Appeal No. 24 of 1949.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF SWAZILAND.

BETWEEN

1. GIDEON NKAMBULE,
2. NATHANIEL NKAMBULE,
3. MFANYANA JOSHUA HLATSHWAKO,
4. BONAPARTE NKAMBULE,
5. BESSIE MAZIYA, and
6. MAGUGA DHLAMINI - - *Appellants.*

AND

THE KING - - - - - - *Respondent.*

CASE FOR THE APPELLANTS.

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1. This is an appeal in *forma pauperis* to His Majesty in Council against the judgment of the High Court of Swaziland dated the 18th October, 1948, whereby the Appellants were found guilty of murder, and against the sentences passed upon the Appellants. All the Appellants were sentenced to death by the said High Court but the sentences on Appellants Nos. 3, 4, 5 and 6 were later commuted to imprisonment with hard labour for 15, 15, 5 and 10 years respectively.

2. Special leave to appeal in *forma pauperis* to His Majesty in Council was granted by an Order in Council dated the 28th day of July, 1949.

3. The principal grounds of appeal are as follows:—

(a) There was no evidence other than that of two accomplices to prove that the crime of murder had been actually committed. The judgment of the High Court therefore failed to comply with the imperative requirements of Section 231 of the Swaziland Criminal Procedure and Evidence Proclamation, 1938, as amended by Proclamation 14 of 1944.

(b) The principal witnesses for the Crown were two accomplices, namely Violina and Matanjana. The trial Judge failed to direct himself as to the danger of accepting accomplice

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evidence which is uncorroborated by independent evidence.

(c) The trial Judge misdirected himself as to the nature of the evidence which should be relied upon to corroborate an accomplice and relied upon certain evidence which was not such corroboration as the law requires.

(d) The trial Judge sat with two European and two Swazi assessors. There was no compliance with Section 8 of the aforesaid Proclamation, as amended by Proclamation 43 of 1942, which provides that the agreement or disagreement of the Assessor or Assessors with the decision of the Judge shall be noted on the record.

4. Section 8 of the Swaziland Criminal Procedure and Evidence Proclamation as amended by the Proclamation 43 of 1942 reads as follows:—

" It shall be the duty of such assessor or assessors 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 assessor or assessors with the decision of the Judge shall be noted on the record."

Section 231 of the Swaziland Criminal Procedure and Evidence Proclamation, 1938, originally read as follows:—

" 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."

By an amending Proclamation (No. 14 of 1944), the said section was amended by deleting the first and second provisoes and substituting therefore 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."

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5. The Appellants were jointly charged with murder, the particulars of the charge being that on or about the seventeenth day of May, 1947 and at Mpopono in the district of Central Swaziland the accused did each and all or one or more of them wrongfully, unlawfully and maliciously kill and murder Northway Mdingi a Xosa adult male there being.

Vol. I., p. 1.

6. The case for the Crown was as follows:—The deceased, who was a Xosa, was in charge of a School at Mponono. He lived in the same village as Appellant No. 2, in whose village there also lived Appellants No. 1 and No. 5, who is the wife of No. 1. Appellant No. 3 lived at a kraal about two miles from No. 2's village, and No. 4 lived at a kraal, Paulos' kraal, about 250 yards from No. 2; the body of the deceased was found in a stream, about 550 yards from the hut where it was alleged he was killed, on Thursday, 22nd May, 1947.

The accomplice, Violina Hlatshwako, a female school teacher on the staff of deceased's school, and living at the same kraal as Appellant No. 4 accused, was a lover of Appellant No. 1. On Saturday, 10th May, 1947, No. 1 asked her to be his assistant in his " doctoring." She agreed and a rite was performed whereby she was washed with water mixed with some medicine produced by No. 1. No. 1 then informed her that in order to complete his collection he required the bone of a Xosa, and for that purpose he proposed to kill the deceased on the following Saturday night. No. 1 asked Violina to assist him by distracting the attention or suspicions of the deceased. On Tuesday afternoon, May 13th, she was called by No. 4 to his hut where she also found Nos. 1 and 2. She was again asked to assist by distracting the teacher's attention, and agreed. On Wednesday, May 14th, No. 1 again invited her and spoke about certain persons who would arrive with cattle from the Paramount Chief's kraal for Rev. Goiba, and who would assist in the killing. On Friday, 16th May, she was again called by No. 4 and repeated instructions were given in the presence of Nos. 1 and 3, and plans were discussed. It was proposed to use a hammer for the killing, belonging to No. 4 accused; No. 4 said that the hammer did not have a handle, but that he would fit one on.

On Saturday evening, 17th May, No. 4 woke up Violina and she accompanied him to the kraal of No. 2, where Violina went to the hut of the deceased. She found the deceased sitting on his bed and asked him for his keys. He pointed to the table where the keys were, and Violina took up the key, opened a cupboard and took out some books. She sat down beside the deceased on his bed and pretended to read. The deceased did not speak but stared at the table in front of him, apparently in some sort of stupor. After a while No. 2 entered and sat on a chair, and thereafter No. 1 entered, followed by the accomplice Matanjana. No. 2 stood up and No. 6 then entered, followed by No. 4. On a signal given by No. 2, who said " That is it, young man," the deceased was seized and dragged to the floor by the five men present, whereupon accused No. 3 entered and hit the deceased with a hammer. No. 1 accused thereupon took a knife and cut something from the deceased's head. The body was thereupon lifted and pointed Eastward and then Westwards, South and North. Violina was then moved away by the accused and she left, observing that No. 5 was standing guard outside the hut, and that the body was being removed. On the following Sunday Violina was pledged to silence by No. 1 in the presence of No. 2 and Matanjana. No. 1 showed her three skulls and informed her that she would become like those skulls if she should speak.

Vol. III., p. 210. 7. Mtonela Tabede, a constable in the Swaziland Police gave evidence of the finding of the deceased's body on the 22nd May, 1947, in a stream called the Mpopono stream in about 18 inches of water. The stream was not in flood. The approximate width of the stream at the place where p. 212. the body was found was eight feet.

Vol. V., p. 422. 8. The post-mortem examination on the deceased's body was conducted by Dr. Oscar Arnheim who was unable to find the cause of Vol. I., p. 7. death and who certified that he found no signs of violence. The examination of this witness at the trial included the following passages:—

"What was the state of the body when you examined it?—It was in advanced decomposition.

"Was it possible for you to ascertain the cause of death?—It was not possible.

"What were your actual findings—external appearances?—Body of a male African adult. Skin of the skull, face, hands and feet was wrinkled, sodden, soft and appeared to be filled with sandy particles, giving it the appearance of a brownish colour. Where the body was covered by clothing, the skin and the underlying soft tissues were in an advanced state of putrefaction, and those parts had a grey bluish colour. The mouth and nostrils were filled with a watery, blood-stained fluid."

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p. 9. "I examined for signs of violence and did not find any."

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p. 10. "If there is evidence that at some stage deceased was seized with some violence by the neck, would that possibly pass undetected at the post mortem?—It can.

p. 10. "For what it is worth, the body was actually exhumed in February of this year and a further examination was made—But no additional evidence was gained, beyond the fact that it was a body upon which a post mortem had been held."

In cross-examination this witness deposed as follows:—

p. 11. "Could you disprove any contention that the deceased died by drowning, by pointing to some injury or some condition of the body which would negative that contention?—I could not."

Save as aforesaid there was no medical evidence and no evidence other than that of the accomplices to show the cause of death.

Vol. I., p. 16. Vol. II., p. 126. 9. Violina Hlatshwako, the first accomplice, gave evidence in support of the case for the Crown as set out in paragraph 5 hereof.

Vol. II., p. 126. Vol. III., p. 210. 10. The accomplice Matanjana Dhlamini deposed that he and Appellant No. 6 came from the vicinity of the paramount chief's kraal. They went to Mponono with some cattle which they fetched from Bremersdorp at the request of No. 2 accused. They arrived at the kraal of Appellant No. 2 on Friday, 10th May, and during the evening

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No. 2 told them that he wanted to kill a man and enlisted their aid. They agreed as No. 2 promised them two head of cattle each. On the Saturday evening, 17th May, he and No. 6 were in No. 1's hut when No. 4 arrived with Violina. Appellants Nos. 1, 2 and 3 were also there. Violina was told to go and distract the teacher's attention and left. Appellant No. 5 was told to stand guard outside the teacher's hut. The party thereupon entered the teacher's hut and the killing took place. Matanjana's evidence in respect of the killing, however, differs from that of Violina in a number of respects, particularly with regard to the final struggle in the hut. Vol. V., p. 415.

11. In addition to the two accomplices, the Crown called the following further witnesses to implicate the Appellants:— Vol. III., p. 126.

(a) Fanwako Dhlamini, a constable of the Swaziland Police, who arrested Appellant No. 1, on the 16th January, 1948, deposed that at the time of arrest Appellant No. 1 was in possession of a bag filled with bottles and a skin bag containing bones. Two of the bottles were identified by Violina as having been used by Appellant No. 1 at her initiation ceremony. He also found a hammer in the kraal of Appellant No. 2. Vol. III., p. 218, p. 219.

(b) Mgadi Ngwenyeni said that on Saturday evening the teacher was alleged to have been killed, he met Appellant No. 3 close to his kraal, and that he was walking in the direction of the kraal of Appellant No. 2 away from his own kraal.

(c) Zima Dhlamini deposed that at the kraal of one Mokolo Tshabalala Appellant No. 3 spoke of his having hit "a foreign guinea fowl" and put it "in the stream." Vol. III., pp. 222, 223, 224.

(d) Ngangenyoni Dhamini deposed that the previous witness said to him in the presence of Appellant No. 3: "This man told me outside that a foreign guinea fowl is the teacher who disappeared in the winter time." Zima was recalled and said he thought "foreign guinea fowl" meant a bird. p. 229. p. 249.

(e) Thomas Geiba, an African male minister, confirmed that he arranged with Appellant No. 2 to have his cattle brought from Bremersdorp and that the cattle were delivered before the disappearance of the deceased. p. 232. p. 234.

(f) Paulos Nkambule, the father of Appellant No. 4, testified to receiving a report of the disappearance of the deceased. In cross-examination, this witness identified the hammer with which it was alleged the killing was done, and said that at the time of the disappearance of the teacher, this hammer was lying about his kraal and used for sharpening grinding stones. The hammer had no handle to it at the time and a handle was fitted by the witness in August, 1947. p. 327.

g) Mambini Kunalo, the grandson of Appellant No. 2, deposed to the arrival of Appellant No. 6 and Matanjana at his grandfather's kraal on the Friday preceding the day of the Vol. III., p. 239.

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alleged murder. On the Saturday evening following, the witness went to bed early in the bedroom of Appellant No. 2. He was sleeping under the bed of Appellant No. 2. At cock crow (which he later said was at midnight) he was awakened by Appellant No. 2 trampling on him and getting into the bed.

Vol. IV., pp. 254–339.

12. The Appellants all gave evidence on oath in their defence and denied that they took part in or had any knowledge of the alleged killing. Evidence was given of how Appellant No. 6 and Matanjana arrived at their kraal on the Friday. The men went on a hunt on the following Saturday and returned late. At supper after their return the deceased did not appear and on the following day when he was found to be missing a search was organised.

13. The judgment of the trial Judge (Sir Walter Haragin) contained the following passages:—

Vol. V., p. 402.

"At this point I may deal with another point of law, namely the question of accomplices. The law with regard to the evidence of accomplices is clearly laid down in Section 231 of the Criminal Procedure and Evidence Proclamation, 1938, as amended by Ordinance No. 12 of 1944. That particular section has been the subject of consideration in the case of *Rex* v. *Thielke*, ((1918) A.C. 373, at pp. 377–8); and I should mention that the section of the law to which I have referred is exactly the same in the Union of South Africa as in Swaziland. The Appellate Division there held that it was quite competent for a court to convict on the evidence of one accomplice corroborated by another accomplice. This would not be the case in England.

"The first thing that the Crown has to prove in a murder case is that there was a murder; and in general that is a most simple task, because the doctor, whose evidence is usually accepted without question, is able to give the necessary evidence on that point. Unfortunately in this case the doctor is of practically no assistance to the Court at all, for he appears to have only seen the body some days after death, and he says that it is impossible to state what the cause of death was. Both sides have attempted to glean some help from this evidence, for the doctor did go on to say that although he could not say what was the cause of death, it could have been as it was subsequently described by the witnesses for the Crown. The defence, on the other hand, say that if the man had been foully murdered it is impossible that the doctor would not have been able to see some evidence of that fact. Be that as it may, as far as I am concerned in this case I set little store on the doctor's evidence; and the Crown case rests almost entirely on the evidence of two witnesses, both of them accomplices; one a woman by the name of Violina and the other a man by the name of Mtanjana.

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" I do not intend to comment on the evidence of the other Crown witnesses, who for the most part only gave evidence which might affect No. 3, and all of whom, except one, were fellow drinkers at a beer drink and appeared to be proud of the fact that they were intoxicated. It would not be right for the Court to set great store by any detail that they gave in their evidence, though the main facts that they speak to must, of course, be taken into consideration. It must be said, in fairness to them, that as they were frank enough to admit their condition on the night in question which is hardly a method they would employ if they were anxious to impress the Court—there is more than a probability that what they can remember and do tell the Court is in fact the truth.

Vol. V., p. 404.

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" Perhaps the most important witness that was called in support or to corroborate the two accomplices is the witness who was the neighbour of No. 3. His name was Mgadi Ngwenyeni. He says that on the night in question, the Saturday night, he did see No. 3 some 200 or 300 yards away from his kraal, after dark, walking in the direction of No. 2's kraal. That is important, if believed because it does show that for some reason No. 3 was abroad that night—which incidentally he denied when he went into the box and gave evidence. I have already made mention of the witnesses from the beer drink; I will say no more about them.

Vol. V., p. 412.

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" In this connection I have not yet mentioned one rather important witness, in my view. I refer to the grandson of No. 2. On the one hand you have No. 2 saying ' I never left my room that night. So much so did I never leave it that I had the necessary utensil in the room and I did not have to go outside when I wanted to relieve nature.' On the other hand, the Crown called a little boy, who was no means, shall I say, a Crown witness; he was the grandson of the accused and he did not seem to like the police at all. His name is Mambini. This little chap was sleeping underneath No. 2's bed. He says that on that night in question he was wakened by his grandfather coming in very late. By way of showing his attitude towards the prosecution generally, he goes on to say that later on some wicked policemen threatened him in order that he should say that No. 5 had left her baby in the grandmother's hut, which from his point of view was not true. So you cannot get away from the fact that this little chap—who strikes one as a truthful witness if there ever was one—says that he slept under his grandfather's bed and that No. 2 came in at cock crow in the morning. He helps his grandfather's case as far as he can, of course. He says he was sent with food to the teacher's hut that night and that the teacher was not there; and he explains that what he means by " cock crow " is in the middle of the night.

Vol. V., p. 414.

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Vol. V., p. 416.

"Those, then, are the short facts of the case; and it resolves itself into, from one point of view, one simple question; can this Court—and I refer to the assessors, my advisers, and myself—as reasonable men, accept the evidence of Violina and Mtanjana? Because the moment that this can be done the whole case lies bare before you. The fact the doctor is unable to give satisfactory evidence matters not at all; everything is explained away in the evidence of these two witnesses.

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Vol. V., p. 418.

"I think I have now dealt with all the points that have been raised; and I will, in conclusion, just say this, that the Court as a whole, fully recognising the fact that it is dealing with the evidence of accomplices—which is tainted evidence—is perfectly satisfied beyond all reasonable doubt that Violina was telling the truth from start to finish and that she was truthfully corroborated in every main detail by this stranger Mtanjana, so that we can come to no other conclusion, in view of their evidence and the small pieces of evidence by the other witnesses for the Crown, which although they do not carry the case very far, all point in one direction, than that we are satisfied beyond all reasonable doubt that the accused each and all of them are guilty of having conspired together on the day in question to kill the teacher known as Northway Ndingi and they did in fact so do, and are thus guilty of the crime charged."

14. The Appellants respectfully submit that the judgment of the High Court of Swaziland should be set aside and their convictions quashed for the following, amongst other,

REASONS:—

1. Because it was not proved by evidence other than that of the accomplices that the offence charged, namely murder, had been actually committed. The requirements of Section 231 of the Swaziland Criminal Procedure and Evidence Proclamation, 1938 as amended by Proclamation 14 of 1944, were not, therefore, fulfilled.
2. Because the trial Judge failed to give himself and the assessors any or any sufficient direction as to the danger of accepting accomplice evidence which is uncorroborated by independent evidence.
3. Because the evidence of the independent witnesses upon which the trial Judge relied was not evidence implicating the Appellants in the offence and the trial Judge therefore misdirected himself and the assessors in holding that such evidence could be accepted as corroboration.
4. Because none of the independent witnesses even purported to implicate Appellants Nos. 5 and 6.

5. Because no note appears on the Record to show the agreement or disagreement of the assessors with the decision of the Judge, and the requirements of Section 8 of the aforesaid Proclamation, as amended by Proclamation 43 of 1942, were not therefore fulfilled.

6. Because the convictions of the Appellants were wrong and should be quashed.

DINGLE FOOT.

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ON APPEAL

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BETWEEN

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