1967
Sept 26

COSTAS ANDREOU KOKKINOS

v

THE POLICE

COSTAS ANDREOU KOKKINOS,

Appellant,

THE POLICE,

Respondents

(*Criminal Appeal No* 2929)

Criminal Law—Criminal Procedure—Unnatural offence—Criminal Code, section 171 (b)—Evidence—Confession—Voluntary nature challenged—Admissibility—Judge's finding as to admissibility

Evidence in Criminal Cases—Confessions—Admissibility—Voluntariness—Principles applicable

Human Rights—Fundamental rights and liberties—Confessions—Voluntariness of confessions a matter affecting the liberty of the subject—The Rome Convention for the Protection of Human Rights and Fundamental Freedoms (1950) a part of the law of Cyprus—Convention approved by Cyprus Law 39 of 1962

Confessions—Voluntariness—Admissibility—See above

Rome Convention—On Human Rights—Part of our law because it has been approved by Law 39 of 1962

Arrest—Persons under arrest—Rights of—The Courts should take a firm and vigilant stand in enforcing the law protecting persons under arrest

Persons under arrest—Rights of—See immediately above

The present appeal against conviction for an unnatural offence, contrary to section 171 (*b*) of the Criminal Code Cap 154, which was originally taken by the appellant in person, was fought on the voluntariness of his confession to the Police made some 20 months after the commission of the alleged offence, as his conviction by the trial Court rested on such a confession

The appellant challenged the admissibility of his confession at the trial and after evidence was taken by the trial Court on the issue of the voluntariness of the statement the judge ruled that the confession was free and voluntary

The Court of Appeal after reiterating the principles applicable to admissibility of confessions held, per Vassiliades P., Josephides & Hadjianastassiou, JJ. concurring :—

(1) In this appeal we now have one point to decide : Whether the finding of the trial Judge that the statement of the appellant was free and voluntary, can stand in the light of the evidence on record. We are unanimously of the opinion that it cannot. This particular confession, soon after arrest for another case, more than 18 months after the alleged offence, is, in our opinion, certainly suspicious: The absence of any other evidence to verify the story given in the confession indicates that either no investigations were made for that purpose, or, if made, they produced no positive result. That, we think, strikes at the very foundation of any retracted confession. The reasons for which the statement in question was found to have been made freely and voluntarily are, in our opinion, inadequate and unconvincing. We therefore consider that the finding is unsatisfactory and must be set aside. And it is common ground in this case, that if the confession is ruled out as not free and voluntary, there is nothing else to support the conviction.

(2) I would exclude the confession ; allow the appeal ; set aside the conviction ; and discharge the appellant.

Appeal allowed. Conviction quashed.

Per curiam : (1) We, moreover, think that we should take again the opportunity to repeat that if the Courts will not take a firm and vigilant stand in enforcing the law which protects persons under arrest, whoever such persons may happen to be, the consequences are bound to reach deep and wide against public respect for law and order in the country. Abuse of power and authority over persons in custody can do much more harm to the community than the temporary suppression of a few hard criminals by fear of rough handling at the police station.

(2) The Courts have the duty to sustain the rule of law in all circumstances, and absolutely. Over sinners and saints. The confessions of persons in custody must be dealt with the care and scrutiny they deserve at all times ; especially the times which the country is going through at present.

Cases referred to :

Chan Wei Keung v. *The Queen* [1967] 2 W.L.R. 552 at p. 558;

Ibrahim v. *The King* [1914] A.C. 599 :

Michael Vassili Volettos v. *The Republic*, 1961 C.L.R. 169 ;

Simadhiakos v. *The Police*, 1961 C.L.R. 64 .

Patsalides v. *Afsharian* (1965) 1 C.L.R. 134 ;

Koumbaris v. *The Republic* (reported in this part at p. 1 *ante*) ;

Meitanis v. *The Republic* (reported in this part at p. 31 *ante*);

Reg. v. *Sfongaras* (1957) 22 C.L.R. 113 ;

R. v. *Thompson* [1893] 2 Q.B. 12 at. p. 18 ;

Commissioners of Customs and Excise v. *Harz and Another* (H.L.) [1967] 1 All E.R. 177 ;

R. v. *Sykes* 8 Cr. App. R. 233–237.

Appeal against conviction.

Appeal against conviction by the appellant who was convicted on the 18th May, 1967, at the District Court of Nicosia (Criminal Case No. 25966/66) on one count for unnatural offence, contrary to section 171(*b*) of the Criminal Code, Cap. 154 and was sentenced by Stylianides, D.J., to nine months' imprisonment.

A. Paikkos, for the appellant.

S. Georghiades, Counsel of the Republic, for the respondents.

The following judgments were delivered :

VASSILIADES, P.: This is an appeal against a conviction which rests on the confession of the appellant. The admissibility of the confession was challenged at the trial Court ; and the Judge thereupon proceeded to take evidence on the issue of the voluntariness of the statement. After hearing three witnesses called by the prosecution, on the one hand, and the appellant on the other, called by his counsel, the Judge ruled that the confession was admissible as free and voluntary, notwithstanding appellant's denial on oath.

Mainly on the contents of that confession to the Police, the trial Court convicted the appellant, who, however, on the very same day of his admission to the Central Prison, immediately after his conviction, signed the form of this appeal, giving as ground that he is innocent.

When the appeal was called before this Court, the appellant appeared without the assistance of an advocate ; and as the Court, in view of what was on the record on

this issue of the admissibility of the confession, was of the opinion that the appellant would not be able to present his case on such a delicate and complicated legal matter, without the help of an advocate, the Court adjourned the case with directions to the Chief Registrar to arrange for legal assistance to the appellant.

Counsel was retained ; and in due course he filed full grounds of appeal. One of them is the admission of the confession in question. And as the appeal turns mainly on that ground, we asked counsel to take it first.

We heard argument from both sides on this ground, before entering into the rest of the case. And having heard learned counsel on the point, we think that we can decide the appeal on this ground.

It is well established in our Courts, that a confession can only be admitted in evidence against the person making it, if it is positively proved to the satisfaction of the Court, that it was made freely and voluntarily. The reasons why this practice has developed into a rule of law, so deep rooted in our legal system, are obvious.

The nature of a confession contains the urge, the strong desire of the person making it, to do so under pressure from his own conscience ; to relieve his heart and mind of the weight of guilt, no longer bearable. The moral as well as the legal principles involved are simple, clear, and well established. It is their application to the circumstances and to the persons involved in each particular case that it is difficult. And it is the *application* of the principle which from time to time comes up before the Courts either at the trial or on appeal.

I may refer, for instance, to a recent case, *Chan Wei Keung* v. *The Queen* ([1967] 2 W.L.R. 552 at p. 558) before the Privy Council. Lord Hodson, in that case, delivering the judgment of the Privy Council, quoted the words of Lord Summer in an earlier case, also before the Privy Council, *Ibrahim* v. *The King* [1914] A.C. 599 :

> " It has long been established as a positive rule of English criminal law—his lordship said—that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

I do not think that I need take time by going into other authorities—and there are many—in support of the statement that this is a well established practice in our Courts as well. It is common ground in the present case ; and Mr. Georgiades has placed his argument on that footing. He opened by stating that the voluntariness of the confession must be positively established by the prosecution who offer it in evidence, before they can put it in. That is indeed the position. The voluntariness of all statements and particularly those containing a confession, is a matter which affects the liberty of the subject ; and is connected with fundamental human rights, internationally recognised, embedded in our Constitution : the right to corporal integrity ; the right against degrading treatment ; and the right to liberty and security of person with all the incidents thereto in connection with arrest.

These rights are also secured and guaranteed by the European Convention on Human Rights to which Cyprus is a subscribing party. But let it be remembered that the substance of these rights is not the fruit of a modern invention. It has been part of our law for years. And it is deep rooted in the philosophy of our morality and tradition. We do not tolerate unfair treatment of the weak by the strong ; of the helpless by the powerful ; of the ignorant by the cunning.

We do not admit in our courts as proof of guilt, incriminating statements made by accused persons in the hands of the police, tendered as " confessions ", unless we are satisfied beyond reasonable doubt, that such statements originate in a burdened conscience, and are " free and voluntary ", as these terms are defined and understood in the courts. The motive of a " confession " should also attract attention, not only in connection with the statement's evidential value, but also in connection with the exercise of the discretion to admit it at all.

When investigating into a criminal case, especially a grave offence, the Police, in their zeal to detect and bring to justice the criminal, are, naturally, often inclined to overstep the marks set by the law for the protection of the individual in their hands. Especially young policemen full of zeal, or anxious for a promotion. They seem to have an aptitude in attracting confessions. As against so many cases of statements made by persons in custody, I cannot now think of a single case where the accused walked alone to the Police to relieve his conscience by making a confession.

One of the first cases which were before the Courts of our new Republic, is the case of *Michael Vassili Volettos* v. *The Republic* (1961, C.L.R. p. 169). There, in a murder case, the Police took several statements from the appellant, all brought to court, and offered by the prosecution in evidence, in support of the charge. The trial Court held side-trials for the admissibility of each one of those statements. Some of them were admitted, others were rejected. The Court of Appeal in dealing with that case considered the position as a whole. I need not now go into further detail. The case covers eighteen pages in the Reports. I shall only mention that Mr. Justice Josephides in his judgment, referred to two other appeals in an attempted murder case resting mainly on confessions, investigated at about the same time, in the same police station and went as far as to suggest legislative measures against such state of affairs. (at p. 186).

Having thus set the background against which the admissibility of the confession of the appellant in this case, is to be considered, we can proceed with the facts.

We have here a young man aged 20, accused in November, 1966, of committing an unnatural offence, contrary to section 171(*b*) of the Criminal Code, that is of permitting another person to have carnal knowledge of him against the order of nature, about eighteen (18) months before he is alleged to have freely and voluntarily confessed to the police to have committed it.

During police investigations into another case the appellant was arrested. The circumstances of the arrest, as given to us by counsel, are that he was invited to follow a police officer to his station. Soon after arrival there, the appellant was informed that he was under arrest. We have no doubt in our minds that in the circumstances of this case, regardless of technicalities about arrest, when this particular young man was requested by the police officer to follow him to the Station, he thought that he was being arrested.

In these circumstances the law requires that he should be informed of the reasons of his arrest. He was not so informed until after arrival to the station. There, the appellant is said to have been formally arrested and to have been informed of the reason for the arrest. He was then put at the disadvantages of a person in that position ; a person whom long established principles of law emanating from experience, protect against any interference with

his mental state and his corporal integrity, by persons in whose hands he is put by the law. Protection from fear, or promise of favour, from persons in authority.

The appellant alleges that while under arrest at the police station he was rough-handled and ill-treated. In consequence of such ill-treatment, he made a statement confessing to the offence charged. The alleged interference with his personal integrity while under arrest, was the subject of a side-trial in this case, in connection with the admissibility of the alleged confession. The trial Judge heard evidence as to the circumstances which led to the confession. He heard three police officers called by the prosecution to establish the voluntariness of the statement ; and then he heard the appellant on oath.

Again I do not propose going into detail, either with the police-evidence called to establish the voluntariness of the statement, or into the evidence of the appellant. I shall go directly to the findings of the trial Judge. These appear at page 17 of the record. The learned Judge took pains in going carefully into the matter, and in putting down his reasons, as he must do, for the purpose of enabling this Court to deal with the matter in case of appeal. He sums up the evidence called in support of the admissibility of the confession, by saying (at page 17 F.) that the substance of the evidence, of the police officer who took the statement, is that the accused spoke out of remorse ; he repented and wanted to alleviate himself " νὰ ξαλαφρώσῃ " ; to relieve his conscience.

Now this to us seems a position which deserves great care and special attention. It is a very delicate situation. It is connected on the one hand with the human and constitutional rights of this man, which have been set out earlier in this judgment, and on the other hand, it touches the very root of the administration of justice ; the truth regarding the facts upon which the law will be administered.

The trial judge, after making reference to the able cross-examination of the police witness by defending counsel, goes on to say that the other two constables corroborate the story that this man, under the pressure of remorse from his conscience, came out with this stale and belated confession. And that their immediate reaction was as it should be, to warn the appellant of the fact that such a confession might implicate him into a prosecution.

If one places this picture in the background of this case, one cannot help thinking that it presents, at least, a very

strange situation. Then, according to the record, this accused was taken to a medical officer who, though summoned, by the defence, he was not called. Anybody with some experience in the Courts would think that the defence did not call the doctor because his evidence did not help them. But does this really mean much in a case of this nature ? The doctor may have found no signs supporting such a complaint; and may have made no note of it on his papers, or in his mind. He may even have been unwilling to overtax his memory in order to help such an individual against the Police.

Then the Judge deals with the version of the appellant, finds a marked discrepancy between his evidence and the line of defence in the cross-examination of some police-witnesses, and he rejects the version of the appellant.

That, however, does not necessarily mean that his evidence is entirely untrue ; it may only mean that the Judge was not satisfied of its truth when he found it in conflict with the police evidence. There are parts of his evidence which are obviously correct. When the appellant was taken before a Judge for a remand order, he did not complain of ill-treatment. But the appellant gave an explanation why he abstained from making such a complaint. He knew, he said, of the consequences to another man who took that course. He named both the man and the consequences, as far as his knowledge went. Unfortunately there is no doubt that many persons in police custody do not always feel safe regarding their " corporal integrity ". And such complaints are frequently coupled with " confessions ". But the Courts can do a good deal in discouraging practices which destroy public confidence in police methods. If suspicious confessions are rejected, —as they should be, according to our law—there will be less zeal in obtaining them ; and less danger of harm in using them.

In this case, however, counsel for the prosecution submitted, there is an express finding by the trial Judge that the confession was free and voluntary ; and the Court of Appeal must have sufficient reasons, from the record, before they can upset such finding. Especially when the trial Judge, having assessed its evidential value, has decided to act on it, counsel argued.

The position arising from findings of fact made by the trial Court, has been the subject of discussion in a number of cases. Soon after the establishment of the Republic

and its new Courts of Justice Law in 1960, the matter came up in *Simadhiakos* v. *The Police* (1961, C.L.R. p. 64) which was considered and discussed in several subsequent cases. The position is now well settled. (See *Patsalides* v. *Afsharian* (1965) 1 C.L.R. 134) ; and more recently, *Koumbaris* v. *The Republic* (reported in this part at p. 1 *ante*) and *Meitanis* v. *The Republic* (reported in this part at p. 31 *ante*).

In this appeal we now have one point to decide : whether the finding of the trial Judge that the statement of the appellant was free and voluntary, can stand in the light of the evidence on record. We are unanimously of the opinion that it cannot. This particular confession, soon after arrest for another case, more than 18 months after the alleged offence, is, in our opinion, certainly suspicious. The absence of any other evidence to verify the story given in the confession indicates that either no investigations were made for that purpose, or, if made, they produced no positive result. That, we think, strikes at the very foundation of any retracted confession. The reasons for which the statement in question was found to have been made freely and voluntarily are, in our opinion, inadequate and unconvincing. We therefore consider that the finding is unsatisfactory and must be set aside. And it is common ground in this case, that if the confession is ruled out as not free and voluntary, there is nothing else to support the conviction.

We, moreover, think that we should take again the opportunity to repeat that if the Courts will not take a firm and vigilant stand in enforcing the law which protects persons under arrest, whoever such persons may happen to be, the consequences are bound to reach deep and wide against public respect for law and order in the country. Abuse of power and authority over persons in custody can do much more harm to the community than the temporary suppression of a few hard criminals by fear of rough handling at the police station.

The Courts have the duty to sustain the rule of law in all circumstances, and absolutely. Over sinners and saints. The confessions of persons in custody must be dealt with the care and scrutiny they deserve at all times ; especially the times which the country is going through at present.

I would exclude the confession ; allow the appeal ; set aside the conviction ; and discharge the appellant.

JOSEPHIDES, J.: I concur both with the reasoning and the conclusion reached by the learned President of the Court. I fully endorse what was said by him with regard to the human rights of individuals. As is well known these rights are incorporated in the Rome Convention for the Protection of Human Rights and Fundamental Freedoms, concluded in 1950, of which the Republic of Cyprus is a signatory. This Convention has been approved by a law made by the House of Representatives in 1962 (Law 39 of 1962) and it, therefore, forms part of the law of this country. Needless to say that our Constitution is substantially modelled on that Convention as will appear from Part II of our Constitution which guarantees the fundamental rights and liberties of the individual.

In the Privy Council case of *Chan Wei Keung* v. *The Queen*, [1967] 2 W.L.R. 552, quoted earlier by the learned President of this Court in his judgment, Lord Hodson (at page 558) relied on the case of *Ibrahim* v. *The King* [1914] A.C. 599, which was applied in the Cyprus case of *Reg.* v. *Sfongaras* (1957) 22 C.L.R. 113. In the *Sfongaras* case it was held that the onus lay upon the prosecution to prove the voluntariness of a confession, 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 prosecution had not discharged the onus cast upon it.

The learned trial Judge in the present case, in his ruling on the question of the admissibility of the confession, stated that the substance of the police evidence was that the accused out of remorse spoke. He repented and wanted to take it off his chest " νὰ ξαλαφρώσῃ ". On the question of remorse, for my part may I reiterate once more the oft-quoted dictum of Cave J. in the case of *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."

I should, perhaps, add that this dictum has added force in a case like the present one where the confession was made some twenty months after the alleged offence and after the accused was arrested by the police in the course of investigations into sexual offences committed by another person who was subsequently tried and convicted.

I would, therefore, allow the appeal and quash the conviction.

HADJIANASTASSIOU, J.: I am in full agreement with the reasoning and conclusions reached by the learned President of this Court, but in view of the nature of this case, I would like to venture to add a few words myself.

The main contention of counsel for the appellant in this appeal, argued before us, was that the statement of the accused was not a free and voluntary one. I am content to decide the appeal on this point only, and it is no discourtesy to counsel that I do not intend to deal with the rest of the grounds raised in Court.

The principle with regard to the admissibility of confessions is too well known and has been expounded in many English and Cyprus cases ; and, in order to be admissible, a confession must be free and voluntary ; and unless it be shown affirmatively, on the part of the prosecution, that it was made without the prisoner's being induced to make it by any promise of favour, or by menaces, or undue terror, it shall not be received in evidence against him, vide *R.* v. *Thompson* [1893] 2 Q.B. 12 ; *Ibrahim* v. *The King* [1914] A.C. 599 at p. 609. This principle was adopted and followed in the very well known case of *R.* v. *Georghios Sfongaras*, [1957] 22 C.L.R. p. 113, decided in the dark days of the EOKA fighting. See also the recent case of the *Commissioners of Customs and Excise* v. *Harz and Another*, (House of Lords) [1967] 1 All E.R. 177, where the principle relating to confessions was extended to the effect that a confession or statement by an accussed is not admissible in evidence at his trial, if it was induced by a threat or promise, applies equally where the inducement does not relate to the charge or contemplated charge as where the inducement does so relate.

Now, since the facts of this case have been presented so lucidly and clearly by the President of this Court, I will not tread over the same path again. I consider it, however, constructive to quote the words of Cave J. in *R.* v. *Thompson*

(*supra*) at p. 18, which I fully endorse and follow in the present case :

> " 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."

The present is a case in which the Police was investigating an offence committed by the appellant 18 or 20 months earlier. According to the Police the appellant out of remorse spoke because he wanted to alleviate himself. I am content, therefore, to say, having in mind the facts of this case, that the prosecution failed to prove affirmatively that the statement of the appellant was free and voluntary, and I rule that the trial Judge has misdirected himself that the confession of the appellant was free and voluntary. Nowhere in the Judgment is there anything to indicate that consideration was given to the fact that the confession was retracted under oath when the appellant gave evidence in Court. As I have said earlier, the confession of the accused was not voluntary and it was wrongly received in evidence against the appellant.

I would like, however, in view of these facts, to go a step further and say that even assuming for a moment that I might have been persuaded that the confession was a voluntary one, I would still have been prepared to allow the appeal, after examining and weighing very carefully such confession, having adopted the useful common sense test of the truth of a confession which has been approved in *R.* v. *Sykes*, 8 Cr. App. R. 233 at pp. 236-7 :

> " The first question you ask when you are examining the confession of a man is, is there anything outside it to show 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 murder ? 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 ? "

I am satisfied that there was nothing outside the confession to show that it was true or that the statements of fact made in it were tested and found true and as I have reached the conclusion that the Court could not safely act upon such confession, and for the reasons I have given earlier, I would allow the appeal.

Appeal allowed. Conviction quashed.