TE KAOBUNANG TEIWAKI

v.

REGINAM

[COURT OF APPEAL, 1965 (Mills-Owens P., Hammett J.A., Knox-Mawer J.A.), 23rd November 1964, 12th January 1965]

Criminal Jurisdiction

Criminal law—evidence—confession—relevance of circumstances surrounding previous inadmissible statement by accused to voluntariness of statement made after caution—Western Pacific (Courts) Order in Council 1961—Code of Criminal Procedure (Ord. No. 6 of 1963) s.227—(Western Pacific) Court of Appeal Rules (No. 2) 1956—Criminal Appeal Act 1907 (7 Edw.7, c.23) (Imperial) s.4—Homicide Act 1957 (5 & 6 Eliz.2, c.11) (Imperial) s.9(1).

The appellant was convicted of murder mainly on the evidence of a confession which he allegedly made after his arrest and after being cautioned. The substance of his confession was not written down and no note was made of it until five days later. Immediately prior to making the alleged confession the appellant was alleged to have made another statement which, as it was subsequent to arrest and made without caution, was excluded from evidence.

Held: The exclusion of inquiry into the improper questioning in the case of the statement ruled inadmissible was wrong, as it was relevant to the question of the voluntariness of the statement made after caution. It was not possible for the Court of Appeal to decide upon the material before it whether, if the whole of the circumstances had been inquired into the trial judge would have admitted the statement in evidence.

Cases referred to: *R. v. Martin* (unreported — Times 20/10/64): *R. v. Sullivan* (1887) 16 Cox C.C. 347: *R. v. Sykes* (1913) 8 Cr. App. R. 233: *R. v. Onufrejczyk* [1955] 1 Q.B. 388; 39 Cr. App. R. 1: *R. v. Davidson* (1934) 25 Cr. App. R. 21: *R. v. Wattam* (1952) 36 Cr. App. R. 72: *R. v. Straffen* [1952] 2 Q.B. 911; 36 Cr. App. R. 132: *R. v. Bass* [1953] 1 Q.B. 680; 37 Cr. App. R. 51: *R. v. Erieza Mulindwa* (1949) 16 E.A.C.A. 148.

Appeal from conviction by the High Court of the Western Pacific at Bairiki on the Tarawa Atoll.

A. Lateef for the appellant.

G. N. Mishra for the Crown.

The facts appear sufficiently from the judgment.

Judgment of the Court: [12th January, 1965]—

The appellant was convicted in the High Court of the Western Pacific of the murder, on the night of the 29th-30th January, 1964, at Marakei in the Gilbert and Ellice Islands Colony, of one Te Birieti Erietera. The trial took place on the 14th to 18th September, 1964, at Bairiki on the Tarawa Atoll before a Puisne Judge of the High Court (Barwick J.) sitting alone. Under section 15 of the Western Pacific (Courts) Order in Council, 1961 the jurisdiction of the High Court is to be exercised, so far as circumstances admit, and subject to local laws, upon the principles of the statutes of general application in England on the 1st January, 1961, and the substance of English law, with the usual provisions as to local circumstances and construction accordingly. The information was laid, we assume, under the Criminal Procedure Code of the Colony, namely Ordinance No. 6 of 1963 which was brought into force by order of the High Commission on the 14th October, 1963 (Legal Notice No. 37 of 1963). Under section 227 of the Code the practice of the High Court in its criminal jurisdiction is assimilated so far as the circumstances admit to the practice of the English superior courts. Rule 35 of the relevant rules, the (Western Pacific) Court of Appeal Rules (No. 2) 1956, is in terms similar to section 4 of the Criminal Appeal Act, 1907, but with the addition of a power to direct a new trial. The information charged the appellant with murder "contrary to section 9(1) of the Homicide Act, 1957". The trial judge convicted of (non-capital) murder, and pursuant to the Act sentenced the appellant to imprisonment for life. The appellant now appeals against his conviction and is represented before us by counsel assigned to him on his application for legal aid.

The case for the Crown was marked by lack of precision in the evidence available from the prosecution witnesses, absence of proper investigation, and lack of scientific or expert evidence. The police witnesses concerned with the arrest of the appellant were obviously uninstructed in their duties; the lay witnesses were unsophisticated; the alleged murder weapon, a bush knife, was handed from one person to another and finally placed under a mat; the place where the knife was first found was left unmarked and never precisely evidenced; no specimen of alleged blood-stains on the knife was kept; articles belonging to or used by the appellant were apparently left unexamined; the witnesses were vague concerning the time factor. We do not refer to these matters in any sense critical of the trial. The prosecution laboured under these many difficulties, and the task of the learned trial judge was rendered still more difficult by the absence of legal representation of the appellant.

Three factors formed the basis of the prosecution's case: an alleged oral confession made by the appellant to one of the police officers, the prosecution witness Constable Temaua, and, independently of the confession, proof of motive and opportunity.

As appears from the evidence given by the appellant in his own defence, it is common ground that there were two encounters between the appellant and the deceased during the late evening of the 29th January. On the first occasion the deceased was more or less in a drunken and disorderly condition, and the appellant, in his capacity as an Island police officer on Marakei, had attempted to arrest him.

An argument developed between them, ending with the appellant releasing the deceased and telling him he intended to prosecute him. Later in the evening the deceased came to the appellant's house, calling on the appellant to come and arrest some persons who were playing a game called 'bingo'. The appellant refused to do so and the deceased went off saying he would see the Chief of the Island police about it. At the least, some ill-feeling between them had been engendered.

In the early hours of the following morning the deceased was found lying on a platform used for copra drying situate midway between the house where the deceased lived with his sister and the house of a woman neighbour, Tebanimarawa. He was in a dying condition. His throat had been cut; the wound, according to the medical evidence, extended across the front of the throat, being 6 inches in length, 1 inch wide, and 1 inch deep. At the nape of his neck on the left side there was a further wound 3 inches in length, $\frac{1}{8}$th of an inch wide and $\frac{3}{4}$ths of an inch deep. The medical evidence was scanty, making no mention of the mode of infliction of the wounds. The medical witness was not available at the trial and accordingly his deposition taken at the preliminary inquiry was the only medical evidence available. The deceased died some minutes afterwards without making any statement.

Some time later during the night, among the many persons who came to the scene, a witness for the prosecution, as he said, picked up a 'bush knife' from the ground some distance away from the platform. The knife, as we have said, was then handed from hand to hand. Several witnesses however spoke to its apparent blood-stained condition. The evidence as to its precise location was unsatisfactory but it would appear to have been sufficiently distant from the platform to have been dropped or placed there by a third party. Counsel for the appellant made no complaint that it had not been proved to be the weapon used. In the whole of the circumstances it appears to have been sufficiently established that it was a case of murder and that the bush knife was the murder weapon.

It is now necessary to describe the circumstances attending the discovery of the deceased in his dying condition. The prosecution relied on the evidence of the deceased's sister. She stated that the deceased came home that night sometime after mid-night. He sharpened the bush knife, which belonged to the household, and his spear, and betook himself to the copra platform to sleep. It was the first time he had slept there. He was in a drunken condition. She remained indoors and went to sleep. Later she was awakened by a noise and went outside to investigate. She saw the figure of a man standing close to the platform where her brother was lying. It was, she said, the appellant. She saw a dark stain on the ground below the platform where her brother lay. She shouted out, calling her neighbour Tebanimarawa by name. The appellant, as she said, then walked away. She did not see that he held anything. He was wearing a lavalava (a form of skirt). Then Tebanimarawa arrived and they both saw the wound on the front of the deceased's throat. Later her brother Ringkan arrived. Subsequently she found the bush knife in her house. It is apparent from the evidence of other witnesses

that it had been passed from hand to hand by various persons following its discovery by one of the many attendants at the scene that night.

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The learned trial judge, in his judgment, said that he took no account whatsoever of the sister's evidence; she was demonstrated, he said, to be an untrustworthy witness and the value of her evidence was negligible. It is apparent from the record that she had made no reference to the appellant in her evidence at the preliminary inquiry and that when faced with her deposition, at the trial, she
B completely retracted her statement that the man she saw close to the platform where her brother lay was the appellant. Clearly her purported identification of the appellant earlier in her evidence was wholly unreliable. But it is evidence that in a number of other respects her evidence was corroborated by the circumstances and the evidence of other witnesses. Thus, for example, her shout to Tebanimarawa was corroborated by the latter. Moreover, that shout was
C accepted by the trial judge as an important factor in regard to the evidence of another witness, Ona Tokaniman, in whose evidence, the judge said, was to be found corroboration of the appellant's confession.

The witness one Tokaniman said she was awakened from her sleep
D by a woman's shout from approximately the direction of the deceased's house, and as she lay awake in her house, under a mosquito net, she saw the appellant walking along the road. It was a clear moonlit night with excellent visibility, and she kept the appellant under observation for about 5 minutes. He was pushing a bicycle, walking at a normal pace. She watched him until he arrived at his own house. Later that night, she said, she saw him again; he was
E then cycling in another direction. Clearly the time factor was of the utmost importance in relation to the evidence of this witness. The trial judge evidently took the shout heard by Ona Tokaniman to be the shout by the deceased's sister to her neighbour Tebanimarawa. It is by no means clear to us that this was indubitably so. There was no identification of the voice other than that it was a woman's voice. There may very well have been other shouts that night
F following on the discovery of the deceased. Further, it would appear unusual, to say the least, that a murderer fresh from his crime should make his way from the scene pushing a bicycle and walking at a normal pace. The deceased's sister said the man she saw near her brother was wearing a lavalava. According to Ona Tokaniman, the appellant was wearing black shorts. No reference was made by this witness to the appellant carrying a truncheon, which according to
G the alleged confession he had with him. Then it was part of the evidence for the prosecution that after the discovery of the deceased the appellant was called out to assist in the investigation. He might well then have taken his bicycle and been seen in the vicinity. The absence of unequivocal evidence as to the time factor, in our view, seriously minimised the value of Ona Tokaniman's evidence on the
H issue of opportunity. Counsel for the appellant has also strongly attacked an identification admittedly made from within a mosquito net.

Turning to the alleged confession, this, if properly admissible in evidence and believed, was clearly sufficient material upon which to found a conviction. The appellant was arrested in the afternoon of the following day, the 30th April, by two police officers, Constable Bureititi, and Constable Temaua to whom we have already referred. They took him to the Government station and there he was locked up in some form of separate prison building. About half-an-hour later Bureititi entered the prison, and, without cautioning the appellant, questioned him. The learned trial judge directed his mind to the question whether the appellant had, by this time, been charged with the murder of the deceased, and upon it appearing that he had in fact been charged, ruled as inadmissible all detail of the conversation between Bureititi and the appellant. In so doing, the judge said, he acted upon the 'new' Judges' Rules, which had come into force some few days before the alleged murder. The tenor of the ruling would appear to indicate that the judge would have been prepared to admit statements made in answers to questions by the police officer notwithstanding that the appellant was in custody provided he had not yet been charged with murder of the deceased. Clearly the appellant was in custody following arrest for that offence and should not have been questioned, without first being cautioned, whether already charged or not: *R. v. Martin* (The "Times", 20th October, 1964), an authority which was not available to the trial judge in the present case. However, when it became apparent that the appellant had in fact already been charged, further examination-in-chief directed to eliciting the terms of the conversation with Bureititi ceased, except to the extent that he was allowed to say that he made no promises or offers or inducements to cause the appellant 'to say to me what he did'. Bureititi made no written notes, it is to be observed.

This police officer then went outside and had some conversation with Constable Temaua. Temaua thereupon entered the prison. According to his evidence, he immediately cautioned the appellant and the appellant thereupon made a statement, the exact words of which Temaua said, he could remember and repeat, as he then purported to do. The alleged statement, if accepted, amounted to a confession by the appellant that he had killed the deceased by cutting his neck with a knife lying beside him on the copra drying platform; he killed him because he was afraid of him and could not beat him; he was wearing black shorts at the time; he carried a knife in his trousers and a truncheon in his hand; then he went and told his father about it. Temaua proceeded to say that although the caution was in the usual form, indicating that anything said would be taken down in writing, he did not in fact write down the statement made by the appellant. He was on leave, and without his notebook or writing materials. Under cross-examination by the appellant he admitted that he did not make any written record of the alleged confession until 5 days later. It is evident that by then other investigating officers had arrived in the village. In the result no statement in writing was ever signed or acknowledged by the appellant; in addition, there is no written record of the questioning by Constable Bureititi. Temaua did not refer to any writing to refresh his memory. The point is made on the appeal that writing materials were readily

available at the Government station. There was no statement attributed to the appellant as to what had been done with the alleged murder weapon.

A The appellant, in his evidence, said that Temaua endeavoured to induce him to confess but that he refused to do so. No 'trial within a trial' was held on the admissibility of the evidence of either of the police officers.

In substance the conviction rests on an elleged confession attributed to the appellant by the unsupported oath and recollection of
B Temaua, but, as the appellant says on oath, falsely so attributed; with but some slight independent evidence of motive. The learned trial judge referred to the alleged confession as 'by far the most important single item of evidence connecting the appellant with the death'. He had explained to the appellant his right to make objection to any statement procured by threat or inducement and the appellant had made no formal objection when the two police officers gave their
C evidence. The judge went on to say that there was evidence corroborative of the accused's confession; 'by far the most significant' item, he said, was to be found in the evidence of the woman Ona Tokaniman. We have discussed her evidence, and its limitations, above. It is not entirely clear to us whether the judge was seeking for corroboration as a matter of law. He referred to *R. v. Sullivan* (1887) 16 Cox C.C. 347 as an authority for the prposition that a con-
D fession duly made and satisfactorily proved is sufficient to warrant a conviction without corroboration, but, he said, this had been doubted, at least where confessions of murder are concerned; on this point he referred to *R. v. Sykes* 8 Cr. App. R. 233. There is some basis for thinking that the learned judge considered that it might be the better view that corroboration was required in homicide cases. We would not be prepared to agree that as a matter of law a conviction
E of murder cannot be had on a confession alone. As appears from the judgment in Sullivan's case, earlier authorities are sometimes affected by the former understanding that there could be no conviction in homicide without production of the dead body; an understanding since held to be wrong: vide *R. v. Onufrejczyk* (1955) 39 Cr. App. R. 1; and *R. v. Davidson* (1934) 25 Cr. App. R. 21. In Sykes' case the
F Court of Criminal Appeal approved the statement that the law did not require corroboration of a confession of murder.

The matter which mainly gives us cause for concern, however, is the admission of the alleged confession in evidence. It is clear that the appellant was in custody on arrest for the alleged murder and should not therefore have been questioned without first being cautioned. No doubt a statement obtained from a prisoner in breach of the
G Judges' Rules may, in the discretion of the trial judge, be admitted in evidence; see *R. v. Wattam* (1952) 36 Cr. App. R. 72 and *R. v. Straffen* (1952) 36 Cr. App. R. 132, to which authorities the learned judge referred in his ruling on the matter of admissibility in the course of the evidence of the police officer Bureititi. Clearly the ultimate test is one of voluntariness. But equally clearly, where a
H breach of the Judges' Rules occurs the court must exercise its discretion: *R. v. Bass* (1953) 37 Cr. App. R. 51. In the present case such a breach did in fact occur when Bureititi entered the prison and,

admittedly, questioned the appellant without cautioning him, in consequence of which, as it is alleged, the appellant immediately confessed on being cautioned by Temaua. It would be entirely unrealistic to treat these two incidents as seperate transactions. The questioning by Bureititi was followed immediately by the entry of Temaua into the prison, and the fact that Temaua administered a caution, as he said, would have been unlikely to have eradicated in the appellant's mind the effect of his conversation with Bureititi. It then becomes plain that it was essential, if the trial judge was to be in a position properly to exercise his discretion, that the facts and circumstances attending Bureititi's conversation with the appellant should have been clearly brought out. Bureititi was allowed to say in evidence that he made 'no promises or offers or inducements', but only after it had become apparent that the substance of the conversation was to be excluded. Admittedly he questioned the appellant and, as he said, 'when I left him he looked worried'. The appellant gave no evidence as to the conversation, nor was he cross-examined on it. As to the terms and manner in which the questions were framed, and put, the Court was therefore left entirely in the dark; so likewise are we. No doubt the learned judge was doing his best to exclude inadmissible, possibly prejudicial, material, but in the result he deprived himself of the benefit of material upon which alone could he properly exercise his discretion to admit or reject the evidence of the alleged confession. It was a case requiring the maintenance of a rigid line between the issue of admissibility, on the one hand, and that of weight and value on the other. The mere assertion by Bureititi that he had made no promises, offers or inducements was insufficient; it is for the Court to decide on the evidence, not merely for the witness to assert, that a statement is made voluntarily. *R. v. Erieza Mulindwa* (1949) 16 E.A.C.A. 148. There was no specific denial of any threat. The facts and circumstances of the questioning not having been brought out in the evidence for the prosecution it is not surprising that the appellant gave no evidence in relation to it.

In our view the course of the trial was such that it became essential that the whole of the circumstances leading up to the point at which, as it is alleged, the appellant came to make a statement to Constable Temaua should be subjected to detailed scrutiny and close consideration. Only thus could the learned trial judge properly decide whether or not the statement was made voluntarily and whether or not to exercise his discretion to admit it in evidence. By their very nature the Judges' Rules are to be judicially noticed, and consequently any apparent breach thereof, unless the breach is distinctly waived by the defence. In the present case the tenor of the ruling made in the course of Constable Bureititi's evidence, and the attitude thereupon adopted by the prosecution, was that all detail of the questioning of the appellant by the constable was inadmissible, because the appellant had been charged. As we have indicated, the real position was that evidence as to the questioning was admissible only in the exercise of the judge's discretion. No occasion for waiver on the part of the appellant arose in view of the decision to exclude the evidence. But, paradoxically, the exclusion of inquiry into the improper questioning was allowed to operate as a means of admitting

evidence (the statement) procured by means of the questioning. In other words, the admissibility of the statement was dependent on the evidence as to the questioning and there was no such evidence.

A It is quite impossible for us to decide on the material before us whether, if the whole of the circumstances had been inquired into, the learned trial judge would have admitted the statement in evidence, and if so whether that would have been a proper exercise of his discretion. There is no other evidence to support the conviction.

We have considered whether this is a proper case in which a new
B trial should be ordered. In view of the paucity of the evidence adduced by the prosecution at the trial in support of the charge and the whole of the circumstances of the case we do not feel this is an appropriate case in which a new trial should be ordered.

For these reasons we are of opinion that the conviction cannot be sustained. We allow the appeal, quash the conviction, and direct
C that a judgment and verdict of acquittal be entered; the appellant to be released from custody forthwith.

Appeal allowed.