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CONSTITUTIONAL LAW

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The constitutional rights of persons charged with crime formed a significant part of the decisions of the Louisiana Supreme Court on constitutional law matters during the 1960-1961 term.

A. *Voluntariness of Confessions, Louisiana Constitution of 1921, Article I, Section 11 — What Constitutes Improper Threat?*

In one case, *State v. Ferguson*,[1] the court backtracked from what it called the "extended concept of involuntariness of confessions" of *State v. Ross*.[2] In the *Ross* case the statement by an officer to the accused who was under arrest that "the best thing to do is to tell the truth because we have the evidence against you" was held a threat sufficient to vitiate the confession thereby obtained. In the *Ferguson* case, the statement by a deputy sheriff to the accused, that he had better tell the truth because "we have evidence that you were seen leaving your home with [the victim]," was held not to constitute such a threat. It is difficult completely to reconcile the two cases, for logically a statement that the police have "the evidence" against an accused is not substantially more or less threatening, nor its effect upon an accused substantially different from a statement indicating to the accused that the police have important incriminating evidence against him. The *Ferguson* case rightly allows an interrogating officer to exhort an accused to tell the truth by indicating to him what evidence the police have linking him to the crime, a usual technique of interrogation. The *Ross* case can be distinguished in that it involved an exhortation which indicated to the accused that the police had "the evidence" of an unspecified sort, presumably in an amount sufficient to convict the accused; whereas in *Ferguson* the statement specified one particular item of incriminating evidence, apparently not sufficient to convict. However, the quantity and specificity of the evidence alleged to the accused to be known by the police have little relation to the character of the exhortation as a

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1. 240 La. 593, 124 So.2d 558 (1960).
2. 212 La. 405, 31 So.2d 842 (1947).

threat. Indeed, an assertion that the police have an item of particularly incriminating evidence may be more threatening to the accused than a vague assertion that the police have "the evidence." After the *Ferguson* case, the authority of *State v. Ross* must be considered as seriously impaired.

B. Privilege Against Self-Incrimiation, Louisiana Constitution of 1921, Article I, Section 11 — Testimony Before Grand Jury

In another case, *State v. Smalling*,[3] the Louisiana Supreme Court affirmed the judgment of a trial court which quashed a bill of information charging the defendant with various counts of theft and public bribery on the ground that the information had been grounded in whole or in part upon evidence secured by a grand jury in violation of the defendant's constitutional privilege against self-incrimination. The relevant section of the Louisiana Constitution of 1921, Article I, Section 11, provides that "no person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution, except as otherwise provided in this Constitution." One exception is designated by Article XIX, Section 13, of the Constitution. By its terms "any person may be compelled to testify . . . *against any one* who may be charged with . . . the offense of bribery and shall not be permitted to withhold his testimony upon the ground that it may incriminate him . . . *but such testimony shall not afterwards be used against him.*" (Emphasis added.) This district attorney had argued that because the phrase in Article XIX, Section 13, "against anyone" refers to testimony against someone other than the witness himself, impliedly the immunity afforded by the Constitution applies in bribery cases *only* where the witness testifies "against another," and not when the witness testifies against himself. The court rejects this argument, holding that in bribery cases Article XIX, Section 13, does not by implication strip a witness of the immunity afforded by Article I, Section 11, where his testimony incriminates himself rather than someone else.

The defendant had testified before the grand jury on two occasions within a period of a month. On the day of his first appearance, and just prior to his testifying, he signed a waiver

3. 240 La. 887, 125 So.2d 399 (1960), (seven cases).

of his immunity, voluntarily consenting "to testify before the Grand Jury." His second appearance was not voluntary on his part but was in response to a subpoena. Since, the court said, there was no waiver of immunity with respect to his second appearance and since part of the evidence forming the basis of the information against him was secured during his second appearance, the bill was held to be a nullity, as having been secured in violation of defendant's privilege against self-incrimination. The court does not discuss the question of the duration of the initial waiver. Although not in its terms applicable only to his first appearance, the court impliedly holds it was inapplicable to his appearance at a later date despite the fact that the subject matter of the later inquiry remained the same.

C. Unconstitutional Statutory Vagueness

Two cases relate to the requisite specificity of definitions of criminal offenses. In one, *State v. Robertson*,[4] the court, with two Justices dissenting, held unconstitutionally vague R.S. 14:129 which made criminal the act of jury tampering, which it defined as "any influencing of, or attempt to influence, any petit juror in respect to his verdict," the court noting that influencing "embraces all possible modes of influence. . . . [a] newspaper article, a bribe, a gesture, a smile, a lifting of the eyebrows."[5] The specific charges in the indictment against the defendant, a deputy sheriff, included allegations that he had stated in the presence of petit jurors who were in his charge that a witness for the state in a criminal trial was not worthy of belief, that certain evidence introduced by the prosecution was not reliable, and that the jury's verdict would have little effect, because the trial judge had committed reversible error, and the Supreme Court would reverse the conviction in the event they found the accused guilty.

In the other, *State v. Roufa*,[6] the court, quoting with approval language in certain United States Supreme Court cases that "all that is required is that the language [of the criminal statute] conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and

4. 241 La. 249, 128 So.2d 646 (1961).
5. 128 So.2d at 649. Compare Texas & New Orleans R.R. v. Brotherhood of Railway and Steamship Clerks, 281 U.S. 548, 568 (1930).
6. 241 La. 474, 129 So.2d 743 (1961).

practices,"[7] went on to uphold, against a charge of unconstitutional vagueness, R.S. 14:106(2) which defines obscenity as the intentional "production, sale, exhibition, possession with intention to display, exhibit, or sell . . . any obscene, lewd, lascivious, filthy, or sexually indecent print, picture, motion picture, written composition, model, instrument, contrivance, or thing of whatsoever description." It is difficult to discern why, unlike obscenity which may be measured by common understanding of that term, jury tampering may not be so measured, or why the "influencing . . . any petit juror in respect to his verdict" is not a sufficiently definite warning to intending violators of the proscribed conduct. In any event the Supreme Court evidently thought it expeditious to pass upon the constitutionality of the tampering statute in a case where the indictment alleged conduct clearly within the statutory prohibition. The formidable task of redrafting the statute to characterize or enumerate species of jury tampering now falls to the legislature.

Other Cases

In several unrelated cases, various constitutional provisions were cited by the court, or invoked by litigants with varying success. In *Katz v. Singerman*,[8] which concerned a sectarian religious dispute, the court notes that the "no establishment of religion" clauses of the state and federal constitutions (Article I, Section 4, and the First Amendent respectively) buttress the reluctance of state tribunals "to monitor the internal affairs of religious bodies."[9] In another, *Randolph v. Village of Turkey Creek*,[10] owners of a cafe where beer containing less than three and two-tenths per cent alcohol by weight successfully urged the unconstitutionality, as ultra vires, of a municipal ordinance prohibiting the sale of such beer where a state statute[11] provides that such sale cannot be prohibited. In a third case, *Hays v. Hays*,[12] the constitutional attack failed. There ingenious counsel for a divorced husband who had been ordered by the court to pay alimony to his ex-wife, argued that since, under Louisiana law, a termination of a marriage by divorce dissolves the bonds of matrimony so that any alimony awarded

7. 129 So.2d at 747, quoting Roth v. United States, 354 U.S. 476, 491 (1957).
8. 241 La. 103, 127 So.2d 515 (1961).
9. 127 So.2d at 524.
10. 240 La. 996, 126 So.2d 341 (1961).
11. LA. R.S. 26:588 (1950).
12. 240 La. 708, 124 So.2d 917 (1960).

is a "gratuity in the nature of a pension," such an award is an unconstitutional taking of the husband's property without due process of law. The Supreme Court gave the contention shorter shrift perhaps than its ingenuity warranted by pointing out that alimony is, of course, an obligation imposed by a court under its authority to regulate and impose conditions upon divorces, and is, alas, in no sense an unconstitutional taking.