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G.F.S.G.T.

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 : NKAU MAJARA ... Appellant

- and -

THE QUEEN ... Respondent

RECORD OF PROCEEDINGS

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37745

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

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL

No. 29 of 1953

ON APPEAL FROM THE HIGH COURT OF BASUTOLAND

B E T W E E N : NKAU MAJARA ... Appellant

- and -

THE QUEEN ... Respondent

RECORD OF PROCEEDINGS

No. 1.
INDICTMENT.

In the High Court

No. 1.
Indictment.

IN THE HIGH COURT OF BASUTOLAND

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ARTHUR CLEMENT THOMPSON, in his capacity as Attorney-General for the High Commission Territories, who as such prosecutes for and on behalf of Her Majesty the Queen, presents and informs the Court:-

20

- That: (1) PHEELLO SMITH
- (2) MOKHOU SHAPHANE
- (3) GEORGE MAHATANYE
- (4) MAHLEHLA SMITH
- (5) MOTEMEKOANE MASIPHOLE
- (6) MAJAKATHATA MEMANE
- (7) NKAU MAJARA
- (8) TUMO TANYELE
- (9) TLOKOTSI MOTSAPI
- (10) BOTSO MOHALE
- (11) MOQEKELA POKOLA
- (12) MOAHLOLI SELEKE
- (14) MOTLALEPULA MASENYANE
- (15) DURBAN RAKOJOANA
- (19) RAMATHE MASENYANA
- (25) MAKAKAMELA LETHENA
- (30) MAPHEELLO SMITH

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In the
High Court.

No. 1.

- (32) MAMOTSETSE MAHATANE
- (42) MOTHIBA TLATLAMETESE
- (43) MAZONDANE MEMANI
- (44) RATEMA MOHLOCHANA

Indictment - all Basuto adults, hereinafter called the accused,
continued. are guilty of the crime of

M U R D E R

In that on or about the sixteenth day of May, 1952, and at KUBUNG in the district of QUTHING, the accused did each and all, or one or more of them, wrongfully, unlawfully and maliciously kill and murder MOTETWA MEMANI, a Tembu male adult there being.

10

In case of conviction the said ARTHUR CLEMENT THOMPSON in his capacity aforesaid, prays for judgment against the accused according to law.

(Sgd) A.C. THOMPSON
ATTORNEY GENERAL FOR THE HIGH
COMMISSION TERRITORIES.

Prosecution
Evidence

No. 2.

H. Acutt,
Examination.

No. 2.

EVIDENCE OF H. ACUTT.

20

P.W.11. MR. H. ACUTT (who is duly sworn):

EXAMINED BY:

MR. WILL:

Mr. Acutt you are the District Commissioner of Maseru ? - I am.

How long have you been in Basutoland? - I have been in Basutoland for thirty-seven years.

Have you been in Government Service for most of that time ? - I have been in Government

30

Service for twenty-seven years, and in an Administrative job since 1946.

Have you had much to do with the customs of the Basuto ? - I have had quite a fair amount.

Will you tell His Lordship and gentlemen Assessors what powers the chiefs have over their people ? - The Paramount Chief of course has power over all the Basuto and in terms of Chapter 54 of the Laws of Basutoland she issues orders and instructions to the principal chiefs,

Ward Chiefs,
Chiefs,
Sub-chiefs and
Headmen.

Do you particularly refer to section 4 Mr. Acutt ? - I do.

Section 6(i) ? - Yes.

Section 8 ? - Yes.

Section 10 ? - Yes.

Those are the sections which give her right to send out instructions to people ? - They are.

Over what area does a chief rule then ? - You will have a ward chief who is responsible for the equivalent of a district. In Qacha's Nek you have one ward chief who is responsible for the whole of that district. In Maseru, however, there are five such chiefs. They again have ordinary chiefs who are responsible to them and then the Headmen who are again responsible and come under those Chiefs, they are responsible to the Chiefs.

In this case a particular accused has been referred to as a sub-chief, how would he fit into that category ? - Sub-chief is the name given to a person less than a ward chief, to distinguish between a chief and a sub-chief. A sub-chief is a person who has half a dozen or more Headmen under him, then he is called a sub-chief.

HIS LORDSHIP:

Is a sub-chief directly under a Ward Chief or is there another chief in between ? - A chief comes in between.

So the table is -

In the
High Court

Prosecution
Evidence

No. 2.

H. Acutt,
Examination
continued.

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In the
High Court

Prosecution
Evidence.

Paramount Chief,
Ward Chief,
Chief,
Sub-chief,
Headman.

No. 2.
H. Acutt,
Examination --
continued.

MR. ACUTT:

Today a sub-chief is never referred to as sub-chief, they are merely referred to as chiefs.

MR. WILL:

Dealing with the lowest of the rank. Is a Headman a man with any sort of authority in his particular area that he has to control? -- Headmen have considerable control in their area. He is the man who allots all land, takes them away from people if they are not being ploughed properly and is responsible for carrying out any lawful order issued by the Paramount Chief. 10

Who is responsible for investigating crime apart from the actual Police? -- The Headman is responsible for reporting all crime. 20

Would you say that a Headman is a man in a dominant position so far as the people under him are concerned? -- I would say that he held a dominant position in his area.

Then of course to take the next step, a sub-chief he also is given more power is he? -- Yes he has more power than a headman.

Does it make any difference whether a Headman is gazetted or not for the purposes you are telling us now? -- Not at the present moment. When these Chiefs and Headmen were gazetted a great number of them were left out of the gazette for some reason or another but in many districts the ungazetted Headman still collects the tax and they are paid tax gratuities. 30

The point I am making is that does the fact that a Headman has been gazetted or not make any difference with respect from a commoner or the dominant position that a Headman holds? -- At the present, in my opinion, it does not make any material difference. 40

I don't want to deal with all the orders issued by the Paramount Chief obviously but I want to deal with a particular order. Do you know of a particular order issued by the Paramount Chief in

regard to ritual murders ? -- In the last five years very, very many orders have been sent out by the Paramount Chief dealing with murders. I couldn't say I can give any particular one.

Do you recognise these two which have been signed by the Paramount Chief ? - It is difficult to say I can remember the exact one but it is similar to the Circulars issued by the Paramount Chief in regard to medicine murders.

10 The real point I want is that in these Circulars and any other Circulars has she laid any particular responsibilities on Chiefs, sub-Chiefs and Headmen in regard to ritual murders ? - She definitely has, not only by these Circulars but also of making a tour of Basutoland herself and emphasizing that particular point.

HIS LORDSHIP:

Do these Circulars come to District Commissioners ? - They do.

20 Are you putting those in ? - Yes, My Lord.

You are putting these in an exhibit. The first one is dated what date ? - The first one is Circular No.1 of 1946 dated 10th January, 1946, Exhibit E.

And the other one ? - The other one is No. 28 of 1946 dated 31st July, 1946, Exhibit F.

MR. WILL:

30 Mr. Acutt you said she had been round the country addressing the people. Has she addressed Pitsos in your presence on murders ? - Yes, the Paramount Chief addressed a pitso in the Qacha's Nek district in my presence.

40 Just shortly what is the general effect of the responsibility which the Paramount Chief has laid on the shoulders, so far as we are concerned in this case, of sub-chiefs and Headmen in respect of the reporting or investigation of ritual murders ? - First of all she stressed very strongly that they should speak to the people and try to stop ritual murders. She then went on to stress that it was their duty and responsibility to report to the authorities immediately they heard of any such plot, then she went on to emphasise that it always has been said that the chiefs themselves and the headmen themselves were responsible for these murders and then she called upon the people

In the
High Court

Prosecution
Evidence.

No. 2.

H. Acutt,
Examination
continued.

In the
High Court

Prosecution
Evidence.

No. 2.

H. Acutt,
Examination -
continued.

Cross-
examination.

themselves, the ordinary commoner to bring this matter to the notice of the authorities.

I think you have dealt with the question about what they were to do if they heard of a medicine murder which was going to take place but what were they to do when they found that an actual ritual murder had taken place? - To report to the authorities immediately, that is to the Chiefs immediately above and to the Police.

CROSS-EXAMINED BY:

10

MR. DE WET:

If an offence is committed in the presence of the Chief and some Headman whom would you expect to report that offence? - I suppose the Chief, but in my opinion it is the responsibility of both of them.

You admit that you would expect the Chief to report it. He is the dominant authority present in such a case isn't he? - The Chief is the dominant personality of the two and if he was there and they both saw it the Headmen would probably stand back and let the Chief take action.

20

And the Headmen would be entitled to assume the Chief would make a report? - I wouldn't say he would be entitled to.

He might assume? - He might assume the Chief would make a report.

You said a Headman has certain powers in his area, outside that area he has no power? - No, he hasn't any power outside his own area except the responsibilities of the ordinary Basuto like anybody else in authority.

30

He has no right to order any people outside his own area? - No, he hasn't any right to do so.

In fact they won't obey an instruction to any such order? - I cannot answer that one because if they know he is a Chief or a Headman they might easily obey such an instruction but on the other hand they may not, they are not obliged to.

40

I suggest he then reports to his Chief if he knows a crime has been committed? - Yes, he is expected to or in certain criminal matters direct to the native Court.

He would be entitled to report to his Chief ?
- Yes, he is entitled to report to his Chief or anybody in authority.

And leave the matter there ? - Yes once he has reported the onus does pass either to the Court or to the Chief.

HIS LORDSHIP:

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Mr. Acutt of your own knowledge have you ever known a Chief or Headman being dismissed from the Government service or whatever they are dismissed from for not reporting a ritual murder ? - I know of no such case.

In the High Court

Prosecution Evidence.

No. 2.

H. Acutt - Cross-examination - continued.

No. 3.

EXTRACT FROM JUDGMENT.

No. 3.

Extract from Judgment, 9th February, 1953.

PER WILLAN, C.J.

... ..

I now come to the case of accused No. 7. He is a gazetted headmen of the area in which this crime was committed - he admits this.

20

The case against him is that five Crown witnesses said he was present in the hut after the deceased had been killed. One of these five said that when accused No.7 entered the hut he asked accused No.1 why so many people were present, and accused No.1 replied that he trusted all the people who were present.

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One other Crown witness stated that he saw accused No.7 arrive with the crowd of people bringing the deceased to the hut; another Crown witness stated that he saw this accused enter the hut with the other people; and another Crown witness said he saw this accused enter the hut when there was screaming therein.

The defence of this accused is an alibi supported by two witnesses. That alibi is that this accused was at a village on that Friday night some

In the
High Court

No. 3.

Extract from
Judgment,
9th February,
1953 -
continued.

distance from the hut and that he spent that night with his lover, Matie Pera, in that village. This accused stated that his uncle's mother-in-law lived in that village and was well known there. In cross-examination he said that this mother-in-law died in that village on that Friday and yet he did not hear anything of this until the Saturday afternoon after he had returned to his own home. I am unable to believe this nor do any one of the assessors, particularly the Basuto Assessors, who can visualise a small native village better than myself. Accordingly for that reason and because of the abundant evidence brought by the Crown, which I accept, proving that this accused was at the hut on that Friday night, I reject the alibi of accused No. 7.

10

The next point to consider is when accused No. 7 first appeared at the murder. The preponderance of the Crown evidence is that he was present immediately after the killing of the deceased and not before it. I accept that preponderance of evidence because I have a doubt as to whether this accused was present prior to the killing of the deceased.

20

Having come to that conclusion can this accused be convicted of being an accessory after the fact ?

From the Crown evidence, and from his own admissions made when he gave evidence, I find the following -

First, that he is a gazetted headman of the area in which this murder took place.

30

Secondly, that he was in a dominant position because he was a headman.

Thirdly, that by virtue of section 6(3) of the Native Administration Proclamation (Cap. 54) there was a legal duty cast upon him to arrest any native he knew, or had information against, that such native had committed an offence for which an arrest could be made without a warrant. In this case accused No. 7 knew that murder had been committed in the hut by certain persons known to him.

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Fourthly, that he took no effective action afterwards when the body had been thrown over the cliff. In his own evidence he said he knew of the existence of this body at the foot of the cliff on Saturday, the 17th May, 1952, but he did nothing about it till the following Tuesday.

Fifthly, as a headman he did not carry out the provisions of two circular instructions, Exhibits E and F, issued by the Paramount Chief of Basutoland regarding the immediate reporting of a ritual murder and the giving of prompt assistance to the police.

In the
High Court

No. 3.

Extract from
Judgment,
9th February,
1953 -
continued.

10

The cumulative effect of all these matters leads me to one conclusion only and that is that accused No. 7 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.

All four Assessors agree with my findings in respect of each of the accused I have convicted.

HIS LORDSHIP:

Stand up No. 7 accused.

I sentence you to twelve years hard labour

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No. 4.

ORDER IN COUNCIL GRANTING SPECIAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL.

In the
Privy Council

No. 4.

Order in Council granting special leave to appeal to Her Majesty in Council, 1st August 1953.

AT THE COURT AT BUCKINGHAM PALACE

The 1st day of August, 1953.

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD CHANCELLOR

MR. SECRETARY LYTTELTON

LORD PRESIDENT

SIR THOMAS DUGDALE

CHANCELLOR OF THE

DUCHY OF LANCASTER

30

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 22nd day of July 1953 in the words following, viz:-

In the
Privy Council

No. 4.

Order in Council granting special leave to appeal to Her Majesty in Council,
1st August 1953 -
continued.

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of (1) Pheello Smith (2) Mokhou Shapane (3) George Mahatanye (4) Mahlehla Smith (5) Motemekoane Masiphole (6) Majakathata Memane (7) Nkau Majara (8) Durban Rakojoana (9) Mapheello Smith (10) Mamotsetse Mahatane (11) Mothiba Tlatlametsi (12) Ratema Mohlochana in the matter of an Appeal from the High Court of Basutoland between the Petitioners (Appellants) and Your Majesty (Respondent) setting forth (amongst other matters): that the Petitioners (except No. 7) desire special leave to appeal against the Judgment and sentence dated the 9th February 1953 of the High Court of Basutoland whereby each of them was convicted of and sentenced to death for the murder on the 16th May 1952 at Kubung in the district of Quthing of one Motetwa Memani a Tembu male adult; that Petitioner No. 7 desires special leave to appeal against the said Judgment and sentence whereby he was convicted of being an accessory after the fact in the murder and was sentenced to twelve years' imprisonment with hard labour; that it is submitted that the only material evidence of the alleged murder given on behalf of the prosecution was that of eleven accomplices and there were such discrepancies in their evidence that it ought to have been wholly disregarded by the Court; that Petitioner No.7 further submits that the Court was wholly wrong and misdirected itself in law in finding as it purports to have done that he was an accessory after the fact; And humbly praying Your Majesty in Council to grant the Petitioners and each of them special leave to appeal from the Judgment and sentence of the High Court of Basutoland dated the 9th February 1953:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that the said Petition of all the Petitioners except Petitioner No.7 ought to be dismissed and (2) that leave ought to be granted to Petitioner No. 7 (Nkau Majara) to

enter and prosecute his Appeal against the Judgment of the High Court of Basutoland dated the 9th day of February 1953 upon condition that the said Petitioner accepts the five findings of fact of the Judge of the said High Court at the end of his Judgment, viz:- 'First that he is a gazetted headman of the area in which this murder took place; secondly that he was in a dominant position because he was a headman; thirdly that by virtue of section 6 (3) of the Native Administration Proclamation (Cap. 54) there was a legal duty cast upon him to arrest any native he knew or had information against, that such native had committed an offence for which an arrest could be made without a warrant. In this case accused No. 7 knew that murder had been committed in the hut by certain persons known to him; fourthly that he took no effective action afterwards when the body had been thrown over the cliff. In his own evidence he said he knew of the existence of this body at the foot of the cliff on Saturday the 17th May 1952 but he did nothing about it till the following Tuesday; fifthly as a headman he did not carry out the provisions of two circular instructions, Exhibits E and F, issued by the Paramount Chief of Basutoland regarding the immediate reporting of a ritual murder and the giving of prompt assistance to the police':

"AND THEIR LORDSHIPS do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (so far as it relates to and is necessary for the purposes of the Appeal as regards accused No. 7 as hereinbefore set forth and which in the event of any dispute arising in regard thereto shall be referred to Their Lordships) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

In the
Privy Council

No. 4.

Order in Council granting special leave to appeal to Her Majesty in Council, 1st August 1953 - continued.

In the
Privy Council

No. 4.

Order in Coun-
cil granting
special leave
to appeal to
Her Majesty in
Council,
1st August
1953 -
continued.

Whereof the High Commissioner for Basutoland
the Bechuanaland Protectorate and Swaziland for
the time being and all other persons whom it may
concern are to take notice and govern themselves
accordingly.

W.G. AGNEW.

E X H I B I T SExhibits.E. - CIRCULAR No. 1 of 1946.E.
Circular No.
1 of 1946,
10th January
1946.Circular No. 1 of 1946.

No. 17.

Office of the Paramount Chief,
Matsieng, Basutoland.

10th January, 1946.

RITUAL MURDERS.

I greet you, Chief.

Chief,

10 With reference to the above matter I order
you to call a pitso of the people in your ward and
read them this message from me.

MESSAGE.

20 Whereas cases in which the Chiefs and peo-
ple are accused of ritual murders are on the in-
crease so much so that this country is now overcast
with a terrible cloud of this crime, I remind the
Chiefs and people of the following words of a pro-
clamation by the late Chief Moshoeshoe dated the
27th August, 1855. He said:

"Now, when any one is killed in a case of
witchcraft, the murderer will be most severely
judged and sentenced to death. This word
is for public information, and will stand
as law, and is assented to by Letsie, by all
my brothers, and by all men in the tribe,
who spit on the lie of witchcraft, and cover
its face with their spittle."

30 These ritual murders which are committed for
the sole purpose of obtaining chieftainship medi-
cine horns, etc. I feel I cannot tolerate them and
the Government will also not tolerate them. In the
circumstances I shall be glad if every Mosuto,
Chief or commoner, will keep the above-quoted words
of the founder of this nation in his mind as the
text of these words will henceforth be carried out
to the letter. These murders have brought dis-
grace upon this country to an unmeasurable extent.

Exhibits.

E.
Circular No.
1 of 1946,
10th January
1946 -
continued.

I order the Chiefs and nation that in the investigations by the Police of suspicious deaths, the Police must be assisted by all those who may have knowledge of what may have happened to the deceased person. Any Chief or person who will not assist the Police or who will not report what he knows of the suspicious death of the deceased will bear very heavy responsibility for having hidden his knowledge. Chiefs and people, you should, however, be careful in the giving of information to the police that you must not give them false information based on hatred and because of which innocent people will be arrested. The wrongful arrest of persons arising out of calumny must be avoided and it must be known that I shall deal severely with any person who offers to give false evidence because in these matters what is required is the truth only.

10

Further I have come to the conclusion that this wave of replenishing medicine horns is caused by these many witch doctors who are scattered all over villages and hamlets. I hereby give an order that no witch doctor should enter any village without the knowledge of the chief of that village. If there be a doctor using Sesuto medicines in any house with the knowledge of the Chief, the Chief should send out two witnesses to see personally what is being doctored in that particular house. If the doctor is to doctor at the Chief's place even then the Chief must order two witnesses to see what is being done. Every Chief who will find a witch doctor wandering about in his village without his knowledge should arrest such doctor and try him for an offence because it is these doctors who encourage the breaking of the law.

20

30

With greetings,

I am,

(Sgd) MANTSEBO SEEISO

Paramount Chieftainess.

F. - CIRCULAR No. 28 of 1946.

Exhibits.

No. 17. F. Circular No. 28 of 1946, 31st July, 1946.

Office of the Paramount Chief,
Matsieng, Basutoland.

31st July, 1946.

Circular No.28 of 1946.

Chief
.....

I greet you, Chief.

10 Chief,

I remind you of my circular No.1 of 1946 regarding ritual murders against which I have already warned the nation.

20 2. As there is no change in the situation and matters still continue to be as bad as before I am obliged, therefore to issue orders again which will serve as a panacea in the matter. The ward Chief, Chief and any Headman, will, every time there is a suspicion of such an occurrence, raise an alarm and start at once to investigate and to collaborate with the Government in every possible way which is the duty of every person who has responsibility in this country.

30 3. Chief, as you are aware the nation of Basutoland is noted for its strength more than any African nation and famous for its loyalty to the Government of His Majesty the King and all these things have been brought about by the services of the nation. It is understandable that whatever bad things the nation does will likewise be notorious which things will not only ruin our good name and fame but will also ruin our Basuto Chieftainship and we will then be deprived of our authority and rights.

4. I cannot pass this matter without saying a strong word of warning to you Chiefs. In these murders your names are being mentioned and the people say they have been ordered by you. As I do not know the secret of this matter, it may or it

Exhibits.

F.

Circular No.
28 of 1946,
31st July,
1946 -
continued.

may not be true. If it be true it is a painful thing that Basutoland should have this ill-luck because of you. This is a new thing in Basutoland which did not happen in the time of previous Chiefs. You should know that God will make it possible for every person committing such a crime to be known because he who is in hiding may be seen by a passerby. You should know that whoever will be found involved in such matters will lose his rights.

10

5. I order, therefore, that any person hearing of a suspicion in such a matter, and being unable to do anything, will be held responsible in the same way as the perpetrator of the crime himself. I conclude by directing these words to every person in Basutoland who will obtain an order from his chief to kill a person that he should come direct to me to report so that I can take measures to punish such a chief. This is my order to you and it remains for you to choose whether you choose to report to me or to carry out the order of your Headman to murder a person, which is the excuse most people give in such cases that they were ordered by their chiefs.

20

6. Any person who is involved in such a matter and who defends himself by stating that he had been ordered by his chief will have to answer and say what he thinks of my circular which says: "You should refuse and report such an order to the Paramount Chief because your defence will not be acceptable". Follow my order as head of the nation and leave these orders which you get from your chiefs which are dangerous to you.

30

With greetings,

I am

(Sgd) 'M'ANTSEBO SEEISO

Paramount Chieftainess.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT

OF BASUTOLAND

B E T W E E N :

NKAU MAJARA ... Appellant

- and -

THE QUEEN ... Respondent

RECORD OF PROCEEDINGS

Hy. S.L. POLAK & CO.,
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Solicitors for the Appellant.

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Solicitors for the Respondent.