THE PROVISIONAL MILITARY GOVERNMENT OF SOCIALIST ETHIOPIA
SUPREME COURT,
ADDIS ABABA

Criminal Appeal No.4/71
Hedar 7,1972 Eth. Cal. (November 17,1979 G.C.)

Haleka W.H.S. and B.T. — Appellants
The Public Prosecutor ... Respondent

Judges: 1
2
3
4
5

After a careful consideration of the case we have given the following decision.

DECISION

The first appellant was charged in the High Court with having bribed judges and investigators by giving Birr 5,000, during the time when he was detained for examination and after he was released from detention, so as to make them act in a manner contrary to their duties in the investigation that was being conducted against him on the suspicion that he caused the death of Ato H.T., contrary to Article 20 of the Special Penal Code; the second appellant was also charged in the High Court on the grounds that, as an accomplice to the first appellant, he received Birr 2,000 from the first appellant, and gave this money to sergeant Major G.S., who was conducting the investigation while the two appellants were detained together, and that after he was released from detention he took another Birr 2,000 from the first appellant to be given as a bribe and used the money for himelf. The court of first instance found both appellants guilty as charged, and sentenced the first appellant to ten years' rigorous imprisonment and the second appellant to six years' rigorous imprisonment on 7 Meskerem 1972 (Ethiopian Calender) in file No. 203/71. The appellants appealed against the judgement to this court.

The grounds of appeal as presented by the appellants' counsel were that the offence of which the appellants were charged was not proved by other reliable witnesses; the High Court based its majority judgement on the confession, which it is alleged that the appellants gave to police; but the confession was obtained not voluntarily, but through force and torture; the defendants, through their defence witnesses, have satisfactorily proved that they were severely beaten and suffered from heavy pain during the investigation; the High Court's admission

of the confession which the defendants are said to have given at the police station is improper, since it has been proved that it was obtained by force and not voluntairily. On these grounds, counsel for the appellants has requested that this court reverse the majority judgement of the High Court and set the appellants free, in accordance with the view of the minority.

In his three page reply, written on 29 Tikimt 1972, the Public Prosecutor, as respondent, stated that there was not sufficient evidence produced other than the confession the appellants made at the police station; their defence witnesses have testified that the appellants were inhumanly beaten for four consecutive days and seriously wounded, while they were detained during the investigation. Because of this, it cannot be said that the confession given at the police station was voluntary. Since the allegation that the appellants have committed the offence has not been proved by sufficient evidence, the Public Prosecutor has no objection if the appellate court sets the appellants free, affirming the opinion of the minority decision.

The appellants' previous argument at the High Court and their present argument before this court is total denial of their commission of the offence stated in the charge. The only evidence the Public Prosecutor introduced to prove the charge was the confession which is said to have been given at the police station, and the witnesses who were said to have been present when the confession was given. The appellants did not and do not want to deny the fact that they confessed at the police station. What they are arguing is that they admitted to having committed the offence only because they were tortured for four consecutive days. Through their defence witnesses, the appellants have proved that they were tortured.

The High Court, taking the confession of the appellants obtained under such circumstances as genuine and sufficient, found them guilty by majority. The majority decision's rationalizations in its attempt to show that the confession obtained at the police station is sufficient and genuine are questionable. The majority decision states that "as there is mere fabrication to save one's own life when one is tortured, one should not forget the fact that truth may be elicited by torture" This opinion confirms the majority's opinion that inducement, threat and coercion are proper during investigation. To overlook the clauses that use of force to get information or to obtain confession during investigation is punishable (Art. 417 Penal Code and Art. 21 Special Penal Code); to forget that confession in these circumstances is also doubtful; to ignore that the work of the courts is in accordance with the law, and that law is also proclaimed to do away with force; and to remark that torture is good for it elicits truth: these actions performed by officials sitting on the forum of justice and entrusted with the duty to protect human rights, redress the injured, and punish the offender, are evocative of dismay and disappointment.

Of course, it is sometimes possible to elicit a hidden truth by inducement, threat and force. But, what should be borne in mind is that every person, suspected

and detained, is not necessarily a criminal. If every suspected and detained person is to be coerced for the purpose of eliciting truth, victimization of the innocent will be inevitable. Even if the suspect is indeed the real criminal, it does not necessarily follow that his confession under coercion is fully true, for he can be terrorized when tortured. The reason why the law and judicial opinions condemn such measures is to protect the innocent from unlawful coercion and self-incrimination. The law prefers the escape of the criminal to the suffering of the innocent. Since torture is unlawful a confession obtained through torture cannot be lawful.

Continuing its comment, the majority decision states that "as the peoples of the world have marched towards a higher level of civilization and, as the methods of committing offences are equally sophisticated, it has become absolutely necessary that in order to elicit truth, various means should be employed" So long as the level of development increases and so long as there is advancement in civilization, it is not debatable that methods of committing crimes will become equally sophisticated. Hence, in order to abort crimes and bring truth to light, and to arrest and bring the offender before the court, it is necessary that the agency in charge of maintaining law, peace and order should develop sophisticated means. To this extent our opinion is not different from the opinion expressed in the majority decision. Nevertheless we cannot agree that torture is a modern device invented to elicit truth. It should be known to everyone that torture is a primitive and not a modern means of investigation. But the majority decision tries to convince us that torture is a sophisticated means of investigation introduced by modern civilization to educe truth. The opinion does not limit itself to the attempt to convince that torture is a method of investigation that is allowed. It also lays down practical principles for courts, particularly those in socialist countries, as to what they should do when a confession obtained by torture is presented to them as evidence. Elaborating this view, it stated that "since the principal aim of courts in socialist countries, as state organs, is to find ways for educing truth after diligently considering the report of the police investigation, they should render a proper decision; but to reject the report of police investigation which has been obtained after much effort has been exerted under the pretext that certain minor legal procedures are not complied with, is not, we believe, a proper procedure to follow" While on the one hand it states that courts should find ways for eliciting truth, on the other hand the majority decision states that courts should not reject what has been inevstigated by the police, as the investigation is a result of much effort. We fail to understand how courts can find ways for eliciting truth if they are to accept the result of police investigation presented to them without any consideration and without examing as to whether or not the investigation was conducted in accordance with the law. It is confusing as to what is to be considered diligently, if courts are to accept the report of police investigation as it is, disregarding legal procedures and without examination and consideration. If it is to be disregarded that use of torture is punishable by law, and if one is to take the stand that one should not doubt the truth

of a confession of a suspect obtained even by torture, because use of torture is a minor procedural irregulatiry which should not be taken into account, and because much effort has already been exerted thereto; the enactment of laws and the establishment of courts becomes absolutely unnecessary. The reason why an accused is brought before a court is to enable him to obtain a proper judgement, after the truth has been elicited by examining the case and proving it on the basis of evidence properly weighted by an impartial judge. According to the majority opinion, however, the duty of courts is not to analyse and elicit the truth of the case but merely to endorse the evidence presented by the Public Prosecutor without questioning and doubting its truth. But, if the duty of a court is merely to give its blessings to the evidence of the prosecution, its very existence and the bring ng of an accused before it appears to be unnecessary, although directly or indirectly, the majority opinion seems to confirm this view.

After examination of the case that was brought against the first appellant before the High Court on the charge that he had H.T., killed, the High Court set him free on 21 Hedar 1971 E.C., and the division of the High Court which gave the decision in the present case knows this fact very well. This being the case, the majority decision states, "Although the question as to what motivated a person who claims to be like pilate 'innocent of the blood of this just person' to commit and to induce others commit the crime of bribery remains unanswered, we on our part cannot pass without remarking that the circumstances of the case have forced us to believe that it was intended to conceal the crime of the brutal murder of H.T" This remark was made eleven months after the first appellant had been acquitted of the offence of homicide. The majority opinion, on the one hand, states that the motive that prompted the first appellant to commit the present offence is not clearly known. On the other hand, it tells us that the motive was to conceal the crime of which the first appellant had already been declared innocent and acquitted. However, the basis for the majority's opinion is not consideration of objective evidence but its suspicion and feelings. But, this is not what is expected of a judge! Such emotionally laden phrases as "I am as free as Pilate", "the brutal murder of H.S." show that the case has not been considered on an impartial basis. The majority decision has been influenced by a subjective rather than by an objective consideration. It had done away with the cardinal principle of impartiality. It has completely undermined the very basis of justice. Finally, the majority decision concludes its opinion by stating that "since the evidence of the prosecution presented to us is sufficient and not open to doubt", the defendants are guilty. The majority decision quoted the opinion of the well-known jurists, Archbold and shaw, which states, "when a confession is corroborated by another confession and by circumstancial evidence, it becomes reliable", to support its view. However, other than quoting it for the sake of quoting, it did not relate it to the case presented to it. Had it done so, it might have understood that the jurists' theory is completely contradictory with the conclusion it arrived at. The said jurists did not forward the view that a confession by itself is sufficient and reliable. What they said is that a

confession should be reliable if it is corroborated by another confession and circumstantial evidence. We also agree with this opinion. If the evidence of the prosecution had been sufficient and not open to doubt, what prompted the need to quote the opinion of well-known jurists in the wrong place and to try to convince us that the confession of a suspect obtained through torture is sufficient and genuine?

However, in the case at hand, the only evidence presented is the confession which the defendants are said to have given at the police station. There is no circumstantial evidence which corroborates this confession. This being the case, we fail to understand why the opinion of the jurists was quoted.

To sum up, the only evidence presented against the appellants to prove the offence with which they are charged is the confession they gave at the police station. But, when the case was brought to court, the defendants denied that they committed the offence. They did not deny that they confessed at the police station. But their argument is that, since their confession was not given voluntarily because of torture, which they were not in a position to resist, it should be rejected as evidence. Their defence witnesses have testified that they were beaten for four consecutive days while under investigation at the police station. A confession given at the police station can be an additional evidence against an accused. But, even then, a confession can be additional evidence only if the accused gave it voluntarily and of his own free will, without any threat or inducement. In the case at hand, it has been proved by defence witnesses that the appellants were beaten for four consecutive days while they were at the police station for investigation. If the fact that they were beaten is proved, then it cannot be said that they have given their confession voluntarily and of their free will. Had the appellants confessed at the police station of their own free will without any coercion that they have committed the offence, we do not see any reason why they would have denied it in court. In the absence of additional corroborative evidence, we cannot say that the confession they gave at the police station is authentic, on the assumption that they changed their minds and denied what they previously wanted to confess. It is completely unknown why the appellants are suspected of having committed the offence. Since it is established that the confession they gave at the police station was obtained through coercion, the appellants should not be held guilty and punished in the absence of corroborative evidence that establishes that their confession under coercion was authentic.

Therefore we hereby reverse the majority decision of the High Court and affirm the opinion of the minority decision and order that the appellants be set free. We order that a copy of this decision be sent to the High Court, so that it knows that its judgement has been reversed. We also order that an order be sent to the prison where the appellants are imprisoned to release them.

Involuntary Confession: A Case Comment on Criminal Appeal No. 4/71

*by YOSEPH GEBRE EGZIABHER**

In Criminal Appeal No. 4/71, reported in this issue of the Journal, the court was faced with the issue of involuntary confession. The issues raised by this case are:

(a) Should a distinction be drawn between reliable and unreliable evidence where a confession is obtained involuntarily by the use of force? or

(b) Should a court reject as evidence a confession obtained involuntarily by the use of force, regardless of whether or not it is reliable?

The legal requirement that whether or not a person has committed an offence must be proved beyond reasonable doubt[1] by evidence sustainable at a court of law has a long history behind it.

There were times when people accused of crime had to fight a duel with their accusers and win in the duel in order to be found innocent.[2] In our present era, although one may justify the legal prohibition of the use of force, threat or any other illegal means by deriving it from other principles,[3] the probhibition seems to be tied in with the presumption of innocence when we look at it strictly from the law of evidence.

*Assistant Professor, Faculty of Law, Addis Ababa University

1. See Crim. Pro. C. Art. 141.
2. Ploscowe, Morris, The Development of Present-Day Criminal Procedures in Europe and America, *Harvard Law Review* (Vol.48/1934-35), p. 440.
3. See, for example, Art. 176 of the Constitution of the Federalist Republic of Yugoslavia, which states "the inviolability of the integrity of the human personality, personal and family life and of other human rights shall be guaranteed.

   "Any extortion of a confession or statement shall be forbidden and punishable". From this, it can be argued that extortion of a confession is considered as a violation of the integrity of the human personality. See also Wigmore, *Evidence in Trials at Common Law* (Little, Brown and Company, 1970), volume 3, pp. 329-344, for the theory that the reason why involuntary confession is excluded is that it is untrustworthy, and also that it violates the right against self-incrimination. However, the latter theory seems to be part and parcel of the principle of presumtion of innocence, since this presumption implies that before a person can be suspected of a crime and screened as such from other law-abiding and innocent citizens, there must be independent evidence that incriminates him.

That the principle of presumption of innocence is a principle almost universally accepted can be seen from different commentaries, declarations and legal systems. Thus, in Article 14, paragraph two of the International Covenant on Civil and Political Rights of 16 December 1966 it is provided that "(e) very one charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."[4] Rudolf Herrmann states that "under no circumstances must suspicion alone be considered sufficient ground for giving up ones' fundamental belief in a fellow being as a law-abiding citizen".[5] Section 14, paragraphs 2 and 3 of the Basic Principles of the Criminal Procedure of the USSR and the Union Republics read, respectively, "(t) he court, the Procurator, the investigagator and the person who conducts the inquiry may not shift the burden of proof on to the accused" and "(i) t is forbidden to extract information from the accused by force, threats or by other unlawful means" [6]

These declarations and legal provisions impose "on the organs of the administration of criminal justice the obligation not to be satisfied with an assumption of guilt, but in criminal proceedings to base their judgements on demonstrable and irrefutable evidence" [7]

Thus presumption of innocence as a principle implies that the burden of proof cannot shift from the organs of the administration of justice to the accused before establishment of probable guilt.

As can be seen from the above quotations, it is provided in the Basic Principles of the Criminal Procedure of the USSR and the Union Republics that an accused person's right to presumption of innocence is applicable starting from the initial stages of criminal process, i.e., investigation. The implementation of this in practice should be such that, before pinpointing a citizen as suspect and subjecting him to the ordeals of criminal process, any investigating authority must establish that the suspect has probably committed an offence on evidence obtained independently of the suspect.

However, since they are burdened with the heavy responsibility of apprehending criminals and protecting a society from being exposed to criminal activities, investigating police officers at times find it difficult "not to shift the burden of proof to the accused "and to refrain from extracting" information from the accused by force, threats, or by other unlawful means", to use the words of Section 14

4. Herrmann, GDR Criminal Procedure Law Governed by Socialist Principles, *Law and Legislation in the German Democratic Republic* (1974, second issue), p. 29. See also Article 11(1) of the Universal Declaration of Human Rights where it is provided that "(e) veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." Source, Brownlie, *Basic Documents on Human Rights* (Clarendon Press, Oxford, 1971), p.109. For similar provisions in different national laws, see *id.* pp.3-89.
5. Herrmann, cited at note 4 above, p.29.
6. Section 14, paragraphs 2 and 3 of the Basic Principles of the Criminal Procedure of the USSR and the Union Republics, as reproduced in *Law in Eastern Europe* (Vol.3), p.119.
7. Herrmann, cited at note 4 above, pp. 29-30.

Paragraphs two and three of the Basic Principles of the Criminal Procedure of the USSR and the Union Republics quoted above.

Awareness of this "abuse" has led different jurisdictions to devise different approaches to deter the police from violating a suspected person's right to presumption of innocence by the use of force, threat or other unlawful means.

Thus, in England, the "abuse" it is believed, will be avoided by forbidding "*all* interrogation of the accused while he is in custody, the time when the abuse generally takes place"[8]. Moreover, the courts have the disrcretion to exclude the confession if it is obtained in violation of the accused's privilege against self-incrimination.[9]

In America, the "abuse", it is believed, will be avoided by making a suspect's right to counsel while in police custody always realistic, in that a denial of this right automatically makes a confession involuntary and unacceptable as evidence whether or not it is credible.[10]

In India, on the other hand, the approach is different. In order for a confession to be admissible against an accused person at trial, it must be made before a magistrate. This procedure, it is believed, will make a confession reliable as given voluntarily.[11]

In Yugoslavia, still another approach is followed. Prior to 11 May 1967, the Yugoslav Code of Criminal Procedure recognized two authorities as investigators into the commission of a crime, viz., the police and the judiciary. However, by the Statute of 11 May 1967, inquiry, which was a pre-trial investigation and which fell within the exclusive domain of the police, was abolished. The only mode of investigation left now is the "investigation proper," which is within the exclusive domain of the judiciary.[12] According to the amended Yugoslav Criminal Procedure Code, the new task of the police is "only to provide the public prosecutor with background information so that he can decide whether or not to set the investigative judicial machinery into motion... Thus, it was obviously the drafters' intention that the police should under no circumstances produce admissible evidence through the interrogation process" [13] Considerations taken in adopting this approach seem to be "abuses" by the police of the principle of presumption of innocence.[14]

8. Fisher, Involuntary Confessions and Article 35, Criminal Procedure Code, *Journal of Ethiopian Law* (Vol.III, No.1), p. 351.
9. Ibid.
10. Ibid. However, it is doubtful to what extent this right could be realistic in cases where the accused is indigent and where bias is likely against the indigent who is of "low class" in a bourgeousie society.
11. Id., p.332.
12. *Collection of Yugoslav Laws: Code of Criminal Procedure* (Beograd, 1969), Vol. 19, p.9.
13. *Id.*, p.10. That the judge should play a role at the initial stage of the criminal process by investigating into the commission of a crime is a civil law development, see Ploscowe Morris, cited above at note 2, pp. 433-467.
14. *Id.*, foot-note 2 at p.8.

The principle of presumption of innocence seems to be inbuilt in our criminal procedure, starting from the initial stage of our crininal process. Before the decision to pinpoint a given person as a possible offender and thus to sift him from the innocent is arrived at, the investigating police officer must first have reason to believe that the person has committed an offence.[15] Moreover, it is provided that "(n)o police officer... shall... use... any inducement, threat, promise or any other improper method to any person examined by the police" [16]

It is clearly provided in the law that where an investigating police officer, whose duty it is to investigate into the commission of a crime, uses inducement, threat, promise or any other improper method against the suspect, he is liable to punishment. Article 22 of the Revised Special Penal Code Proclamation No.214 of 1981 provides:

> "(1) (a) ny public servant or official or any elected member of a mass organization or co-operative society or any member of any revolution defence committee charged with the arrest, custody, supervision, escort or interrogation of a person who is under suspicion, under arrest, summoned to appear before a court of justice, detained or interned or imprisoned who in the performance of his duties, treats the person concerned in an improper or brutal manner, or in a manner incompatible with human dignity, is punishable with imprisonment not exceeding five years, except where his act may justify the application of more severe punitive provisions.
>
> "(2) where the commission of the said offence was ordered by a public official or an official of a mass organization, the said official shall be punished with rigorous imprisonment from five to fifteen years".[17]

However, the legal consequences that must follow as far as the evidential value of the confession is concerned in cases where the police violate the law in the process of investigation is not spelt out in the Code.[18]

On the other hand, despite the absence of statutory power as far as the evidential value of involuntary confession is concerned, courts have to use their inherent power of decision. This was, to a certain extent, what happened in Criminal Appeal No.4/71.

15. Cr. Pro.C. Art. 25.
16. Cr. Pro. C. Art. 31.
17. Negarit Gazeta, 41st yr.No. 2. See also P.C. Art. 417.
18. Art. 462 bis of the Avant-Project of the Criminal Procedure Code in its sub-article 2 as reproduced in Fisher, *Ethiopian Criminal Procedure Code: A Source Book* (Addis Ababa University, in association with Oxford University Press, 1969), p.458, provided that confession obtained in violation of the law shall be null and void. However, this draft Article in the Avant-Projet was replaced by Article 31. The reason why Art. 31 of the Criminal Procedure Code does not mention the effect as far as the evidential value is concerned, as pointed out by fisher, cited at note 8 above, pp.333-34, Seems to be the legislature's belief that this would be provided in a Code of Evidence.

In contravention of the principle of presumption of innocence and Article 25 of the Criminal Procedure Code, which is intended to implement this principle, it is plain from an examination of the case that the police did not try to look for evidence independent of the appellants and forced them to confess, thus violating Article 31 of the Criminal Procedure Code and Article 22 of the Revised Special Penal Code Proclamation cited above. Neither, did the police try to substantiate the appellants' confessions by facts that could corrobrate the veracity of the confessions.

Having ascertained from the facts of the case that the confessions given by the appellants were neither voluntary nor corraborated by circumstancial evidence, the Supreme Court rejected them. However, whether the court would have accepted involuntary confessions corroborated by circumstantial evidence still remains to be a matter of conjecture, since the court was not in this case faced with involuntary confessions corroborated by circumstantial evidence.

CONCLUSION

1) From the court's decision, the conclusion that can be drawn seems to be that an involuntary confession should be rejected if it is not found to be credible.

2) The court does not seem to be of the opinion that exclusion of an involuntary confession would deter the police from violating the principle of presumption of innocence. The court's stand seems to be that, since use of force to get information or to obtain confession during investigation is punishable, the better solution would be accepting the involuntary confession where it is credible and at the same time subjecting the concerned investigating police officers to penal sanction.

3) The court's decision is based on its inherent power to give decision on issues raised before it and not on the basis of a statutory power. However, in a country where we have codified laws, the vacuum in the law of evidence seems to be a vacuum that should be filled in without any delay.[19]

4) Possible abuses of this kind are bound to happen, not because it may be in police interest to use force to obtain a statement nor because of the police's disrespect of the law, but since it is the duty of the police to apprehand criminals, they may understandably violate the presumption of innocence because of the intuitive feelings they may have against possible suspects.[20] However, abuses of this kind must be done

19. This is not in any way to imply that there is no law of evidence in our legal system. Thus, a reference to Arts. 2001-2026 of our Civil Code (Negarit Gazeta 19th year, No. 8, Proclamation No. 165/1960) shows that these are laws of evidence.
20. Fisher, Some Aspects of Ethiopian Arrest Law: The Eclectic Approach To Codification, *Journal of Ethiopian Law* (Vol.3 No.2), pp.473-74.

away with. In the commentator's opinion, making abuses of this kind a penal offence does not seem to have the desired effect. On the other hand, to follow the Yugoslav approach and to take away the duty of investigation from the police and give it to the judiciary may be premature. However in the opinion of the commentator, this form of abuse might be minimized by amending Article 27 of our Criminal Procedure Code so as to withhold from the police the burden of accepting any statement or confession from an accused person and by retaining Article 35 of the Code as has already been suggested;[21] additional rules should ensure that the statement or confession taken by a court is not the result of "hidden" threats, inducements or force used by the police before the accused is brought to the court.

21. See Fisher, cited at note 8 above, pp. 332-338.