SAMPLE CLASS / THE CRIMINAL TRIAL SYSTEM
PROFESSOR BARRON

1. "I am innocent. I didn't do it."

2. "I am not guilty. The prosecution cannot prove its case beyond a reasonable doubt."

What do those two statements mean? Do they mean the same thing? Are they different? Is there a clear answer? That is what we will explore during our session during orientation, when we discuss the criminal trial process.

In order to help you parse out those two statements, please read the three cases that follow. They will be our proverbial food for our collective thought during the sample class.

Bon Appetit!

The People of the State of New York, Respondent, v. Herbert Russell, Appellant

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

266 N.Y. 147; 194 N.E. 65; 1934 N.Y. LEXIS 897

November 26, 1934, Argued
December 31, 1934, Decided

PRIOR HISTORY: [***1] Appeal from a judgment of the Court of General Sessions of the County of New York, rendered June 18, 1934, upon a verdict convicting the defendant of the crime of murder in the first degree.

DISPOSITION: Judgment of conviction reversed, etc.

CASE SUMMARY
PROCEDURAL POSTURE: Defendant sought review of the decision of the Court of General Sessions of the County of New York (New York), which entered judgment against defendant after a jury convicted him of murder in the first degree.

OVERVIEW: The only evidence against defendant was identification by three witnesses that saw the homicide. Defendant denied that he had participated in the felony and claimed that he was confined to his bed. The court reversed the judgment and remanded for a new trial. The court held that the trial court impermissibly shifted the burden of proof upon defendant. The trial court had charged in the jury instructions that defendant's alibi defense should have been regarded with suspicion and pointed out grounds for suspicion that did not even exist in the case. The trial court further stated that if the jury did not believe the testimony of defendant's witnesses it could have considered the defense of alibi a fabrication and therefore corroboration of the state's witnesses and an admission by defendant of the truth and relevancy of their testimony. The court held that the trial court's charge substantially deprived defendant of his fundamental right to have the burden of proof of guilty beyond a reasonable doubt never shifted from the state.

OUTCOME: The court reversed defendant's conviction for the offense of murder in the first degree and remanded the matter for a new trial.

CORE TERMS: homicide, fabrication, robbery, guilt, suspicion, apartment, shot, murder, credibility, impeached, convicted, identification, corroboration, photograph, fabricated, fortify, picked, gun used, inclinations, disregarded, overlooked, accomplice, endeavor, impeach, fasten,

gun, testimony of witnesses, evidence produced, burden of proof, reasonable doubt

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JUDGES: Lehman, J. Pound, Ch. J., Crane, O'Brien, Hubbs, Crouch and Loughran, JJ., concur.

OPINION BY: LEHMAN

OPINION

[*149] [**66] On March 7th, 1933, Martin L. Harris was killed in his apartment in Harlem. He was a colored man and, it appears, known in Harlem as the "policy king." At the time of the homicide, three persons were living in Harris' apartment and, in addition, a carpenter was working there. Their testimony establishes that three [***6] colored men entered the apartment and one of them held in his hands two revolvers. Harris was shot by that man. Then they escaped with a considerable sum of money. Two pistols used in the "hold-up" were found on the floor of the apartment after the robbers escaped.

In July, 1933, five men were indicted for the murder of Harris. Four of them had been previously apprehended. The fifth defendant is still at large. The four defendants who were apprehended were tried jointly. The jury convicted the defendant Russell of murder in the first degree. It acquitted the defendant Mowatt. It disagreed as to the other defendants on trial.

[*150] At the trial three witnesses who were present at the homicide positively identified defendant Russell as the man who entered the apartment of Harris with two guns in his hands and who shot Harris. They also identified the defendant Mavis as one of the participants in the robbery. The two other defendants on trial were concededly not present at the homicide. The People endeavored to prove their guilt by evidence of admissions that they had aided and abetted the felony, in which the others were engaged when Harris was shot. Russell was [***7] not present when these alleged admissions were made. Against him the only evidence is the identification by the three witnesses who saw the homicide.

Russell denied participation in the felony and that he was present at the homicide. From the moment of his arrest he claimed that at that time and for some weeks thereafter he was confined to his bed by an attack of rheumatism. He so testified at the trial. He produced a number of witnesses who corroborated this evidence on his part. If the jury believed the testimony of the three witnesses who were present at the time of the homicide and who identified him, it could not reasonably fail to bring in a verdict of guilty of murder in the first degree. If they believed the testimony that Russell was at the time confined to his bed, then the jury was bound to acquit. The issue was simple and on that issue the burden of proof beyond a reasonable doubt, of course, rested on the People.

Though the issue is simple, its resolution requires a careful scrutiny of the evidence on both sides. There may be no ground to believe that the People's witnesses intentionally testified falsely. There is, nevertheless, ground for doubt as to the correctness [***8] of their identification. It is not disputed that immediately after the homicide they were taken to police headquarters and there they picked out a photograph as the likeness of the man who had shot Harris. They were mistaken then. [*151] The man whose likeness they picked out was in prison. Subsequently they picked out other photographs and again they were mistaken. Though these previous attempts at identification may be explained, yet they serve to impeach the testimony of these witnesses given at the trial. Even so, the jury might accept their testimony in spite of the denial by the defendant Russell and the testimony of his corroborating witnesses. Careful scrutiny of the evidence produced by both sides and appraisement of the probabilities were called for. In a case as close as this, circumstances which would ordinarily seem immaterial might become a decisive factor in the decision. Errors in the admission of evidence, or in the charge, which we might disregard where the People's proof points more conclusively to guilt, then may require a reversal of a judgment of conviction.

Since the defendant became a witness in his own behalf, the People had the undoubted right [***9] to impeach his credibility by proof of prior convictions. In this case they went further. They brought out on cross-examination not only that the defendant had been previously convicted of robbery in the second degree, but that at the time of the robbery of which he was convicted he had an accomplice and that a gun was used in the robbery. That evidence was admitted not upon the theory that it impeached the credibility of the defendant's testimony as a witness, but that it might tend to show inclinations and tendencies of the defendant which might impel him to commit the crime for which he was on trial. Indeed, the trial judge, in the presence of the jury, stated: "I think the District Attorney can ask him whether or not in connection with that previous robbery, there was also a gun used, as showing the temperament of the witness and what his inclinations and habits were, and [**67] the fact that he consorted with another individual at the time of the commission of this crime, and that he did not do it alone. He is charged here with going in with two others, [*152] and having a lookout. The District Attorney may ask him whether or not there was any gun used in the commission [***10] of the previous robbery to which this witness pleaded guilty, and whether or not in that case he had an accomplice." We have said: "Inflexibly the law has set its face against the endeavor to fasten guilt upon him by proof of character or experience predisposing to an act of crime." (People v. Zackowitz, 254 N. Y. 192, 197.) The discussion in the opinion in that case leaves nothing further to be said on that point. This well-established rule has been disregarded here.

The trial judge charged the jury very carefully upon the issues presented by the evidence. Indeed, throughout the case the trial judge showed admirable care for the rights both of the People and the defendants. Nevertheless, in that part of the charge in which the jury was instructed as to the manner in which it should consider the defendant's attempt to establish an alibi, the trial judge fell into error which in our opinion cannot be disregarded as immaterial. Evidence by a defendant that at the time when it is charged that a crime was committed he was at some other place does not constitute an exculpatory defense upon which the defendant has the burden of proof. Rather,

it is evidence which if believed [***11] shows that the defendant could not have participated in the crime as claimed by the People. Such evidence is at times fabricated and when given by witnesses who are interested or whose credibility is otherwise impeached, it should be carefully scrutinized. Testimony of a defendant in denial of the charge against him may be viewed with suspicion where a defendant has attempted to fortify his denial by evidence of his presence elsewhere which is shown by independent proof to be fabricated. None the less, it is the proven fabrication which in such case gives rise to the justified suspicion not the mere fact that defendant has attempted to fortify his denial by other evidence that he could not have committed the [*153] crime. The People always have the burden of establishing the commission of a crime.

In his charge the trial judge overlooked these fundamental considerations. He charged: "It is obviously essential to the satisfactory proof of an alibi that it should cover the whole of the time of the transaction in question so as to render it impossible that the defendant should have committed the act. It is not enough that it render their guilt improbable." We have held to [***12] the contrary in People v. Barbato (254 N. Y. 170).

He charged further: "An unsuccessful attempt to establish an alibi is always a circumstance of great weight against the prisoner because the resort to that species of defense implies an admission of the truth and relevancy of the facts alleged and the correctness of the inference drawn from them, if they remain uncontradicted. And where the defense of alibi fails, it is generally on the ground that the witnesses are disbelieved and the story considered to be a fabrication."

A charge may be a sufficient and even a substantially correct instruction even though it contains phrases which, isolated from their context, seem erroneous. The test is always whether the jury, hearing the whole charge, would gather from its language the correct rules which should be applied in arriving at decision. Here, in effect, the judge charged that the so-called "alibi defense" must be regarded with suspicion and even pointed out grounds for suspicion which do not exist in this case. He told the jury further, in effect, that if it did not believe the testimony of the defendant's witnesses, it might consider the "defense of alibi" a fabrication [***13] and, therefore, corroboration of the People's witnesses and an admission by the defendant of the truth and relevancy of their testimony. He thus placed upon the defendant a burden of proof which in law rests upon the People.

The People's witnesses have testified that the defendant Russell shot and killed Harris at a specified time and [*154] place. The defendant's witnesses have testified that the defendant, at the time of the shooting, was at a different place. In weighing the testimony the jury was called upon to consider the possibility of mistake on the part of the People's witnesses and the possibility of fabrication on the part of the defendant's witnesses. There is no independent proof of fabrication. The jury could infer fabrication only if they found that the testimony of the People's witnesses, who were present at the time of the homicide and who identified the defendant, was true. Disbelief of the defendant's witnesses [**68] would be the inevitable result of belief of the People's witnesses. It could not, at the same time, be corroboration of the People's

witnesses.

An honest defendant may fortify his denial of the charge against him by other evidence [***14] which, if accepted, would demonstrate the falsity of the charge, without thereby subjecting himself to the suspicion that his denial is false and the evidence produced by him fabricated, unless there is independent evidence of such fabrication. The burden of proof of guilt beyond a reasonable doubt may never be shifted from the People to the defendant. The presumption of innocence continues throughout the trial. The charge in this case has substantially deprived the defendant of this fundamental right.

The judgment of conviction should be reversed and a new trial ordered.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SIDNEY FOSTER, Defendant-Appellant

No. 63179

Appellate Court of Illinois, First District, Fourth Division

56 Ill. App. 3d 22; 371 N.E.2d 961; 1977 Ill. App. LEXIS 3944; 13 Ill. Dec. 869

December 22, 1977, Filed

PRIOR HISTORY: [***1] APPEAL from the Circuit Court of Cook County; the Hon. FRANK W. BARBARO, Judge, presiding.

DISPOSITION: Reversed and remanded.

CASE SUMMARY
PROCEDURAL POSTURE: Defendant appealed his convictions upon a jury verdict by the Circuit Court of Cook County (Illinois), for murder, under Ill. Rev. Stat. ch. 38, para. 9-1(a)(2) (1971), and concealment of the victim's homicidal death, under Ill. Rev. Stat. ch. 38, para. 9-3-1 (1971). The trial court had denied defendant's motion for a judgment of acquittal on both charges based on lack of evidence that he committed the murder or was sane when he concealed it.

OVERVIEW: After concealing the victim's murder for several weeks by various means, defendant turned himself in to police, alleging that the victim had been killed by two men with whom she had been dealing drugs. Defendant claimed that the other men had threatened to kill him and the victim's children if he told police about the murder. The trial court denied defense counsel's pre-trial motion appointment of an expert to examine defendant's mental competence under Ill. Rev. Stat. ch. 38, para. 1005-2-1 (1973), although the state provided no evidence as to his sanity. Evidence at trial reflected that defendant had access to a gun similar to the murder weapon until a date certain but the state failed to prove that the victim was killed prior to that date. On appeal, the court reversed murder conviction and remanded the case for a new trial on the concealment conviction, finding first that the defendant's hypothesis that someone else committed the murder created reasonable doubt as to the state's hypothesis as to his guilt. The court also held that the state had failed to offer evidence as to defendant's sanity sufficient to sustain the conviction of concealment of a homicidal death.

OUTCOME: The court reversed defendant's murder conviction and reversed and remanded for a new trial his conviction of concealment of a homicidal death.

CORE TERMS: guilt, gun, apartment, reasonable doubt, bedroom, bullet, murder, sticker, fitness, sanity, concealment, revolver, trunk, right-hand, killed, grooves, twist, hypothesis, photograph, homicidal, wound, license-applied-for, circumstantial, competency, innocence, insanity, arm, pathologist, spoke, shot
JUDGES: Mr. JUSTICE JOHNSON delivered the opinion of the court. DIERINGER, P. ., concurs. Mr. JUSTICE LINN, dissenting.

OPINION BY: JOHNSON

OPINION

[*24] [**964] The defendant, Sidney Foster, was charged by indictment for the murder of Vivian Patterson in violation of section 9-1(a)(2) of the Criminal Code of 1961 (Ill. Rev. Stat. 1971, ch. 38, par. 9-1(a)(2)), and charged with concealment of the victim's homicidal death in violation of section 9-3.1 of the Criminal Code of 1961 (Ill. Rev. Stat. 1971, ch. 38, par. 9-3.1). Following a jury trial, the defendant was found guilty of both offenses and was sentenced to concurrent terms of imprisonment of 125 to 250 years and 2 to 6 years. The defendant's motion for a judgment of acquittal notwithstanding the verdict or, in the alternative, motion for a new trial, and [***2] his motion to arrest judgment were denied. This appeal followed.

The issues presented for review are (1) whether the trial court erred in denying defendant's motion for a judgment of acquittal based on the failure of the prosecution to prove beyond a reasonable doubt that the defendant caused the death of the decedent, Vivian Patterson; (2) whether the trial court erred in denying defendant's motion for a judgment of acquittal based on the failure of the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time he committed the acts which constitute the offense of concealment of a homicidal death; (3) whether the trial court erred in denying defendant's motion for a new trial where the court (a) admitted irrelevant evidence which was prejudicial and inflammatory, (b) refused the defendant's offers of proof, and (c) denied defendant's motion to suppress evidence obtained in violation of the defendant's constitutional rights, and (d) where the prosecutor suppressed evidence favorable to the defendant which denied the defendant due process of law, and (4) whether the trial court erred in refusing to charge the jury as requested by defendant.

A few days [***3] prior to the commencement of the trial, one of the attorneys for the defendant moved the court to appoint experts to examine the [*25] defendant to determine his mental competency pursuant to section 5-2-1 of the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1005-2-1). In the motion, the attorney stated that he had reasonable cause to believe that defendant was presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly assist in his own defense and, also, that defendant was insane at the time of the alleged offense of concealment of a homicidal death. According to the record, a hearing was held on the motion on August [**965] 11, 1975, evidence was heard, and the motion was denied. There is no transcript of this hearing in the

record.

The following pertinent facts were adduced at trial: By January 1974, the defendant had been living with the victim, Vivian Patterson, and her four children, Solomon and Sandra Hudson and Sherri and Ronald Patterson, about 2 1/2 years at her apartment, located at 2030 South State Street, Chicago, Illinois. Foster owned Crown Town Records, a small [***4] recording company in Chicago, and managed various young musical groups. Vivian Patterson sang in small night clubs on Chicago's south side. The relationship between the defendant and Ms. Patterson was platonic. Foster was trans-sexual; although he was biologically, physiologically, and anatomically a male, he felt that psychologically he was a female. However, he claimed to be the father of Solomon Hudson who was 12 years old in 1974.

Solomon testified that the defendant insisted he be called Mama, claiming he was Solomon's mother. Without objection, he further testified that Foster forced him to engage in abnormal sexual conduct and to observe defendant engage in sexual acts. Solomon explained that he never told his mother of this abuse.

On January 23, 1974, the dismembered and badly decomposed body of Vivian Patterson was discovered by the Chicago Police after responding to a call regarding a suspicious car parked in a lot at 2030 South State Street. The police noticed a strange odor emanating from the trunk of the car; the trunk was opened and a torso, arms, and legs were discovered wrapped in bed sheets. The only identifying marks on the car were a "Cee Fred" sticker [***5] and the auto identification number. The police learned through "Cee Fred" that the auto belonged to the defendant. The corpse was transported to the County Morgue in a squadrol which was not examined for spent bullets after the body was removed.

During the Christmas holiday, 1973, Vivian's four children visited Lucius Hudson, her ex-husband. Sandra, Ronald, and Sherri left on Christmas Day and Solomon joined them 2 days later. Sandra returned home on December 27, 1973, to pick up some clothes. She testified that this was the last time she saw her mother. She again returned to the apartment on December 29, 1973, and Foster told her that Vivian was in [*26] California buying a home. Foster cautioned her not to tell anyone about these matters.

On January 23, 1974, Sandra was ill and stayed home from school. Throughout the day, Foster kept looking out her bedroom window down at the parking lot where his car was parked. Foster asked her to accompany him across the street for the purpose of making a telephone call. After placing the call, Foster said they would have to pick the other children up from school. Sandra testified Foster then said that "[she] was going to hate [***6] him for the rest of [her] life." They picked up Ronnie and Sherri, and met Solomon on his way home from school. At this time, according to Sandra, Foster stated "he had to get two plane tickets in false names" for himself and Solomon. He placed Sandra, Ronnie, and Sherri in a cab and took Solomon with him to the home of his parents. Detective cars were parked in front, so they exited through the rear and were driven to defendant's sister's home. On January 24, 1974, Foster called the police and voluntarily

turned himself in.

In addition to testifying about his relationship with Foster, Solomon testified that he spoke to his mother the day after arriving at Lucius Hudson's home. He again called his mother on December 29, 1973. Foster answered the phone and said Vivian was in California, but he should tell no one this, especially Mr. Hudson. When he returned home on the 31st, Foster told him that Vivian had been in a plane crash in California and was in critical condition. Thereafter, in January 1974, the defendant told Solomon that Vivian was killed by some men who put "her in the trunk of [his] car and it looks like [he] did it." He first said the killers were members [***7] of the "syndicate." Then he said "Jiggy" killed her, and finally that "Jimmy Wayne" killed her.

[**966] Both Sandra and Solomon noticed a "bad smell" coming from their mother's bedroom when they returned to the apartment. Foster explained that some turkey and chicken bones were left in the room. He refused the children admittance to the room, claiming Vivian had the key in California.

Sometime in January 1974, Diane Adams, a friend, inquired about Vivian. Foster told her Vivian had been injured in a plane crash in California. Diane called her mother in California who heard of no plane crash. Lucille Wood, a neighbor, asked if Vivian was at home on January 20, 1974, and Foster responded that she was on the West Coast. That same night, she received a call for Foster. Foster was summoned, briefly conversed, and after hanging up, told Mrs. Wood that Vivian had been in an accident.

Officers Bobko and Savage interviewed the defendant on January 24, 1974. They told the defendant that he was a suspect in a homicide [*27] investigation. Officer Savage read the defendant his constitutional rights. He was asked if he knew anything about Vivian Patterson's death. [***8] He replied that he was not sure. Foster asked if the police had been to Vivian's apartment. Savage replied that they had been there. Foster stated he was afraid for the life of himself and his children and that he could relate the circumstances of Vivian's death, but would not name the offenders as that would endanger his child. He said two men from the Mafia had machine-gunned her to death in the bedroom. In the next sentence he said he wanted to tell the truth. He related that Vivian had been selling marijuana and pills from her apartment, that three males, one named Jiggy, had been attempting to get him to sell dope to some rock musicians he employed, and that he had resisted these pressures for about 2 years. Around December 28, 1973, the same men who had pressured him in the past came to their apartment. An argument erupted. The men heard Vivian call from the bedroom. The men entered Vivian's bedroom. Foster heard a shot. As he approached the bedroom, he heard three more shots. He entered the bedroom and ran to Vivian who was lying on the bed. Her head was bleeding. She asked him for help. One of the men put a gun to Foster's neck and threatened that if he did [***9] not cooperate, a similar fate would befall him and the children. Defendant left Vivian in the bedroom and locked the door.

Foster next related that about a week to 10 days later, Jiggy called him and said some friends would be over to dispose of the body. Jiggy and another arrived that night, bringing with them a

power saw and long-handled ax. Jiggy and his companion amputated Vivian's arms and legs, placed the limbs in green plastic garbage bags, and then moved the torso and bags to the trunk of Foster's car.

At the police station, Foster also spoke with two friends, Shirley Jones and Diane Adams. He expressed his fear for the lives of the children. He told both women that Vivian had been killed by the white Mafia and then told them that Vivian had been killed and dismembered by Jiggy. Diane Adams attempted to locate Jiggy at that time, but was unsuccessful. Later she located Jiggy and spoke to him, but failed to notify the police of her success. Both Shirley and Diane told Officers Savage and Bobko that Jiggy existed and that his girl friend was Yvonne Thorn. The women gave the police a detailed description of Jiggy. After cross-examining Officer Bobko, it came to light [***10] that there was a detailed description of Jiggy and the other alleged offenders contained in some hand-written notes of the officer. These notes were not subject to discovery prior to trial.

Investigator Bobko also testified that he had been told that Yvonne Thorn had been a patient at Louise Burg Hospital. He said he checked the hospital records, but found no record of Yvonne Thorn. However, several [*28] hospital records regarding Yvonne Thorn or her children were admitted into evidence. These records contained the name, address, telephone number, and welfare number of Yvonne Thorn.

Diane Adams testified that Bobko told Sandra and Solomon Hudson that Sidney [**967] had killed their mother. He also told the children that Sidney was jealous of Vivian and that Vivian was getting in the way. Diane said that the police told her the same things and she responded that there was no reason for those allegations as Sidney and Vivian "got along beautiful." She testified further that Officer Bobko, around the time of Foster's arrest, said Foster was not in his mind and "was sick in the head." Diane Adams also related that she thought Foster was mentally disturbed. [***11] She explained that Jiggy and "T-Bone" were the same person.

Evidence was introduced that the defendant had access to a .38 caliber Rohm revolver until December 31, 1973. The defendant, accompanied by Solomon, borrowed the gun approximately 1 week before Christmas 1973 from Edward Thomas. Thomas testified that the defendant wanted to borrow the gun because of harassment in regard to the record company business. The defendant refused to handle the gun and asked Thomas to remove the bullets and put the gun and bullets into an empty camera case. The defendant returned the gun to Thomas in a gift-wrapped package on December 31, 1973, and said "he thought he got the 'dude' and wouldn't be needing the gun any more." Thomas testified that when the gun was returned, it contained only two shells, one being misfired, and four empty chambers. Shortly after the return of the revolver, Thomas gave the gun to another friend who disposed of the gun when chased by the police. Before returning the gun, the defendant allowed Solomon to play with it, but urged him not to tell anyone about the weapon. One day while Solomon was playing with the gun, Vivian arrived home. Foster grabbed the gun [***12] and threw it behind the couch.

The day the victim's body was discovered, the coroner's pathologist, Dr. Shalgos, performed an autopsy on the body. The pathologist could not establish the date of death. The testimony revealed that there were four bullet wounds to the head, two entry wounds, and two exit wounds. The pathologist recovered one pellet from the victim's head which was enmeshed in her hair. He testified that at the time he examined the body, the brain was a mushy mass, showing no bullet tracks. In his opinion, the bullets had passed through the brain, causing death. He also stated that a person suffering from this type of wound would not be able to ask for help. On cross-examination, he testified that there was a remote possibility the bullet coursed around the meninges of the brain. With this type of wound, a person would be able to ask for help.

The pellet recovered from the victim's head was identified by a firearms examiner for the Chicago Police Department as a .38 caliber [*29] bullet which had been fired through a bore having eight lands and grooves with a right-hand twist. The firearms examiner testified that due to the condition of the bullet recovered, [***13] it would be impossible to determine the particular gun which fired the bullet even if the firing gun was available. He further testified that Rohm revolvers have two sets of class characteristics; those with 8 lands and grooves with a right-hand twist and those with 10 lands and grooves with a right-hand twist. Likewise, at least four other models of revolvers have the class characteristics of eight lands and grooves with a right-hand twist.

Officer Bobko testified at the preliminary hearing in this cause that two pellets were removed from the victim's head by Dr. Shalgos, the pathologist. His police report contains the same data. However, at trial he testified that only one pellet was removed.

Samuel Thomas, a witness for the prosecution, testified on crossexamination that he had seen Vivian Patterson alive on January 4, 1974, and that he had related this information to the assistant State's Attorney. The witness further testified that the assistant State's Attorney told him this was impossible as the autopsy report indicated Vivian had died around December 28 or 29, 1973. The State did not inform the defense of this evidence despite defendant's motion for discovery.

[**968] [***14] Darnell Glover, a witness for the defense, testified that he spoke with Vivian Patterson on the telephone sometime during the first week of January 1974. Miss Adams testified that she spoke to Vivian Patterson on the telephone on New Year's Day.

Wilbur Richburg and Marvin Morgan, acquaintances of the defendant, testified that Foster offered them $ 5000 each to help dispose of Vivian Patterson's body. Richburg testified that he met the defendant at a party at Morgan's house several days before New Year's Eve. Morgan stated that he did not have a party at his house, but that he met the defendant at a party at another friend's house on New Year's Eve. Both testified that they left the party with Foster, proceeded to Vivian's apartment, saw Vivian's corpse, but did not see Solomon Hudson or any of the other children. Solomon Hudson testified that he was at home on New Year's Eve.

Richburg and Morgan further testified that the defendant sold an old car for $ 10, gave them the money and asked them to purchase cardboard barrels. Sometime in the middle of January, late at night, they returned to the apartment with the barrels. The body was dismembered. They were unable [***15] to fit the torso in one of the barrels, even after the arms and legs had been amputated. Instead, they wrapped the torso in bed sheets and put the limbs in large plastic bags. Richburg and Morgan dragged the body out of the bedroom to the elevator and then to Foster's car. Richburg and Morgan testified that they were seen with the body on the [*30] elevator. Before returning to the apartment, Foster removed the "license-applied-for" sticker from the windshield. Foster suggested keeping watch at the window for the police. The next morning, Foster gave the trunk key to Richburg who, along with Morgan, placed the limbs in the car trunk. Regarding Vivian's death, Foster told Richburg and Morgan that "T-Bone" had come to the apartment drunk, argued about sex with Vivian, and shot her four times.

Investigator Carroll testified that Diane Adams informed the police either on January 24 or 25, 1974, that the defendant told her in "early December 1973, that Vivian Patterson was moving to California and that he was afraid he would lose Solomon because she wasn't going to take [Foster] with her." Ms. Adams denied making these statements to the police.

Dr. Kermit T. Mehlinger, a [***16] noted psychiatrist, testified on behalf of the defense. He testified that at the time the defendant was engaged in acts which constituted concealment of the homicidal death of Vivian Patterson, "He [defendant] was suffering from a transient situational disturbance, acute reaction," and that as a result of such mental disease or defect, the defendant "lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." He further testified that in the presence of overwhelming stress or trauma, his personality structure could undergo such a change that he could be considered psychotic, irrational, and dilutional.

He further testified that in keeping with the basic passive dependent personality structure of the defendant, his timidity, his fear, his inability to assert himself, his proneness to try and run away from any type of stressful situation, and being in such a situation where he was coerced and under the intimidation and threats of three individuals and at the same time witnessing the horror of this crime, this, Mehlinger felt, was sufficient to cause the deteriorated state of his mind so that he was unable [***17] to exercise prudence and rational judgment during the period of prolonged ambivalence. Dr. Mehlinger did not believe that amputation of the limbs of the 300-pound victim was a rational way of concealing the body. The fact that Foster removed the "license-applied-for" sticker from the windshield did not change the doctor's opinion of Foster's mental capacity. Mehlinger said Foster told him that "he had an intense fear of any kind of violence." Foster did not tell the doctor that he had obtained a gun prior to Christmas. The doctor said that this fact would not change his opinion, except he opined that Foster showed a little more aggressivity than he would expect.

[**969] The defendant's motions for acquittal were denied. Following the return of the verdict, post-trial motions were made by the defense and were denied.

[*31] With reference to the first issue, the defendant contends the trial court erroneously denied his motion for judgment of acquittal because the prosecution failed to prove beyond a reasonable doubt the guilt of the defendant for the murder of Vivian Patterson. He further asserts that the State failed to prove he (defendant) was the criminal [***18] agency causing the death of the victim. Also, the defense argues that because the evidence was circumstantial and because a reasonable hypothesis consonant with the innocence of the accused exists, the law requires adoption of this hypothesis and the conviction should be reversed.

The State contends that the defendant was proved guilty beyond a reasonable doubt and that the facts proved are inconsistent with defendant's claim of innocence.

The State has the burden of proving beyond a reasonable doubt all of the material and central facts constituting the crime for which the defendant is charged. (People v. Weinstein (1966), 35 Ill. 2d 467, 470, 220 N.E.2d 432, 434; People v. Aldridge (1974), 20 Ill. App. 3d 1045, 1048, 314 N.E.2d 24, 27.) It is the duty of a court and jury to resolve all of the facts and circumstances in evidence on the theory of innocence, rather than guilt, if that reasonably may be done, and where the entire record leaves a grave and substantial doubt of the guilt of the defendant, the conviction will be reversed. (People v. Ibom (1962), 25 Ill. 2d 585, 592, 185 N.E.2d 690, 694.) Furthermore, even though great weight is to be attached to the findings [***19] of the trier of fact, including his appraisal of the credibility of the witnesses, it is the duty of this court to carefully review the evidence, and if there is not sufficient evidence to remove all reasonable doubt of defendant's guilt, the conviction will be reversed. People v. Charleston (1970), 47 Ill. 2d 19, 22, 264 N.E.2d 199, 201; People v. Urban (1949), 403 Ill. 420, 427, 86 N.E.2d 219, 223.

The rule with reference to sufficiency of circumstantial evidence is that it must be of a conclusive nature and tendency leading on a whole to a satisfactory conclusion and produce reasonable and moral certainty that the accused and no one else committed the crime. The guilt of the accused must be so thoroughly established as to exclude every other reasonable hypothesis. People v. Yaunce (1941), 378 Ill. 307, 310-11, 38 N.E.2d 30, 31; People v. Burgard (1941), 377 Ill. 322, 327, 36 N.E.2d 558, 561; People v. Sorrells (1920), 293 Ill. 591, 594, 127 N.E. 651, 653.

In the instant case, the People introduced evidence that the defendant had access to a .38 caliber Rohm revolver until December 31, 1973. In order to link the defendant with the victim's death, it was [***20] critical for the State to establish the fact that Vivian Patterson was dead prior to December 31, 1973. However, the evidence does not establish this fact. First, the pathologist could not establish the date of death. Second, the testimony of the State's witnesses differed as to the last time Vivian [*32] Patterson was seen alive, the dates ranging from December 27, 1973 to January 4, 1974. Additionally, two defense witnesses testified that they spoke with the decedent on New Year's Day and during the first week of January 1974.

Furthermore, the State failed to sufficiently connect the murder weapon to the defendant. According to the record, the projectile recovered from the decedent's body was fired from a gun having the class characteristics of eight lands and grooves with a right-hand twist. The Rohm

revolver has two types of class characteristics; one with 8 lands and grooves with a right-hand twist and one with 10 lands and grooves with a right-hand twist. The ballistics evidence further showed that there are four other types of revolvers which have class characteristics of eight lands and grooves with a right-hand twist. It is apparent that the gun which the defendant [***21] had access to until December 31, 1973, may or may not have fired the .38 caliber bullet recovered from the victim's body.

[**970] In support of its argument, the State emphasizes that the defendant conducted himself in such a manner as to evince a clear consciousness of guilt by attempting suicide and by giving conflicting statements of the events surrounding Vivian's death. The suicide attempt was not made closely following the murder. The psychiatrist testified that the defendant took 20 aspirins because the police were drilling him and making belittling and vituperous epithets toward his mother. Even further, the attempt was made around the time when Ms. Adams indicated that the defendant was not in his right mind. In light of these facts, the suicide attempt did not evince a consciousness of guilt on the part of the defendant.

Regarding the defendant's statements, it is true that conflicting statements may be considered as evincing a consciousness of guilt (People v. Wilson (1972), 8 Ill. App. 3d 1075, 1079, 291 N.E.2d 270, 273); however, the record indicates that the defendant made conflicting statements not due to guilt, but, rather, out of fear for [***22] the children and protectiveness for them. Jiggy had threatened to kill the defendant and the children if the defendant related the events surrounding the death of Vivian Patterson. Psychiatric evidence showed that the defendant was very protective regarding the children, he feared violence, and he was in a panic state following Vivian's death. In light of these facts, it was not unreasonable for the defendant to have given conflicting statements as to other persons committing the murder.

The People also indicate that the defendant's account of the shooting is inconsistent with the facts proved. The defendant said he heard four shots at the time of Vivian's death. The pathologist testified that Vivian had been shot twice through the brain, but further testified that there was a penetration in the back of her chest which could have been caused by a [*33] bullet. Richburg testified that there was a bullet wound in Vivian's arm, but that section of the arm was missing. The record does not indicate any inconsistency on this point.

Additionally, two equally reasonable hypotheses exist in this case; one consonant with the defendant's guilt and one consonant with his innocence. [***23] The hypothesis consonant with innocence is that sometime after January 4, 1974, Vivian Patterson was killed by Jiggy who had been dealing in drugs with the victim and two other men. She was shot to death. This hypothesis was not adequately refuted.

We believe that the evidence raises sufficient doubt as to the guilt of the defendant. Furthermore, we cannot ignore the hypothesis consonant with the defendant's innocence and, therefore, we are duty bound to find the defendant innocent on the murder conviction and reverse the judgment of the trial court.

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Reversed and remanded.

DISSENT BY: LINN

DISSENT

Mr. JUSTICE LINN, dissenting:

I must respectfully dissent since I believe that the majority, while correctly reciting the standard of review in a criminal case, appears to have disregarded the verdict of guilt rendered by the jury in the instant case and has determined de novo whether the evidence sufficiently established the defendant's guilt.

Admittedly, the evidence presented by the State was circumstantial. However, "there is no legal distinction between direct and circumstantial evidence [***37] as to the weight and effect thereof." (People v. Robinson (1958), 14 Ill. 2d 325, 331, 153 N.E.2d 65, 68.) The majority correctly states that "[w]here the only evidence in a prosecution for homicide is circumstantial evidence the guilt of the accused must be so thoroughly established as to [*39] exclude every other reasonable hypothesis." (People v. Lewellen (1969), 43 Ill. 2d 74, 78, 250 N.E.2d 651, 654.) However, this precept should not be interpreted as requiring the prosecution to prove guilt beyond any possibility of a doubt. (People v. Williams (1977), 66 Ill. 2d 478, 363 N.E.2d 801; People v. Murdock (1971), 48 Ill. 2d 362, 270 N.E.2d 21, cert. denied (1971), 404 U.S. 957, 30 L. Ed. 2d 274, 92 S. Ct. 323; People v. Mackins (1974), 17 Ill. App. 3d 24, 308 N.E.2d 92, cert. denied (1975), 419 U.S. 1111, 42 L. Ed. 2d 808, 95 S. Ct. 786.) Unless there are circumstances contradicting the reasonable inferences and conclusions drawn by the jury from such circumstantial evidence, the determination should not and cannot be disturbed. People v. Stone (1977), 46 Ill. App. 3d 729, 361 N.E.2d 330.

Without reciting the State's evidence in this case [***38] at great length, it is sufficient to note that defendant had a motive for the murder in that Vivian Patterson had threatened to separate her son from defendant by taking him to California. Defendant was also in possession of a .38-caliber revolver during the time that the murder was committed. It was unnecessary for the jury to make great leaps in logic to conclude that defendant had a reason to murder Vivian Patterson and the [**975] means by which to accomplish the crime. That defendant offered his own explanation as to the events does not vitiate the jury's determination that defendant was guilty of the crime. The jury was entitled to disbelieve his explanation and to discount the credibility of his witnesses, especially in view of the fact that he told a different story immediately after his arrest. See People v. Mackins (1974), 17 Ill. App. 3d 24, 308 N.E.2d 92.

I believe credence must be given to the reasonable inferences of guilt drawn by the jury. It is perfectly proper for the majority to make an exhaustive search of the record to determine whether

the defendant received a fair trial. However, where, as here, the jury's verdict is supported by the [***39] evidence, the jury's independent judgment as to the weight to be given the testimony of the witnesses, and the conclusion drawn therefrom as to the defendant's guilt, must be accepted. It is for the jury to ferret out the truth and determine whether or not there exists a reasonable doubt of guilt. See People v. Stanley (1976), 44 Ill. App. 3d 85, 358 N.E.2d 69.

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For these reasons, I would not disturb the jury's decision. Accordingly, I must respectfully dissent from the judgment of this court.

The People of the State of New York, Plaintiff, v. Janet Elura Paulin, Defendant

[NO NUMBER IN ORIGINAL]

County Court of New York, Saratoga County

61 Misc. 2d 289; 305 N.Y.S.2d 607; 1968 N.Y. Misc. LEXIS 1553

April 22, 1968

CASE SUMMARY
PROCEDURAL POSTURE: Defendant was charged with murder in the second degree, pursuant to N.Y. Penal Law ' 1046, and she filed a motion to suppress an alleged oral admission and an alleged oral confession under N.Y. Code Crim. Proc. ' 813-g. Defendant also filed a motion to suppress evidence alleged to have been obtained as a result of unlawful search and seizure under N.Y. Code Crim. Proc. ' 813-c.

OVERVIEW: Defendant was charged with murder in the second degree, pursuant to N.Y. Penal Law ' 1046, and she filed motions to suppress certain statements and tangible property. The court granted the motions in part and denied in part, holding that: (1) defendant's oral statements to police were given in response to constitutionally impermissive, in-custodial interrogation, and thus the questions and answers were inadmissible; (2) defendant's oral statements to police after she requested an attorney were elicited by an unlawful and illegal invasion of her overtly claimed Fifth and Sixth Amendment privileges and were extracted in a constitutionally impermissive interview and thus were inadmissible; (3) the alleged instrumentality of the crime was illegally seized by police in an illegal search without a warrant and thus was inadmissible under the Fourth Amendment; (4) for the purpose of justifying the search incident to defendant's arrest, the arrest was not lawful, and thus the seizure of a knife was illegal and the knife was inadmissible; and (5) certain tangible property not mentioned in defendant's alleged confession was not tainted or the product of any search and thus was admissible.

OUTCOME: The court granted in part and denied in part defendant's motions to suppress certain statements and tangible property and ordered that the prejudicial determinations of the admissibility of evidence not be published until there was a determination of the trial or until further order of a court of competent jurisdiction.

CORE TERMS: interrogation, arrest, suppressed, knife, pot, confession, reasonable doubt, happened, seizure, warnings, constitutional rights, police officers, telephone, seized, conversation, inadmissible, arrived, cooking, kitchen, minutes, preliminary hearing, matter of

law, search warrant, living room, atmosphere, several times, coming, stab wounds, suppression hearing, find beyond

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JUDGES: Edward T. Sullivan, J.

OPINION BY: SULLIVAN

OPINION

[*290] [**610] Hearing held March 18 and March 19, 1968 on two pretrial motions to suppress evidence in the above action wherein the defendant is being prosecuted on a charge of murder in the second degree, section 1046 of the former Penal Law, under Indictment No. 1609-67 of the Grand Jury of Saratoga County, September 1967 Term of the Supreme Court. After arraignment and a subsequent bail application wherein same was fixed and defendant released thereon, the [*291] case was transferred by the Supreme Court to Saratoga County Court.

By stipulation, to avoid repetition of the same testimony, one hearing was held for both motions; and the hearing proceeded initially on the motion for suppression of an alleged oral admission and an alleged oral confession under [***5] section 813-g of the Code of Criminal Procedure, and then proceeded on the motion for suppression of evidence alleged to have been obtained as a result of unlawful search and seizure under section 813-c of the Code of Criminal Procedure and by consent, the hearing was held with all witnesses, except the witness actually testifying and the defendant, remaining outside the closed hearing room.

Defendant was arraigned on June 12, 1967 on an information charging murder in the first degree under section 1044 of the former Penal Law before Malta Town Justice, Morgan E. Bloodgood; entered a plea of "not guilty"; and requested a preliminary hearing. On August 17, 1967 a preliminary hearing under section 190 et seq. of the Code of Criminal Procedure was held before the same justice, who found that the crime of murder in the first degree had been committed, that there was reasonable ground to believe the defendant guilty thereof, and ordered that she be held to answer for the same. A photocopy of the transcript of the preliminary hearing was made a part of the motion for the suppression of the alleged oral admission and oral confession.

Defendant brings her initial motion upon the ground [***6] that her alleged statements, confession and/or admission, either inculpatory or exculpatory, either oral or written, were and are inadmissible as evidence against her in that they were obtained from her during impermissive pre-arraignment, in-custodial interrogation by the New York State Police [**611] in violation of her constitutional guarantees under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution as proclaimed and fixed as guidelines for State law enforcement officials and State trial courts by the United States Supreme Court on June 13, 1966 in (1) Miranda v.

Arizona, (2) Vignera v. New York, (3) Westover v. United States and (4) California v. Stewart (384 U.S. 436), all of which are herein called the Miranda case.

The companion motion for suppression of tangible property, including a metal cooking pot and a knife, is based on the Fourth Amendment of the United States Constitution guaranteeing that the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, [*292] shall not be violated, and guaranteeing the condition of issuance of warrants.

[***7] PART I

The facts established by the preliminary hearing and the admissibility hearing are as follows:

Shortly before 10:00 a.m. on Monday, June 12, 1967, defendant's son, Michael Okon, reported via telephone to the New York State Police his discovery of the dead body of his stepfather, Joseph Paulin, a New York State Police Sergeant, in the family residence, 18 Barcelona Drive, Clifton Knolls, Town of Clifton Park, Saratoga County, N.Y. Uniformed Lieutenant Raymond J. Kuzia, pursuant to radio dispatch, telephoned Acting Troop Commander, Captain James Smith, at Troop Headquarters, Loudonville, N.Y., who advised him of the report and instructed him to proceed to Sgt. Paulin's house. Lt. Kuzia arrived at about 10:00 a.m. and was led by the stepson to the guest room clothes closet, wherein he saw the dead body which was later identified as that of the victim.

Lt. Kuzia was asked:

"Q. What did you do then? "A. Well, as I say, I dropped the covering back over the body. I asked Michael if he knew anything about this and as I recall he said no but it must have happened Friday, as".

Significantly, Michael Okon was not questioned again and the record establishes that he was not subjected [***8] to any form of detention. Further, the record establishes that it is State Police policy, practice and instruction to handle every death as a homicide.

Lt. Kuzia then reported via the basement telephone his finding to Captain Smith and requested assistance. He returned upstairs to the living room area and, for the first time that day, saw the defendant. He testified she was barefooted, wearing a blue housecoat and was coming from the direction of the master bedroom. She asked him who he [**612] was and what he was doing there. Lt. Kuzia identified himself and told her he "was there to see about Joe".

At this point in the chronology of events, there is a variance in the testimony of the two key witnesses for the People. At both the preliminary hearing and the suppression hearing, Captain Chieco testified that upon his arrival at about 11:15-11:30 a.m., Lt. Kuzia, in briefing him on events up to that time, told him that when the Lieutenant first saw the defendant, that she

mentioned something about having a terrible fight, that he [*293] observed a cut on her left hand, and that believing she might possibly be a suspect, he immediately advised her of her rights under [***9] the Miranda case.

According to Lt. Kuzia's testimony, he began questioning the defendant about 10:20 a.m. concerning what happened to her husband and continued this interrogation for about 20 minutes before he gave her the constitutional warnings to which she was entitled under the Miranda case. With reference to the homicide, of which he said he believed her to be a suspect, and obviously the only suspect at that time, he asked her 10 or 12 times what had happened. Defendant did not answer his questions. Later, during the hearing, defendant testified that she knew she was being accused of killing her husband, that she knew she was being detained, that she knew she was being held for killing her husband, and that she requested the presence of her lawyer because of this knowledge.

After the 10 or 12 questions with reference to the homicide, Lt. Kuzia asked her several times what was wrong with her hand and then she finally answered. This was followed by several questions as to how the hand injury happened and she ultimately answered him. Thereupon Lt. Kuzia gave her the Miranda warnings.

Lt. Kuzia's testimony was as follows:

"A * * * We both walked into the living [***10] room area. I asked her what happened several times. I got no answer. We sat down. I asked her in substance if she could tell me what happened here. I got no answer several times, and I then asked if she would like me to make some coffee and Mrs. Paulin then told Michael to make the coffee. We sat there for a while and repeatedly I asked her if she could tell me what happened. Again no answers. We had some coffee eventually, smoked some cigarettes, and as we sat there I noticed Mrs. Paulin had a bandage on her left hand. I asked what had happened, what was wrong with her hand again several times, again no answer, and finally she said, 'My husband cut it,' and I asked how that had happened and again I asked it several times and got no answer [**613] and then finally she said, 'We had an awful fight, an awful fight.'"

Then, according to the testimony of Lt. Kuzia, for the first time, he advised her of her constitutional rights and gave her the Miranda warnings.

While defendant was in her own home, and it may be considered factually similar to People v. Rodney P. (Anonymous) (21 N Y 2d 1), the situation herein was far from identical, and, [*294] in the [***11] opinion of this court is clearly distinguishable. Upon the whole evidence given at the day and one-half hearing, the atmosphere of her residence was overwhelmingly police-dominated. From the moment Lt. Kuzia first saw defendant until she was conveyed by two (2) State Police Investigators and an acting police matron in a State police patrol car to the Malta police station for booking, she was constantly and closely accompanied by one, two or more police officers or department female employee, even to entering the bathroom with her. The

number of police personnel in and about the house, garage and yard rose to 12 or 13 from 10:00 a.m. to sometime after 1:30 p.m.

As to the time for giving the required warnings required by Miranda, whether the former standard as the rule was understood to be on June 12, 1967, i.e., when the officer knew she was "not free to go" if she failed to answer a question, or the later modification of the standard expressed in People v. Rodney P. (Anonymous) (21 N Y 2d 1, 9) as "whether the subject * * * is placed in a situation in which he reasonably believes that his freedom of action or movement is [significantly] restricted by such interrogation", [***12] the warnings came too late. This court finds that the above facts establish beyond a reasonable doubt that the defendant was interrogated by a uniformed police officer, that she was significantly detained, that the officer knew that her freedom of action and movement was being restricted in a police-dominated atmosphere by the interrogation, and that she knew and believed the same. The interrogation, under those circumstances and in that atmosphere, particularly by a uniformed high-ranking police officer, is the compulsion barred by the Miranda decision. It is this coercion which deprives the individual of his freedom of choice -- to answer or not to answer -- which requires that he be clearly and understandingly advised of his constitutional rights and privileges. This court further and specifically finds that the oral answers given by the defendant after a series of 15 to 18 repetitive questions were, concerning the cut on her hand, the fact that her husband, the victim, cut it, and the statement to the effect that they (she and her husband) had an awful fight, and made by the defendant before the interrogating officer gave her the Miranda warnings, beyond a reasonable [***13] doubt, given in response to constitutionally impermissive, in-custodial interrogation; and, as a matter of law, the questions and answers are inadmissible [**614] as evidence at her trial. Defendant's oral statements to Lt. Kuzia are, therefore, suppressed, and defendant's motion in this respect is granted. Submit order accordingly.

[*295] PART II

Immediately after the above-quoted testimony, the defendant requested an attorney; as other officers of the State police came, they were promptly instructed upon arrival not to question the defendant. Lt. Kuzia did not question her further, and neither did the officers of lesser rank who received the instruction. By Lt. Kuzia's efforts, James Straney, the attorney named by defendant, was reached via telephone at the courthouse in Albany, N.Y., where he was engaged and could not leave. Attorney talked directly with his client via telephone and she accepted his office associate, Richard D'Allesandro, as counsel. About 10 minutes later Attorney D'Allesandro telephoned, spoke to Lt. Kuzia, and reported that he would come right up to the defendant's residence.

At this time, defendant was not overtly accused of the homicide; she [***14] was not placed in physical restraint; and she was not placed in formal police arrest. These events, as related above, brought the time up to about 11:25 a.m.; and, apparently between the telephone calls to the attorneys for the defendant, Captain Saverio A. Chieco of the New York State Police arrived, having been taken off leave and also dispatched to the site by Captain James Smith of company

headquarters. It is also noted that, per the minutes of the preliminary hearing, William Werner, M.D., one of the Coroners in Saratoga County, arrived about 11:30 a.m. and proceeded to make his official examination of the body of the victim, Joseph Paulin, which he pronounced dead and directed to arrange an autopsy performed by a pathologist at Ellis Hospital, Schenectady, N. Y.

Lt. Kuzia informed Captain Chieco of the events prior to his arrival, including the belief that Mrs. Paulin might possibly be a suspect, the fact that he, Lt. Kuzia, had given her the Miranda warnings, that the other police officers present had been instructed not to question her since she had requested an attorney, that her attorney had been notified of her request and that an associate attorney from her lawyer's [***15] office was then en route to the Paulin house. Thereafter, the events, as testified by Captain Chieco at the suppression hearing, which testimony was substantially the same as the preliminary hearing, were as follows:

"Q. What did you do then? "A. I looked at -- into the room, into the living room, I looked around then and there was Mrs. Paulin, at least I believed it was Mrs. Paulin, I had never met Mrs. Paulin. I said to the Lieutenant, 'Is [**615] that Mrs. Paulin?' [*296] and he said yes and we walked over towards her and the Lieutenant introduced me to Mrs. Paulin.

"Q. What did you say? "A. I sat down next to Mrs. Paulin and I said, 'Mrs. Paulin, I know this is a terrible tragedy.'

"Q. Prior to that did you have any conversation with her in reference to Lieut. Kuzia's conversation with her? A. Yes, I said, 'I understand the Lieutenant has advised you of all of your rights and you have requested an attorney, is that correct?' She said, 'Yes.' I said, 'Did you understand all of your rights?' She said, 'Yes.' I said, 'Well, I will repeat the rights for you and to make sure you understand them,' and I did repeat them and she said, 'I understand.' I said, 'You know [***16] your attorney is coming, right?' and she said, 'Yes,' and I said, 'As long as you wanted your attorney and as long as he is coming, you understand you shouldn't say anything?' She said, 'Yes.' Then I said, 'Well, you know this is -- as bad as this thing is, there are certain things that have to be taken care of. We have to think of the body -- funeral. Do you have any thoughts about an undertaker who you would want to handle this?' and she looked at me and she didn't answer that and then she said, 'I want you to know it wasn't my fault,' and I said, 'Well, you know your lawyer is coming and you know he is on his way and you wanted him to come,' and warned her as long as he was coming she shouldn't say anything, and she said, 'Yes, but I want you to know how it was; it wasn't my fault.' She said, 'I couldn't help it. What did you expect me to do?' and from this point on she just kept talking. I don't think anything could have stopped her.

"Q. What did she say, Inspector? A. She wanted to tell me what it was that happened and she said that they had had violent arguments for years and that he hit her a lot and that Thursday night they had an argument and she couldn't take it any [***17] more and he had cut her hand and she had killed him while he was in the bed sleeping, she had gotten a kitchen pot and hit him on the head several times as hard as she could.

"Q. Up to this point had you asked her any questions? A. No sir.

"Q. All right, continue. A. She got this all out and I again told her her lawyer was en route, reminded her that her lawyer was en route, she said, 'I know.' I said, 'Are you sure you understand all your rights? I know [**616] all these years you are married to a Trooper you are probably familiar with the law but are you sure of your rights?' She said, 'Yes, I know, I know.' Then I did ask her a question, I said, 'Will you, would you mind showing me the pot?' and she said, 'I will show it to [*297] you,' and she led the way to the kitchen, pulled out one of the drawers and she showed me a particular pot."

These are the oral admissions, statements and confession defendant also seeks to suppress by one of her motions. This court is of the opinion defendant should prevail. In the Miranda case (384 U.S., at pp. 473-474),.after a showing that he intends to exercise his Fifth Amendment privilege, (1) "the interrogation must cease [***18] ." (Emphasis added.) "Any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." (2) "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning."

I find that by her failure to answer some 10 or 12 questions asked her by Lt. Kuzia as to how the homicide happened, of which Captain Chieco was aware, was, beyond a reasonable doubt, an exercise of her Fifth Amendment privilege and right to remain silent; that after the Miranda warnings were first given, her rights were honored; and the duty of the police officers not to invade and violate her constitutional rights were respected until the foregoing dialogue was initiated by Captain Chieco. As well as her failure to answer, her affirmative request for an attorney is a further basis for finding that she had claimed her privileges. He was bound by this claim of privilege even without direct advice thereof under People v. Dunleavy (26 A D 2d 649), where a confession was [***19] excluded which had been taken by one officer who was unaware that accused had claimed privilege previously to another officer.

I further find beyond a reasonable doubt that the defendant affirmatively stated her request to have her attorney present and had thus exercised her privilege under the Sixth Amendment; that Captain Chieco knew this and was bound by it. In addition to the Miranda case prohibition, in-custody statements taken in the absence of counsel must be excluded under the spirit of People v. Donovan (13 N Y 2d 148), and the pronouncements of our New York appellate courts in People v. Gunner (15 N Y 2d 226); People v. Sanchez (15 N Y 2d 387); People v. Ressler (17 N Y 2d 174); [**617] People v. Lacy (25 A D 2d 788); People v. Harper (27 A D 2d 736); People v. Noble (9 N Y 2d 571) and Escobedo v. Illinois (378 U.S. 478); unless a finding can be made that the defendant waived the privilege after exercising the claim and before making an admission, statement or confession, which has not been contended by the People herein; or [*298] that the alleged statement in issue was volunteered by the defendant [***20] without interrogation, which is the contention relied upon by the People.

Briefly, in passing, the record, beyond a reasonable doubt, is devoid of any evidence of waiver. Once the privileges have been exercised under the rights guaranteed by the United States Constitution, the Miranda decision, quoting from Escobedo v. Illinois (supra) reiterates the heavy burden on the prosecution to prove waiver of constitutional rights, and requires it to show that a defendant voluntarily, competently, knowingly and intelligently waived his privilege against self incrimination and his right to retained or appointed counsel. The Miranda case also states (p. 475 that an express affirmative statement "that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." The United States Supreme Court in Carnley v. Cochran (369 U.S. 506, 516) said: "Presuming waiver from a silent record is impermissible. The record must [***21] show * * * that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." (Emphasis added.) Note that these principles apply where there is an asserted waiver after the warnings. In the instant motion, there is the added factor that the defendant affirmatively claimed her privileges. The burden of the People to eliminate this added factor before a statement or confession can be taken must be and is even greater. Herein the testimony of Captain Chieco above quoted leading up to the alleged confession fails beyond a reasonable doubt to carry this burden of proof. (See United States v. Nielsen, 292 F. 2d 849.)

While the Miranda case, once the privileges have been claimed, uses the phrase, "interrogation must cease", it also adds (p. 474):"If * * * he indicates that he wants one [an attorney] before speaking to police, they must respect his decision to remain silent." HN5Go to the description of this Headnote.The Manual for Police, prepared and published by the New York State Police, in section 78 -- investigations -- on the topic, Subject Refusing Interview or Desiring an Attorney pointedly avoids using the word, "interrogation" and states: [***22] "If the subject at any time during 'custodial interrogation' indicates in any manner that he does not wish to talk or that he [**618] wishes to consult an attorney, the interview cannot lawfully be conducted. If already in progress it must be [*299] stopped." (Emphasis added.) At the hearing, the District Attorney clearly and emphatically stated that the Manual is not the law. However, it is the instructions to members of the State Police force for conducting criminal investigations, prepared by their supervisors based upon their interpretation of the law.

In its main brief, the People rely mainly, almost exclusively, upon People v. Torres (21 N Y 2d 49) as decisional authority that defendant's utterances were volunteered. The factual situation therein is clearly distinguishable. In Torres the police officer came to the defendant's residence and explained the meaning of the search warrant which he displayed. The defendant then volunteered an oral statement, which was held to be admissible. The defendant therein was concededly in custody, but there was absolutely no interrogation. In the instant case there was extensive interrogation by Lt. Kuzia, [***23] and the crux of the issue now reached herein is on whether or not the dialogue initiated with the defendant by Capt. Chieco was an interrogation under the Miranda case and cases which followed.

Neither, in the opinion of this court, do the supplementary citations submitted control on the factual situation herein. In People v. Baker (28 A D 2d 24), the defendant had conferred with his own attorney; had been advised by him; had engaged in a no-answers interrogation in the presence of his attorney; and later, after his attorney had left, because of an outside factor, changed his mind according to the appellate opinion, and talked. Baker's statements were held (3:2) to be admissible and not to be the result of impermissible interrogation under Miranda, since the defendant is the final arbiter of his defense. People v. Allen (28 A D 2d 724) may be considered factually similar but there was no police-dominated atmosphere to constitute compulsion and neither had there been an overt assertion of his constitutional rights by Allen, and is therefore not controlling herein.

A "volunteered" confession is not the product of an interrogation at all. Had the defendant [***24] herein not claimed her right to remain silent and to have her attorney present, the conversation initiated and pressed by the Captain in this police-dominated atmosphere and at the particular time herein would have constituted impermissible interrogation. It is not necessary that the sentences terminate with rising inflections and require question marks as punctuation in the transcription. It is the over-all effect which must be scrutinized to determine the interviewer's intent and goal. Under the circumstances, the technically non-interrogatory [*300] phrases; "this is a terrible tragedy", "as bad as this is", "think of the body", -- "funeral", "Do you have any thoughts about an [**619] undertaker to handle it?" are inherently, implicity, and indirectly the type of psychological pressures made unlawful and ordered eliminated by Miranda. The law has gone far beyond the holdings prohibiting physical coercion and so-called third degree tactics. "The blood of the accused is not the only hallmark of an unconstitutional inquisition." (Blackburn v. Alabama, 361 U.S. 199, 206.) This was not "routine" and "casual" nonincriminating questioning.

The explanation in [***25] the Captain's testimony, coming as it did after all other police officers on the scene had been instructed to, and did, not invade her asserted constitutional rights, was a weak, transparent excuse for his constitutionally unlawful embarkation on the interview, rather than a legally acceptable reason for it. Speaking to her about the obviously ultimate need of an undertaker for proper care and disposition of the body, which, according to all the witnesses, after some three days of decomposition, was already adding to the atmosphere, was not necessary at that moment and was not in proper pursuit of his duties. He had another motive, and though illegal, was successful. At the time he initiated the dialogue, he knew that she at least was a possible suspect who had overtly claimed her rights, that the attorney she requested was en route and minutes away, that from his own testimony, she was distraught, subnormal physically, mentally and emotionally, that she was under some form of medication, that the County Coroner was in the next room examining the body, that under department policy it was necessary that an autopsy would follow. There was plenty of time for her attorney, a relative, [***26] or friend, to attend to the civil function of funeral arrangements, as would normally be done.

I find that, beyond a reasonable doubt, the alleged confession, admissions and statements against interest of defendant in the interview or dialogue initiated and conducted by Captain Saverio A.

Chieco, and herein quoted, were elicited from her by an unlawful and illegal invasion of her overtly claimed privileges, were extracted in a constitutionally impermissive interview, and are doubly inadmissible as a matter of law, against her at trial, under both the Fifth and Sixth Amendments of the United States Constitution. All of the oral statements of defendant to Captain Saverio A. Chieco are, therefore, suppressed as evidence as a matter of law, and defendant's motion under section 813-g of the Code of Criminal Procedure in this respect is granted. Submit order accordingly.

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[**623] CONCLUDING DIRECTIONS

Pursuant to established authority in New York State,. the pretrial judicial determinations on the admissibility of evidence should not be disclosed to the jury. (People v. La Belle, 44 Misc 2d 324, 326; 44 Misc 2d 327, 330; People v. Marturano, 24 A D 2d 733; People v. Pratt, 27 A D 2d 199, 202; People v. Hulett, 28 A D 2d 624.) To be effective, this must include prospective jurors, which at this time include all members of the general public in Saratoga County who are eligible for jury duty. This decision and any orders made and entered pursuant to it shall not be published or in any way released until there is a determination of the trial or until further order of a court of competent jurisdiction.

The chief counsel [***35] for the People and the chief counsel for the defense are hereby directed to advise witnesses called by each to avoid all reference in their testimony at trial to items of evidence which have been suppressed as inadmissible.