R. v. CHITAMBALA.

CRIMINAL REVIEW CASE NO. 235 OF 1939.

Witchcraft—headman encouraging a wrongful act—mere repetition of what someone else has said is not an offence under the Witchcraft Ordinance.

In order to sustain a conviction under section 12 of the Witchcraft Ordinance it is essential that some offence under another part of the Ordinance be proved. On the facts of this case (which are set out in the judgment hereunder) no other offence is disclosed. The Court agrees with the South African authorities on similar legislation and also distinguishes the case of *Rex* v. *Unsunki and Namusaka* 4 N.R.L.R. 193.

Robinson, A.C.J.: The conviction must be quashed. The charge is *contra* section 12 of Cap. 31 and the essence of it is whether the act which the headman permitted and facilitated was an act punishable by the Ordinance.

The facts were that the headman facilitated, or even organised, a party to go and consult a witch doctor in Angola, i.e., outside the jurisdiction of the Ordinance. On their return, one witness Manjimera said " We reported to Chitambala and told him the result of the divining and that Nyamusanzha had been named as a witch ". Fundulu said, " We reported to him that Nyamusanzha had been named as a witch responsible for the death of Kabwita ". The accused himself said, " They named Nyamusanzha as having been called a witch by the Doctor ". On those facts and evidence it is difficult to see what act has been committed punishable by the Ordinance. In South Africa, where the wording of their Act is practically similar to Cap. 31, there is authority which I will quote. In *R.* v. *Nywelluna* (1928 T.P.D. 66) on a charge of naming or indicating X as a wizard, it appeared that the accused had by X and others been sent to consult a witch doctor as to a certain occurrence, and returned conveying the witch doctor's diagnosis that X was a wizard responsible for the occurrence. It was held that in this he had not contravened the section by naming or indicating X as a wizard. The point was considered in *R.* v. *Njalo Mpambani* and in *R.* v. *Njanjante and Others* (1938 E.D.L., P.H., H. 152), where it was pointed out that while the mere conveyor of a message, as in Nywelluna's case, was not an imputer, he might, by his own adoption of the witch doctor's finding and his statement in consequence, be guilty of imputing. Thus in Mpambani's case, where the accused having consulted a practitioner, asserted that the complainant was a witch, basing his assertion upon the information he had received, he was guilty under the section.

It is clear that the evidence in this case does not go further than to show that Manjimera and Fundulu were only conveying the witch doctor's diagnosis and it follows that they committed no offence *contra* section 3 of the Ordinance. The Magistrate argues that the judgment of

MACDONELL, J. in *Rex* v. *Musunki and Namusaka* reported on p. 38 of *Instructions to Magistrates* at the bottom of p. 43 is in point where he says that the offences set out in section 3 are " a species of criminal libel ". The Magistrate then argues that anyone who repeats a slander, even though he says " so and so told me " is himself liable. That is perfectly true in a civil action for slander, i.e.; defamation by spoken words, but the learned Judge was careful to say " a species of criminal libel " because criminal libel is defamation by any means otherwise than solely by . . . spoken words. (Section 168 Penal Code.)

I respectfully agree with the statement of the law set out in the South African Authorities and hold that that is the true interpretation of Cap. 31. It appears to me to be good law and good sense.

Therefore, by virtue of section 309 and section 300 Criminal Procedure Code I quash the conviction and order the discharge of the accused forthwith.