R. v. TAPALU.

CRIMINAL APPEAL CASE No. 41 OF 1935.

Charge of murder—admissibility of statement incriminating the accused person made to a " Kapasu " (the name applied to a messenger or public officer of a native chief in Northern Rhodesia)—Judges' Rules with regard to statements made to and questions put by police officers—kapasu to be regarded as corresponding with police officer.

In this case it was held that a native " kapasu ", who is a chief's messenger or public officer, must be regarded as being the equivalent of a police officer and accordingly the Judges' Rules regarding the procedure to be followed by police officers in receiving statements from and putting questions to suspected or accused persons must be followed.

From the judgment it is evident that the statement made by the accused person in the case in question was made after he had been taken into custody by the kapasu.

Difficulty often arises in deciding whether in fact a native kapasu (or any other native public authority) has taken a person into custody.

On occasion he requires some native to go with him to a European Government officer (e.g., a district officer or a police officer) or some native authority so that the latter may take such action as may be considered necessary; in some cases there is an undoubted " arrest " or " taking into custody ", in other cases the action is no more than that of a police officer who asks some suspected person to go with him to a police station.

On the question of whether the position and powers of a village headman warrant the application of the Judges' Rules and as to whether a village headman could be regarded as a " person in authority " see *Reg.* v. *Samson Manuwa* 5 N.R.L.R. 176.

Fitzgerald, A.J.: The appellant was convicted of murder by the Resident Magistrate of the Subordinate Court of the first class at Ndola and sentenced to death.

He now appeals against that decision on the grounds—

Firstly: That the Judge wrongly admitted in evidence statements alleged to have been made by the accused to one Manta who was the boma kapasu of Chief Kasempa; that the said kapasu was acting in the capacity of a police officer, and that the statements were made in answer to questions put by him after he had taken the accused into custody, and as such were inadmissible in evidence.

Secondly: That the statements were not free and voluntary but were made to a person in authority, under such circumstances that accused was influenced to say what was not true.

Thirdly: That apart from these statements there was not sufficient evidence upon which the accused could have been convicted.

The rules as to the admissibility in criminal proceedings of statements made to police officers have been considered in numerous cases. They are now embodied in a memorandum issued by the Home Secretary with the approval of His Majesty's Judges. The relevant rules read:

"(*a*) Whenever a police officer has made up his mind to charge a person with a crime he should first caution such person before asking any questions or any further questions as the case may be.

(*b*) Persons in custody should not be questioned without the usual caution being first administered."

It is not disputed by the Crown that no caution was administered to the accused, and that one at least of the statements made was in answer to a question or questions put by the kapasu. I am also satisfied from the evidence that the appellant had already been taken into custody by the kapasu when he made the statement.

It was submitted by the prosecution that the rules to which I have referred are applicable to police officers only, that the kapasu was not a police officer, and that statements made to him are not subjected to the limitation imposed by the rules.

It will be borne in mind that the memorandum issued by the Home Secretary was intended for the guidance of authorities in Great Britain where the investigation of crime and the arrest of suspected persons are conducted almost exclusively by officers of an organised police force. But if the rules are applicable to proceedings before the courts in this Territory, as they undoubtedly are, they must be construed with such verbal alterations, not affecting the substance, as may be necessary to facilitate their application. In the more settled parts of this Territory, criminal investigations are conducted and arrests are made by members of the Northern Rhodesia Police Force. In other areas, where no police are stationed, these functions are performed by district messengers, and in native administration districts, native law and custom provides, and the Government approves, that these duties should devolve on the kapasu. It seems to me that the underlying principle of the rules that statements made by persons in custody to anyone whose duty it is to inquire into alleged offences and make arrests shall only be admitted in evidence when certain specified conditions have been fulfilled. This being so, it is immaterial whether the arrest was made by a police officer, a district messenger or a kapasu provided that the person making it had authority to do so. The point was considered by CHANNELL, J. in *Rex* v. *Knight and Thayre* (Cox, C. C. Vol. XX). The learned Judge is reported to have said:

> "It is, I think, clear that a police officer, or anyone whose duty it is to inquire into alleged offences, as this witness here, may question persons likely to be able to give him information, and

that, whether he suspects them or not, provided that he has not already made up his mind to take them into custody. When he has taken anyone into custody and also before doing so when he has already decided to make the charge, he ought not to question the prisoner."

I have therefore come to the conclusion that the learned Magistrate was wrong in admitting the statements objected to by the appellant.

In view of my decision on this issue it becomes unnecessary to examine the second ground of appeal.

The learned Solicitor-General has argued that even if the statements to which exception has been taken are excluded there was no other reasonable finding except guilty open to the Court. Now it is true that apart from the statements, which I have held to have been inadmissible, there was evidence upon which a jury might have convicted, but unfortunately the learned Magistrate did not write a judgment and it is impossible to gauge the weight he allotted to any particular item of evidence. Moreover, the statements made to the kapasu were extremely prejudicial to the accused, and it is equally impossible to speculate what his defence might have been had they been excluded.

I cannot say that had the learned Magistrate properly directed himself he would have inevitably come to the same conclusion.

In these circumstances the conviction cannot stand. The appeal must be allowed and the conviction quashed.

Conviction quashed.