

GFS. 3.1

3, 1954

IN THE PRIVY COUNCIL

No. 29 of 1953

ON APPEAL  
FROM THE HIGH COURT OF BASUTOLAND

~~37747~~

UNIVERSITY OF LONDON  
W.C. 1.  
24 FEB 1955  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN:-  
KAU MAJARA ... .. Appellant  
-and-  
THE QUEEN ... .. Respondent

C A S E for the RESPONDENT

RECORD  
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10 1. THIS is an appeal from a judgment, dated the 9th February, 1953, of the High Court of Basutoland (Willan, C.J., two advisers and two assessors), whereby the Appellant was convicted of being an accessory after the fact to the murder of one Motetwa Memani and was sentenced to twelve years' hard labour.

2. THE following statutory provisions are relevant to this appeal:

Criminal Procedure and Evidence Proclamation (Laws of Basutoland, 1949, cap. 16).

20 "177.(2) 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, and shall on conviction, in the absence of any penalty expressly provided by law, be liable to punishment at the discretion of the Court convicting him, provided that in no case shall such punishment exceed that to which the principal offender would under any law be subject."

30 First Schedule, Part II.  
Offences referred to in respect of which Arrests may, under Part V, be made without Warrant

.....  
"Murder".

The Native Administration Proclamation (Laws of Basutoland, 1949, cap.54)

"4. It shall be the duty of the Paramount Chief and every Chief, Sub-Chief and Headman to perform the obligations by this Proclamation imposed, and generally to maintain order and good government among the natives residing or being in the area over which his authority extends; and for the fulfilment of this duty he shall have and exercise over such natives the powers by this Proclamation conferred in addition to such powers as may be vested in him by virtue of any law or native custom for the time being in force.

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x x x x x x x

"6.(1) It shall be the duty of the Paramount Chief and of every Chief, Sub-Chief and Headman to interpose for the purpose of preventing, and to the best of his ability to prevent, the commission of any offence by any native within his jurisdiction.

(2) The Paramount Chief and every Chief, Sub-Chief or Headman knowing of a design to commit an offence by a native within his jurisdiction may arrest or direct the arrest of the native so designing, if it appears to the Paramount Chief or to such Chief, Sub-Chief or Headman that the commission of the offence cannot otherwise be prevented. Any native so arrested shall, unless he be released within twenty-four hours of his arrest, be taken forthwith before a native Court having jurisdiction over him.

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(3) The Paramount Chief and every Chief, Sub-Chief or Headman receiving information that any native who has committed an offence for which he may be arrested without a warrant, or for whose arrest a warrant has been issued, is within the limits of his jurisdiction, shall cause such native to be arrested and taken forthwith before a native Court having jurisdiction over him.

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(4) The Paramount Chief and every Chief, Sub-Chief RECORD  
 or Headman receiving information that any  
 property of any description which has been  
 stolen, whether within or without the limits  
 of his jurisdiction, is within such limits,  
 shall cause such property to be seized and  
 detained pending the order of a Court having  
 jurisdiction in the matter and shall forth-  
 with report such seizure and detention to such  
 Court.

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x x x x x x x

8. (1) Provided that such orders do not conflict with  
 any law for the time being in force in the  
 Territory, the Paramount Chief may issue orders  
 to be obeyed by natives within the area of his  
 jurisdiction -

.....

(h) requiring natives to report to the Para-  
 mount Chief or to a Chief, Sub-Chief or Headman  
 the presence within the limits of his juris-  
 diction of any native who has committed an  
 offence for which he may be arrested without  
 a warrant or for whose arrest a warrant has  
 been issued, or of any property stolen or  
 believed to have been stolen whether within  
 or without such limits;

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.....

x x x x x x x

12. (1) A native shall be guilty of an offence and  
 shall be liable on conviction to a fine not  
 exceeding ten pounds, or to imprisonment with  
 or without hard labour for a period not  
 exceeding two months, or to both such fine  
 and imprisonment, if he -

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(a) contravenes or fails to obey any order  
 or direction which by this Proclamation he is  
 bound to obey;

.....

x x x x x x x

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14. A Chief, Sub-Chief or Headman shall be liable to a fine not exceeding fifty pounds upon conviction before a Subordinate Court of the First Class or before the Court of the Paramount Chief of any of the following acts or neglects -

(a) if he shall wilfully neglect to exercise the powers by this Proclamation conferred upon him for or in respect of the prevention of offences or the bringing of offenders to justice, or the seizure of property stolen or believed to have been stolen;

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(b) if he shall wilfully, and without reasonable excuse, refuse or neglect to exercise any powers given or delegated to him under this Proclamation;

....."

pp.1-2

3. The Appellant and twenty other persons were tried together on an indictment charging them with the murder of Motetwa Memani. Of the twenty other persons nine were acquitted at the close of the case for the Crown, and eleven were convicted of murder. The case for the Crown was that all the accused were members of a gang which, on Friday, 16th May, 1952, seized Motetwa Memani, took him into a hut, inflicted various injuries upon him by a ritual process, thereby killing him, and then threw his body over a cliff.

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4. The Appellant was a gazetted headman, and all the persons convicted of murder at the trial were his subjects. The Crown called the District Commissioner of Maseru, Mr. Acutt, who gave evidence about the position of chiefs and headmen in Basutoland. Mr. Acutt had been in Basutoland for thirty-seven years. He said that the Paramount Chieftainess had power over all the Basuto, and issued orders and directions to the Principal Chiefs, Ward Chiefs, Chiefs, Sub-chiefs and Headmen (that being the scale of authority). A headman had considerable control in his area. He was responsible for carrying out any lawful order of the Paramount Chieftainess and

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p.4,1.5.

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for reporting all crime. The Paramount Chieftainess had laid particular responsibility on chiefs, sub-chiefs and headmen in regard to ritual murders, both by sending round circulars and by touring Basutoland herself. (Mr. Acutt produced two of the circulars). She had urged sub-chiefs and headmen very strongly to try to stop ritual murders. She had told them that it was their duty and responsibility to report to the authorities immediately they heard of a plot to commit a ritual murder, and immediately they heard that there had been such a murder to report to their superior chiefs and to the police. Mr. Acutt had never known a chief or headman to be dismissed for not reporting a ritual murder.

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5. The first of the two circulars produced by Mr. Acutt was dated the 10th January, 1946. In it the Paramount Chieftainess referred to the increasing number of ritual murders, and ordered the chiefs and the nation that anyone with any knowledge of what might have happened must help the police in the investigation of suspicious deaths. Any chief or person not helping the police or failing to report what he knew would bear very heavy responsibility. The second circular was dated the 31st July, 1946. In it the Paramount Chieftainess ordered ward chiefs, chiefs and headmen, whenever there was a suspicion of a ritual murder, to raise an alarm and start at once to investigate and collaborate with the Government in every possible way. Any person hearing of such a suspicion and failing to do anything would be held responsible in the same way as the perpetrator of the crime.

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6. The Appellant was granted leave to appeal to Her Majesty in Council on condition that he accepted five findings of fact made by Willan, C.J. in his judgment. In dealing with the Appellant's case, the learned Chief Justice summarised the evidence against him. He set out the Appellant's defence, which was an alibi,

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and gave his reasons for rejecting it. The preponderance of the Crown evidence was that the Appellant arrived on the scene immediately after, not before, the murder, and this the learned Chief Justice accepted. He then made the five findings, which amounted to the following: The Appellant was a gazetted headman of the area in which the murder took place, and therefore in a dominant position: he had a duty under the Native Administration Proclamation, s.6(3) to arrest any native whom he knew to have committed an offence for which an arrest could be made without a warrant, and he did know that certain persons known to him had committed a murder in the hut: he took no effective action when the body had been thrown over the cliff: he did not carry out the provisions of the two circulars produced by Mr. Acutt. The effect of these findings was that the Appellant did all he could to defeat the ends of justice by hindering the arrest of the murderers and concealing the crime. The learned Chief Justice accordingly convicted him of being an accessory after the fact.

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7. The common law of Basutoland is, as nearly as the circumstances of the country permit, the same as the law for the time being in force in the Colony of the Cape of Good Hope; the statute law consists of Acts passed by the Parliament of the Cape of Good Hope before the 29th May, 1884 and Proclamations made by the High Commissioner since that date. Neither in the relevant South African statutes nor in the Proclamations is there any definition of 'accessory after the fact'. The Respondent respectfully submits that under the law now in force in the Cape of Good Hope the words 'accessory after the fact' cover not only persons who assist the principal offender, but also persons who knowingly adhere to the crime in any way. Persons who for any reason make common cause with the criminal, including those who fail to perform a legal duty knowing that their failure will help the criminal to escape detection, are accessories after the fact. The Respondent respectfully submits that the

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Appellant made common cause with the murderers, and RECORD  
committed a punishable offence, by failing to report  
either to a superior chief or to the police that  
certain persons known to him had committed a murder.  
8. The Respondent respectfully submits that the  
judgment of the High Court of Basutoland is right and  
ought to be affirmed, for the following (amongst other)

R E A S O N S

- 10
1. BECAUSE the Appellant made common cause with  
the murderers
  2. BECAUSE the Appellant committed a punishable  
offence with the object of concealing the  
murder.
  3. BECAUSE the Appellant's conduct constituted him  
an accessory after the fact under the law of  
Basutoland.

J.G.LE QUESNE.

No. 29 of 1953

IN THE PRIVY COUNCIL

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ON APPEAL  
FROM THE HIGH COURT OF BASUTOLAND

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BETWEEN:  
NKAU MAJARA      ....      Appellant  
                  ~~-and-~~  
THE QUEEN        ....      Respondent

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C A S E  
~~-for-~~  
THE RESPONDENT

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CHARLES RUSSELL & CO.,  
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Solicitors for the Respondent.