Privy Council Appeal No. 37 *of* 1939

Fakisandhla Nkambule - - - - - *Appellant*

v.

The King - - - - - - - *Respondent*

FROM

THE SPECIAL COURT OF SWAZILAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH MAY, 1940

Present at the Hearing:

LORD THANKERTON
LORD JUSTICE GODDARD
SIR PHILIP MACDONELL

[*Delivered by* SIR PHILIP MACDONELL]

This is an appeal by special leave from the Special Court of Swaziland which had convicted the appellant of murder. The appellant and a certain Nhloko Hlatshwako, who will be referred to hereafter as the first accused, were indicted before the Special Court of Swaziland for the murder of certain three persons, the first accused as having actually committed the murders and the second accused, the appellant, as having incited him to commit them. The Special Court convicted them both but it is only the second accused who appeals.

The appellant is a native chief in Swaziland, a territory under the protection of the Crown and governed as to the law of evidence by the Transvaal Proclamation No. 16 of 1902 and as to criminal procedure by the Transvaal Criminal Procedure Code, Ordinance No. 1 of 1903. The essential facts in the case were these. The appellant's mother died in 1936 and a daughter of his in 1937 and somewhere in July or August of 1937 he sent his "doctor", the witness Nyandeni, to find someone who had the knowledge and skill necessary to make a rope and put it on the graves of these two deceased persons so that by its agency the dreams troubling him might be turned from him and those responsible for the two deaths discovered; the rope, it was believed, would by some inherent magic kill the persons responsible. The witness Nyandeni eventually found the first accused who, according to him, undertook to perform this rope ceremony. The appellant had duties as Court "induna" at Hlatikulu, the chief town of Swaziland, which kept him there during the weekdays, and following on

instructions by him, the witness Nyandeni wrote the letter A which was signed in the name of the appellant, and was addressed and duly delivered to the first accused. This letter states *inter alia* that the appellant's children "are finished", i.e., dead, that the person killing them is at the appellant's village, that the appellant is busy and cannot come personally, that the first accused must bring all his medicine bags with him, that "it is the Chief Fakisandhla who is calling him" and that the "advance payment" is ready. In accordance with this letter the first accused came to the witness Nyandeni's village on a day which can be fixed as Thursday the 9th September, 1937, and Nyandeni wrote to the appellant saying that he had arrived. In reply the appellant dictated to the witness Memorial two letters, B addressed to Nyandeni, and C addressed to the first accused, both in the same envelope, and it is in evidence that the contents of each letter became known to Nyandeni and to the first accused. In letter B the appellant says that he understands that the first accused has arrived and is unwilling to do the work until he has seen him, the appellant, but that his duties at Hlatikulu prevent him from coming. Letter B goes on, "it is necessary that this man (i.e., the first accused) should carry on because you know that it is Mpindela, Mbuko, Majalimane and Ngilane". The first two of these so named are two of the three persons proved to have been murdered by the first accused; the other two persons named were at all material times absent and at a distance. The next words in letter B, according to the translation before the Court at the trial, were "as far as the others are concerned, the medicine will take its course", but according to affidavits sworn after the trial and put in as part of the printed record before their Lordships, this portion of the letter should have been translated "on the other hand, the work itself will simply proceed", with no mention of medicine. In this letter B the appellant then speaks of advance payment and enjoins stealth or secrecy in doing the work, also that no one must be told. In letter C the appellant tells the first accused that he understands what he is saying and that he will himself come on Sunday. Nyandeni and the first accused will have received these letters on Friday the 10th September, 1937, and the same day they went to one of the appellant's villages called Buseleni where Nyandeni pointed out to the first accused, Mpindela and Mbuko, named in letter B, and also one Patekile, a woman, whose name was not in letter B but whom the appellant said he had mentioned to the witness Memorial when dictating that letter to him. It is clear that somehow her name was mentioned and had become known to Nyandeni and the first accused. As some of the members of the village were absent Nyandeni and the first accused did nothing that day, but returned to Nyandeni's village. Next morning, Saturday the 11th September, they came again to the village Buseleni, and the first accused, with the inhabitants ranged in a half circle before him, proceeded to conduct a witch-doctor enquiry. He had two earthenware pots, one on a fire, and a

smaller one which he held up to his breast. On his own admission the smaller pot contained two separate substances, one harmless, the other arsenic, and by a little manipulation he administered the harmless substance to the rest of the village but arsenic to the two persons, Mpindela and Mbuko, mentioned in letter B, and also to Patekile, whose name the appellant says ought to have been in letter B, whereby these three persons died the same day. Admittedly nothing was done with regard to the rope which, according to the appellant and the witness Nyandeni, the first accused had been called in to make. Nyandeni, who throughout his evidence sought to exculpate the appellant, had to admit that the first accused had said earlier that he would use the earthenware pot, a thing that would have nothing to do with the rope ceremony but which could be used to give the villagers something from it to swallow and so to test their responsibility for the matter to be discovered, whatever that might be.

On Sunday the 12th September, the appellant came over to Nyandeni's village as he had promised and gave the first accused £2 10s. and a promise of some cattle. His behaviour at this interview with the first accused was inconsistent with his having ordered any rope ceremony—and since no rope had at that time been made the first accused had not done anything then to earn any payment—and was evidence that he had called in the first accused for the purpose of killing the three deceased persons. His letters and his behaviour on the Sunday were corroboration of the evidence of the first accused, that the appellant had sent for him to kill these three people as being responsible for the deaths of his mother and daughter, and had never asked the first accused to do the rope ceremony at all. Assuming that the evidence of the first accused was admissible and that the letters were properly before the Court of trial, it had before it sufficient evidence for finding the appellant guilty of inciting the first accused to commit these murders.

Two main points were urged to their Lordships in support of this appeal.

When the first accused and the appellant as second accused were arraigned, the appellant pleaded not guilty. The first accused pleaded guilty but prior to his doing so his Counsel said that his client intended to make a full confession of the murders but would also say "in defence" that he had committed them at the instigation of the appellant, a tribal chief, and in the belief that the Paramount Chief of the tribe knew what he was doing. The President of the Special Court said that he thought the proper course was to enter a plea of not guilty in the case of each accused. The Attorney-General, appearing for the Crown, agreed to this but there is nothing of record as to whether the several Counsel for first accused and for appellant said anything; presumably they consented to the Court's suggestion. The Clerk of the Court had entered on the record a plea of guilty for the first accused and no alteration of this plea was at any time made on the record. The trial then proceeded as a joint trial of the two accused as if each had pleaded not guilty.

For the defence the first accused and the appellant each gave evidence and were cross-examined by the Attorney-General and each was cross-examined on behalf of the other accused. The evidence of the first accused, an accomplice, implicated the appellant as having incited him to murder the three deceased.

It was argued before their Lordships that this procedure was wrong by reason of section 20 of the Transvaal Proclamation No. 16 of 1902, "No confession which may be made by any person shall, in any case be admissible as evidence against any other person", and that the correct procedure in accordance with that section and with Transvaal practice thereon would have been to take evidence *aliunde* that the crime charged had been committed, and then to have sentenced the first accused on his plea of guilty, thereafter calling him as a witness for the Crown, on the principle that before his evidence could be used to implicate any person mentioned therein he should by reason of having already been sentenced, have nothing to fear or hope when giving that evidence. In the present case, however, being one of murder, one sentence only was possible. Counsel for the appellant cited the case of *Rex* v. *Fatshawa and another* [1930] S.A.L.R. Transvaal 526, where the Transvaal Provincial Division quashed a conviction in which a third accused, after plea of guilty, but before sentence, gave evidence against the two other accused. In that case, however, the third accused, after his plea of guilty, though invited to take part in the case by asking questions declined to do so, the only thing he did being to give at the end of the case for the Crown evidence, part of which implicated the other two accused. That case then is distinguishable as not having been a trial of that third accused jointly with the two other accused while the present case, in the course it took, was a joint trial of the two accused, as if on a plea of not guilty for each of them. Further, it would appear that South African practice does permit a Court to enter a plea of not guilty on behalf of a native or other ignorant person pleading guilty if it considers that he does not properly understand the effect of that plea or if he seems to have matter of exculpation that he wishes to allege; see Gardiner and Lansdown, South African Criminal Law and Procedure, 2nd edition, Vol. 1 at pp. 238, 255 and 257. Here the first accused through his Counsel said that he wished to state certain facts—which therefore would need proof—that he thought furnished some defence for what he had done, namely that the man inciting him was a chief and that the Paramount Chief knew what he intended to do. There was some authority then for the procedure of the Court in this case, though it certainly was irregular to allow the first accused's plea of guilty to remain on the record and not to alter it to one of not guilty. The difference between what the Court did do and what strictly it would seem that it ought to have done in accordance with section 20 of the Transvaal Proclamation No. 16 of 1902 and the practice thereon amounted to this:—if the first accused had been

sentenced before giving evidence and had then been called as a witness for the Crown, the Attorney-General could not have cross-examined him; in the course taken the first accused was witness for the defence so the Attorney-General could and did cross-examine him. But in either event it would still have been necessary to corroborate his evidence and it cannot be said that the departure from what apparently is the correct Transvaal procedure was departure of substance from the principles of justice. In connection with this section 20 of Transvaal Proclamation No. 16 of 1902 making confessions inadmissible, reference was made to the case of *Rex* v. *Zawels and another* [1937] S.A.L.R. Appellate Division 342, where Curlewis C.J. said that on a joint indictment and a joint trial evidence given by one of the accused is admissible against the other, adding " if in the course of giving such evidence one of the accused makes an admission of his guilt amounting to a confession, though such admission may not be admissible as evidence . . . against any other of the accused, but only as against himself, the rest of his evidence stands as admissible like that of any other witness so far as it incriminates any of the other accused of the charge for which they are being tried ", which is the case here; the evidence of first accused that appellant had incited him to commit the murders was no part of his confession of having committed them. In the opinion of their Lordships the irregularity of leaving on the record a plea of guilty after in effect altering it to one of not guilty did not entail any real prejudice to the appellant.

The other argument in support of this appeal turned on the letters produced, letter A written by the witness Nyandeni in the name of the appellant, and letters B and C written by the witness Memorial, at the appellant's dictation. The originals in the Swazi tongue were produced and sworn to, but the language of the Court was English and no one was called to prove their English meaning, that is a translation. An English translation was put in and used at the trial but was not sworn to and it would seem that, as stated above, there was a mistake therein as to the English meaning of a particular sentence in letter B. If there was no evidence produced to the Court as to the meaning in English of those letters, then the Court could not look at them, and their contents would not be before it. (It is quite possible that all parties to the case accepted by consent the translation which had been made, but not sworn to.) Detailed examination of the evidence given at the trial shows, however, that the meaning in the three letters of each sentence implicating the appellant was proved, though in piecemeal fashion. The witness Nyandeni was taken through each material sentence in letter A and admitted each to give correctly what the appellant had dictated to him, and the Court interpreter will have rendered Nyandeni's answers into English. The material sentences in letters B and C were put to the appellant, and he admitted that he had dictated these to the witness Memorial; again, the interpreter will have rendered his

answers into English. In these sentences so proved the appellant requested the first accused to bring his medicine-bags—obviously with medicine in them—named the persons to whom the attention of the first accused was to be directed, and enjoined secrecy and that nobody was to be told. In the opinion of their Lordships the words wrongly supposed to be in letter B do not materially add to or diminish the incriminating nature of other passages in that letter, and their corrected translation does not effect any material change in their meaning.

Their Lordships are satisfied that if the Court of Trial had had before it a correct instead of an incorrect translation of the disputed words in letter B, it must still have arrived at the same conclusion that it did arrive at, namely, that appellant incited the first accused to commit these murders.

Their Lordships regret the irregularities in the trial of this case but are satisfied that they are not of such a character as would justify interference with the decision appealed from. The scope of such interference is well understood and it is only necessary to cite the words of Lord Watson in *Dillet's* case, 12 A.C. 459 at 467,

> " The rule has been repeatedly laid down and has been invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done ",

and it is clear that no such injustice has been done in the present case.

Their Lordships therefore are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

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In the Privy Council

FAKISANDHLA NKAMBULE

v.

THE KING

DELIVERED BY SIR PHILIP MACDONELL

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
POCOCK STREET, S.E.1.

1940