Privy Council Appeal No. 4 of 1930.

Chief Tshekedi Khama - - - - - - - - *Appellant*

v.

Ratshosa and another - - - - - - - - *Respondents*

AND

His Majesty's Attorney-General - - - - - - *Intervener*

FROM

THE SPECIAL COURT OF THE BECHUANALAND PROTECTORATE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH JULY, 1931.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD BLANESBURGH.
LORD TOMLIN.
SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by Chief Tshekedi Khama, hereinafter called the appellant, from that part of a judgment dated the 20th of September, 1929, of the Special Court of the Bechuanaland Protectorate, holden in appeal at Lobatsi, which set aside and varied the judgments of the Resident Magistrate given at Serowe on the 29th of March, 1928. The appellant was the defendant in three suits instituted by the respondents, Simon and John Ratshosa, and their brother Obeditse, respectively, on the 5th of December, 1927, in the Court of the Additional Resident Magistrate for the Ngwato District of the Bechuanaland Protectorate. Each suit contained several claims: The first claim in each suit was in respect of the destruction by burning of certain houses and huts belonging to the plaintiffs situate at Serowe and their contents, for which the plaintiffs alleged that the appellant was liable.

It is not necessary to refer to the other claims in detail, inasmuch as the Magistrate who tried the suits dismissed these claims and with one immaterial modification the Magistrate's judgment in respect thereof was affirmed by the Special Court on appeal and there is no cross-appeal before the Board.

The appellant denied liability on all claims and filed counter-claims against Simon and Obeditse. The Magistrate who tried the cases entered judgment for the appellant in respect of all the claims of the plaintiffs, and upon the appellant's counter-claims he directed that Simon and Obeditse should each pay the appellant £500 damages and half of certain medical expenses.

Obeditse did not appeal. Simon and John appealed, and the above-mentioned Special Court on appeal affirmed in substance the decision of the Magistrate in respect of all the claims made by Simon and John, except their above-mentioned claims in respect of the destruction of their houses and huts and their contents.

In respect of these last-mentioned claims the Special Court ordered judgment to be entered for Simon and John and directed that the amount of damages should be determined by a Magistrate sitting with assessors.

The judgment of the Magistrate against the plaintiff Simon on the appellant's counter-claim was altered by the Special Court to judgment for £150, which sum was to include the amount paid as medical expenses.

From the above-mentioned judgment of the Special Court the appellant has by leave appealed to His Majesty in Council.

It was submitted by the appellant that judgment should be entered for him on the ground that the Courts had no jurisdiction, and that if and so far as the Resident Magistrate had jurisdiction his judgments were right upon the matters which are the subject of the appeal to His Majesty in Council and should be restored.

At the hearing of the appeal by the Board the respondents, Simon and John Ratshosa, did not appear, and inasmuch as the appeal raised questions of importance, the hearing was adjourned in order that an opportunity might be given to the Secretary of State of placing his views upon the questions at issue before the Board.

In pursuance of leave granted on the 12th of February, 1931, His Majesty's Attorney-General intervened and was represented by Counsel at the hearing of the appeal.

The material facts which relate to the matters in issue on appeal before the Board are as follows :—

By arrangement with certain chiefs in Bechuanaland, of whom Khama was one, a Protectorate was proclaimed over their territories in the year 1885. By an Order in Council dated the 9th of May, 1891, made by virtue and in exercise of the powers by the Foreign Jurisdiction Act, 1890, vested in Her Majesty Queen Victoria, the limits of the Protectorate were defined.

Amongst other things, it was thereby provided by clause 4 that :—

"In the exercise of the powers and authorities hereby conferred upon him the High Commissioner may, amongst other things, from time to time by Proclamation provide for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons within the limits of this Order, including the prohibition and punishment of acts tending to disturb the public peace."

Accordingly a Proclamation was made by the High Commissioner for South Africa on the 10th June, 1891.

In the preamble thereof it is recited that among the powers conferred and committed to the High Commissioner is :—

"The power of appointing and removing Resident Commissioners, Assistant Commissioners, Judges, Magistrates and other officers, with such powers and authorities as the High Commissioner may assign, subject to the provisions of the said Order :

"And whereas, moreover, the High Commissioner is by the said Order empowered, with due respect for native laws and customs, to provide by Proclamation, from time to time, for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons within the limits of the said Order, including the prohibition and punishment of acts tending to disturb the public peace : "

The material clauses are as follows :—

"1. There shall be one or more Resident Commissioners, who shall be appointed by commission under the hand and seal of the High Commissioner, each of whom shall, within such parts of the territories comprised within the limits of the said Order in Council as shall be assigned to him, exercise such administration and control, and shall be invested with all such powers, authorities and jurisdiction as may be by law, including this Proclamation, and by the terms of his commission conferred upon or committed to him, subject always to the directions and instructions of the High Commissioner."

"4. The High Commissioner may appoint such Assistant Commissioners or Magistrates as he may think necessary, and it shall be lawful for any Assistant Commissioner or Magistrate duly appointed for the said territory to hold a Court at such place or places as shall be fixed, and to exercise such jurisdiction as shall be conferred by law or defined in and by his commission."

"8. The jurisdiction of the Courts holden by Resident Commissioners, Assistant Commissioners or Magistrates under this Proclamation shall not extend to any matter in which natives only are concerned, unless in the opinion of such Court the exercise of such jurisdiction is necessary in the interests of peace, or for the prevention or punishment of acts of violence to person or property."

"9. In every matter wherein jurisdiction is exercised by any such Court under the last preceding section of this Proclamation, the decision shall follow the laws and customs of the natives concerned, in so far as they are applicable ; provided that if such laws or customs conflict or are not clearly proved, or if such laws or customs should be found to ' be incompatible with peace, order and good government,' the Court may decide in accordance with the law which would regulate the decision if the matter in dispute concerned persons of European birth or descent."

"10. If any Native Chief shall request to be appointed to exercise jurisdiction, it shall be lawful for any Resident Commissioner within the limits assigned to him, subject to the sanction and approval of the High Commissioner, to appoint such Native Chief to adjudicate upon and try

such cases, criminal or civil, and to exercise jurisdiction in such manner and within such limits as may be defined by any rules established by the authority of the Resident Commissioner, who is hereby empowered, with the approval of the High Commissioner, to make all such rules as may be necessary in that behalf; and to amend, alter, or cancel the same as he may think fit: Provided that no suit, action or proceeding whatsoever, to which any person of European birth or descent shall be a party, either as plaintiff or complainant, or as defendant or accused person, shall be adjudicated upon by any such Chief under this section, save by the consent of all parties concerned."

"14. The rules, orders and regulations respecting the manner and form of proceeding in civil and criminal cases before the Court of any Assistant Commissioner, or Magistrate, shall, *mutatis mutandis*, and as far as the circumstances of the said territory will admit, be the same as those in force for the time being with respect to Courts of Resident Magistrate in the Cape Colony."

The area of the Protectorate is about 275,000 square miles, and the territory over which Khama was chief is about 40,000 square miles. The British Government has no armed force in this reserve, and it looks to the Chief to preserve law and order within its boundaries.

Khama died in 1923 and was succeeded by Sekgoma, the brother of the appellant.

On the 19th January, 1926, the appellant was installed as Acting Chief of the Bamangwato tribe during the minority of his nephew Seretsi.

Serowe, where the events about to be mentioned took place, is one of the six principal native villages of the Protectorate and is situated about 225 miles from Mafeking.

Their Lordships were informed that it has a population of about 30,000.

The respondents are relatives of the late Chief Khama and were called Royal Headmen.

It was alleged that the three Ratshosa brothers were insubordinate and from the first had defied the appellant's authority, and on the 5th April, 1926, the appellant summoned them to attend his "Kgotla" or council to discuss with him and the Resident Magistrate certain questions with reference to some Masarwa girls then in the possession of the wife of one of the Ratshosas. The Ratshosa brothers ignored the summons, with the result that the "Kgotla" broke up and the Resident Magistrate went away.

On the same day Simon Ratshosa's regiment was under orders from the appellant to parade for routine work on the roads. Simon failed to parade with them.

Certain officers with an unarmed party were sent to fetch Simon, but the party met with resistance and Simon took shelter in the house of some relatives.

There was evidence that John Ratshosa was threatening to kill someone on that day.

Later in the same day the appellant caused his "Kgotla" to re-assemble and again summoned the Ratshosas to attend.

This summons they obeyed, and they were asked to explain their conduct, and on their failing to do so satisfactorily the appellant ordered them to lie down and to be beaten.

There was a scuffle: Simon and Obeditse escaped: John was caught and beaten.

It is clear from the evidence that Simon and Obeditse proceeded to arm themselves and that they returned to the "Kgotla": Simon had a Mauser pistol and Obeditse had a rifle.

They took cover behind some poles and started firing at the appellant and those near him in the "Kgotla." The appellant was wounded in the side of the abdomen; fortunately the wound was not dangerous.

Two others at least were wounded; one received a dangerous wound in the hip. Thereupon there was great excitement and commotion. Simon and Obeditse fled to their houses and the appellant ordered that they should be brought before him alive or dead.

Subsequently the people of the tribe were summoned. They assembled with their arms and moved off to carry out the appellant's orders. Fortunately for the Ratshosas the Resident Magistrate then arrived. He found an attack being made on the Ratshosa's houses and at considerable risk to himself he intervened and succeeded in persuading the people to stop shooting.

He obtained from the appellant a safe conduct for the three Ratshosas, and took them away to his own camp. There is little doubt that but for his efforts the three Ratshosas would have been killed.

Later in the same evening some of the houses and huts of the Ratshosas were burnt, and on the following morning some more houses belonging to the Ratshosa brothers were burnt. The contents also of the houses and huts were burnt.

The Magistrate who tried the case held that the appellant, as Chief, with the unanimous consent of his councillors in "Kgotla" and people, ordered a regiment to burn down the plaintiffs' dwellings as they stood.

The Special Court disagreed with this finding and held that the evidence did not show that the burning was done with the unanimous consent of the councillors and people in "Kgotla."

Their Lordships have examined the evidence and they are unable to agree with the finding of the Special Court on this part of the case. Their Lordships are of opinion that the evidence justified the above-mentioned conclusion at which the Magistrate arrived. The appeal, therefore, must be decided upon the assumption that the burning of the dwellings of the Ratshosas was ordered by the appellant in his capacity as Chief, after consulting and with the approval of the councillors and headmen of the tribe assembled at the "Kgotla."

It may here be stated that the appellant has admitted responsibility for the burning. In fact, he asserts that by the

laws and customs of the Bamangwato tribe he was justified in view of what had occurred in burning the Ratshosas' houses and their contents.

Simon and Obeditse were tried upon the charge of attempted murder by Captain Reilly, a Magistrate. They were convicted and sentenced to ten years' imprisonment: the High Commissioner upon appeal reduced the sentence to four years, on the recommendation of the Acting Resident Commissioner that the sentence of ten years was excessive in view of the fact that the accused had already been punished by the burning of their property.

It appears that John Ratshosa was not prosecuted, inasmuch as he had not taken an active part in the shooting, and he had shared the penalty of having his property burnt.

The view taken by the Magistrate, who tried the suits, of the evidence was that John Ratshosa was the ringleader in the opposition shown by the Ratshosas to the appellant's authority, that there was a preconceived plan by the Ratshosas, that John was the person who incited his brothers to public violence and armed rebellion, and that it was he who handed them the Mauser pistols when the working party was sent to fetch Simon to the work on the roads, and who uttered threats of killing the descendants of Sekgoma.

The Special Court disagreed with this finding and held that the evidence did not justify the finding that John was the ringleader and was engaged in a plot to kill the appellant.

Their Lordships have examined the evidence relating to this part of the case and have come to the conclusion that there was ample evidence to justify the finding of the magistrate who tried the suits, and they see no reason to differ therefrom. This appeal therefore must be decided upon the assumption that John Ratshosa was a party to the plan to kill the appellant, though by accident he was prevented from taking part in the actual attack upon the appellant.

The learned Magistrate, in dealing with the customs of the tribe, over which the appellant is the chief, said as follows :—

> "It is well known to every old Mongwato here present in Court, and the evidence adduced on native law and custom bears this out, that prior to the establishment of a British Protectorate over this Territory, plaintiff and his brother Obeditse would most certainly have been condemned to death by the Chief and people in 'Kgotla' and executed for their attempted murder and wounding of the Chief. Also the plaintiff's and his brothers' dwellings with their contents would certainly have been burned. All their cattle would also have been confiscated. The expert evidence of old headmen upon native custom adduced in this case describes the crime of which plaintiff and his brother were found guilty as an Act of War on the Chief."

The Special Court on appeal came to a contrary conclusion and held as follows :—

> "We can find no support, however, for the view that the Chief has authority to order the destruction of the house and property of an individual

member of the tribe as a punishment for some offence committed by him even after a trial in his Court. In this case there was no semblance of a trial. Nor can it be alleged that what took place amounted to a State of War."

Their Lordships are of opinion that the undisputed facts of this case show that Simon and Obeditsi took part in an armed rebellion against the appellant and attempted to murder him by shooting, and although John did not take part in the actual shooting, the evidence as to his previous actions goes to establish the conclusion that he was acting in concert with his brothers, even if he was not the ringleader as the Magistrate found.

Further, the evidence is clear that by custom of the tribe an act of armed rebellion is punishable by death and by the burning of the dwellings and property of those taking part in such rebellion. The custom was that the Chief should consult his councillors in "Kgotla" before executing such punishment.

In this case the evidence shows that after the shooting had taken place the councillors and headmen were unanimous in approving the orders of the Chief to burn the houses of the culprits.

Their Lordships therefore are of opinion that the burning of the houses and huts of the three plaintiffs, and their contents, was in accordance with the custom of the tribe, and that it was carried out after consulting and with the approval of the councillors and headmen of the tribe.

It was suggested in argument that such a custom as that above-mentioned might exist with regard to temporary and outlying huts, but that it could not be applicable to houses which were of a permanent structure and in a large place like Serowe.

This point, however, does not appear to have been taken at the trial and no such distinction was made in the evidence.

The main question which arises for consideration is whether the Resident Magistrate had jurisdiction to entertain the suits.

This depends upon the terms of clause 8 of the above-named proclamation and the findings of fact by the Resident Magistrate, which have been adopted by the Board.

The clause provides that the jurisdiction of the Courts holden by Magistrates under the proclamation shall not extend to any matter in which natives only are concerned unless in the opinion of such Court the exercise of such jurisdiction is necessary for certain purposes named therein.

It was argued on behalf of the appellant that the appellant should not be considered a native within the meaning of the clause, inasmuch as the terms of the proclamation implied that the chief should retain his existing jurisdiction over his native subjects and that a dispute between him and one of his subjects would not be within the meaning of the words "any matter in which natives only are concerned."

Their Lordships are not able to accept this argument. The words in clause 8, viz., "any matter in which natives only are

concerned " are without any qualification or limitation : they are used in contradistinction to the words " persons of European birth or descent " in clause 9, and their Lordships are clearly of opinion that the suits in question were matters in which natives only were concerned.

Prima facie therefore the jurisdiction of the Magistrate did not extend to the suits.

By reason of the terms of clause 8 of the Proclamation, the Magistrate could only exercise jurisdiction in respect of the suits and make a decree in favour of the plaintiffs if, in his opinion, the exercise of such jurisdiction was necessary in the interests of peace or for the prevention or punishment of acts of violence to person or property.

In order to form such opinion it would be necessary for him to consider the nature of the claims contained in the suits, and to ascertain the facts which were alleged to give rise to such claims.

In this case the Magistrate, as already stated, upon investigation of the facts, found that the burning of the plaintiffs' houses and their contents was done in the ordinary course of native and tribal administration of justice. He found that the offence of the three Ratshosa brothers was of such a grave nature that according to native customs the appellant might have ordered them to be killed, that their houses and their contents should be burned and their cattle confiscated.

In consequence of the opportune arrival of the Resident Magistrate the lives of the Rathosas were saved ; their cattle were not confiscated, and they suffered only part of the punishment, to which they were liable, by native custom, viz. : the burning of their houses and their contents.

The question therefore for the trying Magistrate was whether in view of the above-mentioned facts, it was necessary for him to exercise jurisdiction in the civil suits relating to claims for damages in respect of the burning of the plaintiffs' houses by the orders of the appellant, in the interests of peace, or for the the prevention or punishment of acts of violence to person or property.

So far as their Lordships can ascertain from his judgment, the Magistrate does not seem to have applied his mind directly to this question, for he did not express any opinion in respect thereof, nor was it specifically dealt with by the Special Court on appeal. It was suggested, however, that the Magistrate must have considered the question, inasmuch as he tried the suits and made decrees therein on the assumption that he had jurisdiction.

Whether the Magistrate did consider the question or not, it is now necessary for their Lordships to consider whether there was any evidence which would justify the Magistrate in forming the opinion that it was necessary for him to exercise jurisdiction in the suits in question in the interests of peace, or for the prevention or punishment of acts of violence to person or property.

In view of the above-mentioned findings of fact at which the Magistrate arrived and which have been adopted by the Board their Lordships are of opinion that the Magistrate should have held that he had no jurisdiction. It seems to their Lordships impossible to hold that it was necessary in the interest of peace in the future that the magistrate should entertain claims for damages by the plaintiffs in civil suits against their chief in respect of the punishment which he had inflicted on them in the past in pursuance of native custom for a very serious offence committed against the person of the chief, especially having regard to the fact that such punishment had been taken into account by the High Commissioner and had resulted in the sentences being reduced in the case of two of the plaintiffs and in the non-prosecution of the third plaintiff.

Their Lordships are also of opinion that it was not necessary for the Magistrate to assume jurisdiction in the suits in question for the prevention or punishment of acts of violence to person or property.

There was no evidence of the probability of any further breach of the peace or acts of violence being committed by the appellant, and even if there were, civil suits by the plaintiffs against the appellant to recover damages for past acts were not appropriate proceedings for preventing future acts of violence or for administering punishment in respect thereof.

This decision depends upon the facts which are peculiar to this case, and which are quite out of the ordinary, and it is confined solely to the question of jurisdiction under clause 8 of the Proclamation.

Their Lordships desire to make it plain that their decision in this appeal must not be taken as in the least degree approving the action of the appellant in directing the burning of the plaintiffs' houses and their contents, and that if it had been necessary for the disposal of the appeal for their Lordships to express an opinion as to the provisions of clause 9 of the Proclamation (which it is not, in view of their decision in respect of clause 8), they must have held that the custom by reason of which the plaintiffs' houses and their contents were burned was incompatible with peace, order and good government as expressed in clause 9.

Their Lordships think it is not out of place for them to suggest that if it is desired to prevent the repetition of such acts, it would seem to be for the High Commissioner to take such steps as he thinks necessary by way of administration.

For these reasons their Lordships are of opinion that the Magistrate was right in deciding that judgment should be entered for the appellant in the said suits, though they are not able to adopt the reasons for that decision.

It follows from the above-mentioned conclusion, viz., that the Magistrate should not have assumed jurisdiction over the suits, that he should have dismissed the appellant's counterclaim

against Simon Ratshosa as well as the claim by Simon against the appellant.

Their Lordships therefore will humbly advise His Majesty that the appeal should be allowed and that that part of the judgment dated the 20th of September, 1929, of the Special Court which set aside and varied the judgments of the Magistrate, dated the 29th of March, 1928, should be set aside, and the judgments of the Magistrate in the suits brought by Simon and John Ratshosa should be restored except in respect of the appellant's counter-claim against Simon Ratshosa, which should be dismissed.

The plaintiff respondents must pay to the appellant his costs of this appeal, and of the proceedings in the Special Court, and of the two suits.

There will be no order as to the costs of the appellant's counterclaim against Simon, or as to the costs of His Majesty's Attorney General.

In the Privy Council.

CHIEF TSHEKEDI KHAMA

v.

RATSHOSA AND OTHERS,

DELIVERED BY SIR LANCELOT SANDERSON.

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