

IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

20250

THE QUEEN -v- GELU-GAUA.

J U D G M E N T.

MINOGUE J.
PORT MORESBY
11/10/62

On the trial of the accused GELU-GAUA on the 10th and 11th October, 1962 for wilful murder evidence was given by Inspector Parry of an interview which he had with the accused and of admissions made by him at such interview which amounted to a clear admission of guilt.

At the close of the case for the Crown, Mr. Barnett, who appeared for the accused, submitted that I should reject this confessional evidence on the grounds that the confession was induced by a threat or promise contrary to Section 68 of the Evidence and Discovery Ordinance 1913-1957 and on the further and major ground that in the exercise of my discretion, even if the confession were not induced contrary to that section, I should still reject it because, so it was urged, Rule 3 of the Judges' Rules had not been observed.

I ruled against Mr. Barnett's first submission but upheld his second submission, partly on the ground urged by him and partly on the ground that the particular circumstances of this case called for special care in advising the accused of his right not to incriminate himself.

Evidence other than the confessional evidence in question established that at about 11.45 in the

morning of 15th September a man named MOTO was wheeling his brother KOGA on a hospital trolley along a roadway within the Port Moresby General Hospital at Taurama. For some minutes previously, and I am unable to determine for precisely how long, the accused had been loitering in the vicinity. He fell in behind MOTO, ran up, and with a knife which he had in his hand, stabbed him twice in the back. On the second blow the knife penetrated some 8½ inches through a number of vital organs, and MOTO died within a very short time.

KOGA's wife ADAI was present and witnessed the fatal assault, and there were a number of other native people in the vicinity. The accused ran away and was intercepted on the Hubert Murray Highway and brought back to the Hospital in a private car owned by a European witness named Bremner.

At or shortly prior to the accused's arrival at the Hospital, a utility truck arrived bringing Inspector Parry and Constables BUGUME (the driver) and KURUAU. There was quite a crowd present, including a number of native people, and on his arrival, Constable BUGUME handcuffed the accused. It was not made clear to me whether this was done on instructions or on his own initiative.

Inspector Parry immediately endeavoured to sort out the confused situation, and had around him a number of excited people, including the witness Bremner. The accused was apparently frightened of the people present and was left sitting in the truck for some short time in handcuffs. I have no doubt that at this stage he was in custody.

Constable KURUAU gave evidence that on the verandah Inspector Parry immediately questioned the accused, and began his questioning by asking - "Did you kill this man?" The Inspector denied that he had asked any such question, and I accept his denial, but I do not feel satisfied that at this stage some other Police Officer did not question him in some such fashion, and that a proper warning or caution was administered to him. It appears to me that the accused may well then have been in a state of terror.

After a short interval, perhaps of five minutes, the accused was taken to the Hospital Secretary's Office and was questioned by Inspector Parry in the presence of Sub-Inspector Ramsay and through the interpretation of Constable KURUAU. The interview was conducted on the part of the accused in Motu and on the part of the Inspector in Pidgin. On arrival at the office a caution was administered, as it was on two subsequent occasions. The caution was in the standard form - "I wish to ask you some questions. You are not obliged to say anything unless you wish to do so, as anything you say may be taken down and given in evidence. Do you understand this?" The accused was a Fuyuge and appeared to me to have no understanding at all of the English language.

It was urged upon me that Constable BUGUME and any other Police, of whom Inspector Allen was one, who were present at any time that morning should have been called to testify as to the voluntariness of the confession, and that I should not be satisfied on the Crown case that no threat or promise by some person in authority had been made. The accused gave no evidence and no cross-examination was directed to any of the Crown witnesses to suggest such a threat or

promise. I do not consider it necessary for the Crown to specifically negative such a threat or promise unless in course of the trial circumstances appear which suggest that the confession has been improperly induced. I was satisfied on the evidence that there had been no such threat or promise.

However, the remaining submission caused me much greater concern. Reconstructing the scene as best I can from the evidence, the impression left in my mind is that the accused was quite clearly under the control of persons in authority. He was frightened of what was to happen to him. He was not initially cautioned on first being questioned on the verandah, and although, on being taken into the office, he was cautioned in what may be regarded as the proper form, I do not think that it would really be brought home to his mind that he was not obliged to answer any questions asked of him.

Although the Judges' Rules do not form part of the law of the Territory (see R. v. Smith 97 C.L.R. 100 at pp. 109 and 130), yet from what was said both in that case and in R. v. McDermott 76 C.L.R. 501, they may be taken into account by the trial Judge in the exercise of his discretion whether or not to admit confessional evidence. As Dixon J. (as he then was) said in R. v. McDermott at p. 515 - "... a judge at the trial should exclude confessional statements if in all the circumstances he thinks that they have been improperly procured by officers of police, even although he does not consider that the strict rules of law, common law and statutory, require the rejection of the evidence."

I was further satisfied, not only that section 68 had not been infringed, but that at common law the confession should be regarded as voluntary. However, feeling as I do that in the case of a primitive and uneducated person as this accused was particular care should be exercised to make him fully aware of his right to remain silent, I was not satisfied that such care was taken in this case and in that sense only the confession was improperly procured. I do not read the word "improperly" as necessarily meaning any deliberate or intentional impropriety and I was satisfied that there was no such impropriety used or exercised by any of the police officers concerned. I am not to be taken as laying down any rule of general application; each case must depend upon its own circumstances, although generally for myself I would regard it as necessary that the police officer conducting an interrogation of such people as was the accused should go to some pains to advise him of his right. A mere literal translation of the wording of the English form of caution would not seem to me to be enough. In the particular circumstances of this case I did feel that the accused was a person in custody who was questioned without a proper caution having been administered, and accordingly, in the exercise of my discretion, I rejected this confessional evidence.
