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Kelly J.

THE QUEEN v EMANUEL PATRICK DOMARA

The accused is charged with rape.

At the conclusion of the opening address of Sir Colman O'Loughlen for the Crown, Mr Sturgess, Counsel for the accused, intimated that he would object to the admission of any evidence by Sub-Inspector Young as to an alleged confession by the accused on the grounds that -

- (1) The confession was not a voluntary confession.
- (2) That if it was a voluntary confession it was obtained under such circumstances as would make it unfair that the evidence be admitted, and that I should exercise my judicial discretion and exclude the evidence of that statement.

Sir Colman O'Loughlen then consented that evidence be taken forthwith on the voir dire.

Evidence was then taken from Sub-Inspector Young and the accused on the voir dire, not for the purpose of adjudging the guilt or innocence of the accused, but for the purpose of allowing me to decide whether the evidence of the alleged confession should be admitted.

The accused was interviewed by Sub-Inspector Young at the Police Station at about 1.15 pm on 14th August last.

Sub-Inspector Young gave the following evidence in chief:-

(Read pp. 49 to 57)

On cross-examination he admitted that he did not make any attempt to obtain a written confession from the accused - "only from something I had been told." He also admitted that he did not make notes of the interview.

The accused, in chief, stated that when he was taken into the room for interview, he was asked if he had anything in his pockets, and on replying that he had a wallet

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containing money, that wallet was taken from him. He contended that the wallet was taken from him by Sub-Inspector Young, but Sub-Inspector Young stated in evidence that he knew nothing about that episode.

In both evidence in chief, and in cross-examination, the accused admitted that he did make a statement but he claimed, in effect, that he did not fully understand what was happening. In evidence in chief he stated that he did not remember all the questions put to him and that "whether I understand or not I have to say 'Yes' or I will get into trouble." He also explained in evidence in chief that he was afraid of the investigating officer.

Without deliberating at length upon the evidence, I find myself in grave doubt as to whether the accused really understood the position in which he found himself, and more particularly his right to refuse to answer any questions put to him by Sub-Inspector Young.

The first ground of objection is therefore upheld.

On the second ground of objection. I have been somewhat concerned for some time past at what appears to me to be a matter which may be explainable - the absence on many occasions of a written confession when one might normally be expected.

Sub-Inspector Young admitted that he did not attempt to obtain a written confession because of something he had been told.

The Judges' Rules, which many authorities declare have not the force of law but are administrative directions for the guidance of Police authorities, provide by Rule 9 that any statement made by a person should, wherever possible, be taken down in writing and signed by the person making it after it has been read to him, and he has been invited to make any corrections he may wish.

In this particular instance, no attempt whatsoever was made to obtain a written statement.

For myself, I would imagine that had the investigation been made in a different manner and a written confession compiled in simple English, there would have been a possibility of having that statement duly produced before this Court, if the accused's statement was voluntary.

Rule 7 of The Judges' Rules provide, inter alia, that a person making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in which he has actually said.

Although it may be contended that Sub-Inspector Young was not "cross-examining" the accused when he put to the accused the statement embracing practically every ingredient of the charge, I certainly think he was "manufacturing evidence" when he included the act of emission. Probably with the purpose of helping the prosecutrix to prove penetration.

No notes were made of the interview. In view of the fact that no attempt was made to obtain a written statement from the accused, I think that Sub-Inspector Young should have taken the precaution of making notes of his interview.

In the Privy Council case Ibrahim v The King (1914) A.C. at p. 610, it was laid down that on this second ground it is one which leaves the matter to the discretion of the trial Judge "depending largely on his view of impropriety of the questioner's conduct and the general circumstances of the case." Also McDermott v The King 76 C.L.R. p.501 at p517

I express my disapproval of the manner in which the alleged confession was obtained, and more particularly under circumstances existing in this Territory as between a European Police officer interrogating an accused such as the present accused, a semi-educated native, on a charge carrying a maximum penalty of imprisonment with hard labour for life.

I exercise my discretion and uphold the objection on the second ground also.

Any evidence of Sub-Inspector Young as to the alleged confession by the accused will be rejected.

J.

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