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## Criminal Law And Procedure—Confession During Period Of Illegal Detention Admissible If Voluntary

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child is to be brought here and adopted, then the prospective foster parents must show that they have obeyed the pre-adoption requirements of the state, if such requirements exist, of the child's proposed residence.<sup>6</sup> Possible constitutional issues are thus apparently avoided by a combination of state and federal legislation.

W. W. M., Jr.

CONFESSION DURING PERIOD OF ILLEGAL DETENTION ADMISSIBLE IF VOLUNTARY

Defendants were arrested for illegal possession of firearms and were committed to the county jail by a formal written order of a city court judge, pending proceedings on the following day, which was Monday. Three hours after the commitment order, the defendants were removed from the county jail by police officers and were taken to a police station for questioning. During the interrogation, which lasted for ten to twelve hours, the defendants made inculpatory statements in connection with a felony murder for which they were subsequently indicted. At the trial the statements were admitted into evidence despite the fact that the trial court ruled as a matter of law that they were made during a period of illegal detention. The detention was illegal because of the unauthorized removal from the county jail, and the unreasonable delay in arraignment. The defendants were convicted of first degree murder and sentenced to death. On reargument of appeals from these convictions, *held*, reversed, two judges dissenting, and new trials ordered. No error was committed in submitting to the jury the voluntary nature of the statements of the defendants, although obtained after an illegal removal from the county jail, and during an unreasonable delay in arraignment. But, it was reversible error to allow the district attorney to make comments in his summation on the absence of police brutality toward one of the suspects. The reason that the comment was error was that the district attorney had been successful in excluding testimony at the trial pertaining to the physical treatment afforded this suspect. The majority concluded that this was prejudicial because it implied that the defendants in the case were not beaten. *People v. Lane*, 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961).

The New York rule on admissibility of confessions is based on whether or not the confession was made voluntarily.<sup>1</sup> Ordinarily the question of the voluntary nature of the confession is a question of fact to be decided by the jury.<sup>2</sup> But the law is well settled that when the evidence shows without dispute that the confession was extorted by force or fear, the judge should reject it as a matter

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6. Immigration and Nationality Act, 8 U.S.C. § 1155(b) (1961).

1. N.Y. Code Crim. Proc. § 395, states that "a confession of a defendant . . . can be given in evidence against him, unless made under the influence of fear produced by threats. . . ."

2. *People v. Elmore*, 277 N.Y. 397, 14 N.E.2d 451 (1938); *People v. Alex*, 265 N.Y. 192, 192 N.E. 289 (1934); *People v. Kelly*, 264 App. Div. 14, 35 N.Y.S.2d 55 (3d Dep't 1942).

of law.<sup>3</sup> However, in the case at bar the defendants do not base their appeal solely on the fact that their confessions were involuntary. They contend that their confessions should be excluded from evidence because they were made during a period of illegal detention. The Court of Appeals has held that in certain situations confessions are to be excluded not because they were involuntary, but because their use would violate the defendant's fundamental constitutional rights. Voluntary confessions and statements made in the absence of counsel after indictment are inadmissible on the ground that the defendant's constitutional right to counsel and freedom from testimonial compulsion have been violated.<sup>4</sup>

In the instant case, the question is whether the statements made by the defendants, although voluntary, should be excluded because they were elicited during a period of illegal detention prior to arraignment. It is conceded by the prosecution that the provisions of the New York prompt arraignment statute<sup>5</sup> were violated, but this violation does not in itself make the statements inadmissible. This has been the rule in New York since 1880, when it was held that the People are not precluded from the use of a voluntary confession merely because the officer to whom it was made was exercising an illegal restraint over the defendant.<sup>6</sup> It is also settled New York law that the fact that a confession was given during a period of illegal detention is only one factor to be considered in determining whether or not it was involuntary.<sup>7</sup> But in a concurring opinion in the instant case, Judge Fuld said he would change the New York law to conform to the federal rule, as enunciated in the cases of *McNabb v. United States*<sup>8</sup> and *Mallory v. United States*,<sup>9</sup> to exclude all confessions made during an illegal detention period from being admitted into evidence. His contention was that this exclusionary rule should be adopted by New York because judicial integrity demands that the court should not sanction illegal enforcement of the criminal law. Chief Judge Desmond, in a dissenting opinion, dismisses the grounds for reversal relied upon by the majority as not being significant enough to justify reversal. His opinion, however, is chiefly concerned with replying to Judge Fuld, and is based primarily on the assertion that to exclude a confession merely because it was obtained during a period of unlawful detention does not take into consideration

3. *People v. Valletutti*, 297 N.Y. 226, 78 N.E.2d 485 (1948); *People v. Barbato*, 254 N.Y. 170, 172 N.E. 458 (1930); *People v. Weiner*, 248 N.Y. 118, 161 N.E. 441 (1928).

4. *People v. Waterman*, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961) said that there is a "constitutional . . . right of a defendant to the assistance of counsel at every stage of a criminal cause (N.Y. Const., art. I, § 6 . . .)." *People v. DiBiasi*, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960) held that statements obtained from an accused in the absence of counsel, after indictment, which were admitted into evidence was testimonial compulsion.

5. N.Y. Code Crim. Proc. § 165, provides that upon arrest the defendant "must in all cases be taken before the magistrate without unnecessary delay."

6. *Balbo v. People*, 80 N.Y. 484 (1880).

7. *People v. Alex*, supra note 2; *People v. Mummiani*, 258 N.Y. 394, 180 N.E. 94 (1932); *People v. Trybus*, 219 N.Y. 18, 113 N.E. 538 (1916).

8. 318 U.S. 332 (1943).

9. 354 U.S. 449 (1957).

the voluntary nature of the confession. He concludes that voluntariness is the only logical test regarding admissibility, as is illustrated by the New York cases.<sup>10</sup> He also concludes that if a change in the statute regarding confessions is needed, that change would have to come from the legislature, and not from court interpretation.

The holding of the instant case seems to fall within the established principles regarding admissibility of confessions and adds nothing to the law of New York. As to Judge Fuld's attempt to adopt the *McNabb-Mallory* rule, the United States Supreme Court has stated that the rule is only procedural and evidentiary and not required by constitutional due process. Therefore, it is not made applicable to the states by the Fourteenth Amendment, but is based solely on the supervisory power of the Supreme Court over federal courts.<sup>11</sup> Judge Fuld's thesis that an exclusionary rule would be the worthier rule of law, finds ample support in the telling arguments of Professors Hogan and Snee in their now-definitive work on the subject, so that they need not be detailed here.<sup>12</sup>

In the case of *People v. Everett*, 10 N.Y.2d 500, 180 N.E.2d 556, 225 N.Y.S.2d 193 (1962) a unanimous court, Judge Fuld deeming himself "concluded by the holding in the Lane case," reaffirmed the principle that confessions are not inadmissible because obtained during a period of unlawful detention. In the *Everett* case the defendant argued that his confession should not have been admitted into evidence, because his arrest failed to comply with section 180 of the Code of Criminal Procedure. That section provides that when an officer makes an arrest without a warrant and not during the commission of a crime, "the officer must inform him of the authority of the officer and cause of the arrest." The defendant claims he was not informed of the cause of the arrest, therefore, his arrest was unlawful as was the detention that followed. But the Court does not consider the question of the legality of the arrest or the detention thereafter, stating that the manner of arrest and subsequent detention are circumstances which are to be considered by the jury in deciding the issue of the voluntary nature of the confession. As a collateral argument, the defendant attempted to have the confession excluded on the ground that it was fraudulently induced. The Court also rejected this contention, relying on the well-settled doctrine that "a confession is admissible, although it is . . . obtained by artifice or deception."<sup>13</sup>

More recently, the Court of Appeals, in the case of *People v. Meyer*,<sup>14</sup> extended the exclusionary rule to confessions made in the absence of counsel,

10. Supra note 6.

11. *Culombe v. Connecticut*, 367 U.S. 568, 599, 601 (1961); *Stein v. New York*, 346 U.S. 156 (1953); *Gallegos v. Nebraska*, 342 U.S. 55 (1951).

12. Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 *Geo. L.J.* 1, 21-33 (1958).

13. 10 N.Y.2d at 507, 180 N.E.2d at 559, 225 N.Y.S.2d at 198, quoted from *People v. Wentz*, 37 N.Y. 303, 306 (1867).

14. 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962).

from the post indictment to the post arraignment stage of the criminal proceedings. The Court held that a voluntary, unsolicited statement made by the defendant to a police officer, in the absence of counsel, after arraignment following his arrest, was inadmissible. The Court, in *Meyer*, stated that the arraignment must be considered the first stage of a criminal proceeding, and any statement, made thereafter in the absence of counsel, violates the defendant's right to counsel and also infringes upon his privilege against self-incrimination. In an even more recent case,<sup>15</sup> the Court stated that interrogation in the absence of counsel is prohibited after the criminal proceeding had been commenced. The Court went on to state that it makes no difference if the criminal proceedings are commenced by a grand jury indictment, or by a charge placed against the accused by a magistrate after arrest.

In the light of these developments, the question that arises with regard to the instant case would be—when did the criminal proceedings against the accused commence? With the benefit of hindsight it would seem likely that if a case involving the same facts as the instant case were before the Court today, it would hold that the criminal cause against the defendant had begun. The defendants had been committed to jail by a court order, and although a formal arraignment was postponed until the following day, the judicial process had started in motion. Therefore, it would seem that the statements of the defendants, obtained during the interrogation following their illegal removal from jail, would be a violation of their right to counsel and their privilege against self-incrimination. But this conclusion would only pertain to the facts of the instant case, that is, where there has been the illegal removal of an accused from jail, following judicial process. Still the question remains whether eventually the Court may find it necessary to adopt the exclusionary rule in the area of illegal detentions. Since constitutional rights now attach at arraignment, it may present a real temptation to law enforcement officials to prolong further the pre-arraignment period and exaggerate present illegal detentions. The result is an impingement on these constitutional rights which depend upon arraignment. The door then is left ajar for the Court to declare through due process that such impingement requires an exclusionary rule to make effective the constitutional right to counsel and freedom from testimonial compulsion already declared to belong to the accused.

W. J. L.

CONFESSIONS OBTAINED BY CONFRONTATION WITH ILLEGALLY SEIZED EVIDENCE  
OR AFTER INITIATION OF CRIMINAL PROCEEDINGS WITHOUT BENEFIT OF  
COUNSEL ARE INADMISSIBLE

Prior to arraignment for premeditated murder, defendant was questioned and made statements implicating himself after being confronted with illegally obtained evidence. The following day he was brought before a justice of the

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15. *People v. Rodriguez*, 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962).