KANGACHEPE MBAO ZONDO AND OTHERS v THE QUEEN (1963 - 1964) Z and NRLR 97 (CA)

1963 - 1964 Z and NRLR p97

COURT OF APPEAL

[Before the Honourable the Chief Justice, SIR DIARMAID CONROY, the Honourable Mr. Justice BLAGDEN and the Honourable Mr. Justice CHARLES on the 8th, 9th and 21st July, 1964.]

Flynote

Voluntary statements of accused persons - proof that such statements were not induced by threats or promises - effect of the Judges' Rules.

Headnote

The appellants were sentenced to death by the High Court. The main ground of appeal was that there had been a breach of the Judges' Rules in the obtaining of statements from the accused and the statements should accordingly not have been admitted in evidence.

Held:

(a) The Judges' Rules are administrative directions enforced by the police authorities as tending to the fair administration of justice.

(b) In deciding whether a statement made by an accused person to the police is admissible, the test which a court must apply is not whether the Judges' Rules have been infringed, but whether the prosecution has affirmatively established that the statement was made freely and voluntarily.

(c) In this case the statements were properly admitted (in one case, Charles, J, dissenting). Appeals dismissed.

Cases cited:

(1) *Mandavu v R* 1962 R & N 298.

(2) *Mbcpeleghe v R* 1960 R & N 508.

(3) *R v Wattam* 36 Cr. App. R 72.

(4) *R v Joyce* 42 Cr. App. R 19; [1957] 3 All ER 623.

(5) *R v Bass* 37 Cr. App. R 51; [1953] 1 All ER 1064.

(6) *R v Smith* [1961] 3 All ER 972.

(7) *Bene v R* 1963 R & N 896.

(8) *R v Ananias* 1963 R & N 938.

(9) *R v Baldry* (1852) 2 Den. 430.

(10) *R v Thompson* [1893] 2 QB 12.

(11) *Ibrahim v The King* [1914] AC 599.

(12) *Sparks v R* [1964] 1 All ER 727.

(13) *R v Johnston* [1864] Ir. CLR 60.

(14) *McDermott v The King* (1948) 76 CLR 501.

(15) *R v Lloyd* (1834) 6 C & P 393.

(16) *R v Green* (1834) 6 C & P 655.

(17) *R v Joyce* [1957] 3 All ER 623.

(18) *The King v Lee* (1950) 34 ALJ 223.

(19) *Chalmers v H.M. Advocate* (1954 SLT (Notes) 26).

J J O'Grady, Crown Counsel for the Crown

C J W Fleming for the appellants

Judgment

Conroy CJ: The four appellants were sentenced to death for murder by the High Court, sitting at Fort Jameson, on 23rd March, 1964. They now appeal against that conviction. The offence of which they were convicted was that on 6th January, 1964, they murdered Jailos Malausi. There is no shadow of doubt that Jailos Malausi was murdered; the only question at the trial was whether the Crown could establish that it was some or all of the appellants who had murdered him. (*The learned Chief Justice then recited the facts and continued* -)

The degree of incrimination varied with the statements. The first appellant made three statements, the first a complete confession on 17th January; the second, on arrest on 18th January, an admission that he had been present in the village, but alleging that he only took part in the attack from fear of a party leader; the third when formally charged on 22nd January, an alibi that he had not been in the village when the crime was committed, but had been at his gardens with his wife. The second appellant also made three statements: the first on 18th January before his arrest, when he said he took part in the attack on the two villages and the house - burning; the second (after his arrest) when he said he took no part in the killing, but described - obviously as an eye - witness - how others did it; and the third, on 20th January, when he was formally charged, in which he said he was at a tobacco farm a long way away and had no part in the affair. The third and fourth appellants made statements exculpating themselves and setting up alibis.

The first ground of appeal argued on behalf of the first appellant was that the trial judge erred in failing to consider whether he should exercise his discretion to exclude the confession made by the first appellant. When the Crown sought to put this statement in at the trial, Mr. Fleming, the defence counsel, objected to the production of this statement on the ground that it was not voluntary. A trial within a trial was then held.

The Crown called Detective Sub - Inspector Kalenje, who gave evidence that he took the statement from the first appellant, and that it was voluntary, no encouragement being given to the appellant. He was cross - examined and it was put to him that he had made up the statement himself, and that it was not made by the appellant. This he denied. The Crown also called Detective Inspector Witherspoon, who was the officer in charge of the investigations. He gave evidence that he took a team of policemen out to investigate the murder, and set up a police camp about seven hundred yards to the north - west of Kaziwake Village. In the course of his investigations he wished to question the first appellant and a man called Fenias. He did not wish to alarm the villagers and therefore asked these two men to come to the camp to sell mealies to the police party. They brought mealies and the police (who needed them as

provisions) purchased them from the two men. They arrived in the camp on 14th January and were questioned that day. They slept that night in two or three empty houses on the outskirts of the village, with the African detective staff. Mr. Witherspoon said that neither man was under any compulsion to stay, and each was told of this. He gave instructions that they were not to be questioned at their sleeping quarters. The questioning continued throughout 15th January, with breaks for meals, and about 7 p.m. the first appellant said he would like to make a statement the next day. In fact, a statement was not taken from him either that night or the next day, even though he was questioned further. About noon the party broke camp and went into Fort Jameson. Mr. Witherspoon said he did not take a statement on the 16th, as up to then the first appellant had been saying things which did not tie in with evidence given by other witnesses, and Mr. Witherspoon considered there was no point in taking a statement which was irrelevant.

When the police broke camp and moved to Fort Jameson, the first appellant was asked whether he would accompany the party, and gave Mr. Witherspoon permission to bring him in to Fort Jameson police station. Mr. Witherspoon said that he was free to leave the police station when he wished, and that he appeared to know this quite well. At about 4.15 p.m. on 17th January, the first appellant made a warned and cautioned statement, which was taken down by Detective Sub - Inspector Kalenje, and took just on three hours to record and read back to the appellant.

Only one matter was put to Mr. Witherspoon in cross - examination. This was that, in order to make him confess, the first appellant was physically assaulted by being struck, tied up with rope and stretched out, swung from side to side, and made to do press - ups for a considerable period.

The first appellant gave evidence at the trial within a trial, and said that during the night when he slept with three detectives in a hut, he was handcuffed by his wrist to the wall of the house, his

foot was handcuffed to a post and he was swung round. The next morning he was made to do press - ups. He also told a story which had not been foreshadowed in cross - examination and which he, presumably, had not previously told to his counsel. He alleged that on 14th January, on arrival at the camp Mr. Witherspoon questioned him and when the first appellant said he knew nothing of what happened in the village, he (together with three detectives) began to beat him. They started to beat him about 11 a.m. and beat him all through the day and all throughout the night. The next morning they started beating him again and said they would not stop beating him until he confessed. He said he was given no food except what his relatives brought to him. He then denied that he had made any statement, but was forced by Mr. Witherspoon to thumb - print a plain piece of paper with no writing on it - the implication being that the police subsequently wrote the confession on this blank piece of paper.

The trial judge decided that no credence could be given to the story told by the appellant that he had never made a statement and that he had been forced to thumb - print a blank piece of paper which had subsequently had written on it a confession by the police. He decided that Mr. Witherspoon and Mr. Kalenje were witnesses of credibility. Having read

the record I can find no reason why this appellate court should substitute any other finding on this matter different from that reached by the learned judge.

In front of us Mr. Fleming raised an entirely new point. He argued that as the appellant was in custody it was wrong for the police to question him for four days and to extract the confession from him. As this was in breach of rule 3 of the Judges' Rules, Mr. Fleming contended that the judge had a discretion to exclude the statement, even though it was otherwise admissible. The learned judge had never considered this aspect and therefore had not dealt with the matter properly.

A further point raised, albeit indirectly, in Mr. Fleming's argument was that he contended that the confession had been extracted from the appellant by his being " continuously badgered until he confessed ". He therefore made the confession in order to avoid further questioning.

Mr. Fleming argued that although one accepted that the appellant had been told by the police that he was free to go at any time, this was but a formal intimation, without any practical effect, because one knew that simple and unsophisticated villagers would be so overawed by the presence of police officers, that they would not dare object. I must confess that this argument would have carried more weight with me some years ago. Experience of cases recently from the Eastern Province leads me to believe that the argument no longer possesses much, if any, cogency. The inhabitants of the Eastern Province, particularly those who are connected with politics, are very independent - minded and are in no mood to be overawed by authority. Indeed, many of the cases coming from that province could lead one to accept the converse of Mr. Fleming's argument, and to believe that the normal reaction there to authority is now one of opposition.

It is trite law that when the Crown seeks to put in a confession the burden rests on the Crown to establish, beyond a reasonable doubt, that the confession was made freely and voluntarily, and that the prisoner was not induced by any promise of favour, or any menace or undue terror, to confess. It is also trite law that a judge has a discretion to exclude a statement, even though freely and voluntarily made and otherwise admissible, if he considers it was taken in circumstances unfair to the accused. Thus a confession, freely and voluntarily made, is sometimes excluded in the exercise of this discretion if there has been a breach of the Judges' Rules.

In *Mandavu v R* 1962 R & N. 298 at 304, I considered the question of the Judges' Rules in this country, and I now repeat what I there said:

"As the grounds of appeal specifically allege breaches of the Judges' Rules as a ground for rejecting such statements, I will once again, and as simply as possible, explain the effect, in law, of the Judges' Rules. The rules were advice given by the judges to the executive arm of government. They were not judicial decisions made by the judges, they have therefore no binding legal effect. The executive arm of government then issued the rules to police officers as administrative instructions which police

officers, as a matter of discipline, were enjoined to follow. They are administrative directions enforced by the police authorities as tending to the fair administration of justice.

All policemen in Northern Rhodesia are required, as a matter of police discipline, to obey the Judges' Rules. In the handbook, issued to every member of the Force, the rules are set out *in toto* as rules to be followed in dealing with suspects and persons in custody.

In deciding whether a statement made by an accused person to the police is admissible, the test which a court must apply is not whether the Judges' Rules have been infringed but whether the prosecution has affirmatively established that the statement was made freely and voluntarily. In applying that test, it is very relevant to consider whether the Judges' Rules have been complied with. If they have, this fact is of considerable assistance in deciding whether the statement was made freely and voluntarily. If they have not, the burden cast upon the prosecution will be more difficult to discharge. There is one further manner in which the Judges' Rules are relevant. Even though a court is satisfied that a statement was made voluntarily, it nevertheless has a discretion to exclude such statement if it were obtained in a manner unfair to the accused. In this context the observance or non-observance of the Judges' Rules is a most relevant fact. See *Mbcpeleghe v R* 1960 R & N. 508 (F.S.C.)."

The new Judges' Rules have not been applied in this country, as policemen have not been administratively enjoined to follow them. When I speak of the Judges' Rules, I therefore refer to the rules set out in paragraph 1118 of the 35th edition of *Archbold*.

Rule 3 of the Judges' Rules provides that persons in custody should not be questioned without the usual caution being administered. In explanation of their rules, the judges further advised

that *prima facie* the expression " persons in custody " in rule 3 applies to persons arrested before they are confined in a police station or prison, but the rule applies equally to prisoners in the custody of a warder. The terms " persons in custody " and " prisoners " are therefore synonymous for the purposes of this rule. The first question, therefore, is whether the appellant was in custody when he was being questioned at the temporary police camp and at Fort Jameson police station prior to his being arrested on 18th January.

The following passage appears at paragraph 804 of the 10th edition of Phipson on Evidence:

"Difficult questions arise as to whether a person who is being questioned by the police but neither arrested nor charged, is in custody. Police officers frequently testify that the accused was invited to accompany them to the police station for questioning and that on arrival there he was free to leave had he asked to do so.

In the past judges have tended to rule that such a person is not in custody. Opinions have been expressed as to whether the Judges' Rules should not be applied to such situations."

It is primarily a question of fact whether the appellant was then in custody or not. It is quite clear that the learned judge, who had the advantage of seeing and hearing the witnesses, believed Mr. Witherspoon, and did not believe the appellant. Reading the record I am in no position to disagree with that assessment, indeed I agree with it. I therefore come to the conclusion that the appellant was told that he was free to go, and did consent to come into Fort Jameson police station. I do not think he was in custody. He was supplied with food and blankets. The question, therefore, of a breach of the Judges' Rules does not, in my opinion, arise.

The next two questions are, first whether the circumstances of his questioning were so unfair to the appellant as to render it desirable that the judge should have considered whether to exercise his discretion and exclude the confession; the second whether the questioning by the police was such a badgering that the appellant ultimately made a confession in order to avoid further oppressive questioning, i.e. that the questioning was itself an ill - treatment from which he could only obtain relief by making a confession. As the evidence under consideration touching these two questions is largely the same, I shall consider them together.

It is relevant to note that the third and fourth appellants made completely exculpatory warned and cautioned statements to the police, which were accepted by the police and tendered in evidence. I remark, obiter, that one wonders how they were admissible. If the police were prepared to behave improperly to extract evidence from the first appellant, and were refusing to accept any statement from him other than a confession, it is worthy of remark that the same police officers were prepared to accept exculpatory statements from two of the four accused. It is also significant that when the first appellant was formally charged with the offence, he was not so overawed by the police as to prevent him making a statement differing from his first one, in which he said that he was present at the burning but he was forced to do so. It is also significant that no objection was raised by the defence to the admission of the latter statement. It could be

argued with some strength that this was itself a confession to the offence charged in that the first appellant was apparently taking part in a concerted attack, made with the intention of killing. The defence allegation becomes even more inconsistent when one considers that the Crown tendered in evidence three statements made to the police by the first appellant - the last one an exculpatory statement.

But to my mind the most significant point in this matter is that never once did the appellant say in his evidence at the trial within the trial that he had been subjected to such oppressive questioning that he confessed as the only means of escape from being so badgered. If this had been the case, then I am sure that he would have so instructed his counsel, who would have cross - examined to it. Even more so, would the appellant himself have made this point in evidence. The story he told

was quite different. It was that he was severely ill - treated in order to make him thumb - print a blank sheet of paper, and that he never made any confession at all.

In the circumstances I come to the conclusion that although the police questioned him in the course of their investigation, and that such questioning was spread over a period of four days, nevertheless such questioning was not oppressive and did not amount either to unfairness or to a threat. I consider that this first point fails. (*The learned Chief Justice then considered a second point, which was one of fact.*)

Judgment

Blagden JA: I concur with the judgment of the learned president which has just been delivered. In my view the only difficulty of any substance which is presented by this case arises in connection with the appeal of the first appellant, and I confine my judgment to the arguments and considerations advanced on his behalf. Reference in my judgment to " the appellant " are accordingly references to the first appellant only.

The first appellant's appeal was directed solely to the admission of a statement which the Crown alleged he had made to the police on the 17th January, 1964. At the trial objection was taken that this statement was not made voluntarily.

The learned trial judge conducted a trial within a trial to decide this issue. From the evidence which was adduced at this trial within a trial, it emerged that the appellant's case was to the effect that the statement should not be admitted because in the first place he had been subjected to long periods of violence and in the second place he had never made the statement at all. Under stress of the violence he had been forced to apply his thumb - print to a blank piece of paper upon which, subsequently, a statement had been fabricated by the police.

The learned trial judge found that the appellant had not been subjected to violence, that he had made a statement voluntarily and that he had thumb - printed it; and he accordingly admitted the statement in evidence.

In support of his appeal, the appellant has added other grounds on which he says the statement should not have been admitted in evidence. Substantially, these are two:

(1) There was a contravention of rule 3 of the Judges' Rules in that the appellant was in custody at the time his statement was taken and the statement was the result of his being questioned whilst in custody.

(2) The appellant was subject to practically continuous questioning over a period of four days. This conduct constituted undue pressure upon him to make a statement and in consequence the statement he made was not made voluntarily.

Before us Mr. Fleming has not attempted to challenge the learned trial judge's decision that the statement was not fabricated by the police, but was in fact made by his client. In regard to the judge's finding that no violence was offered to the appellant, Mr. Fleming referred only to the evidence given by the appellant on the trial within a trial to the effect that during the night he was handcuffed. With regard to that evidence,

Mr. Fleming claimed that there had been no cross - examination of the appellant in regard to it and no evidence called to contradict it. It would seem from the record that no specific questions were asked in cross - examination about it. Indeed, according to the record the only passages in cross - examination which refer to the voluntariness or otherwise of the statement, were the three concluding sentences - " I was beaten. My statement was not voluntary. I made no statement ". The fact that none of the detectives who spent the night with the appellant were called to give evidence as to what happened during the night is explicable, in that until the appellant gave evidence of being ill - treated during the night, the prosecution had no idea that that particular conduct was being alleged. Application could have been made, and I think it would have been better if it had been made, by the prosecution to call rebutting evidence. In giving his judgment on the trial within a trial, the learned trial judge made no specific reference to the allegation that the appellant had been handcuffed at night. He said he had no hesitation in rejecting as false the allegation that the appellant had been beaten and that he did not accept the allegation that the statement had been fabricated by one of the police officers. He found that not only had the appellant made the statement but that he had made it freely and voluntarily. Although the appellant's allegations regarding his handcuffing at night might have been further investigated, I am satisfied that on the evidence which was put before him in the trial within a trial, the learned trial judge's finding that the statement was made voluntarily was justified.

To resolve the additional issues raised before us regarding the admissibility of this statement, the first question to decide is whether or not the appellant was in custody within the meaning of that term in rule 3 of the Judges' Rules. Rule 3 provides that: " Persons in custody should not be questioned without the usual caution being first administered"; and a Home Office circular (No. 536053/29) issued in 1930 with the approval of the judges made it clear that this rule did not authorise the questioning of persons in custody, and consequently, was not in conflict with rule 7

which prohibits any question upon a voluntary statement except such as is necessary to clear up ambiguity. But there is a dearth of authority as to the exact meaning of " in custody " in the context of rule 3.

The circumstances in which the appellant came to be questioned by the police were described by the witness, Detective Inspector Phillip Charles Witherspoon, whose evidence on this point was recorded by the learned trial judge in these terms:

"On the 14th January, 1964, Kangachepe Mbao Zondo, the first accused, visited the temporary police camp site near Jeleman Village. He stated that he stayed there voluntarily to the 16th January, 1964, when with his permission I brought him to Fort Jameson police station at 4.15 p.m. on the 17th January, 1964."

He was cross - examined about this and he said, according to the record:

"The first accused visited this camp. He came to sell maize . . . the first accused came with a man called Fenias. They were the only people who came to sell maize. We needed maize to

feed the detective team. We sent word to Jeleman Village particularly to the first accused. We wanted to question the first accused on our camp site without the other persons who may have been involved becoming alarmed and leaving the district. The same applied to Fenias."

Inspector Witherspoon went on to explain that the appellant and Fenias came on the morning of the 14th January and stayed the whole time until the 16th January when they accompanied the police to Fort Jameson. He further pointed out that the appellant and Fenias did not sleep at the camp but in two houses on the outskirts of Kaziwake Village, and that the detectives who had been interviewing them slept with them. He said: " They were not under arrest and had they chosen to go home they could have done and we the police would have taken other steps." Later in his cross - examination he repeated that the accused was not in custody; and in re-examination he said that the accused was not under any compulsion either to come to the camp, or to remain there or to accompany the police to Fort Jameson or to remain for the night of the 16th January at Fort Jameson or to be at the police station on the 17th January.

Inspector Witherspoon was recalled to give evidence at the trial within a trial and was asked particularly about the actual taking of the statement. He said: " I am aware the first accused's presence at the police station on that day was voluntary. He was free to leave the police station when he wished. He appeared to know that quite well." In cross - examination he repeated in effect what he had said previously about the appellant and Fenias visiting the camp at the request of the police to bring mealies. He also repeated his previous evidence concerning the appellant and his companion's sleeping accommodation over that period. He said: " Some of the detective staff I have mentioned slept with them. I should think two detectives slept with each man. Despite this neither man was under any compulsion to stay and they were told this."

It was strongly urged by Mr. Fleming that although the appellant may not have been in custody in the technical sense, he was a simple African and in all the circumstances he could not have appreciated the fact that he had any rights in the matter and must have felt all along that he had to do what the police wanted, and, in particular, that he had to stay with them until he was formally sent away.

I entertain no doubt in my mind that the appellant was not in custody in the sense that he had been arrested or charged. Furthermore, until he made his statement at Fort Jameson it would appear from the evidence of Inspector Witherspoon that he was not even a suspect. Thus the Inspector said in answer to cross - examination by Mr. Fleming: " The first accused did not make any statement to me at the camp leading me to think he was implicated, but on the night of the 15th January he said he wanted to make a statement the following day. The next morning I did not say anything to him at the camp. He was told that we were going to Fort Jameson and that he should make his statement in Fort Jameson. At that time I had no idea what he was going to say."

The situation of a person who is questioned by the police under circumstances which, although not technically amounting to custody, might well give that person the impression that he was in custody, has been considered in one or two cases. Thus in *R v Wattam*, 36 Cr. App. R 72, where the appellant was approached at his lodgings by police officers and asked to accompany them to the police station and not told that he was free to go if he wished, the Court of Criminal Appeal took the view that the appellant had not been taken into custody, and the fact that the police might have arrested him if he had refused to answer their questions, did not alter the case. The position of a person who accedes to a request to go to a police station was also considered in the case of *R v Joyce*, 42 Cr. App. R 19, where police officers had visited the accused's house at 11.30 p.m. and invited him to accompany them to the police station, one of them saying to him: " I need to take a statement from you." The trial judge, Slade, J, admitted the statement which the accused subsequently made to the police. Slade, J, said in that case: " I think it is right to say that the accused probably would not even have accompanied the police officers to the station if he had not thought, rightly or wrongly, that (to use his own words) ' he had very little choice in the matter '; and I will assume that that was the reason why he did so. I think it is further fair to say that the accused might very well have refused to answer any questions at all . . . if he had not been previously told - ' I need to take a statement from you '."

Slade, J's ruling admitting the statement was based on his finding that there had been no sufficient inducement in law to render inadmissible a statement resulting from it since the invitation to go to the police station did not relate to the charge or the accusation. *R v Bass*37 Cr. App. R 51, was a case in which police officers left a message at the appellant's house asking him to go to the police station. When he arrived he was invited into the CID room and there questioned for three - quarters of an hour. He then made a confession which was admitted in evidence by the trial judge. The Court of Criminal Appeal held that the appellant was in custody when he was at the police station and that there had been a breach of the Judges' Rules. But in

my view that case is distinguishable from " Wattam " and " Joyce " and also from the instant case in that it was quite apparent from the evidence of the police officers there concerned that the appellant would not have been allowed to leave the station if he had wished to do so. He was thus *de facto* in custody.

If the appellant here were to be regarded as being in custody at the police camp when he was questioned, then there was undoubtedly a breach of rule 3 of the Judges' Rules; and although the court could in its discretion admit the resulting statement obtained - see *R v Smith* [1961] 3 All ER 972 - the breach in this case would be so flagrant and prolonged that, speaking for myself, I would not hesitate to exercise my discretion against its admission. But in all the circumstances, I am satisfied that the appellant was not in custody over these days and in consequence that there was no breach of rule 3 of the Judges' Rules.

There remains the question of whether the statement could be said to have been induced as a result of persistent questioning over a long period of time. This question is a question of fact to be decided upon the evidence

available. I do not think it can be said that any period of questioning, however long, amounts, *per se,* to compulsion to answer. It may well be that, in the circumstances of an individual case, such conduct does constitute compulsion. But it is for the accused at least to raise the issue at his trial and if - as here - he does not raise it, then in the absence of any other evidence the mere fact that the questioning occupied a long period of time is not, in my view, sufficient to infer undue pressure. This is not to say that in any particular case it might not be incumbent upon the court to raise the issue - for example, where the accused was unrepresented at his trial. But where, as here, the appellant is represented by experienced counsel and the issue is not raised then it seems to me that it cannot be said that there is an issue of this character which the trial court has to consider.

This reasoning finds some support in the case of *Bene v R*, a 1961 case, reported in 1963 R & N. 896 in which Clayden, F.C.J., said on page 89 (letter H):

"The main submission was that the persistent questioning to which the appellant was subjected indicated that prior to the making of the statement he had been overawed by the police. This was coupled with the contention that the purpose of the questioning was not to obtain information in regard to the crime, but to get the appellant to admit that what Chidzero had said was the truth. There is much to be said for the view that this was the purpose of the questioning and that it was unlikely that the questioning was in part ' to check up . . . the extent to which he could help them in obtaining information which might lead to further arrests ' but there is a lot of evidence to show that the appellant, despite the nature of the questioning, was not overawed. He is an intelligent person and the evidence indicates that throughout the evening he seemed to be well aware of what he was saying and doing and appeared to be on good terms with his questioners . . ."

This case is also of interest in respect of a passage in the headnote which reads:

"A person could not at one and the same time maintain that he had been overawed into making a statement and deny that he ever made one. In these circumstances the question of the persistency of the questioning became hypothetical."

A further case in point is the recent case of *R v Ananias* 1963 R & N. 938. Part of the headnote reads as follows:

"(ii) Confessions extracted by persistent questioning after arrest cannot be excluded on that ground alone.

(iii) The final test of the admissibility to be applied in a case must be the general one applicable to the admission of confessions, i.e. whether there was anything in the facts of the case to suggest that the confessor's will was weighed by external impulses improperly brought to bear upon it and calculated to negative his freedom of volition."

In the instant case the appellant had every opportunity at his trial to complain that the length and persistence of the questioning to which he was subjected overbore his free will and induced him to make a statement

which he would not otherwise have made. He did not make that complaint. That was not his case. In all the circumstances I consider that the learned trial judge rightly admitted the statement which he found that the appellant had made.

As I indicated at the start of this judgment, I concur with the judgment delivered by the learned president and I would dismiss all four of the appeals in this case.

Judgment

Charles J: The facts relating to the four appeals have been set out fully by the learned Chief Justice.

The first appellant's appeal is mainly on the ground that the first statement made by him to the police should not have been admitted in evidence as it was taken in contravention of the Judges' Rules. As the learned Chief Justice has said, it is trite law that an incriminating statement by an accused to a person in authority is inadmissible in evidence unless it is proved to have been made voluntarily, and that, even when it is proved to have been so made, the trial judge may exclude it in the exercise of his discretion if it appears that it was made in circumstances which render its use unfair to the accused. Trite though that law may be, it is nonetheless still the subject of misunderstanding by those concerned with its administration.

The rule of law governing the admissibility of extra - judicial incriminating statements by accused persons may be stated shortly as being that such a statement is not admissible in evidence against the maker upon his trial on a criminal charge unless it is proved, beyond

reasonable doubt, to the presiding judge that the statement was made without any inducement by a person in authority whereby the accused was led to believe that it would be his duty, or to his temporal advantage to make a statement, or it would be to his temporal disadvantage not to make a statement, when the opportunity became available to him.

The leading authorities for that statement are *Regina v Baldry* (1852) 2 Den. 430, and *Regina v Thompson* [1893] 2 Q.B. 12, both of which have received the approval of the Privy Council in *Ibrahim v The King* [1914] A.C. 579, and again only recently, in *Sparks v R* [1964] 1 All ER 727. According to those authorities, the basis upon which evidence of an incriminating statement is excluded in the absence of proof of the condition of admissibility is not that the law presumes the statement to be untrue in the absence of such proof, but because of the danger which induced confessions or admissions present to the innocent and the due administration of justice. That danger has been aptly pointed out by the American authority on evidence, Professor Wigmore (Evidence, Vol. 4, section 2250) in the following passage:

"The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self - disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds readiness to resort to

bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer - that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately the innocent are jeopardised by the encroachments of a bad system."

As the history of recent years alone suffices to show, the danger referred to in that statement is such as to render it of constitutional importance that the courts adhere strictly to the law governing the admissibility of self - incriminating statements against accused persons. Not to do so will open the door to the methods of the Gestapo, to " brain - washing " and to the police usurping the functions of the courts. It is not without significance that rules on the subject of voluntary confessions did not become crystallised until after the establishment of a regular police force in England, and there are authorities before then for the proposition - which is now untenable - that evidence of an incriminating statement was not admissible if the statement had been induced even by a person who was not a person in authority (see *Halsbury*, 3rd edition, Vol. 10, page 469, note (p), where the authorities are cited).

It still appears commonly to be thought that an incriminating statement is admissible in evidence, notwithstanding that it has been induced by a person in authority, so long as the inducement has not been by a promise or threat or by actual violence. That opinion appears to be based on the remarks of Mr. Justice Cave in *Regina v Thompson* [1893] 2 Q.B. 12, at page 15, that a

confession is inadmissible if it is the result of hope or fear exercised by a person in authority, and the oft - quoted remarks of Lord Sumner in *Ibrahim v The King*[1914] A.C. 599, at page 604, that a statement by an accused is inadmissible unless it is shown to have been made voluntarily in the sense that it was not obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority. Those remarks do not support such a narrow view: any inducement necessarily raises hope or fear or both in the person affected by it and, in that sense, it constitutes a threat or a promise of some kind, impliedly if not expressly. That the opinion is fallacious is shown by a later passage from the judgment of Mr. Justice Cave in *Thompson*'s case above and by the less well - known statement of Mr Justice Hayes in the Irish case of *Regina v Johnston* [1864] Ir. C.L.R 60. In the former case, Mr. Justice Cave referred to various authorities, the last of which was a citation, with approval, of the statement in the then current edition of Russell on Crime, that any improper inducement is sufficient to vitiate a confession. He then summed up the position tersely in these words (page 17):

"Is it proved affirmatively that the confession was free and voluntary - that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible."

In *Regina v Johnston* (at page 83 *et seq.*) Mr. Justice Hayes said:

"All that the common law requires is that the confession in pais be voluntary. But that word is to be understood in a wide sense, as requiring not only that the prisoner should have free will

and power to speak, or refrain from speaking, as he may think right, but also that his will should not be warped by any unfair, dishonest, or fraudulent practices, to induce a confession . . . upon this principle, it is that, in the tenderness of modern times, judges have uniformly refused to receive in evidence a confession that has been either certainly or probably procured by a promise of good or a threat of evil; by exciting a hope of reward or a fear of temporal punishment other than that which the law has prescribed for the offence charged. So also a confession will be rejected if it appear to have been extracted by the presumed pressure and obligation of an oath, or by pestering interrogatories, or if it appear to have been made by the party to rid himself of importunity, or if by subtle and answering questions, as those which are framed so as to conceal their drift and object, he has been taken at a disadvantage, and thus entrapped into a statement, which, if left to himself, and in the full freedom of volition, he would not have made. These are cited merely as instances of the several ways in which a confession may be unfairly and improperly procured, so as to deprive it of the character of being voluntary . . . It is manifest to everyone's experience that, from the moment a person feels himself in custody on a criminal charge, his mental condition undergoes a very remarkable change, and he naturally becomes more accessible to every influence which addresses itself either to his hopes or fears."

It is obvious, once the full scope of the word " inducement " is recognised, that prolonged police questioning may amount to an inducement, since it may excite the hope in the victim that it will be discontinued if he makes a statement and the fear in him that it will continue if he does not make a statement. The mere asking of a question, or a number of questions, of a suspect or an accused by a person in authority will not be an inducement so long as such questioning does not amount to an importunity of the suspect or accused to answer. In each case whether the questioning has amounted to an inducement, that is to an overbearing of the will of the person questioned to remain silent, must be determined by reference to the nature and extent of the questioning, the circumstances in which it took place, and with regard to the *onus* being upon the prosecution to negative the use and effect of any inducement.

In accordance with those statements are the observations of Clayden, CJ, in *Mbcpeleghe v R* 1960 R & N. 509 at page 512; and decisions of the High Court of Australia that a confession or admission by an accused is inadmissible in evidence against him under the common law unless it is proved not to have been induced by a threat, promise or any other means whereby his will to remain silent has been overborne. (See, for example, *McDermott v The King* (1948) 76 C.L.R 501, particularly at page 511 per Dixon, J). Scots law on the subject is similar: it having being held in *Chalmer*'s case(1954 S.L.T. (Notes) 26), noted in the Journal of Criminal Law, July, 1954, pages 268, 271) that admissions by words or conduct are inadmissible when they have been induced by prolonged police questioning.

The basis of exclusion is inconsistent with two other propositions which, consequently, cannot now be regarded as sound law. The two

heretical propositions may be expressed jointly as being that evidence of an incriminating statement is admissible if it is established that, although it was induced by a person in authority: (i) the inducement was such as was unlikely to produce an untrue statement, or (ii) that the inducement did not relate to the charge or accusation against the accused, that is, the inducement was not one likely to create in the accused's mind the hope of bettering or the fear of worsening his position in relation to the charge of accusation if he did or did not make a statement.
In *Regina v Thompson, supra,* it was held expressly that the likelihood of an inducement not resulting in an untrue confession was immaterial, while the whole tenor of the judgment in that case is against an induced confession being admissible if the inducement did not relate to the charge. The distinction between inducements which relate to the charge and inducements which do not relate to the charge is artificial and impracticable. The most obvious forms of inducement which vitiate confessions are physical torture and prolonged questioning under the so - called third degree process whereby the will of a suspect not to incriminate himself is broken. Yet those forms of inducement do not operate by holding out any hope or fear as to the accused's position in relation to the charge or accusation but operate by inspiring the unfortunate victim with the hope of relief from immediate physical or mental pain. The heresy was first propounded in *R v Lloyd* (1834) 6 C. & P. 393, and *R v Green* (1834) 6 C. & P. 655, and is not supported, so far as I

am aware, by a single decision since then until it was revived by Slade, J, in *R v Joyce* [1957] 3 All ER 623. The latter decision, in my judgment, was manifestly wrong in so far as it was based on the alleged inducement not being one relating to the charge.

It follows from the foregoing that the questions which a judge presiding over a criminal trial has to answer whenever an incriminating statement by the accused is tendered in evidence are:

(a) Was the incriminating statement preceded by any words or acts on the part of a person in authority which were reasonably capable of inducing the accused to believe that, when the opportunity occurred for making a statement, it would be his duty or of temporal advantage for him to avail himself of the opportunity, or it would be of temporal disadvantage for him not so to do?

(b) If that question is not answered in the negative as a matter proved beyond reasonable doubt, did the words or acts which preceded or which might have preceded the making of the incriminating statement induce the accused to make that statement? Unless that question, if it arises, is also answered in the negative, as a matter proved beyond reasonable doubt, the incriminating statement must be excluded. In determining the answer to the second question, it is incumbent upon the judge to bear in mind that the effect of a prior inducement is not necessarily removed by the solemn administration of a caution as a piece of ritualism imposed on police administration in order to meet the requirements of judges.

The requirement that the judge shall satisfy himself that the answer to the first of those questions is in the negative is *prima facie* satisfied by evidence tending to show that the accused was left to decide for himself whether or not to make the statement, for example, by evidence of compliance with the Judges' Rules. It is not satisfied by the police officer concerned with the taking of the statement solemnly swearing that it was made voluntarily, as that is merely deposing to an opinion on the question which the court has to determine. If, after *prima facie* evidence of voluntariness has been given, no objection is taken to the statement on the ground that it was made involuntarily, or there is no evidence giving reasonable cause to suspect that it was the result of an inducement by a person in authority, the statement may be admitted in evidence. If, however, objection is taken, or there are grounds for reasonably suspecting the voluntariness of the statement, the judge is bound, in my judgment, to inquire into the grounds of objection and of reasonable suspicion by holding a trial within a trial for the purpose of answering the first or both of the questions stated above unless it appears that sufficient grounds exist for excluding the statement in any case as a matter of discretion. If the judge admits the statement without satisfying himself by a trial within a trial that the grounds of objection or of reasonable suspicion do not exist, the admission of the statement in evidence will be wrong. In this respect, it is important to note that the judge is not discharged from his duty to inquire into the admissibility of the statement by the failure of the accused or his counsel to object to the admission of the statement: the responsibility of a judge presiding over a criminal trial is to ensure that the issue of guilt is determined only upon what the law says is evidence. On the other hand, the judge does

not have to satisfy himself that every possible form of inducement has been negatived. If he had to do so, an intolerable burden would be placed upon the Crown. All that the judge has to be satisfied upon is that the grounds of objection raised by the defence or suggested as a reasonable possibility by the evidence have been negatived. As it is, that requirement imposes a heavy burden on the Crown, but it is one which, for reasons stated earlier, the courts cannot permit to be whittled down.

As indicated earlier, if a statement is proved beyond reasonable doubt to have been made voluntarily, the court may none the less exclude it, in the exercise of its discretion, when it appears that it was obtained in such circumstances that its prejudicial effect against the accused outweighs its probative value or as otherwise renders its use against the accused unfair.
The *onus* in respect of exclusion on that ground rests upon the accused, not the Crown, since the former seeks the exercise of the court's discretion by excluding legally admissible evidence, and proof that a statement was made voluntarily, that is, free from any material inducement whereby the accused's will to remain silent was overborne, leaves little scope for a statement unfairly obtained being admissible. That has been held to be the correct approach by the High Court of Australia in *The King v Lee* (1950) 34 A.L.J. 223; an approach with which I respectfully agree.

The relationship of the Judges' Rules to the law governing the admissibility of extra - judicial confessions and admissions has been explained by the learned Chief Justice. I respectfully agree with that explanation.

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CHARLES JA

An objection to the admission of an incriminating statement on the ground of contravention of the Judges' Rules is really an application to the trial judge to reject the statement in the exercise of his discretion, assuming that the statement was made voluntarily. If contravention of the Judges' Rules is made a ground of appeal that ground is really that the trial judge was wrong in deciding that there was no contravention, if he did so decide, and either he did not exercise his discretion or he exercised his discretion wrongly in not excluding the statement. The taking of the objection either before the court of first instance or as a ground of appeal without an objection on the ground that the statement was made involuntarily does not absolve either the court of first instance or the appellate court from considering the latter question if the evidence before the former court reasonably raises it and it does not appear that the statement should be or should have been included as a matter of discretion. As I have said, what is not evidence cannot be made evidence by its wrongful reception.

It is on that account, that it seems to me that the real question relating to the first appellant's appeal is, in the circumstances of this case, whether that appellant's first statement was rightly admitted in evidence as having been proved to have been made voluntarily. In my judgment it is impossible to say from the evidence before the learned trial judge that it was. It is clear that the first statement was made after prolonged police questioning. That fact raises a reasonable suspicion, at least, that the first appellant's will to remain silent was eventually overborne. Obviously, he had that will at the outset, as otherwise the questioning would not have been so

prolonged. It, therefore, behove the learned trial judge, in my judgment, to address his mind to that aspect and to reject the statement if he was not satisfied beyond reasonable doubt that the prolonged questioning did not amount to an operative inducement. He did not address his mind to that aspect, understandably enough perhaps because it had become buried under the issue actually raised as to inducement by physical force. And on the evidence before him on the trial within the trial the learned judge could not have found, in my judgment, that the prolonged questioning was not in itself an operative inducement. Further evidence might have justified such a finding, but not the evidence as it stood at the conclusion of the trial within the trial.

The fact that the first appellant's objection was based on a spurious allegation of physical violence, while not without weight, cannot be regarded as conclusive that he was not induced by prolonged questioning. My experience is that accused persons with more education than the average African villager often think that the only ground upon which an incriminating statement is inadmissible is that it was extracted by physical violence: an error often shared by their legal advisers who, consequently, may fail to take instructions as to the use of other forms of inducement. Further, according to my experience, the police in countries under the Crown usually resort to more subtle means of inducement than violence when they deliberately set out to obtain " a free and voluntary confession ". Moreover, without further evidence, I find insuperable difficulties in seeing justification for a finding that the first appellant was free, and really believed that he was free, to break off the interrogation at any time by leaving the police camp or by refusing to

accompany the police to Fort Jameson. It may be that he was not in custody within the meaning of the Judges' Rules but he was certainly in a predicament which had the appearance of actual restraint and involuntary subjection to questioning, and which could have led him to believe that the police assurances to the contrary were unreal. It cannot be overlooked that he had been lured to the police camp for the purpose of questioning and keeping him away from his co - villagers during the process, and that the police intended to use other means, unspecified, had he elected to leave the camp or not to go to Fort Jameson. As to the first appellant's own state of mind at the time, it may be that political truculence could have inspired him with contempt for the police, with the result that he would not have hesitated to take the police at their word and leave the camp if he wanted to do so. It may be, on the other hand, that such inspired contempt was limited to while he was with a mob and left him when he found himself alone with the police. It may also be that he felt that, if he availed himself of his right to leave the camp or to refuse to go to Fort Jameson, he would be regarded as admitting guilt. I find it difficult to believe that a villager in this territory, whose only education may be in current political shibboleths, is any less susceptible than the average Irishman to undergoing a remarkable change in his mental condition when he finds himself in real or believed custody (*Regina v Johnston, Sup.*) or than the average Scot to regarding a police station as a sinister venue for questioning (*Chalmer*'s case, sup., per Lord Cooper). Finally, I find it difficult to dissociate this case from the scepticism which Mr. Justice Cave expressed in *Thompson*'s case (sup. at page 18), notwithstanding that the police

subsequently did obtain other evidence against the first appellant. That scepticism was thus expressed:

"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 infrequently alleged to have been seized with the desire borne of penitence and remorse to supplement it with a confession; a desire which vanishes as soon as he appears in a court of justice."

It has been suggested that the fact that the third and fourth appellants obviously made voluntary statements is indicative that the first appellant's statement was also made voluntarily. That fact was not before the learned trial judge at the trial within the trial but it is properly open to this court to have regard to it in determining whether any substantial miscarriage of justice resulted to the first appellant by the admission of his statement without strict proof that it was made voluntarily. In my judgment no significance can be attached to the statements of other appellants having been made voluntarily. The police may well have had good reasons for trying to obtain a confession only from the first appellant. It is significant that he, alone of the four appellants, was lured to the police camp for questioning.

As, in my judgment, the first appellant's first statement was wrongly admitted in evidence, the question arises whether he was thereby deprived

of a chance of acquittal which was reasonably open to him if the error had not occurred. In my judgment the answer to that question is in the negative, and it is on that ground that I agree with my learned brethren that the appeal should be dismissed. The learned trial judge accepted the eye - witnesses as witnesses of truth and reliability. I cannot see any reason for this court going behind that acceptance on the basis that it was unjustified. Consequently, it is apparent that had the learned trial judge rejected the first appellant's incriminating statements, he still must inevitably have concluded from the eye - witnesses' evidence alone that the first appellant was guilty.

With regard to the other appellants, I agree with the learned Chief Justice that their appeals should be dismissed. I only add this, with reference to the second appellant. His incriminating statement was objected to only on the ground that he did not make it. There was no evidence suggesting that, if he did make it, he made it involuntarily or in circumstances which called for the learned trial judge to exercise his discretion by excluding it. As the validity of the objection depended entirely upon the credibility of the witnesses called in respect of it, it was also a matter on which the learned trial judge's determination must be accepted.

I agree that the four appeals should be dismissed.