which I have mentioned above. I must therefore assess what I believe to be the proper sentence in this case having regard to the fact that the accused must be taken to be a first offender and disregarding the above quoted passage from the Probation Officer's report, I think that the proper sentence is one of six months' imprisonment and I reduce the sentence of the accused accordingly.

Record No. Criminal Appeal 11/1970.

No. 4.

R. v. DODIN

Criminal Law & Procedure - Statement of accused obtained in violation of Judges' Rules - Whether admissible in evidence.

On objection in the course of a trial to the admission of a statement obtained by the Police from an accused party after arrest:

HELD:

(1) The law of evidence applicable to criminal cases in Seychelles is the English law of evidence in force on the 15th October, 1962, and the version of the Judges' Rules current at that date is the 1912 version.

(2) Save in very exceptional cases, a person arrested and in the custody of the Police should not be questioned or cross-examined on the subject of the offence for which he is in custody.

(3) No question should be put to an accused party upon a voluntary statement, except such as is necessary to clear up an ambiguity.

(4) Before a statement made by an accused party to the police can be admitted in evidence, it must be proved affirmatively by the prosecution that the statement was free and voluntary and was not preceded by any inducement held out by a person in authority.

Mr. René, for the Accused.

delivered in September, 1970, by:

SAUZIER, A.C.J.:- The prosecution seeks to produce a statement made by the accused to the police on the 23rd April, 1970. The statement was produced for identification purposes only and marked Exhibit 1.

Mr. René on behalf of the accused objects to the production of the statement on two grounds, namely -

(a) that it was obtained by the police in breach of the Judges' Rules; and

(b) that the statement is not voluntary as it has not

been affirmatively proved that it was not preceded by any inducement to the accused on the part of the police.

As was pointed out by the Seychelles Court of Appeal in the case of *Kim Koon & Co. Ltd. v. R.* (1969) S.C.A.R. 60, the law of evidence applicable to criminal cases in Seychelles is the English law of evidence in force on 15th October, 1962, and, in the absence of an express application of the 1964 version of the Judges' Rules to Seychelles, the version of the Judges' Rules which was current at that date is the version to be applied in Seychelles. The version applicable to Seychelles is therefore the 1912 version of the Judges' Rules which I hereafter refer to as the Judges' Rules".

Rule 3 of the Judges' Rules stipulates that persons in custody should not be questioned without the usual caution being first administered. A Home Office circular issued in 1930 comments that Rule 3 was never intended to encourage or authorise the questioning or cross-examination of a person in custody, after he has been cautioned, on the subject of the crime for which he is in custody, and long before this rule was formulated, and since, it has been the practice for the judge not to allow any answer to a question so improperly put to be given in evidence; but in some cases it may be proper and necessary to put questions to a person in custody after the caution has been administered and the circular proceeds to give instances of such cases. The circular then comments that Rule 3 is intended to apply to such cases and, so understood, is not in conflict with and does not qualify Rule 7 which prohibits any question upon a voluntary statement except such as is necessary to clear up an ambiguity.

From the above it is clear that, except in very exceptional cases, once a person has been arrested and is in the custody of the police he should not be questioned or cross-examined on the subject of the offence for which he is in custody.

In this case the accused was arrested and brought to the Baie Lazare police station in the custody of the police for the very purpose of being questioned on the subject of the offences which he was alleged to have committed and for which he was arrested. Although Sgt. Waye Hive said at one stage of his evidence that he started questioning the accused after he had admitted having committed the offence it is clear from his evidence taken as a whole that the accused must have been questioned from the very start. I find that the statement of the accused, Ex. 1, was obtained by the police in breach of the Judges' Rules.

It is a well-known principle that the Judges' Rules are administrative directions only and do not have the force of law. Failure to comply with them does not necessarily make a statement inadmissible. Nevertheless a court will not normally admit in evidence a statement taken in breach of the Judges' Rules.

I will now deal with the second point raised by Mr. René. Before a statement made by an accused party is admitted the Court has to ask itself: Is it proved affirmatively that the confession was free and voluntary - that is, was it preceded by any inducement held out by a person in authority to make a statement? If so, and the inducement has not been clearly removed before the statement was made, evidence of the statement is inadmissible. The case of *Reg. v. Thompson*, 17 Cox Criminal Law Cases 641 is relevant.

In the course of his cross-examination, Sgt. Waye Hive stated as follows:

Q. Didn't you or Inspector Lau Tee tell the father in accused's presence that it would be better for him if His son was to tell the truth?

A. I do not remember. We talked to the father about the case in the car all the way to the station. Then and at the station I do not remember if we told him that it would be better for his son to tell the truth but it may be that this was mentioned in the conversation because this was a discussion between the police, father and son.

Q. Am I right to say that both you and Lau Tee were trying to find the truth and help this accused?

A. No, not exactly. I for one was sure he had committed this offence.

Q. You thought it would in fact be better for the accused if he were to say that he had done it?

A. It would be of no advantage to him to tell a lie.

Q. Did you explain that to him or did Inspector Lau Tee explain that to the father?

A. I do not remember.

Q. Is it possible?

A. It could be.

From the above it is impossible to say whether or not

R. v. DODIN

at some stage it was not conveyed to the accused by the police that it would be better for him to tell the truth. It is true that Inspector Lau Tee said that he did not tell the accused or his father that it would be better for the accused to tell the truth. He also said that in his presence Sgt. Waye Hive did not make any promise to the accused. After that evidence however a doubt still subsists as to what in fact happened.

Before making his statement the accused was given the usual warning. I am not satisfied that such warning by itself would have been sufficient to remove the inducement to make a statement which may have been conveyed to the accused by the police saying something to the effect that it would be better for him to tell the truth. In this respect one has to bear in mind that the accused is fifteen years old and was under the time under arrest. He had up to the time he made the statement either expressly or impliedly denied having committed the alleged offence.

It is the duty of the prosecution to prove, in a case of doubt, that the accused's statement was free and voluntary and I find that the prosecution has not discharged itself of this obligation.

The statement, Exh. 1, is not admissible on both grounds raised by Mr. René and I uphold his objection to the production of the statement.

This ruling is not to be construed as implying any lack of integrity on the part of the police in the investigation of this case. The officers concerned gave their evidence in a very frank and straightforward manner and if they may have been ill-advised in not adhering strictly to the Judges' Rules there is nothing to suggest that they were prompted by improper motives.

Record No. Criminal Case 9/1970.

No. 5

KILINDO & ANOR. v. R.

Criminal Law & Procedure - Sentence - Assault occasioning actual bodily harm - Sect. 236 P.C. - Assault on person on account of act done by him in execution of duty imposed by law - Sect. 238(e) P.C. - Aggravating circumstance considered by Magistrate.

The appellants were charged with assault causing actual bodily harm under sect. 236 P.C. and sentenced to one year's imprisonment. The Court upheld the findings of fact of the Magistrate and dismissed the appeal against conviction.

HELD: Although the evidence showed the aggravating circumstance that the assault was motivated by the complainant having arrested the first accused's brother in the execution of his duty as a police constable, the Magistrate was wrong to take into consideration for purposes of sentence an aggravating circumstance not charged against the appellants. The sentence was accordingly reduced to 6 months' imprisonment in the case of each appellant.

Judgment delivered in September, 1970, by:

SAUZIER, A.C.J.:- The appellants were convicted by the Magistrates' Court on the 13th August, 1970 of the offence of assault occasioning actual bodily harm contrary to section 236 of the Penal Code and were sentenced to one year's imprisonment. They now appeal against both conviction and sentence.

Against conviction they have raised two grounds of appeal, namely -

(a) that the conviction cannot be supported having regard to the evidence; and

(b) that the learned Magistrate misdirected himself as to the facts.

The Magistrate had evidence before him to convict both appellants of the offence charged and there was no misdirection on his part as to the facts. I find that the appellants were rightly convicted and I dismiss their appeal as to conviction.

Their appeal against sentence is based on three grounds, namely -

(a) that the Magistrate was unduly influenced by the