Raine, J

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IN THE FULL COURT OF)
THE SUPREME COURT OF)
PAPUA NEW GUINEA)

CORAM: FROST, A.C.J.
CLARKSON, J.
PRENTICE, J.

O R D E R

That none of the questions be answered.

IN THE FULL COURT OF)
THE SUPREME COURT OF)
PAPUA NEW GUINEA)

CORAM: FROST, A.C.J.
CLARKSON, J.
PRENTICE, J.

Friday,
4th October 1974.

PROSECUTOR'S REQUEST NO. 1 OF 1974

1974

Sept. 26

PORT MORESBY

FROST, ACJ

CLARKSON, J

PRENTICE, J

This is a reference to the Full Court made at the request of the prosecutor pursuant to Sec. 30 of the Supreme Court (Full Court) Act 1968.

The request was made following the acquittal of two persons after a trial for wilful murder.

It is unnecessary to detail all the facts. The deceased was undoubtedly murdered and the principal issue was the identity of the assailant or assailants. The accused said this was a "marking" case, that is one fabricated by tribal enemies.

The principal Crown witness who was following some distance behind the deceased at the time of the attack gave evidence that she saw the two accused strike down the deceased and that she told another companion following her "A and Y (the accused) have killed W so let us run away" and that she later shouted "A and Y have killed X's wife".

Another Crown witness, M, gave evidence that the deceased prior to her death said "A and Y hit me".

The trial judge ruled each of these statements inadmissible and the first three questions referred ask whether the trial judge erred in law in so doing.

In our view the Court should in the circumstances decline to answer any of these questions because it cannot be shown that any of them if otherwise decided might have led to a different result at the trial.

The trial judge expressly found that the witness K did not see the attack on the deceased and he gave his reasons which to us seem convincing enough. For instance, the medical evidence established that the attack could not have occurred in the way she described and she herself said that when the deceased made an exclamation, apparently on being attacked, the witness called out "What happened, have you dropped your baby?". It seems to us that even if the first and second statements had been initially admitted in evidence and even if at the end of the evidence the trial judge believed they had been made they could carry no weight in view of

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the other findings we have referred to. Bearing in mind the onus on the Crown, we cannot accept that the trial judge might have then rejected those findings in favour of a finding that the witness saw the attack merely because of the additional evidence by her that having seen it she said she had seen it.

The third question is even more clearly one which we should not answer. It refers to the admissibility of a dying declaration said to have been overheard by another Crown witness none of whose evidence was believed by the trial judge. In effect we are asked to comment on the admissibility of a statement which was not made.

Before leaving the first three questions we need only record that we did not understand Counsel to question anything said in Ratten v. The Queen (1) in relation to res gestae or in R v. Ambimp (2) and R. v. Kipali-Ikarum (3) in relation to dying declarations.

The fourth question was whether the trial judge erred in law in indicating to the Crown Prosecutor that he had a duty to tender in the trial the statement made by the accused pursuant to S.103 of the District Courts Act 1963 as amended.

These statements were self serving and since the accused were acquitted the failure to tender them clearly could not have affected the result of the trial. Counsel for the Crown conceded this but said this was a matter on which some guidance from the Full Court would be helpful.

We think we should decline to give any specific answer. Our own view is that S.104 of the Act refers only to the method of proof of a statement otherwise admissible. The circumstances in which such a statement may become admissible vary greatly and no good purpose would be served by trying to identify them.

In certain circumstances, of course, in fairness to the accused the prosecutor may in his discretion decide to tender such a statement although it may not be strictly admissible. The law relating to the manner in which the prosecutor is to exercise his discretion in the adducing of evidence generally is as stated by the High Court in Richardson v. The Queen (4).

Some of the considerations by which the Court will be guided in dealing with these references are to be found in R. v. P.M. (5) and R. v. B.P. (6). Applying them, the Court should decline to answer any of the questions asked.

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(1) (1972) A.C. 378
(2) (1971-72) P.N.G.L.R. 258
(3) (1967-68) P.N.G.L.R. 110
(4) (1974) 48 A.L.J.R. p.181
(5) (1971-72) P.N.G.L.R. 222
(6) (Unreported) F.C. No. 38 October 1972

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PRENTICE, J. This is a reference by the Secretary for Law of four questions arising from a trial of two accused on a charge of wilful murder. The first two questions seek answers as to whether his Honour the trial judge was correct in law in ruling inadmissible, statements made at and near the scene of the crime, allegedly at the time of its commission and very shortly thereafter, by a person who claimed to have been an eye-witness of the killing. The statements asserted the identity of the killers.

Counsel for the respondents submits that these questions should not be answered; as the reception of the evidence concerned could not have affected the result, inasmuch as the trial judge specifically disbelieved the witness Kurapen, rejected her evidence, and found as a fact that the witness did not see the attack. S.30 (4) of the Supreme Court (Full Court) Act provides that on such a reference the Court "may determine the question so referred". In Reg. v. P.M. (7) and The Queen v. B.P. (8) it was held that the power given the Court was a discretionary one; and the criteria upon which it would be used were laid down in the terms adopted in the decisions of the New South Wales Court of Criminal Appeal in relation to that State's comparable section. These criteria may be summarised as follows:-

(a) the question must be a specific question of criminal law;

(b) which was raised at the trial;

(c) decided adversely to the Crown;

(d) and which if decided otherwise, might have led to a different result at the trial;

(e) it must be a question involving a general principle on a matter of public importance;

(f) if it were a wrong decision and to remain uncorrected it may set a precedent for other courts of first instance.

In this reference the first two questions are specific, were raised at the trial, and decided adversely to the Crown. Apparently the trial judge decided not to accept the witness Kurapen's evidence once he had heard medical evidence in which opinions were expressed as to the direction from which blows were delivered (based on the position of the injuries to the deceased); and upon a reconstruction of where assailants, deceased and witnesses were placed on the roadway in relation to one another. It is well known that among the Enga people, members of one line will "mark" or assert the complicity of particular individuals of another line in a crime, entirely without foundation; but as part of the cultural background and payback system of the district. Apparently his Honour formed views as to the possibility that such a marking had been contrived by the witness Kurapen and her woman companion (who, we were informed, was to support the content of

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(7) (1971-72) P.N.G.L.R. 222

(8) (1972) (Unreported) Full Court Judgment 38

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Kurapen's evidence). His Honour made definite findings that such a marking had been effected by another witness Minakti, whose evidence his Honour disbelieved, and another person.

I understand that I have the misfortune to disagree with the other members of this Court on this matter. But I consider it is not to the point to say that the judge disbelieved her anyway; therefore the witness' evidence if admitted could not have affected the result. This proposition with respect, appears to me to beg the question. If Kurapen and her companion had been heard to say, and each cross-examined upon the subject, that these exclamations regarding the accused's guilt were truly made; it may well have negated the theory later adopted by his Honour that the two women almost instantly set up a false hue and cry (or later conspired to say they or Kurapen had done so). That is to say it could well have gone to the rebuttal of an imputation in effect of recent invention. The reception of this evidence may well have affected very greatly his Honour's approach also to the evidence of Minakti, which purported to retail a dying declaration also implicating the accused. I am of the opinion therefore that the reception of this evidence could well have provided a totally different complexion to the case and have produced a different result.

The question of whether this rejected evidence should have been ruled inadmissible, could I think be used to set a precedent as to whether this type of evidence can be regarded as an exception to the "hearsay rule". A study of Ratten's case (9) - the advice of the Privy Council, makes it clear to my mind that a "hearsay" statement made by a by-stander as to the identity of an attacker may be admissible, subject to a consideration of the possibility of concoction or fabrication.

> "The test should be not the uncertain one whether the making of the statement was in some sense part of the event or transation. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and the differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the

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(9) (1971)45A.L.J.R. 692

> statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should be not the uncertain one whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received." (Page 695)

It would seem that the necessary association between the statement and the event itself must be established by more than the statement itself. (Page 696). The Privy Council in this case gave "a few illustrations", and cited Brown v. The King (10) as an example, seemingly, of where evidence could be excluded as being "a mere narrative respecting a concluded event, a narration not naturally or spontaneously emanating from or growing out of the main transaction" (at page 696). Their Lordships did not comment further on Brown's case (11) (supra) or expressly criticize it. But it seems to me that their description of when accompanying declarations may be admitted in one or other ways of contribution to proof of the facts in issue, contemplates a wider field of admissibility than that on which his Honour the trial judge here relied, viz. the words of Barton A.C.J. in Brown v. The King (12) (supra). Barton A.C.J's words seem to envisabe a "transaction" and incidents forming "part of the transaction". It would seem that their Lordships in Ratten's case (13) (supra) contemplates admissibility in some cases of accompanying declarations not only as corroboration of a witness' testimony but in some cases possibly as evidence of the facts averred (compare Phipson 7th Edition at page 78 citing Lord Campbell, C.J.'s decision in R. v. Fowkes (14). Their Lordships in Ratten's case (15) (supra) in making their observations on "res gestae" problems mentioned the uncertainty of the writers on the question of what such declarations may be admitted to prove; but were purporting to deal with the appellant's submissions on the assumption that there was a hearsay element in the evidence - in "that the words said to have been used involve an assertion of the truth of some facts stated in them and that they may have been so understood by the jury". (Page 694).

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(10)1913-14 17C.L.R. 570
(11)1913-14 17C.L.R. 570
(12)1913-14 17C.L.R. 581/2
(13) (1971) 45 A.L.J.R. p.692
(14) (1856) The Times 8th March
(15) (1971) 45 A.L.J.R.

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I am of the opinion with the greatest respect, that his Honour the trial judge insofar as he ruled the statements the subject of questions (1) to (2), inadmissible for the reason stated in his findings of fact (g) was in error and that he should have directed himself on the wider basis apparently contemplated by Ratten's case (16) (supra). For these reasons I consider this Court should answer these questions (1) and (2) - yes.

Questions (3) and (4) in my opinion, also comply with the criteria hitherto set down by this Court, and in my opinion should be answered.

Question (3) relates to a ruling that a statement tendered as a dying declaration was inadmissible because his Honour could not infer that the declarant at the time of making it had a settled hopeless expectation of death. Counsel informed us that his Honour's notes did in fact make reference to S.32 of the Criminal Procedure Act 1889 (Papua adopted) which is in the following terms:-

> "The declaration of a deceased person whether it be made in the presence of the accused person or not may if the Chief Magistrate shall see fit be given in evidence if the deceased person at the time of making such declaration believed himself to be in danger of approaching death but yet had hopes of recovery".

Counsel for the respondents readily agreed with the Court, that to have purported to apply the former common law rule as the case stated (apparently incorrectly) has his Honour doing, without reference to S.32 of the Criminal Procedure Act, would constitute an error. In my opinion this Court should answer question (3) "If the evidence the subject of question (3) were ruled inadmissible in reliance on the former common law rules and without advertence to S.32 Criminal Procedure Act, then an error of law appears in the proceedings".

Question (4) as stated by his Honour assumes that his Honour ruled that the Crown Prosecutor had a duty to tender in the trial as part of the Crown case, statements made by the accused pursuant to S.103 District Courts Act 1963, at the Committal proceedings. It was agreed in this Court and apparently accepted by his Honour at the trial that a perusal of the statements indicated that they were solely exculpatory.

Mr Adams who addressed the Court on this subject as amicus curiae at the request of the Court, submitted that it was the Crown's duty to tender upon the trial as part of the Crown's case any such exculpatory statement made by an accused. He bases this argument on a study of the history of S.103 of the District Courts Act. In its original form the cautionary phrase used by committing magistrates as by investigating Constabulary, appears to have included the phrase "may be given in evidence against you". The deliberate omission of the words "against you" indicated,

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(16) (1971) 45 A.L.J.R 692

he says, a legislative intention to render any subsequent statement of the person charged ex mero motu admissible at his trial despite its self-serving nature. The word, "may" in S.104 should, he says, be rendered "shall". That the legislature should have intended to effect such a drastic change in the common law rules against admissibikity of "self-serving" statements except for very limited purposes principally in rebuttal of allegations of recent invention, would be sufficiently surprising. With respect, it seems to me that the present wording of Ss. 103 and 104 can be read quite naturally in the context of the maintenance in force of the common law rules. To my mind the legislature was merely intending to ensure that an accused person was not inhibited by the form of the words used, from at that point seeking to exculpate himself - perhaps set in train further investigations, or ensure he was not committed for trial. I am of the opinion that S.104 is an enabling section only, which goes to procedure.

The duties of Crown Prosecutors as to calling evidence have recently been examined afresh by the High Court of Australia in Richardson v. The Queen (17). It is clear that the prosecutor may exercise a discretion as to which witnesses may be called, a discretion with which the Court would be loath to interfere "unless perhaps, it can be shown that the prosecutor has been influenced by some oblique motive" (page 119). The observations of the High Court in this case and of the Privy Counsel in Adel Muhammed El Dabbah v. A.G. for Palestine (18) provide a guide for prosecutors as to the calling of witnesses and are of some assistance I believe to this Court in ruling on the instant problem. It is not suggested here that the prosecutor in expressing unwillingnesss to tender in the Crown case the admittedly exculpatory statements of the accused was activated by an oblique or improper motive. I would wish to express the opinion that this Court should not preclude the possibility of cases where a trial judge would be justified in directing that some witness or piece of evidence be called in the interests of fairness or regularity. But with the greatest respect, I am of the opinion that the prosecutor in this case was proceeding merely in accordance with the common law rules as to inadmissibility of self-serving statements, except in certain eventualities, none of which had apparently risen at the end of the Crown case; and that his Honour was in error in ruling that the prosecutor had a duty to tender the accused's statements.

As appears from his findings, his Honour seems to have made significant use of the exculpatory statements in deciding to reject the evidence of the Crown witnesses and in therefore finding there was no evidence upon which the two accused could be found guilty of murder. I am of the opinion, despite something of a concession apparently to the contrary by the Crown Counsel on the hearing of this appeal, that the exclusion of these statements may have produced a different result. In coming to that

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(17) (1974) 3 A.L.R. 115 (18) (1944) A.C. 156/167

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conclusion I have in mind also the evidence which was excluded and which I think ought to have been received.

If I were wrong in arriving at this opinion, I would yet consider that question (4) involves a matter of such general importance and potentially frequent future occurrence, as to warrant this Court in agreeing to answer the same. In other words, I would regard this case as requiring an exception to be made to the practice or policy of generally declining to answer questions that if otherwise decided would yet have led to no differing result.

For these reasons I consider question (4) also should be answered. I would wish the Court to answer it - yes.

Counsel for the Secretary for Law : L.W. Roberts Smith & C.P. White
Counsel for the Respondent M. F. Adams and M. Kapi.