*Privy Council Appeal No. 49 of 1945*

**Mohamed Sugal Esa Mamasan Rer Alalah - - *Appellant***

*v.*

**The King - - - - - - - - - - *Respondent***

FROM

## THE PROTECTORATE COURT OF THE SOMALILAND PROTECTORATE

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## REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

DELIVERED THE 31ST JULY, 1945

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*Present at the Hearing:*

LORD PORTER
LORD SIMONDS
LORD GODDARD

[*Delivered by* LORD GODDARD]

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Their Lordships now give their reasons for the advice they humbly tendered to His Majesty on July 31st that this Appeal should be dismissed.

The appellant together with his brother Elmi was charged on July 22nd, 1944, before the Protectorate Court of Somaliland with the murder of his half-brother Abdillahi on or about May 17th, 1942. The Judge of the Court convicted the appellant and sentenced him to death, and acquitted Elmi. The conviction and sentence were confirmed on appeal by the Military Governor sitting as Judge of the Protectorate Court on the appellate side and the appellant subsequently obtained special leave to appeal to His Majesty in Council. The ground upon which special leave was given was that the Court had admitted and acted upon the unsworn evidence of a girl of 10 or 11 years of age whom the Judge found was competent to testify but whom he did not consider was able to understand the nature of an oath. It was conceded by the Crown that if her evidence was inadmissible, not being given on oath, there was not sufficient evidence to warrant a conviction. In substance the only question for decision is whether the law in force in the Protectorate permits the Court to receive evidence from a person who does not understand the nature of an oath but is otherwise competent to testify, as understanding the questions put and being able to give rational answers. It is only necessary to give a very brief statement of the facts as the whole question is one of law.

There had been a dispute between the appellant and the deceased about a she-camel, which had been decided on May 16th, 1942, in favour of the latter by a native tribunal, and the appellant had been heard to utter threats against him. On the next day the deceased was murdered, and his body was found near the camp in which both he and the appellant were living. There was evidence that the appellant was seen at the camp just after the body was found and that immediately afterwards he and his brother disappeared and made no attempt to trace the murderer of

their half-brother and so become entitled to blood-money. They did not return to the camp for about six months and were arrested in consequence of some other dispute about property and charged with the murder rather more than a year after it had been committed. The witness whose evidence is in question in this appeal is a girl named Sudio Mohamed, who at the time of the murder was not more than 10 years old and she was tendered by the Crown as an eyewitness of the crime and as having given the alarm at the camp which led to the finding of the body. It is stated by the trial judge that she appears to be intelligent for her age and that she gave her answers frankly and without hesitation.

By paragraph 16 of the Somaliland Order in Council, 1929, the Indian Evidence Act, 1872, and the Indian Oaths Act, 1873, are expressly applied to Somaliland. Section 118 of the Evidence Act is in these terms:—

> " 118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.
>
> Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

The material sections of the Oaths Act are sections 5, 6 and 13 which provide as follows:—

> " 5. Oaths or affirmations shall be made by the following persons:—
> All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence.
>
> . . . . . .
>
> " 6. Where the witness, interpreter or juror is a Hindu or Muhammadan, or has an objection to making an oath, he shall, instead of making an oath, make an affirmation.
>
> In every other case the witness, interpreter or juror shall make an oath."
>
> " 13. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

In India the question has more than once arisen whether the omission to take an oath referred to in section 13 of the Oaths Act applies to a case where the Court deliberately refrains from administering the oath to a witness, or only to cases where the omission is due to some accident or negligence, and opinion on the subject has not been unanimous. It is unnecessary to set out all the cases but their Lordships will refer to three of them.

Soon after the passing of the Act the question came before the High Court of Bengal in *R.* v. *Sewa Bhogta* (14 B.L.R. 294) where a majority of the Full Bench, Jackson J. dissenting, held that the section being unqualified in terms did apply to a case where the Court accepted the evidence of a child to whom the oath was not administered on the ground that the witness did not understand its nature. On the other hand in Allahabad, Mahmood J. in an elaborate judgment refused to follow that case, and preferred the view of Jackson J. that in such circumstances the evidence was inadmissible—*R.* v. *Maru* (1888) I.L.R. 10 All. 207. The other case to which their Lordships would refer is *Ram Samujh* v. *King Emperor* (1907) 10 Oudh Cases 337, in which an instructive judgment was given by Greeven A.J.C. agreeing with that of the Bengal High Court.

In their Lordships' opinion the decision of the Bengal High Court and in the case in 10 Oudh are right. Section 13 of the Oaths Act is quite unqualified in its terms and there is nothing to suggest that it is to apply only where the omission to administer the oath occurs *per incuriam*. If that had been the intention of the Legislature it would have been simple to insert words in the section to that effect. No doubt, however, it was recognised that in some backward communities there may well be persons capable of understanding the necessity and duty of speaking the truth without appreciating the religious or moral obligations imposed by taking an oath. It is not to be supposed that any Judge would accept as a witness a person who he considered was incapable not only of understanding the nature of an oath but also the necessity of speaking the truth when examined as a witness. It may be observed that this question can no longer arise in India because in 1939 the Indian Legislature passed the Indian Oaths (Amendment) Act (Act xxxix of 1939), which settles the law in accordance with the Bengal and Oudh decisions referred to above. A question was raised in this Appeal as to whether that Act applies to Somaliland but in view of the opinion which their Lordships have formed as to the true construction of section 13 of the unamended Act they do not find it necessary to decide it and accordingly they express no opinion as to whether the amending Act is part of the law of Somaliland.

It was also submitted on behalf of the appellant that assuming the unsworn evidence was admissible the Court could not act upon it unless it was corroborated. In England where provision has been made for the reception of unsworn evidence from a child it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a Court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law. In a careful and satisfactory judgment the Judge of the Protectorate Court shows that he was fully alive to this rule and that he applied it, and their Lordships are in agreement with him as to the matters he took into account as corroborative of the girl's evidence. There is no fault to be found with the judgments of either Court and their Lordships have humbly so advised His Majesty.

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**In the Privy Council**

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MOHAMED SUGAL ESA MAMASAN
RER ALALAH

*v.*

THE KING

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DELIVERED BY LORD GODDARD

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