SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA.

T H E Q U E E N

against

AINGO, son of AIDA
ISOA, son of EVORO and
SIMANU, son of UVIGA.

The Supreme Court (the Chief Justice) in its Criminal Jurisdiction at Port Moresby, Papua,
22nd, 23rd, 24th February, 1961.

Criminal Law - "Confessions" - "Judges Rules" - "Person in Custody" - Natives.

These three Goilalas were on trial for the murder simpliciter of a Buang. The case is reported only on the point of admissibility of what each said at a police interview at which statements (although hardly incriminatory in themselves) were allegedly made which conflicted with the defence of an alibi set up on the trial. This point was argued on the voir dire at which the Accused were not called and the only evidence was that -

(i) two of Accused were taken to the police station during a "riot", the third went there for his own purposes;

(ii) the police Inspector was not at the police station at the time of arrival of the two Accused, being busy at the "riot" but returned later and interviewed them then;

(a) there was no evidence how long they had been there before the interview,

(iii) until the arrival of the Inspector the three Accused were in a place where police Constables and N.C.O's went, passed and repassed.

(a) there was no evidence of whether any of these Constables or N.C.O's communicated with Accused, either orally or by signs or menaces;

(iv) the interview took place as soon as the Inspector returned and was conducted by him without use of any interpreter because he is an experienced Pidgin speaker and, although each of the Accused, not being New Guinea men, did not speak true Pidgin but used a mixture of Pidgin and broken English, he understood them perfectly;

(v) the Inspector asked each Accused certain questions and received answers before, he swore, he felt justified in making up his mind to charge them. He then cautioned each before he continued the interviews, at the end of each of which he arrested each and asked each if he had anything to say in answer to the charge, administering the usual caution;

(vi) the Inspector did not regard the Accused as being "in custody" at any time before he cautioned them;

(vii) in answer to the hypothetical question of what he would do if the Accused "bolted" from the police station before the caution the Inspector said that at any time they could have walked out but they did not; however, if they had he would have followed them, continuing his questioning as they walked away.

HELD:

(i) The Accused were "in custody". They would so regard themselves. (para. 1.).

(ii) It is a practical necessity to explain to Natives who have not been arrested or formally charged that they are not under arrest and are free to go if they wish and are not bound to answer questions (para.2.).

(iii) The prosecution must prove the absence of threats or inducements before a confession is admissible (para. 3.).

(iv) That part of the interviews which followed the first "cautions" is admissible (paras. 4 and 5.).

Cases referred to:

(i) R. v. Swatkins and Others (1831) 4 Car. & P. 548; 172 E.R. 819.

(ii) BULARI, son of GAIO v. R. (1950) 34 A.L.J.R. 266 (sub.nom. GAIO v. R.).

(iii) Smith v. R. (1957) 97 C.L.R. 100.

D. S. O'Regan, for the Defence, on the voir dire argued that:-

(i) the "confessions" were inadmissible because it had not been proved affirmatively that they were voluntary. All possible witnesses had not been called. Any of the police constables and N.C.Os. passing through where the Accused were waiting could have made threats or promises

to them to induce a confession and all should therefore be examined. He cited R. v. Swatkins and Others 4 Car. & P. 548; 172 E.R. 819.

(ii) that, assuming an interpreter was used, he had not been called and so the evidence was inadmissible as hearsay. He cited BULARI (sub-nom. GAIO) v. R. (1960) 34 A.L.J.R. 266.

(iii) that, if an interpreter was not used there is no evidence the Inspector is correctly interpreting the conversation, nor that he is competent to do so.

(iv) the Accused were in custody because it is well-known that people being questioned at a police-station regard themselves as being in custody - particularly Natives. He cited Smith v. R. (1957) 97 C.L.R. 100.

(v) Assuming the confessions are admissible, the Judicial Discretion should be exercised to exclude them.

D. J. Kelliher, Crown Prosecutor, with him J.S. Bowen, submitted, in regard to each of the above points that,

(i) Swatkins Case is distinguishable because:-

(a) the facts specifically were that "A prisoner was in the custody of A., a constable" and another constable then took over and examined him. It is submitted these prisoners were not in custody;

(b) the case was tried in 1831, and conditions were quite different - it was before the creation of the present kind of police force in England;

(ii) the only evidence is that of the Inspector. He swears that no interpreter was used and his oath is not contested;

(iii) the Inspector is on oath to tell the truth. He says he is an experienced Pidgin speaker and that he understood what Accused said and he has related what it was each said. To go further and say his mental processes were correct is unnecessary.

(iv) the Accused were not in custody until arrested at the end of the interview. The third Accused came to the police station for his own purposes and, although they did not do so, the evidence is, all could have left had they wished. SMITH is distinguishable because Smith was told by the police that he could not leave and was held for over six hours while he was continuously questioned.

(v) The Judicial Discretion should only be exercised judicially and there is no reason why the "confessions" should be excluded.

R. S. O'Regan, for the Defence, in reply on the Voir Dire did not develop the argument in any material way.

cur. ad vult.

After the luncheon adjournment on 23rd February, 1961.

MANN, C.J.

1. I think that for the purpose of this case I should treat the Accused as being in custody at the Police Station. I think it clear that they would so regard themselves.

2. It is a common practice for Police Officers to give a warning at the outset of any conversation under such circumstances and I think that such a practice is wise. When Police Officers desire to question suspected Natives who have not been formally charged or arrested I think it becomes a practical necessity to explain to the Natives that they are not under arrest and free to go if they wish and are not bound to answer any questions. If this step is not taken, it becomes a matter of difficulty for the Crown to show that a primitive Accused was not in custody or that his statement was voluntary.

3. From the evidence I am unable to say how long Accused were kept waiting for Inspector Allen. In such cases I think the Crown should be in a position to show that the suspected persons were not in fact approached and given any threat or inducement. Difficulty of proof does not alter the onus. The remedy is: not to keep suspects waiting in the muster-room, where the idea of being in custody and the risk of intimidation are likely to be greater.

4. As a question of fact I do not think the Crown has shown that the statements were voluntary and I reject them up to the

Inspector Allen gave a proper warning and I admit the evidence after that point. 5.

I think that his oath as a witness is enough to verify that his English version of a conversation in Pidgin and broken English is a true translation so far as his present evidence includes the step of translation. I do not think there is any cross-examination of the Accused after the warnings were given and there is no objection on that ground. 6.

There is no suggestion of any impropriety on the part of Inspector Allen or any of the Police. The problem is purely one of admissibility of evidence and onus of proof under circumstances rendered difficult by the state of mind of primitive people in circumstances unfamiliar to them and in which it cannot be validly assumed that they are aware of their rights. 7.

((end))

R. S. O'Regan, instructed by the Public Solicitor

Reported by P. J. Quinlivan
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Editor's Note.

The law of confessions is complicated; a fact which led the police to request and the Judges to formulate The Judges Rules for Police guidance. Shortly stated those rules frown on the interviewing, in relation to any offence, of any person "in custody", although they in fact permit it provided the person "in custody" is specially cautioned that he may refuse to answer any or all questions. Subject to this the Judges lay down Rules in respect of -

(i) questioning by police, and

(ii) statements by "a prisoner"

piecemeal nature and also by the use throughout of the word "caution" (with an inherent conflict between "statement" and "further questions") they are, on this aspect of the subject:-

(i) re questioning by police.

(a) "there is no objection" to a police officer asking anyone "whether suspected or not", any questions which he thinks may be useful in his endeavours to discover the author of a crime, provided that

(b) "whenever a police officer has made up his mind to charge a person with" an offence, he should first, "before asking him any questions, or further questions as the case may be", tell him he does not have to answer any questions and "caution" such person that if he does answer any questions he will be recorded for use in evidence.

(ii) re statements by "a prisoner"

(a) when a police officer "formally charges" a person he should ask him whether he "wishes to say anything in answer to the charge" but must caution him that he need not do so and also that if he does it will be used in evidence. HOWEVER,

(b) "a prisoner" making a statement cannot be questioned "except for the purpose of removing ambiguity in what he has actually said."

(c) in addition to statements made under (ii)(a), the prohibition referred to in (ii)(b) applies in any "statement" volunteered by "a prisoner".

It appears that this ruling on the Voir Dire is a local gloss on (i) above in that all Natives are half-way in the category of the exception - the class of persons "in custody" - if the circumstances of the interview are such that a Court might hold that the Native regarded himself as being in custody. Thus no questions may be asked of him (for the purpose of adducing the conversation as evidence) unless he has first been cautioned. The rule as to "statements" is unaffected, but if the Native is willing to answer questions, knowing that his answers will be used in evidence, he may be questioned, except in relation to a "statement".

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