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## Questions and Answers

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# Questions and Answers

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Long before the science of criminal investigation came into repute, enforcement officials had come to rely upon the confession as an important means of establishing guilt. The courts, for example, viewed confessions as one of the best and most substantial species of evidence. They assumed, and correctly, that no person in the full possession of his faculties would voluntarily sacrifice life, liberty, or property by confessing to a crime he did not commit. And from the point of view of the police, the confession offered an invaluable means of disclosing guilt in light of the exceptional difficulties involved in fixing criminality. For crimes in large part are cloaked in secrecy and men conscious of criminal purpose seek to shelter their knavery from the observing eyes of others. Thus, through the ages, the confession has held a significant position in the field of crime repression.

Nevertheless, use of confessional evidence has suffered an harrassed and checkered career and on innumerable occasions has obstructed the normal functioning of enforcement. Examination of the problem supplies an answer. In the eyes of the law, a confession is good only to the extent that it was made *voluntarily*—that is without force, threat, fear or inducement of any kind. This is the one basis on which courts admit a confession. Hence their close scrutiny of the circumstances of confessions.

Thus, the police in their quest of confessions are confined to a corridor of narrowest dimensions, possibilities of transgressions beyond the limits of which are legion. Difficulties of securing a purely voluntary confession invite the employment of police tactics which violate the inalienable rights of man. Furthermore, since the prosecution has the difficult and dubious task of *proving* voluntariness of the confession, an alert defense can hurl a variety of real and imaginary challenges which may result either in rejection of the confession or may so influence judge and jury that the confession ceases to have any real influence at trial. These are some of the considerations which lead us to devote this issue of *Questions and Answers* to the subject of confessions.

*Question 1:* We were cruising on A street when our dispatcher advised of a hit-and-run-accident. We drove up to the scene, found a witness who had spotted the license number of the fleeing car, and then we picked up the suspect. At the time we secured a confession from him, it was apparent that he had been drinking and, in fact, he so admitted. Is a confession taken while a person is in a state of intoxication good?

*Answer:*

Courts have held on a number of occasions that a confession is good even though the accused was intoxicated or under the influences of narcotics at the time he gave the confession.<sup>2</sup> However, exceptional caution must be used in relying upon such a confession since many factors may

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<sup>2</sup> Note the list of cases in footnote 5, sec. 499, p. 920, vol. 1, of Wigmore's *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Second Edition).

influence the court in either rejecting the confession or of giving it little or no credence. The answer to this question stems back to the principles governing the competence of witnesses. Intoxication, even habitual, does not in itself incapacitate a person offered as a witness, as Wigmore has pointed out. The question is, in each instance, whether the witness was so bereft of his powers of observation, recollection, and descriptive ability that he is untrustworthy as a witness in respect to the subject at hand. This is the test in your case. If, at the time you questioned the hit-and-run driver, he was so far intoxicated *that he would have been untrustworthy as a witness*, the confession would probably be rejected as evidence.

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*Question 2:* We secured a confession from a suspect. One paragraph of the confession was of particular value. Can we introduce only this paragraph as evidence or must the entire confession be introduced?

*Answer:*

To be on the safe side, introduce the entire confession. The rule is by no means clear. One of the interesting cases holding that the entire confession need not be offered is *Webb v. State*, 14 So. 865 (Ala. 1893).

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*Question 3:* Two men were picked up on a larceny charge. We questioned them separately and got one of the men (Jones) to talking by telling him his pal had peached on him. Jones was furious and when we brought the two men together, Jones went up to his pal and said: "Why you so-and-so, don't try and hook me. You planned the whole thing and you stole the stuff." The pal got red in the face but didn't say a word. My question is this: Can the pal's silence be construed as a confession?

*Answer:*

Your question raises a number of interesting issues. Under the rules governing the use of tacit (i.e., silent) confessions, a statement made and the silence following it could be introduced against the silent person. The assumption is that where a person fails to deny an accusation under circumstances where an innocent man would have denied it, then failure to deny is deemed an admission of guilt. However, exceptional caution must be employed by the police officer in "arranging" for a silent confession. For one thing, the accusation should never be made by a person in authority—police officer, prosecutor, etc. The reason is that one is not required by law to answer an accusation made by such person. Next, the accusation must be made *in the presence* of the person whose silent confession is sought. This means that the accusation must be made in language so clear that the person could and did understand the accusation. Lastly, the accusation must be made by word of mouth. If, for example, a written accusation is handed the suspect and he remains mute, his silence cannot be construed as a tacit confession. Under the circumstances you have outlined in your question, I should say that the pal's silence constituted a good tacit confession.

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*Question 4:* Is it necessary to warn the defendant of his constitutional rights before securing a confession from him?

*Answer:*

This is one of those controversial subjects on which there is by no means complete agreement. Statutes prescribing safeguards for the accused are in effect in all the states. In many instances, warning requirements are in-

cluded. Such is the case in Texas. In general, this is the situation: If the accused is taken before a magistrate for a judicial hearing, then the accused must be warned of his constitutional rights. Ordinarily, where a suspect is picked up by the police and questioned, the police are not obliged to warn the suspect of his constitutional rights. But, to be sure, it is always wise to check your statutes and to follow them strictly. For an interesting case on this point, see *People v. Randazzo*, 87 N.E. 112 (N. Y.)

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*Question 5:* In an important criminal case, we went to the home of the suspect and interrogated him and his wife. We asked the wife what time he had returned home on a particular night. She mentioned a time. He made no objection to her statement. Later, he tried to establish an alibi by declaring that he was home several hours previous to the time affirmed by his wife. Is there any rule of evidence which can be used to introduce evidence of the wife's testimony?

*Answer:*

This is another instance in which the rule governing tacit confessions plays an important role. The facts disclosed in your question point to a good tacit confession and parallel those in a recent North Carolina case—*State v. Portee*, 156 S.E. 783 (1931). There the supreme court of that state held that evidence of the wife's testimony and of the defendant's silence was properly admissible in overcoming the alibi defense.

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*Question 5:* I notice that the terms "admission" and "confession" are used frequently. Apparently, in some instances, they mean the same thing, in others they are used in a widely different sense. If there is a distinction, what is it?

*Answer:*

For all practical purposes, the distinction between the two terms is purely artificial insofar as criminal trials are concerned. A confession is an acknowledgment in expressed terms, by a party in a criminal case, of his guilt of the offense charged. An admission is simply a partial confession—a statement by the accused, direct or implied, of facts pertinent to the issue. A suspect may not confess that he committed the crime but he may admit to certain facts which, taken in conjunction with other evidence, may lead to the proposition that he did commit the crime. With respect to admissibility, both confessions and admissions are governed by the same evidentiary rules. See Wharton's *Criminal Evidence* (11th Ed.) p. 954.

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*Question 6:* Suppose a police officer tells a suspect: "You tell me what happened and I'll ask the prosecutor to go easy on you." Is the confession good if obtained as a result of the officer's promise although the officer made no attempt to see the prosecutor?

*Answer:*

No. Such a promise by the police officer is an *inducement to confess* and therefore violates one of the cardinal rules of evidence relating to confessions. All confession must be made *voluntarily* to be admissible. Now the term "voluntary" is one of those all-purpose legal terms which covers a variety of situations. Ordinarily we think that an act is voluntary if it is performed without force or putting in fear: in other words, of our own free will. Actually, the term is far more embracing. Any act (insofar as evidentiary

law is concerned) which is promoted by inducement or reward of any temporal nature is deemed to be involuntary since it was motivated by considerations other than those promoted by our own will or choice. As the court stated in *Wilson v. United States*, ". . . the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort."<sup>3</sup> And in the acrid words of another court: "To . . . admit direct confessions of guilt obtained by . . . promises designed to influence the prisoner is to put a premium on the unscrupulous methods of overzealous detectives and to take a step backward towards the thumb screw and the rack as a means of procuring testimony."<sup>4</sup> There is this important proviso, however. If the promise is made by a person *not in authority*, then such a promise does not invalidate the confession. Whether or not the officer intended or did see the prosecutor is immaterial.

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*Question 7:* An officer poses as a "con" man and gets himself locked up in a cell with the suspect in order to gain his confidence. As a result the suspect described how he pulled a number of jobs. Can the officer testify in court as to the suspect's story?

*Answer:*

While no force, fear, threats or inducements of any kind are permitted by the court, this is by no means true in respect to use of artifices in securing confessions or admissions. While the courts do not approve such practices, nevertheless they will admit confessions and admissions even though they were gained through deception. Diguising an officer as a fellow prisoner, falsely telling an accused that his accomplice has confessed and implicated him, intercepting an accused's letter, and the like, are acts which do not, because of their deception, invalidate the confession. For further consideration see the following cases: *People v. Buffom*, 108 N.E. 184 (N. Y. 1915) and *Lewis v. United States*, 74 Fed. (2nd) 173 (1934).

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*Question 8:* We picked up a suspect, quizzed him and by threats got him to own up where he had hidden the loot. His attorney intends to have the confession thrown out on the ground that threats were used to get it. We found the stolen jewelry. Query: Can we show the jewelry as evidence although it was found through illegal confession?

*Answer:*

The fact that threats were used in securing the confession will, of course, make the confession inadmissible and it will not be admitted. But even though the confession is inadmissible, the courts have held that evidence gained through an inadmissible confession is in itself admissible. Wigmore has described the principle involved as follows: "It was once contended that the impropriety of the inducement to the confession tainted the facts discovered in consequence of it, and that they also, as well as the confession, should remain inadmissible. Such a doctrine needs only to be stated to expose its equal lack of logic, principle, and expediency. It was fortunately repudiated at the outset in an opinion which leaves nothing to be said."<sup>5</sup> Hence, the jewelry should be admitted in the case at issue. However, there is one important proviso that the police officer must consider. For example, if the officer entered the suspect's home without a warrant, the jewelry would not be admitted since the evidence was illegally seized.

<sup>3</sup> 162 U. S. 613 (1895).

<sup>4</sup> *State v. Garrison*, 117 Pac. 657 (Ore. 1911).

*Question 9:* A suspected rapist was picked up. In order to get him to talk, we gave him several drinks of intoxicating liquor. As a result he loosened up and boasted of his conquests. Are his confessions good?

*Answer:*

No. While a variety of trickery practices may be employed in securing a confession, offering a person intoxicating liquor to get him to confess is definitely not one of them. In this respect the courts are adamant and hold to the practice of rejecting all confession and admissions so obtained.

*Question 10:* Is it necessary that a confession be signed by the confessor?

*Answer:*

No. For one thing, a confession need not be in writing insofar as admissibility is concerned. An oral confession is good. Nor is it necessary that a confession be signed or witnessed. Of course, a written confession, signed by the confessor and witnessed by some responsible person, carries much greater weight and is particularly valuable because evidence of such procedure assists in overcoming a defense challenge of duress.

*Question 11:* A motorist failed to stop after striking a pedestrian. Is a jury entitled to infer failure to stop as an admission against the motorist?

*Answer:*

As a rule, yes. It was so held in the case of *Kotler v. Lalley*, 151 Atl. 433 (Conn.). For a discussion of the case and the principles involved see 25 *Illinois Law Review* 809 and 40 *Yale Law Journal* 484.

*Question 12:* We arrested a woman, questioned her and secured valuable admissions from her. During the questioning, however, she grew hysterical. My question is this: is the confession admissible despite the fact that she was in a hysterical condition at the time?

*Answer:*

Yes. Such a state of mind does not ordinarily render a confession inadmissible. However, the situation will undoubtedly affect the jury. In any event, it is not wise to rely too heavily upon such a confession.

*Question 13:* We caught a person suspected of burglarizing an apartment. The only evidence we had on him was his confession. Is the confession alone sufficient to warrant conviction?

*Answer:*

No. A confession without additional proof that the crime charged had been committed is not sufficient to warrant conviction. In your case, it would be necessary to show that the apartment had been burglarized. But it would not be necessary for you to connect the suspect with the crime by means of other evidence. The rule is as follows: It is sufficient to warrant conviction if corroborating circumstances are shown which, in connection with the confession, are sufficient to establish the suspect's guilt in the minds of the jury beyond a reasonable doubt.

<sup>5</sup> *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Second Edition) vol. 11, sec. 859.

*Question 14:* Where does the burden of proof lie in respect to whether or not the confession was voluntary or not?

*Answer:*

The prosecution has the burden of proving voluntariness of the confession. A case on this point is *People v. Rogers*, 85 N.E. 135 (N. Y.)

*Question 15:* I understand that the Supreme Court of the United States has recently held that a confession obtained previous to taking a prisoner before a committing magistrate is void. I am unable to find the case. Therefore a discussion of it will be appreciated.

*Answer:*

*Mc. Nabb v. United States* is doubtless the case you have in mind.<sup>6</sup> It is one which should be carefully studied by enforcement officials. Briefly, the facts are these: Revenue officers of the Federal Alcohol Unit learned that the McNabbs (brothers living in the Tennessee hills) were planning to sell whiskey on which no federal tax had been paid. While the brothers were in the act of selling the liquor, revenue men attempted to arrest them. In the ensuing fight, the brothers escaped but only after one of the officers was slain. His assailant could not be identified. Shortly after, the McNabbs were arrested in their home and were taken to federal headquarters at Chattanooga. There they were questioned from approximately 9:00 P.M. until 1:00 A.M. and the following day from 9:00 A.M. until 2:00 A.M. the next morning. The prisoners did not have benefit of counsel and relatives and friends were excluded from seeing the accused. In particular, the McNabbs were not taken before a committing officer until after the admissions were secured. The brothers were convicted of second degree murder.

Counsel for the defense appealed the case on the grounds that the admissions were secured in violation of the Fifth Amendment to the Federal Constitution. However, it was not upon these grounds that the Supreme Court of the United States held the conviction invalid but upon the specific grounds that the McNabbs were not taken before a committing officer until after the admission had been secured. The court called attention to the fact that a Congressional statute requires that a federal officer making an arrest must take the person arrested before a United States Commissioner or the nearest judicial officer having jurisdiction for purposes of hearing, taking bail, or committing the person for trial. The court held that by subjecting the brothers to questioning without following the statutory requirements, "The arresting officers assumed functions which Congress has explicitly denied them. They subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very limited duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceedings."

Thus, the opinion is a pointed reminder to police interrogators that the time element enters into the validity of a confession and that they may not usurp the functions specifically denied them by law. Since legislation in nearly all the states parallels the federal provision requiring that the accused be taken promptly before a committing authority, it follows that a confession obtained previous to the hearing, bail, or commitment may be rejected and a conviction based upon such confession may be set aside.

<sup>6</sup> Decided March 1, 1943. See 87 L. ed. Ops. 579. Note also the review of the case in the April, 1943, issue of the *American Bar Association Journal*, pp. 214-215. See 87 L. ed. Adv. Ops.