

South African Incident

THE GANYILE CASE

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INTERNATIONAL COMMISSION OF JURISTS
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FOREWORD

The Ganyile case records another unhappy episode in the history of the arbitrary methods employed by the Government of South Africa.

The International Commission of Jurists, since its foundation almost ten years ago, has been deeply concerned about the situation in South Africa. The matter was discussed at length and a resolution passed on the subject at the first International Congress of Jurists held by the Commission in Athens, Greece, in June 1955. The Commission has sent observers to the Treason Trials as well as on investigatory missions to South Africa; it has published lengthy articles in its *Journal* and *Bulletin* and on every possible occasion has condemned the policy of apartheid and the actions of the South African Government in enforcing the tenets of this onerous philosophy which violates the very fundamentals of the Rule of Law. In November 1960 the Commission published an extensive report entitled *South Africa and the Rule of Law* as part of its unceasing efforts to call world attention to the systematic injustice prevailing in the Republic of the Union of South Africa and to bring to the notice of that Government the feelings of deep revulsion shared by the world legal community over the continued repressive measures used against the Africans.

During the last eighteen months the Government of South Africa has rigorously persisted in its plan for the separate treatment and development of the races. Harsh and discriminatory legislation continues. African lawyers are often the subjects of persecution. An effect of legislation has been to confine their practice to certain localities, for example, African townships. Such discrimination may prevent them from being briefed by solicitors, may deprive them of access to client and may even may deny them the use of a law library. One African lawyer was officially told last year that he would be prosecuted if he did not give up his law offices in a "white" suburb of Johannesburg.

On the night of August 26, 1961, a party of six South African policemen crossed the border from the Republic of South Africa into the neighbouring British territory of Basutoland. There they

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entered a hut by force and overpowered Anderson Ganyile, a political refugee from South Africa, and two other refugees. They took the three men forcibly and secretly across the border into South Africa. There the men were kept in prison secretly and without trial for four and a half months. Ganyile smuggled a note out of prison. His whereabouts thus became known to his friends, who began legal proceedings which led ultimately to the release of the three men. In the meantime the case had aroused great interest in South Africa, in Great Britain and elsewhere throughout the world. The International Commission of Jurists and its British Section "Justice", sent Mr. Peter Charles, Q.C., a member of the Southern Rhodesian Bar, as observer to South Africa to report on the case. The case drew attention to some remarkable features of the administration of justice in South Africa which are discussed below.

The Commission owes its thanks to Mr. Charles who has now recorded in eloquent detail the history of the "Ganyile case". His narration is not confined to the facts of the case; Mr. Charles discusses the background to the situation and analyses the legislation involved. He calls the Proclamation No. 400 of 1960 (at page 10 of the Report) by virtue of which the South African Government claimed to have acted: "... surely one of the most remarkable laws in force anywhere in the civilized world".

I particularly commend to the attention of our readers the last part of this report. Under the heading "Concluding Comments" Mr. Charles sets forth with great fairness the implications of the case. While he criticizes strongly the South African Department of Justice, he praises the Full Bench of the Eastern Division of the Supreme Court, the Magistrate at Umtata, and the lawyers engaged in the litigation.

In publishing this report the Commission seeks to remind its readers of the need for unceasing vigilance in the preservation and assertion of Human Rights. The Commission recognizes its continuing and paramount duty and task in contributing to this vigilance.

Geneva,
June 1962

LESLIE MUNRO
Secretary-General

INTRODUCTION

Anderson Ganyile is a Pondo, a member of one of the African tribes inhabiting the Transkeian Territory in the Republic of South Africa. This territory lies in the Eastern Cape Province between the Kei River and the border of the Province of Natal. It was annexed piece-meal by the Cape Colony, under British rule, during the latter part of the XIXth century, and has always been administered as a Native reserve. It is densely populated by Africans living mainly under tribal conditions. Since the present South African government came into power and announced its intention of carrying out its policy of *apartheid*, or separate development, the Transkeian Territory has been set aside as one of the territories in which a measure of African self government would be developed, one of the so-called "Bantu homelands". In January 1962, shortly after the denouement of the Ganyile case, the South African Government announced that a new Constitution was to be promulgated giving a measure of local self government to the Transkeian Territory.

Measures previously taken by the Government to implement its policy, and in particular to build up a system of Bantu authorities, proved unpopular and led to tension and disorders in the Transkeian Territories, particularly in Pondoland, during 1960 and 1961. In March 1960, a National Emergency was declared in South Africa, following the Sharpeville and Langa incidents, in which there had been considerable loss of life in clashes between the Police and Africans. A large number of persons from Pondoland, as well as from other parts of South Africa, were rounded up and held in emergency detention for a period of several months. Anderson Ganyile was then a young man of 25 who had recently been expelled from the African University College of Fort Hare, apparently for political reasons, and who was regarded as a leader by the Pondo people. He was detained on March 30, 1960, until August 8, 1960. He then returned home to Pondoland.

During the latter part of 1960 Pondoland was in a state of simmering revolt which culminated in a full scale emergency in November 1960. During the emergency serious disorders occurred in

which about 25 people were killed, 30 injured and nearly 400 huts were burnt down.¹

On November 7, 1960, Ganyile was arrested at Bizana in Pondoland and was deported to a Native Trust farm at Frenchdale, in the Mafeking district of the Northern Cape Province. This deportation was the consequence of his failing to comply with an order issued by the State-President as Supreme Chief of all natives in the Republic of South Africa under the provisions of the Native Administration Act.² There are several of these "banishment" farms in South Africa. The system has been adopted of banishing Africans whom the authorities regard as

¹ D. & A. (Newsletter of the South African Defence and Aid Fund) October/December 1961.

² Section 5 of the Native Administration Act 38 of 1927, as substituted by Section 20 of Act 54 of 1952 and amended by Section 3 of Act 42 of 1956. The relevant provisions of this Section read as follows:

- " 5 (1) (b): The State-President may—whenever he deems it expedient in the general public interest without prior notice to any person concerned, order that, subject to such conditions as he may determine, any native shall withdraw from any place to any other place or to any district or province within the Union, and shall not at any time thereafter or during a period specified in the order return to the place from which the withdrawal is to be made, or proceed to any place, district or province other than the place, district or province indicated in the order, except with the written permission of the Secretary for Native Affairs...
- " 5 (2) (a): Any native who neglects or refuses to comply with an order issued under subsection (1) (b) or with any condition thereof, shall be guilty of an offence and liable on conviction to a fine not exceeding £ 50 or to imprisonment, with or without the option of a fine, for a period not exceeding six months.
- (b) Any native commissioner or magistrate may, upon such conviction take all such steps as may be necessary to ensure compliance with the order or with any condition thereof and may, by warrant under his hand, direct that any policeman or policemen shall carry out the withdrawal or ensure compliance with the order, if necessary by force.
- " 5 (3): Notwithstanding the provisions of subsection (2) the State-President may order that any native who neglects or refuses to comply with an order issued under subsection (1) (b) or with any condition thereof shall be summarily arrested and detained and as soon as possible removed in terms of the order.
- " 5 (4): No interdict or other legal process shall issue for the stay of any order or direction issued under subsection (1) (b); subsection (2) (b) or subsection (3), nor shall any such order or direction be suspended by reason of any appeal against a conviction under subsection (2)."

trouble-makers to isolated farms remote from their own tribal areas. There they live under "open prison" conditions in soul-destroying frustration and idleness and at a bare subsistence level. At Frenchdale Anderson Ganyile found one deportee (Chief Mopeli from the Witzieshoek area of the Orange Free State) who had been there for twelve years. Ganyile described the conditions of life at Frenchdale to the Commission's observer. He said:

There is nothing whatever to do at Frenchdale. All the people can do is sit in their huts and rot. I was informed that the government supplied rations to the value of £ 1.10 s. 0 d. per month and 10/- cash monthly for the maintenance of people detained there...³

³ See articles "The Banished" and "The Banished Men" which appeared in the *Sunday Times* on April 23, 1961, and on November 12, 1961, respectively. On November 23, 1961, it was believed there were 41 Africans living in banishment in similar conditions.

THE KIDNAPPING OF GANYILE AND HIS COMPANIONS

Ganyile escaped from Frenchdale in December 1960, and took refuge in the British colony of Basutoland. This is an enclave of British territory in the centre of South Africa lying to the north of the Transkeian Territory. In December 1960, Ganyile went to live in a hut about a mile from the village of Qacha's Nek in the southern part of Basutoland. This hut is about 700 yards from the border between Basutoland and South Africa and about 1,000 yards from a border post where the border fence crosses the road from Qacha's Nek to the South African village of Matatiele. The hut is somewhat isolated; there are only two other huts in the immediate vicinity, both of which were at all material times uninhabited.

The Special Branch (i.e., the political security branch) of the South African Police became aware of Ganyile's presence at Qacha's Nek. According to affidavits filed on behalf of the Minister of Justice in the subsequent *habeas corpus* proceedings, a statement was signed by an informer, whose name the Minister did not disclose, on August 10, 1961, alleging that at Qacha's Nek Ganyile was organizing subversive activities in Pondoland, including the boycotting and killing of chiefs, sabotage, and the killing of government informers and witnesses for the prosecution in the Pondo unrest cases. Because of the Government's withdrawal of opposition to the *habeas corpus* proceedings, Ganyile at no time had an opportunity of replying to these allegations.

Ganyile had reported his presence in the Qacha's Nek area to the Basutoland authorities and had applied for permission to remain there permanently. He lived there unmolested until the night of August 26, 1961, when he was captured. Although the South African authorities for a long time attempted to conceal what had happened and made no admission whatever until January 18, 1962, it is now admitted that Ganyile's captors were six members of the South African Police who crossed into Basutoland, captured Ganyile and carried him off to captivity in South Africa without the knowledge or permission of the Basutoland

authorities. There is still a good deal of conflict of evidence about the precise circumstances in which the capture took place. Ganyile gave his version of the facts fully in an affidavit which he filed in the Court of the Magistrate, Umtata, in support of an application for bail on January 9, 1962. The only statement which has ever been made by anyone connected with the South African Government or Police about the capture is the laconic statement which was issued to the press by the Department of Justice on January 18, 1962, announcing the decision to abandon the proceedings against Ganyile and allow him to return to Basutoland.

To understand the circumstances of the capture it is necessary to have some knowledge of the terrain. Qacha's Nek is situated in mountainous country at an altitude of 5,500 feet above sea level. The road from the nearest South African village, Matatiele, is 23 miles long and over the last 7½ miles the road climbs steeply through mountains to Qacha's Nek. The border is marked by a strong fence consisting of six strands of barbed wire. The fence runs continuously for distances of approximately 25 or 30 miles on each side of the border post. Where the road crosses the border there is a border post manned by an African policeman of the Basutoland Mounted Police. The fence runs approximately along a watershed. There are several other fences in the area of somewhat similar construction, but none runs for any distance along a watershed. The mountainous country for the last 7½ miles on the South African side of the border is a Native Trust area in which, in the interests of soil conservation, there are no dwellings and in which grazing is strictly controlled. There is apparently only one group of huts in this area, which is occupied by the warden of the area, and would be well known to anyone with local knowledge. On the other hand there are no such restrictions on the Basutoland side of the border, where there are huts dotted about. The only road which could be used by a vehicle anywhere in the area is the main road from Matatiele to Qacha's Nek.

The statement eventually issued by the South African Department of Justice on January 18, 1962, states that the police were in search of four suspected murderers of a certain African chief and they crossed the border unwittingly during the night in heavy mist. In their search the police reached a hut in which the suspected murderers were hiding. They established that the hut was inhabited. They knocked on the door and informed the occupants that they were the police. The door was opened and when they entered a policeman was hit in the face with an axe and seriously

injured. There were three natives in the hut who, after a struggle with the police, were taken to the police car which had been left at the foot of the mountain on the road. Only after the incident was it established that Ganyile was one of these three natives. The Attorney-General said he was satisfied, following a comprehensive investigation by a senior police officer, which he had ordered, that the police had acted in good faith. It was estimated that the distance by which the police overshot the border was 500 yards, but a surveyor has established that it was 638 yards.⁴

Ganyile's account of the incident is that about 10.30 at night he and his companions heard people at the door of their hut. He asked who they were and a voice replied saying the speaker was Ndaba, the owner of the hut. Ganyile, however, recognized one of the voices as being that of a certain South African policeman whom he knew. The police party burst into the hut. As the first man entered the hut Ganyile struck him a glancing blow with the axe. After a violent struggle Ganyile and his companions were overcome and handcuffed. The six members of the South African Police were all in civilian clothes and were wearing scarves which had been wrapped around the lower half of their faces as masks. The police did not take Ganyile and his companions to the gate at the border post but forced them to walk across country towards the border fence. After crossing the border fence of six strands of barbed wire they were taken to two cars parked on the South African side of the border. The cars appeared to have false number plates covering their ordinary number plates.

The issue whether the members of the police who overpowered Ganyile and his companions believed they had lawful power to arrest them and to take them as prisoners to the South African Republic may arise in civil proceedings, which are pending, in which damages for assault, false arrest and false imprisonment are being claimed from the Government and the members of the police party. In these circumstances it would not be proper to comment on any conflict of evidence which appears from the two statements. It can, however, be said that the statement by the Department of Justice, although it says the police crossed the border unwittingly, does not say that at the time the police entered the hut, or at any subsequent stage, the police were unaware that they were in Basutoland. Indeed, in the circumstances, it

⁴ *East London Daily Despatch* (East London, South Africa), January 18, 1962.

appears impossible that they did not know that Ganyile had been captured in Basutoland, at the latest when they recrossed the border fence and returned to their cars. The statement that the Attorney-General was satisfied that the police had acted in good faith appears to imply no more than that the police *bona fide* believed even if they were in Basutoland they had the power to arrest the three men in the circumstances. The reference in the statement to a distance of 500 yards appears to be a reference to the Fugitive Offenders Act.⁵

Ganyile and his companions were taken to Matatiele by the police and thereafter to a prison in the village of Mount Fletcher in the Transkeian Territory. On August 27, 1961, a certain Sergeant Steyn of the South African Police issued a warrant of detention addressed to the keeper of the Mount Fletcher prison in the following terms: —

Whereas Anderson Kumani Ganyile of Bizana was duly arrested in terms of Regulation 19 of regulations published under Proclamation No. R.400 of 1960, as amended by Proclamation No. R.413 of 1960, and I am not satisfied that he has answered fully and truthfully all questions put to him under the said Regulation 19, this is to require you to detain him in your prison until he has answered to my satisfaction fully and truthfully all questions so put, or he is sooner released as provided in sub-regulation 2 of the said Regulation 19.

In an affidavit filed in the subsequent *habeas corpus* proceedings, Sergeant Steyn said that he issued this order because he had received numerous reports, as well as the statement made on August 10, 1961, referred to above, concerning offences which someone intended to commit and concerning which offences he had reasonable grounds to suspect Ganyile of having taken part or intending to take part in the commission thereof. Apparently similar orders were made in respect of Ganyile's two companions, Ingleton Ganyile and Mohlouoa Mtseko. The men were kept separately in solitary confinement in various prisons in the Transkeian

⁵ 44 and 45 Vict. Ch. 69. This section provides:

"Where two British possessions adjoin, a person accused of an offence committed at or within a distance of 500 yards from the common boundary of such possessions may be apprehended, tried and punished in either of such possessions."

This provision applied as between South Africa and Basutoland before South Africa became a Republic outside the British Commonwealth and applied up to May 31, 1962, in terms of certain "standstill" legislation enacted when South Africa left the Commonwealth.

Territory for the next four months, during which time, according to the police affidavits, Anderson Ganyile was questioned about the alleged offences on September 6, 1961, on October 30, 1961, and on December 6, 1961, and was detained because he failed to answer questions completely and satisfactorily.

PROCLAMATION 400 OF 1960

The law under which Anderson Ganyile and his two companions were detained must surely be one of the most remarkable laws in force anywhere in the civilized world. Although it is frequently referred to in South Africa as an "emergency regulation", it is not in fact an emergency law, but is part of the ordinary law of the Transkeian Territory. Proclamation 400 of 1960 is headed "Regulations for the Administration of the Transkeian Territories". The Proclamation is made under a general power to legislate by proclamation for the Transkeian Territories under the Transkeian Annexation Act of 1877. Certain parts of the Proclamation, regulating movement between districts and like subjects, are of a temporary, emergency nature and are only brought into force in certain districts from time to time. Regulation 19 and Regulation 20, however, are not stated to be temporary. In answer to a Parliamentary question enquiring how long the emergency in Pondoland would remain in force the Minister of Bantu Administration stated in January 1962:

There is no emergency in Pondoland. Proclamation 400 of 1960 was passed at the request of the Bantu authorities and will remain in force as long as they wish it to remain in force.

In the statement announcing the grant of a measure of self-government to the Transkeian Territories it was said that certain aspects of the administration of justice, including internal security, would remain the responsibility of the central government. It appears that the apparatus set up by Proclamation 400 of 1960 is regarded by the South African Government as a permanent and necessary part of the administration of the "Bantu homelands". Regulations 19 and 20 read as follows: —

19. (1) Whenever a Native Commissioner or a commissioned or non-commissioned officer of the South African Police, is satisfied that any

person has committed an offence under these regulations or under any other law, or whenever the said Native Commissioner or commissioned or non-commissioned officer has reason to suspect that any person has or had the intention to commit such an offence the said Native Commissioner or commissioned or non-commissioned officer may without warrant arrest or cause to be arrested any person whom he suspects upon reasonable grounds of having taken part or intending or having intended to take part in the offence or intended offence in question or who in the opinion of the said Native Commissioner or commissioned or non-commissioned officer is in possession of any information relating to the said offence or intended offence, and the said Native Commissioner or commissioned or non-commissioned officer may question or cause to be questioned the said person in regard to any matter which has any bearing upon the said offence or intended offence and may detain or cause to be detained him at any place which the said Native Commissioner or commissioned or non-commissioned officer deems suitable for the purpose until the said Native Commissioner or commissioned or non-commissioned officer is satisfied that the said person has answered fully and truthfully all questions put to him which have any bearing upon the said offence or intended offence.

(2) The Minister may at any time upon such conditions as he may determine, cause to be released any person arrested and detained under sub-regulation (1), and if such person fails to comply with any such condition, he shall be guilty of an offence.

20. No person who has been arrested and is being detained under regulation 19 shall, without the consent of the Minister or person acting under his authority, be allowed to consult with a legal adviser in connection with any matter relating to the arrest and detention of such person.

In a published statement commenting on this law the observer of the International Commission of Jurists said:

Under this law a second class sergeant of police, if he has reason to suspect that a person, A, intends to commit any offence (say, the theft of a fowl) may arrest without warrant A and/or B who he thinks may have information about A's intended offence—and may keep A and B in jail indefinitely until they have answered all questions put to them about the intended offence to the satisfaction of the police sergeant. They need not be brought before any Court and they are not allowed to consult with a legal adviser without the consent of the Minister or a person acting with his authority.

APPLICATION FOR HABEAS CORPUS

On September 15, 1961, a friend of Ganyile, Jackson Nkosiyanane, received a message in consequence of which he went to the hut where Ganyile had been living and found it in a state of disorder with what appeared to be stains of human blood on the blankets on the beds. No one in Basutoland had apparently

learned of Ganyile's capture before this. This appears to be remarkable but, having visited the scene, the Commission's observer was satisfied that, because of the isolated area in which the huts stand there was in fact nothing impossible about Ganyile's capture having remained undiscovered for a period of more than two weeks. Nkosiyanane made a report to the Basutoland Police who began investigations into the incident. About the same date Ganyile succeeded in smuggling out of prison a note saying that he and two companions had been "kidnapped" in Basutoland on August 26, 1961, by six policemen from South Africa and were then in "K. D." (Kokstad). The "kidnap note" and the information gained by Jackson Nkosiyanane were used for the making by Ganyile's uncle of a *habeas corpus* application to the Eastern Cape Division of the Supreme Court of South Africa and were also published first in the periodical *New Age* of Cape Town on September 21, 1961, and afterwards in other newspapers in South Africa and in the United Kingdom.

When these reports were published Colonel Prinsloo, head of the Security Branch of the South African Police, and Major Loxton, South African Police District Commandant of Kokstad, both stated that they knew nothing about the alleged kidnapping. *Die Burger*, the Cape Town newspaper supporting the South African Government Party, published a report indicating that government circles ridiculed the story. Investigations were carried out by the Basutoland authorities which very quickly established that there had been a struggle and bloodshed in Ganyile's hut but failed to provide corroborative evidence that South African Police were involved. The Basutoland authorities and the British Government treated the reports at first with considerable scepticism.

On October 12, 1961, application was made to Mr. Justice George Wynne, sitting in the Eastern Districts Division of the Supreme Court of South Africa at Grahamstown, Cape Province, for what was in effect a *habeas corpus* order. The applicant, Anderson Ganyile's uncle, Siwele Ganyile, put before the Court a photostatic copy of the note from Ganyile with an affidavit identifying it as being in Ganyile's writing and said that he and Anderson Ganyile's mother had received a message from Ganyile that he was kidnapped in Basutoland on August 26, 1961, by South African policemen. The petition also was supported by an affidavit from Jackson Nkosiyanane stating that he had lived with Ganyile in his hut at Qacha's Nek and on September 15,

1961, had found the hut unoccupied and in a state of disorder with blood stains on the blankets. The petition asked for an order calling upon the Minister of Justice and certain subordinate officials to produce the body of Anderson Ganyile to the Court and it asked that a rule *nisi* be issued calling upon the respondents to return to Basutoland, or, alternatively, why they should not furnish information to the Court as to whether Ganyile was under arrest, on what charge he was arrested, where and why he was being detained. The application was made to the Court without notice to the respondents in accordance with what is the usual procedure in a case of this kind, where only a rule *nisi* is asked for.

Mr. Justice Wynne required counsel who appeared for the applicant to argue the matter at considerable length when the matter originally came before him on the following day, and on October 18, 1961, when the judge called for further argument. The judge reserved judgment and on the December 11, 1961, delivered a judgment in which the application was refused *in toto*.

The judgment by Mr. Justice Wynne is a curiosity of legal literature. He dealt with this comparatively straightforward application for a rule *nisi* affecting the liberty of the subject in a judgment of seventy two typewritten pages. The main points made in the judgment were: —

By escaping from Frenchdale Ganyile had committed a criminal offence, and he could have been brought back to South Africa from Basutoland for trial on a charge of committing that offence by the procedure of backing of warrants prescribed in the Fugitive Offenders Act of 1881. The remedy sought by the applicant was in effect the old Roman-Dutch Law writ *de libero homine exhibendo*. An applicant for this writ must show *prima facie* that his arrest or detention had been made "in ill fraud" and "without just cause". In the *habeas corpus* procedure developed in the English Courts too the applicant must show *prima facie* that he was unlawfully detained. An applicant approaching the Court *ex parte* should make full disclosure of all material facts which might affect the grant or refusal of the order sought. The effect of Section 5 of the Native Administration Act, as amended, was that a deportee remained within the jurisdiction of the State-President in the exercise of an unfettered discretion and outside the purview of the Courts so long as the deportation order stood unrevoked and that no Court had jurisdiction, where executive action was being taken, to restore the *status quo ante*. Proclamation 400 and Proclamation

413 of 1960 had been in force in the Transkei during the whole of 1961, and the Court had the right to draw the inescapable inference that Ganyile, if in the Transkei, had been detained under these "Emergency Regulations". Any alleged "kidnapping" in Basutoland was irrelevant. The learned judge then criticized the form of the petition, in particular attaching some sinister significance to the fact that the applicant had been assisted in the presentation of the petition by a Durban attorney who was not identified in the papers. He came to the conclusion "that the applicant, is a person liable to suspicion within the ambit of Digest (43.29.10) who falls to be excluded from the use of the interdict *de homine libero exhibendo*". The judge commented adversely on the fact that at the hearing only a photostat copy of the "kidnap" note had been put before him, and what purported to be the original had been handed in from the Bar on October 18, without any identifying affidavit. The evidence identifying the note was valueless as testimony. The petition was deficient in that it had not expressly stated that to the petitioner's knowledge the "backed warrant procedure" had not been followed. The judge came to the remarkable conclusion that Ganyile's petition "is manifestly an abuse of the process of the Court". The allegations of unlawful detention had been made on hearsay evidence without any real ground therefor, so far as the present papers showed.

The decision by Mr. Justice Wynne was subject to appeal to a Full Bench of the Eastern Districts Division of the Supreme Court. The matter was dealt with with unprecedented celerity. An appeal was noted, a Full Bench was convened and, in the course of the same week, i.e., on December 15, 1961, the Full Bench heard and allowed an appeal, and issued a rule *nisi* substantially in the terms asked for by the applicant.

Delivering the judgment to the Full Bench, the Judge President said that Mr. Justice Wynne had misdirected himself in his judgment in several respects. *Prima facie* it appeared that Ganyile had committed an offence by escaping from Frenchdale, but if so, the law required that he should either be brought to trial for that offence or returned to Frenchdale. There appeared to be no justification for keeping him in prison without trial in Kokstad. There was no justification for the suspicion which Mr. Justice Wynne had entertained about the application and the presentation of the petition or for any inference that Ganyile, if in the Transkei, had been detained under the so called "Emergency Regulations".

The judgment of the Full Bench pointed out that there were some apparent deficiencies in the petition but on this aspect the learned Judge President said:

Dealing with the matter therefore as of first instance, it seems to me that the obvious thing to do where, however meagre, there is a *prima facie* case, is to invite the Respondents to tell the Court what the position is. The issue of a rule calling upon them to give this information and for the release of Ganyile, can cause them no prejudice or hardship. If their detention of Ganyile is lawful, if they can justify it, *cadit quaestio*, but to refuse a rule may cause considerable hardship and injustice to Ganyile. From a practical point of view therefore, I do not think the Court should be astute to find objections at this stage to the relief claimed. The Court should rather be astute to find a means of exercising its function and jurisdiction in the protection of a citizen from a potential inroad on his liberty. If this course had been followed in the first instance, it seems to me the whole matter would have been completed and finished by now. Either the Respondents would have satisfied the Court that the Petitioner is not entitled to the relief that he claims, or the Petitioner would have succeeded. In either case there would have been finality.

PROCEEDINGS BEFORE THE MAGISTRATE'S COURT

The judgment of the Full Bench was delivered on December 15, 1961. On December 22, Ganyile was brought before the Court of the Magistrate, Umtata, and a preparatory examination was commenced against him on charges of attempted murder and incitement to murder. No particulars of the charges were given and no evidence was led at the hearing on December 22, but Ganyile was formally remanded to January 5, 1962. On January 5, 1962, he was remanded, again without evidence, until January 19, 1962.

Meantime, after his appearance in Court, Ganyile had been allowed to communicate with a solicitor and an Umtata firm of attorneys was instructed to represent him at the preparatory examination and to make an application for bail on his behalf. On January 10, 1962, an application was made to the Magistrate of Umtata for Ganyile's release on bail pending the hearing of the charges against him. The application was supported by an affidavit, to which reference has already been made, in which Ganyile set out the circumstances of his alleged kidnapping. The State filed no affidavit in answer to this but was represented

by counsel who opposed the application. It appeared in the course of the argument that the charges which at that time it was intended to bring against Ganyile were:

- (a) attempted murder, relating to his attack on the Constable when he was resisting capture, and
- (b) incitement to murder, about which no details were ever given, but which apparently referred to the messages and instructions alleged to have been sent by Ganyile from Qacha's Nek to Pondoland, as set out in the statement by the anonymous informer which was filed by the Minister in the *habeas corpus* proceedings.

It was stated by the Public Prosecutor that Ganyile had been held between August 26, 1961, and December 22, 1961, in terms of the "Emergency Regulations".

The application was heard by the Senior Magistrate of Umtata. Magistrates in South Africa are all stipendiary magistrates, i.e., full time officials of the Department of Justice, with legal qualifications. Under South African procedure a magistrate has power to grant bail to an accused who is undergoing preparatory examination in all cases except where the accused is charged with treason or murder. The decision as to whether bail should be granted and, if granted, on what conditions, depends upon whether the accused, if admitted to bail, is likely to abscond and whether he is likely to interfere with Crown witnesses.

The magistrate, Mr. Potgieter, reserved judgment and the following day gave judgment admitting Ganyile to bail on the bond of two sureties for R.400 (£200). In his judgment the magistrate said that Ganyile in the circumstances had convinced the Court there was not sufficient evidence to believe he would not stand his trial if allowed out on bail, and the Court in its discretion allowed him bail. It was clear from the magistrate's reasons that the fact which influenced him most was that ample time had elapsed for any charges which might be pending against Ganyile to have been brought and disposed of; instead of which Ganyile had been kept in prison for four months without any action at all having been taken.

Ganyile's attorneys were able to arrange for suitable sureties to be provided and on January 11, 1962, Ganyile was released from imprisonment. It is notable that, although at that time an order under the provisions of Proclamation 400 of 1960 as amended was still in force authorizing Ganyile's detention for questioning, no attempt was made to hold him in custody under that order.

On January 12, 1962, Mr. Peter Charles, Q.C., the observer appointed by the International Commission of Jurists, saw representatives of the press in Umtata and pointed out that the International Commission of Jurists and "Justice" were particularly interested in the fate of Ganyile's two companions who had been captured at the same time as Ganyile and had not been brought before any Court, but were apparently being imprisoned somewhere without trial. On the same date Ganyile's Umtata solicitor wrote to the Public Prosecutor asking for information about the whereabouts of these two men as they were necessary defence witnesses in Ganyile's trial. The following day it was announced that the two men in question had been released from two prisons in the Transkei, Mount Fletcher and Kokstad. An officer of the Special Branch stated that the two men had been held for questioning under Proclamation 400 of 1960, as amended, and had now answered questions satisfactorily.

PROCEEDINGS BY THE GOVERNMENT ABANDONED

The next scenes in the drama were due to take place upon January 18 and 19, 1962. On January 18, 1962, the Minister of Justice was required to show cause before the Supreme Court in Grahamstown why Ganyile had been detained and on January 19 the preparatory examination was due to be resumed in Umtata. During the week preceding these dates the Minister of Justice filed affidavits in the Supreme Court in Grahamstown in which he alleged that Ganyile had been detained in terms of an order made by Sergeant Steyn under the provisions of Section 19 of Proclamation 400 of 1960, as amended. The Minister stated that the allegations in regard to the "kidnapping" in the original applications were irrelevant and immaterial and he did not answer them. He asked that the application should be dismissed with costs. This affidavit was filed on the January 15, 1962. Clearly it was necessary that Ganyile should have an opportunity of replying to it and clearly it was not possible for him to do so before the return day of the rule on January 18, 1962, as in accordance with the conditions of his bail he was not allowed to leave Umtata, which is some 250 miles away from the seat of the Court at Grahamstown. It was agreed that the return day of the rule would be postponed on January 18.

At this stage it was clear that the British Government was actively interesting itself in the case. An official of the British Embassy at Cape Town visited Umtata and saw Ganyile in the course of this week. On January 18, 1962, an official statement was issued by the South African Department of Justice that the proceedings against Ganyile had been abandoned, that Ganyile would be allowed to return to Basutoland and that the South African Minister of Foreign Affairs had informed the British Ambassador of this and conveyed to him the regret of the South African Government that the incident had taken place. On that date the *habeas corpus* proceedings in Grahamstown were postponed, but later in the day the government attorneys wrote to Ganyile's attorneys tendering to pay Ganyile's costs. This brought the proceedings to an end, as the matter of costs was the only question outstanding at that stage. On January 19, 1962, the proceedings against Ganyile in the Umtata Magistrate's Court were abandoned. It was stated that the sole reason why the proceedings were not going on was that it had been established Ganyile's arrest took place in Basutoland. The same day the Minister of Justice issued an order withdrawing the order for Ganyile's detention under Proclamation 400 of 1960, as amended, and Ganyile was allowed to return to Qacha's Nek in Basutoland.

Reference has already been made to the meagre information given in the statement by the Department of Justice about the circumstances of Ganyile's capture. The statement began:

As it had now been established that the arrest of Anderson Ganyile had taken place within the borders of Basutoland, the Attorney General at Grahamstown had decided not to proceed against Ganyile in the preparatory examination of allegations of attempted murder and incitement to murder.

In a comment on this statement issued to the South African press on January 19, 1962, the Commission's observer stated he was satisfied it was known to the authorities from August 26, 1961, onwards that the arrest of Anderson Ganyile had taken place in Basutoland. The only inference which could be drawn was that the criminal proceedings were instituted as a result of the Court order on the *habeas corpus* application and that they were dropped because of the international repercussions which resulted when the facts were exposed and because of representations made by the British Government. Reconsideration of the relevant facts at leisure gives no reason to modify these comments in any way.

It has been announced that Ganyile and his two companions are each bringing civil actions against the Minister of Justice and

the individual policemen concerned for substantial damages on the grounds of wrongful arrest and imprisonment. Save for these proceedings the Ganyile incident is closed.

CONCLUDING COMMENTS

Some comment on the wider implications of the case can appropriately be made at this stage. In the first place the case has drawn attention to two serious inroads into civil liberties existing in South Africa. These are: —

- (a) the provisions of Proclamation 400 of 1960, as amended, upon which we have already commented and which are regarded as a permanent and necessary feature of the administration of justice in what is intended to be the model "Bantu homeland", the Transkeian Territory;
- (b) the extraordinary far-reaching provisions for banishment under Section 5 of the Native Administration Act, 1927, as amended.

Secondly, the case draws attention to the spirit of lawlessness which seems to prevail among certain members of the Special Branch of the South African Police. We have already referred to statements issued by senior police officers approximately a month after the capture of Ganyile and his two companions in Basutoland denying all knowledge of the incident. These statements can be explained only by deliberate mendacity on the part of the senior officials concerned, or by the fact that the comparatively junior police officers who carried out the operation, did so on their own initiative and concealed from their superior officers the fact that they made an irruption into neighbouring British Territory. Either explanation is disquieting. The incident shows that if political police are given wide powers placing them, in many respects, above the law, they tend to assume that they are entitled to do anything which in their sole discretion they consider justified in the fulfilment of their tasks.

Thirdly, the action of the higher officials of the South African Department of Justice in attempting to brazen out what had been done, when the facts were indisputably established, reflects a disquieting contempt for standards of international law.

Fourthly, it must be said that the handling of the *habeas corpus* application by Mr. Justice Wynne was not in accordance with

the high traditions of the South African Judiciary. In particular, the delay of two months in dealing with an urgent application affecting the liberty of the subject was deplorable. In every other respect, however, the South African judicial officers and legal practitioners, who dealt with the matter, added lustre to the deservedly high reputation enjoyed by the South African Courts, and those who practise before them, among lawyers throughout the world who are familiar with the working of the South African system. We refer particularly to the judgment of the Full Bench on appeal from the judgment of Mr. Justice Wynne, to the most admirable speed with which the matter was dealt with by the Full Bench, and to the fairness and independence of mind shown by the magistrate, Mr. Potgieter, who dealt with Ganyile's bail application. In this connection it may be pointed out that Mr. Potgieter's assessment of what would happen was amply vindicated, as Ganyile in fact could very easily have slipped across the border into Basutoland between January 12, and the date when the proceedings against him were withdrawn, had he not in fact had a genuine determination to stand his trial and to adhere to the conditions of his bail bond. In regard to the conduct of the legal practitioners who handled the case, the Commission's observer is able to say that Ganyile's representatives at Grahamstown and Umtata were practitioners to whom the Ganyile case was simply a case which came to them in the ordinary course of practice, involving the liberty of the subject. They were not persons who had any particular political affinities which would make them specially interested in taking up the cudgels on Ganyile's behalf. The great energy and assiduity with which the case was handled by all the legal practitioners concerned were in accordance with the highest professional traditions. It is clear that despite the existence in South Africa of the sort of repressive laws to which we have drawn attention in this report, much can still be done and is being done to maintain the liberty of the subject by a vigilant and independent Bench and a courageous legal profession.

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