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254.

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

REGINA

against

BANJI, NUBEN & KURUMP

Judgment on Admissibility of Evidence

[illegible]
[illegible]
24/10/62.

On 24th September a native woman and her young daughter were killed by axe wounds, and their bodies were subsequently scorched in the fire which destroyed the house in which they had been sleeping.

There is no eye-witness' evidence of what occurred or why. The people concerned were very primitive, living in what was a restricted area, and sorcery and pay-back killings were common.

The Anglican Mission and an Administration Patrol Post were established at Simbai at about the same time some four years ago. In consequence the people have made considerable progress, but one must regard a murder like this as by no means abnormal. The underlying motives are likely to be difficult to discover and check, owing to the closeness of family ties and the power and fear of sorcery.

Several officers attempted to investigate the crime with no apparent success, and an inquest was held in 1961. Some suspicion attached to KURUMP, in whose house the women were sleeping at the time of their death.

A stain, variously described, remaining on one of his unwashed feet was identified by the native police as blood from the victims, but this slender clue is the subject of so much conflict of evidence as to be worthless. There was some rationalisation,

and a lot of close scrutiny and checking of KURUMP's movements, but his explanations appear to have satisfied Father Robin at the time, and there the matter stood, without any real evidence of what happened.

Inspector Honisett had gone out to the scene of the crime in November, 1961 and had given orders for the house in which the woman had been murdered to be reconstructed to identical plan, and shortly before the trial, took some photographs. Mr. Honisett's photographs and explanations were most helpful and gave a very clear picture of the scene of the crime.

In March, 1962 inquiries were revived and Superintendent McNaught went to Bimbai with Inspector Wood. Some further information was gleaned and as a result statements were obtained from NUBEN and BANJI. The substance of the Crown case against these two accused is to be found in these statements. I have now to determine whether they should be admitted in evidence.

The evidence given by Mr. McNaught is not contested. He produced records of his conversations and was in the best position to be accurate and to fix the dates upon which interviews took place.

The defence relies in the first place on the failure of the Crown case to exclude the possibility of improper influences being brought to bear on the accused whilst they were outside the range of Mr. McNaught's observation. This of course does not impute any impropriety in Mr. McNaught, and apart from one matter, none of the witnesses called was challenged as to any conduct of an improper nature. This raises the question of onus of proof. I have, in other cases, applied the general rule that the onus is on the Crown in all matters other than insanity, once the issue is fairly raised.

I have also been referred to the recent decision of Ollerenshaw J. in Regina v. TOROMAN. It is not clear whether the degree of proof required was argued in that case, but the learned Judge applied the general rule, and, I think, correctly.

I do not think that the expression "prove affirmatively" either in statutory provisions or in judgments has any bearing on the degree of proof required. It shows merely the direction in which a fact must be established to whatever degree of proof may be appropriate. It must be proved affirmatively and positively as a fact that a statement is voluntary. An absence of evidence is not enough, nor is evidence to exclude influences which might suggest themselves. In a sense the negative must be affirmatively proved, that there were no influences of any kind, and that the statement was in truth and fact voluntary.

The only matter put in issue as to admissibility by the defence was covered by the evidence of the interpreter GUS, and related to a warning given to NUBEN to the effect that now that very important officers had come from Madang, he must tell them the truth if he killed the woman. It was suggested that NUBEN in turn influenced BANJI to make his statement.

GUS was rather confused in some parts of his evidence, and as an uneducated man, showed little understanding of what he described. Moreover, his evidence, being unrecorded, was affected by lapse of time. Nevertheless, he positively asserted that before NUBEN was taken in to Superintendent McNaught, he was repeatedly asked whether he had killed the women, and repeatedly denied it, before he changed his mind and admitted it, whereupon he was taken before Superintendent McNaught, who

took his statement. Others present at this time gave conflicting evidence of what took place, or failed to remember details.

It appears from Mr. McNaught's evidence that some at least of what GUS was trying to describe, consisted of imperfectly remembered events on other occasions, and GUS appeared possibly to have failed to grasp the difference between a caution and an affirmation. However this may be, it does appear to me that the Crown evidence on this point is not satisfactory and would not lead me to an affirmative conclusion that NUBEN's statement when made was voluntary. If no distinct issue had been raised, Mr. McNaught's evidence would have been ample to establish voluntariness, but this specific issue was clearly raised in GUS's evidence and cross-examination.

In BANJI's case the same argument arises, but possibly with less force, for NUBEN appears to have been the persuasive force and not the police party. Moreover, BANJI, having previously denied the crime, before Mr. McNaught, at least understood that he was free to do so.

In BANJI's case the stronger ground is that the statement should be rejected as a matter of discretion. What I say about BANJI here applies equally to NUBEN.

The two men were brought into Simbai by police constables for questioning. That they would have been recaptured had they tried to escape is demonstrated by the fact that BANJI did try to escape, and bit the policeman's hand to get away from him, but was recaptured. This was at a stage when Superintendent McNaught said that BANJI was free to go when he pleased, and had not been charged, arrested or questioned.

Later when BANJI was closely and rather vigorously interrogated in the presence of NUBEN, he denied that he

was involved, and gave a reasonable explanation of why NUBEN, who was charged with the crime, wanted [redacted] to get BANJI to confess and accompany NUBEN to Madang.

That night, the Thursday after the murder, BANJI, who was "free" and NUBEN, who was under arrest, slept together under police escort. In the morning BANJI, apparently persuaded by NUBEN, gave a statement to Mr. McNaught without much prompting. The statement and the subsequent demonstration show many signs of fabrication and rehearsal with NUBEN. Some points, such as the positions occupied by the bodies before the murder, strongly suggest that neither BANJI nor NUBEN saw them, but that BANJI saw them after the fire (which was the case) and that NUBEN was relying on what others had told him.

BANJI's whole manner was different from NUBEN's. He was surly and apparently unwilling and uncooperative with the police.

The whole story left me with a strong impression that two men were not involved in this crime, and certainly not NUBEN and BANJI together. Three theories have, in effect, been presented to the Court to explain how each accused came into the picture, but on the evidence available I think the least probable is that concerning BANJI.

In each case the statements were obtained by searching questions, and as soon as a direct admission was obtained, a rather perfunctory warning was given, and the questioning continued.

The questioning proceeded in a manner which would give a very strong impression that a Court was in session, so that the accused would have no idea that they had any means of protection, unless the true nature of the proceedings was carefully explained at the outset. Mr. McNaught said that they would not have understood a

warning if given at the commencement of the interview. This only means that in those circumstances, no interrogation can fairly proceed, for the suspect is not capable of understanding his rights, and has no free choice.

It is usually fair to give a warning even if not strictly necessary, but in the case of a person in custody, even a warning does not justify interrogation.

Cases decided elsewhere draw a distinction between a person who is merely suspect and a person charged and arrested, for the purposes of interrogation. This is important, for a suspect is taken as understanding that he is free to go and refuse to answer. It is when charged and arrested that his position needs further protection. It is different in the Territory where, in spite of previous rejection of statements so obtained, the practice apparently persists of bringing witnesses, suspects and others, for the convenience of investigating officers, to headquarters, and interrogating them until a confession is obtained. These people are undoubtedly in police custody, albeit illegally, and it does not alter the position as the police officer has not as yet sufficient evidence to lay a charge, or decided to make a formal arrest. Apart from the major question whether a statement apparently taken in a "Court" in these circumstances can be accepted as voluntary, it is in my opinion a clear breach of the Judges' rules to conduct such an interrogation when persons are in fact in police custody.

As the present Chief Justice of the High Court of Australia pointed out in McDermott v. The King, 76 C.L.R. at p. 513 - "The abuse of the power of arrest by using the detention of an accused person as an occasion for securing from him evidence by admission is treated as an improper

upon questions or an attempt to break down or qualify the effect of an accused person's statement so far as it may be exculpatory. The practice of excluding statements so obtained is supported by the Court of Criminal Appeal in England, which will quash convictions where evidence has been received which in the opinion of that Court has been obtained improperly, that is, in some such manner."

It is not a question of anyone ill-treating the accused. If a statement is obtained in this way the Court ought, in fairness to the accused, reject it as a matter of discretion, even if, in the narrower sense, it was made "voluntarily."

There are in BANJI's case, clear breaches of Judges' Rules 3, 7 and 8.

For the reasons stated I exclude the statements in question from the evidence.

VERDICT: Not Guilty each accused.