# REPORTS OF CASES

DECIDED IN THE

# HIGH COURT

OF THE

# ORANGE RIVER COLONY.

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# 1903.

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## REX v. CELLIERS.

1903. *February* 20. FAWKES, J., and a Jury.

*Criminal procedure.—Murder.—Autrefois acquit.—Incompetent court.—Jurisdiction.—Martial law.—Orders of superior officer.*

An acquittal by an incompetent court is no bar to a subsequent indictment for the same offence.

Where a person is charged with shooting another while martial law is in force, he may justify such an act by pleading that he acted under orders of a superior officer; but the onus of proving that such orders were not manifestly illegal will be upon the accused.

In this case, which was one of the "excepted" cases under the Vereeniging Terms, the prisoner stood charged with the murder of one Lieutenant Boyle.

During the late war the prisoner was on active service, and was promoted first to field-cornet and later on to commandant. About the end of 1900 he was serving under General P. Botha. About the same time (23rd December, 1900) the town of Dewetsdorp was recaptured by General de Wet, and a number of priso-

ners taken, including, amongst others, one Lieutenant Boyle, who had been assistant commandant of that town during the British occupation. All the prisoners, with the exception of Boyle, were subsequently released by General de Wet; but on advice received from the inhabitants of Dewetsdorp and surroundings that Boyle had ill-treated women, Generals de Wet and P. Botha decided not to let Boyle go; at that time General P. Botha advised the execution of Boyle. Shortly after this occurrence General de Wet left for the south, and Boyle remained as a prisoner with the Boer forces under General P. Botha until the 2nd January, 1901. On the latter date the prisoner received orders from General Botha to take Boyle about an hour's ride out of camp and to shoot and bury him. This order the prisoner, accompanied by one Smalberger, carried out. On his return to camp prisoner made no secret of what he had done, and the order was never contradicted by General Botha. On the 26th January, 1901, the prisoner was called upon by General de Wet and President Steyn to account for this act, and about the same time General P. Botha was suspended for having given the orders to prisoner. Botha was killed in action before a suitable opportunity arose to inquire into his conduct in giving the orders. On the 26th July, 1901, however, the prisoner was tried by court-martial at a place called Blijdschap. At that trial Smalberger, who subsequently died, gave evidence, and the prisoner himself volunteered a statement. The court-martial found that the prisoner acted under orders from General P. Botha, and acquitted him. The prisoner was subsequently wounded and taken to the British military hospital at Kroonstad; on his recovery he gave information as to the whereabouts of the grave, and, accompanied by an escort, went to look for the grave, found it, and pointed it out.

*Hertzog* (with him *de Jager*), for the prisoner, raised the plea of *autrefois acquit*. Although the *Krijgsraad* or court-martial was incompetent *ratione materiae*, the acquittal by the same must stand, because the only way that acquittal could be set aside was by means of appeal; the judgment had to be upheld and considered as having force until annulled or declared void

by a competent court having jurisdiction. In support he quoted Merlin, *Rep. Un. de Jur.* vol. 27, p. 152; Merlin, *Quaest. de Droit,* vol. 8, p. 208; Kersteman, *Academie der Jonge Prak.* pp. 207 *et seq.*; Kersteman, *Woordenboek* (Byvoegsel), sub voce *Exceptie;* Gaill, *Observ. van de Kays. Pract.* bk. 1, obs. 42; Groenewegen, *de Leg. Abrog. ad Cod.* lib. 7, tit. 48. It was a general observance and rule of law in all civilised countries that an acquittal by an incompetent court cannot be annulled. See Broom's *Legal Maxims,* pp. 330 *et seq.*; Merlin, *Rep. Un. de Jur.* vol. 27, p. 152; Merlin, *Quaest. de Droit,* vol. 8, p. 208; *Holl. Wetboek Strafv.* arts. 346–348; and Simon's *Strafv.* p. 179. The *Krijgsraad* was a competent court under the circumstances, because (*a*) the civil judicature had ceased and the court-martial was the only court; (*b*) the State President had, by ordering the court-martial to try the case, made it a competent court. He referred to Halleck, vol. 2, p. 440.

[FAWKES, J.: Will the Proclamation giving the court-martial jurisdiction be put in?]

Unfortunately no copy of this Proclamation was obtainable. Law No. 34 of 1899 gave the State President the power to make laws, and this right was exercised in some cases. See the Proclamation bearing date 9th February, 1900.

*Barclay Lloyd,* for the Crown: The Court could try the case again without appeal from the incompetent court; see *Regina* v. *Ntoyaba* (4 S.C. 249).

[FAWKES, J.: The court-martial which tried the prisoner was not a competent court. Although the prisoner has been in actual peril he has not been in legal peril; the case will therefore have to proceed.]

The prisoner pleaded not guilty, and evidence was then led bearing out the facts as already stated.

*Barclay Lloyd:* The defence was that prisoner acted under

orders given by a superior officer, which he had to carry out. Supposing these orders had been given, the question still arose in how far the prisoner was justified in his action, and whether it relieved him of all guilt. A soldier was not justified in obeying all orders given by a superior officer, but would be justified in disobeying any orders which were manifestly illegal. He quoted *Keighley* v. *Bell* (4 F. & F. 763, 790) and *Regina* v. *Smith* (17 S.C. 561).

*Hertzog:* There could be no doubt that the orders were given. A commander could destroy his prisoner if he found himself in a position where it would be dangerous to keep him; but, of course, the necessity had to be a dire one. An inferior officer on active service must carry out the orders of a superior. It was the duty of the Crown to prove that the order was so manifestly illegal that the prisoner was not justified in obeying it. Forsyth, *Cases and Opinions on Const. Law* (1869 ed.), p. 216; Boehmerus, *Obs. sel. ad Carpz.: Obs. ad Quaest.* sec. 2, p. 12; Leyserus, *ad Pand.* lib. 45, vol. 3, p. 45; Mascardus, *de Probationibus*, vol. 2, *conclusio* 1141.

FAWKES, J.: In this case we have two classes of evidence, namely, the prisoner's confession and what is known as circumstantial evidence. Where a person is charged with murder, and circumstantial evidence is led to support the charge, it is the duty of the Crown to prove the body. It would be well to consider the facts of this case apart from the confession. The evidence goes to show that Lieutenant Boyle was captured by the Boer forces, and that thereafter, on a certain day, he was taken out by the prisoner, who returned with a riderless horse. Some time afterwards a body was found by the prisoner, and you will have to satisfy yourselves as to the identity. It has been said that the body was found with leggings, while the prisoner tells you that he buried Boyle without leggings. A further important point is as regards the teeth. Both the descriptions given by Miss Boyle and the doctor are to the effect that the lower teeth were cramped. The left central incisor, the doctor says, was stopped with gold,

and Miss Boyle says that her brother broke a similar tooth, which he had stopped with gold in her presence. Taking all the evidence as to identity, are you satisfied beyond any reasonable doubt that the body seen by the doctor was that of Lieutenant Boyle? If you are not satisfied, the case is not proved, and you will acquit the prisoner. If you are satisfied as to the identity, then, taking the prisoner's confession into account, you may come to the conclusion that the prisoner killed Lieutenant Boyle, and the killing will be proved. If, therefore, you are satisfied that the prisoner committed this act, you will be entitled to demand from the prisoner a justification for such act. The prisoner wishes to justify that act by asking you to believe that General Botha, his commanding officer, gave him the order to shoot Boyle, and that he carried out that order. Does that order, taking all the circumstances of the case into consideration, justify the act? If you find that the order was never given, then there is no justification whatever. General Botha was undoubtedly in command, and the prisoner was bound to carry out his orders up to a certain point. General de Wet has told us that General Botha was instrumental in preventing the release of Boyle at the time when the other prisoners were released. You have been told that General Botha was standing near by when the prisoner took Boyle out, and that he saw the prisoner ride out with Boyle with all the latter's belongings. You have further heard that General Botha was hasty, and that he was suspended by the President because of the order he was alleged to have given, and he never said anything about it. His son had said that the General denied having given the order, but I do not think it would be wise to lay too much stress on that. If on all the facts you come to the conclusion that General Botha gave the order, then the law governing the orders of a superior officer will have to be considered. Up to a quite recent date there was no direct authority, but only a dictum of WILLES, J., in the case of *Keighley* v. *Bell*. But the law as I am going to state it to you was laid down in the case of *Regina* v. *Smith* (17 S.C. 561). It was there laid down by SOLOMON, J., that a soldier on active service was justified in obeying the order of his superior officer, provided that order was not manifestly illegal. In that case the defence was that

the man was shot as it was necessary for the safety of the patrol concerned.

It is for the prisoner to prove that the orders were not manifestly illegal. If, therefore, you find that the orders were manifestly illegal, and that the prisoner was aware of the manifest illegality, you will find him guilty. But the first point for you to decide is, Was Lieutenant Boyle killed, and was the body that was found that of Lieutenant Boyle?

The jury found the prisoner not guilty, and he was acquitted.

Attorney for prisoner: *J. P. van Zijl.*

## JONES v. McKENZIE.

1903. *March* 5. MAASDORP, C.J., and FAWKES, J.

*Magistrate's court.—Jurisdiction.—Counter-claim.—Statement by defendant on oath.*

A statement on oath by a defendant that he has a *bonâ fide* counter-claim above the magistrate's jurisdiction is sufficient ground for upholding an exception to the jurisdiction.

This was an appeal from a decision of the Assistant Resident Magistrate of Bloemfontein.

Before the magistrate plaintiff claimed for £6 money lent. The defendant excepted to the jurisdiction on the ground that he had a counter-claim for £40, which would have been above the magistrate's jurisdiction.

The magistrate having satisfied himself of the *bona fides* of the counter-claim, upheld the exception, and the plaintiff appealed on the following grounds:—

(*a*) That the judgment was contrary to law, in that the plaintiff in reconvention did not give twenty-four hours'