

In the Privy Council.

No. 24 of 1949.

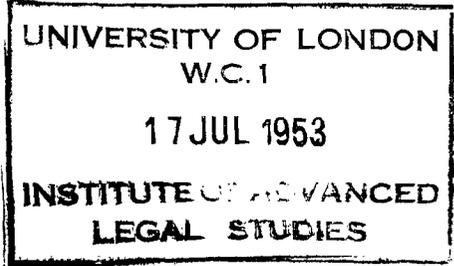
ON APPEAL FROM THE HIGH COURT
OF SWAZILAND

BETWEEN

- (1) GIDEON NKAMBULE
- (2) NATHANIEL NKAMBULE
- (3) MFANYANA JOSHUA HLATSHWAKO
- (4) BONAPARTE NKAMBULE
- (5) BESSIE MAZIYA
- (6) MAGUGU DHLAMINI APPELLANTS

AND

THE KING RESPONDENT.



CASE FOR THE RESPONDENT.

1.—This is an Appeal from the Judgment dated the 18th October, 1948, of the High Court of Swaziland (Sir Walter Harragin) convicting the Appellants of the murder on Saturday, the 17th May, 1947, of one Northway Mdingi (hereinafter called "Northway"), a teacher, of Xosa race.

Record
pp. 402-418

2.—The Judge sat with two European and two Swazi assessors. Section 8 of the Swaziland High Court Proclamation as amended by Proclamation 43 of 1942, requires the assessors to give either in open court or otherwise such assistance and advice as the Judge may require. The section provides that the decision shall vest exclusively in the Judge, but that the agreement or disagreement of the assessor or assessors with the decision of the Judge shall be noted on the record. In the present case the Judge made it clear that in convicting the Appellants he was expressing the opinion of each member of the Court and that he and the assessors were all perfectly satisfied beyond all reasonable doubt that the Appellants were guilty of murder.

p. 416, l. 12 ;
p. 418, ll. 6-20

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W.C.1.

RECORD

pp. 210-212 ; p. 15

3.—The body of Northway was found on the 22nd May, 1947, in a stream in about 18 inches of water, a few yards below a place where a path crosses the stream at rocks, 4½ feet apart, where people using the path jump across the stream. The body was examined by a doctor on the 25th May, 1947, but was in such an advanced state of decomposition that the cause of death could not be ascertained. On the one hand drowning could not be ruled out, and on the other hand death could have been caused in the manner described by two accomplices who gave evidence for the Crown. The Judge found the medical evidence of practically no assistance.

pp. 7-13 ;
pp. 422-423p. 402, l. 29—p. 403,
l. 15p. 213, l. 26 p. 214
l. 12 ; p. 215
ll. 13-19 ; p. 237, l. 23
p. 238, l. 8 ;
p. 246, ll. 10-20
p. 211, ll. 18-27 ;
p. 236, ll. 1-15 ;
p. 275, l. 24—p. 276
l. 18
p. 212, ll. 1-7

4.—The fact that Northway was missing was made generally 10 known by Appellant No. 1 very early on the 18th May and search was made. Appellant No. 1 said to a witness, "I am surprised the teacher has "disappeared, but I do not know where he has gone to." The depth and nature of the stream indicated that an adult who accidentally fell in could easily get out again. Moreover, the body was clothed in a shirt and trousers without jacket or footwear, and there was no sign of any hat. The Respondent submits that these facts indicate that the body was placed where it was found, and that the proper inference is that it would not have been placed there if it had not been the body of a murdered man.

p. 402, ll. 16-28

5.—The learned Judge did not apply his mind to the question whether, 20 excluding the evidence of accomplices from consideration, the commission of a murder was proved, because he took the view, on the authority of the South African case of *Rex v. Thielke* (1918) A.D. 373, that it was quite competent for a court to convict on the evidence of one accomplice corroborated by another accomplice.

pp. 16-21,
249-253
p. 418, ll. 6-11

6.—In the present case two accomplices, Violina and Mtanjana gave detailed evidence of the murder (a ritual murder) and the Court, viewing their evidence as tainted, was yet perfectly satisfied that Violina was telling the truth from start to finish and that she was truthfully corroborated in every main detail by Mtanjana. Each of the Appellants said that he 30 did not leave his own hut on the night of the 17th May, 1947, and there was evidence independent of the accomplices in the case of Appellants No. 2 and No. 3 that they were away from their huts on that night.

pp. 260, 300, 312,
319, 323, 331pp. 240-241 ;
pp. 219-220

7.—The principal relevant sections of the Swaziland Criminal Procedure and Evidence Proclamation 1938 as amended by Proclamation No. 14 of 1944, are as follows :

Competency of Witness.

207. Every person not expressly excluded by this Proclamation from giving evidence shall be competent and compellable to give evidence in a criminal case in any court in 40 the Territory or before a District Commissioner on a preparatory examination.

* * * * *

Sufficiency of Evidence.

RECORD

230. It shall be lawful for the court by which any person prosecuted for any offence is tried, to convict such person of any offence alleged against him in the indictment or summons on the single evidence of any competent and credible witness :

Provided that it shall not be competent for any court—

10 (1) to convict any person of perjury on the evidence of any one witness unless, in addition to and independent of the testimony of such witness, some other competent and credible evidence as to the guilt of such person is given to such court ; or

(2) to convict any person of treason except upon the evidence of two witnesses where one overt act is charged in the indictment, or, where two or more such overt acts are so charged, upon the evidence of one witness to each overt act.

231. Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons on the single evidence of any accomplice :

20 Provided that the offence has, by competent evidence, other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court to have been actually committed.

An accomplice is not expressly excluded from giving evidence by the Proclamation except in so far as, if on trial for the offence, he can only be called as a witness upon his own application.

8.—From 1938 until 1944, Section 231 had been in the following form :

30 231. Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons on the single evidence of any accomplice :

Provided that the testimony of the accomplice is corroborated by independent evidence which affects the accused by connecting or tending to connect him with the crime :

Provided further that such evidence shall consist of evidence other than that of another accomplice or other accomplices.

9.—Before 1938 and after the 1944 amendment the relevant law was the same in Swaziland and South Africa. Section 285 of the Union Act No. 32 of 1917 (corresponding to Section 231) has uniformly been interpreted in South Africa as permitting the corroboration of one accomplice by
40 another accomplice although a Judge must always have in mind the danger of accepting accomplice evidence which is uncorroborated by independent evidence.

RECORD

10.—In all material respects the legislation in Swaziland is identical with that in Basutoland. In *Tumahole v. The King* (1949) A.C. 253 (where the current of South African authority was not called to the attention of the Judicial Committee) the Judicial Committee interpreted the expression “the single evidence of any accomplice” in Section 231 of the Basutoland Proclamation as meaning, not “the evidence of a single “accomplice,” but “the unsupported evidence of any accomplice or “accomplices.” The Respondent respectfully submits that the expression has the same meaning in the section as amended as in the unamended section, and that in the unamended section the second proviso is quite inconsistent 10 with the interpretation of the Judicial Committee.

11.—That interpretation was challenged in *Bereng Griffith Lerotholi v. The King* (Privy Council Appeal No. 6 of 1949) but the Judicial Committee found it unnecessary to decide whether the construction put upon Section 231 in Tumahole’s case was correct or not. Their Lordships therefore did not express any opinion as to the propriety of reopening that question or as to the validity of the argument submitted on it.

pp. 402-418
pp. 415-416
pp. 416-418

12.—By his Judgment in the present case, after reviewing the evidence for the prosecution and the defence, and pointing out discrepancies between the evidence of one accomplice and that of the other, the learned Judge 20 showed that he and the assessors appreciated the danger of convicting on the evidence of accomplices and gave reasons which compelled him and the assessors nevertheless to accept that evidence.

13.—The Respondent therefore submits that this Appeal should be dismissed for the following amongst other

REASONS

1. BECAUSE the agreement of the assessors with the decision of the Judge was duly noted on the record.
2. BECAUSE the murder of Northway by the Appellants was proved by eye-witnesses, whose evidence the Judge accepted. 30
3. BECAUSE the proper inference from the evidence, other than that of accomplices, was that Northway had been murdered; and therefore the Judge was entitled to rely on the evidence of accomplices which implicated the Appellants in the murder.
4. BECAUSE on the proper construction of Section 231 of the Swaziland Criminal Procedure and Evidence Proclamation, the Judge was entitled to convict the Appellants of Northway’s murder on the evidence of Violina and of Mtanjana.

FRANK GAHAN.

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CASE FOR THE RESPONDENT

BURCHELLS,

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Solicitors for the Respondent.