Michigan Law Review

Volume 47 | Issue 5

1949

CRIMINAL LAW-EVIDENCE-SILENCE TO ACCUSATION WHILE UNDER ARREST AS ADMISSION OF GUILT

Colvin A. Peterson, Jr.
University of Michigan Law School

CRIMINAL LAW—EVIDENCE—SILENCE TO ACCUSATION WHILE UNDER ARREST AS ADMISSION OF GUILT—Defendant was convicted of murder. Before the victim died, defendant, handcuffed and in custody of police, had been taken to the hospital room where the victim lay. Eight witnesses were present at the time, and each testified that the victim pointed out the defendant as her assailant. At the trial the witnesses were permitted to testify that when accused of the crime, defendant stood by silently, saying and doing nothing, although it also appeared that he had been told by the police chief to "keep your mouth shut." The prosecution capitalized upon defendant's silence as an admission of guilt. On appeal, *held*, reversed. Defendant, while under arrest, had no duty to speak or to deny the

accusation, and his silence could not be construed as an admission. *People v. Mleczko,* 298 N.Y. 153, 81 N.E. (2d) 65 (1948).

By the great weight of authority, inculpatory statements made in the presence of an accused and not denied by him are admissible against him as evidence of his acquiescence to the truth of the statement, as an exception to the hearsay rule, on the theory that it is contrary to the experiences of men to allow such statements to go unchallenged unless true.[1] Admitting the force of this rule, courts are very careful to restrict its application, because such evidence is not of great probative force. The statement must be made in the presence and hearing of the accused;[2] it must affect his rights;[3] it must be understood by him[4] and call for a reply.[5] Also, the accused must have an opportunity to speak freely.[6] Especially wide is the divergence of judicial opinion as to whether the accused remains "free" to speak when under arrest at the time the statement is made. Some courts say that the fact of arrest alone affects the weight rather than the competency of the evidence, and is merely one of the circumstances to be considered in determining whether the accused was free to speak.[7] Other courts, as in the principal case, hold that arrest places the accused under such restraint that he cannot be called upon to speak.[8] The foundation for this view comes from an early Massachusetts decision[9] which has been so enlarged upon that it renders the accused's silence when accused while under arrest inadmissible in all cases.[10] Although New York now seems committed to the Massachusetts rule, much authority can be found for the other view in that state.[11] One could scarcely deny that the present defendant was under restraint; under such circumstance, it would seem that virtually all courts would hold the evidence inadmissible, or of little weight. However, the desirability of the broad rule of the instant case is questionable. That arrest may place such

[1] 2 WHARTON, CRIMINAL EVIDENCE, §656 (1935); 22 C.J.S., Criminal Law, §734.

[2] Myers v. State, 192 Ind. 592, 137 N.E. 547 (1922).

[3] McNutt v. State, 163 Ark. 444, 260 S.W. 393 (1924).

[4] People v. Lewis, 238 N.Y. 1, 143 N.E. 771 (1924).

[5] Bob v. State, 32 Ala. 560 (1858).

[6] "A party's acquiescence, to have the effect of an admission, must exhibit some act of voluntary demeanor or conduct." People v. Koerner, 154 N.Y. 355 at 374, 48 N.E. 730 (1897).

[7] Skidmore v. State, 59 Nev. 320, 92 P. (2d) 79 (1939); 80 A.L.R. 1259 (1932); 22 C.J.S., Criminal Law, §734 at 1264.

[8] State v. Redwine, 23 Wash. (2d) 467, 161 P. (2d) 205 (1945); 80 A.L.R. 1262 (1932); 22 C.J.S., Criminal Law, §734 at 1263.

[9] Commonwealth v. Kenny, 53 Mass. 235, 46 Am. Dec. 672 (1847).

[10] Courts holding otherwise insist that later Massachusetts cases have misconstrued the Kenny case, as other circumstances besides arrest were present to prevent a reply by the accused. See 2 WHARTON, CRIMINAL EVIDENCE, §661 at p. 1103 (1935) and cases cited therein.

[11] "It is no objection to the admission of the declarations of the accused, as evidence, that they are made while he is under arrest, and his admission, either express or implied, of the truth of a statement made by others under the same circumstances is equally admissible," Kelley v. People, 55 N.Y. 565 at 572, 14 Am. Rep. 342 (1874); followed in People v. Cascia, 191 App. Div. (N.Y.) 376, 181 N.Y.S. 855 (1920); disapproved in People v. Rutigliano, 261 N.Y. 103, 184 N.E. 689 (1933).

restraint on the accused as to deny him the opportunity to speak freely should not be denied by any court; that fear,[12] pain,[13] advice of counsel,[14] admonition,[15] and other circumstances may likewise restrain the accused is also recognized. Yet under the latter circumstances each case has been made to depend upon its own facts. It is submitted that each case of arrest should also be decided upon its own facts. The rule that arrest automatically excludes evidence of accused's acquiescence to an accusation robs the law of flexibility without any appreciable gain to the accused. If the maxim *qui tacet consentire videtur* has validity, there is little logic in the rule of the principal case, which is, in effect, that arrest will always restrain the accused from speaking freely. Under the experiences of the past such a view is scarcely justified.[16]

Colvin A. Peterson, Jr.

[12] Merriweather v. Commonwealth, 118 Ky. 870, 82 S.W. 592 (1904).

[13] Cook v. People, 56 Colo. 477, 138 P. 756 (1914).

[14] People v. Conrow, 200 N.Y. 356, 93 N.E. 943 (1911); People v. Blumenfeld, 330 Ill. 474, 161 N.E. 857 (1928).

[15] People v. Kessler, 13 Utah 69, 44 P. 97 (1896).

[16] For example, see Murphy v. State, 36 Ohio St. 628 (1881) (one defendant volunteered information in the presence of an officer against a co-defendant also present). See also Commonwealth v. Merrick, 255 Mass. 510, 152 N.E. 377 (1926); and cases annotated in 22 C.J.S., Criminal Law, §732 at 1253.