~~GES.G.1.~~

3,1954

IN THE PRIVY COUNCIL No.29 of 1953

ON APPEAL FROM THE HIGH COURT OF BASUTOLAND

B E T W E E N:

37740

NKAU MAJARA Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

RECORD

pp.9-12 pp.7- 9 Indictment pp.1,2

1. This is an appeal by Special Leave against the Judgment and sentence of the High Court of Basutoland (Willan C.J.) dated the 9th February, 1953, whereby the Appellant was convicted of being an accessory after the fact to the crime of murder of one MOTETWA MEMANI, a Tembu adult male on the 16th May, 1952, at KUBUNG in the district of QUTHING and was sentenced to twelve years hard labour.

p.10,l. 41-p.11, l.29 p.8. l.30-p.9 l.6.

2. The granting of the said special leave was subject to the condition that the appellant accepts the five findings of fact which are set out in the said Judgment commencing page 8, line 30 and ending at page 9, line 6.

3. The sole question, for determination in this appeal is, accordingly, whether, accepting the said findings of fact, the appellant was rightly in law convicted of being an accessory after the fact to the said murder.

p.8,ll. 17-26

And in regard to the said question it is proper to emphasise that the learned trial Judge has in no wise whatsoever found that the appellant was concerned in, or connected, at any time, with the commission of the said murder, and he convicted the appellant upon, and only upon, the said findings

p.9,ll. 7-13.

of fact, his conclusion in law thereon being as stated in the said Judgment-

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"The cumulative effect of all these matters leads me to one conclusion only and that is that [the appellant] did all he could to defeat the ends of justice by hindering the apprehension of the murderers and by concealing the crime. Accordingly I convict him of being an accessory after the fact in this murder."

4. The power to convict a person of being an accessory after the fact in respect of an offence in Basutoland is given by section 177(2)of the Criminal Procedure and Evidence Proclamation (Cap. 16. Revised Edition of the Laws of Basutoland, 1949, Vol.1,p.299)which(omitting immaterial parts) is as follows:-

"Any person charged with an offence may be found guilty as an accessory after the fact in respect of that offence, if such be the facts proved....."

5. As regards the law to be administered in Basutoland it is by section 2 of the General Law Proclamation (Cap.26,ibid.p.408)so far as material enacted as follows:-

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

The determination of the said question depends therefore upon the Roman-Dutch Common Law ,which was pursuant to the said section, and still is the law in the said Cape of Good Hope and is now the Common Law uniformly in force throughout the whole of the Union of South Africa.

6. In consequence in the Union of South Africa of the case of R.v.Mlooi and Others 1925.AD.131, it was found necessary to make provision in the law there for the case of persons not properly socius criminis or particeps criminis and who could thus not be convicted as such but who might have been convicted as accessories after the fact if by the law as it then stood this could (which it could not) be done.

This was remedied by the insertion, as provided by section 27 of Act No.36 of 1926 of a section, insimilar terms as that of the said section 177(2) of the Basutoland Criminal Procedure and Evidence

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Proclamation, namely section 230(2),into Act No.31 of 1917.(Criminal Procedure and Evidence Act). In the said case of Rex v.Mlooi and others the particular accused concerned had been charged with murder but had, as it appeared from the evidence taken no part whatever in the actual murder, but merely assisted the murderer in disposing of the body of the murdered person . The jury convicted them of murder and they were sentenced to death by the presiding judge

It was held by the Appellate Division(Innes C.J.,Solomon,J.A., De Villiers,J.A.Kotzé ,J.A. and Wessels,J.A.) upon a question of law reserved that the appellants, being accessories after the fact and not socii criminis could not be convicted of the crime of murder. And it was held, further, that under the provisions of the Criminal Procedure Act No.31 of 1917, it was not competent for the jury upon an indictment for murder to convict the appellants as accessories after the fact.

7. From what is stated in regard to the law applicable to accessories after the fact in the judgments in the said case of Rex v Mlooi and others as well as according to the cases in the Union of South Africa of (e.g.):-

R v.Reynolds 1933 W.L.D.1.
per De Wet Jat pp.4,5

R v.Van Rensburg & Others
1943 T.P.D. 436
per Schreiner J.(as he then was)

and R v.Von Elling 1945 A.D.234

it is,the appellant submits,abundantly clear that inasmuch as the appellant did no act such as could come within the description, according to law, as regards the said murder of being an accessory after the fact thereto, he was not guilty and could not and should not in law have been convicted thereof but ought to have been acquitted.

8. In further support of the submission made in paragraph 7 hereof as to his having been wrongly convicted the appellant would refer to-

South African Criminal Law and Procedure -
Gardiner and Lansdown 5th Ed.pp.120-123.

Criminal Law in South Africa
William Pittman (sometime Judge-President Eastern Districts Local Division Supreme Court of South Africa) 3rd Ed.pp.80,81.

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And as to the Law of England which is to the same effect-

Archbold's Criminal Pleading Evidence and Practice 32nd Ed.pp.1478,1479.

9. As regards the said findings of fact the appellant would call attention to

Exhibits "E"&"F" pp.13-16 p.4.l.42. p.5.l.28

(a) the fact that the circulars Exhibits"E"and"F" on pages 13 to 16 of the Record referred to in the fifth of the said findings of fact are addressed to "Chief" whereas the appellant was a Headman and moreover the witness Acutt through whom the said circulars were put in evidence did not state that they had been seen by the appellant and

(b) section 6 (3) of the Native Administration Proclamation (Cap.54,Revised Laws supra.p.566) referred to in the third of the said findings of fact and as regards the same the appellant submits having regard to the provisions thereof that

(i) it can form no basis whatever (as the learned Judge has done) in law for the appellant either being charged with or convicted of the offence of being an accessory after the fact,and

(ii) any failure by the appellant to perform the duties placed upon him by the said Native Administration Proclamation or a failure as regards any other duty under which he was could only render him liable to such punishment as in any case is provided in the case of such failure but that such failure could not convert him into an accessory after the fact(such as the learned Judge it is submitted has done).

10. The appellant therefore respectfully submits that the said Judgment is wrong and unsustainable in law and that the same ought to be set aside and the said sentence quashed for the following amongst other

R E A S O N S

1. BECAUSE there is nothing in the said findings of fact whether regarded cumulatively (as the learned trial Judge did) or separately to render the appellant an accessory after the fact to the said murder.

2. BECAUSE there is nothing shown in any of the said findings of fact which is of such a kind as would constitute it an act done by the appellant as coming within the description in law of an accessory after the fact as regards the said murder.

3. BECAUSE mere inactivity, passivity or inanition which is what at the most the said findings of fact amount to is not such conduct as could render any person liable as being an accessory after the fact.

4. BECAUSE there was nothing done by the appellant which rendered him an accessory after the fact to the said murder.

5. BECAUSE the appellant was clearly not guilty of being an accessory after the fact to the said murder.

6. BECAUSE for the reasons hereinbefore set forth and other good and sufficient reasons the said Judgment is erroneous in law and ought to be set aside and the said sentence quashed.

S. N. BERNSTEIN

No.29 of 1953

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B E T W E E N

NKAU MAJARA Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

HY. S. L. POLAK & CO.
20/21, Took's Court,
Cursitor Street
London E.C.4.

Solicitors for the Appellant.