~~GFS 6-1~~

19, 1954

No. 2 of 1954.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT OF BASUTOLAND

B E T W E E N:

KHOTSO SEPHAKELA — Appellant

37687

- and -

THE QUEEN — Respondent

CASE FOR THE APPELLANT

1. This is an appeal by special leave (to proceed, pursuant to further leave granted, in forma pauperis) against the Judgment and Sentence dated the 15th July, 1953, given and passed in the High Court of Basutoland, by the Honourable the Chief Justice (Sir Harold Willan) whereby the Appellant (as were also five other men with whom he was jointly indicted and jointly tried) was convicted and sentenced to death upon a charge of having on the 20th August, 1951, at or near Red Path in the District of Berea murdered one Tieho Matsora, a Mosuto male.

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p.92
pp.85-91
Indictment pp.1,2.

2. The case for the prosecution which was based mainly upon the evidence of three accomplices namely Ranthene Molala (P.W.7.); Ramatsepe Seoli(P.W.8); and Motsoenkana Motlalehi(P.W.25) and as formed in the said Judgment by the learned Chief Justice was that on Monday (the 13th August, 1951) previous to that (Monday the 20th August 1951) of the murder a meeting took place at the hut of one of the Appellant's said co-accused, namely accused No.4(Sabilone Rantsoelebe) at which as expressed in the words of the said Judgment:"The plot was hatched to kill the deceased".

p.87,l,42-p.88,l.2
p.87,l.43-p.88,l.1

3. The learned Chief Justice has misdirected himself in his said Judgment in finding that the said Ranthene had stated that the Appellant(referred to in the said Judgment and at the trial as Accused No.3) was present at the said meeting. Such misdirection is(the appellant submits), having regard to the Appellant's said conviction (and sentence) based thereon, and when moreover it is taken in conjunction with the matters set forth in

p.87,l.43 p.88,l.1

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paragraphs 5,6,7,8 and 9 infra, in a most literal sense, of
p.21,l. a most vitally crucial nature. The evidence given by the
24-l.27 said Ranthene was, as given in cross-examination, as follows:-

p.21,ll.39-43 "Who was present when you arrived at Accused No.4's house?-

p.22,ll. 1-5 On that occasion on the Monday the people I found there were Accused Nos.1,5,2,7 and No.4 and myself.

.....

So now we are quite certain therefore that Nos.3(i.e. the Appellant) and 8 Accused never attended that meeting on the Monday?- That is possible because we did not all come at the same time, those who had been invited.

As far as you know Nos.3 and 8 did not come, that is correct is it? - I am not absolutely certain about that because this thing happened a long time ago. It is also possible that they may have eventually arrived.

At this point the Court adjourned until the next day, namely, the 8th July 1953(the second day).

.....

p.27 ll. 3-31 Then you went towards No.4 Accused's village and you met a group of people? - Yes.

Could you tell me the names of the people again who you met at that place? - Yes.

Who were there?- I will give you the names of those I actually saw there were others sitting down who I could not actually recognise.

Give me the names of those you actually saw?-

I saw No.1 accused, Nos.5,8, myself.

Anybody else besides that? - Those are the ones I saw, the other one was No.2 Accused.

Those are the only ones you recognised?- Yes.

You didn't recognise No.3 accused there?- I know No.3 all right but at the time I am not quite sure whether he was there.

Yesterday afternoon when you gave evidence you were quite certain that Accused No.3 was there in

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that group? - At the path where the person was seized, many of us including him were at the path.

I am not talking about the path. I am talking about the group you met near Accused No.4's village. You told us yesterday that No.3 Accused was in that group? - I cannot remember having said that.

His Lordship- But you did- If I said so I think I made a mistake."

4. The evidence of the said Ramatsepe to which the learned Chief Justice also refers in his said Judgment in regard to the alleged presence of the Appellant at the said Meeting was, he (the appellant) would point out, in view of the said misdirection of the learned Chief Justice as regards the said evidence of the said Ranthene, unsatisfactory inasmuch as the said Ramatsepe in cross- examination had (as was pointed out to him) when giving the names of those present at the said meeting in his evidence at the preparatory examination, omitted any mention whatsoever of the Appellant and gave the explanation that it was quite possible he had so omitted it and that the reason was because the matter took place long ago. The preparatory examination took place eighteen months previously to the trial. In these circumstances the said evidence of Ramatsepe(the Appellant submits) was clearly nonsensical to say the least.

p.89, 11,23-27
p.43, 1.37-p.44, 1.7

5. It was conceded by the prosecution, and is clearly established by the evidence of the said prosecution witnesses Ranthene, Ramatsepe and Motsoenkhana that the Appellant (as he would submit) was forced against his wish and will, and notwithstanding the attempt made by him to run away therefrom, to remain present at the said Red Path at the time of the murder of the deceased and that the same amounted to compulsion and coercion and fear such as would not in law render him guilty of the murder of the deceased and would entitle him to be acquitted.

Attorney General p.85,11. 9-20
Ranthene p.12.11. 17-32
Ramatsepe p.40.11.6-13
Montsoenkana.p.69. 11.36-40

6. In his said Judgment the learned Chief Justice after referring to the evidence of the said witnesses (Ranthene, Ramatsepe and Montsoenkana) as regards the said unsuccessful attempt of the appellant to run away says:

p.71 1.42 -p.72.1.1
p.89,1.27-p.90,1.16

"The defence of this Accused is an alibi supported by his wife. Counsel for the defence suggested in his closing address that if this accused was found to be present at the Red Path when the deceased was killed he would on the Crown evidence that he tried to run away be entitled to rely on the defence that he acted under

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compulsion. In my view such a suggestion is untenable because, first, this accused did not rely on it in his evidence- he said he was not at the killing, and secondly, there was not sufficient evidence that he took part in the killing because he was in fear of his life or of serious bodily injury. Further, there is the evidence for the Crown that he attended the meeting when the plot was hatched to kill the deceased ; if he wished to withdraw he could have done soon after that meeting and never gone to the Red Path on the night of the 20th August, 1951."

7. The Appellant submits, that as regards the first stated of the grounds of the said Judgment, the learned Judge was wrong and misdirected himself in law in regard thereto since the onus was(as it always is in such a case) upon the prosecution to prove beyond a reasonable doubt that he had murdered the deceased and it was never upon him to prove his innocence thereof. And furthermore since (as the Appellant submits) the said evidence as aforesaid exculpated him, the learned Chief Justice should have given effect to the said evidence and acquitted him and should have entirely disregarded the fact that he had set up the defence of an alibi.

8. The Appellant further submits that, as regards the second ground stated in the said Judgment, the learned Chief Justice misdirected himself in regard to the evidence, and did not give such consideration or effect thereto as in law he should have done, and he was furthermore wrong and misdirexted himself in law in holding that the said evidence was not sufficient that he took part in the killing because he was in fear of his life or serious bodily injury.

9. The Appellant has in paragraphs 3 and 4 hereof called attention to the misdirection by the learned Chief Justice of himself upon the evidence as regards his presence at the said meeting which forms one (and the last) of the grounds upon which the learned Chief Justice in his said Judgment bases his rejection of the effect of the prosecution evidence, establishing that the Appellant acted(as the Appellant submits) under compulsion, coercion and fear; a consequence of the said rejection being that the appellant was convicted.

10. The Appellant submits that the learned Judge has, as hereinbefore set forth, misdirected himself upon the evidence and was furthermore wrong and has misdirected himself in law and that the said Judgment is bad in law and that his said Conviction and Sentence ought to be quashed and set aside for the following amongst other

R E A S O N S

1. BECAUSE the learned Chief Justice misdirected himself in fact in a crucially vital respect in regard to the presence of the Appellant at the said meeting on Monday the 13th August, 1951.

2. BECAUSE in the light of, and apart from, the said misdirection the learned Chief Justice further misdirected himself in fact and was wrong and misdirected himself in law in regard to and the effect of the evidence of the prosecution as establishing that he only remained present at the murder of the deceased and only was concerned therein through compulsion, coercion and fear such as to render him not guilty in law of the said murder and to entitle him to be acquitted thereof.

3. BECAUSE the said Judgment, Conviction and Sentence were wrong and bad in law and he should have been acquitted.

4. BECAUSE in law he was not guilty of the said murder.

S. N. BERNSTEIN

B.J.G.de ZWAAN.

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