

THE PEOPLE v OBINO (1968) ZR 40 (HC)

HIGH COURT

McCALL J

17th JUNE 1968

Flynote and Headnote

[1] Evidence - Burden of proof - Voluntariness of accused's confession.

The prosecution bears the burden of proving that the accused's confession was made voluntarily.

[2] Evidence - Confessions - Voluntariness - Discretion of judge.

The judge has discretion to exclude a statement from evidence if, in light of such factors as the absence of an adequate caution as to the effect of making a statement and the amount of police force confronting the accused, the judge is not satisfied that the statement was made voluntarily.

Chaila, State Advocate, for the People

Gani, Legal Aid Counsel, for the accused

Judgment

McCall J: It is now for me to decide whether the statement which has been sought to put in against the accused by the prosecution should be admitted in evidence against him or not. In this regard there is only one test and that is whether the statement in question was or was not of a voluntary character. I must observe that apart from this statement the evidence so far in this prosecution does not implicate the accused so as to fix him with *prima facie* responsibility for the offence of which he is charged. This statement therefore is of vital importance at this stage of the prosecution case. It has been objected to by the defence on the ground that it was not a voluntary statement. [1] It is for the prosecution to show that it was. [2] As to the facts concerning the circumstances in which the statement was taken I find that when the accused was taken to the police station he was in custody, that he was suspected of the offence, that he was going to be charged, and that the interrogating officer was ordered to take a cautioned statement from him. This order can be equivocally interpreted. On the one hand, it could be taken to mean that he, the interrogating officer, had to take a statement whether the accused wished genuinely to make one or not or that he had to do his proper best to obtain a statement. The investigating officer, Inspector Mumba, says he interpreted his order in the latter sense, but from the evidence given by the accused the interpretation must be, in the circumstances of the physical assault to which he says he was subjected, in the latter sense. I am satisfied that the accused was cautioned about the making of the statement and about the effect of making a statement if he wished to do so. It is agreed that the caution was not signed as is the custom here. However, the caution and the absence of a signature to it cannot rule the question before me. The absence of any reference to a charge and a signature in the caution are only circumstances which may or may not relate to the voluntary character of the statement. Here I think they do relate to this issue. I am satisfied that the accused in custody was inadequately cautioned, that he was confronted with an amount of police authority which reduced his freedom to make or not to make a statement, and therefore it was not voluntary to the extent that it should be admitted in evidence against him. In my discretion therefore I refuse to admit this statement. That is not to say - and I wish to emphasise this - that I find as a fact that the accused was assaulted by the police. My finding is that in all the circumstances of the evidence before me concerning the taking of this statement the accused did not make it voluntarily and of his own free will. There is one further matter which I think I should refer in the circumstances of this case. In evidence in front of me this accused was warned and cautioned three times and having read the depositions it could be given in evidence that he was cautioned a fourth time. It has been said time and time again by judges before me that persons already charged from whom a statement has already been obtained should not be further questioned. It has been the practice here so obvious to me trying criminal cases that the police, despite whatever has been said to them by the accused, keep on

and on warning and cautioning prisoners and then asking them have they got anything to say. This practice has been condemned in the past in the most authoritative terms and I condemn it again. A person in custody who is pestered - and I think that is the proper word - by the police to make statements must, when confronted with the authority of the police, being in most cases simple minded persons, be worn down by these requests until finally it would appear to me that in some cases the accused person makes the statement which the police desire. This is a practice which I cannot condemn too strongly. Once a person has been arrested and charged and original statement obtained it is only in the most unusual exceptional circumstances that he should be questioned further. And I hope that the words I have uttered here on the bench today get the widest circulation amongst the police of this country.

Order accordingly.