

Bereng Griffith Lerotholi and others - - - - - Appellants

v.

The King - - - - - Respondent

FROM

THE HIGH COURT OF BASUTOLAND

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REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE  
25TH JULY, 1949

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*Present at the Hearing :*

LORD SIMONDS

LORD NORMAND

LORD REID

SIR JOHN BEAUMONT

[Delivered by LORD REID]

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On the 15th November, 1948, in the High Court of Basutoland the appellants were found guilty of the murder of Meleke Ntai and sentenced to death. The principal evidence against them was the evidence of four accomplices and the main ground of this appeal was that the learned Judge who convicted the appellants misdirected himself in law in considering the evidence of the accomplices. The trial in this case took place before the decision of the Board in *Tumahole Bereng and Others v. The King* 1949 A.C. 253. It was admitted that the learned Judge in this case properly applied the law as it was thought to be in Basutoland before that decision, but it was argued that if the grounds of decision in *Tumahole Bereng's* case are applied in this case these convictions cannot stand. Their Lordships must therefore first consider what was decided in *Tumahole's* case.

The law in Basutoland with regard to accomplice evidence is enacted in s. 231 of the Basutoland Criminal Procedure Proclamation, 1938; that section was amended by the Basutoland Criminal Procedure and Evidence (Amendment) Proclamation, 1944, and the amended section is as follows:—

“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 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.”

In *Tumahole's* case as in this case the crime alleged was a ritual murder; in *Tumahole's* case their Lordships first considered whether there was any evidence in addition to the evidence of the accomplices to show that the deceased had been murdered, and they held that there was not. Their Lordships therefore proceeded to a consideration of the legal issues “on the basis that there was no evidence in the case sufficient to confirm the two accomplices in proving, or to prove *aliunde*, that Katse was murdered at all.”

The foundation of their Lordships' judgment was that the expression “the single evidence of any accomplice” in s. 231 cannot be read as the equivalent of “the evidence of a single accomplice” but must be read as

meaning "the unsupported evidence of any accomplice or accomplices." So the proviso inserted by the amendment of 1944 requires that there must in addition to accomplice evidence be "additional proof that the offence charged has been committed by somebody." But the proviso only requires additional evidence that an offence has been committed. Once that has been proved the proviso is satisfied. There is no statutory requirement that additional evidence is necessary to prove the identity of the offenders. A conviction "cannot be impeached as beyond the power of the Court solely on the ground that the only evidence which implicated the appellants was the evidence of the accomplices." The first question in the present case must therefore be whether there is in this case evidence independent of the evidence of the accomplices which shows that a crime was committed by somebody.

The murder in this case is alleged to have taken place during the evening of Thursday, 4th March, 1948, at Rusis in the district of Teyateyaneng and the purport of the evidence of the witnesses other than the accomplices may be shortly stated as follows: On the 4th March, there was a funeral a few miles away from Rusis, and the deceased rode to that funeral in a small party which included No. 11 accused, who was his brother or cousin. On their way back from the funeral, and some distance before Rusis was reached, No. 11 accused suggested that the party should gallop their horses. The deceased was not in very good health and was unable to gallop, so he refused to gallop and was left behind by the rest of the party. There is nothing to suggest that at this time he was intoxicated or in other than his usual health. He was not seen alive again by any of the witnesses other than the accomplices. Shortly after leaving the deceased behind the party passed a group of men standing near the road and No. 11 accused left the party to join these men. He remained with them for a short time and then made up on the party which had ridden on slowly. The following morning the deceased's wife was anxious as her husband had not returned. She consulted No. 11 accused, who lived nearby, but he was not helpful. Some time after that the deceased's horse returned home riderless and without its saddle. His wife then went out to search for him and in the course of her search went to the house of No. 8 accused. She was there informed that a saddle and other articles had been found in the open some distance away. She went out and identified the saddle, saddle cloth, sjambok and handkerchief as articles belonging to her husband. These articles were found lying about one hundred yards from the road. Nothing further was discovered that day. Early the next morning on Saturday, 6th March, a witness, who was a servant of No. 8 accused, found the body of the deceased lying in a donga some four or five hundred yards from the road. The approach to the donga is steep and rough, there being a low ridge intervening. The donga is a steep-sided cleft in this ridge. This servant of No. 8 accused was in the habit of going to this donga in the morning. No. 8 accused had a number of lunatics under his charge and this servant used to take them out in that direction. On this occasion he went out to the donga at a very early hour; on his return he reported that he had found a body in the donga. The police were sent for and the deceased's body was removed.

A post mortem examination of the body was made during the afternoon of Sunday, 7th March. This disclosed that the cause of death was drowning. There had been heavy rain on Thursday and some water had accumulated at the bottom of the donga: but any person falling into that water could easily have got out unless he was seriously injured or unconscious. If the deceased was unconscious when he fell into the donga, the position in which his body was lying was such that he would have drowned in a few inches of water. When the body was removed from the donga some small crabs were found below it and the post mortem examination disclosed that crabs had eaten small parts of the flesh at various points, and that considerable parts of the lips had gone: these parts might have been eaten by crabs or they might have been cut off. There were no other significant injuries. The only other material fact disclosed by the post mortem examination was that the deceased had eaten a large meal

within a comparatively short time before his death. There was a large meal provided at the funeral which he had attended and that fact together with the medical evidence that he had been dead about two and a half days when the post mortem examination was made, show that he must have died not very long after the time when he was left behind by the rest of the party on his way home from the funeral. Only one boot was found on the deceased's body. Sometime on Sunday, the 7th, another witness found the deceased's hat and the other boot lying in the open about half way between the place where the saddle was found and the donga where the body was found. Some stress was laid by counsel for the appellants on the absence of blood from the blankets which the deceased was wearing, and on the fact that the body was not bruised. As regards the absence of blood, these blankets were not carefully examined, but there was no blood apparent; on the other hand the water might have washed away any blood there was. The absence of bruising is remarkable on any view of the facts because it seems clear that the deceased must have fallen or been thrown from the top of the donga to the bottom, a height of some 13 ft. He must have been unconscious when he reached the bottom or he would not have been drowned, and in such circumstances bruising might have been expected whatever the cause of his fall into the donga; but the medical evidence was to the effect that the blankets which he was wearing, and the fact that there was mud at the bottom of the donga could account for the absence of bruising. In their Lordships' judgment these facts are not consistent with death by accident, and are sufficient to prove that the deceased must have been subjected to violence before his death. It cannot be supposed that the deceased voluntarily dismounted, unsaddled his horse, walked in the direction of the donga and fell in. He might have been thrown from his horse where the saddle was found but it seems incredible that in that event he would have wandered off in a dazed condition over rough ground, dropped a boot on the way and finally have reached the donga a quarter of a mile away. It was also suggested that he might have had an epileptic fit. There was evidence that at one time he had suffered from epilepsy but similar considerations make it equally difficult to suppose that an epileptic fit could have caused him to wander off in the way which has been described. The only conclusion which can reasonably be drawn from the facts is that the deceased was carried to the donga and was unconscious when he was put into it and left there.

Their Lordships therefore hold that there is in this case sufficient evidence independent of that of the accomplices to show that a crime was committed and to satisfy the test laid down in Tumahole's case.

That, however, does not end the case. Although there was independent evidence sufficient to show that a crime had been committed, that evidence only implicated one, or, at most, two of the accused as having taken part in the crime. There was no evidence beyond that of the accomplices to show that any of the other accused had taken part in the crime. It was argued for the appellants in this case that, although s. 231 permits a court to convict on accomplice evidence alone once the proviso is satisfied by independent proof that a crime has been committed, Tumahole's case decides that before doing so the court must have in mind and apply the cautionary rule of English practice, emphasising the danger of acting on accomplice evidence (be it that of one or more accomplices) which is uncorroborated in some material respect implicating the accused. It was argued that the learned Judge who tried this case did not have in mind or apply that rule and therefore that the appeal must succeed. To appreciate this argument it is necessary to refer briefly to the evidence of the accomplices and to the way in which the learned Judge dealt with it. One of the four accomplices who gave evidence Moha Moli was described by Counsel for the Crown as an untruthful witness and no reliance was placed on his evidence. The Crown case depended on the evidence of the other three accomplices Mapeshoane Sothi and Sepalami. The evidence of Mapeshoane was that on the evening of the 3rd March, all the accused except Nos. 8 and 9 met at No. 2 accused's house. No. 2

accused is the local chief and No. 1 accused, a son of the late paramount chief, was staying with No. 2 accused at that time. There was also present another chief Ntoane who died before the trial. It was arranged at this meeting that there should be a ritual murder, that No. 11 accused would "sell" his brother the deceased for £100 to be the victim and that he would contrive that his brother would be alone when passing the place appointed for the murder on the following day of his return journey from the funeral. No. 11 accused did so contrive and when the deceased reached the appointed place all the accused (other than No. 11) the four accomplices and the deceased Ntoane intercepted him, dragged him from his horse and held him down throttling or strangling him while portions of his upper and lower lips were cut off by Ntoane and handed to No. 1 accused Chief Bereng. Chief Bereng is said then to have remarked, "This man of yours has no blood, he is an unhealthy person" and no more wounds were inflicted. It was apparently thought that he was already dead and the chiefs directed that he should be taken away by some of the accused and thrown into the donga where his body was found two days later. The other two accomplices were not present at the meeting on 3rd March. But with regard to the events of the 4th March, their evidence was similar in most respects to that of Mapeshoane. The evidence of these three witnesses was given at considerable length and with a wealth of detail. The learned Judge examined this evidence with great care. He said "it is difficult to believe that they could have concocted the terrible story to which they have deposed," and at the end of his examination of the evidence he expressed his conclusions in these terms:

"Mapeshoane was cross-examined in great detail by counsel for the defence, and in my opinion his evidence was not shaken. He gave his evidence well and conveyed the impression to me that he was speaking the truth. I can find no sufficient grounds for rejecting his evidence. His evidence is corroborated as to the meeting of 3rd March by Ntsane and Makhetha Ntai. (These two witnesses accompanied Mapeshoane to the house of No. 2 accused but did not attend the meeting.) As to the events of the evening of 4th March he was corroborated in material respects by the evidence of the witnesses Sothi, Sepalami and Moliko. It is true that Sothi's evidence is, in many respects, at variance with that of Mapeshoane. He is an unintelligent man of weak character, but in my opinion he tried to tell the truth to the best of his recollection and ability. Sepalami's evidence was substantially in agreement with that of Mapeshoane. As I have said, they told a circumstantial and terrible story with a wealth of detail and I cannot believe that it was concocted."

It was argued that nevertheless the learned Judge misdirected himself, first because he accepted the submission of the Attorney-General, who conducted the case for the Crown, that one accomplice can corroborate another accomplice; and secondly because the cautionary rule which he had in mind fell short of the cautionary rule of English practice.

Again it becomes necessary to consider what was decided in Tumahole's case. In that case after having decided the case on the ground that there was no independent evidence to prove that the deceased had been murdered and had not died by accident, their Lordships' judgment proceeded:—

"This is enough to dispose of the appeal, but their Lordships think it right to refer to two further matters which it raised and which are of importance in the administration of criminal justice in the Territory. The first of these relates to the cautionary rule of English practice emphasising the dangers of acting on accomplice evidence (be it that of one or more accomplices) which is uncorroborated in some material respect implicating the accused. It was not suggested that this rule of practice was alien to the conduct of criminal proceedings in Basutoland, or that it had been ousted by the provisions of s. 231."

In the present case their Lordships have had the advantage of hearing an argument by the learned Attorney-General for the Territory in the course of which he drew their Lordships' attention to several matters

which had not been put before the Board which decided Tumahole's case. In Tumahole's case it was argued for the appellants and not disputed by Counsel for the Crown, that from 1884 onwards English Law and practice had been applicable in Basutoland except in so far as superseded by legislative enactment and that accordingly the English cautionary rule must apply as it was not inconsistent with the provisions of s. 231. It now appears that this is a misapprehension. Basutoland was annexed to the colony of the Cape of Good Hope by an Act of the legislature of that colony in 1871 and from that time until 1884 it remained a part of that colony. In 1884 the legislature of that colony passed a bill to provide for the disannexation of Basutoland from the colony. That bill was reserved for the signification of Her Majesty's pleasure thereon, and on the 2nd February, 1884, by Order in Council it was provided *inter alia* that Basutoland should again come under the direct authority of Her Majesty and that all laws in force in Basutoland at the time when this Order took effect should continue in operation until repealed or altered by proclamation of the High Commissioner. On 29th May, 1884, the High Commissioner made a proclamation, Article 12, of which is as follows:—

“In all suits, actions, or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope:

Provided, however, that in any suit, action or proceeding in any Court, to which all the parties are natives, and in all suits, actions, or proceedings whatsoever, before any Native Chief exercising jurisdiction as aforesaid, native law may be administered; and provided, further, that no Act passed after this by the Parliament of the Colony of the Cape of Good Hope, shall be deemed to apply to the said territory.”

In 1884 the law in force in the colony of the Cape of Good Hope with regard to accomplice evidence was in substantially the same terms as those of s. 231 as now amended, and that law continued to be in force in Basutoland until 1938. In 1938 the law of Basutoland was changed. S. 231 of the Basutoland Criminal Procedure Proclamation, 1938, in its original form was as follows:

“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.”

These provisos were new and were obviously based on English practice. But after a period of six years they were repealed by the Proclamation of 1944 already referred to with the result that the law of Basutoland on this matter reverted to what it had been before 1938.

The learned Attorney-General for the Territory cited to their Lordships a series of decisions of the Appellate Division of the Supreme Court of South Africa which show that since 1918 the Courts of the Union of South Africa have consistently adopted a construction of the corresponding section in the Criminal and Procedure Evidence Act, 1917, of the Union of South Africa, which is different from that adopted by the Board in Tumahole's case, and he also brought to their Lordships' attention the existence in South Africa of a cautionary rule which, while different in some respects from the cautionary rule of English practice, is based upon the same broad considerations of fairness to the accused. It is extremely regrettable that these matters were not brought to the attention of the Board in Tumahole's case.

The learned Attorney-General argued that Tumahole's case was wrongly decided. It is not necessary for their Lordships to consider that argument in so far as it relates to the construction of s. 231. Their Lordships have already stated their reasons for holding that, in so far as it is based on that

ground, the present appeal must fail whether the construction put on that section in Tumahole's case was correct or not. Their Lordships therefore do not propose to express any opinion in this case as to the propriety of reopening this question or as to the validity of the argument submitted. But their Lordships think it necessary to examine further the question whether the cautionary rule of English practice must be applied in Basutoland.

It is not disputed and there is no doubt that a judge in Basutoland as elsewhere must always have in mind the danger of accepting accomplice evidence which is uncorroborated by independent evidence: the question is whether a judge in Basutoland must apply the rule of English practice as laid down by the Court of Criminal Appeal in *Rex v. Baskerville* 1916 2 K.B. 658. In the present case the learned judge who convicted the appellants was referred to the cautionary rule which is followed in South Africa and he appears to have been guided by it. That rule has been stated by Schreiner, J.A., in *Rex v. Ncanana* 4 S.A.L.R. (1948) 399 in the following terms:—

“The cautious Court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof *aliunde*, that the crime charged was committed by someone; so that satisfaction of the requirements of s. 285 (the section in the South African Act corresponding to s. 231 in Basutoland) does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although s. 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question.”

In Tumahole's case in view of the arguments submitted it was almost inevitable that reference should be made to the English cautionary rule. It was admitted and rightly admitted that a cautionary rule must be observed in Basutoland, and no rule other than the English rule was suggested as applicable. In the circumstances their Lordships do not regard Tumahole's case as a decision that the law of Basutoland requires the application of the English rule and no other. Reference was made to s. 268 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938, which is in the following terms:

“In criminal proceedings in any case not provided for in this chapter the law as to admissibility of evidence and as to the competency examination and cross-examination of witnesses in force in criminal proceedings in the Supreme Court of Judicature in England shall be followed in like cases by the Courts of the Territory and by District Commissioners holding preparatory examinations.”

The cautionary rule is concerned neither with the admissibility of evidence nor with the competency examination or cross-examination of witnesses and this section cannot therefore be authority for requiring the adoption of the English cautionary rule. No other legislative provision

in force in Basutoland was suggested as containing such authority. Their Lordships are now satisfied that the South African cautionary rule is properly applicable in Basutoland, and that it was present to the mind of the learned Judge who convicted the appellants and properly applied by him in this case. The appeal must therefore fail on this ground also.

One other matter must be noticed. It appears that shortly before his death the deceased chief Ntoane made a statement about the facts of this case, and that rumours about this statement had been heard in the course of his administrative duties by one of the administrative officers who sat to assist the Judge in this case. In Tumahole's case their Lordships commented on the conduct of an officer who had, before the trial and in the absence of the accused, taken active steps to acquaint himself with the facts of the case and had interrogated one of the witnesses. In their Lordships' view that is an entirely different matter: it is impossible to hold that an officer who has taken no active steps to acquire information, but who happens to have heard some rumour about a case, is disqualified from sitting or acts improperly in sitting at the trial. It is not suggested that this officer passed on the rumours to the Judge or made any other use of them.

Their Lordships have already intimated that they would humbly advise His Majesty that this appeal should be dismissed.

In the Privy Council

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