a registered medical practitioner setting forth the reasons for his belief that there is such danger. The applying party must have given the other party reasonable notice of his intention to take the deposition, and in the case of an unavoidable delay, the court must be satisfied that the delay is so great that it is in the interests of justice to have a deposition taken.

Where the application is based on danger to physical or mental health, the court hearing the application may summon the medical practitioner who made the affidavit or affirmation to appear to answer questions or be cross-examined.

CHAPTER 8

Voir Dires, No Case Submissions, Calling Witnesses and Identification Evidence

This chapter primarily focuses on the procedures by which a challenge to evidence is tested by the court. Topics to be addressed include:

(i) the requirement to hold a *voir dire*;
(ii) confessions and 'voluntariness';
(iii) threats, oppression, and inducements to confess;
(iv) the court's residual discretion to exclude a voluntary statement for unfairness;
(v) questioning witnesses on the *voir dire*;
(vi) the procedure on the *voir dire* and the alternative procedure;
(vii) the no case to answer submission;
(viii) calling the accused and witnesses for the defence;
(ix) getting witnesses to court; and
(x) identification evidence.

THE VOIR DIRE

A *voir dire* (or a 'trial within a trial') is used to test the admissibility of evidence. The most common evidence challenged by the accused on the grounds of admissibility is an admission or a confession. Other evidence which is sometimes tested includes whether a person of unsound mind is competent to give evidence.[1]

Determinations of admissibility are a matter of law and are therefore decided by the court. In the Court of First Instance, the decision will be made in the absence of the jury. A *voir dire* may take place before the commencement of the trial proper or during the course of the trial when the evidence challenged is raised. For a confession to be admissible, it must not only be voluntary but must be relevant to a fact in issue.

The court should hold a *voir dire* where the defence have allowed a confession or admission was made by the accused, but have objected to the prosecution's claim that the confession or admission was made voluntarily.[2] The defence may object on the basis that the confession was not voluntary because the accused

1 See Evidence Ordinance (Cap 8) s 3(b).
2 *Seeray Ajodha v The State* [1982] AC 204, PC.

confessed under the influence of oppression, an inducement, threat or fraudulent misrepresentation.

A *voir dire* is mandatory where a so-called 'double barrelled attack' is made by the defence on the admissibility of the confession.[3] A double barrelled attack is said to be made on the admissibility of the confession evidence when the accused denies making the confession *and* alleges that before or at the time the prosecution have alleged he confessed, the accused was ill treated by the police. Evidence of oppression, an inducement, or a threat, may constitute ill treatment of the accused.

The key issue, denoting the necessity of a *voir dire* is, therefore, whether the voluntary nature of any confession alleged by the prosecution is subject to challenge. It should also be noted that the judge may be required to hold a *voir dire* into the admissibility of an alleged confession, even though the defence have not raised a challenge to it, where there is evidence before the court suggesting the confession may not have been voluntarily made.[4]

Where the admissibility of a confession is challenged on a *voir dire*, the burden lies on the prosecution to establish beyond a reasonable doubt that the confession was voluntarily made. If the prosecution fails to do so, the confession will be ruled inadmissible. The underlying rationale of the rule requiring the prosecution to prove the voluntary nature of an alleged confession, where a challenge has been made to it, is to try to ensure the reliability of the confession and to preserve the accused's right to silence.[5]

It should be noted that even where a court finds a confession was voluntarily made and is therefore admissible in evidence, the court still retains the power to exclude the confession from evidence, in its residual discretion. The residual discretion to exclude a voluntary confession exists to ensure the court retains the power to secure a fair trial for the accused.

A confession is an exception to the hearsay rule. This is because it is an admission against interest. Evidence of a confession can secure a conviction without corroboration.

Confessions may be oral or written; where the confession is made orally, it is sometimes called a 'verbal'. A verbal made at the time of arrest will often be recorded in a 'post-record statement' prepared by police for the accused to sign at the police station. A written confession may result from an interview conducted by police with the accused at the station. An arrested person will sometimes write out his own confession. The police should try to ensure any confession which is made is as clear and unambiguous as possible and is signed by the maker. If the accused later denies the accuracy of the alleged confession or denies he made it at all, then it will be up to the judge or jury to determine his credibility. However, if the accused also alleges threat, oppression or inducement at the time of the alleged confession, a *voir dire* would be required.

Where a *voir dire* has been held and the court finds the confession admissible, this is not taken as conclusive evidence that the confession was actually made

3 *Thongjai and Anor v R* [1998] AC 54, PC.
4 *HKSAR v Lee Ying-lun* [1997] HKLY 263, CA.
5 *Secretary for Justice v Lam Tat-ming and Anor* [2000] 2 HKLRD 431, [2000] 2 HKC 693, CFA.

by the accused. All that is determined by the *voir dire* procedure is whether the confession, if made, was voluntary, not whether it was made at all. The accused can still deny he made the confession despite a ruling by the judge that it is admissible evidence against him. In a jury trial he can also put forward the same evidence again, alleging that the confession was involuntarily made, in front of the jury, for their consideration.

An artificial distinction is therefore made: the judge first determines the merit in any challenge made to the 'voluntariness' of the confession and, if the 'voluntariness' is established, and the confession is ruled admissible, the jury (or the judge, if he is the finder of fact) must then, if the accused has also denied making the confession, determine whether the accused actually confessed.

Where a challenge is made to the admissibility of a confession or admission, the prosecution should be advised of the objection before the trial commences. Persons in authority who are most commonly alleged to have threatened, oppressed or induced the accused into making a confession, include the officer who arrested the accused, or interviewed him, the magistrate or judge, and the prosecutor. An employer or teacher who has been asked by police to speak to the accused whilst he is in police custody also may be alleged to have induced a confession. In the Court of Appeal decision *HKSAR v Ng Wai Man*,[6] the court held that police who disguised themselves as prisoners, in order to eavesdrop on a confession, had not induced the confession they overheard because they had not actually questioned the appellant. The court also held that because the disguise did not amount to unfair trickery, the confession need not be excluded from evidence in the court's residual discretion. However, where an undercover officer has actively questioned a suspect in order to elicit a confession, the residual discretion may be used to exclude the confession for unfairness.[7]

What constitutes an inducement may vary from case to case, but an offer of bail or a statement by police that a family member will not be questioned if an admission is made, are obvious inducements. Where a suspect expresses a self-generated hope or fear to a police officer or other person in authority, the officer should ensure that the suspect realises he has nothing to gain or lose by making a confession. In *R v Chan Yip Kan*,[8] the Court of Appeal held that where an accused has specifically indicated to a person in authority that he is making a confession in the hope of becoming a prosecution witness and gaining immunity, the person in authority has a responsibility to advise the accused that no such guarantee is being made to him.

A threat need not be severe to negate the voluntary nature of a confession. A confession may be held to be involuntary even where it is merely tainted by the threat of violence.[9]

The original classic statement on 'voluntariness' was made by Lord Sumner in the Privy Council case *Ibrahim v R*. It provides that a voluntary confession should not have been obtained either by fear of prejudice or hope of advantage,

6 [1998] 3 HKC 103, CA.
7 *Secretary for Justice v Lam Tat Ming and Another* [2000] 2 HKLRD 431, [2000] 2 HKC 693, CFA.
8 [1986] HKC 35, CA.
9 *R v Smith* [1959] 2 QB 35, CA (Eng).

exercised or held out by a person in authority.[10] To this definition has been added the requirement that a confession has not been obtained by oppression[11] or deception.[12] What constitutes oppression will vary according to the circumstances of the case and the offender.

Oppression has been defined by Justice Sachs in *R v Priestly*[13] as words or conduct which tend to sap and have sapped that free will which must exist before a confession is voluntary. This definition was referred to in the English Court of Appeal decision *R v Prager (No 2)*,[14] in which Lord Justice Edmund Davies, quoting Lord MacDermott's address to the Bentham Club in 1968, stated that oppression includes:

> ...questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent.[15]

The age, health and psychological well-being of the accused will affect whether his will can be said to have been sapped,[16] as will the duration of questioning or repeated questions in the face of continual denials.[17] Police are entitled, however, to put questions in the face of denial, an interrogation is not a 'tea party conversation',[18] so long as their conduct is not oppressive. In the Magistracy Appeal, *HKSAR v Lee Sin Sau*,[19] Barnes J ruled that whilst there is no general principle that once a suspect has indicated that he or she has nothing to say, under arrest, the police cannot continue with their investigation by putting questions to him or her; the questions put must be fair and not oppressive. In the case on appeal, the defendant had been heavily pregnant when interviewed. In fact, she gave birth four days later. She alleged that after her initial refusal to answer police questions, the interviewing officer had told her it was not okay to remain silent and that she would have to come back to the station again if she did not give a statement. This alleged inducement, together with the fact that before she gave her cautioned statement the police allowed the appellant to receive advice from her common law husband and former boss (who was also a suspect in the case) amounted to doubt over the voluntariness of her admissions.

There must be an actual finding of oppression rather than simply breaches of the Rules and Directions before the court will rule a confession has been gained involuntarily, on this ground.

The courts recognise that a state of oppression which genuinely existed may dissipate over time to the point where a confession is made voluntarily. An earlier

10 *Ibrahim v R* [1914] AC 599, 609, PC.
11 *DPP v Ping Lin* [1976] AC 574, CA (Eng).
12 *R v Lam Yip-ying* [1984] HKLR 419, [1984] HKCU 36, CA.
13 (1965) 52 Cr App R 1.
14 (1972) 56 Cr App R 151, [1972] 1 All ER 1114, CA (Eng).
15 (1972) 56 Cr App R 151 at 161, [1972] 1 All ER 1114 at 1119, CA (Eng), at page 161.
16 *R v Cheng Ma-fuk* [1984] HKLR 132, [1984] HKCU 10, CA; *HKSAR v Lee Sin Sau* [2009] 6 HKC 441, CFI.
17 *R v Cheng Ho-shing*, Criminal Appeal No 356 of 1981, unreported.
18 *R v Clark* [1973] NI 45.
19 [2009] 6 HKC 441, CFI.

statement may be inadmissible because it was made when oppression is apparent, and a later statement admissible, because the oppression has worn off. To lead evidence off the second statement, the prosecution would need to establish the oppression had worn off beyond all reasonable doubt.[20] Oppression may wear off with time or where circumstances have changed. However, it is unusual for a second statement to be ruled admissible where an earlier one is excluded for oppression, as the court usually finds the oppression has tainted both statements.

A confession gained by fraudulent misrepresentation must also be regarded as involuntary.[21]

A court may also exercise its residual discretion to exclude a voluntary statement for unfairness. The unfairness may be the result of the circumstances in which the statement was made or may arise because the admission of the statement in evidence at trial would be unfair to the accused. The use of this residual discretion is rare as it involves the judge withdrawing relevant and admissible evidence from the jury and most confessions which have been made in circumstances of unfairness to the accused would already have been excluded for lack of 'voluntariness'.[22] In the House of Lords decision *R v Sang*,[23] Lord Diplock ruled that the purpose of the court exercising its residual discretion to exclude a voluntary statement was limited to ensuring the accused received a fair trial.

In the Court of Final Appeal decision *Secretary for Justice v Lam Tat Ming and Another*, the former Chief Justice Li stated that relevant circumstances a judge should consider, when determining whether to exclude an admissible confession from evidence for unfairness, include whether the accused's right to silence was abrogated or if there were breaches of the Rules and Directions issued by the Secretary for Justice for Questioning Suspects and Taking Statements.[24] Unfairness should be judged in light of all the material facts and circumstances of the case.

Breaches of the Rules and Directions do not automatically require that a confession is ruled inadmissible but breaches may be considered by the court, when it comes to exercise its discretion to exclude an otherwise voluntary statement for unfairness to the accused. According to Roberts CJ (as he then was) in *R v Lam Yip-ying*, the discretion to exclude evidence for unfairness because of breaches of the Rules and Directions should seldom be employed.[25]

Further, when an accused was questioned by undercover operatives, any admissions made are usually considered voluntary. However, such admissions may be excluded by the court in its residual discretion, in discharge of its duty to ensure a fair trial for the accused. In *Secretary for Justice v Lam Tat-ming and Anor*, the former Chief Justice gave examples of problems with the evidence that may render the confession so unreliable that no jury properly directed could

20 *R v Law Shing-huen* [1989] 1 HKLR 116, [1989] HKCU 348, PC.
21 See *Seeray Ajodha v The State* [1982] AC 204, PC, in which a police officer was found to have lied to the accused as to the nature of the document he was signing.
22 *R v Lam Yip-ying* [1984] HKLR 419, [1984] HKCU 36, CA.
23 [1980] AC 402, CA (Eng).
24 *Secretary for Justice v Lam Tat Ming and Another* [2000] 2 HKLRD 431, [2000] 2 HKC 693, CFA.
25 *R v Lam Yip-ying* [1984] HKLR 419, [1984] HKCU 36, CA.

before the accused formally elects whether to give evidence or exercise his right to silence, on the general issue.

It is preferable to hold a *voir dire* in the Court of First Instance before the jury is empanelled, or at least before the prosecution opens its case. One reason for this practice is that if the statement challenged is ruled inadmissible, and the prosecution relied strongly on the statement for a conviction, the prosecution may consider it prudent to withdraw its case or accept a plea to a lesser charge.

If the *voir dire* is held in the course of the trial, the jury will usually be sent out while the issue of admissibility is determined; however, the accused has the right to ask for the jury to remain throughout the *voir dire*. If, at the end of the procedure, the statement is ruled inadmissible, the judge would have to direct the jury to put that evidence out of their minds when considering their verdict. If it is ruled admissible, the jury must still determine whether the confession is reliable when they come to deliberate on the general issue: the guilt or innocence of the accused.

The procedure on the *voir dire* is as follows:

(i) the prosecution witness produces the confession statement, which will be marked as a provisional exhibit, and the witness leaves the court;
(ii) defence counsel states the objections made to the admissibility of the statement, which are recorded by the court, and the prosecution witness returns to the witness box;
(iii) the court states that a *voir dire* will be held;
(iv) the prosecution witness gives evidence in chief on the special issue only;
(v) defence counsel cross-examines the witness on the special issue only;
(vi) the remaining prosecution witnesses are called and examined on the special issue only;
(vii) a no case submission on the special issue may be made;
(viii) the accused may give evidence/call defence witnesses on the special issue only and cross-examination is also limited to the special issue only;
(ix) the judge/magistrate hears submissions and rules on the special issue (defence counsel has the last word); if the statement is admitted into evidence, it becomes an exhibit and if it is not admitted it is returned to the prosecutor;
(x) the prosecution calls its witnesses on the general issue;
(xi) the prosecution closes its case and the defence is invited to make a no case submission;
(xii) the court rules on the no case submission and, if there is a case to answer, the defence call the accused/witnesses on the general issue; even where the statement has been ruled admissible, the defence may deny its truthfulness.

In the Magistrates' Courts and the District Court, the magistrate or judge will determine both a challenge to the admissibility of the evidence (the special issue) and the guilt or innocence of the accused (the general issue), so the *voir dire* may occur either before or during the trial with less inconvenience. If the alternative procedure is used, the evidence on the special issue (admissibility) and the evidence on the general issue (guilt or innocence) is led from the prosecution

witnesses all at the same time. There is no separate hearing on the admissibility evidence.

The procedure for an alternative procedure is as follows:

(i) the prosecution witness produces the confession statement, which will be marked as a provisional exhibit, and the witness leaves the court;
(ii) defence counsel states the objections made to the admissibility of the statement, which are recorded by the court, and the prosecution witness returns to the witness box;
(iii) the court states that the alternative procedure is to be followed in the case;
(iv) the prosecution examines the witness on both the special issue and the general issues;
(v) defence counsel cross-examines the witness on both the special and general issues;
(vi) the process is repeated until all the prosecution witnesses have given evidence;
(vii) the court determines whether there is a case to answer on the admissibility issue;
(viii) if there is a case to answer, defence counsel calls the accused/witness for the defence to give evidence on the special issue only;
(ix) the prosecutor cross-examines the accused/witness for the defence on the special issue only;
(x) the process is repeated until all the defence witnesses have given evidence;
(xi) the judge/magistrate hears submissions and rules on the special issue (defence counsel has the last word); if the statement is admitted into evidence, it becomes an exhibit, if it is not admitted it is returned to the prosecutor;
(xii) the prosecution closes its case and defence counsel is invited to make a no case submission;
(xiii) the court determines whether there is a case to answer;
(xiv) if there is a case to answer, the defence presents its case on the general issue by calling the accused/witnesses; even where the statement has been ruled admissible, the defence may deny its truthfulness.

The defence should alert the prosecution before trial if there is to be any objection to the admissibility of evidence. The particulars of the objection should be given to both the court and the prosecution.[33] When the prosecutor calls a police witness whom the defence have alleged behaved improperly towards the accused, the prosecutor may ask the witness whether he threatened the accused or offered an inducement in exchange for the statement from the accused, but may not alert the witness as to the specific allegations of the accused against the witness.[34]

If there are co-accused and witnesses in common on several *voir dires*, it is usual for the court to hold back its ruling on the special issues until all the *voir dires* have been conducted.[35]

33 *Li Ming-kwan v R* [1973] HKLR 275, [1973] HKCU 27, FC.
34 *Wong Tak Ming v R*, CACC 261/1982, unreported.
35 *R v To Kam-wing and Another* [1988] HKLY 201.