a wider ambit. In other words, it appears to permit the proof of defendant A's confession by defendant B, even where the prosecution would not be able to prove that confession because of the restrictions imposed on them under section 76(2).

Section 78(1) of the Police and Criminal Evidence Act also has an important effect on the admission of confession evidence. It provides that,

> In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard 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.

[10] See cases cited at note 7 above.

[11] The common law rules governing vicarious admissions, such as those made by the directors of a defendant company, or informal admissions made by a defendant's legal representatives, appear to remain unaffected by section 76, which applies only to admissions made by the defendant himself.

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This provision is most frequently invoked in respect of prosecution evidence which is technically admissible, but which has been obtained in breach of rules laid down by the codes of practice established under sections 66 and 67 of the Police and Criminal Evidence Act, or which has been obtained by "unfair" tactics generally. In particular, confession evidence may be excluded under section 78 where it has been obtained in breach of rules laid down in Code C, which governs matters such as the administration of cautions, the provision of access to legal advice and the conduct of interviews. As with section 76(2), however, it is expressly stated that the section 78 discretion can only be exercised in respect of evidence on which the prosecution proposes to rely. It has no application whatsoever in respect of defence evidence, even evidence which unfairly incriminates a co-defendant.[12]

IV. Admissions and Previous Inconsistent Statements

Even if it is not permissible for evidence to be given in-chief for the purpose of proving that a co-defendant or third party has made incriminating admissions, it may still be possible for such admissions to be proved in the course of cross-examination, as previous inconsistent statements, under sections 4 or 5 of the Criminal Procedure Act 1865.[13] This possibility can only be considered, however, in cases where the person who made the admission is available for cross-examination, either as a witness for another party, or as a witness who has been declared to be hostile when called for the party in question.[14] Even then, the theory is that previous inconsistent statements are relevant only to the credibility of that person as a witness.[15] Furthermore, if the prosecution are precluded from proving the confession of a defendant under section 76 of PACE, they are equally precluded from raising it in cross-examination,[16] and it is most unlikely that they would be permitted to cross-examine a defendant on a confession which has previously been excluded by the court in the exercise of its discretion under section 78.

[12] The same is true of the common law discretion preserved by section 82(3) of the 1984 Act. See *Lobban* v. *The Queen* [1995] 1 W.L.R. 877 (p. 150, below).

[13] Often referred to (even today) as "Lord Denman's Act".

[14] Where a third party has allegedly confessed to the crime with which the defendant is now charged, but is not called as a witness for the prosecution, the defence may wish to call him themselves, but it seems that they would not be permitted to call him solely with a view to having him cross-examined as a hostile witness. See *R.* v. *Blastland* [1986] A.C. 41.

[15] But, as the trial judge noted in *R.* v. *Myers,* it may be impossible for a jury to distinguish between a confession which is evidence of the facts admitted, and a previous inconsistent statement, which is supposedly relevant only to the credibility of the defendant who denies the matters he once admitted.

[16] *R.* v. *Treacy* [1944] 2 All E.R. 229; *Wong Kam-Ming* v. *R.* [1980] A.C. 247, 258.

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This restriction does not apply to defendants, however, and there have been a number of cases in which defendants have been permitted to cross-examine their co-defendants as to previous inconsistent statements which the prosecution were unable, for one reason or another, to mention in front of the jury.[17] The court has no discretion in this matter. If A's previous inconsistent statement is relevant in any way to B's case, B has the right to cross-examine him concerning it. Unfortunately, B cannot ordinarily be certain that A will testify, and he may not in any case be satisfied with a mere attack on the latter's credibility. If the prosecution cannot (or choose not to) adduce evidence of A's confession, it may be very much in B's interest to do so, whether by cross-examining police officers to whom the confession was made or by calling his own witnesses for the purpose of proving it as part of his own evidence.

V. Admissibility, Discretion and Co-Defendants

The defendant's right to cross-examine his co-defendant about his previous inconsistent statements is just one manifestation of the broader rule that a defendant has the absolute right to adduce any admissible evidence he chooses, and to cross-examine opposing witnesses as to any relevant and admissible matter, whatever the cost or prejudice to the prosecution or to any co-defendant involved.[18] The only limitations applicable are those of relevance and admissibility. As the Privy Council observed in *Lobban* v. *R.*,[19]

> There is no discretion to exclude, at the request of one co-accused, evidence tendered by another. Thus, although ... there is a discretion to exclude similar fact evidence tendered by the prosecution, such evidence, when tendered by an accused to show the misconduct on another occasion of a co-accused, is, if relevant to the defence of the accused, admissible whether or not it prejudices the co-accused ... similarly, there is no discretion to prevent an accused from cross-examining a co-accused about his previous convictions and bad character when, as a matter of law, he becomes entitled to do so under section 1(*f*)(iii) of the Criminal Evidence Act 1898, because ... the accused, in seeking to defend himself, should not be fettered in any way.

This principle is manifestly a sound one. It would be morally indefensible to hamstring a defendant by preventing him from adducing or eliciting relevant and admissible evidence which directly

[17] *R.* v. *Rowson* [1986] Q.B. 174; *Lui Mei-Lin* v. *R.* [1989] 1 A.C. 288.
[18] See *Murdoch* v. *Taylor* [1965] A.C. 574.
[19] [1995] 1 W.L.R. 877, *per* Lord Steyn at p. 887 (citing Adrian Keane, *The Modern Law of Evidence*, 3rd ed. at p. 36).

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or indirectly supports his case, even if that evidence causes embarrassment to a co-defendant. One could go further, and argue that the rules governing the admissibility of evidence (and these include judicial concepts of relevance) should themselves be construed, wherever possible, so as to prevent the hamstringing of the defence case. The interests of justice can seldom be served by rules which prevent courts or juries from hearing and assessing the merits of evidence on which defendants propose to rely. The courts have acknowledged that the hearsay rule, in particular, can sometimes have such an effect.[20] One of the central arguments of this article, however, is that it should not do so where a defendant seeks to prove his co-defendant's confession, because there is no sound legal basis on which such evidence can or should be excluded.

VI. The Cases Before Myers

A. R. *v.* Beckford and Daley

It is somewhat surprising that the right of a defendant to adduce evidence of his co-defendants confession was not examined in any reported case prior to *R.* v. *Beckford and Daley*[21] in 1991. The issue had been explored by a number of academic writers, who were more or less unanimously of the opinion that the right existed under section 76(1) of Police and Criminal Evidence Act 1984 and that it was unfettered by anything in sections 76(2) or 78.[22] The Court of Appeal, however, reached a very different conclusion.

Beckford, Daley and a third man, Correia, were charged with murder. Correia confessed to police officers that he alone had been responsible for the fatal stabbing; but the trial judge (Auld J.) refused to allow the prosecution to adduce evidence of that confession before the jury, because of breaches of PACE Code C.[23] It should be noted that he did not rule the confession inadmissible under section 76(2), but excluded it in the exercise of his discretion under section 78. Counsel for Daley then sought to cross-examine the police officers about Correia's confession. Auld J. refused to permit this. He correctly discerned that the case could be distinguished from cases such as *R.* v. *Rowson,*[24] in which defendants

[20] See for example *R.* v. *Beckford and Daley* [1991] Crim.L.R. 833, in which Watkins L.J. stated that the hearsay rule could sometimes have the effect of obscuring or even shielding the truth. Whether that was its effect in *Beckford and Daley* itself is open to argument. See below, p. 152.

[21] [1991] Crim.L.R. 833.

[22] Andrews and Hirst, *Criminal Evidence* (1st ed., 1987) at para. 19.28; M. Hirst and J.C. Smith [1989] Crim.L.R. 603; M. Zander, *The Police and Criminal Evidence Act 1984* (2nd ed., 1990) at p. 188; D.W. Elliott [1991] Crim.L.R. 5 (at pp. 9–10); Tunkel [1991] Crim.L.R. 396.

[23] Correia had not been granted access to legal advice when he made the admissions in question.

[24] [1986] Q.B. 174.

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had been permitted to cross-examine their co-defendants as to previous inconsistent statements amounting to confessions. If Correia had been rash enough to testify and deny his guilt, there was no doubt that he could have been cross-examined on his confession under section 4 of the Criminal Procedure Act 1865, in order to discredit his later denials. The only possible purpose of cross-examining the police officers, however, was to put the confession before the jury as evidence in the case; and that, said Auld J, would involve reliance on hearsay. The real question was whether section 76 could be invoked by Beckford or Daley in such circumstances, but Auld J ruled that it could not:

> In my view, section 76 does not touch the general rule of which the cases of *Turner* and *Blastland* are examples and that the same principle applies whether the statement of confession sought to be adduced is made by a third party to the proceedings or by a co-defendant.

As a result of this ruling, the jury never learned of Correia's confession, and all three men were convicted. Beckford and Daley appealed, but the Court of Appeal agreed with Auld J.'s ruling. Watkins L.J., who gave the judgment of the court, regarded sections 76(2) and 78 as irrelevant to the issue. He held that section 76(1) was entirely concerned with prosecution evidence, and nothing in that section permitted the use of confession evidence by a co-defendant. "It was inconceivable", he reasoned, "that Parliament would have attempted to overturn a well-recognised common law rule unless it did so expressly and in the plainest possible terms".

There is nevertheless a bizarre twist at the end of Watkins L.J.'s judgment. Despite their agreement with Auld J.'s "faultless exposition of the law, the Court of Appeal in *Beckford* ultimately felt obliged to quash the appellants' convictions, because they felt the jury might well have acquitted both men, had evidence of Correia's confession been adduced at the trial. Watkins L.J. said,

> ... the hearsay rule, sound though it is when usually applied, is capable sometimes of obscuring—shielding even—the truth. It may have done so here.

Whilst one must admire the Court of Appeal's willingness to quash the convictions in such circumstances,[25] their interpretation of the law governing confessions is open to criticism on a number of grounds.

First, it is far from clear that the common law position in respect of a co-defendant's confession was as Watkins L.J. assumed, and by

[25] But see the critical note struck by the editors of *Archbold 1995* at pp. 11–14.

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no means could it be described as well-established. There was in fact a dearth of direct authority on that issue. In the absence of such authority, there was no proper basis for the operation of the presumption that Parliament did not intend to amend the common law.

Secondly, parties in civil disputes are entitled to adduce evidence of informal admissions made by other parties.[26] Such admissions are admissible regardless of whether they were obtained improperly or unfairly. *Beckford* would leave the defendant in a criminal case as the only category of litigant unable to adduce evidence of admissions made by other parties. On what logical basis could such a situation be justified?

Thirdly, the clause which eventually became section 76(1) of the 1984 Act was amended before it was put before Parliament, precisely so as to enable defendants to adduce the confessions of their co-defendants. In his commentary on *R.* v. *Callan,*[27] Sir John Smith notes that the original (Criminal Law Revision Committee) draft of the clause began, "A confession made by the accused may be given in evidence *by the* prosecution ...," whereas the version put before (and approved by) Parliament merely provides that the accused's confession may be given in evidence "*against him.*"[28] He observes,

> Whoever decided on this change of wording ... appears to have intended that the admissibility of confessions under the Act should not be limited to occasions when they are offered in evidence by the prosecution. It is difficult to see that the change could have had any other purpose; and if admissibility is not to be limited to confessions produced by the prosecution, it must extend to confessions produced by a co-defendant, because there is no-one else to offer such evidence.

Professor Smith also points out that the Criminal Law Revision Committee made separate provision, in Part II of the draft Bill appended to their 11th Report, for the use by one defendant of statements (confessions or otherwise) made by another defendant; but none of the recommendations in Part II were included in the Police and Criminal Evidence Bill. The amendment to the clause which became section 76 was presumably considered necessary in order to compensate for that omission.

Finally, the law as stated in *Beckford* sits uneasily alongside the rule which permits a defendant to cross-examine another defendant

[26] The common law rule was preserved by section 9(2)(a) of the Civil Evidence Act 1968. It became otiose following the abolition of the hearsay rule in civil proceedings by the Civil Evidence Act 1995.
[27] [1994] Crim.L.R. 198 at p. 200.
[28] Professor Smith's emphasis.

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as to a previous inconsistent statement which also amounts to an excluded confession. Given that a defendant is permitted to cross-examine his co-defendant on such a statement, even where the prosecution would be forbidden from so doing, why should he not also be permitted to call or cross-examine the police officers to whom it was made? The law as stated in *Beckford* provides the defendant who has made such a confession with a massive incentive to stay out of the witness box; which cannot be a good thing.

B. R. *v.* Campbell and Williams

The admissibility of confession evidence at the hands of a co-defendant was reconsidered by the Court of Appeal in *R.* v. *Campbell and Williams.*[29] As in *Beckford,* the case involved the joint trial of three defendants, although on this occasion the charge was robbery. The prosecution case was that C and W had robbed V of property, including two gold rings, at a bus stop, and that the third defendant, B, drove the getaway car, which was identified by its registration number and stopped by the police shortly afterwards. When interviewed, C and W each denied everything, but B stated that C and W had indeed alighted from her car at the relevant time, and that on their return they had handed her the gold rings, which she had taken without knowing that they had been stolen. She denied being a party to any joint enterprise involving robbery, and she ran a cut-throat defence, consistent with this story, at the trial.

In support of B's evidence at trial, her counsel was permitted to call evidence from B's father, who had secretly tape-recorded a conversation he had contrived to hold with C. On this recording, which was played to the jury, C admitted that he and W had taken V's rings, and that W had handed the rings to B when he realised they were about to be stopped by the police. After unsuccessfully objecting to the admissibility of this evidence (which in theory was evidence only against C) C and W were effectively forced to change their original stories,[30] and both men eventually gave evidence consistent with the tape-recording. They were duly convicted of robbery. B escaped with a conviction for handling stolen goods.[31]

On appeal, it was argued, in light of the Court of Appeal decision in *Beckford,* that the evidence of what C had said to B's father was

[29] [1993] Crim.L.R. 448. *R.* v. *Beckford and Daley* was considered by the Court of Appeal in *R.* v. *Marviadi and Ghanchi* [1992] Crim.L.R. 733 and acknowledged to be binding authority on the interpretation of section 76, but the latter case did not ultimately turn on confession evidence.

[30] C admitted in evidence that he had intended to lie about what had happened.

[31] C and W still denied the robbery, but their revised story, according to which the rings had "fallen off" V's fingers and V had then permitted C and W to keep them, does not appear to have impressed the jury.

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inadmissible hearsay, and should therefore have been excluded. The Court of Appeal, whose judgment was given by Hobhouse J., disagreed. Purporting to distinguish *Beckford*, but arguably displaying, "deliciously little regard for the binding nature of the earlier decision",[32] Hobhouse J. said:

> *Beckford* ... is clearly distinguishable on the ground that the confession [in that case] was not admissible as a confession and the question raised was whether the appellant could independently adduce the out of court statement. Here the question is whether the proof of a confession which is admissible against the appellant was a material irregularity in the trial of the appellant because the evidence by which it was proved was led by a co-defendant not the prosecution. Accordingly we consider that the decision in *Beckford* does not preclude us from reaching a conclusion in the present case that the admission of the confession did not amount to an irregularity during the trial material to the conviction of either appellant.[33]

In other words, *Beckford* was distinguished on the basis that the prosecution in that case had already tried and failed to have the confession ruled admissible, whereas in *Campbell* the confession would apparently have been admissible if the prosecution had attempted to rely upon it.

With respect, this totally misrepresents the reasoning of the Court of Appeal in *Beckford*, and it is manifestly untenable as a basis for distinguishing the two cases. The gist of the reasoning adopted in *Beckford* was that a defendant had no right to adduce evidence of the confession of a co-defendant at common law and was granted no such right under section 76(1). If this reasoning was correct, it cannot matter whether the prosecution are forbidden from using the confession under section 76(2), restrained from using it by an exercise of judicial discretion under section 78 (as in *Beckford* itself) or merely disinclined to use it, because it does not fit in with their argument that all the defendants are equally guilty.

In contrast to their earlier approach in *Beckford*, the Court of Appeal in *Campbell* appear to have started from the proposition that, at common law, an informal admission by a party to litigation could be used against him by any other party to that litigation, subject to "strict rules to control the admission of confession

[32] The phrase is taken from Professor Birch's commentary on *R.* v. *Campbell and Williams* [1993] Crim.L.R. at p. 453; but given that the appeal in *Beckford* was allowed on other grounds, is it perhaps arguable that this "earlier decision" was nothing more than earlier obiter dicta?

[33] Although *R.* v. *Campbell and Williams* is reported only in summary form, this passage from Hobhouse J.'s judgment in that case is quoted by Lord Slynn in *R.* v. *Myers* [1997] 3 W.L.R. 552 at p. 558.

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evidence in criminal cases". These rules are now to be found, as the court in *Campbell* acknowledged, in section 76 of the Police and Criminal Evidence Act 1984. Unfortunately, Hobhouse J.'s judgment contains no detailed analysis of section 76 itself, and he makes no attempt to explain the court's reasoning in terms consistent with that provision.

This failure to offer any analysis of section 76 makes it very difficult to identify the precise basis on which the taped confession evidence was held to be admissible in *Campbell*. Was it perhaps held admissible on some quite different basis? Some commentators, notably Sir John Smith, have concluded that the Court of Appeal resurrected the old common law concept of voluntary and involuntary confessions.[34] In his commentary to *R.* v. *Callan,*[35] Smith argues that,

> *Campbell* would seem to resurrect (though only for rare and limited purposes) the common law rules relating to voluntary confessions which we thought had been relegated to legal history ... E's confession is admissible at the suit of the prosecution if they can satisfy the judge beyond reasonable doubt of the section 76(2) conditions; and at the suit of D if he can prove beyond reasonable doubt that it was obtained voluntarily ...

With respect, there is little evidence to suggest that Hobhouse J. ever intended to perform such a bizarre resurrection. It is true that there are a handful of references in his judgment to the admissibility of "voluntary confessions", but these references would appear to be nothing more than judicial shorthand for "confessions which are admissible under section 76(2)".[36] If he had intended to rule that common law principles still governed confessions adduced by co-defendants, whilst section 76 governed confessions adduced by the prosecution, he would surely have said so; but what he actually states is that both are governed by precisely the *same* principles. It is implicit in the decision in *Beckford,* he says, that "a co-defendant cannot be in a better position than the prosecution in relation to the proof of an inadmissible confession as a confession".[37] The reasoning is suspect, but this was the principle which the Court of Appeal purported to apply in *Campbell.*

[34] At common law, a confession was "involuntary", and thus inadmissible, if procured by inducements (*i.e.* threats or promises) from persons in authority or by oppression.

[35] [1994] Crim.L.R. 198, at p. 201. See also Diane Birch's commentary to the Court of Appeal's decision in *R.* v. *Myers* [1996] Crim.L.R. 735 at p. 737.

[36] Lord Hope, in *Myers*, also interprets references to "voluntary confessions" and "confessions admissible under section 76(2)" to be different ways of saying the same thing ([1997] 3 W.L.R. at p. 572).

[37] In contrast to the position where a defendant seeks to cross-examine his co-defendant as to a confession which is also a previous inconsistent statement under the Criminal Procedure Act 1865.

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VII. *Myers*: The Background

Although *Beckford* was briefly considered by the Court of Appeal in *Callan,*[38] this was another case in which admissions had been made by a third party, who had not been prosecuted,[39] and the issue of co-defendant confessions did not arise.[40] Indeed, the problem of reconciling *Beckford* with *Campbell* did not arise again until *Myers*[41] itself.

Myers and her co-defendant, Quartey, were charged with the murder of a taxi driver. The prosecution case was that they had robbed and killed him together, in the course of a joint enterprise, but at trial the defendants ran cut-throat defences, each attempting to place sole responsibility on the other. To this end, Quartey sought to adduce evidence of two conversations between Myers and police officers, in which Myers had allegedly made damning admissions. In one of these conversations, she was alleged to have said, "Well, I cut him didn't I? He wanted to be a fucking hero, so I cut him". The prosecution did not attempt to adduce this evidence themselves, because both confessions had apparently been obtained in breach of the relevant PACE codes of practice. Confession evidence obtained in such circumstances is regularly excluded by judges under section 78. According to Lord Slynn, who gave the leading speech in the House of Lords, there was no suggestion that the breaches of the codes were so serious as to render the confessions inadmissible under section 76(2), but the trial judge was never in fact required to rule on that point, and the prosecution were never required to discharge the burden of proving admissibility, which is placed upon them in cases where admissibility is challenged under section 76(2).

Counsel for Quartey naturally sought to adduce the confession evidence on behalf of his client. Counsel for Myers conceded that Myers could be cross-examined under the Criminal Procedure Act 1865, if she were rash enough to give evidence inconsistent with either confession, but he argued that, in all other respects, the confessions were inadmissible hearsay as far as Quartey was concerned.

The trial judge recognised that he was faced with a conflict between *Beckford,* on the one hand, and *Campbell* on the other, and chose to follow the latter. The evidence was admitted. Myers was convicted of murder and Quartey of manslaughter. Myers appealed, but the Court of Appeal agreed that the approach adopted in

[38] (1993) 98 Cr.App.R. 467.
[39] As in *R.* v. *Blastland* or *R.* v. *Turner* (note 7 above).
[40] Although this conflict is discussed in some detail by Sir John Smith in his commentary to that case ([1994] Crim.L.R. 198 at pp. 199–202).
[41] [1997] 3 W.L.R. 552.

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Campbell was correct and that Quartey's counsel had been fully entitled to prove Myers's confession against her. The Court of Appeal nevertheless gave leave to appeal, and certified the following question for the attention of the House of Lords:

> In a joint trial of two defendants, A and B, is an out of court confession by A which exculpates B but which is ruled, or is conceded to be, inadmissible as evidence for the Crown, nevertheless admissible at the instigation of B in support of B's defence, or does such a confession in all circumstances offend the rule against hearsay?

The House of Lords dismissed the appeal, but declined to provide more than a partial answer to the certified question.

VIII. *Myers* in the House of Lords

The leading speech in *Myers* was delivered by Lord Slynn, with whom Lords Steyn and Hutton were content to agree. Lord Hope agreed that Myers's appeal should be dismissed, but set out his own reasons for so doing. Lord Mustill agreed with Lord Hope, but it is clear that the ratio of the case must be found in the speech given by Lord Slynn. Alas, the reasoning in that speech is confused, and its ratio decidendi is not easy to identify. The following extracts represent the core of the speech and also provide some indication of the confusion:

> Since the specific grounds of exclusion of a confession in section 76(2) of the Act of 1984 relate to confessions which the prosecution proposes to put in evidence, that section[42] does not apply to the present case, where it is the co-accused seeking to put in the confession. Section 78 ... provides for the exclusion of "evidence on which the prosecution proposes to rely" where the judge thinks that the admission of the evidence would lead to unfairness. That again does not apply to the present case....[43]
>
> [T]here is a long line of authority showing that a defendant must be allowed to cross-examine a co-defendant as to a previous inconsistent confession so long as the material is relevant to the defendant's own defence. In my opinion, a defendant should also be allowed to put a co-defendant's confession to witnesses to whom the confession was made so long as the confession is relevant to the defendant's defence and so long as it appears that the confession was not obtained in a

[42] His lordship must presumably mean, "that subsection". He cannot mean to say that section 76 as a whole is inapplicable, if only because in a later passage he expressly leaves open the question whether section 76(1) applies.

[43] [1997] 3 W.L.R. at p. 558.

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> manner which would have made it inadmissible at the instance of the Crown under section 76(2)....[44]
>
> This seems to me the position whether or not the judge and the Court of Appeal in *Beckford* and *Daley* were right to hold that section 76(1) ... only applies to evidence which the prosecution seeks to adduce, a question which is still subject to debate and on which it is not necessary to rule in this case.[45]
>
> It was not suggested that the confessions [in *Myers*] were obtained in the circumstances referred to in section 76(2) ... and the fact that the prosecution was not able to introduce the evidence because of breaches of the police Code did not preclude Quartey's counsel from doing so.[46]
>
> The certified question goes much wider than the facts of the present case and it is neither necessary nor desirable to answer it further in the present context.[47]

What exactly is Lord Slynn saying here? He begins by observing that sections 76(2) and 78 are inapplicable to confession evidence which is adduced by one defendant against another; but a few lines later, he states that a defendant cannot use such evidence if section 76(2) would prevent the prosecution from doing so. This is tantamount to saying that section 76(2) applies to the co-defendant. On what possible basis could this be so?

Having decided that one defendant can at least adduce evidence of an admissible confession made by another, Lord Slynn then declines to decide whether a defendant can do so on the basis of section 76(1). This is very strange. If he cannot rely on section 76, the defendant must have the right to adduce that evidence at common law; but if section 76(1) cannot be invoked by a defendant, even though nothing in its wording prevents it from being thus invoked, the only possible reason for that state of affairs is the one put forward by Watkins L.J. in *Beckford:* namely, that the common law never allowed it and Parliament could not have intended to change such a well-established principle without using the "plainest possible terms".[48] To put it another way, if the common law permits or once permitted a defendant to prove the confession of another (as Lord Slynn assumes), section 76(1) must permit it too; and if section 76(1) permits it, nothing in section 76(2) or section 78 can be construed as restricting it. It would be monstrous to hold that section 76(2) applied, even indirectly, against a co-defendant, because it does not allow a co-defendant to prove that the section 76(2) conditions are satisfied. Only the prosecution can do this, so surely only the prosecution can be affected by it.

[44] *Ibid.*, at p. 563.
[45] *Ibid.*
[46] *Ibid.*, at p. 564.
[47] *Ibid.*
[48] See p. 152, above.

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What then of Lord Slynn's refusal to answer the question certified by the Court of Appeal? This refusal may, paradoxically, help to clarify the *ratio* of the case. It shows that the views expressed on section 76(2) are not only obiter, but strictly provisional. *Myers* therefore decides that the defendant can adduce evidence of a co-defendant's confession in cases where section 76(2) has not been infringed, but it leaves unresolved the position where that provision has been infringed, or where the prosecution makes no attempt, when challenged, to prove that it has not been.[49] This interpretation is not easy to reconcile with some of the passages quoted from Lord Slynn's speech, but it is the only one that can be reconciled with his refusal to answer the certified question.

Lord Hope's speech adopts a slightly different approach to that of Lord Slynn, but tends to confirm that the above analysis is correct. The key part of his speech is to be found in the following extracts:

> [Section 76(2)] does not refer to the position of a co-defendant.... But it is hard to see why a co-defendant should be in a better position than the Crown if the confession was obtained in such circumstances.[50] A confession which has been obtained by oppression or which, for other reasons, was not freely given and is unreliable, is worthless evidence. It is beyond question, as a general rule, that an accused person has the absolute right to lead all relevant evidence in his defence. He is not subject to discretionary control by the court, which has no power to exclude such evidence on the ground that it may prejudice a co-defendant or because it was obtained by improper or unfair means. But ... it is at least open to question whether the rule extends to a case where the evidence ... consists of a confession which was made by a co-defendant in the circumstances which section 76(2) describes. While it would appear not to be accurate to describe such a confession as irrelevant ... the circumstances in which it was obtained may ... render it worthless for all purposes, whoever seeks to rely on it. On this view it would be a proper exercise of his discretion by the trial judge to exclude such evidence even although the other defendant wished to put it in evidence....[51]
>
> The certified question does not ... distinguish between confessions which are inadmissible on grounds of oppression or unreliability and confessions which are held to be inadmissible [*sic*] on other grounds ... I would therefore decline to answer it....[52]

[49] As previously explained, section 76(2) does not permit any party other than the prosecution to discharge the burden of proof it imposes.
[50] *i.e.*, where the confession is inadmissible as prosecution evidence by virtue of section 76(2).
[51] [1997] 3 W.L.R. at p. 571.
[52] *Ibid.*, at p. 572.

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Clearly, Lord Hope is reserving his final position on the status of confessions which would be inadmissible as prosecution evidence under section 76(2), but his provisional view appears to be that such confessions are inherently worthless and thus analogous to evidence which is logically irrelevant. A defendant has no right to adduce irrelevant evidence.[53] He suggests that a trial judge may have a discretion, quite distinct from the section 78 variety, under which he could exclude such evidence, even in the hands of a co-defendant.

Although Lord Hope's speech is easier to follow than Lord Slynn's, there is still much that is open to criticism. The analysis of section 76 is poor, and the suggestion that confessions excluded by that section must necessarily be so unreliable as to be worthless is naive. Section 76(2) provides that, if the prosecution proposes to adduce evidence of a confession, it may be required to prove: (a) that the confession was not obtained by oppression; and (b) that it was not obtained in consequence of anything said or done that was likely to render such a confession unreliable. If the prosecution cannot discharge this burden, the court shall not allow the evidence to be given, *notwithstanding that it may be true.*[54] If a suspect's arm is twisted behind his back, his confession may indeed be worthless, but he may also reveal information that only the real offender could possibly know. There are still good policy reasons for preventing the prosecution from using such a confession,[55] but from a strictly logical viewpoint it may be far from worthless. It may, if admitted in evidence, be more or less conclusive proof of his guilt.

As for Lord Hope's "alternative discretion" theory, the obvious objection to it (apart from the absence of any precedent in favour of its existence) is that irrelevant evidence is always legally inadmissible, even at the suit of the defence.[56] Discretion has nothing to do with it. If, however, a confession is relevant and admissible, the weight or credibility of that evidence is a matter for the jury to assess. A trial judge may withdraw an issue from the jury where there is no credible evidence to support it, but the power can only be exercised against a party who bears an evidential burden of proof in respect of that issue, and it does not entitle the judge to exclude individual items of evidence.

[53] *R.* v. *Blastland* (above).
[54] My emphasis.
[55] If only to avoid giving the police any incentive to adopt such measures. That argument becomes less compelling in respect of confessions which are inadmissible under section 76(2)(b).
[56] This follows from *R.* v. *Blastland,* although few commentators have ever managed to understand how the disputed evidence in *Blastland* could possibly have been classed as irrelevant.

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IX. The Law Commission Proposals

It is hard to avoid the conclusion that the House of Lords in *Myers* flinched from the proposition that one defendant must have the absolute right to adduce evidence of another's confession. They could find no proper legal basis for denying a defendant that right, but they preferred to leave the point undecided, rather than concede defeat on it. Their reluctance to accept this proposition has been shared by some writers,[57] and the Law Commission have recently proposed amending legislation, under which a new section 76A would be added to the Police and Criminal Evidence Act 1984.[58] The new section would be almost identical to section 76 itself, but it would provide for the section 76(2) conditions to be satisfied by a co-defendant on balance of probabilities.

In my submission, however, this approach is misguided. In their understandable anxiety to protect the maker of a forced confession, the Law Commission seem to have neglected the rights of a co-defendant who may be exculpated by it. How can it ever be right to prevent defendant A from proving defendant B's confession, when there may be evidence to suggest that the confession is true? As Watkins L.J. recognised in *Beckford*, such a rule can lead to the suppression of the truth and to miscarriages of justice. It is generally recognised that A cannot be restrained from adducing relevant evidence in support of his case, merely because that evidence is embarrassing to B. That is precisely why A can cross-examine B on the latter's previous inconsistent statement, even if it amounts to a "section 76(2)" confession which the prosecution cannot mention. It would be wrong to create a rule that introduces new limitations on a defendant's right to prove his innocence.

X. Third Party Confessions and Separate Trials

As the law now stands, any right which A might have to prove B's confession or to cross-examine B as to his previous inconsistent statements could be frustrated, if charges against B are dropped or if separate trials are ordered.[59] The Law Commission accordingly propose that such evidence should be made admissible in cases where the maker of the confession has died, become too ill to testify, gone abroad or cannot be traced—as is already the case where the confession was made in a document which is admissible under

[57] See for example Professor Diane Birch's commentary on the Court of Appeal's judgment in *Myers* [1996] Crim.L.R. 735 at p. 737.

[58] *Evidence in Criminal Proceedings: Hearsay and Related Topics*, Law Com. No. 245 (1997) para. 8.95; Draft Criminal Evidence Bill, clause 17.

[59] *Cf. R.* v. *Callan* (1993) 98 Cr.App.R. 467.

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sections 23 or 24 of the Criminal Justice Act 1988. In cases where the maker of the confession is too scared to testify, the confession would be admissible only with leave of the court.[60]

If these conditions are not satisfied, B's confession might still be admitted under a general "safety valve" provision (or inclusionary discretion) proposed elsewhere in the Report.[61] This valve would only be opened where the court considers the probative value of the evidence to be sufficient to justify such a measure in the interests of justice; but the Law Commission clearly regard third-party confessions as the kind of evidence which might well benefit from such a discretion.[62]

XI. Conclusions

The failure of the House of Lords in *Myers* to answer the question certified for their consideration is a matter of serious regret. They were given the opportunity to clarify the muddle created by three conflicting Court of Appeal decisions, but largely wasted it. They could have given careful consideration to the scope and effect of section 76 of the Police and Criminal Evidence Act 1984, in what was (astonishingly) the first confessions case to go before the House since the Act came into force, but they never did so. It is now settled that A can prove B's confession, where the prosecution are prevented from doing so only by an exercise of discretion under section 78, but it is still not clear whether he can do so where the confession infringes, or may possibly infringe, section 76(2).

The Law Commission's recommendations on this issue have the merit of being clear and explicit, but their proposed section 76A could cause injustice in cases where A's credible but "inadmissible" confession purports to exculpate B. There may be some cases in which this problem could be avoided by ordering separate trials, and invoking the "safety valve" provision so as to enable the jury trying B to be told of A's confession, without A's jury knowing of it at all, but there are many cases in which separate trials are not a viable option.

In conclusion, my basic submission is that the question certified by the Court of Appeal in *Myers* should have been answered. The answer to the first part of the question should have been an

[60] Law Com. No. 245, at para. 8.99.
[61] At para. 8.141 and in Clause 9 of the Draft Criminal Evidence Bill.
[62] See the last of the three examples given by the Law Commission at para. 8.147:
"D is charged with assault. X, who is not charged, admits to a friend that he, X, committed the assault. D and X are similar in appearance. X's confession is inadmissible hearsay unless the safety valve is used."

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unqualified, "yes", and the answer to the second part should have been an unqualified, "no". In other words, A should have the absolute right to prove B's confession at any joint trial. The Law Commission proposals on safety valves and "third party confessions" should be implemented, so as to cover the position where A and B are not tried together; but the Commission's proposal for a new section 76A is misconceived and should be reconsidered.

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