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THE COURT'S CHARACTERIZATION OF DEFENDANT'S EXCULPATORY STATEMENTS AS A CONFESSION NOT PREJUDICIAL ERROR

After a conviction in the County Court of Erie County for manslaughter in the second degree,⁴² and a subsequent affirmance by the Appellate Division,⁴³ the defendant in *People v. Kingston*⁴⁴ was granted a permissive appeal.⁴⁵

Defendant's sole argument to the Court was based on the trial judge's charge wherein reference was made to the rule governing the admissibility of a confession. Defendant argued that the interjection of this rule implied that he had in fact confessed to the crime as charged and tended to characterize certain pretrial statements, admittedly made by him, as a confession of guilt in the eyes of the jury. It was submitted that this was highly prejudicial and constituted reversible error.

The record showed that defendant's four-year-old foster son had died of "shock due to blood loss" resulting from a "tearing of the mesentery." Medical testimony established that a sharp blow or kick to the stomach or back could have caused the fatal injury. Defendant's own statements to the district attorney, both written and oral, vividly recounted his striking and shoving the child in an attempt to "discipline" him; whereupon, the child fell against the leg of a bed and shortly thereafter lapsed into a coma, which resulted in death. The defendant did not, however, acknowledge guilt of the crime or admit that his punishment was either excessive or the cause of the child's death.

The Court of Appeals, although recognizing that the trial court's reference to the rule governing the admissibility of confessions was unnecessary, rejected the defendant's argument on the basis that it was clear that the judge was merely "speaking in the abstract and not of the statements given by the defendant."⁴⁶ The Court reached this conclusion despite the fact that the phase of the charge referring to the rule governing the admissibility of a confession immediately followed the trial judge's express reference to the defendant's pretrial statements.

In an effort then to strengthen their ultimate result, the Court further held that "even if the instruction were to be construed as an oblique characterization of the statements as confessions, that would not constitute prejudicial error."⁴⁷ In any trial some error is inevitable; on review it must be determined whether the claimed defect influenced the jury and tainted its verdict.⁴⁸ If it did not, the verdict must stand.

The Court recognized that the defendant's statements technically would

42. N.Y. Penal Law § 1052.

43. 11 A.D.2d 906, 205 N.Y.S.2d 1021 (4th Dep't 1960).

44. 8 N.Y.2d 384, 208 N.Y.S.2d 956 (1960).

45. N.Y. Civ. Prac. Act § 589.

46. *People v. Kingston*, supra note 43 at 389, 208 N.Y.S.2d at 959.

47. *Ibid.*

48. N.Y. Code Crim. Proc. § 542.

not amount to a confession in that he did not acknowledge his guilt.⁴⁹ However, the statements made were highly incriminating by and of themselves and it is only a fine distinction between the content of those statements and what could in fact be considered a confession. The Court concludes from this that there is little chance that the jury was influenced by the Court's characterization, if such it was, of the defendant's statements as confessions. The test being applied is that the possibility of prejudice "varies with the degree to which the court's description of the defendant's statement departs from the fact."⁵⁰

The defendant relied upon the two cases of *People v. Thomas*⁵¹ and *People v. Doria*,⁵² where judgments were reversed because the trial court had erroneously characterized certain pretrial statements of the defendants as confessions.

The *Thomas* case was a per curiam decision which held that, in a burglary conviction, characterization of exculpatory pretrial statements as a confession constituted error which deprived the defendant of a fair and impartial trial, the result having been based on the *Doria* case. However, reliance on the holding in *People v. Thomas*,⁵³ without a full opinion expressing the court's view of the degree to which the characterization of the statements as a confession departed from the actual fact, ignores the test as it has developed.

In the *Doria*⁵⁴ case, defendant had been tried for rape. He had made pretrial admissions of indecent familiarities with the complainant, and the judge had improperly referred to his statements several times as a confession. This writer feels that the case is distinguishable from the present one in that the admissions were not for the act complained of and, further, because rape is a technical charge which the jury must be made to understand has certain essential elements which must be present for the commission of the crime. To a layman it might be very easy to equate admitted indecencies with the act of rape when the judge refers to these admissions as a confession.

A slightly later decision, *People v. Lewis*,⁵⁵ clarified the holding in the *Doria* case and denied a new trial for the error here in question. In the words of that case:

It is true that it is a technical error to characterize an explanatory or exculpatory statement by an accused as a "confession." . . . But every error in a criminal case will not warrant a reversal. . . . The error must rise to a level where it can reasonably be evaluated as adversely affecting the result. In *People v. Doria* we regarded the question of guilt or innocence of the rape charged as closely balanced; we felt

49. See 23 C.J.S. Criminal Law p. 152, note 89 (1961). Accordingly the term 'confession' excludes exculpatory statements and in general all statements, declarations and admissions by word or act, which do not amount to an acknowledgment of guilt.

50. *People v. Kingston*, supra note 44 at 390, 208 N.Y.S.2d at 960.

51. 283 App. Div. 995, 130 N.Y.S.2d 292 (4th Dep't 1954).

52. 281 App. Div. 918, 119 N.Y.S.2d 691 (3d Dep't 1953).

53. Supra note 51.

54. Supra note 52.

55. 282 App. Div. 267, 123 N.Y.S.2d 81 (3d Dep't 1953).

the error in the context of that record of sufficient gravity to warrant a new trial.

But it can scarcely be argued that every time a judge in his charge calls a pretrial statement a "confession" there must be a reversal without regard to the course and direction of the record as a whole.⁵⁶ (Emphasis added, Citations omitted.)

Another Appellate Division case, *People v. Lee*,⁵⁷ again emphasized that this improper designation of pretrial statements is only important in its overall impression on the jury by the following statement:

We do not think that the jurors were misled by the use of the word "confessions" in the charge or that their minds were not clearly directed to the true issues involved . . . or that the verdict was against the law or that justice requires a new trial. . . .⁵⁸

That case, involving murder in the first degree, was affirmed.⁵⁹ However, the dissenting opinion in the instant case argues that *Lee* is distinguishable because an exception was not taken by the trial counsel to the designation of the admissions as confessions. To the writer it is impossible to believe that this Court was controlled in its determination by this minor technical point, especially in a situation wherein the crime charged was murder and the penalty death.

The Court holds here that the error did not influence the verdict, thereby affirming the Appellate Division's denial of a new trial

Chief Judge Desmond, dissenting, views the error as highly prejudicial, for "with the issue of guilt so close, this was a dire blow to the defense and an error most grave."⁶⁰ This writer cannot agree with the interpretation Judge Desmond gives to the record. If the case is viewed as a close one, an error such as this would certainly be a highly prejudicial and reversible error in that the jury might well be swayed by the fact that the defendant had confessed to the crime. But here we have the defendant's own account of what had transpired, an admission that he had administered a severe beating to a four-year-old child. The account itself was highly incriminating and the defendant's own words must have had a tremendous impact on the jury. It is difficult for this writer to believe that a jury would not consider these statements as tantamount to an admission of guilt however they were labeled by the trial judge.

P. C. B.

WITHDRAWN GUILTY PLEA NOT ADMISSIBLE FOR ANY PURPOSE IN CRIMINAL PROCEEDINGS

The long standing rule in New York has been that although a trial court may in its discretion allow a plea of guilty to be withdrawn at any time before

56. *Id.* at 272, 123 N.Y.S.2d at 86.

57. 4 A.D.2d 770, 165 N.Y.S.2d 338 (2d Dep't 1957).

58. *Id.* at 771, 165 N.Y.S.2d at 342.

59. *People v. Lee*, 4 N.Y.2d 843, 173 N.Y.S.2d 815 (1958).

60. *People v. Kingston*, *supra* note 44 at 391, 208 N.Y.S.2d at 962.