Privy Council Appeal No. 32 *of* 1948

Tumahole Bereng and Others - - - - - - - *Appellants*

v.

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

THE HIGH COURT OF BASUTOLAND

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH JANUARY, 1949

Present at the Hearing :

LORD MACDERMOTT
LORD REID
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* LORD MACDERMOTT]

This was an appeal from a judgment of the High Court of Basutoland of the 25th October, 1947, whereby the seven appellants were convicted of the murder of one Katse Phatela on the 25th December, 1945, at Phatela's in the District of Qacha's Nek, and sentenced to death.

The case for the Crown was that the killing of Katse was a ritual murder committed by ten persons for the purpose of obtaining human blood to be used by a witch-doctor named Molumo Kaphe in connection with a dispute about land. Of these ten, the witch-doctor died in gaol while awaiting trial and two others, Jan Gat and Maama Molahlehi, gave evidence for the prosecution. The remaining seven are the appellants. It is unnecessary to recite the evidence adduced at the trial in detail. At this stage it will suffice to say that the Crown testimony in support of the charge was to the effect that Katse was chosen by appellant No. 1 as the victim whose blood was required ; that a feast previously arranged by appellant No. 1 was held in the hut of appellant No. 2 on Christmas Day, 1945 ; that Katse was there plied with drink until he was insensible ; that he was taken out of the hut after dark and carried by some of the ten persons already mentioned, the others accompanying them, to a spot about 500 yards away where he was hit on the head with a pick-handle and throttled ; that the witch-doctor next pierced or stabbed Katse's head behind the right ear with a sharp pin and caught the blood from the wound in a tin ; that Katse was then carried to the edge of a krantz or cliff some 21 feet high and thrown over into a stream ; and that several of the appellants followed him down and confirmed he was dead.

Such, in broad outline, was the story sworn to by each of the accomplices, Jan Gat and Maama Molahlehi. Their versions differed in certain points, but in substance they told the same tale. It may be stated now, though the matter will be referred to hereinafter, that apart from their testimony there was no evidence sufficient to implicate the appellants in the offence alleged. Whether there was any other evidence showing that Katse

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had been murdered by someone was a disputed question which will be examined later. His dead body was found on the 26th December and buried on the 28th. On the 10th January, 1946, it was exhumed and examined by Dr. R. C. Ogg who proved the cause of death to be " injury to the brain from a fractured skull and a fractured femur ".

The case made by the appellants at the trial challenged the contention that Katse had been murdered and suggested that he had met his death by falling over the krantz while on his way home drunk. Appellant No. 2 elected to give evidence on oath denying the charge but his testimony was not accepted. The other appellants did not give evidence but contented themselves with statements from the dock, after verdict given, protesting their innocence. In addition to appellant No. 2 several witnesses were called for the defence, the gist of their evidence being that the deceased left the feast before it ended and while the appellants or some of them were still there, and that Jan Gat and Maama Molahlehi spent the hours of darkness, during which the murder was alleged to have occurred, asleep in the hut of the witness Dora Mafatela.

The first question arising for determination is whether it was competent for the High Court to convict the appellants having regard to the state of the evidence and the terms of section 231 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938, as amended. It has already been observed that the only evidence implicating the appellants in the crime charged was that of the two accomplices. It will be convenient to consider now, before referring to the relevant provisions of the Proclamation, whether there was any evidence, in addition to that of the accomplices, to show that Katse had been murdered by someone, At the trial corroboration of the accomplices' story of an intentional killing appears to have been sought in various quarters and the learned trial judge (Grindley-Ferris J.) expressed himself as satisfied that it was to be found in the medical evidence. The material passage in his judgment reads as follows: —

> " In corroboration of the evidence of the two accomplices as to the commission of the crime, if such were necessary, it is to be found in the evidence of Dr. Ogg who conducted the post-mortem examination. He found at the back of the right ear of the deceased a wound which he said might have been caused by a sharp stabbing instrument such as the stay of an umbrella being pushed in and forced sideways."

At the hearing before the Board Mr. Stevenson for the Crown did not seek to rely, for this purpose, on any evidence except that of Dr. Ogg or any part thereof save that referred to in the excerpt from the judgment just quoted. Their Lordships are satisfied that this course was fully justified by the evidence and that the field of enquiry may be limited accordingly. They do not, therefore, find it necessary to comment upon the medical testimony with regard to the other injuries sustained by the deceased save to say that they were all compatible with death by accident. The medical evidence contained nothing to support the story of throttling and Dr. Ogg was not asked about it. It remains, then, to see whether, as the Crown contended, the injury above the right ear, described by Dr. Ogg as a superficial wound about ½" to ¾" long, confirms the accomplices' story of the wound made by the witch-doctor for the purpose of drawing blood. It is important to observe that Dr. Ogg was examined immediately after Jan Gat and had been present in Court when the latter had not only described but demonstrated how this wound had been made. As much may turn on this question it is necessary to consider the relevant evidence in some detail. Jan Gat swore that " the doctor pierced the deceased with a sharp pin ", that it entered " just behind the right ear, the back of the head " and that the doctor " withdrew the needle and then he caught the blood in a tin." In cross-examination the witness gave the demonstration referred to and subsequently, in answer to the judge, stated: " Then Molumo Kaphe (the witch-doctor) said ' here is the pin in my bag ' and he took out the pin and then I saw him stab the deceased with it " ; and, later, when asked how high the witch-doctor

lifted his hand, he said: "He didn't raise his hand, the pin was a very sharp instrument that he used ". To Mr. Driver, an Administrative Officer sitting to assist the Court in circumstances to be mentioned later, the witness added: "It was a stab, it was not a cut" and, again: "He (the witch-doctor) probed it before he withdrew the pin". Maama, the other accomplice, was examined after Dr. Ogg. His evidence on this matter was not so detailed as that of Jan Gat but was to much the same effect. He, too, used the word "pierce" and, speaking of the witch-doctor, said: "As he withdrew that sharp thing which he pierced with blood came out and he caught the blood in a tin." In cross-examination he was asked how the pin or nail was inserted and answered: "I can't say which way they pierced; it was a dark night, but I saw that they did pierce him". When Dr. Ogg was called he agreed that he had heard the evidence of Jan Gat. Then came the following questions and answers:

> "While he was being cross-examined this afternoon did you hear his evidence and in answer to His Lordship, his evidence about a thrust with a sharp thing which he called a 'pin' into the deceased's head?—Yes.
>
> Did you find anything which was medically consistent with that having happened?—I didn't find anything."

After that the witness said that he might have missed a small puncture made 16 days before the post-mortem examination, but he did not think it very likely. Subsequently, the learned judge asked him several important questions which with their replies read thus:

> "Then you said 'It was not down to the skull,' by that you mean it was just a flesh wound?—Yes, a superficial wound, skin and flesh. I couldn't feel the skull, the skull was covered.
>
> Would such an injury bleed copiously?—Yes, it would bleed.
>
> Might that wound have been caused by a sharp instrument, possibly like some part of an umbrella?—It would if it was sliced but not if it was stabbed.
>
> Not if it was stabbed?—It was not a stab wound, it was about three-quarters of an inch long and lacerated."

It cannot be disputed that the wound so described by Dr. Ogg might have been the result of an accidental fall on the rough and rocky ground in the vicinity of the krantz, or that it was, at least, as consistent with such a cause as with that suggested by the prosecution. It could, no doubt, have been due to a sharp-pointed instrument being drawn sideways through the flesh. But that was not the nature of the wounding as deposed to by the accomplices and their Lordships have no hesitation in holding that their testimony as to the killing was not confirmed by the medical evidence which must now be regarded as consistent with accident throughout. Their Lordships therefore proceed 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 Proclamation of 1938 is a codification of the law relating to procedure and evidence in criminal cases in Basutoland. Chapter XII deals with witnesses and evidence and provides (section 268) that in any case not provided for by it the law of England as to admissibility of evidence and the competency and examination of witnesses in criminal proceedings shall be followed. In this chapter is section 231 which, as it stood until 1944, read as follows:

> "231. 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."

This section was amended by section 1 of the Basutoland Criminal Procedure and Evidence (Amendment) Proclamation, 1944, which is in the following terms:

"1. Section two hundred and thirty-one of the principal law is hereby amended by deleting the first and second provisos and substituting therefor the following proviso:—

'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.'"

Section 231, therefore, was at all times material to these proceedings, in this form:

"231. 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."

The question which must now be examined is whether the Court, in view of the terms of this provision, had power to convict the appellants on the evidence of the two accomplices standing alone and unconfirmed in any material respect by other evidence. This question is not concerned with any rule of practice based on the dangers of acting upon the testimony of accomplices. The power to convict is clearly limited by section 231 and the present issue necessarily turns upon its true construction as respects the extent of the limitation.

The amendment of 1944 would seem to have worked an important alteration in the law for, whereas the section in its earlier form made corroboration implicating the accused a condition precedent to conviction, that requirement is not mentioned in the amended section which does not appear to demand more than additional proof that the offence charged has been committed by somebody. This is a drastic change as false evidence given by an accomplice is commonly regarded as more likely to take the form of incriminating the wrong person than of imagining the crime charged. Their Lordships must, however, take the section as they find it and they cannot read the new proviso as referring to proof that "the offence has . . . been actually committed" by the accused. So to construe it would leave the object of the amendment obscure and would tend not merely to qualify but to negative the opening paragraph of the section. Their Lordships are therefore of opinion that the conviction cannot be impeached as beyond the powers of the Court solely on the ground that the only evidence which implicated the appellants was the evidence of the accomplices.

This leaves for consideration what, on the argument, were the main contentions respecting the meaning of the section. For the Crown it was submitted that the opening words of the section "Any court . . . may convict . . . on the single evidence of any accomplice" showed that the restriction imposed by it on the power of the Court only applied whenever the prosecution relied upon the testimony of one accomplice and no more and, consequently, that where, as here, the prosecution called two accomplices telling the same story and believed by the Court, the case fell outside the section altogether. The use of the word "single" was stressed as emphasising that the section was only concerned with the irreducible minimum of this particular category of evidence, and some reliance was placed on the fact that section 231 was one of a group of sections headed "sufficiency of evidence". For the appellants, on the other hand, it was urged that the singular "any accomplice" included the plural and that the use of the word "single", being merely to qualify "evidence", did not indicate the contrary.

Their Lordships are unable to accede to the Crown's argument on this point. The expression "the single evidence of any accomplice" cannot be read as equivalent to "the evidence of a single accomplice". The word "single" is plainly used in the sense of "standing alone" or "unsupported" and as qualifying the evidence to which this part of the section refers. As for the question whether the singular "accomplice" includes the plural, the new proviso affords no conclusive answer. In the view of the Board, however, the second of the original provisos goes to show that the intention was that the plural should be included. It enacted that the corroboration required by the section in its earlier form "shall consist of evidence other than that of another accomplice or other accomplices". It is impossible on any fair reading of the section in its earlier form to regard this provision as directed to witnesses called for the defence. Even if not limited to the evidence for the prosecution it must, at least, have extended to such evidence; and if so the words "any accomplice" cannot well be confined to the singular. In thus resorting to the terms of the section before amendment their Lordships are not unmindful of the warning given by Lord Watson in *Bradlaugh v. Clarke*, 8 App. Cas. 354 at 380, when he said:

> "It appears to me to be an extremely hazardous proceeding to refer to provisions which have been absolutely repealed, in order to ascertain what the Legislature meant to enact in their room and stead. There may possibly be occasions on which such a reference would be legitimate. In the present case the words of the existing Act are, in my opinion, capable of being interpreted without such foreign aid . . . ."

The wisdom of that warning cannot be doubted, but the circumstances of the present case put it beyond the mischief Lord Watson was minded to discourage, and that for two reasons. In the first place the terms of the section as it now stands are sufficiently difficult and ambiguous to justify the consideration of its evolution in the statute-book as a proper and logical course; and secondly, the object of the instant enquiry is to ascertain the true meaning of that part of the section which remains as it was and which there is no ground for thinking the substitution of a new proviso was intended to alter.

For these reasons their Lordships conclude that in section 231 the words "the single evidence of any accomplice" mean "the unsupported evidence of any accomplice or accomplices" and, accordingly, that the section is applicable to the facts of the present appeal.

The next question is whether the fact of murder was established so as to satisfy the terms of the new proviso. The contention of the Crown was that it had been, as the evidence of a second accomplice could, it was said, supply the necessary additional evidence required. This appears to have been the view of the learned trial judge. It also finds support in *Rex v. John* (1943) T.P.D. 295, a decision of the Supreme Court of South Africa (Transvaal Provincial Division) which was referred to at the trial and before the Board, for there Schreiner J. in the course of his judgment said with reference to an almost identical section:

> "So also the evidence of a second accomplice, covering precisely the same ground as the first, is sufficient to satisfy the section and provide the Crown with more than the single evidence of an accomplice."

Their Lordships have given the terms of this judgment the close consideration which it merits, but on this point they are unable to accept the proposition it lays down as applicable to section 231 of the Basutoland Proclamation. It was suggested on behalf of the appellants that the expression "competent evidence" sufficed in itself to exclude the use of a second accomplice for the purposes of the proviso. Their Lordships cannot agree with this view. They see no reason to hold that the phrase means more than the admissible evidence of a competent witness and it is clear from the terms of section 207, if on no other ground, that an accomplice is

such a witness. In the opinion of the Board it is the words which follow —" other than the single and unconfirmed evidence of the accomplice" —that render the contention of the Crown untenable. Though these words speak in the singular they must march with the opening part of the section, and if, as has been held, the singular there includes the plural, the same must be the case in the proviso. Were it otherwise the application of the proviso in instances where the prosecution relied upon several accomplices would involve a notional marshalling of the accomplices, one being assigned to satisfy the minimum requirements apart from the proviso and the other or others being used to satisfy the proviso itself. Their Lordships are of opinion that such a strange procedure was not within the contemplation of the enactment. The point under discussion, though raised in the alternative to that previously discussed, really falls with it. If the section applies where the prosecution depends on a number of accomplices they remain an indivisible group for the purposes of the proviso and some proof that is not subject to the taint attaching to their testimony must be adduced to meet its demands.

Their Lordships are, therefore, of opinion that the evidence in the present case failed to establish the fact of murder as required by section 231 and they accordingly hold that the conviction was beyond the powers of the Court and bad. 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 section 231. The learned trial judge clearly regarded it as applicable and their Lordships think he was right. It was, however, contended that—apart altogether from what he considered as sufficient corroboration of the commission of murder to satisfy the requirements of the section—he had, in applying the rule of practice, found corroboration where none existed. What he looked upon as corroboration for this purpose appears from the following passages in the judgment:

> " In the case of *Rex* versus *John* to which I have just referred, it was said that the rule of practice may in the absence of direct evidence be satisfied in various ways, *inter alia*, by the non-denial by the accused of the evidence given by the accomplices incriminating the accused, or by the giving of false evidence. The Court must exercise the same great care, if not greater care, in considering the evidence tending to incriminate the accused as it does when considering the evidence relating to the commission of the crime. It was with these principles in mind that the Court has approached the questions to be determined in this case and they are most serious ones as far as the accused are concerned."

And later:

> " In addition to the evidence of the two accomplices incriminating all the accused, there is evidence that all the accused attended the feast as the accomplices said they did. None of the accused has given evidence denying taking part in the murder. If they were innocent is it not reasonable to suppose that they would have given evidence under oath and said so? "

This last passage is not quite accurate as there was no other evidence that appellant No. 3 was at the feast and appellant No. 2, as mentioned above, had in fact given evidence on oath denying the charge. These slips are, however, of minor importance in the circumstances. What matters is whether the learned judge was right in treating as corroborative the points thus relied upon. As regards the Christmas Day feast their Lordships cannot accept the view that the attendance of the appellants, or most of

them, thereat afforded any corroboration of the kind required. It was, by its nature, an event calculated to attract and it did attract others beside the appellants who were there, and the mere fact of attendance is no sufficient link with a crime alleged to have occurred after the festivities were over and at some distance from the hut where they had been held. The circumstance that the appellants (other than No. 2) elected not to give evidence is equally incapable of constituting corroboration, though on more general grounds. Silence on the part of an accused person which is tantamount to an admission by conduct may, on occasion, amount to corroboration. But an accused admits nothing by exercising at his trial the right which the law gives him of electing not to deny the charge on oath. Silence of that kind—and it is the only kind relevant to this appeal—affords no corroboration to satisfy the rule of practice under consideration. Nor does an accused corroborate an accomplice merely by giving evidence which is not accepted and must therefore be regarded as false. Corroboration may well be found in the evidence of an accused person ; but that is a different matter, for there confirmation comes, if at all, from what is said, and not from the falsity of what is said. It is, of course, correct to say that these circumstances—the failure to give evidence or the giving of false evidence—may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him. But if the other material is insufficient either in its quality or extent they cannot be used as a make-weight. To hold otherwise would be to undermine the presumption of innocence in a manner as repugnant to the Proclamation of 1938 as to the common law of England.

For these reasons their Lordships are of opinion that the learned judge misdirected himself as to the nature of the corroboration required by the rule of practice which he was obviously endeavouring to apply. As has frequently been pointed out the functions of this Board in criminal cases are not those of a court of criminal appeal and grounds of appeal going to the weight of evidence are not readily entertained. In the present instance, however, their Lordships feel that the question under discussion stands on a special footing. There was no proper corroboration of any material part of the evidence of the accomplices which, in itself, was not by any means free from blemish. Before accepting that evidence the learned judge sought corroboration and found it in circumstances which, as already held, ought not to have been regarded for the purpose, and it cannot be assumed that he would have arrived at the same conclusion had he directed himself correctly. Indeed, the terms of the judgment go some way to suggest that he would not have disregarded the cautionary rule of practice had he held, as he should, that its requirements were not fulfilled. In the circumstances their Lordships are disposed to treat the misdirection as a matter of grave consequence and would, were it necessary to do so, advise that the appeal be allowed on this ground also.

Before leaving this aspect of the case their Lordships desire to refer to a sentence in the judgment of the learned Judge which reads: "It has been frequently laid down that the evidence of one accomplice is corroborative of the evidence of another so far as the commission of the crime is concerned." From its context it would seem that this passage was intended to refer to the requirements of the proviso to Section 231. So understood it has already been dealt with. But, lest it might be taken as referring to the rule of practice just discussed, their Lordships think it well to state plainly that for the purposes of that rule the evidence of one accomplice is not corroborative of the evidence of another.

The remaining matter for consideration concerns the Administrative Officer, Mr. Driver, who in company with a native assessor sat with Grindley-Ferris J. at the trial. His conduct, according to the appellants, "constituted so grave a departure from the due and orderly administration of justice that its consequence is to vitiate the trial and judgment". Before coming to the detail of this complaint it will be convenient to refer to the provisions under which Mr. Driver was appointed to sit. By section 7 of Proclamation No. 57 of 1938, as amended by section 1 of Proclamation No. 41 of 1942, it is provided that:

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

It shall be the duty of such Officer or Officers to give, either in open Court or otherwise, such assistance and advice as the Judge may require, but the decision shall be vested exclusively in the Judge. The agreement or disagreement of such Officer or Officers with the decision of the Judge shall be noted on the record."

Before the amendment of 1942 it was necessary that the opinion of the Administrative Officer should be given in open court. See the decision of this Board in *Mahlikilili Dhalamini* v. *The King* [1942] A.C. 583. It is material to observe that under section 7, as amended, the assistance and advice of the Officer may be given "in open Court or otherwise", an expression which their Lordships think wide enough to authorise the giving of such assistance and advice in private.

The complaint against Mr. Driver was raised after the trial and the allegations made are not entirely agreed. Mr. Driver has, however, sworn an affidavit for the information of the Board and their Lordships are content to take the facts as therein appearing. The affidavit reads as follows:—

"During my tour on Circuit at Qacha's Nek in August, 1947, I learnt that Tumahole Bereng and others had been indicted by the Attorney General on a charge of (ritual) murder. As it had been customary for the Resident Commissioner to appoint me under the provisions of Section 7 of Proclamation No. 57 of 1938 as amended by Section 1 of Proclamation No. 41 of 1942 to assist the Judge of the High Court at the High Court sessions, I anticipated my appointment for the next session and I therefore made enquiries with the object of visiting the scene of the crime so that I would have a better understanding of the testimony of the witnesses called to testify at the trial. I learnt that the Superintendent of Police at Qacha's Nek, Major G. H. Cockrell, was proceeding to the scene of the crime on Monday 18th August to draw up a plan on the orders of the Attorney General to be produced in evidence at the trial and decided with his permission to accompany him and his staff. Two of my staff also accompanied us viz. my interpreter and assessor.

We all proceeded to the hut of No. 2 accused Gladstone Phatela. On arrival, the Superintendent of Police requested permission of the wife and (*sic*) No. 2 accused to enter the hut. To the best of my recollection I did not repeat the request to enter the hut. The wife agreed and the Superintendent of Police and I entered. I made notes of the size and contents of the hut.

The party then went out of the hut and the crown witness Jan Gat was called to point out the route taken by himself and the accused on the night of the murder. I had not read the Record at that stage so had no idea of the evidence given by Jan Gat at the preparatory examination.

When we got near the cattle kraal the Superintendent of Police who had prosecuted at the Preparatory Examination reminded Jan Gat of his evidence at the preparatory where he had described the route taken on the night of the murder as running between the kraal and the hut and asked him to follow that route. This request was no doubt made as that was the starting point. Gat did so and we followed him. He then proceeded on a path leading up the side of the hill and later diverted southwards and upwards and took us on to the plateau and onwards to the place where he thought the live body had been placed and bled (and probably killed). The other accomplice Maama was never with us when the Superintendent of Police and I followed Gat. He was behind with my staff. From the place where the deceased

was probably killed on the plateau behind No. 2's huts, Gat led us down to another point where he said the body had fallen from their hands while being carried to the stream where it was eventually found. He then led us further to the point where he said the body had been thrown over the cliff into the stream below.

At this point (stream) after the Superintendent had taken photographs and he and I had measured distances from the normal well worn path etc., I asked Gat numerous questions about the manner in which they had carried the body and eventually thrown it over the cliff.

None of these questions were questions which were not asked in evidence at the trial by the prosecuting Counsel, elicited by the defence, in cross examination of Jan Gat or Maama or by the bench.

The indications about the route taken etc., were all shown the Superintendent and myself by Jan Gat and at no stage to the best of my recollection did I direct any questions to Maama."

It may be stated at once that Mr. Driver's good faith was not impugned by the appellants and that their Lordships have no reason to think that in acting as he did he was moved by anything more than a desire to prepare himself for the duty he then anticipated. His action was none the less most unfortunate and his subsequent participation in the trial highly irregular. The burden of this complaint does not lie in the fact that Mr. Driver came to Court with a knowledge of the physical features of the terrain; it lies in the fact that before the trial, and in the absence of the appellants or their representatives, he had acquainted himself with certain material aspects of the Crown case in the company of a number of Crown witnesses and had interrogated Jan Gat regarding several important aspects of his evidence. As has been so often said, justice must not only be done but must manifestly be seen to be done. In their Lordships' opinion Mr. Driver's conduct was such as to cause doubt in the public mind as to the complete impartiality of the proceedings in which he subsequently took part. As Counsel for the Crown said when dealing with this aspect of the case, it has not been shown that what Mr. Driver did before the trial prejudiced the appellants. But it might well have been thought, when his activity became known, that he had come to Court with a biased mind in the sense of having formed a definite view as to what had occurred or as to the credibility of the witnesses whom he had observed or questioned. It might also have been thought that he had been told more than could be legally proved, or that his interrogation of an accomplice might have had an effect upon the story as told by that witness afterwards at the trial. All this, of course, is in the realm of conjecture, but where the irregularity complained of may reasonably engender suspicions of this nature it cannot be left out of account, particularly when, as here, the opinion of the Officer could have been communicated to the judge in private. In the case of *Mahlikilili Dhalamini* v. *The King* to which reference has already been made, Lord Atkin delivering the judgment of the Board said:

"*Prima facie*, the failure to hold the whole of the proceedings in public must amount to such a disregard of the forms of justice as to lead to substantial and grave injustice within the rule adopted by this Board in dealing with criminal appeals."

In the opinion of their Lordships the same may well be said of the irregularity under consideration. In the circumstances and in view of what has already been said regarding the appeal in its other aspects it is unnecessary to add more save to express the hope that the observations of their Lordships may serve to prevent the recurrence of such a procedure.

For the reasons appearing above their Lordships have, as already intimated to the parties, humbly advised His Majesty that the appeal should be allowed and the convictions set aside.

3622-43553-82-30-2/50. (Tq. P.)

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Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1949