Evidence—Competency of Confession—Jury's Power to Consider

The blindfolded lady with the scales has long been our personification of impartial justice, and to attend her, the common law recognized two functionaries. The judge admits or excludes the evidence which the parties offer to be placed in the balance, and the jury assigns to the accepted evidence such weight as it finds it merits. The jury concerns itself only with deciding which side of the balance weighs more heavily. It has nothing to do with the selection of the evidence, nor can it remove from the balance evidence which the court has decided was proper to be placed there. As a general proposition this fundamental concept of the division of functions between the judge and jury requires only statement; for it is accepted everywhere that the decision on competency is one for the court, while the decision on weight is for the jury.

However, despite unanimous acceptance of the principle, its application to the confession of one accused of crime results in two distinct practices. For thirty-five years New Jersey has followed an orthodox rule, founded strictly on the respective functions of judge and jury, but recently in the case of *State v. Foulds*[1] the Court of Errors and Appeals sanctioned a contrary practice, which has found approval in the federal courts and some other jurisdictions, but which New Jersey has expressly repudiated.[2]

Whether a confession of guilt may be received in evidence depends upon whether it was made voluntarily.[3] When the confession is offered, the court examines witnesses, including the defendant, on the circumstances under which the confession was given.[4] If the court is satisfied

1. 127 N.J.L. 336, 23 A. 2d 895 (E. & A. 1941).

2. For the alignment of the various jurisdictions under one or the other of the two rules, see exhaustive review in annotation 85 A.L.R. 870 (1933).

3. See State v. Kwiatkowski, 83 N.J.L. 650, 85 A. 209 (E. & A. 1912).

4. "The evidence to this point, being in its nature preliminary is addressed to the judge . . ." 1 GREENLEAF, TTEATISE ON THE LAW OF EVIDENCE (15th ed. 1892) 296. This hearing may be held in the presence of the jury, State v. Fiumara, 110 N.J.L. 164, 164 A. 490 (E. & A. 1932); State v. Dolbow, 117 N.J.L. 560, 189 A. 915 (E. & A. 1936); or with the jury excluded, State v. Gruff, 68 N.J.L. 287, 53 A. 88 (E. & A. 1902); State v. Yarrow, 104 N.J.L. 512, 141 A. 85 (E. & A. 1928).

that the confession was not induced by hope or fear so as to cause a "fair risk of a false confession",[5] the confession is admitted in evidence. The decision on voluntariness is, therefore, a decision on competency.

Once the confession is admitted, orthodox law puts an end to the question of voluntariness. The rules on voluntariness "do not attempt to measure the ultimate value of a given confession, and the tribunal which is to weigh all the evidence finally ought not to be artificially hampered by them."[6] Therefore the confession, together with the rest of the evidence, is submitted to the jury only for a decision on weight and credibility. The jury can believe or disbelieve the confession, but it is not called upon to decide again the preliminary question of voluntariness, which has already been settled by the court.[7]

The contrary view permits it to pass on this latter question, too. The court is allowed to instruct the jury to disregard or reject the confession if it finds that it was not made voluntarily,[8] and this practice was followed in *State v. Foulds*:

> "The court, after hearing the testimony on this issue, admitted the confession in evidence and in charging the jury was most careful to safeguard the rights of the defendant. The jury were instructed that 'such confession should be disregarded' by them unless they were satisfied that it had been made voluntarily; that they might 'disregard' any part of the confession which the defendant, if they believed him, said he had not made, and that it was their prerogative to ascribe to the confession the weight and importance that they thought it merited under all the cir-

5. 1 WIGMORE, EVIDENCE (1904) 937, sec. 824.

6. *Idem*, 992, sec. 861.

7. *Idem.*

8. Such an instruction is permissive in the Federal courts when conflicting evidence is offered to the court on the question of voluntariness, Wilson v. U. S., 126 U.S. 613, 16 S. Ct. 895, 40 L. Ed. 1090 (1895); Lewis v. U. S., 74 F. 2d 173 (C.C.A. 9th 1934). In each case, however, the statement is obiter dictum, since in the Wilson case the "confession" under consideration was actually a denial of guilt, and in the Lewis case the District Court had refused to submit the confession to the jury for a review of competency, allowing it to consider only the weight. The refusal was assigned as error, but the conviction was affirmed.

> cumstances. These instructions were advantageous to the defendant. Compare *State v. Compo,* 108 N.J.L. 499, 504, 158 A. 541, 85 A.L.R. 866."[9]

At the outset it should be noted that, while *State v. Compo* would support the lower court's charge with respect to the jury's consideration of the weight of the confession, it is one of the most authoritative decisions in the state repudiating the practice of allowing the jury to disregard or reject a confession after a review of its voluntariness. In the *Compo* case the trial court's failure to charge the jury to disregard or reject the confession if they found it involuntary was assigned as error, but the Court of Errors and Appeals held that "under the decisions of this court such an instruction would have been erroneous."[10]

Of the New Jersey decisions prior to the *Compo* case few had been direct holdings on the jury's power to pass on the competency of a confession, and yet comment on the question by way of obiter had been frequent.

The first case to mention the jury's part was *State v. Aaron.*[11] The Supreme Court, through Chief Justice Kirkpatrick, granted a new trial after the conviction of an infant for murder, finding reversible error in the admission of a confession which detailed no circumstances, but went on to say:

> "If the confession, however, rested upon the ground of hope and fear alone, doubtful as it might be, I should have been inclined to yield to its competency and leave it to the discretion and judgment of the jury."[12]

This rather ambiguous dictum came in for consideration in the decision in *State v. Guild.*[13] The trial court there had entertained some doubts about the voluntariness of a second confession, after the first

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9. Chief Justice Brogan speaking for the court in State v. Foulds, *supra,* note 1.

10. Bodine, J., in State v. Compo, 108 N.J.L. 499, 504, 158 A. 541, 85 A.L.R. 866 (E. & A. 1931).

11. 4 N.J.L. 269 (S. Ct. 1818).

12. State v. Aaron, *supra,* note 11, at p. 279.

13. 10 N. J. L. 163 (S. Ct. 1828).

one was shown to be involuntary, but admitted it in evidence and then charged the jury:

> "The court with some hesitation admitted the confessions; and having been admitted, it is your business to consider them; and to consider them with reference to the manner in which they were obtained; and if you are not satisfied that these latter confessions were made freely and understandingly and wholly free from any expectation of benefit raised by the hopes and promises preceding the first confession, . . . it is your duty to reject them from your mind, and not to make them the foundation of your verdict."[14]

The Supreme Court found it unnecessary to pass on the correctness of this part of the charge. Yet it affirmed the conviction, and later opinions have cited it as approving the charge.

While these opinions seem to point away from the orthodox law on the subject, their trend was checked by a strong opinion in *Donnelly v. State*,[15] treating the allied subject of a dying declaration. Such a declaration to be admissible must be made in fear of impending death, and the lower court in that case, after admitting several declarations, instructed the jury on the law governing their admissibility, and charged it to reject any of the declarations which in its opinion were not made under the apprehension of immediate death. Of this charge the court said:

> "This instruction we regard as incorrect; and if the court had themselves avoided the decision of that question, and shifted the responsibility to the jury, the instruction would have been fatally erroneous. It was a question of law, and the prisoner was entitled to have the decision of the court directly upon the point. The credibility of the statement, the weight to which it was entitled, was entirely for the jury. They could believe or disbelieve it, but after the court had declared that it was competent testimony, the jury were not authorized to reject it as incompetent any more

14. From trial court charge by Judge Drake, quoted in State v. Guild at page 172.

15. 26 N.J.L. 463 (S. Ct. 1857), *aff'd*, 26 N.J.L. 601 (E. & A. 1857).

> than they would have been, if the court had decided that the evidence was incompetent, to take it into their consideration."[16]

The error, however, was not found to be prejudicial, since it gave the defendant "the judgment not only of the court, but of the jury also."[17]

Although this opinion concerned dying declarations, the rationale is equally applicable to confessions, and must have been so regarded by the court in *State v. Brooks*.[18] For, though no opinion in the meantime, except the *Donnelly* case, can be found repudiating *State v. Guild,* the court without citing any authority said by way of dictum:

> "It has been a question whether the decision of the admissibility of these confessions was one for the court or the jury, but it is now settled that it is one for the court. The court weighs the evidence upon this point and admits or rejects the evidence in its discretion. What weight the jury are to give it is another matter."[19]

If the question was settled, two opinions by Mr. Justice (later Chief Justice) Depue did much to unsettle it again. In *Roesel v. State*[20] there was an appeal from a conviction for murder, and the admission of a confession was assigned as error. So far as can be determined there was no question raised as to the jury review, but Justice Depue after a lengthy opinion, based largely on English and Federal[21] cases, gave express approval to *State v. Guild,* finding the law to be:

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16. Chief Justice Green in Donnelly v. State at 26 N.J.L. 503.
17. *Idem,* p. 504.
18. 30 N.J.L. 356 (S. Ct. 1863).
19. Vredenburgh, J., at 30 N.J.L. 364.
20. 62 N.J.L. 216, 41 A. 408 (E. & A. 1898).
21. The decision cites Wilson v. U. S., *supra,* note 8; Hopt v. Utah, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1883), which treats only the general conditions under which a confession is admissible, and not the matter of jury review; Bram v. U. S., 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897), jury review not involved; Sparf & Hansen v. U. S., 156 U.S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1894), no discussion of jury review.

> "If there be a conflict of evidence as to whether the confession was or was not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject it if upon the whole evidence they were satisfied that it was not the voluntary act of the defendant."[22]

Two years later the question was again before him, and he wrote a shorter opinion to the same effect in *Bullock v. State*,[23] relying entirely on the statement in the *Roesel* case.

Yet, both of these opinions were recognized to be dicta in *State v. Young*.[24] The lower court there had submitted the question to the jury, instructing it "if they found the confession not voluntary to reject it." Chancellor Magie in delivering the opinion of the Court of Errors and Appeals found it unnecessary to approve or disapprove of this action, since it had not been assigned as error, but stated:

> "In submitting this question to the jury, the trial court was doubtless influenced by an expression of Chief Justice Depue in the *Roesel* case. . . . Nor was the expression of the opinion called for in the *Roesel* case . . . and it is thought proper to state that we deem it still open to question whether, after the trial court has upon a preliminary examination admitted such a statement in evidence, it may be required to submit the same question to a jury, and whether after such admission by the trial court, the function of the jury is not confined to a determination of the weight and credit of the statement admitted.
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> "It would seem that an authoritative decision thereon cannot be pronounced except upon a refusal of a trial court to submit to the jury on defendant's request, the admission of a culpatory statement which the court had previously admitted in evidence."[25]

Such a refusal arose just a few years later with respect to a dying declaration. Since the efficacy of *Donnelly v. State* had been weakened by the intervening decisions on confessions, Mr. Justice Pitney found

22. Depue, J., in Roesel v. State at 62 N.J.L. 238.
23. 65 N.J.L. 557, 47 A. 62 (E. & A. 1900).
24. 67 N.J.L. 223, 51 A. 939 (E. & A. 1901).
25. *Idem*, at 67 N.J.L. 230, 231.

it necessary to repudiate expressly the dictum of the *Roesel* case, and reaffirm the *Donnelly* case, holding in part:

> "The determination of the question whether a declaration that is offered as a dying declaration was in truth made under a sense of impending death, like the cognate question whether a defendant's confession was made voluntarily is for the trial court and not for the jury. The question relates to the admissibility of evidence, and like all similar questions is not reviewable by the jury."[26]

Two later decisions involving confessions,[27] but not involving the point of jury review, took the opportunity to observe that the *Monich* case had settled the matter not only as to dying declarations but to confessions as well. If any doubt remained, it certainly was removed by *State v. Yarrow*[28] and *State v. Compo*.[29] Both of these cases presented the situation which Chancellor Magie has said would be necessary for an authoritative holding. The trial court after admitting the confession refused to submit to the jury the question of voluntariness or competency. The refusal was assigned as error, and both decisions were affirmed.

The statement, therefore, in *State v. Foulds* that the lower court in its charge "was most careful to safeguard the rights of the defendant"[30] cannot be justified on the existing decisions in this state, which hold that such a charge is not a right of the defendant, and, if given, is error. It is true that the error is not prejudicial, and in the instant case would not call for a reversal, and it may therefore seem hypercritical to object to the appellate opinion for its failure to point out the error. Yet it

26. State v. Monich, 74 N.J.L. 522, 64 A. 1016 (E. & A. 1906).

27. State v. Kwiatkowski, 83 N.J.L. 650, 655, 85 A. 209 (E. & A. 1912); State v. Morehous, 97 N.J.L. 285, 291, 117 A. 296 (E. & A. 1921).

28. 104 N.J.L. 512, 141 A. 85 (E. & A. 1928).

29. 108 N.J.L. 499, 158 A. 541, 85 A.L.R. 866 (E. & A. 1931). Of this opinion the annotator in 85 A.L.R. at p. 879 says, "The former confusion and indefiniteness in the law on the subject under annotation has been dissipated by a direct decision of the New Jersey court, in which the position is clearly taken that it is solely the province of the court to determine whether a confession is voluntary."

30. See *supra*; note 9.

is in just such a fashion that the erroneous view has gained stature in other jurisdictions. As one commentator points out, "since the defendant cannot complain of such error favorable to him, the appellate courts have given apparent acquiesence to the practice by treating it not as error, but merely as another reason why the defendant cannot complain. This constant practice, favorable to the defendant has lent the color of authority. . . ."[31]

Furthermore, there are more than negative grounds for objecting to the opinion. For in the court's approach to the problem lies another seed of the erroneous doctrine which New Jersey has rejected. Speaking of the preliminary hearing on the voluntariness of the confession the court said:

> "The issue was one of both law and fact; of law, that is whether that which was said, no matter what, by the state's representative at the time the confession was made, amounted to an inducement which instilled fear or hope of favor. . . . This is a question for the court alone. Of fact, that is whether the inducement was in effect [fact?] done or said. . . . This is a matter for the jury."[32]

Now it is true that there are elements of both fact and law in the preliminary decision of admissibility, but it is a *non sequitur* to conclude that therefore the jury shall have a hand in the decision. For every question of fact is not a jury matter. This point has bearing not only on the admission of a confession, but on any matter which involves the admission of evidence,[33] and it is the inflexible rule that when there

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31. Annotation in 85 A.L.R., at p. 872.

32. See at 23 A. 2d 897.

33. Cf. Manda v. City of Orange, 82 N.J.L. 686, 82 A. 869, 870 (E. & A. 1912), "In fact such preliminary or incidental questions addressed to the discretion of the judge to determine the admissibility of a given piece of evidence arise in numerous cases, among them the qualifications of a witness, voluntariness of a confession, the belief of impending death in a declarant, absence from the jurisdiction of a subscribing witness, the loss of an original writing, the qualifications of an expert witness." [Cit. omitted.]

is a question of fact involved in the decision on competency it is for the court alone to decide, and is not for the jury.[34]

Appellate courts have drawn a distinction between the law and fact element in the decision on competency only as a guide in determining what error is reversible. If the error assigned is in the factual side of the court's decision there can be no reversal if there was any evidence to support it,[35] but the distinction certainly was never intended to allow submission of a judicial question to jury review.[36]

Apart from the fact that New Jersey law is expressly opposed to the practice, there is no apparent, worthwhile reason why the jury should be required or permitted to consider the voluntariness of a confession with the privilege of rejecting it if found involuntary. As Professor Wigmore points out the jury sits to judge the credibility and weight of testimony, and it should be allowed to do it "untrammeled by the rules of law" concerning competency.[37] It will be protected from inadmissible evidence by the capable arbitration of the judge in that field, and if he has decided that certain evidence is competent, there is nothing to be gained by the jury's consideration of the same

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34. "We think this question of fact was one to be determined by the trial court and not by the jury. Questions of the admissibility of evidence are for the determination of the court; and this is so whether its admission depend upon matter of law or upon matter of fact." Pitney, J., in Gila Valley G. & N. R. Co. v. Hall, 232 U.S. 94, 103, 34 S. Ct. 229, 58 L. Ed. 521, 525 (1913). See also Clendennin v. Clancy, 82 N.J.L. 418, 81 A. 750, 751 (E. & A. 1911). *Accord*: 1 Wigmore, op. cit., 590, sec. 487, "The orthodox division of function between judge and jury allots, without question, to the judge the determination of all matters of fact on which the admissibility of evidence depends. . ."

35. Donnelly v. State, *supra,* note 15. *Contra,* Peak v. State, 50 N.J.L. 179, 12 A. 701 (S. Ct. 1888), with dissent by Dixon, J. Dissent in Peak case and holding in Donnelly case approved in State v. Monich, *supra,* note 26. *Accord*: State v. Zeller, 77 N.J.L. 619, 73 A. 498 (E. & A. 1909); State v. Dolan, 86 N.J.L. 192, 90 A. 1034 (E. & A. 1914); Leonard v. Standard Aero Corp., 95 N.J.L. 235, 112 A. 252 (E. & A. 1920). See also State v. Arthur, 70 N.J.L. 425, 57 A. 156 (S. Ct. 1904).

36. "Of course the authority to pass upon the admissibility of evidence cannot be delegated by the trial court to any person." State v. Nardella, 108 N.J.L. 148, 150, 154 A. 834 (E. & A. 1931).

37. 1 Wigmore, op. cit., sec. 487.

point. The jury is not familiar enough with the rules of evidence, which often are artificial, to attempt to employ them,[38] and such an attempt would serve only to distract the jury from its primary function, *i.e.*, the weighing of the evidence.[39] Instead of deciding whether the confession helps to prove guilt, it stops to consider whether it shall consider the confession at all. "This unpractical doctrine fails to appreciate the elementary canon of admissibility, and in that respect its judicial extension is a discouraging circumstance."[40]

More discouraging is the fact that a solid line of New Jersey decisions finds no honor in the *Foulds* opinion, and the most recent of them is cited to uphold a proposition which it expressly repudiates.

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38. *Idem*, sec. 861.

39. "In criminal cases juries undoubtedly, in accordance with their prerogative, make up their minds on the whole case. What weight was given to the confession we do not know." State v. Locicero, 12 N.J.Misc. 837, 175 A. 904 (S. Ct. 1934), *aff'd per cur.*, 115 N.J.L. 208, 178 A. 778 (E. & A. 1935).

40. 1 Wigmore, op. cit., sec. 861.