

43, 1954

No. 35 of 1954

IN THE PRIVY COUNCIL

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

38037

BETWEEN

KURUMA S/O KANIU
and
THE QUEEN

UNIVERSITY OF LONDON
W.C.1
23 MAR 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES

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CASE FOR THE RESPONDENT

RECORD.

1. This is an appeal in forma pauperis by Special Leave granted on the 19th day of July, 1954, from an order of the Court of Appeal for Eastern Africa dated the 27th day of March, 1954, dismissing the Appellant's Appeal against his conviction by a Court of Emergency Assize (Law, Acting Judge, sitting with three Assessors) at Nairobi in the Colony and Protectorate of Kenya on the 11th day of February, 1954, whereby the Appellant was convicted of being in unlawful possession of two rounds of ammunition contrary to Regulation 8 A (1) (b) of the Emergency Regulations, 1952, of the said Colony and was sentenced to death.

p.25.

p.19.

p.16.

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2. The Appellant contends that the evidence called by the Prosecution at his trial that he was in possession of the ammunition was inadmissible. This evidence was given by two Police Officers who alleged that they had found the said ammunition on the Appellant's person. The Appellant contends that the ammunition was found in the course of, or as a result of, a search of the Appellant's person which was not authorised by law and for that reason the evidence was inadmissible.

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3. The Appellant was charged with having the said rounds of ammunition in his possession at Chania Ridge, Thika in the Central Province of Kenya on the 1st January, 1954. The Prosecution called Police Constable John Nyaundi Ogwang (P.W. 1.) who deposed that he was stationed at Thika and on the said 1st January, 1954, he was on duty at Chania Ridge Road Block near Thika. His duties were to inspect the documents of persons passing through the Road

p.1.

pp.2-5.

RECORD.

Block and to search them by running his hands over their body. The Police Constable in the course of his duty stopped the Appellant and inspected his papers which were in order. The Police Constable then felt the Appellant's clothes and in a small pocket near the waist band of the Appellant's shorts the Police Constable felt objects which he suspected to be rounds of ammunition. The Police Constable thereupon seized the Appellant and summoned his superior officer Rattan Singh (P.W. 2.) by blowing his whistle. The two Police Officers took the Appellant aside removed his shorts and discovered the two rounds of ammunition together with a small penknife which was returned to the Appellant. The Appellant was then taken together with the two rounds by the two Police Officers in a Police car to the Police Station at Thika where he was later charged with the offence by the Chief Inspector of Police (P.W. 5.). Rattan Singh (P.W. 2.) gave evidence confirming the finding of the ammunition on the Appellant; the remainder of the witnesses called by the Prosecution were Police Officers attached to Thika Police Station, who gave evidence of what occurred after the Appellant was brought to the Station. Evidence was tendered identifying the two rounds produced in Court with those brought to the Police Station, and a statement denying the offence made by the Appellant to the Chief Inspector (P.W. 5.) when he was charged was also produced.

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4. The Appellant's Counsel did not object to the admissibility of any of the evidence called by the Prosecution at the time when it was given. Nor did the Appellant's Counsel challenge or put any questions in cross-examination to the Police Constable (P.W. 1.) about his statement that it was his duty to search people at the Road Block. However after the Prosecution's case was closed, Counsel for the Appellant submitted that the search of the person of the Appellant was invalid ab initio and referred to Regulation 29 of the Emergency Regulations 1952 of the said Colony. Regulation 29 provides that

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p.9.

"any Police Officer of or above the rank of Assistant Inspector with or without assistance and using force if necessary may stop and search any individual whether in a public place or not if he suspects that any evidence of the commission of an offence against this Regulation is likely to be found on such individual and he may seize any evidence so found."

5. As the Police Constable was below the rank of an Assistant Inspector it was submitted on behalf of the Appellant that he had no power to search under Regulation 29 and that therefore the object found during that search could not be produced in evidence.

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6. The learned Trial Judge did not call upon the Prosecution to reply to this submission but overruled it on the grounds:

pp.10-11.

10 (a) that when the Police Constable felt what he thought was ammunition in the pocket of the Appellant he suspected upon reasonable grounds that the Appellant was committing a cognizable offence and was therefore entitled to, and did, arrest the Appellant under Section 28 of the Criminal Procedure Code of Kenya. Further the Police Officer was thereafter entitled to search the Appellant under Section 25 of the said Code as the Appellant was "a person who was reasonably suspected of having in his possession something unlawfully obtained." Further the Police Constable was entitled to search the Appellant after arrest under Section 24 of the said Code as he had arrested the Appellant without a warrant for an offence which the Appellant could not be admitted to bail.

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Annexe hereto.

Annexe hereto.

Annexe hereto.

(b) that even if the first search by the Police Constable (in which he ran his hands over the Appellant's clothes) was not authorised by law, it was only trespass to the person and did not invalidate the production of objects found as a result of such search. The learned Trial Judge relied on the case of Elias and Others v. Pasmore (1934 2. K.B. 164).

30 7. The Appellant then gave evidence. He stated that when he was searched by the Police Constable nothing was found on him except a Twenty shilling note which the Police Constable took from him. The Police Constable then asked the Appellant for a special tax receipt which the Appellant did not have. The Police Constable said that the Appellant would be taken to the Police Station for not producing the tax receipt. The Appellant denied that he was taken aside and searched further or that his shorts were removed. The Appellant said that on the way to the Police Station he asked the Constable to return his Twenty

40 shilling note whereupon the Police Constable slapped him. When they reached the Station the Constable produced the rounds of ammunition and this was the first time the Appellant had seen these rounds. The Appellant suggested that the Constable had brought this false charge against him because he had asked for his money to be returned. The Appellant also called two witnesses as to character.

pp.11-13.

50 8. After Counsel's addresses and a summing-up by the learned Trial Judge the Assessors returned their verdict finding the Appellant not guilty and giving their reasons as follows:-

pp.15-16.

Assessor No. 1. I do not find Accused guilty. The knife should have been produced.

RECORD.

Assessor No. 2. I agree with No. 1. The knife should have been produced with the bullets. I do not believe Prosecution witnesses. I believe the story of the twenty shillings. I do not believe he was beaten.

Assessor No. 3. I do not believe Accused is guilty. The Inspector did not write down in Accused's statement that he has seen the bullets on the Accused (! Sic). The knife should have been produced.

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pp.16-19.

9. On the 11th February, 1954, the learned Trial Judge delivered his judgment disagreeing with the Assessors, convicting the Appellant and sentencing him to death.

p.20.1.3.

10. The Appellant by leave of the learned Trial Judge appealed to the Court of Appeal for Eastern Africa against his conviction. The grounds of the Appeal was (inter alia) that the evidence of the finding of the ammunition was inadmissible. At the hearing of the Appeal it was argued on behalf of the Respondent that the search of the Appellant by the Police Constable was authorised by law. The Road Block was in the administrative district of Thika which had been declared to be a Special Area by an Order made under the Emergency Regulations, 1952, and contained in Special Areas (No.13) Order, 1953, Government Notice No. 1283, published in the Official Gazette of the 11th August, 1953. By Regulation 22 B (2) of the Emergency Regulations, 1952, it was "the duty of any person in a Special Area to stop and submit to search by an authorised officer when called upon to do so." By Regulation 22 B (4) read with Regulation 22 A (8) an authorised office included any member of the Police Force. The Court of Appeal would not allow the Respondent to rely on that contention on the ground that the Counsel for the Crown at the trial "did not base his argument upon that fact", and the Trial Judge's attention was not called to the relevant notification nor was there any evidence at the trial that the Road Block was in the administrative district of Thika.

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Annexe hereto.

Annexe hereto.

Annexe hereto.

pp.19-24.

12. The Court of Appeal (Nihill, President, Worley, Vice President, and Briggs, Justice of Appeal) in a Judgment delivered on the 27th day of March, 1954, held that the original stopping and searching of the Appellant was unlawful but that after the Constable had felt the rounds of ammunition in the Appellant's pocket he had "reasonable suspicion of the commission of a cognizable offence" and his arrest and subsequent search of the Appellant was lawful. Further the Court of Appeal agreed with the learned Trial Judge and held that "even if the original detention and search which

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p.22.,1.25.

p.22.,
11.31-37.

lead to the discovery of the ammunition and the arrests were unlawful and amounted to a trespass and an assault, this fact did not invalidate the production in Court of the incriminating articles which were found as a result of these irregular acts". The Court of Appeal therefore dismissed the Appeal.

10 13. It is submitted on behalf of the Respondent that the evidence of the two Police Officers that they discovered two rounds of ammunition in the Appellant's shorts on the said 1st January was evidence of a fact in issue at the trial of the Appellant who was being charged with being in possession of the said rounds on the said date. As such the evidence was prima facie admissible evidence under Section 5 of the Indian Evidence Act, 1872, (which Act was incorporated into the Laws of Kenya by East Africa Order in Council 1897), unless there is some rule which excludes such evidence. There is no rule excluding such evidence. Annexe hereto.

20 14. Further it is submitted that it is quite immaterial whether the search by the Police Officers was, or was not, authorised by law. The evidence that the rounds were in the Appellant's possession would it is submitted, be admissible evidence even if the Police Officers when the said rounds were found had been committing an assault on the Appellant. However, it is submitted that in this case the search of the Appellant conducted by P.W. 1. and P.W. 2. in the course of which the rounds were discovered was authorised by law under Sections 25 and/or 24 of the Criminal Procedure Code of Kenya, being made after the arrest of the Appellant by P.W. 1. and after the Police Constable suspected that the Appellant had in his possession something wrongfully obtained. Annexe hereto.

40 15. The Respondent further submits that the first search by P.W. 1. during which he felt something in the Appellant's pocket which he suspected to be rounds of ammunition was relevant as a fact closely connected with and leading up to the fact in issue (i.e. the actual finding of the two rounds in the subsequent search). Apart from that the only importance of this evidence was that it constituted the ground which caused the Police Constable to suspect that the Appellant was committing an offence and justified the subsequent arrest and search of the Appellant. It is submitted that evidence of this first search was admissible in evidence whether the search was lawful or unlawful. Further it is submitted that this first search was in fact lawful by virtue of the provisions of Regulation 22 B. of the Emergency Regulations, 1952, (referred to above) and that there was ample evidence that the search took place within the administrative district of Thika and therefore within a Special Area. Alternatively, it is submitted that if there was not sufficient evidence of the place where the search took place, the Court of Appeal should have Annexe hereto

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RECORD.

permitted the Prosecution to call or should themselves have called, evidence of the said place, since at the trial no objection was taken to the evidence of the said search on the grounds of its illegality at the time when the said evidence was tendered, nor was it suggested that the said search was illegal until after the Prosecution had closed its case. Finally it is submitted that even if the first search was illegal and for that reason the evidence of the first search was inadmissible, the inadmissibility of such evidence did not invalidate the evidence of the second search, so that even if all the evidence of the first search was excluded, there was ample evidence to justify the conviction of the Appellant.

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The Respondent therefore submits that the appeal should be dismissed for the following (among other)

R E A S O N S

- (1) That the first search of the Appellant by P.W. 1. was lawful and admissible in evidence.
- (2) That even if the said first search was not lawful it was admissible in evidence.
- (3) That if the said first search was not admissible in evidence the second search of the Appellant by P.W. 1. and P.W. 2. was lawful and admissible in evidence.
- (4) That if the said second search was not lawful the evidence of what was found during the said search was admissible in evidence.
- (5) For the reasons given by the Court of Appeal.
- (6) For the reasons given by the learned Trial Judge.

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D.A. GRANT.

A N N E X E

ANNEXE.

Criminal Procedure Code

Criminal
Procedure
Code.

Section 24.

Whenever a person is arrested:-

(a) X X X X X

(b) without a warrant, or by a private person under a warrant, and the person arrested cannot legally be admitted to bail or is unable to furnish bail,

10 the police officer making the arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested may search such person and place in safe custody all articles, other than necessary wearing apparel, found upon him.

Section 25.

(1) Any police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain -

(a) X X X X

(b) X X X X

20 (c) any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

Section 28.

Any police officer may, without an order from a magistrate and without a warrant, arrest -

(a) any person whom he suspects upon reasonable grounds of having committed a cognizable offence;

30 (d) any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to such thing;

Section 381.

Subject to the provisions hereinbefore contained, no

ANNEXE

Criminal
Procedure
Code -
continued

finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account -

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code; or

(b) of the omission to revise any list of jurors or assessors in accordance with section 264; or

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(c) of any misdirection in any charge to a jury, unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice:

Provided that in determining whether any error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

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Indian
Evidence
Act 1872.

Indian Evidence Act, 1872.

Section 5.

Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Section 6.

Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

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Section 7.

Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Section 167.

The improper admission or rejection of evidence

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shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

Indian Evidence Act, 1872 -- continued

Emergency Regulations, 1952

Emergency Regulations 1952.

10 Regulation 22 B. (inserted by the Emergency Amendment) (No. 2) Regulation, 1953.)

20 22. B. (1) If, as respects any area, it appears to the Governor to be necessary or expedient that special precaution should be taken to prevent malicious injury to persons or property, he may, by order declare such area to be a special area for the purpose of these Regulations. Any area in relation to which an order made under this Regulation is in force is hereinafter referred to as a "special area".

(2) It shall be the duty of any person in a special area to stop and submit to search by an authorised officer when called upon so to do, and if any such person fails to stop when challenged, or called upon to stop by an authorised officer, he shall be guilty of an offence against this Regulation and may be arrested by such officer without warrant.

30 (4) For the purposes of this Regulation the expression "authorised officer" has the meaning assigned to it by sub-section (8) of Regulation 22. A. of these Regulations.

Regulation 22 A. (inserted by Emergency (Amendment) (No. 2) Regulation, 1952.)

22. A. Prohibited Areas

(8) For the purposes of this Regulation the expression "authorised officer" means any member of the Police Force

The Special Areas (No. 13) Order, 1953.

The Special Areas (No.13) Order, 1953.

40 (2) I declare each of the areas specified in the

ANNEXE.

The Special
Areas
(No. 13)
Order, 1953
continued

Schedule to this Order to be a special area for the purposes of the said Regulations.

Schedule

- (b) Those areas of the Colony being respectively the areas at present comprising the administrative districts of
 - (i) Thika.
 - (ii) Kiambu.

IN THE PRIVY COUNCIL

O N A P P E A L
FROM HER MAJESTY'S COURT OF APPEAL
FOR EASTERN AFRICA AT NAIROBI

B E T W E E N
KURUMU S/O KANIU Appellant
 - v -
THE QUEEN ... Respondent

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