

R. v. ABRAHAM NYENDWA.

CRIMINAL REVIEW CASE NO. 350 OF 1940.

Guilty but insane—finding cannot be revised by High Court but can be appealed against.

A finding of "guilty but insane" is a special finding which is equivalent to a finding of "not guilty" and so is an acquittal. The High Court has no power to revise a verdict of acquittal but such a verdict is appealable.

Law, C.J.: The accused was charged before the Resident Magistrate, Lusaka, on the 19th November, 1940, with the offence of attempting to commit arson on the 6th October, 1940, contrary to section 295 (1) Penal Code. On the 3rd December, 1940, the Magistrate made a finding that the accused committed the act charged but was insane at the time. This was a special finding under section 153 Criminal Procedure Code of "guilty but insane". In compliance with that section the Magistrate reported the case to the High Court which, in turn, is required to report the same to the Governor.

2. The case has thus come to the knowledge of the High Court, but the question for consideration is whether the High Court is at liberty to exercise its powers on revision, under section 309 Criminal Procedure Code, as regards this special finding.

3. In the case of *Felstead v. The King*, Appeal Cases, 1914, p. 534, it was decided by the House of Lords that the special verdict of "guilty but insane" takes the place of the general verdict of "not guilty" and is a verdict of acquittal. Consequently, the accused in that case was not a person convicted on indictment and could not, therefore, avail himself of section 3 Criminal Appeal Act, 1907, which gives a right of appeal to persons convicted on indictment but not otherwise.

4. In view of the decision in *Felstead's* case the Magistrate's special finding of "guilty but insane" must be regarded as an order of acquittal. Such an order, however, cannot be revised by this Court because of the specific provision to that effect in section 309 (1) (b) Criminal Procedure Code.

5. If this Court were acting in its appellate capacity and not on revision the question for consideration would arise whether section 300 (c) Criminal Procedure Code would permit an appeal from a special verdict of "guilty but insane" in view of the words "on an appeal from any other order" which appear therein. It has been argued that this section must be read together with the preceding section 294 which relates solely to appeals from convictions and sentences. Also, that the words quoted above should be read as relating only to orders ancillary to orders of acquittal or conviction, such as may be made by a Subordinate Court as

to costs, compensation, restitution of property, etc. Against this argument, however, it must be borne in mind that the Legislature chose specific and unambiguous language to exclude orders of acquittal from being revised (section 309 (1) (b)), but did not so express its intention to exclude them from being appealed (section 300 (c)). In these circumstances, therefore, I am unable to agree that there is no appeal from an order of acquittal. In plain English, an order of acquittal is obviously "any other order" than an order of conviction or sentence. Consequently, the reasons in Felstead's case for an order of acquittal not being appealable under section 3 Criminal Appeal Act, 1907, do not apply in this Territory because of the language employed in section 300 (c).

6. In my opinion, therefore, an order of acquittal is appealable under section 300 (c) though it cannot be revised under section 309 (1) (b) however erroneous the order may appear to be.

7. For the foregoing reasons no order can be made in this revision altering or reversing the Magistrate's finding of "guilty but insane".