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

THE QUEEN -v- BAUWAI GIAVA.

REASONS FOR JUDGMENT.

PORT MORESBY.

Minogue J.

10/7/64.

The accused, BAUWAI GIAVA, was arraigned before me on an indictment charging him with the rape of a young Australian woman. During the course of the case for the Crown, Mr. Johnson, the Crown Solicitor, led the evidence of Inspector Feeney who, after relating the early investigations he made, began to give evidence of his interrogation of the accused BAUWAI. At this stage of the trial, Mr. Lalor, who appeared for the accused, objected to my receiving any evidence of the questioning of BAUWAI on the ground that the Crown had to satisfy me that any confessional evidence or answers by the accused to questioning from which guilt may be inferred was or were voluntarily made. He further submitted that even if I found such evidence or answers to be voluntary, I should exclude it or them in the proper exercise of my discretion.

After argument, I decided to hear the rest of the Inspector's evidence as on the voir dire and, if Mr. Lalor saw fit, evidence also from the accused, and then to hear argument on the admissibility of the Inspector's evidence.

It will be convenient to now set out the circumstances in which Inspector Feeney came to question the accused and the evidence to which objection was taken.

The young woman was attacked and it was alleged raped by two natives in a disused aircraft dispersal bay at Jackson's Airport, closely adjacent to the present airstrip area, at about 10.30 a.m. on Saturday, 16th May, 1964. Within half an hour of the attack, Inspector Feeney took charge of Police investigations, which continued throughout the rest of

Saturday and were still continuing on the morning of Tuesday, 19th May. Shortly before midday on that day the Inspector and a number of police went out to the premises of Papuan Air Transport Limited at the airport, apparently acting upon some information received. There, after asking a Mr. Noall (BAUWAI's employer) whether he had any objection to his taking BAUWAI to the Police Station, the Inspector spoke to BAUWAI and, according to him, said (speaking in Pidgin): "Mr. Noall says that it is alright for you to come with me. Is that alright?" to which BAUWAI replied: "Yes." The accused then got into the back of the Police utility truck with two native sergeants and a native constable. The Inspector entered the front of the vehicle with a Sub-Inspector named Briancourt. At about midday they arrived at the Boroko Police Station, some four miles distant from Port Moresby, and the accused alighted, whereupon the Inspector, in his hearing, spoke to a Constable GURURAU, saying to him: "I want you to look after this man. Take him up to the Barracks and give him a meal. He is not under arrest. Should he want to go, he can." BAUWAI was given a meal and then taken in a Police truck into the police station at Port Moresby.

The Inspector arrived at that station at 1.35 p.m. The prosecutrix was at this time at the station, and arrangements had been made for an identification parade. BAUWAI was asked to stand in a line-up, having first been asked to remove a khaki shirt which he was wearing. I might add that the prosecutrix had given in evidence that the men involved in the assault upon her were not wearing shirts. He stood in about the centre of the line, which consisted of twelve natives. She was then brought into the room, and without much hesitation positively identified the accused. At about 2.25 p.m. another man was brought in to see if he could identify the accused as being the same man as one he had seen in the vicinity of and about the time of the assault on the previous Saturday. He, albeit with a little more difficulty, positively identified him.

After this identification, the Inspector asked the accused whether he minded coming with him. He went into the Inspector's office, whereupon he sat down and the Inspector offered him a cigarette. This he refused, saying that he did not smoke. In the room also were Sub-Inspector Briancourt and at least one native sergeant. The Inspector deposed to having said to the accused: "You are not under arrest. You can go if you want to. Do you understand" to which the accused

replied that he did. He was then asked his name, address and place of employment, and the Inspector said: "I am going to ask you some questions. You do not have to answer my questions if you do not want to. Do you understand?" To this the accused also replied: "Yes." He was then asked in detail about his movements on the previous Saturday, and he gave a detailed and exculpatory description thereof. At 3.10 p.m. the Inspector again said to him: "You are not a prisoner and you can go if you wish" to which he again replied: "Yes." The Inspector then questioned him further in detail about his movements and the clothing he was wearing on the Saturday. He was also asked about his moustache. At the time of the questioning he was clean-shaven, whereas the prosecutrix had stated that on the Saturday he had a moustache. He informed the Inspector that he had shaven his moustache on the previous Thursday and was clean shaven on the Saturday morning. At 3.30 p.m. the Inspector asked him: "Is that talk straight?" To which he replied: "Yes." The Inspector stated that he read the questions and answers back to him and then said to him: "We will go to Six-Mile and check your story. Is that alright?" To which the accused replied: "Yes." The Inspector then saying: "You are not under arrest. Do you understand?" He again replied: "Yes."

At 3.35 p.m. the accused, the Inspector, Sub-Inspector Briancourt, two native sergeants and a native constable then drove to Jackson's Airport, firstly to the quarters which the accused was occupying and then to the vicinity of the Patair premises. The accused was left in or near the vehicle whilst the Inspector made further enquiries of various people at the airport. At 4.50 p.m. the Inspector came back to where the accused was standing, and sitting on the tailboard at the rear of the vehicle with the accused standing a few feet away and facing him, entered upon the following interrogation:

Inspector : "BAUWAI you are not a prisoner. Do you understand?"
Accused: "Yes."
Inspector : "I am going to ask you some questions. You are not obliged to answer these questions. Do you understand?"
Accused : "Yes."
Inspector : "I have talked to Robega. He said you walked with him at 10.15 on Saturday from the shop to the quarters."
Accused : "I did not."

Inspector : "He also says you did not have these trousers on." (Showing him a pair of shorts which the Inspector had taken from the accused's quarters).

Accused : "I did."

Inspector : "Paul says you did not help him to load the car."

Accused : "He is telling lies."

Inspector : "Paul says that at 11.30 on Saturday he saw you and together you went into Patair office in town."

Accused : "I do not know the time. 10.30 or 11.30."

Inspector : "Taubada Tom (Mr. Noall) says you were not here when the Piaggio came in at 11.15 a.m. from Tapini."

Accused : "No, not true."

Inspector : "Taubada Tom, Robega and Mr. Van say you had a moustache on Saturday, 16th."

Accused : "Lies."

Inspector : "At 6 a.m. on Sunday, 17th, Mr. Van says he saw you with a new hair cut and moustache."

Accused : "Lies. On Friday I had a haircut not Saturday and I cut my moustache on Thursday."

Inspector : "Robega says that on Saturday morning you had a moustache and Sunday you had no moustache."

Accused : "Not true."

Inspector : "Mr. Van and Robega say you had a round-necked singlet on on Saturday."

Accused : "No, this shirt." (pointing to the khaki shirt he was then wearing).

Inspector : "Mr. Van says on Saturday 16th you had old khaki short trousers and blue swim trunks on."

Accused : "No, I had a khaki shirt and these blue shorts." (pointing to those already produced).

It was then 5.20 p.m. The Inspector, in cross-examination, said that when he came back to the utility after making his further enquiries, he considered he had sufficient information to arrest the accused and had at that stage decided to charge him. After the questioning, the Inspector told the accused that he was arresting him and added that he was going to ask him some further questions about the trouble which he was not obliged to answer, but that if he did he would take down the answers in writing and may use them in evidence. The accused made no immediate reply but after a few moments

said: "I made this trouble. There was also Ambrose. He made it too with me." Ambrose had been arraigned with the accused at the beginning of the trial but had pleaded guilty to a charge of attempted rape and was then remanded for sentence.

The Inspector then, according to his evidence, warned the accused that he was not obliged to say anything but anything he did say would be taken down in writing and might be used in evidence. BAUWAI said that he understood this to be the position and went on to make what amounted to a complete confession. In the course of this he was asked by the Inspector if he would show him where BAUWAI and AMBROSE had gone, and at 5.30 p.m. the party drove in the police vehicle to the vicinity of the dispersal bay and he there described in further detail what had happened. At 5.45 p.m. the party left the airport and went back to the Port Moresby Police Station, where BAUWAI was formally charged.

The Inspector in the course of cross-examination denied that BAUWAI was in custody at the time of the initial questioning at the Police Station, giving as his view that at that time all he had was evidence of identification and he wanted further evidence before he considered that he had a case against the accused.

BAUWAI was called on the voir dire and gave evidence to the effect that at his place of employment he was commanded, not requested, to come to the Police Station by the Inspector. He agreed that he was given a meal at Boroko and that he subsequently went into the Police Station at Port Moresby. According to his version he was told to enter the line-up and to stand in the middle thereof but no real question arose as to the adequacy of either identification. He then went on to describe the conversation in the Inspector's office and to swear that he understood himself to be under restraint and not able to leave the Police Station. I should state that BAUWAI is from the Tapini area, has had one year's schooling in his native language and had been working in Port Moresby as a labourer in and around aircraft for approximately five years. He was unable to speak English, although he could understand a good deal of the technical terms used at his work. In reply to a question by Mr. Lalor as to whether he understood the Inspector to say to him that he was not under arrest and was free to go if he wanted, he said: "Suppose he speak to me in this manner my wife and two children were waiting outside

and I would have gone but he did not speak to me in this way." Later he said: "I could not go, the Police Sergeant was standing on one side and the Inspector on the other and he asked me why I did this thing on Saturday morning." He did not disagree with the substance of the questions and answers at the Police Station and, in fact, in cross-examination admitted that he had given his answers for the purpose of misleading the Police and in order that they should not suspect him of being involved in the attack on the prosecutrix. He told lies to the Police and told lies for the purpose, as he said, of "hiding it." No complaint was made by him of any pressure brought to bear or any threat or inducement being offered to him. He agreed substantially with the Inspector's version of the journey to and the delay at the airport and swore that after the Inspector's return to his vehicle he said: "You are standing in the middle and there are a number of witnesses in a circle around you. They are all witnesses against you. They are pushing against you. You do not have a witness. You make kalabus." He then went on to state that his skin shook and Sergeant Raufin (one of the native sergeants) said: "You are shivering, I think you have been making this trouble." Sergeant Raufin, he said, spoke strongly to him, and he replied: "Yes, I made this trouble." Upon being asked why he said this to Sergeant Raufin, he said: "No good that I was shivering and they may push me about so I spoke this way." He went on to explain that by "push about" he did not mean that he feared physical violence. He agreed that the Inspector had then administered the caution to which the Inspector had deposed, and that he went on to give the Inspector a version of what happened, although one that was neither so detailed or so incriminating as the one deposed to by the Inspector. He denied that at any time other than this caution at 5.30 p.m. had the Inspector told him that he was at liberty not to answer any questions or at liberty to go his own way.

I then heard argument on the admissibility of both the interview at the Police Station and the subsequent questioning and confession at the airport. I admitted all the evidence objected to, stating that I would publish my reasons subsequently, which I now proceed to do.

Mr. Lalor repeated his objection to this evidence on the two grounds that the statements made by the accused were not shown to be voluntary and that, even if voluntary, they should be excluded in the proper exercise of my discretion.

At first sight I had some difficulty in seeing how either conversation prior to the confessional statement was admissible at all on the ground of relevance. However, on reflection I felt that such evidence could well be admissible. At this stage of the trial I was not aware of what the defence was or would be. On ordinary principles the evidence of the prosecutrix required corroboration. False denials by the accused to the Police in the course of investigation can amount to corroboration, and one of the purposes in leading the evidence of the employees of Patair could well be to show the accused's denials to be false. See R. v. Tripodi (1961) V.R. 186. Further evidence of the conduct of the interrogation, including the accused's reiterated denials and subsequent confession, may well go to the weight to be ascribed to the confessional evidence, if admitted. Accordingly I did not call for further argument on this aspect and proceeded to consider only the grounds of rejection urged upon me by Mr. Lalor.

Mr. Johnson contended that there was no basis for hearing on the voir dire evidence of the conversations at the Police Station in the early afternoon because, so he said, none of it was confessional and there was no basis for excluding such evidence either under statute or at common law. Firstly, he said, that the rules as to the exclusion of statements made by an accused person unless shown by the Crown to be voluntary did not and could not apply to the statements made by BAUWAI because such rules only applied to statements which were either confessions in the true sense, or, which were confessional in their nature. Next he said that the discretion, which has come to be regarded as residing in a Judge to exclude statements made by accused persons where there has been a breach of the Judges' Rules on the part of the Police, applies only where those statements themselves are capable of being construed as admissions in some way implicating the accused person in the offence charged. And that was not the case here because on any view, the statements of BAUWAI at the Police Station were all exculpatory in their nature and intended to be so.

He submitted further that with regard to the later interrogation and subsequent confession I should be satisfied that the confession was voluntarily made and there was no case for the exercise of my discretion to exclude any of the evidence.

In my opinion Mr. Johnson is right in his first

contention. It is true that Lord Sumner in Ibrahim v. The King (1914) A.C. 599 made use of a very general expression when he said at pp. 609-610: "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement" But it is clear that in that case he was considering what was, in effect, a full confession and the rule, I think, finds proper expression in the words of Dixon J. (as he then was) in McDermott v. The King (1948) 76 C.L.R. 501 at p. 511, when he says: "At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made."

The 35th Edition of Archbold's Criminal Pleading Evidence & Practice when dealing with admissions and confessions states the common law rule but throughout the sections relating to the rule consistently makes use of the word "confessions" and not to statements generally. And it is clear from a reading of the joint judgment of the Court in The King v. Lee (1950) 82 C.L.R. 133, that the type of statement to be rejected on the ground of non-voluntariness is a confessional statement. In Attorney-General for New South Wales v. Martin (1909) 9 C.L.R. 713, the Judges then comprising the High Court regarded the common law rule as being restricted to confessional evidence, e.g., see Griffith C.J. at p. 722, Barton J. at p. 727 and O'Connor J. at pp. 731-732 said: "The real strength of the case against the prisoner is that the statement in this case is not a confession within this meaning of the common law principle. There are many definitions of what will amount to a confession for the purposes of the rule I am considering. They all agree in this, that it must be either a direct admission of guilt, or of some fact or facts which may tend to prove the prisoner's guilt at the trial. The statement in question is certainly not a direct admission of guilt, nor does it admit any fact or facts which may tend to prove the prisoner's guilt at the trial. On the contrary all the facts stated are exculpatory." The Court, in that case, was considering whether a statement made by the accused should be excluded under the provision of the Crimes Act 1900 (New South Wales) Section 401, which provided that no confession, admission or statement should be admissible against an accused person if it had been induced by any

untrue representation, threat or promise. Isaacs J. at p. 73⁴ went further than his brother Judges, and applying the maxim "noscitur a sociis" held that for a statement to be within the section it must contain something incriminating. And in referring to the common law rule he referred to it as "... the principle of protection which the common law has thrown around a prisoner to guard him against a confession gained under the influence of a threat or promise ...". Accordingly, I am of the opinion that evidence of the interrogation at the Police Station cannot be rejected on the ground of non-voluntariness. Still less can it be rejected under section 68 of the Evidence Ordinance of Papua which enacts: "No confession which is tendered in evidence in any criminal proceeding shall be received which has been induced by any threat or promise by some person in authority and every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary be shown." I understood Mr. Lalor to be faintly arguing that this section had application but, in my view, I can see nothing in the words of the accused at the Police Station which could in any way constitute a confession.

However, although this evidence objected to is not confessional in nature, I am of opinion that it is proper to consider whether there has been a breach of what have come to be known as the Judges' Rules in the method of interrogation used by Inspector Feeney, and for that purpose Mr. Lalor was entitled to ask that evidence be heard on the voir dire. For I am also of opinion that the operation of these rules is not confined to confessional statements or admissions. The Judges in England in 1912 framed or approved of rules for the guidance of the Police in their enquiries. These were further reviewed in 1930 and have found their way into the Standing Orders in most of the Police Forces of the States of Australia and, I understand, are either contained in the Standing Orders of the Constabulary of this Territory or in circular instructions issued to members of this Force. The practice became settled in England of excluding confessional statements made to officers of the Police if it is considered upon a review of the circumstances that they have been obtained in an improper manner. "The abuse of the power of arrest by using the detention of the accused person as an occasion for securing from him evidence by admission is treated as an impropriety justifying excluding the evidence. So is insistence 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."

See Dixon J. in McDermott v. The King (supra) at p. 513. The relevant rule in this case is Rule 3 "Persons in custody should not be questioned without the usual caution being administered," with its further explanation in 1930 that "Rule 3 was never intended to encourage or authorise the questioning or cross-examination of a person in custody after he has been cautioned on the subject of the crime for which he is in custody, and, long before this rule was formulated and since, it has been the practice for the judge not to allow any answer to a question so improperly put to be given in evidence."

Mr. Lalor's argument amounted to this, that at the time the questioning began at the Police Station, BAUWAI was a suspect and clearly in custody; that he would not have been allowed to leave the Police Station and that, even assuming the caution to have been administered, which he did not concede was the case, the questioning by the Inspector was clearly in breach of this rule; that the questioning was for the purpose of obtaining evidence against BAUWAI and that it was an improper exercise of the Police powers. He reminded me of BAUWAI's evidence, that he had not been told at the Police Station that he need not answer questions. I am of opinion that BAUWAI was in custody in the sense referred to by Williams J. in R. v. Smith (1956-1957) 97 C.L.R. 100 at p. 129, where he says: "The term 'in custody' in the Judges' Rules is not a term of art. It is not confined to a person who has been arrested after a charge has been preferred against him. Any person who is taken to a police station under such circumstances that he believes that he must stay there is in the custody of the police. He may go only in response to an invitation from the police that he should do so and the police may have no power to detain him. But if the police act so as to make him think that they can detain him he is in their custody." and in the sense used by Smith J. in R. v. Amad (1962) V.R. 545 at p. 546. I accept Inspector Feeney's evidence that he told BAUWAI that he was not under arrest and that on more than one occasion he told him that he need not answer any questions, but I am not satisfied that BAUWAI clearly understood that he was free to go nor to refrain from answering questions. I have said before on several occasions that where a Police Officer is dealing with an uneducated native and, more particularly, as this case later showed, a native from a primitive area, he should exercise particular care to ensure that the native fully appreciates his right to remain silent

upon interrogation. Having had some little experience in the personal questioning of natives and in the observation of witnesses being questioned in Court and, further, of the deficiencies of Pidgin as a language, I reiterate the necessity for this care. I am not satisfied that BAUWAI fully appreciated that he was free to leave the Police Station or that he was free to refuse to answer any questions put to him, and consequently I hold that Rule 3 of the Judges' Rules in this instance was not observed. But that, of course, does not conclude the matter. I hold the position to be in this Territory as it is in England and, in my understanding, all of the States of Australia, that the Judge has a discretion to reject statements made to Police Officers by accused persons if improper or unfair methods are used by Police Officers in interrogating suspected persons or persons in custody. See The King v. Lee (supra) at pp. 150-151. A breach of the Judges' Rules may constitute "improper" or "unfair" methods but it does not necessarily do so, although such might appear to be the position in England from the case cited to me by Mr. Lalor (R. v. Williamson, (The Times Newspaper, November 26th, 1963)). But, of course, the fact that there has been some impropriety on the part of the Police does not cast upon the Crown the onus of satisfying a Judge that it had no such effect as to make it unfair to admit the statement in question. As the Court said in R. v. Lee (supra) at pp. 152-153: "The discretion rule represents an exception to a rule of law, and we think that it is for the accused to bring himself within the exception. We have called attention to the great breadth of the common law rule that a statement is not admissible unless it is proved to be voluntary. If it is proved to be voluntary then it is prima facie admissible. It is admissible as a matter of law unless reason is shown for rejecting it in the exercise of discretion." Other than the impropriety to which I have referred, I can see no other evidence in this case of improper or unfair methods. There was no suggestion, nor do I think there could have been, of the Inspector over-bearing BAUWAI in any way. BAUWAI himself admits that he was asked to be seated and was, in effect, made as comfortable as could be. He was alert and alive to his danger and his mind was working ordinarily, and perhaps extra-ordinarily, well. I asked myself the question impliedly proposed by Mansfield C.J. in R. v. Nichols, Johnson & Aitcheson (1958) Q.S.R. 200 at p. 208 whether in the obtaining of evidence in breach of the Judges' Rules,

there is anything which could be said to be improper or unfair to the prisoner to the extent that it is in the interests of justice that the evidence should be excluded, and I answered that question by saying that I could see nothing improper or unfair to the extent there referred to. Accordingly I admitted the evidence of this conversation or interrogation.

I come now to the questioning at the airport terminal late in the afternoon. Mr. Lalor urged that both the questioning of BAUWAI and his answers and his subsequent confession should be rejected - the latter on the ground that I should not be satisfied that it was voluntarily made, but that, even if I were so satisfied, I should reject both it and the preceding questioning on the ground that there had been a flagrant breach of the Judges' Rules and that I should exercise my discretion in favour of the accused. There are some aspects of the questioning after Inspector Feeney had made his enquiries which disturbed me. In the first place, there can have been no doubt in anybody's mind that at this time BAUWAI was in custody. The Inspector, in effect, said that he had sufficient information wherewith to arrest BAUWAI and he would not have released him at the stage when he began his questioning. The latter had by this time been in at least the company of the Police for some five hours. The questioning was clearly contrary to the Judges' Rules and, although the Inspector said that he felt he should give the accused the opportunity to further detail his movements on the Saturday morning and the right to deny anything which he may put to him, I find it hard to regard the questioning as anything other than an attempt to break down the accused's resistance. There is further the evidence of the accused on the voir dire that the Inspector told him that he was standing in the midst of a circle composed of the witnesses against him who were all pushing against him and that he did not have a witness and, further, that Sergeant Raufin then said: "You are shivering, I think you have been making this trouble." The Inspector denied the whole of this evidence. I am at a loss to understand why in circumstances such as these where an attack was being made on the Crown evidence, where the evidence was of a vital nature and where corroborating evidence was, or should have been, available, it was not called. Failure to call such evidence must create some suspicion in the mind of the tribunal that something is being suppressed. At this stage there was no need for the Inspector to ask any further

questions. All he need have said was: "I have seen all these men that you spoke of and talked to them. I do not believe your story and I am going to arrest and charge you," or words to that effect, then, having administered the caution BAUWAI could have been asked did he wish to make a statement. But in the end I decided to admit the evidence of this conversation and of the subsequent confession. I am satisfied that no other form of pressure was held out against BAUWAI, and I accept the Inspector's denial of having said anything to him about being in a circle and pushed against. And, even if Sergeant Raufin had made the remarks to which BAUWAI deposed, I cannot find any hint of threat or inducement in these remarks. I respectfully agree with what was said by Their Lordships in Sparkes v. The Queen (1964) 2 W.L.R. 566, as to the continued operation of an inducement to confess despite a caution having been administered and understood by the accused. But this is a very different case from that one, and Their Lordships remarks were, of course, made in the light of the facts of that case. I cannot see here any inducement in the shape of a threat or promise and, in the end, I came to the conclusion that the accused decided to confess because, to put it colloquially, he realised that the game was up. I am satisfied on his own admission in the witness box that he heard and understood the caution given to him and that at this stage he was aware of his right to remain silent if he chose. Having heard the evidence given during the trial of the persons who had been interviewed by the Inspector on that day, I am satisfied that BAUWAI realised that his attempts to throw the Police off the scent had failed. I therefore came to the conclusion that the confession was voluntarily made and that the final questioning by the Inspector had little, if anything, to do with BAUWAI's decision. Accordingly the defence failed to show me that there was such a degree of impropriety as to require the exclusion of the testimony as to the prisoner's interrogation and subsequent admissions, and I decided to admit all the evidence to which objection was taken.
