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INQUISITORIAL CONFESSIONS

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Public prosecutors have recently been sharply reminded by the Court of Appeals that excessive zeal in obtaining evidence against persons accused of the crime of murder in the first degree may, although the evidence is legal in form, react in favor of the defendant.' In *People v. Sarzano, 212 N. Y. 231,* the question arose whether a statement made by the declarant on the day he was shot, two months before his death, as to the circumstances of a homicidal assault upon him was admissible as a dying declaration against the defendant on his trial for murder in the first degree. The statement was taken by a county medical examiner discharging the duties of a coroner, at the hospital, upon a blank form used for the purpose, on which was printed the recital that the declarant made the statement under the influence of an impression that he was about to die and that he was without hope of recovery. The statement was read over to the declarant and he said it was true but, outside the statement itself, there was nothing to indicate that declarant believed that his death was certain and imminent, although he had been shot and was in the hospital. The stereotyped recital of fear of death in the language of the printed form was held insufficient evidence that the statement was in fact a "dying declaration." The Court said: "It would be extending the rule beyond the decision in any case we have read or found, and we think beyond safety, to approve the reception in evidence of the statement." In *People v. Buffom, 214 N. Y. 53,* the Court of Appeals, while not denying the admissibility of the evidence, refused to sanction, i.e., to approve as a commendable thing, the use of deception practiced by private detectives employed by the District Attorney to obtain a statement from a person suspected of murder. In neither case was the judgment of conviction reversed because of the admission of the questionable evidence. In the *Sarzano* case the guilt of defendant was fully proved without the declaration; in the *Buffom* case the evidence of the confession was held to be competent and a reversal was based on other grounds, but the warning to District Attorneys and to courts is plain and significant.

Confessions obtained by fraud and deception taint the people's case with suspicion. When they are received in evidence "it be-

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comes extremely important to protect the defendant against any judicial error which may have led the jury to attribute truth to the statements therein contained while otherwise they might have entertained doubts as to those matters." Willard Bartlett, C. J., in *Buffom* case, *supra*. But confessions are not, as a rule, obtained by detectives without the use of fraud and deception and the condemnation seems to extend to all efforts to entrap the defendant into telling the truth. Does not this same condemnation extend to persistent efforts to coax or tire the defendant into telling the truth? Statements obtained by a long course of questions addressed to the accused by public officials while he is illegally in custody have not been considered by the Court of Appeals in any reported case where a conviction could not be sustained without such evidence, but their value or their legality, in the light of the two cases heretofore cited, seems doubtful.

At common law confessions were not admitted, if they were induced by threats or promises. It was held in some of the cases that a confession by one accused of a crime made in response to an exhortation to tell the truth was inadmissible as implying a benefit to the accused if he confessed. *People v. Phillips, 42 N. Y. 200.* The narrowness of this rule led to a statutory change in New York as to the nature of the promises which should exclude a confession, and New York Code Criminal Procedure, section 395, provides: "The confession of a defendant, whether in the course of judical proceedings or to a private person, can be given in evidence against him, *unless made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor,* but it is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed." Confessions obtained by promises of benefit to the person accused are, therefore, admissible unless the promise comes from the District Attorney not to prosecute therefor; but what are "confessions" within the meaning of the section quoted?

That voluntary statements made to public officers, such as sheriffs and police officers, having the defendant in custody, even in illegal custody, and to district attorneys, are admissible as confessions is thoroughly established. *People v. Rogers, 192 N. Y. 331, at p. 350; Balbo v. People, 80 N. Y. 484.* That statements made on examinations under oath before a magistrate or coroner of a person accused of crime, are not confessions is also decided. *People v. Mondon, 103 N. Y. 211.*

But much of the law of confessions remains in a state of confusion. In a very recent case one judge, following the lead of Professor Wigmore's note on New York cases, Wigmore on Evidence, § 852, holds that New York decisions are "far from being harmonious," while another judge in the same case says that he is "unable to discern any conflict in the decisions of this Court relating to the question." *People v. Ferola, 215 N. Y. 285.* Must the statement of a prisoner, in order to be admissible as a confession, be made at his own suggestion, election or request now aided possibly by the suggestion or promise of some benefit to him other than the stipulation of the District Attorney not to prosecute, or may it be elicited by persistent questioning by public officials while the accused is held illegally in custody? Must it, as Judge Selden held before the passage of the code, in the case of *People v. McMahon, 15 N. Y. 384,* proceed "from the spontaneous suggestion of the party's own mind free from the influence of any extraneous disturbing cause," other than the suggestion of benefit which the code now permits; or may it be obtained by the tiresome reiteration of solicitation, interrogation and accusation by public officials, without threats, without putting in fear, without offering immunity from prosecution, from a defendant illegally held in custody without arraignment and without the advice of counsel?

Public officials are charged with the duty of giving the defendant, after arrest, the benefit of an immediate and legal arraignment. "The defendant must in all cases be taken before the magistrate without unnecessary delay." Code Crim. Pro., sec. 165. "When the defendant is brought before a magistrate * * * the magistrate must immediately inform him * * * of his right to the aid of counsel * * * before further proceedings are had." Ib., sec. 188. "He must also allow the defendant a reasonable time to send for counsel and adjourn the examination for that purpose." Ib., sec. 189. But a voluntary confession made while defendant is held illegally before arraignment, is, as we have seen (*Balbo v. People, supra*) admissible. The prisoner may be, and probably not infrequently is, imprisoned illegally, his right of arraignment denied him, his right to send for and advise with counsel concealed from him. He is then interrogated and cross-interrogated, accused, coaxed, promised favors until, without threats, other than the implied threat to continue the inquisition, but without being in fear, but rather hoping to obtain rest if no other advantage, he gives the desired narrative.

Is a statement thus obtained a confession? Doubtless on all the evidence, the question of its spontaneous nature as well as the ques-

tion whether it is true, and the question whether it was obtained under the influence of fear produced by threats, will be submitted to the jury under proper directions and doubtless the verdict of the jury may thus become final, unless the mere use of a statement thus obtained is held to be reversible error. But let us assume a case where the signed confession is in form voluntary with proper preliminary recitals that declarant is making it of his own volition and upon his own initiative, without fear induced by threats, yet it appears that it was made while he was illegally in jail, before arraignment, after repeated denials of guilt and then in response to questionings and accusations by persons in the apparent exercise of official authority, begun before breakfast and continued late into the night without giving the defendant food or rest, and that no other evidence of defendant's guilt exists. The statement has all the indicia of a valid confession. Its style breathes of willing self-accusation; although the language may be the polished diction of the District Attorney and not the simple or uncouth phrases of illiteracy. The recitals of voluntariness are there and voluntariness is the test.

It appears from the statement itself that the prisoner was first asked if he desired to make a statement and informed that he was under no obligation to make one or to answer questions put to him and that, if he did so, his answers might be used against him. Yet it is plain that he was so constantly questioned that he felt that he must answer, that he must make some explanation, not because he was threatened or because he was afraid, but because he hoped to end the inquisition. To call a statement thus obtained a confession, a voluntary admission of guilt, is contrary to the spirit of our criminal procedure, and, whether the statement be true or false, our sense of justice revolts at a conviction based on a finding by the jury that such a statement is voluntary, *in the absence of other evidence of defendant's guilt or other evidence of the truth of his statement.*

We may expect the court to review, where such statements are admitted by the trial court, to require, as in the *Sarzano* case, the evidence to be clear and convincing, *dehors* the statement itself, that the confession was voluntary and, as in the *Buffom* case, to search the record for judicial error which may lead the jury to attribute truth to statements thus obtained. But may not the reception in evidence of such a statement be held prejudicial and reversible error in any doubtful case? Or, if this cannot be consistently held, should not the legislature provide that any statement obtained from one illegally in custody in answer to questionings by those in authority shall not be sufficient to convict the declarant without corroboration?

That the jury is the best judge of the weight to be given to all statements by the accused and that the ultimate question should be whether the statement is true, not whether it was improperly obtained, has been urged by some as the correct principle, but criminal justice in this state has not developed such a policy, even where the body of the offense of murder is clearly established and the only question is the guilt of the accused, and there is a moral certainty of guilt. How much of this tendency to shield the defendant from his own statements is due to an unconscious misapplication of the constitutional mandate that "no person shall be compelled in any criminal case to be a witness against himself," how much to a reluctance to inflict capital punishment, and how much to a general inclination to favor the unfortunate and to protect the prisoner from mental torture by public officials, cannot be determined, but the conclusion is imperative that our courts will look behind the forms of evidence to be sure that the substantial rights of the defendant are protected.