Privy Council Appeal No. 29 of 1953

Nkau Majara - - - - - - - - - - *Appellant*

v.

The Queen - - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF BASUTOLAND

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JANUARY, 1954

Present at the Hearing:

THE LORD CHIEF JUSTICE OF ENGLAND (LORD GODDARD)
LORD REID
MR. L. M. D. DE SILVA

[*Delivered by* MR. L. M. D. DE SILVA]

This is an appeal by special leave from a judgment, dated the 9th February, 1953, of the High Court of Basutoland, whereby the appellant was convicted of being an accessory after the fact to the murder of one Motetwa Memani.

The appellant and twenty others were tried together by the High Court (Willan, C.J. sitting with assessors) on an indictment charging them with the murder. The case for the prosecution was that all the accused were members of a gang which on the 16th May, 1952, seized Motetwa Memani, took him into a hut, inflicted various injuries on him by a ritual process thereby killing him, and then threw his body over a cliff. Of the twenty other persons nine were acquitted and eleven were convicted of murder. The appellant was convicted of having been an accessory after the fact to the murder.

The learned Trial Judge, giving the appellant the benefit of a doubt, found that "he was present immediately after the killing of the deceased and not before it". He then proceeded to convict the appellant of having been an accessory after the fact upon the following findings:—

> "*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."

Murder is an offence for which an arrest could be made without a warrant. It is not disputed that the view of the law taken by the learned Trial Judge in the third finding is correct.

It is abundantly clear from the judgment, although it is not expressly stated, that the appellant failed to arrest the murderers when he came into the hut immediately after the murder or at any time thereafter.

Special leave to appeal was granted to the appellant on condition that he was to be precluded from disputing the findings of fact above-mentioned.

The sole question for determination by their Lordships is whether, accepting the said findings of fact, the appellant was rightly convicted of having been an accessory after the fact to the said murder.

Under section 2 of the General Law Proclamation (Cap. 26 Laws of Basutoland) the common law of Basutoland

> " 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 or 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.

It is not disputed that the determination of the question before their Lordships depends on the Roman Dutch Common Law which is the common law of the Cape of Good Hope and is also the common law in force in South Africa.

The view that the appellant was an accessory after the fact is founded on the fact that by refraining from performing his duties he gave the murderers assistance which in the ordinary course would, or might, have helped them to avoid being brought to justice. It has not been established that he gave assistance through any physical act.

It was conceded by counsel for the respondent that under the English Law the appellant could not be held guilty of being an accessory after the fact. It was suggested that under that law a necessary element of the offence of being an accessory after the fact was assistance to the principal offender by a physical act and not merely by omitting to do something. Counsel for respondent argued that the English Law made this distinction because assistance by omission, which under any system of law could but be logically regarded as reprehensible equally with assistance by commission, would in appropriate circumstances under the English Law constitute the offence of misprision of felony. He contended that the position was wholly different under the law of South Africa because, among other reasons, under the Roman Dutch Law there prevailing, an offence arising from assistance by omission could not be accorded a separate category.

It was argued for the appellant that the term " accessory after the fact " had to be given a meaning under the law of South Africa in no way different from that which it possesses under the English Law.

It is correctly stated by Lansdowne and Gardiner in their treatise on South African Law and Procedure (page 116) that " the term ' accessory after the fact ' is one derived from English Law and although quite unknown to Roman Dutch Law criminologists, has been adopted in South African practice ". In support of this view it is sufficient to refer to the case of *Rex* v. *Mlooi*, S.A.L.R. Appellate Division 1924-25, page 135, in which Solomon, J.A., referring to a set of circumstances, which, on the authority of Moorman and Van der Linden, he thought constituted an offence under the Roman Dutch Law, said:—

> " It does not appear that under the Roman Dutch Law any special name was given to this offence and it is convenient to adopt the English Law expression of ' accessory after the fact '. Its use is sanctioned not only by the practice of our Courts but also by the fact that it is to be found enshrined in our statute law."

It does not necessarily follow from the fact that the term " accessory after the fact " has been adopted from the English Law that it has the same meaning in the Law of South Africa as it has under the English Law.

No doubt it would retain much of the connotation which it possessed under the English Law but its meaning in the country of its adoption could naturally and properly be influenced by the system of law prevailing in that country, namely the Roman Dutch Law. This was almost inevitable as the term had to be used in relation to, and in the course of administration of, that law. It is to be observed that Solomon, J.A. in the passage quoted above was referring to an offence conceived under the principles of the Roman Dutch Law and fashioned by the notions current in that law. In their Lordships' opinion an authoritative view of the true position is to be found in the following passage in the judgment of Innes, C.J. in the case of *Rex* v. *Mlooi* referred to above.

> " He who intervenes to assist a criminal after the event may conveniently be called an accessory after the fact—not in the technical and restricted sense in which that term is used in English law, but in an extended sense applicable to crimes in general. So used, its meaning is well understood, and has received some degree of statutory recognition (Act 48 of 1882 (*c*) s. 61 ; Act 24 of 1886 (*c*) s. 81 ; Act 32 of 1916 s. 149 (2) and (*c*))."

The statute law affords no assistance in the determination of the question before their Lordships because no South African Act or Basutoland Proclamation defines the term " accessory after the fact " for the purposes of the general criminal law although it occurs sometimes defined, sometimes undefined, in various statutes dealing with special subjects.

It appears to their Lordships from what has already been said that the term " accessory after the fact " does not, under the law of South Africa, bear a meaning identical with that which it has under the English Law.

No decision of the South African Courts was cited to their Lordships in which the question had been considered whether assistance to a principal offender given by omission is sufficient equally with assistance given by commission to render the giver an accessory after the fact. Nor have they been referred to the dicta of any of the Roman Dutch jurists bearing on the point. The dicta quoted in the judgments in the case of *Rex* v. *Mlooi* (supra) throw considerable light upon the elements which are necessary to constitute a person an accessory after the fact in South Africa. Those dicta and those judgments lead to this conclusion. To constitute a person an accessory after the fact in South Africa it is sufficient to establish that assistance was given to the principal offender in circumstances from which it would appear that the giver " associated " himself with, in the broad sense of that word, the offence committed. The dicta and the judgments do not concern themselves with the question whether assistance given by remaining inactive and refraining from doing something would render a person an offender equally with assistance given by doing something. In the absence of anything to the contrary in the Roman Dutch Law their Lordships would conclude that that law makes no distinction between the two ways of giving assistance. There is however not merely the absence of anything to the contrary but something which supports that conclusion.

It appears to their Lordships that the idea that a person was punishable, in appropriate circumstances, for refraining from action was prevalent in the Roman Dutch Law. For instance Huber in chapter 1, book VI, of his Heedensdaegse Rechtsgeleertheyt (translated by Percival Gane) dealing generally with crimes, says at section 10 " at times even refraining from action and mere impassivity makes a person liable to the ordinary penalty." Huber goes on to say that this principle has been put into practice in cases of treason. He then says " in other very serious matters impassivity is also punished but with a penalty less than the ordinary."

In section 11 immediately following he says :—

> " Otherwise, apart from such dangerous and detrimental impassivity and negligence of a man's duty, it is an essential of crimes that there should be an act, the intention of a person to do wrong not being enough to convict him of the crime which he intends to commit, if he does not actually commit it."

This passage appears to their Lordships to need some comment. It will be seen that here Huber deals with two kinds of " impassivity." In the one a person remains passive because although he has formed an intention to accomplish something prohibited he does nothing and thereby he fails to accomplish it. In these circumstances he commits no offence. In the other by remaining passive and doing nothing a person accomplishes something prohibited, for instance by refraining from arresting an offender he accomplishes something prohibited namely giving an offender assistance to escape. It is the latter form of " impassivity " which Huber styles " dangerous and detrimental " and which, according to what he has said earlier, is punishable as an offence.

From what has been said it appears to their Lordships that the latter kind of impassivity when it occurs after the commission of an offence by another and has for its objective the giving of assistance to that other to escape, is under the law of South Africa punishable as the offence of being an accessory after the fact.

There can be no doubt that the appellant refrained from arresting the murderers on his arrival at the scene of the murder immediately after it had taken place, in order to assist them by giving them an opportunity to escape from justice. His subsequent conduct was designed to achieve the same object. That they were in fact brought to justice is not material to the question whether the appellant has been properly convicted. The conduct of the appellant taken as a whole leads to the inevitable conclusion that in rendering assistance he associated himself with the murder. In their Lordships' opinion he was under the law of South Africa and consequently under the law of Basutoland an " accessory after the fact," to the murder which had been committed.

Their Lordships think one further point needs some comment. Statutory penal provision under which the appellant could have been punished is to be found in the Native Administration Proclamation (Laws of Basutoland 1949 Cap. 54) Section 14 which says :—

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

It has been suggested that the existence of this provision precludes the appellant from being punished as an accessory after the fact to the crime of murder. It sometimes happens that the elements which constitute a minor offence are present when a graver offence is committed. This is particularly true of minor offences created by statute. But whenever this happens no ground is furnished for not proceeding against the offender for the graver offence. It will be observed that " wilful neglect " of a duty imposed by the proclamation can occur without the objective of giving an offender an opportunity to escape. Where the latter element is present the offence of being an " accessory after the fact " has been committed. Their Lordships are of the opinion that the statutory penal provision referred to does not stand in the way of the conviction in this case.

It was not disputed that the appellant though charged with murder could under the law of Basutoland be convicted of having been an accessory after the fact to murder.

For the reasons which they have given their Lordships have humbly advised Her Majesty that the appeal be dismissed.

(20318) Wt. 8267—24 100 4/54 D.L.

In the Privy Council

NKAU MAJARA

v.

THE QUEEN

DELIVERED BY MR. L. M. D. DE SILVA

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

1954