Note

THE CONSTITUTIONAL RIGHT OF THE ACCUSED TO A PRELIMINARY HEARING TO DETERMINE THE ADMISSIBILITY OF AN ALLEGED CONFESSION

Jose Manuel I. Diokno

"The Constitution has elevated the concept of admissibility from a procedural to a constitutional concept, and the process of determining admissibility from a mere evidentiary process to constitutional due process... It is necessary, therefore, to revise the procedure to bring it up to date with present realities, by incorporating... in the Rules of Court that when a confession is objected to as violating the Constitution, the Court should, upon motion of the accused, hold a preliminary hearing... and admit the confession only if the preponderance of the evidence supports voluntariness, the prosecution having the burden of proof."

-- Jose W. Diokno, Trial Memorandum of Law,
People versus Mondiguing, et. al.

Introduction

In a trial memorandum he wrote in 1978, after 30 years of law practice, the late Jose W. Diokno argued that an accused in a criminal case has a constitutional right to a separate hearing to determine the voluntariness of his confession. His argument fell on deaf ears then; and now, 17 years later, the procedure has not changed. In the meantime, the dangers he foresaw in 1978 are even more apparent in 1995; and though his voice is stilled, his words still carry a message that the Bench and Bar should heed. The following is an adaptation of his memorandum incorporating the recent Supreme Court decisions.

In 1921 the Supreme Court ruled that *"it is not necessary to pass upon the admissibility of the confession as a separate preliminary issue".*[1] Thereafter, the practice of the courts has been to admit a confession if the prosecution has a *prima facie* case of voluntariness, but they allow the accused, in presenting his defense, to offer evidence of involuntariness; and, after trial, in preparing the decision on the case, to consider the evidence of both sides to determine the confession's voluntariness and if it is to be given any weight. This was not, however, the procedure originally followed in this jurisdiction.

Practice under Act No. 619

On February 6, 1903 the Philippine Commission approved Act No. 619, section 4 of which provided as follows:

> SEC. 4. No confession of any person charged with a crime shall be received as evidence against him by any court of justice unless it be first shown to the satisfaction of the court that it was freely and voluntarily made and not the result of violence, intimidation, threat, menace, or of promises or offers of reward or leniency.

Applying this provision the Supreme Court held, in a line of cases stretching from *U.S. v. Pascual*[2] *to U.S. v. de Leon*[3], that at the time the confession is offered in evidence the defense can object to its admissibility and move for a hearing in which it can offer evidence; or offer evidence of involuntariness as part of its defense and then move to strike out the confession.[4] At such hearing, the prosecution has the burden of proving the voluntariness of the confession.

Repeal of Act No. 619.

In 1916, however, the Administrative Code repealed Act No. 619; and because of that the Supreme Court changed the procedure, ruling in *U.S. V. Zara*[5] that:

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[1]People v. Lauas, 38 Phil. 742 (1933), citing V.S. v. Zara, 42 Phil. 308 (1921).
[2]2 Phil. 457 (1903).
[3]27 Phil. 506 (1914).
[4]U.S. v. Alameda, 8 Phil. 266 (1907).
[5]42 Phil. 308 (1921).

> Of course the repeal of section 4 of Act No. 619 in no wise impairs the general rule of jurisprudence to the effect that a confession improperly obtained by the means or under the conditions stated in that section is not competent evidence against an accused person, *but the repeal of that provision does undoubtedly change the burden of proof, for... in the state of the law now existing, it will suffice for the admission of the confession that it was given under conditions which accredit prima facie its admissibility, leaving the accused at liberty to show that the confession was not voluntarily given or was obtained by some undue means, thus destroying its weight.*[6]

Since *Zara* held that to admit a confession the court had only to examine the prosecution's evidence to determine if a *prima facie* case of voluntariness was established, it is obvious that no separate hearing on the issue of voluntariness was needed; and in the case of *People v. Lauas*,[7] the Supreme Court so ruled:

> In this jurisdiction where the trial judge passes upon the weight as well as the admissibility of a confession, he may, in weighing the confession, take into account the conditions under which it was obtained and it is not necessary to pass upon the admissibility of the confession as a separate preliminary issue. x x x

Since *Zara* and *Lauas*, this procedure has not changed. However, in one case, Justice Barredo in a concurring opinion declared that "before any confession is ever marked or identified, upon timely objection of the accused, the court must first hold a separate proceeding solely for the purpose of satisfying itself that the same was taken with due regard to the constitutional rights of the accused discussed earlier in this opinion"[8] the next section will show how the Supreme Court has, on several occasions, disregarded *Zara* by holding that the burden of proof rests with the prosecution to prove the voluntariness of a confession.

Critique of Zara ruling; burden of proof confused with burden of evidence.

It is hornbook law that the burden of proof never shifts; only the burden of evidence does. Therefore, when *Zara* ruled that, after the prosecution makes out a *prima facie* case of voluntariness, the burden of proof shifts to the accused, what it meant is that the accused has the burden of

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[6]*Id.* at pp. 315-316 (emphasis supplied).
[7]58 Phil. 742 (1933).
[8]People v. Caguioa, 95 SCRA 2 (1980).

shifts to the accused, what it meant is that the accused has the burden of coming forward with enough evidence of involuntariness to meet the prosecution's *prima facie* case. This does not mean that the accused has to produce enough evidence to *overcome* the prosecution's *prima facie* case, but only enough to place the mind of the court in equilibrium on whether the confession was voluntary or not. In short, since the burden of proof of voluntariness is on the prosecution and never shifts, it is the prosecution--not the defense--that runs the risk of failing to persuade the Court that the confession was voluntary. So if the court cannot make up its mind whether it was voluntary or not, because the evidence on both sides is of equal weight, it must decide the issue against the prosecution.

Unfortunately, the rather loose language of *Zara* misled the Court, in subsequent cases,[9] to require the accused to prove involuntariness, thereby imposing an unconstitutional burden on the defendant to prove his innocence even before the admissibility of his confession has been ruled upon the court. More recently, however, the Supreme Court has recognized that the burden rests on the prosecution to prove the confession's voluntariness:

> The *People v. Castaneda* ruling applies to a crime committed before the Bill of Rights was amended to include Section 20 on the right to remain silent and to counsel and to be informed of such right. The presumption that 'no one would declare anything against himself unless such declarations were true' assumes that such declarations are given freely and voluntarily. the new Constitution, in expressly adopting the so-called Miranda v. Arizona[10] rule has reversed the presumption. The prosecution must now prove that an extra-judicial confession was voluntarily given, instead of relying on a presumption and requiring the accused to offset it.[11]

Despite these rulings, however, the courts have not adopted any procedure that allows for a separate or preliminary hearing to determine the admissibility of a confession.

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[9]See, e.g., People v. Ramos, 94 SCRA 842 (1979); People v. Juliano, 95 SCRA 511 (1980).

[10]384 U.S. 436.

[11]People v. Jara, 144 SCRA 516 (1986). See also People v. Trinidad, 162 SCRA 714 (1988) "The presumption of regularity of performance of official duty does not apply to in custody confessions. The prosecution must prove compliance with the constitutional requirements" citing People v. Tolentino, 145 SCRA 597.

A separate preliminary hearing on, and a determination of, voluntariness is now constitutionally required whenever demanded by the accused.

The exclusionary rule for confessions appears in both the 1973 and 1987 Constitutions.[12] By expressly providing for the exclusionary rule, the framers of the Constitution elevated the concept of admissibility from a procedural to a *constitutional* concept, and the process of determining admissibility from a mere evidentiary process to *constitutional due process.* Consequently, courts are constitutionally mandated to decide on the admissibility of a confession and reject it if the prosecution fails to meet its burden of proving that it complied with all the constitutional requirements.

While it is true that under the current practice the courts do rule on the admissibility of a confession, such ruling comes only at the end of the trial after both parties have presented all their evidence. As MCCORMICK ON EVIDENCE, 5TH ED., P. 138, BY CLEARY (1972) says, this--

> ... practice of hearing everything first and deciding upon its competency later creates an atmosphere which muffles the impact and deemphasizes the importance of the exclusionary rules of evidence.

And since admissibility is now a constitutional process, its impact and importance can no longer be muffled and de-emphasized.

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[12]CONST. (1973), Art. IV, Sec. 20. No person shall be compelled to be a witness against himself. Any person under investigation for the commission of an offense shall have the right to remain silent and to counsel, and to be informed of such right. No force, violence, threat, intimidation, or any other means which vitiates the free will shall be used against him. *Any confession obtained in violation of this section shall be inadmissible in evidence.*

CONST. (1987), Art. III, Sec. 12(1). Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.

(2) No torture, force, violence, threat, intimidation, or any other means which vitiate free will shall be used against him. Secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited.

(3) *Any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against him.*

The practice of resolving the admissibility and weight of a confession after trial, when the judge is preparing the decision, also gives rise to another risk--that the judge's decision on admissibility will be influenced or colored by evidence of guilt. It is all too easy for judges to allow the police to take shortcuts prohibited by the Constitution if they believe the accused is guilty. As former Chief Justice Concepcion said, quoting Justice Douglas of the U.S. Supreme Court--

> ... Although members of the bench must always endeavour to minimize the influence of emotional factors tending to affect the objectivity essential to a fair and impartial appraisal of the issues submitted for their determination, it is only natural--and I venture to add, fortunate (for, otherwise, how could they hope to do justice to their fellowmen?)--that they should basically react as other members of the human family. This is probably the reason why Justice Douglas of the Federal Supreme Court of the U.S. said in *Abel v. U.S.*:[13]

> Cases of notorious criminals--like cases of small, miserable ones-are apt to make bad law. when guilt permeates a record, even judges sometimes relax and let the police take shortcuts not sanctioned by constitutional procedures. x x x. The harm in the given case may seem excusable. But.the practices generated by the precedent have far-reaching consequences that are harmful and injurious beyond measurement.[14]

This problem has led the American courts to require a separate hearing on the admissibility of a confession even if the case is being tried solely by a judge without a jury:

> The question for our decision is whether *Jackson*[15] requires a separate hearing on the issue of voluntariness where the fact finder is a judge rather than a jury. We think that the decision in *Jackson* requires such a result. The function of a judge trying a case is two-fold: he is a finder of fact, as well as an arbiter of the law. The responsibility is burdensome. But the task becomes too great when we require a judge who has heard the evidence of guilt, to objectively and coldly assess a distinct issue as to the voluntariness of the confession. Objectivity cannot be guaranteed, and

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[13]4 LEd. 2d, 668 (1960).

[14]Aytona v. Castillo, 4 SCRA 1 (1962), concurring and dissenting opinion. The Court made a similar pronouncement in People vs. Jara, 144 SCRA 516, (1986) "... the evils of incommunicado interrogations without adequate safeguards to insure voluntariness could still result in the conviction, of innocent persons. More important, what the Constitution commends must be obeyed even at the risk of letting even hardened criminal mix once more with the law-abiding world."

[15]378 U.S. 368 (1964).

> reliability must be questioned. *Jackson*, properly construed, prohibits the finder of fact from passing on the voluntariness of the confession since its decision as to voluntariness could be colored by evidence as to guilt. x x x[16]

The two processes, therefore -- determining the admissibility of a confession and its weight -- should no longer be merged. The practice initiated by *Zara* and *Lauas* should be abandoned, because it is self-defeating and has been revoked by the Constitution itself. Evidence must first be admitted before it can be weighed. That is why Rule 132, section 38 of the rules on Evidence requires that a court's ruling on objections to evidence "shall always be made during the trial." To allow the courts to determine admissibility in the process of determining weight -- a process that takes place *after* the trial -- not only violates Rule 132 but also obliterates the concept, and eliminates the process, of admissibility. It also runs the risk that the courts may be influenced into admitting a confession, not because the judge finds it voluntary but because he believes it truthful, thus impairing the accused's constitutional immunity from compulsory self-incrimination.

This was in fact the position taken by Justice Barredo in *People v. Caguioa*,[17] where he said in his concurring opinion that--

> In other words, I feel very strongly that with the new constitutional developments in criminal procedure... there must be corresponding innovations in our trial practice to give bone, flesh and sinew to the additional rights of persons under custodial investigation or accused mandated by the new provisions of the fundamental law of the land. Accordingly, it is my view that before any confession is ever marked or identified, upon timely objection of the accused, the court must first hold a separate proceeding solely for the purpose of satisfying itself that the same was taken with due regard to the constitutional rights of the accused... The advantage of this procedure is that the court may not even see the incriminatory parts, if any, of the purported confession until after it is satisfied of the legality of its taking, hence any possible danger of the mind of the court being 'poisoned' factually by illegal evidence, human as the judge is, is thereby eliminated, should the confession be denied.

Justice Barredo's opinion was based on the 1973 Constitution, but it applies with even more force today because the requirements for a confession to be admissible under the 1987 Constitution are stricter insofar as the State is concerned: (1) the counsel who must be present during the taking of a

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[16]U.S. ex rel. Spears v. Rundle, 268 F Supp 691, 695-96 (1967) aff'd in 405 F 2d 1031.
[17]95 SCRA 2, 17 (1980).

confession must be a "competent and independent" counsel; (2) for a waiver of the right to remain silent to be valid, it must be in writing and done in the presence of counsel; and (3) there are more grounds for declaring a confession to be involuntary (torture, force, violence, threat, intimidation or other means which vitiate free will; the use of secret detention places, solitary, incommunicado or other similar forms of detention; and violation of the right against self-incrimination).

To give full meaning to these constitutional provisions, it is essential that a separate hearing solely on the admissibility of the confession be conducted before the trial, and in that hearing only evidence of admissibility (not evidence of guilt)[18] should be allowed, the prosecution having the burden of proving compliance with the Constitution by a preponderance of the evidence. It should be understood, moreover, that in the event the evidence of the prosecution and defense are of equal weight, the confession must be excluded.

The practice of using confessions as evidence has been criticized, and rightly so, as one of the most common shortcuts of our law enforcement agencies. It goes hand in hand with the use of torture, threats, intimidation, and other similar means to extract evidence from the mouth of the accused, methods which society abhors not because they are ineffective (a tortured person may very well be telling the truth to avoid more torture) but because they are morally reprehensible and violate basic human rights. As the Supreme Court ruled in *People v. Buscato*[19]:

> x x x This right against self-incrimination guaranteed in the fundamental charter cannot be abridged. 'If the government becomes the lawbreaker,' once observed Justice Brandeis, 'it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means... would bring terrible retribution'.

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[18]As the Supreme Court of the United States held in Lego v. Twomey, 404 US 477, 484, at footnote 12:

"The sole issue in such a preliminary or separate hearing is whether a confession was coerced. Whether it be true or false is irrelevant; indeed, such an inquiry is forbidden. The judge may not take into consideration evidence that would indicate that the confession, though compelled, is reliable, even highly so. x x x

[19]74 SCRA 30, 48-51 (1976), citing Olmstead v. U.S., 27 U.S. 438, 72 L. Ed. 944- 959.

The use of torture and other improper means of extracting confessions is so widespread and has so often been noted by the courts.[20] A separate or preliminary hearing could immediately expose these practices. It would also provide an effective deterrent to law enforcement personnel.

Finally, a preliminary hearing solely on the admissibility of the confession would save time and avoid a long and expensive trial -- and possibly even an appeal -- in cases where it is shown that the confession was illegally extracted. So many convictions have toiled their way up the judicial ladder to the Supreme Court only to be set aside on the ground that the confession was improperly admitted under the Constitution.[21] If they can be disposed of at the preliminary stage, before trial, this would certainly help unclog the criminal dockets of the courts.

For these reasons, it is submitted that when a confession is objected to as having been procured in violation of the Constitution, the courts should, upon motion of the accused, hold a preliminary hearing and admit the confession only if the preponderance of the evidence supports voluntariness, the prosecution having the burden of proof.[22]

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[20]See, e.g., People v. Obenia, 91 Phil. 292, (1952); People v. Francisco, 74 SCRA 158, (1976); People v. Urro, 44 SCRA 473, (1972); People v. SoFo, 23 Phil. 379; People v. Gande, 31 SCRA 347, (1970); People v. Entina, 23 SCRA 40, (1968); People v. Castro, 11 SCRA 699, (1964).

[21]See, e.g., the following cases where the Supreme Court set aside convictions on the ground that the extra-judicial confessions were inadmissible: People v. Olvis, 154 SCRA 513 (1987) (information filed in 1976, conviction set aside on appeal by Supreme Court in 1987); People v. Albior, 163 SCRA 332 (1988) (conviction handed down in 1984, reversed on appeal by Supreme Court in 1988); People v. Lumayok, 139 SCRA 1 (1985) (convicted in 1980, set aside by Supreme Court in 1985); People v. Magbanua, 115 SCRA 641 (1982) (convicted in 1971, set aside by Supreme Court in 1982.)

[22]U.S. v. Alameda, 8 Phil. 266 (1907).

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