1985 CarswellAlta 291
Alberta Provincial Court, [Youth Division]

R. v. H.

1985 CarswellAlta 291, [1985] A.J. No. 567, [1986] A.W.L.D. 279, [1986] W.D.F.L. 494, 43 Alta. L.R. (2d) 250

R. v. H.

Russell Prov. J.

Judgment: October 24, 1985
Docket: Edmonton No. 06 61 36

Counsel: *R. Parker*, for the Crown.
D. Midanik, for accused.

Subject: Criminal; Constitutional; Public; Evidence

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal Law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Charter remedies — Exclusion of evidence

Education Law --- Pupils — Discipline

Evidence --- Confessions — Voluntariness — Issues involving young offenders

Constitutional law — Constitution Act, 1982 — Charter of Rights and Freedoms — Application of Charter — Provincial legislatures and government — School boards being creatures of provincial legislation enacted pursuant to exclusive authority granted to provinces by B.N.A. Act — Employees of school boards acting pursuant to delegated legislative authority of board — Charter applying to actions of principals and teachers.

Criminal law — Defences — Charter of Rights and Freedoms — Exclusion of evidence — Principal summoning student to office and obtaining statements relating to criminal offence — Principal failing to advise student of right to counsel — Obtaining of evidence against accused directly resulting from violation of rights — Evidence excluded.

Infants and children — Offences — Evidence — Teacher obtaining admission of theft from student after promise of no further action if theft admitted — Statements of accused not voluntary, as being given under promise by person in authority — Teacher failing to follow requirements of s. 56 of Young Offenders Act — Statements inadmissible.

The accused, a 13-year-old student, together with some other students, stole money from a teacher's purse at school. The teacher, on discovering the theft, reported it to the school principal and subsequently indicated to her class that if the money were returned to her nothing more would happen. As a result of that statement the accused and his accomplices admitted the theft to the teacher. The teacher did not inform the principal of her promise. The principal demanded that the accused and his accomplices attend with the principal. They did this and again admitted the theft to the principal. At

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no time was the accused advised of his rights under the Young Offenders Act or the Charter. The police were called and the accused was charged with theft.

Held:

Accused acquitted.

The Charter applies to actions of teachers and principals who are employees of school boards. School boards are constituted pursuant to legislation enacted by a province in exercising its exclusive jurisdiction with respect to education as granted in the Constitution Act, 1867. Therefore, actions of employees of school boards are matters within the authority of the government to which the Charter applies by virtue of s. 32(1)(*b*).

The summoning of a student to the office of the principal to answer questions relating to an offence amounts to a detention within the meaning of s. 10. The accused felt he had no choice but to attend and the objective of the attendance was to interrogate him with respect to the criminal offence. Given that he was detained, his rights were infringed by reason of the failure to inform the accused of his right to retain and instruct counsel.

Where the obtaining of evidence is causally connected to the infringement of Charter rights, the admission of such evidence would bring the administration of justice into disrepute and is therefore excluded. The obtaining of a statement from the accused and the accomplices by the principal was clearly a direct result of the violation of the accused's rights. The accused was relying on a promise made by the teacher and was making the statement in response to interrogations of the principal which he felt he must answer. The principal was thus involving himself in the administration of justice and in effect did the job the police would normally do. To allow the evidence thus obtained in clear violation of the accused's rights would bring the administration of justice into disrepute.

The accused regarded the teacher as a person in authority and made statements to her as a result of a promise of no further consequences. The teacher failed to advise the accused of his right to consult with a parent or lawyer before giving any statement. The teacher was in violation of s. 56 of the Young Offenders Act and the accused's statements to her were thus excluded.

Table of Authorities

Cases considered:

Chyz v. Appraisal Inst. of Can. (1984), 13 C.R.R. 3, 36 Sask. R. 266 (Q.B.) [reversed on other grounds 44 Sask. R. 165 (C.A.)] — *referred to*

Peg-Win Real Estate Ltd. v. Winnipeg Real Estate Bd., [1985] 4 W.W.R. 758, 19 D.L.R. (4th) 438, 34 Man. R. (2d) 127 (Q.B.) [affirmed [1986] 2 W.W.R lxi (C.A.)] — *referred to*

R. v. Clarke (1985), 19 C.C.C. (3d) 106, 15 C.R.R. 156, 59 A.R. 212 (C.A.) — *referred to*

R. v. Guiller (1985), 6 C.R.D. 850.50-08 (Ont. Dist. Ct.) — *referred to*

R. v. Lerke (1984), 41 C.R. (3d) 172, 13 C.C.C. (3d) 515, 11 D.L.R. (4th) 185, 11 C.R.R. 1, 55 A.R. 216 (Q.B.) [affirmed 43 Alta. L.R. (2d) 1 (C.A.)] — *considered*

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R. v. Therens, [1985] 1 S.C.R. 613, [1985] 4 W.W.R. 286, 45 C.R. (3d) 97, 32 M.V.R. 153, 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, 13 C.R.R. 193, 40 Sask. R. 122, 59 N.R. 122 — *applied*

R. v. Wray, [1971] S.C.R. 272, 11 C.R.N.S. 235, [1970] 4 C.C.C. 1, 11 D.L.R. (4th) 673 — *considered*

R. v. Rothman, [1981] 1 S.C.R. 640, 20 C.R. (3d) 97, 59 C.C.C. (2d) 30, 121 D.L.R. (3d) 578, 35 N.R. 485 (S.C.C.), affirming 42 C.C.C. (2d) 377 [Ont.] — *considered*

Statutes considered:

Canadian Charter of Rights and Freedoms, ss. 10, 24, 32.

Constitution Act, 1867, s. 93.

Interpretation Act, R.S.A. 1980, c. I-7.

Interpretation Act, R.S.C. 1970, c. I-23.

School Act, R.S.A. 1980, c. S-3, s. 155.

Young Offenders Act, S.C. 1980-81-82-83, c. 110, s. 56.

Authorities considered:

Black and Elliott, "Overview of the Charter" (1982), Legal Education Society of Alberta and Canadian Institute for the Administration of Justice 20, pp. 21-22.

Gibson, "The Charter of Rights and the Private Sector" (1982), 12 Man. L.J. 212, p. 217.

Hogg, Canada Act, 1982, Annotated (1982), p. 75.

Law Reform Commission of Canada, Report on Evidence: Evidence Code (1975).

Manning, Rights, Freedoms and the Courts (1983), pp. 115-26.

Tarnopolsky and Beaudoin, The Canadian Charter of Rights and Freedoms: Commentary (1982), p. 6.

Trial of accused under Young Offenders Act for offence of theft.

***Russell Prov. J.*:**

Issues:

1 (1) Whether the Charter of Rights and Freedoms applies to teachers and principals who are employees of a public school board in the execution of their duties?

2 (2)(a) Whether a student who is required to attend the principal's office for interrogation by the principal concerning a criminal offence is under detention within the meaning of s. 10 of the Charter and entitled to the rights guaranteed by that section?

3 (b) If so, whether the admission of evidence obtained as a result of that interrogation, including that of the principal and the accomplices, would bring the administration of justice into disrepute and should be excluded?

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4 (3) Whether an admission of a student to a teacher should be excluded when it was obtained as a result of the teacher telling the student there would be no further consequences?

Facts:

5 The accused is a 13-year-old boy who is charged with theft under s. 249(*b*) of the Criminal Code. His teacher had left her purse in her schoolroom while she attended a meeting. When she returned her purse was open, her wallet was gone and $65 was missing. She reported the incident to the vice-principal the next morning; then, apparently without the knowledge or the authority of the vice-principal or the principal, she spoke to her class of students concerning the incident. She told the class that if the money were returned to her, that would be the end of the matter. She testified that she meant what she said and that she thought the principal would back her up. She learned later that her decision was overruled.

6 As a result of her statement to the class, the accused and some other boys came forward, admitted the theft and returned some of the money. The names of these boys were brought to the attention of the principal by another teacher. The boys were told to report to the principal's office, where they were interrogated by the principal about the incident. The principal used the word "interrogation" in his examination-in-chief to describe this incident.

7 The principal testified that the boys had no choice but to report to the office as required. If they had failed or refused to do so, the parents would have been notified and the boys might have been suspended, but not expelled, from school. He said that he was not aware of the promise the teacher made to the boys until the next day, and that the teacher felt badly that the police had been called. The evidence of the accused and the accomplices suggests that the principal had been told by one of the boys about the teacher's promise before the police were called but I do not believe that it is necessary for me to make a finding of fact on this matter to decide these issues. There is no suggestion that the principal made any similar promise to the boys nor that he indicated to them that he would honour the teacher's promise. It was admitted in evidence that at no time did either the teacher or the principal advise the boys of their rights under the Young Offenders Act or under the Charter of Rights and Freedoms.

8 The evidence of the principal, the three boys and the accused was presented in the form of a voir dire; the evidence of the school teacher was not. Counsel for the defence has asked me to exclude the evidence of the accomplices and the principal under the provisions of s. 24 of the Charter on the grounds that the rights of the accused prescribed by the provisions of s. 10 of the Charter have been infringed because the accused was not informed of his right to counsel.

9 I believe I must also consider whether the evidence of the teacher should be excluded although there is no application before me in that regard.

Law:

Issue 1: Does the Charter apply to the teacher and the principal?

10 Section 32(1)(*b*) of the Charter states that the Charter applies "to the legislature and government of each province in respect of all matters within the authority of ... each province". There is some debate as to whether this section is intended to restrict the application of the Charter only to the Crown, or, whether the section is merely intended to ensure the application of the Charter to the Crown for the purpose described in s. 16 of the Interpretation Act (Canada).

11 In his article "The Charter of Rights and The Private Sector" (1982), 12 Man. L.J. 212, Professor Dale Gibson argues that one would have to stretch the language of s. 32 to conclude that the word "government" in that section applies to any form of municipal level of government. However, Professor Gibson concludes that his interpretation lends weight to the argument that s. 32 is merely intended to ensure the application of the Charter to the Crown. According to his reasoning s. 32 is merely inclusive and the Charter would have application to the private sector, including municipal government and other administrative agencies, as well, although not by the operation of s. 32.

12 Conversely, Morris Manning expresses the view that s. 32 is wide enough to encompass acts by municipalities and other administrative agencies that are set up and controlled by the authority of the legislatures or Parliament. He suggests that

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the phrase "all matters within the authority of" in s. 32(1)(*a*) and (*b*) must be read as meaning under the control of. Further, he argues, if a corporation or administrative tribunal exercises power conferred by the statute it is exercising governmental power where those powers are given by legislative enactment. However, according to his reasoning the Charter would not have any application to the purely private sector: Manning, Rights, Freedoms and The Courts (1983), Emond-Montgomery Limited, Toronto, pp. 115-26.

13 Applying the reasoning of either Gibson or Manning I could conclude that the Charter does apply to agencies such as school boards.

14 Tarnopolsky and Beaudoin in Canadian Charter of Rights and Freedoms (1982), Carswell Company Limited, Toronto, p. 6, state that the references to the legislature in s. 32 would probably suffice to make the Charter applicable to all bodies exercising statutory governmental authority including school boards. The authors suggest that the limitations on statutory authority apply to all governmental action which depends for its validity on statutory authority. Similarly, Professor Peter Hogg expresses the view that any body exercising statutory authority such as "municipalities, school boards, universities, administrative tribunals and police officers" is bound by the Charter: Canada Act, 1982, Annotated, p. 75.

15 In *R. v. Lerke* (1984), 41 C.R. (3d) 172, 13 C.C.C. (3d) 515, 11 D.L.R. (4th) 185, 11 C.R.R. 1, 55 A.R. 216 (Q.B.), Rowbotham J. held that the Charter does apply to the actions of private citizens. He appeared to rely on the interpretation of s. 32 proposed by Professor Gibson and on the facts of that case he did not have to consider whether s. 32 might apply to municipal or other administrative agencies. The Courts of Queen's Bench in Manitoba and Saskatchewan have both held that the Charter is not applicable to the private sector: *Peg-Win Real Estate Ltd. v. Winnipeg Real Estate Bd.*, [1985] 4 W.W.R. 758, 19 D.L.R. (4th) 438, 34 Man. R. (2d) 127, and *Chyz v. Appraisal Inst. of Can.* (1984), 13 C.R.R. 3, 36 Sask. R. 266.

16 However, in the *Chyz* case Wright J. said that a body that exercises statutory power may be brought within the scope of the Charter. His interpretation would seem to suggest that s. 32 must be read as having an exclusive application only, but that the section may be read to apply to municipal and other administrative agencies in addition to the Crown in right of Canada and the provinces.

17 The Interpretation Acts of Canada and Alberta contain a section that provides that no enactment is binding on Her Majesty unless the enactment expressly states that it binds Her Majesty: Interpretation Act, R.S.A. 1980, c. I-7; the Interpretation Act, R.S.C. 1970, c. I-23. The usual wording of a provision of this nature is simply "The Crown is bound by this Act (e.g., the Clean Water Act, R.S.A. 1980, c. C-13, s. 3(6)). The wording of s. 32 of the Charter seems to suggest that in the use of the clause "government of each province", rather than the term "Her Majesty" or the "Crown", the drafters intended something more than to merely bind the Crown. But, the Interpretation Act of Alberta also defines "Government" to mean Her Majesty in right of Alberta [s. 25(*g*)]. There is no similar definition in the federal statute. Attention has been drawn to the use of the small case letter in the word "government" in s. 32 in an attempt to discern the intent of Parliament: Dale Gibson, "The Charter of Rights and The Private Sector," p. 217. In an article prepared for a seminar jointly sponsored by the Legal Education Society of Alberta and the Canadian Institute for the Administration of Justice in 1982, William Black of the Faculty of Law, the University of British Columbia, discussed the need to define the word "government" in s. 32. He suggests that because a number of sections are addressed to the conduct of public officials such as police officers, it is likely that the Charter would be interpreted as applying to those officials. Section 32 of the Charter prescribes the right of citizens to have their children receive primary and secondary education in French or English; if the Charter does not apply to school boards and their employees, this right could be meaningless. Section 93 of the Constitution Act, 1867, gives the legislature in each province the exclusive power to make laws in relation to education; education is a matter within the authority of the legislature and it has chosen to govern the matter of education in the manner prescribed by the provisions of the School Act, R.S.A. 1980, c. S-3. That Act provides for the establishment of school boards. The legislature has delegated certain authority to school boards including the authority to make rules regarding the suspension and expulsion of students: s. 155. I am of the view that Parliament intended to extend the application of the Charter to include bodies such as school boards exercising a delegated legislative authority. I am satisfied that teachers and principals who are employees of school boards are governed by the provisions of the Charter.

Issue 2(a): Whether the detention in the principal's office was a detention within the meaning of s. 10 of the Charter?

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18 To the average young person and indeed perhaps even to the average adult who is a graduate of a public school system, the word "detention" conjures up one meaning: the restraint imposed by a teacher or a principal as a disciplinary measure in relation to a student's behaviour at school.

19 However, I think it is unlikely that Parliament intended that the rights prescribed by s. 10 of the Charter would extend to the type of detention imposed as a normal disciplinary measure upon a school student. An ordinary school detention usually does not involve any legal consequences of the sort contemplated by Le Dain J. in *R. v. Therens*, [1985] 1 S.C.R. 613, [1985] 4 W.W.R. 286, 45 C.R. (3d) 97, 32 M.V.R. 153, 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, 13 C.R.R. 193, 40 Sask. R. 122, 59 N.R. 122. But it is possible that in some circumstances even a school detention might involve those sort of legal consequences and so it is necessary to examine the facts of each case. In Le Dain J.'s judgment, which was concurred in by the majority of the court on this point, he concluded that the detention contemplated by s. 10 was not limited to a restraint by a peace officer. In his view, that section necessarily refers to a variety of forms of detention, which may be of short duration, in which a peace officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequences, and which prevents or impedes access to counsel. The issue, he said, is whether the person reasonably regards himself or herself as free to refuse to comply.

20 In the *Therens* case, because the accused was the subject of a demand under s. 235(1) of the Criminal Code and subject to criminal liability for failure to comply with the demand, Le Dain J. concluded that the accused was under effective psychological compulsion or coercion. This compulsion, he said, was enough to make the restraint of liberty involuntary, if the accused reasonably believes that he has no other choice.

21 In this case, the accused was complying with a demand to attend at the principal's office. Although there would not have been any criminal consequences had he failed to do so, it is reasonable to believe that a 13-year-old would believe that he had no other choice but to attend; it is also reasonable to believe that the accused felt compelled to attend because of the possible consequences if he failed to attend. It would not be reasonable to expect a young person to question such a direction or to refuse to comply. He was aware that he was being investigated by the principal in respect of his participation in a criminal offence. Just as most adults would comply with a similar direction by a peace officer in a similar situation, so too would most young persons comply with a direction by a school principal. This was no ordinary disciplinary measure being undertaken by the principal; it was not a typical school detention; the purpose of his interrogation of these students was to determine whether or not to report this matter to the police. The nature of this detention was comparable to that which occurs when a person is being interrogated by the police themselves; the objective of the detention was not to discipline these students in relation to a school matter but to investigate a criminal offence; this accused was aware of that; the psychological compulsion he was under was all the more compelling because of that. I am satisfied that the accused was under detention within the meaning of s. 10 of the Charter and that his rights as prescribed in that section were infringed because he was not informed of his right to retain and instruct counsel.

Issue 2(b): Should the evidence of the principal and the accomplices be excluded?

22 In the *Therens* case the majority of the members of the Supreme Court of Canada held that once an infringement or denial under the Charter had been found, evidence may only be excluded under s. 24(2) of the Charter; that is, the evidence may only be excluded if the court is first satisfied that the admission of the evidence would bring the administration of justice into disrepute. As well, it appears that the evidence may only be excluded if the court is satisfied that the manner of obtaining the evidence, and not merely its admission, would bring the administration of justice into disrepute. Le Dain J. in his dissenting judgment concluded that the simple fact of a denial or infringement of a right would be sufficient to warrant exclusion where the court is satisfied that the admission would bring the administration of justice into disrepute; Lamer J., concurred in by Dickson C.J.C., concluded that there must be some relativity between the violation of the right and the obtaining of the evidence. There was no comment from the other members of the court on this point.

23 In *R. v. Wray*, [1971] S.C.R. 272, 11 C.R.N.S. 235, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673, the court limited the discretion of a trial judge to exclude illegally obtained evidence to cases where the evidence is gravely prejudicial to the accused but is of trifling probative value to the court. That case has been widely criticized. In its Report on Evidence in 1975, the Law Reform

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Commission of Canada proposed an Evidence Code in which the court, in determining whether evidence should be excluded, should consider "all the circumstances surrounding the proceedings and the manner in which the evidence was obtained ... including the extent to which human dignity and social values were breached in obtaining the evidence ..." In *Rothman v. R.*, [1981] 1 S.C.R. 640, 20 C.R. (3d) 97, 59 C.C.C. (2d) 30, 121 D.L.R. (3d) 578, 35 N.R. 485 (S.C.C.) [Ont.], Lamer J., while extending the discretion of the court to exclude evidence beyond the narrow limits of the *Wray* case, stated that judges do not have a blanket discretion to exclude evidence because of any conduct on the part of the authorities that the judge considers unfortunate, distasteful or inappropriate. He said "there first must be a clear connection between the obtaining of the statement and the conduct". While this case did precede the Charter and does not involve a Charter violation, it does appear that Lamer J. has applied the same reasoning in his interpretation of s. 24(2) of the Charter in the *Therens* case where he was concurred in by the Chief Justice. The Alberta Court of Appeal has also recently held that there must be a causal connection between the obtaining of the evidence and the conduct complained of: *R. v. Clarke* (1985), 19 C.C.C. (3d) 106, 15 C.R.R. 156, 59 A.R. 212.

24 The manner of obtaining the evidence of the principal and the accomplices in this case was that, as a result of a previous admission of the boys, the principal held the boys in detention, interrogated them and obtained further evidence concerning their participation in this offence. This evidence was turned over to the police without the boys having been given the opportunity to consult with their parents or a lawyer. In this process their rights under s. 10 of the Charter were denied. It was not only the rights of the accused that were violated; the rights of the accomplices were violated as well. Moreover, the evidence of the accomplices only became available as a result of this violation. The situation is similar to that in *R. v. Guiller* (1985), 6 C.R.D. 850.50-08 (Ont. Dist. Ct.), in which the court excluded evidence obtained as a result of an illegal search of a third party's residence.

25 There is in this case the same type of direct relationship between the manner of obtaining the evidence and the denial of the rights as in the *Therens* case, in which Lamer J. concluded that failure to abide by the duty of informing an accused of his s. 10(*b*) rights will lead to the obtaining of evidence in a manner which infringes or denies the detainee's s. 10(*b*) rights. The violation did precede the obtaining of the evidence. Therefore I must exclude the evidence of the principal and the accomplices under s. 24(2) of the Charter if I am satisfied, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

26 The circumstances in this case include the fact that the teacher made a promise to the accused and his accomplices; that the accused and the accomplices relied on that promise and implicated themselves; that as a result of their admission they were interrogated by the principal and further implicated themselves; that the accused is 13 years of age; that he was not informed of his right to have a parent or lawyer present during the interrogation by the principal; and that the teacher felt badly the police had been called, which seems to convey a sense of unfairness concerning the way this matter was handled. On the other hand the teacher made a promise she may not have the authority to make; the principal was investigating a matter that occurred within his school; it would be quite natural to expect him to exercise some responsibility by demanding answers from the accused and the other boys concerning their behaviour within the school. He did not act out of malice in reporting the matter to the police. His actions did not show any deliberate disregard of the rights of the boys. But the problem is, that in handing the evidence over to the police the principal became inextricably involved in the administration of justice by doing the work of the police themselves. The evidence he provided the police became the evidence in this case; there was no need for the police to attempt to obtain a statement from the accused; the principal had done their work for them. And, in providing this information to the police, the principal had, whether knowingly or not, broken a teacher's promise which the boys had reason to believe would be honoured.

27 Another compelling factor in this case is that the principal had been able to obtain that information without taking any steps to comply either with s. 56 of the Young Offenders Act, which requires that young persons be advised of their rights to counsel and to have a parent present and that their statements be voluntary. Had the police been interrogating these boys they would have been required by their own policies to take steps to secure a voluntary statement and to advise the accused of his rights both under the Charter and the Young Offenders Act. To allow the admission of the evidence obtained by the school principal, who would no doubt have been unaware of these legal requirements, would allow the state to avoid the need to respect the rights of this young person where its own agents are ignorant of the law. I am of the view that such a result would bring the administration of justice into disrepute and, accordingly, the evidence of the principal and the accomplices must be excluded under s. 24 of the Charter. I have considered whether the principal's evidence might have been excluded under s. 56

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of the Young Offenders Act without invoking the provisions of the Charter. I am satisfied that the principal's evidence is a statement to which that section applies and, for the reasons following, that he is a person in authority; the statement he obtained was involuntary because the promise of the teacher continued to act on the mind of the accused whether or not the principal was aware of it and he did not comply with the statutory requirements of that section in obtaining the statement and thus his evidence would be inadmissible under that section. However, although the evidence of the principal might have been excluded by applying that section, the evidence of the accomplices could not have been and it was for this reason that I was asked to consider the application of s. 24 of the Charter.

Issue 3: Is the evidence of the teacher precluded by s. 56 of the Young Offenders Act?

28 There is no suggestion that any violation of the Charter occurred in respect of the manner in which the teacher obtained the admissions from the accused. The only issue relating to her evidence is whether the provisions of s. 56 of the Young Offenders Act were violated in the process.

29 Section 56 of that Act prescribes the law governing the admissibility of statements made by young persons. It provides that no statement given by a young person to a person who is, in law, a person in authority is admissible unless the statement is voluntary, and unless certain other criteria set out in that section have been met. Those additional criteria include a requirement that the young person must have been given an explanation that he is entitled to consult with a parent or a lawyer before giving any statement.

30 In this case the accused has given a statement to the teacher and to the principal. A voir dire has been held regarding the admissibility of the principal's evidence, but not with respect to the teacher's evidence. I do not believe that the failure to conduct a voir dire concerning the teacher's testimony prevents me from considering whether that evidence should now be excluded; further, I believe that the prohibition in s. 56 would require me to exclude that evidence if I am not satisfied that the requirements of that section have been met and that I would have no discretion to accept that evidence even though it has been presented to me in the absence of a voir dire.

31 Section 56 only applies in this case if the teacher is a person who is, in law, a person in authority. The words "in law" in that section might suggest that the person must in fact exercise some form of legal authority and not merely be someone who is perceived by the young person to be a person in authority. If this is so, the subjective test established in the *Rothman* case would not apply to admissions of young persons. Further, it would be necessary to consider whether the legal authority would have to be authority to take statements, or whether any form of legal authority over the young person would suffice. However, I think the words "in law" must be taken to mean under the application of the law; that is, a person may be found to be a person in authority under that section applying the principles of the common law, including the subjective test established in the *Rothman* case.

32 I am satisfied that the accused in this case would regard the teacher as a person in authority. Martland J. speaking for the majority in the *Rothman* case adopted the test established by the Ontario Court of Appeal [42 C.C.C. (2d) 377] in which Jessup J.A. said that the test is whether the accused believed that the person he dealt with had some degree of power over him and whether he thought that person could either make good his promise or carry out his threats. It is reasonable to presume that a 13-year-old boy would believe that his teacher would exercise power over him and could make good her promises.

33 Section 56 of the Young Offenders Act requires that a statement of a young person must be voluntary in order to be admissible and s. 56(1) provides that the common law regarding admissibility would apply in considering the voluntariness of any statement. A basic rule governing the voluntariness of statements is that the statement must not have been induced by any fear or hope of favour. Here the statement has been induced by the promise of the teacher that there would be no further consequences. This accused and the other boys believed that they would not be prosecuted if they confessed; but for that promise they would not have confessed. I am satisfied that the admission to the teacher was not voluntary. As well it is admitted that the teacher did not advise the accused of his right to consult either a lawyer or his parents before accepting his statement and as a result the provisions of s. 56(2) of the Young Offenders Act have been violated. The evidence of the teacher as it relates to the admission of the accused must be excluded.

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34 There being no other evidence before me this charge is dismissed.

Charge dismissed.

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