169/1959

G.P.-S.1568732—1956-7—5,000. S. 150/59 U.D.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

CAPITAL

SEPEKE RATAU
Appellant.

versus/teen

THE QUEEN
Respondent.

Appellant's Attorney Kahl & Sowar ✓ *Respondent's Attorney* ✓
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate G.A. Alexander *Respondent's Advocate* Howard
Advokaat van Appellant *Advokaat van Respondent*

(T.P.D.)

Set down for hearing on: Monday, 28th September 1959
Op die rol geplaas vir verhoor op:

(Leave - A.D.) 8.9. 7.9. (A)

Coram.

van Blerk, Ogilvie Thompson, Rumbold et, JJ.A

Postponed: Friday 2nd Oct. Cur. adv. vult.

Appeal dismissed.

A. van Blerk
J.A.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

SEPEKE RATAU ..... Appellant

versus

REGINA ..... Respondent.

Coram: van Blerk, Ogilvie Thompson et Ramsbottom JJ.A.

Heard: 28th September, 1959. Delivered: 2nd October, 1959.

J U D G M E N T

OGILVIE THOMPSON J.A.:

Appellant was one of six accused jointly charged before THERON J., sitting with assessors, in the Pretoria ~~Circuit Local Division~~ Criminal Sessions with the murder of one Marcus Senamela. Appellant and three of his co-accused - Nos. 2, 3 and 4 at the trial - were convicted as charged. In Appellant's case, the Trial Court found no extenuating circumstances and he was sentenced to death: in the case of Nos. 2, 3 and 4, extenuating circumstances were found and all three were sentenced to imprisonment for life. Appellant, who was No. 1 accused at the trial, was refused leave to appeal by the learned Trial Judge but, on petition to this Court, he

was ...../2

was subsequently granted such leave.

The evidence led at the trial established beyond doubt that Marcus Senamela, who was the sub-chief of the native village at Magnet Heights in the district of Lydenburg, was on the early morning of 21st May, 1958, murdered in cold blood at his stat by a party of natives of the adjoining village of Ratau who had proceeded to the deceased's stat for the express purpose of doing him to death. The Trial Court found that Nos. 2, 3 and 4 accused were members of the party which, it would appear, consisted of a substantial number of men. Appellant was at all material times the sub-chief of the Ratau village. The Crown's case against Appellant is, not that he was himself present at the murder, but that it was in execution of his orders, given to the young men of the Ratau village by him as sub-chief, that the deceased was murdered.

It will be convenient, before considering the appeal on the merits, to refer to what was suggested to be an irregularity in the proceedings at the trial. As part of its case against No.3 accused, the Crown duly proved a statement made by him to the Assistant Native Commissioner

for ..../3

for the Sekhukhuneland area, and recorded in writing by the Assistant Commissioner, on 12th June, 1958. This statement contained some sentences implicating Appellant in the crime. More particularly, the statement, referring to the stage after the deceased had been murdered, proceeded as follows:

> " Ons is toe terug na Kaptein Sepeka Ratau se stat. Hy is ons Kaptein. Dit is die opdrag wat van hom af gekom het."

Counsel for the Crown was, despite objection by Appellant's counsel, permitted by the learned Trial Judge to cross-examine Appellant on No.3's statement. Under such cross-examination Appellant, in effect, specifically denied the above-cited damaging portion of No.3's statement.

Now, although this statement had properly been received in evidence against No.3, it , being hearsay, was of course inadmissible against Appellant. This notwithstanding, prosecuting counsel was, subject to a qualification presently to be mentioned, entitled to cross-examine Appellant in relation to relevant matters mentioned in No.3's statement, including the two specific, and very material, points as to whether Appellant had ordered the murder and whether, after its commission, the perpetrators thereof had

returned ..../4

returned to Appellant's stat (see R. v. Mbande and Others 1933 A.D. 382 at 386). When so cross-examining, a prosecutor should - particularly in a jury trial - by the form of his questions meticulously endeavour to avoid creating any impression that what is contained in the statement, upon which he is cross-examining the witness, is itself evidence against the witness: as is pointed out in Mbande's case supra, it is the witness's answer, not the information thus cross-examined upon, which becomes evidence in the case against the witness. In the present case, the form of prosecuting counsel's questions is open to the criticism that he read the whole of No.3's statement to Appellant and then asked him if he had any quarrel with it; but, when Appellant immediately denied both that he had ordered the murder and that any of the murderers had returned to his stat, counsel at once passed on to another point. Appellant thus sustained no prejudice in consequence of the method of cross-examination adopted, and no material irregularity thereby occurred. That really concludes the matter; but it is not entirely irrelevant to add that No.3 thereafter gave evidence in his own defence and, inter alia, deposed to

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the matters mentioned in the above-cited passage in his statement. The evidence thus given by his co-accused No.3 consequently became evidence in the case against Appellant (R. v. Rorke 1915 A.D. 164; R. v. Zawels 1937 A.D. 342 at 346/7). The weight of that evidence was, of course, another matter. In point of fact, it became clear, while No.3 was in the witness-box, that his testimony that Appellant had ordered the murder derived, not from personal knowledge, but solely either from hearsay or a deduction which he had made, while his testimony that the murderers had, after the murder, returned to Appellant's stat was based upon inference rather than actual observation. Moreover, in stating the Court's reasons for convicting Appellant, THERON J. made specific mention of the fact that No.3's evidence in relation to Appellant's having ordered the murder had been left entirely out of account. There was, therefore, no material irregularity in the proceedings.

The case made against Appellant at the ~~trail~~ trial vitally depended upon a statement made by him to the Native Commissioner for Sekhukhuneland. The Trial Court found that Appellant had made this statement, as recorded by the Native

Commissioner and set out below, and that it was confirmed by other evidence for the Crown. In stating this confirmation, the learned Trial Judge said:

> " It is confirmed that young men attacked and killed Senamela on that very day. It is confirmed that those young men were seen to come from the direction of Accused No.1's stat, it is confirmed that those young men thereafter returned to Accused No.1's stat."

Without examining all the details of the confirmation thus relied upon by the Trial Court, it may at once be stated that, at highest in favour of the Crown, the nature of such confirmation was essentially supplementary in character. That is to say, the evidence in relation to the confirmatory matters mentioned by the learned Judge in the above-cited passage can not, independently of Appellant's aforementioned statement, be regarded as itself constituting proof of Appellant's guilt beyond reasonable doubt.

Appellant, a man of some 65 years of age, was arrested, in connection with the murder of Marcus Senamela, on 12th June 1958. It was duly proved at the trial that on 14th June 1958 he, voluntarily and without any inducement, made a statement before one Alfers, the Native Commissioner

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for the area ~~xx~~ of Sekhukhuneland. This statement was given by Appellant in the Sepedi language and was recorded by Alfers in English after interpretation by one Neverdie Banyini. After the statement had been reduced to writing, it was read over to Appellant by Alfers, Neverdie interpreting, and then confirmed by Appellant in the usual way. No suggestion is made that the proper formalities were not duly observed. The statement, which was exhibit L at the trial, reads:

> " Sir, why you see me here now, Sir, I am arrested because of Headman Sinamela being killed by my people, because we always quarrelled about lands. When I wanted to give my people lands he refused saying it was his area. And whenever my people's cattle grazed on the fields after reaping time he refused this saying they must wait until he gave the word. I said to Sinamela: 'Seeing that we are in the same location and our stock graze together, why should you treat me like this'. When I sent my young men to go and kill him it was because he had refused my people to cut grass. The grass was intended for thatching. Then my young men went and killed Sinamela. I did not expect them to go and kill him. Now these children have caused trouble for me because they killed him. That is all I wish to say".

It was formally admitted at the trial that differences, including differences of the nature mentioned in the above-

cited ...../8

cited statement, had for some while prior to the murder of Marcus Sinamela, existed between the Sinamelas and the Rataus.

Although nowhere in terms so stated, it is implicit in the Trial Court's reasons that it regarded Appellant's above-cited statement as constituting a confession within the meaning of the Code (R. v. Becker 1929 A.D. 167). Now it is true that the crucial sentence in the statement commences "When I sent my young men ...."; but from the preceeding sentences it is plain that Appellant was fully aware both that his "people" had killed Sinamela and that it was for that reason that he had been arrested. It is thus abundantly clear that the sentence "When I sent my young men to go and kill him ...." not only alludes to the killing of Senamela but also carries with it the admission that Appellant did send his young men to kill Sinamela. A more serious criticism of the Trial Court's reasons lies in the absence of any special reference therein to the sentence in the statement reading "I did not expect them to go and kill him". This sentence, so it was submitted to us on behalf of Appellant, is a negation of the instruction "to go

and ...../9

and kill him" appearing in the earlier sentence. Counsel for the Crown, on the other hand, submitted that the sentence in question was intended as some sort of apology or excuse. The statement must, of course, be read as a whole and the presence in it of the sentence "I did not expect them to go and kill him" is certainly a factor to be taken into account. Indeed, had there been any reasonably satisfactory explanation - a matter with which I shall deal directly - of the earlier, and vital, sentence (i.e. "When I sent my young men to go and kill him...."), it may well be that the sentence "I did not expect them to go and kill him" might have proved decisive in Appellant's favour. As the statement stands, however, I do not think that, reading the statement as a whole, this last-cited sentence can rightly be regarded as effectively cutting down the earlier unequivocal and explicit sentence reading "When I sent my young men to go and kill him it was because he had refused my people to cut grass". I, accordingly, hold that the Trial Court was correct in regarding the statement, as recorded by Alfers, as being a confession within the meaning of the Code.

It was, however, urged upon us by Mr. Alexander,

for ..../10

for Appellant, that the Crown had failed to prove beyond reasonable doubt that Appellant had in fact used the Sepedi words meaning "When I sent my young men to go and kill him it was because he had refused my people to cut grass". This submission merits careful consideration; for it is obvious that, if any real doubt exists in relation to the point thus raised by counsel, that would strike at the very foundation of the Crown's case against Appellant. Two arguments were advanced in this connection. I will deal with the shorter one first.

It was urged that by the simple expedient of substituting for the word "kill" in the vital sentence last quoted above some innocuous word, or words, - such as, for instance, "see" or "visit" or "treat with" or "complain to" - the statement not only becomes wholly exculpatory but all ambiguity therein is at once removed. This ingenious and not unattractive theory, unhappily for Appellant, derives no support either from the evidence or from the context of the statement itself. Appellant himself advanced no such suggestion at the trial. Indeed, he stated, in his evidence, that the interpreter and he had understood each other well

and ..../11

and that he had had no language difficulties at all with the interpreter when making his statement before Alfers. Even substituting some colourless word for "kill", it would still remain unexplained why "young men" had been sent. The evidence contains no scintilla of any suggestion that the Sepedi word for "kill" is - as in some other native languages - sometimes used having a different meaning. The words "kill" and "killed" are elementary words and may be presumed to be included in the vocabulary of all adults. These words occur in several other sentences in the statement in contexts which go far to preclude any possibility of error in relation to the use of the word "kill" in the important sentence under consideration. Experience teaches that, where translation from one language into another takes place, the Court must constantly be mindful of the possibility of error, or even slight distortion of a shade of meaning, occuring. In the absence, however, of anything whatever in the evidence to support the contention that something of that kind may have occurred in the present case, I am unable to accede to the submission that the word "kill", where it occurs in the vital sentence (When I sent my young men to go and kill him ...") must be replaced by some colourless alternative.

Mr. Alexander's other, and main, submission was

based ..../12

based upon certain passages in the evidence of the interpreter Neverdie. It may here be mentioned that the Native Commissioner, Alfers, died before the trial and was, thus, unable to testify thereat. His evidence, as given at the Preparatory Examination, was read at the trial in the usual way. That evidence was entirely formal and does not assist the Crown in relation to the present enquiry. In any event, in the absence of evidence that Alfers himself understood Sepedi - the record is silent on the point - the Crown would, in order to establish the correctness of the translation, necessarily have had to depend upon the evidence of the interpreter Neverdie. The latter - one of the official interpreters of Sekhukuneland and who had often interpreted for natives making statements to Magistrates and Native Commissioners - had no independent recollection of the contents of Appellant's particular statement; but he recalled the occasion. He had never seen Appellant before. Neverdie deposed that he had no difficulty whatever in interpreting what Appellant said before Alfers. He stated that Appellant spoke concisely. He was emphatic that, because it was a statement, he had not merely given a precis of what

Appellant said but had interpreted it word for word. He repudiated defence counsel's suggestion that Appellant might have said something which was not recorded in the statement; but conceded that, in accordance with his usual practice, he might have asked Appellant to repeat something he had not properly heard. At the request of Appellant's counsel, Neverdie wrote down the Sepedi words which, he said, ~~Appellant had used and which~~ he had translated as "When I sent my young men to go and kill him it was because he had refused my people to cut grass". The correctness of this interpretation (word for word) was confirmed by the official interpreter ~~my~~ at the trial. Then, towards the end of his cross-examination, there occurred the following passages upon which Mr. Alexander now relies:

> BY MR. SAPIRE: " The accused in this case is going to say that he was told ..... (of what the charge was against him) and that in fact in the course of the discussion - he said 'I am accused because I sent my men' - meaning that I am accused that I sent my men - is that possible? -- Yes.
>
> BY THE COURT: You say it is possible that when he gave his statement, he may have said 'I am being accused because it is said I sent my men'? -- I do not remember clearly the contents of the statement.
>
> Would you have interpreted that statement in the way that it is recorded in this statement - Exhibit 'L'? -- Yes.
>
> The one that you translated? -- Yes."

It ..../14

It is apparent that both counsel's and the Court's questions, as reflected in the above-cited passage from the interpreter's evidence, are unfortunately unprecise and inherently ambiguous. It really is hardly possible to ascertain what the interpreter was here asserting to as being "possible". That apart, however, it is plain that the interpreter was not, in these passages, specifically asked whether he had interpreted the specific phrase "I am accused that - meaning because it is said that - I sent my men to kill" into the English phrase "When I sent my young men to go and kill him it was because he had refused my people to cut grass". In other words, the "possibility" conceded by the interpreter in the above-cited passage, does not, in my opinion, really touch the issue under consideration. It certainly, in my judgment, affords no solid foundation for the submission that the damaging sentence, last cited above, in Appellant's statement is a wrong translation of what Appellant in fact said, in the Sepedi language, to the Native Commissioner.

In the Court below, however, a different view was taken. For, after the re-examining prosecutor (Mr. Harwood) had intimated that he was - as, I think, very understandably -

somewhat ..../15

somewhat confused as to what exactly the interpreter had agreed he might have interpreted as recorded in the statement, there occurred the following:

" BY THE COURT: He says he may well have expressed himself in that way and that the accused - rather the accused may well have expressed himself in that way, that he thereafter translated that statement as is recorded in the statement Exhibit 'L' ..

MR. HARWOOD: Meaning, am I correct in understanding, that I might have translated Sepedi words meaning 'I am accused that I sent my men to go and kill him' - he might have translated that as 'When I sent my men to go and kill him it is because he refused my people to go and cut grass'.

BY THE COURT: That is so.

BY MR. HARWOOD:(CONTINUING): Well now, will you please take pencil and paper and will you please translate for me into Sepedi 'I am accused that I sent my men to go and kill him' (Witness writes down sentence on piece of paper).

MR. HARWOOD: Might I ask please to the Interpreter, My Lord, he is finished now, if he used the same words as he used in the previous sentence.

BY THE COURT: Now the Sepedi as written down on the second occasion is it the same as on the first occasion?

INTERPRETER (Mr. Dearlove): No.

MR. HARWOOD: Might I ask through Your Lordship if he will please record those words which he has just written down on the microphone.

BY THE COURT: Read that last statement out.

(Reads: ke tsoeroei ka romela banna baka go yo mmolaea). (Words written down by witness handed in as Exhibit B)."

The ..../16

The interpreter then left the witness-box without being asked any further questions. It is true that translating the two English phrases into Sepedi, as the interpreter was, in the circumstances outlined above, required to do, is no absolute guarantee that the English phrase under consideration was, where it occurs in Appellant's statement, a correct translation of the Sepedi words actually used by Appellant before Alfers; but it is not without some significance that the two sets of Sepedi words, thus written down by Neverdie, were radically different from one another. Properly regarded, the above-cited passages from Neverdie's evidence do not, in my judgment, afford any sound basis for doubting that Appellant did in fact before Alfers say, in Sepedi, "When I sent my young men to go and kill him it was because he had refused my people to cut grass".

In view, however, of the critical nature of the point under discussion, and ever mindful of the potential dangers inherent in translation, I proceed to examine Appellant's own evidence in relation to the statement he made before Alfers. Appellant, in the course of his evidence, repeatedly denied having employed, before Alfers, the vital

words ..../17

words "When I sent my young men to go and kill him it was because he had refused my people to cut grass". The Trial Court found Appellant to be "an untruthful witness who contradicted himself in many material respects and a witness upon whose evidence very little reliance could be placed". This conclusion is borne out by a mere perusal of Appellant's evidence. ~~Appellant~~ A careful study of that evidence however fails to reveal any clear statement - or, indeed any statement at all - by Appellant of the contention now advanced on his behalf, viz: that the above-cited critical phrase ("When I sent my young men to go and kill him ....") is a mistranslation of what he actually said to the interpreter Neverdie before Alfers. The only passages to which Mr. Alexander could point in support of this contention were the following, both occuring in examination-in-chief, viz:

> " Now when you were in the office, what did you explain to the Native Commissioner? -- I said to him then that when I got into the office, that I was arrested and it was said that we had killed chief Senamela. I said I know nothing about the side of chief Senamela.
>
> .....
>
> Now in fact, did you order your men to go to Senamela's place? -- I did not send one to Senamela's place."

and ..../18

and the following reply, given under cross-examination:

> " Now then what did you tell the Native Commissioner? -- I said to him: Sir, now that I am in front of you here now, I understand that I am arrested because I had killed Senamela. I was astonished about that, I do not know that I went to Senamela's place and I do not recollect that I sent anybody to Senamela's place. And that without any quarrel between myself and Senamela - I had never spoken to him."

These passages manifestly do not lend any substantial support to the contention now advanced; and, as I shall presently show, Appellant later completely contradicted the assertion, contained in these passages, that he had never sent anybody to the deceased. Moreover, Appellant himself, in the third of the following passages (taken from his cross-examination and which I have numbered for convenience of reference), actually refuted the contention now advanced on his behalf. The three passages read:

> " (1) Did you say " I did not expect them to go and kill him"? -- No.
>
> Didn't you say that either? -- I did not send them to go and kill him.
>
> I am not saying that, I am saying did you say that to the Commissioner, because this is what is written down "I did not expect my young men to go and kill him"? -- I will now say that those are the words that I mentioned because it is written down there.
>
> Well I want to know if you said them and if it is written down correctly? -- It wasn't mine to the effect "go and kill him".

(2) Now ..../19

" (2) Now look, I want to make it perfectly clear, I want to know if you recollect saying to the Native Commissioner: "Then my young men went and killed Senamela. I did not expect them to go and kill him" - now did you say that to the Native Commissioner or did you not? -- I did say that.

.....

(3) You said in this statement "When I sent my young men to go and kill Senamela it was because he had refused my people to cut grass" - now that is a very reasonable reason to send them to kill him, so I just want to know if it was in fact so? -- I did say, but in truth of fact I did not send them and tell them to go and kill him."

Nor does the matter end there. Appellant's re-examination was deferred to enable his counsel to obtain the two pieces of Sepedi writing, mentioned above, written by the interpreter Neverdie while in the witness-box. At the trial these writings were Exhibits A and B but have, so we were informed from the Bar, since been lost. In re-examination, Appellant's counsel handed these two writings to Appellant - who is able, he said, to read Sepedi - and invited him to read them both, which Appellant did. What followed, is recorded thus:

" Which of these sentences if any, or words similar to these sentences, which of them did you say to the Native Commissioner? -- I did not say that they must go and kill. What I did say to the Native Commissioner was that I would send my people to Sinamela and to find out from him and that he must say where my cattle had done damage to his lands.

Did ..../20

" Did any of these two sentences now before you, did any of them have the sentence which you intended to convey to the Native Commissioner? -- No."

Appellant's evidence in re-examination then continued:

" Now do you recall on Thursday that you said in answer to my learned friend that you said "When I sent my young men to go and kill him it was because he had refused my people to cut grass"? -- I didn't say that I personally sent them to go and kill him.

BY THE COURT: You see, counsel is asking you that when you were cross-examined you admitted making this statement, but you explained how it came to be made? -- Do you mean that I admitted that I sent my boys to go and kill him?

No. When counsel was asking questions he had before him what was written down by the native commissioner on the occasion when you came and spoke to him? -- I understand.

Then he was reading to you what is contained in that statement. He was not saying that you did what was said in the statement; he merely read to you what was contained in the statement? -- Yes.

Now one sentence in that statement he read to you was that you sent your young men to go and kill Sinamela because "he had refused my people to cut grass". That is the statement - not the fact that you had done so. You then said "Yes, I did make that statement ~~hm~~ because it is written down there"? I follow."

(The learned Judge - who was of course without the benefit of a transcript of the evidence - was here in error. Appellant's earlier reply that he had made that statement "because it is written down" related, not to the critical sentence, but to the sentence "I did not expect them to go and kill him" - vide the passage from Appellant's evidence cited above and numbered (1). Appellant's reply, under cross-examination, in connection with the critical sentence is cited above and

is ..../21

is numbered (3). Nothing, however appears to me to turn on this error).

" Now counsel is refreshing your memory that on Thursday you admitted that that statement was a statement that you made, and he ~~is~~ is wanting to know why you made that statement? -- I follow.

RE-EXAMINATION CONTINUED: Do you remember making that statement to the native commissioner? -- Yes, I remember.

Now what exactly did you want to convey to him - what did you want him to understand? -- The commissioner sent for me and asked me whether I sent my people to go and kill Sinamela.

BY THE COURT: Isn't the position this, that you knew that they were saying that your young men went to kill Sinamela. That was what they accused you of? -- Yes.

You believed that the man was killed; you believed that it may be true that your young men went there to kill him? -- Yes.

You thought that that was the reason why you, as their chief to whom they would listen, is now accused because of what they had done? -- Yes.

You knew that there was trouble with Sinamela about the allocation of land and about grazing and the cutting of grass? -- Yes.

And did you think then in your own mind that that might well have been the reason why your young men on their own went to kill him? -- I can't understand that I sent them to kill him."

At this stage of Appellant's re-examination, the Court adjourned for fifteen minutes. I pause here to remark that the concluding portions of Appellant's evidence last cited above - i.e. his monosyllabic assent to the questions put by the Court - may perhaps be regarded as lending some support to the contention now advanced on Appellant's behalf.

Any ..../22

Any such impression was, however, quickly dispelled by Appellant himself. For, when the Court resumed, his evidence continued:

" RE-EXAMINATION CONTINUED: Before the adjournment his Lordship put a situation to you. Are you able to say whether that was the situation or not? -- That is the situation.

Can you just perhaps also tell the Court what you meant when you said "I didn't expect them to go and kill ~~them~~ him"? -- By that I meant that I didn't expect them to go and actually kill him; I expected them to go and ask him to show us where the damage had been done by the cattle.

BY THE COURT: Do you suggest that you sent them to make enquiries from Sinamela about where the damage had been done by the cattle? -- That is what I sent them to go and do - to go to Sinamela and let him show them where the cattle had done damage.

When you use the word "sent" do you understand what that means? -- To go and do something.

So you say that your men went to Sinamela on your instructions that they should go there? -- Yes.

And your instruction to them was "Go and find out where the damage was done by the cattle"? -- Yes.

How many men did you have present when you gave instructions that they should go? -- I only sent two men.

Who were the two men?--Ntsokolo and Machlagome.

You sent these men as your representatives? -- Yes.

Did you send them on their way the morning ~~of~~ of the day that Sinamela was killed? Yes, it was on the same day.

And your instructions no doubt to them were that they must come and report back to you what they had found out from Sinamela? -- Yes.

Did ..../23

" Did they come back and report to you? -- They did come back.

The same day? -- Yes.

And then they told you that Sinamela was killed? -- Yes.

And no doubt you made enquiries from them how he was killed and by whom he was killed? -- I asked how he was killed and by whom he was killed.

Then they told you - and I don't want to know what they told you? -- Yes.

What did you then do to right, as far as you could, the wrong that these young men of yours had now done? -- I did nothing.

You see, I have some difficulty about what you tell me now, having sent two men to Sinamela, because in your statement you express yourself as follows. You were telling the native commissioner about the difficulties you were having with Sinamela? -- Yes.

And in this statement this is recorded as having been said by you: "I said to Sinamela (this is you speaking to Sinamela) seeing that we are in the same location and our stock graze together, why should you treat me like this". You said that to the native commissioner, didn't you? -- Yes.

So is it correct then that you yourself spoke to Sinamela at some time? -- No, we didn't meet each other.

So the statement is wrong then where you claim to have spoken to him and told him as I have just read out to you? -- I didn't speak to him personally. I can't say whether that is a mistake."

Then, after some questions by one of the assessors, the concluding portion of Appellant's testimony reads as follows:

" BY THE COURT: You told me presently that you sent two men to represent you to speak to Sinamela. You also gave us their names? -- Yes.

Now ..../24

" Now will you repeat those names? -- Ntsokolo Ratau and Machlagome Ratau.

Are they young men or are they older men that you usually ~~xx~~ employ? -- They are both aged men, although both younger than I am. One is slightly younger than I am and the other is slightly younger than that man again.

Are there any of these presently in Court? -- No, they are not among these accused.

Why did you select these two men of your clan to go and see him? -- Just to go and asked him to show them the place.

I take it you sent them because they were older men who could carry responsibility? -- Yes.

Then if what you tell me now is correct you never sent young men to Sinamela at all? -- No.

Why did you then say to the native commissioner that you did send them - whether you had sent them for any purpose other than to kill him doesn't matter - why did you tell him that you sent young men? -- It can be a mistake, because it may be in making a statement to a person you may refer to a person and say "Young man" and you may be thinking that it is old men - people under you.

You see, when you were talking to the native commissioner you knew that young men killed Sinamela - young men of your tribe? -- Yes.

You knew that you were being brought into the net now because you were their chief? -- Yes.

Now if what you tell us now is correct why didn't you tell the native commissioner 'I know nothing about young men going there - I sent two of my elder statesmen to go and negotiate with this ~~xxx~~ man about the damage? -- (No answer)."

I may remark in ~~xx~~ passing that, although the point was not pursued in the evidence and there may possibly be some duplication of names, Machlagome (one of the two "elder

statesmen" .../25

statesmen" here mentioned by Appellant) bears the same name as the man who, according to the evidence of No.3 accused at the trial, was in charge of the murder party who despatched the deceased.

I have been at pains to take the somewhat unusual course of citing extensively from the record, not merely for the purpose of revealing the utterly unacceptable nature of Appellant's testimony, but im order to show that, despite ample opportunity, he never in his evidence advanced anything resembling a plausible innocent explanation of the critical sentence in his statement to the Native Commissioner reading "When I sent my young men to go and kill him it was because he had refused my people to cut grass". After the closest examination of Appellant's evidence, I find no reason for disagreeing with the Trial Court's finding that Appellant did make the statement in question as it is recorded in Exhibit L. Once that conclusion is reached, it necessarily follows that the appeal must fail.

For the foregoing reasons, the appeal is dismissed.

(Signed) N. OGILVIE THOMPSON.

VAN BLERK, J.A.
RAMSBOTTOM, J.A. } Concur.