385 U.S. 493

Edward J. GARRITY et al., Appellants,

v.

STATE OF NEW JERSEY.

No. 13.

Argued Nov. 10, 1966.

Decided Jan. 16, 1967.

Police officers were convicted in state court of conspiracy to obstruct justice. The New Jersey Supreme Court, 44 N.J. 209, 207 A.2d 689, affirmed the judgment. The United States Supreme Court treated the papers of the officers as a petition for certiorari. The Supreme Court, Mr. Justice Douglas, held that where police officers being investigated were given choice either to incriminate themselves or to forfeit their jobs under New Jersey statute dealing with forfeiture of office or employment tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions, confessions were not voluntary but were coerced, and Fourteenth Amendment prohibited their use in subsequent criminal prosecution in state court.

Judgment reversed.

Mr. Justice Harlan, Mr. Justice Clark, Mr. Justice Stewart, and Mr. Justice White, dissented.

For dissenting opinion of Mr. Justice White, see 87 S.Ct. 636.

1. Courts ⇐397½

Where New Jersey Supreme Court refused to reach question whether New Jersey forfeiture of office statute was valid and deemed voluntariness of statements of defendant police officers as only issue presented, statute was too tangentially involved to satisfy appeal provision of federal statute, and United States Supreme Court would dismiss appeal, treat papers of appealing defendants as petition for certiorari, grant the petition, and proceed to merits. 28 U.S.C.A. §§ 1257(2), 2103; N.J.S. 2A:81–17.1, N.J.S.A.

2. Criminal Law ⇐522(1)

"Coercion" that vitiates confession can be mental as well as physical, and question is whether accused was deprived of his free choice to admit, deny, or refuse to answer. U.S.C.A.Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law ⇐266

Where police officers being investigated were given choice either to incriminate themselves or to forfeit their jobs under New Jersey statute dealing with forfeiture of office or employment, tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions, confessions were not voluntary but were coerced, and Fourteenth Amendment prohibited their use in subsequent criminal prosecution of officers in state court. U.S.C.A.Const. Amends. 5, 14; N.J.S. 2A:81–17.1, N.J.S.A.

4. Courts ⇐394(3)

Where police officers being investigated were given choice either to incriminate themselves or to forfeit their jobs under New Jersey statute dealing with forfeiture of office or employment, tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions, question whether officers waived protection under Fourteenth Amendment against coerced confessions was a federal question for United States Supreme Court to decide. U.S.C.A.Const. Amends. 5, 14; N.J.S. 2A:81–17.1, N.J.S.A.

5. Constitutional Law ⇐43(1)

Where police officers were given choice either to incriminate themselves

or to forfeit their jobs under New Jersey statute dealing with forfeiture of office or employment, tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions, there was no waiver by officers of protection under Fourteenth Amendment against coerced confessions. U.S.C.A.Const. Amends. 5, 14; N.J.S. 2A:81–17.1, N.J.S.A.

6. Constitutional Law ⇐82

There are rights of constitutional stature whose exercise a State may not condition by exaction of a price.

7. Constitutional Law ⇐266

Protection of individual under Fourteenth Amendment against coerced confessions prohibits use in subsequent criminal proceedings of confessions obtained under threat of removal from office, and protection extends to all, whether they are policemen or other members of body politic. U.S.C.A.Const. Amends. 5, 14; N.J.S. 2A:81–17.1, N.J.S.A.

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Daniel L. O'Connor, Washington, D. C., for appellants.

Alan B. Handler, Newark, N. J., for appellee.

Mr. Justice DOUGLAS delivered the opinion of the Court.

Appellants were police officers in certain New Jersey boroughs. The Supreme Court of New Jersey ordered that alleged irregularities in handling cases in the municipal courts of those boroughs be investigated by the Attorney General, invested him with broad powers of inquiry and investigation, and directed him to make a report to the court. The matters investigated concerned alleged fixing of traffic tickets.

Before being questioned, each appellant was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office.[1]

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Appellants answered the questions. No immunity was granted, as there is no immunity statute applicable in these circumstances. Over their objections, some of the answers given were used in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws. Appellants were convicted and their convictions were sustained over their protests that their statements were coerced,[2] by reason of the fact that, if

1. "Any person holding or who has held any elective or appointive public office, position or employment (whether State, county or municipal), who refuses to testify upon matters relating to the office, position or employment in any criminal proceeding wherein he is a defendant or is called as a witness on behalf of the prosecution, upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself or refuses to waive immunity when called by a grand jury to testify thereon or who willfully refuses or fails to appear before any court, commission or body of this state which has the right to inquire under oath upon matters relating to the office, position or employment of such person or who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself, shall, if holding elective or public office, position or employment, be removed therefrom or shall thereby forfeit his office, position or employment and any vested or future right of tenure or pension granted to him by any law of this State provided the inquiry relates to a matter which occurred or arose within the preceding five years. Any person so forfeiting his office, position or employment shall not thereafter be eligible for election or appointment to any public office, position or employment in this State." N.J.Rev.Stat. § 2A:81–17.1 (Supp.1965), N.J.S.A.

2. At the trial the court excused the jury and conducted a hearing to determine

they refused to answer, they could lose their positions with the police department. See State v. Naglee, 44 N.J. 209, 207 A.2d 689; 44 N.J. 259, 208 A.2d 146.

[redacted]

[2] The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, and related cases can be "mental as well as physical"; "the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. State of Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242. Subtle pressures (Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948; Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513) may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his "free choice to admit, to deny, or to refuse to answer." Lisenba v. People of State of California, 314 U.S. 219, 241, 62 S.Ct. 280, 292, 86 L.Ed. 166.

We adhere to Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, a civil forfeiture action against property. A statute offered

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the owner an election between producing a document or forfeiture of the goods at issue in the proceeding. This was held to be a form of compulsion in violation of both the Fifth Amendment and the Fourth Amendment. Id., at 634–635, 6 S.Ct. It is that principle that we adhere to and apply in Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574.

[3] The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in Miranda v. State of Arizona, 384 U.S. 436, 464–465, 86 S.Ct. 1602, 1623, 16 L.Ed.2d 694, is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice." We think the statements were infected by

whether, *inter alia*, the statements were voluntary. The State offered witnesses who testified as to the manner in which the statements were taken; the appellants did not testify at that hearing. The court held the statements to be voluntary.

3. N. 1, supra.

4. Stevens v. Marks, 383 U.S. 234, 243, 86 S.Ct. 788, 793, 15 L.Ed.2d 724, quoting from Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593, 46 S.Ct. 605, 607, 70 L.Ed. 1101.

the coercion [5] inherent in this scheme of questioning

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and cannot be sustained as voluntary under our prior decisions.

[4, 5] It is said that there was a "waiver." That, however, is a federal question for us to decide. Union Pac. R. R. Co. v. Public Service Comm., 248 U.S. 67, 69–70, 39 S.Ct. 24, 25, 63 L.Ed. 131. Stevens v. Marks, supra, 383 U.S. 234, 243–244, 86 S.Ct. 788, 793. The Court in Union Pac. R. R. Co. v. Public Service Comm., supra, in speaking of a certificate exacted under protest and in violation of the Commerce Clause, said:

"Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary * * *." Id., 248 U.S., at 70, 39 S.Ct. at 25.

Where the choice is "between the rock and the whirlpool," duress is inherent in deciding to "waive" one or the other.

"It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." Ibid.

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In that case appellant paid under protest. In these cases also, though petitioners succumbed to compulsion, they preserved their objections, raising them at the earliest possible point. Cf. Abie State Bank v. Bryan, 282 U.S. 765, 776, 51 S.Ct. 252, 256, 75 L.Ed. 690. The cases are therefore quite different from the situation where one who is anxious to make a clean breast of the whole affair volunteers the information.

Mr. Justice Holmes in McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517, stated a dictum on which New Jersey heavily relies:

"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a police-

5. Cf. Lamm, The 5th Amendment and Its Equivalent in Jewish Law, 17 Decalogue Jour. 1 (Jan.–Feb.1967):

"It should be pointed out, at the very outset, that the Halakhah does not distinguish between voluntary and forced confessions, for reasons which will be discussed later. And it is here that one of the basic differences between Constitutional and Talmudic Law arises. According to the Constitution, a man cannot be compelled to testify against himself. The provision against self-incrimination is a privilege of which a citizen may or may not avail himself, as he wishes. The Halakhah, however, does not permit self-incriminating testimony. It is inadmissible, even if voluntarily offered. Confession, in other than a religious context, or financial cases completely free from any traces of criminality, is simply not an instrument of the Law. The issue, then, is not compulsion, but the whole idea of legal confession.

* * * * *

"The Halakhah, then, is obviously concerned with protecting the confessant from his own aberrations which manifest themselves, either as completely fabricated confessions, or as exaggerations of the real facts. * * * While certainly not all, or even most criminal confessions are directly attributable, in whole or part, to the Death Instinct, the Halakhah is sufficiently concerned with the minority of instances, where such is the case, to disqualify all criminal confessions and to discard confession as a legal instrument. Its function is to ensure the total victory of the Life Instinct over its omnipresent antagonist. Such are the conclusions to be drawn from Maimonides' interpretation of the Halakhah's equivalent of the Fifth Amendment.

"In summary, therefore, the Constitutional ruling on self-incrimination concerns only forced confessions, and its restricted character is a result of its historical evolution as a civilized protest against the use of torture in extorting confessions. The Halakhic ruling, however, is much broader and discards confessions in toto, and this because of its psychological insight and its concern for saving man from his own destructive inclinations." Id., at 10, 12.

man. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control." Id., at 220, 29 N.E., at 517–518.

The question in this case, however, is not cognizable in those terms. Our question is whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee.

We held in Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee:

"The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of

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guilt or a conclusive presumption of perjury. * * * The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." Id., at 557–558, 76 S.Ct. at 641.

We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.

[6–7] There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. Western Union Tel. Co. v. State of Kansas, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355. Resort to the federal courts in diversity of citizenship cases is another. Terral v. Burke Constr. Co., 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352 Assertion of a First Amendment right is still another. Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292; Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430; Lamont v. Postmaster General, 381 U.S. 301, 305–306, 85 S.Ct. 1493, 1495–1496, 14 L.Ed.2d 398. The imposition of a burden on the exercise of a Twenty-fourth Amendment right is also banned. Harman v. Forssenius, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50. We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

Reversed.