[BOURKE C.J. AND ZEKIA J.]

REGINA

v.

GEORGHIOS SFONGARAS.

(*Criminal Appeal No. 2093*).

Evidence in criminal cases—Confession by person in custody—Onus that confession is voluntary—Factors in considering whether confession is voluntary—Examination of circumstances—Weight and value of confession—Common sense tests of truth of confession.

After the appellant had been in custody for 12 days he made a confession, after caution, to a Police Sergeant of the C.I.D. who had not seen the appellant before recording his confession. As soon as the confession was read over to the appellant by the Sergeant, the appellant retracted it and said that it was untrue and that he had suffered a lot from ill-treatment during interrogation, and that he made the statement in order to save himself from further ill-treatment.

No evidence was called by the prosecution to contradict the accused and his witnesses on the question of ill-treatment, and the trial Judge found that " no undue threat or force " had been used in obtaining the confession, and he admitted it as voluntary.

Held : (1) that the onus lay upon the prosecution, and the trial Judge had to be satisfied that the confession was a voluntary one, and not that it was involuntary. It was not, therefore, necessary that the Judge should have been convinced that the allegations of violence were true ; if he had a doubt the Crown had not discharged the onus cast upon it.

Ibrahim v. *R.* (1914) A.C. 599, at p. 609 applied.

(2) That it was the duty of all Courts which were called upon to consider whether a confession was free and voluntary to take into consideration, *inter alia,* (*a*) how long had the person making the statement been kept in police custody, and (*b*) to what extent was he subjected to questioning.

Houssein Kizil v. *R.* (1953) 19 C.L.R. 162, and observations of Cave J. in *R.* v. *Thompson* (1893) 2 Q.B. 12, at p. 18, referred to.

(3) That, having regard to the circumstances of the case, the trial Judge had misdirected himself ; that the confession of the accused had not been satisfactorily proved to have been free and voluntary, and that, therefore, it ought not to have been admitted.

(4) That, regardless of the admissibility of the confession, there was nothing to show that the trial Judge had considered the circumstances bearing upon the all-important question as to what value and weight should be accorded to the confession and whether it could safely be acted upon as being true.

Common sense tests of the truth of a confession approved in *R.* v. *Sykes* (1913) 8 Cr. App. R., 233, at p. 236, referred to.

Conviction quashed.

Cases referred to :

(1) *Ibrahim* v. *R.* (1914) A.C. 599.
(2) *Houssein Kizil* v. *R.* (1953) 19 C.L.R. 162.
(3) *R.* v. *Thompson* (1893) 2 Q.B. 12.
(4) *R.* v. *Sykes* (1913) 8 Cr. App. R. 233.

Appeal against conviction.

The appellant was convicted at the Special Court in Nicosia (Case No. 1171/57) on the 17th April, 1957,of the offence of depositing a bomb with intention to cause damage to property, contrary to Regulation 52A (*a*) of the Emergency Powers (Public Safety and Order) Regulations, 1955 to (No. 3) 1957, and was sentenced by John J. to ten years' imprisonment.

M. Triantafyllides with *D. Demetriades* for the appellant.

Goodbody for the Crown.

The facts sufficiently appear in the judgment of the Court which was delivered by :

BOURKE C.J. : The appellant was convicted of the offence of depositing a bomb with intention to cause damage to property contrary to Regulation 52A (*a*) of the Emergency Powers (Public Safety and Order) Regulations, 1955 to (No. 3) 1957, and was sentenced to ten years' imprisonment. The bomb was placed in the salt store of the Customs House at Kyrenia and exploded on the 7th August, 1956, causing damage amounting to £200. The appellant was employed at the Customs House as a guard and from the 1st to the 15th August he was on duty with another guard from 6 p.m. to midnight. The two keys to the doors of the main building were kept in the sentry box after the offices were closed at 4 p.m. The guards on duty could gain access to the building by obtaining the keys from their sentry box and access to the salt store by taking the key from the office of the Customs Officer in charge. The explosion occurred at about 7.40 p.m. and the scene was examined at 9 p.m. It was ascertained that the bomb had been placed on a girder over the salt in the store and it had been detonated by means of a time pencil of a type allowing a time lapse variation of from 10 minutes to 20 hours. The witness Ali Djemal, who was the officer in charge of the Customs House, said in evidence that after the explosion he had learned of the spot where the bomb had been placed and that this had also become common knowledge among the staff of the Customs : in evidence the appellant said that he had heard of where the bomb had been placed from his superior Mr. Djemal. It appears that the appellant sought to resign at some time prior to

the date of the explosion but was persuaded to continue in his employment; he did, however, resign on the 30th November giving the explanation that he was taking another job. There was no evidence as to when precisely the appellant or his fellow guard came on duty on the 7th August or that the appellant was seen to take the keys from the sentry box, or indeed anything as to his movements on the day and evening in question. The sole evidence in the case against the appellant consists of his statements and evidence as to opportunity.

The appellant on his own evidence was arrested on the 16th February, 1957, at his house in the early hours of the morning and was taken to Kyrenia Castle, where he was kept in custody until on the 28th February he made a brief oral statement to Inspector Reynolds followed by a confession to Police Sergeant Karayias of the C.I.D. No evidence was led by the prosecution as to the circumstances of the appellant's arrest or as to who effected the arrest; the only evidence as to his arrest is to be found in the testimony of the appellant himself. Nor was any evidence offered to show that he was in legal custody during the period of his detention, though presumably, in the absence of any suggestion to the contrary, the provisions of Regulation 3 of the Emergency Powers (Public Safety and Order) Regulations, 1955, were acted upon. The trial Court accepted, and it is not now in dispute, that the appellant was detained for interrogation. No witness was called by the prosecution to say who questioned the appellant or interviewed him at any time in the Castle until on the 28th February he was brought before Inspector Reynolds. The latter was in charge of the C.I.D. at Kyrenia; he questioned the appellant and asked him if he would make a statement whereupon the appellant after caution made a confession to Police Sergeant Karayias. The appellant was brought to Inspector Reynolds by P.C. Mentesh, against whom serious allegations of ill-treatment have been made, but he was not called as a witness. Inspector Reynolds testified that he was in charge of the investigation into the bomb outrage but he had found nothing to justify the detention of any Customs employee. He knew that the appellant had been arrested on the 16th February but knew nothing else about him until on information received he interviewed him on the 28th February. Police Sergeant Karayias said in evidence that he had not seen the appellant before recording his confession on the 28th February. Apart from the evidence of the appellant himself and his five witnesses, who were persons also being kept in custody at the Castle, there is nothing to disclose what was done with the appellant during the 12 days he was kept in custody up to the time he was heard to confess to the crime. At the committal proceedings it was made very clear that objection was being taken to the statement as evidence

on the ground that it was not of a voluntary character but was the result of ill-treatment. In view of the law that the onus is always upon the prosecution to prove affirmatively beyond reasonable doubt that a confession is voluntary, it is strange that not a single witness was called to testify either to the arrest of the appellant or as to what was done with him during the period he was in custody in Kyrenia Castle ; and particularly is this so when it appears from the deposition of Sergeant Karayias taken before the committing Justice, which we have taken the course of perusing, that the appellant said, as soon as the confession was read over to him by Karayias, that it was untrue and that he had suffered a lot from ill-treatment during interrogation and that was why he made the statement. It was not a case of the prosecution being taken by surprise.

Inspector Reynolds said in evidence that on the 28th February the appellant was brought to him by P.C. Mentesh. Detective Sergeant Jordan was also present. The witness asked the appellant two questions and after reply administered a caution. The appellant said, " I put it on the iron by the salt." He was then asked if he would make a statement and he agreed to do so. He was left with Police Sergeant Karayias, who cautioned him and recorded his statement which amounts to a confession. Thereafter on the same day he was formally charged and cautioned and he replied " Whatever I have to say, I will say it in Court ". He was brought before the Court on the 2nd March for remand where he complained of ill-treatment. As a result he was examined by Capt. Tibbetts of the R.A.M.C. whose evidence, through the production of his deposition owing to his absence from the Colony, was that the appellant made certain complaints to him. His complaint was that he had been kicked in the buttock 14 days before. Examination disclosed an area of bruising of about 3″ in diameter consistent with such a kicking.

The evidence of Police Sergeant Karayias in cross-examination is worth quoting in full :—

" Q. The first statement ended at 4 minutes to 4, and the formal charge commenced at 4.20—a quarter of an hour later on the same day ?

A. Yes.

Q. Did you have instructions to formally charge him after he made a statement ?

A. I had a list and I charged all of them.

Q. So on that day you had in your possession a list of the charges to be preferred against all the persons in the Castle, and after he made the statement you charged him accordingly ?

A. Yes.

Q. You had received information before and in that list you obtained, this man was to be charged with depositing a bomb at the Customs House ?

A. Yes.

Q. This accused made a complaint to you that he had been severely ill-treated at the time when you were obtaining his statement. He made a complaint to you that he was severely ill-treated ?

A. He complained to me that he was ill-treated during his detention in the Castle. He was interrogated and during the interrogation he had been ill-treated.

Q. He made this complaint after you had cautioned him and before he made a statement ?

A. He made a statement and immediately afterwards he told me that he had been ill-treated.

Q. Actually he told you to use the words—I have suffered whilst I was interrogated about the bomb which was deposited in the Customs House and that is why I made a statement.

A. He complained to me that he was ill-treated, beaten severely in order to say who had placed the bomb at the Customs House, and whether it was him.

Q. And he told you : " That is why I made a statement " ?

A. He said I made that statement in order to save myself.

Q. Did he look frightened ?

A. He was frightened but not excited.

Q. He told you that this statement he has made was not true ?

A. I do not remember.

Q. You gave evidence before the Magistrate on the 1st April, and there you have a deposition etc., and he said what is said in Exh. 4 was not true ?

A. That is correct.

Q. And he also told you at the time not to mention this complaint to anybody because he was afraid that he might suffer more ?

A. Yes.

Q. You know a certain P.C. Mentesh at the time he was attached to the Special Branch ?

A. Yes ".

The list spoken of by the witness containing a charge to be made against the appellant in respect of the bomb

outrage at the Customs House may of course only have been a list of suspects in connection with certain incidents, and may not be open to the sinister construction given to it by the appellant's advocate that the appellant had previously been driven to confess, was therefore on the list to be charged with the offence, and his production on the 28th February before Police Officers who had hitherto had nothing to do with him was to introduce an appearance of regularity. But it does clearly emerge that the appellant as soon as he had made the confession to Karayias complained of ill-treatment saying that he made the statement to save himself from further violence and retracting it as untrue. If ever there was a case calling for the exercise of extreme caution one would think that this was it.

The learned trial Judge overlooked or misinterpreted the effect of the evidence of Sergeant Karayias when he found in the judgment that the appellant on the 2nd March before the Court "complained for the first time officially of his ill-treatment". In evidence the appellant and his witnesses went into considerable detail as to the treatment he suffered while in custody. The Judge arrived at the conclusion—"that no undue threat or force was used in obtaining these statements and therefore the accused was not induced by them to make the statements because I do not believe the evidence of the accused or his witnesses". The confession was therefore admitted as voluntary and was acted upon as a truthful account of the facts.

Now because we are bound by the findings of fact we will omit all reference to allegations of ill-treatment which were disbelieved. But it is apparent that the learned Judge did not disbelieve all the allegations that were made. In the passage from the judgment just quoted he speaks of "no undue threat or force" being used. The appellant complained in evidence that on arrest at his house about 3 a.m. he was taken to Kyrenia Castle and was pushed out of the car. A sack was put over his head and he was forced to run by being hit with the butt of a gun; he could not do so very well and fell down two or three times. When ruling upon the admissibility of the confession the Judge accepted it that the appellant had his head covered with a sack. In the course of the judgment he found that—"The covering of the heads was only carried on for the first few days after arrest" (which were the days it was alleged the serious ill-treatment took place); and that—"The whole story of ill-treatment was obviously an invention to meet an eventuality such as this, and based on the actual amount of rough handling one expects to find when suspected terrorists are arrested, and in this case sacks thrown over their heads to prevent recognition of each other when being detained for questioning in the Castle". Again to quote from the judgment—"They

(appellant's witnesses) could not possibly recognise his (appellant's) face as each time he was seen during the crucial period he had a sack over his head. But why he had that sack over his head, or they had it over theirs, when out of their tents, they cannot say except to prevent their seeing who was beating them".

There is no evidence that a sack was put over the appellant's head with the object of preventing him being recognised by other persons kept in custody and his own evidence was that at one stage he was forced to keep it on while he was alone in his tent. Nor is there any evidence that the appellant when arrested offered any resistance or behaved in any way in such a manner as to justify the amount of rough handling that the Judge appears to accept occurred and to think that it is normal to expect when a person is arrested on suspicion of being concerned in some terrorist activity.

The onus lay upon the prosecution (*Ibrahim* v. *R.* (1914) A.C. 599, 609) and the learned Judge had to be satisfied that the confession was a voluntary one, and not that it was involuntary. The same considerations apply to the oral statement made to Inspector Reynolds. It was not, therefore, necessary that he should have been convinced that the allegations of violence were true. If he had a doubt the Crown had not discharged the onus upon it. But though he rejected the uncontradicted evidence going to the more serious allegations of ill-treatment, the learned Judge has accepted that the appellant was kept in custody for questioning over a period of 12 days and, it seems, that there was some physical interference with him when he was arrested which is described as "rough handling"; in the course of the judgment the learned Judge refers to the evidence of the appellant as to how he was treated when brought to the Castle on arrest; there was no other evidence of "rough handling" around the time of the arrest. It was also accepted that at any rate over the early stages of his detention he was forced to endure the discomfiture, to say no more about it, of wearing a sack over his head. In our opinion had the learned Judge fully and properly directed himself and given sufficient consideration to all the circumstances leading up to the making of the confession and had also asked himself whether the statement was obtained in a manner contrary to the letter or spirit of the Judges' Rules, he would not have reached a finding that the confession was of a voluntary character and would at the least have had a reasonable doubt about it. It is the duty of all Courts which are called upon to consider whether a confession was free and voluntary to take into consideration, among other things, these two factors: How long had the person making the statement been kept in police custody and to what extent was he

subjected to questioning. As was said by this Court in *Houssein Kizil* v. *R.*, 19 C.L.R. 162,—" We would like to invite the attention of all trial Courts in the Colony to these confessions by accused persons after being in custody for a considerable time. We would urge the greatest caution in receiving that evidence and the greatest caution in weighing it ". And it may not be out of place to quote once again the well-known words of Cave J. in *R.* v. *Thompson* (1893) 2 Q.B. 12, at p. 18—" I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession;—a desire which vanishes as soon as he appears in a court of justice ".

Quite apart from the question as to whether it was *satisfactorily established that the confession was voluntary*, it does not appear from the judgment of the lower Court that there was any examination of the confession and circumstances with a view to ascertaining its weight and value and whether it could be relied upon as a statement of the truth. At the very moment it was made the appellant, as has been noticed, retracted it and said it was untrue and made in order to save himself from further ill-treatment. Police Sergeant Karayias did not record this and one cannot help wondering whether, though presumably a responsible Police Officer, he acceded to the appellant's request not to report what he, the appellant, had said lest he " might suffer more ".

Nowhere in the judgment is there anything to indicate that consideration was given to the fact that the confession was immediately retracted when made to Sergeant Karayias and again under oath when the appellant testified in the box. Useful common sense tests of the truth of a confession have been approved in *R.* v. *Sykes*, 8 Cr. App. Rs. 233, 236—" . . . . the first question you ask when you *are examining the confession of a man is, is there anything* outside it to show that it was true ? is it corroborated ? are the statements made in it of fact so far as we can test them true ? was the prisoner a man who had the opportunity of committing the (offence) ? is his confession possible ? *is it consistent with other facts which have been ascertained* and which have been, as in this case, proved before us " ? When a confession is retracted as being untrue the need for caution becomes all the greater. In the present case when he came to sum up the evidence the learned Judge

referred to the incident of the explosion, to the oral statement to Inspector Reynolds, to the evidence of opportunity, and concludes—" Finally there is the signed statement of the accused which was admitted as voluntary ". The judgment then concludes with the finding of guilt. There is nothing to show that the learned Judge considered the circumstances bearing upon the all-important question as to what value and weight should be accorded to the confession and whether it could safely be acted upon as being true.

We are of opinion that this conviction cannot be allowed to stand. The appeal is allowed, the conviction quashed and sentence set aside.

Conviction quashed.