

Mahlikilili Dhalamini and others - - - - Appellants

v.

The King - - - - Respondent

FROM

THE HIGH COURT OF SWAZILAND

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE  
20TH MAY, 1942

*Present at the Hearing:*

THE LORD CHANCELLOR (Viscount Simon)  
VISCOUNT SANKEY  
VISCOUNT MAUGHAM  
LORD ATKIN  
LORD ROMER

*[Delivered by LORD ATKIN]*

In this case on April 8th, 1940, the three appellants were convicted in the High Court of Swaziland by Huggard, C. J. of the murder of one Nkalane Vilakazi, and were sentenced to death. On appeal to His Majesty in Council by special leave, their Lordships, on May 20th, 1942, intimated that they would recommend that the conviction be set aside and would give their reasons at a later date. This they now proceed to do.

The three appellants, together with the alleged victim, Nkalane, were natives resident in the central district of Swaziland. The case for the Crown was that the three accused, with a fourth man who was also convicted, but is now dead, agreed together to kill Nkalane in order to use certain parts of his body to make "medicine" to increase their crops. One, Mafukufuku, was alleged to be a party to this conspiracy, and he was called as a witness for the Crown and spoke to the agreement to the killing of Nkalane in the presence of the four accused and himself, and to the mutilation of the body. It was alleged that after the killing one Jojosa a "medicine man" was summoned by the first accused to supply some old war medicine for a "body." He was told by the first accused that the confederates had killed Nkalane and that the medicine was required to purify them from the killing. According to Jojosa, who gave evidence, he first sent some medicine, then visited the kraal of the first accused where he met the four accused and Mafukufuku, ordered them to kill a black heifer in calf, and with the foetal fluid and part of the flesh made the necessary brew to achieve the desired purpose. The accused gave evidence strenuously denying the allegations and disputed the alleged native customs both as to the medicine for the crops, and for the purification from the killing. It is obvious also that grave questions arose as to the value of the evidence, both of Mafukufuku and of Jojosa. The former was clearly an accomplice and the latter also, so far as he was an accessory after the fact. There were further questions as to discrepancies between the evidence they had given at the preliminary examination, and at the trial. Their Lordships, however, at the hearing of the appeal reserved discussion by counsel of these points, and decided to hear in the first

instance the complaint as to an alleged violation of the rules governing criminal trials in Swaziland, which is the matter upon which they eventually decided to advise that the convictions be set aside.

Swaziland, which before the conquest of the Transvaal in 1903, had been governed by the South African Republic, on that conquest was taken over by the British Government who by an Order-in-Council in 1903 made provision for its administration. By a Proclamation of October 15th, 1904, the laws in force in the Transvaal at that date were put in force in Swaziland so far as applicable; a provision which was modified by a Proclamation of 1907 which provided that the Roman-Dutch Common Law save in so far as the same had been or might from time to time be modified by statute should be law in Swaziland. There was a similar provision with respect to the existing statute law. Their Lordships mention these provisions to show that the nature of the Common Law has not been overlooked. They have not, however, been referred to any rule of the Roman-Dutch Common Law which affected the present matter, which appears to be governed entirely by legislative enactments contained in Proclamations by His Excellency the High Commissioner for South Africa, to whom is entrusted the legislative power in Swaziland. By the Swaziland High Court Proclamation, 1938, there was established the High Court of Swaziland, to whom a single judge was assigned having original jurisdiction in civil and criminal matters and appellate jurisdiction in respect of subordinate courts. The proclamation contained the following clauses.

*Section 7.* " If the Judge shall so direct, any trial civil or criminal may be held and any appeal heard with the aid of not more than two Administrative Officers to be appointed for that purpose by the Resident Commissioner by notice in the Gazette for such sittings of the Court as may be specified in that Notice.

The opinion of each officer so associated with the Court shall be given and shall be considered by the Court, but the decision shall be vested exclusively in the Judge "

*Section 8.* " The High Court may call to its assistance one or more Native Assessors who shall be chosen by the Paramount Chief of Swaziland from Counsellors or Headmen or other natives suitably qualified to aid the Court. The Assessor or Assessors shall give his or their opinion and such opinion shall be considered by the Court but the decision shall be vested exclusively in the Judge "

*Section 10 (1).* " The pleadings and proceedings of the High Court shall be carried on and the sentences, decrees, judgments and orders thereof pronounced and declared in open Court and not otherwise: Provided however that at any time during a trial a Judge may, if he thinks fit, order the Court to be cleared or that any person or class of persons shall leave the Court "

It will be noticed that the two administrative officers are not styled " assessors," the trial if the judge so directs is to be held with their " aid ", and they are said to be " associated with the Court." The native assessor is called to the assistance of the Court. Nothing seems to turn on this distinction. Both administrative officers and native assessor are to give their opinion and the respective opinions are to be considered by the Court, but the decision is to be vested exclusively in the judge. If the matter rested on sections 7 and 8 alone, it would appear that the direction to " give the opinion " is a direction to give the opinion in Court as part of the proceedings at the trial; as the judge " gives " his judgment. But when read in conjunction with section 10 the effect of the sections seems plain. The giving of the opinions is part of the proceedings of the High Court, which are to be carried on in open Court. The giving of the opinions must, therefore, under the enactment take place in open Court. There was no indication in the record before their Lordships, when the appeal was first opened, whether the opinions had been given at all or how or when. Though the point had been taken by the accused in their petition for special leave to appeal, dated April, 1941, no information on the subject had been sought by or given to the representatives of the Crown in this country: and the Crown in their case for the respondents contended that the maxim "*omnia praesumuntur rite acta*" applied, which apparently meant that even if the opinions ought to have been given in public it ought to be presumed that they were so given.

Their Lordships were not content to rely on a presumption of this kind in a capital case, and they directed that a telegram should be sent to the Resident Commissioner, asking for an answer to the following questions:

(a) whether the two administrative officers and the native assessor gave their respective opinions on the case before the Judge's judgment:

(b) if so, was each such opinion given in open Court, and if so at what stage? And were their opinions considered by the Judge before giving his decision?

(c) if the opinions were not given in open Court, was each such opinion given to the Judge privately? If so, at what stage, and was it considered by the Judge before he gave his decision?

(d) what was in brief form the substance of each of the opinions so given after the evidence was closed?

They received through the Dominions Office the following reply, dated May 12th.

Your telegram 7th May.

Appeals of Dhalamini and others. Judge's answers to questions are as follows. Begins.

(a) Yes.

(b) and (c) opinions regarding both administrative officer and native assessor were given to the Judge privately in Chambers after closing addresses of counsel and were considered by Judge before delivery of judgment. This is in accordance with procedure invariably observed in similar trials in the Union of South Africa and in High Commission Territories. Please see also Section 7 and Section 8 of the Proclamation No. 65, 1938.

(d) opinions so given were unanimous and in complete accord with conclusion expressed in judgment. Following is extract from report on case furnished to High Commissioner by opinion after conclusion of trial "On evidence I was satisfied beyond any reasonable doubt that all four accused had participated and were equally guilty of the crime with which they had been charged. In this conclusion of the facts I had complete concurrence of administrative officers who assisted me and of native assessor".

Judge further points out that even under the law in force prior to Proclamation No. 65 of 1938 (vide Proclamation No. 4, 1907, as amended by Proclamations No. 8, 1934; No. 23, 1935; No. 55, 1937, and No. 65, 1937) when administrative officers had a definite voice in decision it was never the practice for them to express their opinions in the open court unless they dissented. The object of the relevant portion Section 7 and Section 8, Proclamation No. 65, 1938, appears merely to establish that although administrative officers have now no voice in decision, their opinion shall nevertheless be expressed to and considered by Judge.

It is, therefore, established that the opinions of the officers and of the native assessor were given in private to the judge, contrary to the provisions of the proclamation as stated above. Their Lordships find nothing in the previous proclamations referred to in the learned judge's observations which throw any light on the construction of the present proclamation. Nor can they accept a construction other than what they have indicated by reason of the fact as stated that the practice adopted in this case has been invariably observed in similar trials in the Protectorate and elsewhere. It was suggested that so far as the native assessor was concerned if his opinion had to be given in public he might feel constrained to decide in favour of a native accused, whereas, in the privacy of the judge's room and in company only of the judge and the administrative officers he would be more likely to give an honest independent opinion. It was said that this was a good reason for construing the section as justifying the practice in fact adopted. Their Lordships cannot accept this contention. It would, in any case, afford insufficient reason for disregarding the plain meaning of the words used. But their Lordships do not take the view indicated of the respective probabilities of obtaining an honest opinion. In at least three codes with which their Lordships are familiar—those of India (Code of Criminal Procedure, 1898, S.309) Gold Coast (Criminal Procedure Code (1936 Revision), S.286) and Nigeria (Criminal Procedure Ordinance, 1914, S.142) where trial is with the aid of native assessors, the assessor is directed to give his opinion orally in open Court. These codes cannot, of course, be considered as throwing

any light on the construction of the Swaziland code. They make express provision for the opinion being given in public. But they do indicate that in the countries named there need be no such fear of a dishonest public statement by a native assessor as to make it desirable to be given in private. The analogy in the cases of Nigeria and the Gold Coast are, no doubt, closer than is the case of India. It must further be remembered that the provision for giving the judge, at his request, the assistance of a native assessor cannot be regarded solely from the point of view of aid given to the judge. It operates, and no doubt is intended to operate, as a safeguard to natives accused of crime, and a guarantee to the native population that their own customs and habits of life are not misunderstood. From this point of view the importance of publicity is manifest. Under the present practice, judging by the present record, it is not made known to the public whether any opinion was given at all by the assessor or what it was. The High Commissioner alone is informed in the judge's report. So far is it kept secret that it was not until this appeal was opened and a special request for information addressed by their Lordships to the Protectorate that the facts were made known for the purpose of appeal. There seems, therefore, no reason for refusing to give to the sections in the Proclamation the meaning which the words clearly indicate. What then should be the result of a failure to comply with the Proclamation and to hold the whole of the proceedings in public? In this country the omission would be a fatal flaw entitling a convicted criminal to have the conviction set aside. An analogous case is that presented by cases where the judge has either pronounced sentence or altered sentence in the absence of the accused, see *Lawrence v. The King* [1933] A.C.699 where a judge in Nigeria had altered sentence both in the absence of the accused and when sitting in Chambers. *Prima facie* the failure to hold the whole of the proceedings in public must amount to such a disregard of the forms of justice as to lead to substantial and grave injustice within the rule adopted by this Board in dealing with criminal appeals. There may no doubt be cases where the guilt of the accused is so apparent that in spite of the disregard of this essential need for publicity this Board would not consider it right to grant leave to appeal. But the present is not such a case: as a particular native custom formed an important consideration upon which it was essential that the proclaimed necessity for publicity should be observed. For these reasons their Lordships came to the conclusion that they should recommend to His Majesty that the appeals should be allowed.



In the Privy Council

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MAHLIKILI DHALAMINI AND OTHERS

v.

THE KING

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DELIVERED BY LORD ATKIN

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