31126

IN THE PRIVY COUNCIL P.C. Appeal No.16 of 1951

ON APPEAL FROM THE HIGH COURT OF SWAZILAND

B E T W E E N:

VELABANTU NGCAMPALALA
LOCELA NGCAMPALALA
MKAKWA SIDKONDE, and
MAGABELA SIKONDE

Appellants

-and-

THE KING

Respondent

CASE FOR THE APPELLANTS

pp 353-366

1. This is an appeal by Special Leave from the judgment and

p 369 sentences of the High Court of Swaziland dated the 12th October 1950 whereby the Appellants, Velabantu Ngcampalala (hereinafter called No.1 accused) Locela Ngcampalala (hereafter called No. 2 accused), Mkakwa Sikonde (hereafter called No.5 accused) and, Magabela Sikonde (hereinafter called No.6 accused) were found guilty of murder and sentenced to death.

2. The Appellants were indicted together with two others namely Lufukazi Ndhluli and Nconwane Gamede who are hereinafter referred to as Nos. 3 and 4 accused respectively. The charge against all six accused was that in or about the month of January 1948 they did murder a Swazi male named Magongo Ngcampalala.

3. The principal grounds of appeal are as follows:

(a) The principal witness for the Crown was a single accomplice Mbalekelwa Ngcampalala who was alleged to have assisted in the disposal of the body but not to have been present at the murder. Apart from a youth of 17 years of age named Masaletsheni Ngcampalala (who deposed that he saw the decease walking with Accused Nos.1, 6 and 5 on the day of his disappearance and that he saw the body two days later) the only other witnesses called to corroborate the accomplice or implicate the Appellants in the alleged murder were four children namely Doyika, Mfanyana, Kontile and Ngogola.

Their respective ages at the time of the trial (i.e. over two years after the alleged murder) were approximately 12, 13, 10 and 11.

The learned trial Judge permitted Mfanyana, Kontile and Ngogola to give unsworn evidence:

(1) although they did not understand the duty of speaking the truth

(2) without first satisfying himself that they did not understand the nature of an oath

(3) without administering or causing to be administered any admonition to impress their minds and bind their consciences, and thereby failed to observe the requirements of section 214 of the Criminal Procedure and Evidence Proclamations 1938. In the case of Doyika the learned judge permitted her to be sworn without first inquiring whether she understood the nature of an oath and thereafter directed that she should be regarded as having been cautioned and not sworn without observing the aforesaid requirements of section 214.

(b) The learned judge directed himself and the assessors (it is submitted wrongly) that the unsworn evidence of one child of tender years could corroborate the unsworn evidence of another such child.

(c) The learned judge failed to warn himself and the assessors of the danger of acting upon the unsworn evidence of children of tender years, more particularly when such evidence was adduced in support of the evidence of an accomplice.

(d) One of the principal contentions for the defence was that it was impossible to reconcile the evidence of certain witnesses for the Crown. Mfanyana said that one arm was missing from the deceased's body and that he saw Accused Nos. 1 and 2 burying it in a separate place from the grave where the deceased was buried. Kontile deposed that he saw the body later than the other children deposed that

it had all its arms and legs. Dr. Batchelor who conducted the postmortem on the skeleton of the deceased certified that all the long bones were present and that only the right hand thumb and the left hand fourth and fifth fingers were missing. Nevertheless, although this discrepancy was one of the chief points relied upon by the defence the learned judge failed to refer to it in the course of his judgment or to direct himself or the assessors with reference thereto.

4. The material sections of the Swaziland Criminal Procedure and Evidence Proclamation are as follows :-

"212.(1) It shall not be lawful to examine as a witness any person other than a person described in either of the next two succeeding sections, except upon oath.

(2) The oath to be administered to any person as a witness shall be administered in the form which most clearly conveys to him the meaning of the oath, and which he considers to be binding on his conscience.

"213.(1) In any case where any person who is, or may be, required to take an oath objects to do so, it shall be lawful for such person to make an affirmation in the words following:- "I do truly affirm and declare that" (here insert the matter to be affirmed or declared). Such affirmation or declaration shall be of the same force and effect as if such person had taken such oath.

(2) Every person authorised, required, or qualified by law to take or administer an oath shall accept, in lieu thereof, an affirmation or declaration as aforesaid.

(3) The same penalties, punishments and disabilities which are respectively in force and are attached to any neglect, refusal or false or corrupt taking or subscribing of any oath administered in accordance with the last preceding section, shall apply and attach in like manner in respect of the neglect, refusal, and false or corrupt making or subscribing respectively, of any such affirmation or declaration as in this section mentioned.

"214. Any person produced for the purpose of giving evidence who, from ignorance arising from youth, defective education, or other cause, is found not to understand the nature, or to recognise the religious obligations, of an oath or affirmation may be admitted to give evidence in any court or on a preparatory examination without being sworn or being upon oath or affirmation:

Provided that before any such person proceeds to give evidence the presiding officer before whom he is called as a witness shall admonish him to speak the truth, the whole truth, and nothing but the truth, and shall further administer or cause to be administered to him any form of admonition which appears, either from his own statement or other source of information, to be calculated to impress his mind and bind his conscience, and which is not, as being of an inhuman, immoral, or religious nature, obviously unfit to be administered:

Provided further that any such person who wilfully and

falsely states anything which, if sworn, would have amounted to the crime of perjury, or any offence declared by any statute to be equivalent to perjury, or punishable as perjury, shall be deemed to have committed that crime or offence, and shall upon conviction, be liable to such punishment as is by law provided as a punishment for that crime or offence."

"258. 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 corresponding provision in English Statute law is contained in Section 38 of the Children and Young Persons Act 1933 which in substance, re-enacts Section 30 of the Childrens Act 1908 as amended by the Criminal Justice Administration Act 1914, and which reads as follows :-

"38. (1) Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the Court understand the nature of an oath, his evidence may be received, though not given on oath, if, in the opinion of the Court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with the provisions of section 17 of the Indictable Offences Act 1848 or of this Part of this Act, shall be deemed to be a deposition within the meaning of that section and that Part respectively:

Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him".

5. The case for the Crown was as follows :-

The deceased who was the son of Nos. 2 and 6 accused was mentally backward. There was a conspiracy amongst the accused to kill him either because he was a nuisance in the kraal or in order by means of certain ceremonies to strengthen No. 2 accused. On a Friday some time in or about January 1948, the exact date being unknown, it was agreed by all the accused that the deceased should die, and No. 5 accused agreed to give him medicine on the following Monday. On the Monday after the medicine had been given the deceased disappeared, On the Tuesday the body was mutilated in the presence of all the accused and the accomplice

Mbalekelwa Ngcampalala. On the Wednesday the body was found by some children, but it was destroyed later that day by vultures and after this the bones were buried by the accused, and certain ceremonies gone through.

The bones were first exhumed on the 12th April 1948 and then reburied. They were later re-exhumed on 15th March 1950.

6. Masaletsheni Ngcampalala who was a son of Accused No. 2 and a brother of the deceased deposed (inter alia) as follows :-

pp.29-69 On the Monday before the deceased disappeared he saw him at about noon walking towards the fields with Accused Nos.1,5 and 6. He never saw him alive again. On the same day he saw Accused No.6 weeping. On the following day the deceased was found to be missing and an unsuccessful search was made. On the Wednesday he went out with the child Ngogola and found the body of the deceased. He observed wounds on the stomach, right forearm, thigh and right toe and a cut on the neck which looked as though it had been made with a cane knife. There were also foot prints of naked feet in the neighbourhood. The body had not yet been attacked by vultures or wild animals, although he saw vultures later. He reported what he had found to his father (Accused No. 2) who said that they would wait until deceased's Mother came back from fetching water. Later on this witness saw Accused Nos. 1, 3 and 6 returning with the skeleton of the deceased and Accused No. 3 said that they had found the body already eaten up by vultures. The next day Accused Nos. 1 and 2 buried the skeleton and in the evening there was a ceremony which involved killing a red bull, at which all the accused were present. When this witness was first asked by the police about the death of the deceased he denied all knowledge of the matter because Accused No.2 had warned him not to disclose that Accused No.5 had been at the kraal.

7. The accomplice Mbalekelwa Ngcampalala the son of Accused No.2

p.77-39 and brother of the deceased, deposed (inter alia) that the deceased was not normal either mentally or physically. Accused

No. 5 had been giving him medicine. On the Friday before the deceased disappeared he heard No.2 plotting with No.5 to kill him. The other accused were present at the time. There was a further discussion on the Saturday at which all the Accused were present. It was then agreed that the deceased should be killed with "medicine" on Monday, though accused No.3 objected and said she did not want to concern herself in the matter. Accused No. 1 said nothing. On the Monday this witness saw the medicine being administered to the deceased by accused No. 5. He (the witness) then went away to a neighbouring kraal where he had been invited to work for beer. He was drunk when he returned home in the evening and slept all night. Next morning Accused No. 2 told him that the deceased had run away. Later in the day Accused No.1 said "Oh we killed the person yesterday, my brother" but shortly afterwards said "I was just pulling your leg". They then joined the other accused who were sitting round the body of the deceased which was covered over with a cotton blanket. Accused No. 2 explained that he had struck the deceased with a cane knife. He then ordered the witness to strike the deceased with a knob stick and said "Yes even if you report us you will also be in the case". The body was then exposed and mutilated and this witness helped to carry it away.

8. The evidence of the four children is summarised in the passage from the judgment set out in paragraph 16 hereof.

p.175 p.176 9. The evidence of Mfanyana (the child aged 13) was that one arm was missing from the body when he saw it, that the next day he saw Accused Nos. 1 and 2 burying something under a stone and that the day after that he looked under the stone and saw the arm.

p.189 -190 10. The evidence of Kontile (the child aged 10) was that she saw Accused No.1 "standing in the lands" and that the next day she had seen Mfanyana dig at that spot and had seen a human arm.

p.205 11. The evidence of Ngogola was that Accused No.4 was suffering from a sore leg at the time when deceased disappeared and could not walk.

12. The report of the post-mortem held on 12th April 1948 contained the following passages :-

> "The skeleton was produced and put together. Both hands had parts missing but it is thought the left foot was intact"
>
> .....
>
> "External appearance....merely a skeleton with a large piece of skin which appears to be the back extending from shoulders to buttocks including the anus all long bones present"

p.72 13. Sub-Inspector Potgeiter of the Swaziland Police deposed that on 30th January 1950 the child Mfanyana pointed out to him a piece of skin hanging on a tree and the stone under which it was alleged that the arm had been buried. No evidence was given to show that an arm had been found.

pp.214 -297 14. All the accused gave evidence denying all knowledge of the offence. They deposed that the deceased had disappeared on the Monday and that on the Wednesday they found his bones picked clean by vultures. They further deposed that at the time when the accused disappeared Accused No.4 had a swollen leg and was unable to walk.

15. The speech of Counsel for the Defence contained the following passage :-

p.328 "Your Lordships will remember that when one of the Crown witnesses said he saw the body, the arm had been completely severed. He says that on a subsequent occasion he saw No. 1 and 2 accused in the veld burying something, and subsequently they went there and found an arm buried under the stone which is now an exhibit before the Court. I submit that that is a pure invention, I submit that it is a pure phantasy. The evidence of the doctor is very clear, my Lord, that he found all the long bones in the grave. We have the evidence that this grave was never disturbed, excepting of course when the exhumation took place by the Police and the Doctor, and yet on opening this grave, mysteriously appears an arm, which should to all intents and purposes have been found under a stone in the veld"

16. The judgment contained the following passages :-

p.354 "The first witness called by the Crown was the doctor and he was unable to give the help which doctors usually do in a case like this to the Crown, because he was not presented with a body upon which he could do a post-mortem, but only with a bag full of bones. He was therefore unable

to give a definite opinion as to the cause of death, nor can the Court place particular reliance upon his opinion with regard to the fitting of certain bones and teeth when the body had been exhumed for the second time"

p.361 L.10 "The first witness called to corroborate him: and of course Masaletsheni does corroborate him in many particulars - after the accomplice's evidence, is Doyika. She is a girl about twelve years old who alleges she is the daughter of No.2 accused. She says very definitely that she heard when the deceased disappeared and that the next day she went out with the cattle and goats with someone, called Kontile, a child, and Mfanyana. She says that that day she saw some people carrying something and that she saw the last witness and all the accused, except No. 5 accused, and they took that something, which she thought was a human being, and they placed it under an umtomboti tree. I think it is clear there to say from the evidence that when I said under this tree, it was really in the open near to the tree. The next day she says she went along to see what it was and that the two other children were with her, and she saw that it was a body and that the body had been mutilated in the number of ways she describes, and that she reported the matter to No.2 accused. This was about midday and it was not until the afternoon that they went to collect the body; that when they got there the vultures had already been at it and there were only bones remaining. She sticks to it that when she was there at midday the vultures had not eaten it. She also speaks as to the various ceremonies that she saw taking place. She says she was told by No.2 accused not to say anything about it, which she says accounts for the fact that when the Police asked her on the first occasion she said she did not know anything about it. I should call attention at this point, to another statement of hers to the effect that when she made the report she did tell No. 2 accused that the vultures were there and her explanation for that is that she told him that least he should think that she had seem him with the others carrying the body the day before.

p.362 L.11 The next is Mfanyana, another child of about eleven. This child corroborates Doyika's evidence in almost every particular, even with regard to the details of the wounds, particularly the one on the neck. The last witness and possibly the most convincing was a child of about eight called Kontile. He says that he was watching the goats and he saw Nos. 1,2,4,5 and 6 carrying a person, all except No. 3 accused. It should be noted that he includes No.5 accused although an earlier witness excludes No.5 accused. This child says that he went there the following day and he found and recognised the deceased dead, and he describes the various wounds that he saw, the neck was cut, the ear, the stomach was cut open, and he alleges that No.2 accused told him to say that the deceased died in the veld, and that No.6 had found the body and that if he was to say that the children had found the body, he would cut their throats. He does say that when he went towards the body he saw some vultures flying away, and he does say that the witness Mbalekelwa helped to carry the body.

p.362. L.31 The last witness of any importance is another child Ngogola who comes from a neighbouring kraal and who happened to be staying there with No.2 accused. He had been out herding and he saw the body with

the wound on the neck, wound on the arm; he said he didn't look very carefully because he was frightened and that he was told by No.2 accused to say that the deceased died in the veld and that the body had been eaten by vultures. He says that when he went towards the body the vultures were circling but they hadn't settled on the body then. He gives some further evidence with regard to one or more of the ceremonies that he saw take place. In this connection it is only fair to say that he is the one who says that No.4 accused had a bad leg and took no part in the proceedings; that she could not walk. That in short is the evidence for the Crown".

p.365.L.13 "If the story of almost any, much less the whole collection of children is to be believed, these accused persons are guilty and we do not believe that Mbalekelwa could ever get or persuade a collection of young children to deliberately attempt to take away the lives of their nearest and dearest. Whatever Mbalekelwa himself might be going to gain out of this the children are depriving themselves of those who look after them and care for them and we cannot believe that their story is a concoction of lies. Why I use the word 'we' is because this is a unanimous decision of all of us"

The learned Judge made no reference to the

p.366 L.14 evidence about the alleged burying of the arm.

In this event he found Accused Nos. 1, 2, 5 and 6 guilty of murder and sentenced them as aforesaid. He found

p.366 L.13 accused Nos. 3 and 4 guilty of being accessories after the fact (since he held that they had assisted in disposing of the body) and sentenced them each to 2 years imprisonment with hard labour, these sentences to be suspended for 2 years on condition that the accused were not guilty of any crime of violence during that time.

17. Special Leave to appeal to His Majesty in Council was granted by Order in Council dated 9th day of April 1951.

At the hearing of the petition for Special leave the Judicial Committee of the Privy Council directed an inquiry as follows :-

What steps if any were taken to comply with the requirements of Section 214 of the Swaziland Procedure and Evidence Proclamation? In particular :-

1. What inquiry, if any, did the Court make in each of the four cases in order to ascertain whether the witness understood the nature or recognised the religious obligations of an oath?

2. Did the caution referred to in the Record in each case take the form of the admonition required by the proviso to section 214 to speak the truth the whole truth and nothing but the truth? If not what form did it take?

3. What steps were taken in each case to administer or cause to be administered to the witness the further admonition required by the proviso and to ascertain either from the witness's own statement or from some other source of information what form of admonition would be calculated to impress his mind and bind his conscience?

18. In answer to these inquiries a joint statement dated 19th
P.4 (supp) April 1951 has been prepared by Crown and Defence as follows :-

1. The proceedings were electrically recorded by the official shorthand writer. The transcripts annexed hereto marked "A" (Doyika) "B" (Mfanyana) "C" (Ngogola) and "D" (Kontile) are verbatim records of what passed between the Chief Justice and the respective witnesses before their evidence was led in chief.

2. The interpreter states that to the best of his recollection the caution given to each witness in Swazi was as follows :-

> "You must speak the truth, the whole truth and nothing but the truth - you should only tell me what you know and saw yourself - and not what you have been told by somebody else - you need not be afraid as long as you tell the truth"

Arrangements are being made to place the shorthand writer and interpreter in personal contact, in order that the interpreter can hear his own words in Swazi (as used to Doyika) which have been recorded on the belt. A translation of what was recorded will follow as soon as possible.

3. No express finding as to the religious, educational or mental condition was made, but there was a finding by implication, as after the Chief Justice had received the replies to his questions, he directed that the witnesses be admonished.

4. Each child was manifestly of tender years, and very seldom indeed can a Swazi child give even an approximate estimate of its own age.

5. Swazi, like other Bantu children, receive nc religious education of any sort, unless, as is not the case here, they attend some missionary school.

The transcripts referred to in paragraph 1 above are as follows :-

"A"

DOYIKA

Mr. Thompson: I call Doyika Page 29

Then the interpreter either cautions or swears Doyika. It is in native language.

Mr. Thompson: Doyika, are you related to No.2 accused at all?
His Lordship: Before we get on with that question let us get this cleared up. I see she was cautioned in the lower Court as being too young but she strikes me as being old enough.

Do you know how old you are? No. I don't know how old.

How old would you say she was - ask the assessor? I can't tell, she is not a tall person.

I can see that. Thank him for his assistance.

Does she know the difference between right and wrong? Does she go to school? No I don't go to school.

Do you know what happens if you tell lies? No I don't know.

Well we will take it she is cautioned and not sworn.

Mr. Thompson: Doyika, are you related to No.2 accused? I'm No 2 accused's daughter.

etc.

"B"

P.5 (supp) MGANYANA (Page 170 of Record)

Mr.Thompson: M'Lord this witness was also cautioned at the Preparatory examination.

His Lordship: How old is he does he know? I'm 14 years old.

14 years old. Have you ever been to school? No I was told what my age was at the hospital.

I see, Do you know what will happen to you if you tell a lie? No.

All right caution him.

Mr.Thompson: Do you live at the kraal.....

"C"

P.6.(supp) NGOGOLA (Page 197 of Record)
His Lordship: Do you to to school? No.
Do you know the difference between right and wron
No. I don't.
Right warn her to speak the truth.

Mr.Thompson: Just to get this on record Mr.Interpreter what is the warning you give these children?
Interpreter: I just warn them to speak the truth and nothing but the truth.

Are you related to any of these accused.....

"D"

P.6.(supp) KONTILE (Page 187 of Record)
His Lordship: Well Kontile. What do you think Mr.Interpreter? I think she is about eight or nine?.....Yes
I don't think she can be asked to take the Oath; we will therefore caution her. Tell her if she doesn't understan the question just to say quite boldly she doesn't understand and

not to answer a question until she does.

Mr. Thompson: You remember.....

19. At first it was found impossible to place the shorthand writer and the interpreter in personal contact and so the belt including the recording of opening of the examination of the witness Doyika was played over to Archibald George Dovey an experienced interpreter who on 8th day of May 1951 swore an affidavit giving an interpretation of the words used to the witness as follows :-

"What is your name? Doyika Ngcampalala

"Lift up your hand

"Say you swear all words that I will speak in this case will be the truth, because if I speak lies I will (find or get) trouble with the Chief"

20. Later it was found possible for the Court Interpreter one Johannes Cleophas Musi to hear the recording of the preliminary enquiries which were made before the evidence of the witnesses Mfanyana, Kontile and Ngogola was given and on

P.9(supp) the 30th day of June 1951 he swore an affidavit as follows :-

I, JOHANNES CLEOPHAS MUSI of Bremersdorp Swaziland make oath and say as follows :-

1. I am the official sworn interpreter in the English and Swazi language in the High Court of Swaziland.

2. I interpreted at the hearing of the trial of the above named appellants.

3. That the evidence was electrically recorded, and that the official shorthand writer played back to me the record of the preliminary enquiries before the evidence of the witnesses Mfanyana Ngcampalala, Kontile Ngcampalala, and Ngogola Mamba was given, at the time when these witnesses were cautioned.

4. That the following is a true transcription and translation of such recording :-

(1) In the case of Mfanyana Mgcampalala :-

His Lordship: How old is he does he know?
Witness: I am fourteen years old.
His Lordship: Fourteen years old. Do you go to school?
Witness: No. I was told what my age was at the hospital.
His Lordship: Do you know what will happen to you if you tell a lie?
Witness: No I do not know.
His Lordship: All right caution him
Interpreter: Uti uma hluli angiku tshele kuti konke loku

oza ku kuluma kubabo amaciniso unga kulumi into enga manga (His Lordship says that you must speak the truth and that you must not tell any lies)

(2) In the case of Kontila Ngcampalala :-

His Lordship: What do you think the witness's age is Mr. Interpreter?
Interpreter: I should think she is eight or nine
His Lordship: I do not think she could be asked to know about an oath. We will therefore caution her.
Interpreter: Uthi u mahluli angiku tshele kuti konke oza kuku kuluma ku boba amaciniso amaciniso odwa. (His Lordship wants you to speak the truth and nothing but the truth:

(3) In the case of Ngogola Mamba:-

His Lordship: Do you go to school?
Witness: No.
His Lordship: Do you know the difference between right and wrong?
Witness: No.
His Lordship: Right,warn her to speak the truth.
Interpreter: Ithi inkosi angi ku tshele kuthi loko oza ku kuluma ku boba li ciniso i ciniso lodwa u nga Kulumi amanga (His Lordship wants you to tell the truth the truth only and nothing that is not true)
Mr.Thompson: What is the warning you give these children anyway?
Interpreter: I just warn them to speak the truth and nothing but the truth.

21. Sir Walter Harragin the Chief Justice for the High Commiss-

P1 (supp) ion Territories who presided at the trial of the appellants in a letter dated 25th April 1951 says :-

"I have seen a transcript of an electric recording machine which sets out exactly what took place at the trial.

I will only add that Doyika appeared to be the eldest of the children and once having decided that she was not old enough to take an oath when the younger children were called the same ruling was almost automatic.

The warning that the interpreter alleges that he gave is in accordance with my instructions to him.

Danger with the evidence of native children lies not so much in their deliberate fabrication of evidence but in their repetition of a story which they have heard from their elders as if they had been present at the incident."

Further in a report dated 29th day of April 1951 the learned Chief Justice sets out his normal practice when recording the evidence of children in which he states that he asks them such questions as :-

'How old are you?
Do you go to school?
Are you a Christian?
Do you know what will happen to you if you tell a lie? etc

If as a result of the answers to these questions he is satisfied that the child does not understand the nature of an oath he directs the interpreter to warn the child to tell the truth and the learned Chief Justice proceeds to record the evidence. The learned Chief Justice concludes his report as follows :-

(5) I am satisfied in this case that :-

(a) I did examine the children;

(b) They were too young and/or illiterate to understand the nature of an oath.

(c) I directed the Interpreter to warn the children to speak the truth;

(d) Some form of admonition was given by the interpreter.

(e) The Attorney representing the accused, raised no point as to the admonition of the children;

(f) The only occasion which I might omit to examine a child without care as to its attitude to an oath would be when an elder brother or sister had already given evidence and failed to pass the test. In such a case I might direct the interpreter to admonish the younger child without the usual examination. I am not suggesting that this happened in the present case but it has occurred in other cases.

23. The Appellants respectfully submit that their appeal should be allowed and their convictions should be quashed and their sentences set aside for the following among other

REASONS

1. BECAUSE the learned Judge should not have admitted the evidence of children who did not understand the difference between right and wrong or the duty of speaking the truth.

2. BECAUSE the learned Judge failed to comply with section 214 of the Swaziland Criminal Procedure and Evidence Proclamation, 1938, and in particular failed to administer or cause to be administered to the child witnesses any form of admonition which appeared, either from their own statements or other sources of information, to be calculated to impress their minds or bind their consciences.

3. BECAUSE the learned Judge should have directed himself that the unsworn evidence of children needed

to be corroborated before it could be considered.

4. BECAUSE the learned Judge was wrong in directing himself that the unsworn evidence of one child could be corroborated by the unsworn evidence of other children.

5. BECAUSE the learned Judge failed to consider the fact that (apart from the evidence of Masatelsheni) there was no evidence other than the evidence of the accomplice and the four children which even purported to implicate the accused in the offence and that there was no corroboration of their evidence.

6. BECAUSE the evidence of Malatsheni did not in fact implicate any of the accused in the alleged offence.

7. BECAUSE the learned Judge erred in failing to direct himself as to the discrepancy between the medical evidence that the long bones were intact and the evidence of two of the children that they had seen one arm buried separately.

8. BECAUSE the learned Judge relied on the evidence of the children to corroborate the evidence of the accomplice and without that evidence would not have convicted the Appellants.

DINGLE FOOT

THOMAS O. KELLOCK

No. 16 of 1951

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT OF SWAZILAND

B E T W E E N :

VELEBANTU NGCAMPALALA
LOCELA NGCANPALALA
MKAKWA SIKONDE
MAGABELA SIKONDE — Appellants

- and -

THE KING — Respondent

SUPPLEMENTARY RECORD

INDEX OF REFERENCE

No.1.
Order granting Special Leave to Appeal.
9th April 1951.

AT THE COURT AT BUCKINGHAM PALACE

The 9th day of April 1951.

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

Lord President
Earl of Listowel
Mr.Wilson
Mr.Dugdale

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 15th day of March 1951 in the words following viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of (1) Velebantu Ngcampalala (2) Locela Ngcampalala (3) Mkakwa Sikonde (4) Magabela Sikonde in the matter of an Appeal from the High Court of Swaziland between the Petitioners Appellants and Your Majesty Respondent setting forth (amongst other matters): that the Petitioners pray for special leave to appeal from the Judgment and sentences of the High Court dated the 12th October 1950 whereby the Petitioners were found guilty of murder and sentenced to death: that the principal witness for the Crown was a single accomplice who was alleged to have assisted in the disposal of the body but not to have been present at the murder: that apart from a youth of 17 years of age the only witnesses called to corroborate the accomplice or implicate the Petitioners in the alleged murder were four children whose respective ages at the time of the trial (which was over two years after the alleged murder) were approximately 12, 13 10 and 11: that the learned Trial Judge permitted these children to give unsworn evidence without first satisfying himself that they did not understand the nature of an oath and thereby (it is submitted) failed to observe the requirements of section 214 of the Criminal Procedure and Evidence Proclamations 1938: that the Petitioners further submit (inter alia) that the learned Judge should have directed himself that the unsworn evidence of children needed to be corroborated before it could be considered and that he was wrong in directing himself that the unsworn evidence of one child could be corroborated by the unsworn evidence of other children: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal against the Judgment and sentences of the High Court dated the 12th October 1950 and for such further and other relief as to Your Majesty in Council may seem meet:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the High Court of Swaziland dated the 12th day of October 1950:

"AND THEIR LORDSHIPS do further report to Your Majesty that the authenticated copy under seal of the Record

produced by the Petitioners upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty on the hearing of the Appeal"

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the High Commissioner for Basutoland the Bechuanaland Protectorate and Swaziland for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E.C.E.LEADBITTER

No.2.
Report by
Chief Justice.
25th April
1951.

No. N 2/7960

SWAZILAND GOVERNMENT

The Registrar of the
High Court Mbabane

REPORT BY CHIEF JUSTICE

Rex versus Velebantu Ngcampalala and Others

I have seen a transcript of an electric recording machine which sets out exactly what took place at the trial.

I will only add that Doyika appeared to be the eldest of the children and once having decided that she was not old enough to take an oath when the younger children were called the same ruling was almost automatic.

The warning that the interpreter alleges that he gave is in accordance with my instructions to him.

Danger with the evidence of native children lies not so much in their deliberate fabrication of evidence but in their repetition of a story which they have heard from their elders as if they had been present at the incident.

WALTER HARRAGIN

Chief Justice

Mbabane
Swaziland

25th April 1951

No.3.
Report by Chief Justice
29th April 1951.

VELEBANTU NGCAMPALALA AND OTHERS V. REX

REPORT BY THE CHIEF JUSTICE FOR THE HIGH COMMISSION TERRITORIES SIR WALTER HARRAGIN C.M.G. K.C.

My recollection of what took place when recording the evidence of these children is as follows :-

(1) I cannot recall a case before me where a child has given evidence in which I have not subjected him or her to some form of examination with regard to mental attitude in relation to the truth.

Not only am I on my guard as I have seen the depositions but the Attorney-General invariably calls my attention to the fact when calling the witness, quite apart from one's own observation when the child enters the witness box.

(2) I have no clear recollection of exactly what form my question took in this case, but they must have followed my usual pattern e.g.

How old are you?

Do you go to school?

Are you a Christian?

Do you know what will happen to you if you tell a lie? etc.

(3) If as a result of the answers to these questions I am satisfied that the child does not understand the nature of an oath I direct the interpreter to warn the child to tell the truth.

(4) The interpreter then admonishes the child and I proceed to record the evidence. I do not myself know the native language, but I have beside me two advisers, who are proficient in the language. I may also mention that the particular interpreter in this case is a man of long experience and I have always imagined that the admonition took the same form as an affirmation to an adult with a few words to the effect that the child

will get into trouble if it tells any lies.

(5) I am satisfied in this case that :-

(a) I did examine the children;

(b) They were too young and/or illiterate to understand the nature of an oath.

(c) I directed the interpreter to warn the children to speak the truth;

(d) Some form of admonition was given by the interpreter

(e) The Attorney representing the accused raised no point as to the admonition of the children;

(f) The only occasion which I might omit to examine a child without care as to its attitude to an oath would be when an elder brother or sister had already given evidence and failed to pass the test. In such a case I might direct the interpreter to admonish the younger child without the usual examination. I am not suggesting that this happened in the present case but it has occurred in other cases.

WALTER HARRAGIN

Chief Justice for the High Commission Territories

Dated at Mbabane this 29th day of April One thousand nine hundred and fifty one.

REX VERSUS VELEBANTU NGCAMPALALA AND OTHERS

JOINT STATEMENT BY CROWN AND DEFENCE

No.4
Joint
Statement
by Crown
and
Defence.
19th and
25th
April 1951.

1. The proceedings were electrically recorded by the official shorthand writer. The transcripts annexed hereto marked "A" (Doyika) "B" (Mfanyana) "C" (Ngogola) and "D" (Kontile) are verbatim records of what passed between the Chief Justice and the respective witnesses before their evidence was led in chief.

2. The interpreter states that to the best of his recollection the caution given to each witness in Swazi was as follows:-

> "You must speak the truth, the whole truth and nothing but the truth - you should only tell me what you know and saw yourself - and not what you have been told by somebody else - you need not be afraid as long as you tell the truth"

Arrangements are being made to place the shorthand writer and interpreter in personal contact, in order that the interpreter can hear his own words in Swazi (as used to Doyika) which have been recorded on the belt. A translation of what was recorded will follow as soon as possible.

3. No express finding as to the religious, educational or mental condition was made, but there was a finding by implication, as after the Chief Justice had received the replies to his questions, he directed that the witnesses be admonished.

4. Each child was manifestly of tender years, and very seldom indeed can a Swazi child give even an approximate estimate of its age.

5. Swazi, like other Bantu children, receive no religious education of any sort, unless, as is not the case here, they attend some missionary school.

(SGD) A.C.THOMPSON
Attorney General for the High Commission Territories

Cape Town 19th April 1951.

(SGD) A.E.LANGUAGE
Attorney for the Defence

Goedgegun,
25th April 1951

A

No.5
Transcripts
of Verbatim
Records.

DOYIKA (Belt 18)

MR.THOMPSON: I call Doyika Page 29

Then the interpreter either cautions or swears Doyika. It is in native language.

MR. THOMPSON: Doyika, are you related to No. 2 accused at all?

HIS LORDSHIP: Before we get on with that question let us get this cleared up. I see she was cautioned in the Lower Court as being too young but she strikes me as being old enough.

Do you know how old you are? No I don't know how old.

How old would you say she was - ask the assessor? I can't tell, she is not a tall person.

I can see that. Thank him for his assistance.

Does she know the difference between right and wrong. Does she go to school? No I don't go to school.

Do you know what happens if you tell lies? No I don't know.

Well we will take it that she is cautioned and not sworn.

MR. THOMPSON: Doyika, are you related to No. 2 accused? I'm No.2 accused's daughter.

etc.

B

MFANYANA (Page 170 on Record)

MR. THOMPSON: M'Lord this witness was also cautioned at the Preparatory Examination.

HIS LORDSHIP: How old is he, does he know? I'm 14 years old.

14 years old. Have you ever been to school? No. I was told what my age was at the hospital.

I see, do you know what will happen to you if you tell a lie? No I don't know.

All right caution him.

MR. THOMPSON: Do you live at the kraal?.....

C

NGOGOLA (Page 197 of Record)

HIS LORDSHIP: Do you go to school? No.
Do you know the difference between right and wrong?
No I don't.
Right, warn her to speak the truth.

MR. THOMPSON: Just to get this on record Mr.Interpreter what is the warning you give these children?

INTERPRETER: I just warn them to speak the truth and nothing but the truth.

Are you related to any of these accused.....

D

KONTILE: (Page 187 of Record)

HIS LORDSHIP: Well Kontile - What do you think Mr.Interpreter - I think she is about eight or nine? Yes

I don't think she can be asked to take the oath, we will therefore caution her. Tell her if she doesn't understand the question just to say quite boldly she doesn't understand and not to answer a question until she does.

MR. THOMPSON: You remember.....

REX VERSUS VELEBANTU NGCAMPALALA AND OTHERS

No.6
Further
Statement
of Attorney
General.
April 1951.

Further statement by Attorney-General

It was not found possible to place the shorthand writer and the interpreter in personal contact, as anticipated in paragraph 2 of the Joint Statement. The belt was played over to an experienced interpreter in Johannesburg and his translation of the recorded words in Swazi used to Doyika is attached hereto. The interpreter is known to me, and I can vouch for his competence.

(SGD) A.C.THOMPSON
Attorney-General for the High Commission Territories

CAPE TOWN,
April 1951

No.7.
Affidavit
by Archibald
George Dovey
8th May 1951.

AFFIDAVIT

I, ARCHIBALD GEORGE DOVEY hereby declare that I have listened to the original recording on Belt 18 in the case of REX VERSUS VELEBANTU NGCAMPALALA and at 25 the following recording occurs:-

"Ubani E Gama Lako. Doyika Ngcampalala.

"Pakimisa Esandhla ute u ya funga.

"Onke amagama endawa kuluma ku le cala ataba

"E ciniso. Ngoba Mangi cala imanga nge

"yao tola i cala enkoseni"

The interpretation of the above Swazi words is :-

"What is your name Doyika Ngcampalala

"Lift up your hand

"Say you swear all words that I will speak in this

"case will be the truth, because if I speak lies I will

("find or get) trouble with the Chief"

I declare that I am a retired Sworn Interpreter in native languages in the Supreme Court of South Africa

(SGD) A.G.DOVEY

THE DEPONENT ACKNOWLEDGES THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT

SWORN TO BEFORE ME AT JOHANNESBURG THIS 8TH DAY OF MAY 1951.

(SGD) ATTORNEY - Transvaal
Commissioner for Oaths.

No.8.
Affidavit
by Johannes
Cleophas
Musi.
30th June
1951.

BEFORE THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

IN THE HIGH COURT OF SWAZILAND

In re:

VELEBANTU NGCAMPALALA AND ORS. Appellants

v.

THE KING Respondent

I, JOHANNES CLEOPHAS MUSI of Bremersdorp Swaziland make oath and say as follows:-

1. I am the official sworn interpreter in the English and Swazi languages in the High Court of Swaziland.

2. I interpreted at the hearing of the trial of the above named appellants.

3. That the evidence was electrically recorded, and that the official shorthand writer played back to me the record of the preliminary enquiries before the evidence of the witnesses Mfanyana Ngcampalala, Kontile Ngcampalala and Ngogola Mamba was given, at the time when these witnesses were cautioned.

4. That the following is a true transcription and translation of such recording :-

(1) In the case of Mfanyana Ngcampalala :-

His Lordship: How old is he does he know?
Witness I am fourteen years old.
His Lordship: Fourteen years old, do you go to school?
Witness No. I was told what my age was at the hospital.
His Lordship: Do you know what will happen to you if you tell a lie?
Witness No I do not know
His Lordship: All right caution him
Interpreter: Uti uma hluli angiku tshele kuti konke loku oza ku kuluma kubabo amaciniso unga kulumi into enga manga
(His Lordship says that you must speak the truth and that you must not tell any lies)

(2) In the case of Kontile Ngcampalala :-

His Lordship: What do you think the witness' age is Mr. Interpreter?
Interpreter I should think she is eight or nine.
His Lordship: I do not think she could be asked to know about an oath. We will therefore caution her.
Interpreter: Uthi u mahluli angiku tshele kuti konke oza kuku kuluma ku boba amaciniso amaciniso odwa.
(His Lordship wants you to speak the truth and nothing but the truth)

(3) In the case of Ngogola Mamba :-

His Lordship	Do you go to school?
Witness	No
His Lordship	Do you know the difference between right and wrong?
Witness	No.
His Lordship	Right, warn her to speak the truth.
Interpreter	Ithi inkosi angi ku tshele kuthi loko oza ku kuluma ku boba li ciniso i ciniso lodwa - u nga Kulumi amanga (His Lordship wants you to tell the truth the truth only and nothing that is not true)
Mr.Thompson	What is the warning you give these children anyway?
Interpreter	I just warn them to speak the truth and nothing but the truth

SWORN at Mbabane)
Swaziland)
this 30th day of June) J. MUSI
1951)

Before me
J.D.Telfer
A Commissioner for Oaths