

REGINA
V.
BEN TOFOLA

High Court of Solomon Islands
(Palmer J.)

Criminal Case No. 20 of 1992

Hearing: 30 May 1995

Ruling: 22 August 1995

F. Mwanosalua for Prosecution

J. Remobatu for Accused:

PALMER J: There are two grounds on which the Defence has sought to challenge the admissibility of the caution statement of the Accused, Ben Tofola, in this *voire dire* application.

- These are:
- (i) the non-voluntariness of that caution statement;
 - (ii) that even if it was voluntarily made, that the court should in its discretion, refuse to allow it to be admitted because it would be unfair to do so.

Under the first ground, the allegation raised is that on the 24th of April, 1992 just prior to the recording of the interview conducted with the accused, he was assaulted by one, Sgt. Auga. As a result of that assault and other threats from the recording officer, Sgt Angisia, he felt intimidated and frightened, and was thereby induced to make a confession.

The first question for consideration therefore is whether an assault as alleged did actually occur?

In his evidence in the *voire dire*, the accused said that on the afternoon of the 24th of April 1992, after 1.00 p.m., he was taken to the C.I.D. Office, (Auki), for an interview. Present at that time were, Robert Madeo, Sgt. Angisia, Sgt Ciarani and Rifasia. He says that not long after, Sgt Auga came in.

The Police Officers spoke roughly to him and told him to admit that what Rurugeni, had said about them was the truth. He said he was hungry and thirsty and sick at that time.

He says that Sgt. Auga then came to him and with his finger pointed at his eye and told him to admit that he committed the offence with Rurugeni. When he replied that he couldn't admit something which was not true, Sgt. Auga hit him on his right forehead with his knuckles. He said that his punch injured his forehead and left a scar, which he sought to show to the court. As a result of the punch, he cried. Sgt. Auga then told him that he had done something but that he was trying to lie about it. Sgt. Angisia also told him to tell his story and added that many people go to prison but later are released. He says that he felt his head was sore and that there was no way for him to escape and so he told a false story.

In rebuttal, the prosecution called inter alia, Sgt. Auga. Sgt. Auga says that he saw the accused, Rurugeni, Sgt. Ciarani, Sgt. Angisia and Detective Constable Rifasia at the CID Office (Auki) on the morning of the 23rd April, 1992. He says that he went in, stayed a bit, and then left to attend to other work that he had to do. He says that he did not have responsibility over the accused's case and so had little to do with it. By the time he returned that day, there was no one in that room.

On the 24th of April, 1992, which was a Friday, Mr. Auga says that he was at Auki. Friday was their maintenance day around the Police Station. On that day he did not enter the CID Office. They carried out maintenance work around the station in the morning, and in the afternoon, had sports.

Under cross-examination, Mr Auga stated that maintenance work was carried out between 8.30 am. to 12 noon. Sports was done from 1.00 p.m. to 4.30 p.m. He says that they would go straight to the playing field after lunch. They do not normally go back to the office. He denied being present at the CID Office on the afternoon of the 24/4/92. He also denied hitting the accused on his forehead.

Another prosecution witness who gave relevant evidence on this issue was Detective Sgt. Angisia. He stated that on the afternoon of the 24/4/92 at about 1.30 p.m, Sgt. Auga was not present; either

before the interview or during the interview. The only other person who was present with him, he says was Detective Constable Rifasia.

Under cross-examination, Sgt. Angisia reiterated that Sgt. Auga was not present during the interview on the 24th of April, 1992. When asked if Auga punched the accused when he was outside, he replied that he did not see it.

Another prosecution witness called was Detective Constable Rifasia. In his evidence in chief he stated that only Sgt. Angisia and himself were present with the Accused during the interview on the afternoon of the 24th April, 1992.

Under cross-examination, this witness stated that on the afternoon of the 24th April 1992 at about 1.00 p.m, they all reported in at the Police Station before going to the Auki Playing field. He says that the accused was brought in between 1.15 p.m. and 1.30 p.m.

When asked if Sgt. Auga was present at that time, he said no. When put that Sgt. Auga was also present before the interview, he said, no. He also denied that the accused was assaulted by Sgt. Auga.

What is placed before this court is the evidence on one hand of three Police Officers, as opposed to the evidence of this accused alone. Two of those Police Officers are senior officers, with many years of service in the Police Force. The only discrepancy in their evidence is the statement by Sgt. Auga that after lunch on the 24th of April, 1992, he went straight to the playing field, whereas detective constable Rifasia said that they reported to the station first at 1.00 p.m., before going to the playing field.

If the accused's version is correct, then the only time when the assault could have occurred was when Sgt. Auga called into the Police Station at 1.00 p.m. before going to the playing field.

Did an assault on the accused occur, as alleged. In seeking to answer this question, one must ask which of the two versions is more likely?

If Sgt. Auga did assault the accused, then a relevant question as to motive must be asked. Why would he assault the accused? Too often Police Officers are accused of threatening and intimidating behaviour with regard to the recording of caution statements. Too often the court is placed in a position where it has to weigh the evidence of the Police Officer(s) as against the bare statements of the accused.

On one hand, it is inevitable that such accusations and allegations would arise in the normal course, of police work, because the very nature of their work, involves investigating crime and collecting evidence. Maybe it is now time for the Police to consider utilising modern technology in the form of video and audio equipment, as aides in the conduct of interviews and recording of caution statements. This may assist in shutting out totally unfounded allegations right from the beginning. On the other hand, it should also be borne in mind that Police Officers are not ignorant, untrained persons. They are persons who have undergone specific training for such work and are therefore normally aware of the rules of the game, so to speak. It is important therefore that the accused point to evidence which would raise a reasonable doubt in the mind of the court. A mere bold assertion in normal circumstances may be insufficient.

The accused says that he was punched on his right forehead by Sgt. Auga. There is however, no other supporting evidence produced. In that respect, the possible motive for that assault should be a relevant consideration.

Sgt Auga stated clearly in evidence before this court that he did not have carriage of the accused's case, and therefore, did not participate in any interviews involving the accused; apart from the confrontation arranged between Rurugeni (*co-accused*) and the accused, on the morning of the 23rd April, 1992, at the CID Office, when he was present in the same office, for but a short while, before going out to attend to other matters. He did not participate however, in anyway in that confrontation.

The accused confirmed the presence of Sgt. Auga at that meeting, but there is no evidence of anything untoward, which may show that Sgt. Auga was after the "blood" of this accused, for a conviction, or any suggestions that he may have held any grudges against the accused.

There is also no evidence to show that Sgt. Auga may have been related to the deceased or the parents of the deceased. Rather, he is related more to the accused through marriage. Members of his family and from his village, had inter-married with the accused's people. According to custom therefore he says, it would not be proper for him to do anything to the accused, as it could easily spoil their relationship. His exact words were, that it would be; *"very difficult for him to do anything to the accused or ill-treat him"*.

There is clear evidence to confirm that Sgt. Auga did not take any active part in the conduct of the accused's case. The caution statement that was obtained on the afternoon of the 24th of April, 1992, also did not contain Sgt. Auga's name or signature, as even being present during the interview.

As to the question of possible motive therefore for the assault, there is just no satisfactory explanation adduced as to why the accused should be assaulted. The impression sought to be given has been that Sgt Auga was trying to force the accused to confess to the killing in view of what the co-accused (*Rurugeni*) had stated in his statement. Unfortunately, the apparent lack of a possible motive, does not assist the accused's case.

In weighing this factor, together with other relevant evidence, it is my view that it is more unlikely that Sgt. Auga would have assaulted the accused. Even if he did attend at the Auki Police Station for reporting purposes at 1.00 p.m. on the 24th April 1992, it is still highly unlikely that he would go and assault the accused in the CID Office for no apparent reason, and then going off to play sports. It is also unlikely, that such a Senior Police Officer, well versed in Police procedures for investigating crime and interviewing witnesses, to jeopardise, not only the work of his colleagues, (*which was not in his carriage and therefore such action would have been dis-respectful to Sgt. Angisia who had carriage of the case*), but to also place himself in a position whereby he could be open to prosecution

on a criminal charge for assault by the other Police Officers who were present, and/or by the accused.

The accused says that he incurred an injury on his forehead as a result of the assault. Unfortunately, there is no other supporting evidence produced. When cross-examined, he conceded that no formal complaint was lodged with the Prison Service under whose care he was in, during his period of remand there. No formal complaint was also lodged with the Police at Auki. There are no medical records to verify the injury, though the accused did state that the injury was only minor and therefore did not need medical attention.

It is not clear when he first had access to a Solicitor, but one would think that if indeed the assault did take place, and that it induced him to give a "false" statement, that it is highly unlikely that he would be able to get it out of his mind and to easily forget about it, so that nothing more is said or done about what had occurred, until the matter came to court. A normal reasonable person (*and there is no evidence to say that the accused is not normal*), is not likely, in fact, will not forget such actions by Sgt. Auga so easily, if true, and especially when it had resulted in him giving a false statement. A normal reasonable person in my view, would seek to extricate himself at the first available opportunity; and I see no reason why that should not be expressed at his Counsel's first attendance, and a formal complaint then lodged with the appropriate authorities. There however has been no evidence of such action taken here. An assault such as alleged against Sgt Auga is a very serious allegation and should not be taken lightly. Weighing all relevant factors, I am not satisfied that the accused had been assaulted by Sgt. Auga. In other words I am not satisfied that the accused had raised a reasonable doubt in my mind as to his claim that he had been assaulted.

Another issue has been raised in evidence against the admissibility of the caution statement on the ground that the accused had not been fed from the time he had been brought to the Police Station until the time the Statement was obtained on Friday the 24th of April, 1992, a period of some three days. Unfortunately, again the evidence adduced by the accused has been scanty. He says that he was not fed on arrival. The prosecution witnesses conceded that they did not see him fed on the night of the 22nd April, 1992, on arrival at the Police Station and in the morning of the 23rd April,

1992. However, they said that they left clear instructions with the Shift Officers in Charge at the Police Station to ensure that the accused was fed. Those officers unfortunately have not been called.

On the morning of the 23rd April, they also stated very clearly that there was no complaint raised by the accused as having not been fed either on the night before or that morning. Again, I am not satisfied that the accused had raised a reasonable doubt in my mind as to his claim that he was not fed on the evening of the 22nd and morning of the 23rd April, 1992. I accept the evidence of prosecution witnesses on this point and reject that of the accused.

The accused was then taken to the Auki Clinic later that day and on his return, he was charged and then remanded at the Auki Prison. The feeding of Remandees was then the responsibility of the Prison Authorities.

A Prison Officer, Mr. Wilson Wake, who was the officer in charge of the issue of rations for prison inmates and remandees during that period of the 23rd and 24th April 1992, stated on oath that he recalled the accused being brought to prison. He says that over that period, his records in the Auki Prison Ration Ledger, (*submitted as a court exhibit*) showed that there was an increase by one person from the 22nd of April to the 23rd, as indicated in the increase of the amount of rice issued on those dates. He stated that on the 22nd of April, 1992 only 24 pounds of rice were issued; at *one pound of rice per person*.

On the 23rd and 24th April, there was an increase by one pound to 25 pounds. This would be consistent with the taking in of the accused for remand on the 23rd April, at Auki Prison. Although it is conceded by him under cross-examination that he did not actually see the accused being fed, it was he says, the responsibility of other officers at the Prison who would supervise the distribution and sharing of the food to the inmates and remandees. Again, there has been no evidence of any complaint being lodged by this accused to the Prison Authorities or the Police Authorities, about having not been fed by the Prison Authorities. Even after he had spoken with his Solicitor, no complaint of any sort has been lodged.

With due respect to his allegations, I am not satisfied to the required standard that he was not fed by the Prison Authorities. The feeding of remandees by Prison Authorities in my understanding is a matter of routine, and therefore in order to show that this was not carried out in his case, there must be cogent evidence adduced, sufficient to raise a reasonable doubt in the court's mind. As I indicated earlier, a bare statement would not normally be sufficient.

Finally, the carefully worded caution issued and recorded in writing in the statement of the accused dated the 24th April, 1992, should not be so easily discounted.

In the introductory part, it was recorded words to the effect that he had the right to remain silent and not to incriminate himself. Below that part, he attested his signature, to indicate his understanding of that explanation. He was then asked if he wished to give his story and whether he wanted it to be recorded by the Police. He again attested his signature for the second time, to acknowledge his willingness to give his statement, and for the Police to record it for him.

After the caution was issued, his statement was then recorded.

In examination-in-chief, he denied being told of his rights to remain silent if he wanted to, etc. As to the existence of the signatures, he says that Sgt. Angisia, the recording officer, had held his hand and forced him to write his name. He says that he did not go to school and therefore could not even write his name.

Under cross-examination he denies being cautioned and further says that he does not understand what a caution is. Later on however, he says that Sgt. Angisia did speak with him and told him why he wanted to see him that afternoon.

He concedes that Sgt Angisia did write something, before holding his hand and forcing him to sign. When asked if he had signed his signature on both papers, he said, only once. When the caution

statement however was shown to him, he identified three places in which his signature had been signed. He then said and I quote:

"At first signature - I saw him write, before he told me to sign. Second place, he also wrote and then asked me to sign."

Only when he came to the last signature that he then said, that Sgt. Angisia held his hand and told him to write. Could this be a slip of the tongue or a momentary lapse of concentration because he was not speaking the truth about how those signatures had been written?

Sgt. Angisia's evidence in contrast was that, he did caution the accused. He says that he explained to the accused in pidgin english and Baegu language (the language of the accused), about what he was doing concerning the taking of a caution statement. He says that no threats or inducements whatsoever were done to the accused. Before the caution statement was obtained, the accused started to cry and when asked why, he stated that he was sorry for his mother because if he was sent to prison, then he won't be able to see his mother. Sgt. Angisia stated in no uncertain terms that he issued the caution to the accused in language, and that he understood it. The accused then related his statement to him in pidgin english, and he wrote down what he said. He says that he recorded correctly what was said, and that during the interview no one came and disturbed them. After the statement had been obtained, it was read back to the accused and he said that that was all he wanted to say.

Under cross-examination, Sgt. Angisia remained firm as to having issued a caution. Having heard and observed this witness I am not satisfied that he has been discredited sufficiently under cross-examination, on the question of an issue of a caution as required by the Judge's Rules, to the point that there is a reasonable doubt in my mind.

Sgt. Angisia's evidence has also been confirmed by the clear evidence of Detective Constable Rifasia. In examination in chief, he said that the accused appeared normal. He said that Sgt. Angisia did ask the accused, if he was alright, and his answer was that he was fine. He denied that

the accused ever complained of being hungry. He confirmed what Sgt. Angisia had said that he gave the caution to the accused and that it was understood by him. He confirmed that no threats, assaults or any promises were ever made to the accused in order to induce him to give his statement. Constable Rifasia stated that he was present all throughout the interview and that at no time did Sgt. Angisia ever spoke harshly, or applied any pressure on the accused to cause him to give his story. After the interview, he says that Sgt. Angisia read back the caution statement to the accused and asked him if he wanted to change any part of his story. The accused replied that his story was true and that he did not want to change any part of it. The accused then signed his statement.

Under cross-examination, he stated that after the accused had been brought, in Sgt. Angisia explained the allegation to him and then read the caution to him. He says he heard Sgt. Angisia ask the accused if he understood the things explained and the caution, and the accused said that he did. The accused then gave his statement straight after the caution.

Constable Rifasia was not shaken in cross-examination on this issue and I am satisfied to the required standard about the veracity and accuracy of his evidence.

On assessing the evidence of Sgt. Angisia and Constable Rifasia on this point as compared with that of the accused, I am not satisfied that the prosecution witnesses evidence had been sufficiently weakened or destroyed by the Defence. I do not believe the accused, when he said that no caution was issued and that he did not understand it. I reject his evidence and accept the evidence of the two police officers in lieu.

There is however an allegation raised in the evidence of the accused as to how his signatures on the caution document have been obtained. He says that Sgt. Angisia had held his hand and forced him to sign. Unfortunately, under cross-examination of prosecution's witnesses, it was never put to them, especially Sgt. Angisia, about the accused's allegation.

As a rule, a party should put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness. If he asks no questions then generally, he will be taken to accept the witness's account (see the old case of *Browne v. Dunn* [1894] 6 R.67 H.L.). The above case was cited with approval by Prentice Deputy C.J., sitting in the National Court of Justice, of Papua New Guinea, in the case, *The State v. Ogadi Minjipa* [1977] P.N.G.L.R. 293 at pages 296 and 297.

"Before concluding, I should again mention, as other judges and myself have many times done before, that defence counsel do their clients no good by not opening in cross-examination of state witnesses the version upon which the defence relies. If it is to be suggested that state witnesses are lying or mistaken or failing in accuracy of recollection, they should be questioned to that effect and given an opportunity to explain. You cannot correctly professionally keep your own case secret until your client gives evidence. Nor can you expect that his story will receive much credit - if this course be taken."

Sgt. Angisia and Detective Constable Rifasia were never given an opportunity to explain and to answer the allegation raised by the accused. In contrast, it was put to the accused more than once by Mr. Mwanasalua that he had signed the caution statement voluntarily. Initially, the accused said that he signed only once, however, later he conceded that he had signed more than once.

If a closer examination is made of those three signatures, it will be noticed that they all look very similar. That in my view is quite significant. That would be more consistent with the signature of a person who has not been forced to sign. In the circumstances described by the accused, the signatures are more likely to be dissimilar.

Taking all relevant factors into account, I am not satisfied that a caution had not been given and not fully explained and understood by the accused. I am satisfied to the required standard that the accused voluntarily attested his signature to the caution statement.

There is no reasonable doubt in my mind that the statement was not voluntarily made.

This brings me to consider the next question as to whether the court should in its discretion, refuse to allow the statement to be admitted because to do so would be unfair. The basis on which this ground has been raised relates to a possible breach of Rule 8 of the old Judge's Rules.

Rule 8 reads:

"When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements, and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered."

Two allegations of a possible breach have been raised. First, is the confrontation arranged between the accused and Rurugeni (co-accused) on the morning of the 23rd April, 1992. It should be noted that the accused indicated in the voire dire hearing that there was only one confrontation, and not two as may have been initially led to be believed.

Secondly, it is alleged that the manner in which the accused was dealt with prior to the taking of the caution statement, was also unfair.

The accused was first brought over by the police to Auki on the 22nd of April 1992. Sgt. Angisia and Constable Rifasia both stated that they went to get the accused at his village at Fulilibata that day because the co-accused, Rurugeni had specifically asked to see him. After explaining to the accused as to why they had come for him, he consented to accompany them to the Police Station.

In his evidence in chief however, the accused says that Sgt. Angisia had told him to get ready and go and see his brother (Rurugeni), who was sick at Auki. Under cross-examination, it was pointed out to him by Mr. Mwanasalua that in the first hearing before this court, he did not say that Sgt. Angisia told

him to go and see his sick brother. What he said was that Sgt. Angisia told him that his brother Rurugeni, wanted to see him to tell him something to pass on to his father. In his response, he said that he had forgotten what he had said earlier in court as it was sometime back. When asked which of those two statements were true, he replied that he said both things. When it was put to him that both things can't be right, he says, he does not know.

What this accused claimed was told to him by Sgt. Angisia was never put to Sgt. Angisia and Rifasia, to explain or contradict.

In assessing their evidence in this point, I prefer the evidence of the two police officers as being more correct and truthful.

The police party with the accused arrived back at the police station when it was already dark, and so the accused was kept at the Charge Office overnight. Under cross-examination, he states that they arrived back at about 8.00 p.m. He then told the Officer who was in charge of the shift that night that the accused would spend the night in the pantry, and that he should be fed. Constable Rifasia's evidence on this point was also similar. He says that the shift officers at the Police Station were told to accommodate the accused in the pantry and to feed him. I have already dealt with the issue of feeding and therefore do not need to raise it again.

The alleged confrontation occurred on the following day, 23rd April, 1994, in the CID office. Sgt. Angisia stated that when Rurugeni was brought into the office, he told him to tell the accused what he wanted to say. Rurugeni then told the accused that he had been arrested by the police for the murder of Ben Siale's child, and that he had been kept in custody since. He told him that he had suffered whilst in custody and that it would not be fair for him to remain free outside when both of them were responsible for the murder of the child. He told him that this was the reason why he had asked for him to come and see him.

Shortly after this, the accused complained of being sick and so had to be taken to Auki Clinic.

Under cross-examination, Sgt. Angisia was never shaken or confused as to what transpired when Rurugeni was brought in. He however, gave further details as to what was said between Rurugeni and the accused. He says that after Rurugeni had spoken to him, the accused responded and said that at that time he had gone to cut timber with a chain-saw. Rurugeni however countered, by saying to him that it was best he should not tell lies. He told the accused that it was him who had sent him to go and bring the child, whilst he hid in the bush, because Ben Siale knew him.

Sgt. Angisia was then asked as to who was present during that confrontation. His answer was that Rifasia and Sgt. Auga were also present, though none of them said anything, and that not long after the accused complained of being sick.

It was then put under cross-examination that he (Sgt. Angisia) was outside the office during the confrontation. Sgt. Angisia however replied, that he sat in-between them when they were talking to each other. It was put to him that Rurugeni did not say anything on arrival. The only words he said were "man ia too". Sgt. Angisia however remained firm in his view that Rurugeni was the first person to speak.

Constable Rifasia's evidence on this point is also consistent. He says that when the accused and Rurugeni were brought in, they spoke amongst themselves in their own dialect. He however understands their language. He says that he heard Rurugeni telling the accused that he was with him on the day of the killing and that he too was involved in the offence. Rurugeni also said that he should not be remanded alone for something which both of them did together.

Under cross-examination, Rifasia explained that the accused was brought in first, and Rurugeni brought in a couple of minutes later.

It was put to this witness that Sgt. Angisia may have been standing outside during the confrontation. It was also suggested to him that Sgt. Angisia spoke with Rurugeni whilst standing outside. To both questions, this witness answered in the negative.

Apart from the clear answers given to the above question, this witness found difficulty in re-calling in detail other matters that were put to him. However, I have not been convinced otherwise that this witness may have been lying, or may not have had a clear recollection as to the matters that he was able to answer well.

The accused's evidence by contrast is slightly different. He says that when he was brought in on the morning of the 23rd of April 1992, he was confronted by Sgt. Angisia with Rurugeni's statement. He was told that both of them did the killing of the little boy. He was then shown a piece of paper and told that it was Rurugeni's statement. At this, the accused says that he, then asked for Rurugeni to be brought in. As soon as Rurugeni was brought in, he says that it was him who confronted Rurugeni and accused him of lying about his involvement. He says that Rurugeni did not say anything in response to him. It was only after Sgt. Angisia had stepped on Rurugeni's right leg and then signalled with his head, that Rurugeni then said: "Oh mitufala nao ia".

Straight after this Rurugeni was taken outside.

Rurugeni was called in support of the Defendant's version. In examination-in-chief he virtually repeated word for word, what the Defendant had said about their confrontation on the morning of the 23rd April, 1992. He however said that this confrontation occurred on the afternoon of the 23rd April 1992 at about 3.00 p.m. He says that the defendant denied committing the offence, but that it was the police who had forced him to go and see the accused. He says that when Sgt. Angisia stepped on his leg and signalled to him with his head, he became frightened and so stated that the accused and him were involved in the killing.

Under cross-examination, he was asked if he knew the accused well. He answered in the affirmative and added that the accused was his cousin brother. He was then asked if he was sorry that his cousin brother was in court. To this, he replied again in the affirmative. It was then put to him that because of that, he would want to say some good things about the accused; to which he again answered in the affirmative. It was then put to him that the things he had said happened at the Auki Police Station never happened; to which he also responded in the affirmative.

Later, he was asked if what he had stated on that morning of the 23rd April was the first time for him to reveal that both of them were involved. Initially, he said yes, but then after further cross-examination conceded that he had made an earlier statement to the Police. He conceded that in that statement he had implicated the accused.

Under re-examination, this witness explained that he felt sorry for the accused because he was not involved in the killing.

There is little dispute that a confrontation occurred on the morning of the 23rd April, 1992. The Police say that it was arranged at the request of Rurugeni, and therefore there was nothing improper about that, although they were already aware that he had been implicated in Rurugeni's statement.

The defendant's version would seem to indicate that there had indeed been a breach of the Judge's Rules or something unfair done to him, in the way that confrontation was arranged. He says that he was informed prior to the entry of Rurugeni, that he had been implicated in Rurugeni's statement, and then was shown Rurugeni's statement. It is not clear what was meant by the accused when he says that he was shown Rurugeni's statement. Did he mean that he was able to read Rurugeni's statement?

In view of what this accused had said about his limited educational background, most probably what was meant was that he was simply shown the paper which contained Rurugeni's statement, but did not read it.

The actions of Sgt. Angisia at the most may have been inappropriate, but I am not satisfied that they were unfair. But even if what Sgt. Angisia said and did were unfair, they must be considered within the context of what transpired thereafter.

The accused says that he then asked for Rurugeni to be brought in to see him. Compare this with the evidence of Rurugeni in which he says that it was the police who had forced him to go and see the accused.

Then we have the evidence of the police witnesses, in which they had stated that it was Rurugeni who had requested that the accused be brought to see him.

The significance of the accused's evidence is that, if initially what was done by the police on that day in arranging the confrontation between him and Rurugeni may have been unfair to him, by his specific request, he had more or less consented to the confrontation arranged by the police anyway, in order to confront Rurugeni about what he had said about him in his statement. His version as to what transpired did not depict him in anyway as a timid, frightened or confused person, who may have been intimidated by the appearance of Rurugeni. His version showed him as being assertive and somewhat angry at being implicated by Rurugeni. If I am to accept the version of the accused, then with respect, I am not satisfied that the issue of the confrontation done by Sgt. Angisia and later the confrontation arranged between him and Rurugeni could be construed as being unfair to him. He did not come out of it any worse for wear. If anything, his version depicted him as coming out on top in the confrontation with Rurugeni. According to his version, Rurugeni did not say anything when confronted. Only when Sgt. Angisia had stepped on his right foot that he then uttered the words "Oh mitufala nao ia". Apart from that there was no indication of any admission of guilt and no confession was made that day. I will say more on this latter point later.

If we consider the version of the accused carefully and compare it with the version of the police officers, it will be observed that ultimately they amounted to the same thing.

The police version was that after it had been explained to the accused that Rurugeni wanted to see him and that he was told that Rurugeni had said something about him being involved in the killing as well, Rurugeni was brought in. After Rurugeni had spoken with the accused, the accused responded by denying involvement in the murder. Not long after, the accused complained of being unwell, and so the confrontation was terminated and Rurugeni taken away back to custody, whilst the accused was taken to the Auki Clinic for treatment. There was no suggestion that the accused may have exhibited any signs of guiltiness or behaved in any manner prejudicial to his rights to remain silent and not to incriminate himself. There was no suggestion of any force, threat or inducement done or

held out to the accused or Rurugeni during that confrontation. What is quite clear from their evidence is that the accused denied any involvement in the commission of that offence. All that the police did that morning was to facilitate the meeting of the accused and Rurugeni in their presence at the Charge Office. The police witnesses also confirmed that no confession or statement was obtained after the confrontation that day. When weighing all the above factors together, not only do I prefer the version of the police witnesses as the correct and truthful one, and reject the version of the accused, but I am also not satisfied that what transpired in that confrontation could really be considered as unfair to the accused.

The point about the absence of a confession or statement obtained that day is of particular significance because the crux of that confrontation is that it thereby induced the accused to make a confession; or that there was a continuing inducement through-out and that it resulted in a confession made the following day. The first thing to note, as I have stated, is that no confession or statement was made or obtained straight after that confrontation. This in my view has some significance. Had a confession or statement been obtained straight after that confrontation, then it would have been more readily construed in favour of the supposition that the confrontation may have indeed induced the accused to confess. There is clear evidence however, that no confession was made that day until the afternoon of the following day; some 24-26 hours later. If there was any impression of threat, inducement or intimidation produced by that confrontation, I am not satisfied, that that continued until the next day and caused the accused to confess or give his statement to the police.

There is however, evidence from Sgt. Angisia, given under cross-examination in which he stated that after the accused had returned from the Clinic that day, and was arrested and charged, and taken to the Magistrate's Court for remand, he asked that he be remanded at the Auki Prison away from his 'brother', because he said that he was frightened of him (Rurugeni). This expression of fear by the accused was not expounded upon under cross-examination, and was neither raised in re-examination by prosecution. Neither was it put to the accused by his defence counsel to explain, when he gave evidence as to what he meant. However, I do note that it was not put to him for the reasons that the accused's version would not be consistent with the expression of such a fear. On that basis alone, I would attach minimal significance to that piece of evidence. On the other hand, it was never

suggested to prosecution witnesses that the accused may have been intimidated or threatened by Rurugeni, or that the confrontation had a similar effect on him. On the evidence before me, I am not satisfied that the expression of fear was related to any intimidation or threat arising from the confrontation of the 23rd April, 1992. If anything, such expression of fear is consistent with that of a person who has just told a lie. If Rurugeni was the one who had been lying about the accused's involvement in the killing of the victim, then I would expect him to be frightened rather than the accused. From the evidence of the police witnesses, they stated that it was Rurugeni who first spoke to the accused and confronted him about his involvement with him and not vice versa. Rurugeni therefore could not have been frightened of the accused and would have no reason to lie about what he had said to the accused.

Another important point which must be construed against the accused is the fact that a caution was issued prior to the taking of his statement on the 24th of April, 1992. Even if there had been a breach of the Judge's Rules or that the confrontation had amounted to been unfair, the fact that a caution was issued in the intervening period in my view is sufficient to remove the impression of such breach or unfairness. When this is considered together with the lapse of time between that confrontation and the issue of the caution, then with respect, it provides even stronger grounds for rejecting any notions of unfairness, and for not exercising the discretion in favour of the accused.

Taking all relevant factors into account, I am not satisfied, that the confrontation conducted on the 23rd of April was in breach of the Judge's Rules or that it was unfair. But even if it amounted to a breach or being unfair, I am equally not satisfied that the discretion to admit or exclude the accused's statement should be exercised in his favour.

This brings me to consider the second allegation raised by Mr. Remobatu, concerning the manner in which the accused was again informed of the contents of Rurugeni's statement before his statement was obtained under caution.

There is clear evidence from Sgt. Angisia that sometime before the accused confessed, he had explained to him that he had been implicated by Rurugeni. Whether this information was relayed prior to the caution being issued or after, is not clear.

The issue for determination therefore is whether that act of relaying what was said by the accused, a breach of rule 8 of the Judge's Rules and/or unfair, and therefore inadmissible.

In the case of *R. v. Mills and R. v. Lemon* [1946] 2.A.E.R. 776, Vol. 32; Cr. A.R. 23; it was held that where a confession has been obtained in breach of r.8, it will still be admissible, if it is intelligible without reference to any question eliciting it. The facts to this case are as set out in Lord Goddard's (C.J.) judgment:

"West was arrested, and he made a statement to the police in which he clearly implicated the appellants. Lemon was afterwards arrested, Mills later went voluntarily to the police station. At the police station they were interviewed separately. The officer in charge of the case told each of them what West had said. Without reading West's statement to them in turn, he gave a precis of the statement which, in effect was informing them that West had said they were together with him at the time that the robbery was committed. Lemon was asked if he wished to make a statement, and he said that he would think it over. Shortly afterwards he said that he would like to write out his own account, and he did so. His account was as clear a confession as could well be imagined." Mills afterwards also dictated to the police officer and signed a full confession of his part in the affair."

At the trial, it was raised that those confessions had been obtained in a manner contrary to r.8 of the Judge's Rules. In his judgment at page 777, the learned Lord Goddard C.J. said:

"It is to be observed that the Bristol police did not observe this rule which has been laid down for their guidance, and the sooner they study these rules and learn and abide by them, the better.

..... If therefore, the police had handed both of the appellants the statement which West had made and left them to decide whether they would make statements or not, the rule would have been complied with and no objection could have been taken. The police, however, gave the appellants a precis of West's statement and then asked them if they wished to make a reply. That they should not have done."

The facts in this case are quite similar to the facts in Lemon and Mill's case (supra). The only difference being that a caution was duly given before the confession was made.

Lord Goddard, then went on to consider the question whether the statements made were inadmissible in evidence. At page 777, he said:

"On the other hand, if the prisoner chooses to write out or dictate a full confession, there is no authority which says that, if the confession is intelligible without the question which gave rise to it, if the question is excluded, the confession must be excluded. Indeed, so to hold would be quite contrary to the decision of this court in R. v. Gardner and Hancox. The Judges' Rules were framed after that case, and it will be observed that r.8 nowhere states that the answer which is given is not to be admissible, although, as I have already said, if it can only be intelligible by giving the question, the whole thing must be ruled out."

The above is good law and should also be observed in this jurisdiction where it applies.

In the facts of this case, there is clear evidence that a caution was duly given before the confession was made. I have also found and ruled that the caution was clearly understood by the accused.

The confession itself was contained in four (4) hand written sheets of paper written on both sides, and took approximately 2½ hours to complete (commencing from 13.30 hrs and finishing at 16.00 hrs).

I have considered the question whether what was done that day was in breach of rule 8 of the Judge's Rules. With respect, I am not satisfied that a breach had been committed. Even though what Sgt. Angisia did at the start of the interview, may have been inappropriate, let alone unfair, he did caution the accused, and in my view that would have removed any impressions of any threats, or inducements that may have been produced by what he had said to the accused. But even if there had been a breach, the above case of R. v. Lemon and R. v. Mills is clear authority for the proposition that where a confession has been obtained in breach of r.8 of the Judge's Rules, it will still be admissible, if it is intelligible without reference to any question eliciting it.

In the facts of this case, the statements of the accused did not contain any precis of the information relayed by Sgt. Angisia. The statement on its own "*is as clear a confession as could well be imagined*". It does not require, the admission of what was relayed by Sgt. Angisia, to make that four page statement intelligible. In those circumstances, I am satisfied beyond reasonable doubt, that the confession was made voluntarily and that it should be admitted. I so rule.

ALBERT R. PALMER

A. R. PALMER
PUISNE JUDGE