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Judgment 12/1964

IN THE PRIVY COUNCIL No. 38 of 1963

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF RHODESIA AND NYASALAND

BETWEEN:-

78555

TADEYO KWALIRA and JOSEPH DUNCAN Appellants

- and -

THE QUEEN ... ... Respondent

CASE FOR THE RESPONDENT

Record

10 1. This is an appeal, by special leave of the Judicial Committee given on the 31st July 1963, against a judgment of the Federal Supreme Court of Rhodesia and Nyasaland (Clayden C.J. Quenet F.J. and Unsworth C.J. Ny.) dated the 12th December 1962 which had by a majority dismissed the Appellants appeal against their conviction for the murder of Silino Mathews in the High Court of Nyasaland (Cram J. and three assessors) on the 20th August, 1962, when they were condemned to death. p.320 pp.307-318 pp.272-299 p.300

20 2. The relevant statutory provisions are:

PENAL CODE OF NYASALAND

s.213 (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

30 (2) The provisions of this section shall not apply unless the Court is satisfied that the act which causes death bears a reasonable relationship to the provocation.

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s.214 The term 'provocation' means and includes, except as hereafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master and servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relationship as aforesaid, the former is said to give to the latter provocation for an assault."

295 (1) When, in a case tried with assessors, the case on both sides is closed, the judge shall ascertain the opinion of each of the assessors by requiring him to answer such question as he may, in his discretion, consider desirable to put to them, and except in the case of an assessor who is not familiar with the English language, shall require each of the assessors to state his opinion orally generally upon the case. The opinion of the assessors shall be given orally in open court and recorded by the Court.

(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinion of the assessors.

FEDERAL SUPREME COURT ACT 1955

13(1) On an appeal against conviction the Supreme Court shall allow the appeal if it thinks that the judgment of the Court before which the Appellant was convicted should be set aside on the ground that it is unreasonable or is not justified, having regard to the evidence, or on the

ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that -

(i) The Supreme Court may, notwithstanding, the fact that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred;

14(2) Where an appellant has been convicted of an offence and the trial Court could on the information, indictment, summons or charge have found him guilty of some other offence, and on the finding of the trial Court it appears to the Supreme Court that the trial Court must have been satisfied of facts which proved him guilty of that other offence, the Supreme Court may instead of allowing or dismissing the appeal, substitute for the judgment of the trial Court a judgment of guilty of that other offence and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

3. The trial before Cram J. and three assessors was held between the 5th and 11th June 1962. p.4-271

Evidence called for the prosecution showed that the deceased Silino Mathews had lived in Kavala No.2 village as had the first Appellant: this village was on one side of a valley traversed by the Bilila stream, and was some 770 yards from the stream; on the 13th December the body of the deceased was found on a path which crossed the stream and joined his village with Kavala No.1 village which was on the opposite side of the valley: the body was about a quarter of a mile up from the stream and 250 feet from the deceased's own house just outside Kavala No.2: a panga was found by a policeman 99 feet from the body towards the stream: a son of the first Appellant said that

p.107 L.11
p.108 L.1
p.107 L.14
p.40 L.25

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the deceased had come to his home on the 12th December and in the absence of the first Appellant and his wife had beaten two of their children with
p.30 L.24- a stick. The first Appellant's eldest son Davidson
p.32 L.29 said that his father had come home later and gone out carrying a knobkerrie, and he had later seen his father at the stream fighting the deceased who had come from the opposite village carrying a panga:
p.32 L.21 he then saw the second Appellant come up and the deceased struck the first Appellant twice with the
p.33 L.20 panga: the second Appellant then ran to Valaliyano, who was passing and seized a knobkerrie, after
p.34 L.16 which Valaliyano took Davidson back to the village; he had seen the deceased strike one blow at the
p.34 L.33 first Appellant, and later saw another wound on his
p.36 L.3 wrist. A daughter of the first Appellant had seen him leave the hut armed only with a stick after being told of the assault on his children. The first Appellant's wife testified to seeing two wounds upon his head and wrist which he said were
p.58 L.21 inflicted by the deceased: the head wound was
p.58 L.13 dressed by Jorodani, whom the first Appellant told he had been in a fight with the deceased.

p.70 L.29 The village headman, Matias, had found a trail of blood from near the stream to where the deceased's
p.73 LL.4-19 body was found, and had recognized the panga found
p.76 L.22- by the police as that of the deceased. Marko, the
p.78 L.12 deceased's brother said that he had seen the deceased in the evening of his death, and that the
p.79 L.32 deceased was not carrying a panga: he only had one, which the witness later found in the deceased's hut.
p.84 L.29- Dr. S.V. Bhima gave evidence of three serious wounds
p.86 L.34 on the head of the deceased and three lesser wounds on his arm, which were all consistent with blows
p.98 L.5 by a panga: it was unlikely that the deceased could
p.99 L.2- have walked after receiving either of the two most
p.100 L.31 serious head wounds. Both the Appellants had wounds consistent with blows by a panga.

p.111 L.32- Sub-Inspector Makowa had arrested the second
p.114 L.29 Appellant who had said that the first Appellant had killed the deceased "by protecting his children": the first Appellant had given himself up and accused the second Appellant of killing the deceased with a panga: he had said that he had no panga and received his injuries while trying to separate the other two.

p.133 L.18- 4. The first Appellant gave evidence and said that
p.134 L.10 after hearing of the assault on his children he had gone to report to the headman, carrying only a

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stick: at the stream he had met the deceased, who told him to go home and struck him with a panga: the second Appellant then came on the scene and was pushed to the ground and struck by the deceased: the deceased then attacked the first Appellant and cut his head, breaking his stick: the second Appellant had fetched another stick and again struggled with the deceased, but the witness could not see clearly what happened: then the two Appellants went off up the path followed by the deceased which made them walk faster: the second Appellant had originally had a panga which might have been used after the first Appellant was injured: the panga found on the path had belonged to the deceased. p.135 L.24- p.137 L.10 p.138 L.3- p.139 L.30 p.149 L.4

5. The second Appellant, brother-in-law to the first Appellant, gave evidence and said that when he came to the stream the first Appellant struck several blows with a stick on the head of the deceased after he had crossed the stream, who in turn struck the first Appellant with the panga he was carrying: the first Appellant turned to run but struck the deceased again: the second Appellant put down his panga and tried to stop the fight but was struck: he fetched a stick and struck the deceased, but was thrown to the ground: the first Appellant then hit the deceased with his own panga, and dropped it, and then hit the deceased several times with the stick he was carrying. The two Appellants then went off together up the hill: when they saw the deceased get up and follow them, they ran off, and the second Appellant did not hear of the death until the following day. p.196 p.197 L.38- p.198 L.20 p.200 LL.6-28 p.205 LL.7-33 p.207 L.35- p.208 L.22 p.217 L.30

6. The learned trial Judge summed up to the assessors and invited them not to accept the evidence of the boy Davidson: he then suggested that the deceased never had a panga during the incident and that his brother, Marko, was giving reliable evidence: he reminded the assessors of the medical evidence, and said that even if medically the deceased could possibly have walked up the hill after receiving his head injuries, the Court had to decide whether he could have done so. He directed the assessors upon the need to find each Appellant guilty separately: the defences of provocation and self defence should be considered in relation to both Appellants. p.262 p.265 L.8 p.265 L.28

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p.268 L.28- p.271 L.30

7. A number of questions were then put to the assessors, who answered them as follows:-

Q. Do you consider these two men made an attack or not on the deceased, the one aiding and abetting the other?

1st Assessor - V.H. BENI CHISEU:

A. Yes, I am of the opinion that they were together aiding and assisting each other in assaulting the deceased.

2nd Assessor - MILLION SEMU:

A. I am satisfied it is true.

Q. What is true?

A. That the two were determined to assault the deceased.

3rd Assessor - YOUNGSTER SEMU CHILIPA:

A. I believe it is true that both assaulted the deceased.

Q. Now, I am going to ask you, is it possible for you to make up your minds which one inflicted the blows?

1st Assessor:

A. Both of them aided each other in inflicting the blows.

2nd Assessor:

A. They all did it together.

Q. Do you mean all, or both?

A. Both of them.

3rd Assessor:

A. It is quite certain that they both did it together.

Q. I am now going to ask you a simple issue of fact. Was Silino armed with a panga, or not?

1st Assessor:

A. I don't believe that he had a panga because these two men are the ones who were found with the pangas and they are the people who assaulted Silino.

2nd Assessor:

A. He did not have a panga.

3rd Assessor:

A. It is clear that he did not have a panga. These are the people who had pangas because he, the deceased, is the one who was injured.

Q. I am now going to ask you: Did Silino offer provocation to Tadeyo?

1st Assessor:

A. Although he did offer him any provocation, what he should have done was to go to the Village Headman.

Q. Who should have gone to the Village Headman?

A. The first accused whose children had been assaulted should have gone to the Village Headman.

Q. But on this occasion did Silino offer him a wrongful act or insult?

A. No, the first accused had a motive because of the incident which had taken place previously, and he was there waiting for him with a purpose.

2nd Assessor:

A. He waited for him there because of his children's assault.

3rd Assessor:

A. It is quite clear that all this happened because of the children.

Q. Was Tadeyo acting in self defence?

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1st Assessor:

A. That is not self-defence. He was determined to fight there.

2nd Assessor:

A. They were determined to fight, he was not acting in self-defence.

3rd Assessor:

A. He was there determined to fight.

Q. Now, did Silino offer any provocation to Joseph?

1st Assessor:

A. Silino did not offer any provocation to Joseph.

2nd Assessor:

A. He did not offer him any provocation.

3rd Assessor:

A. He did not offer him any provocation.

Q. Was Joseph acting in self-defence?

1st Assessor:

A. Joseph was not acting in self-defence, but he intended to kill the deceased.

2nd Assessor:

A. He was not acting in self-defence, but he went there with an intention to kill the deceased.

3rd Assessor:

A. A man who is acting in self-defence does not act in that way.

Q. A final issue of fact I am going to ask you. Was the final assault on the deceased person at the blue-gum trees or where his body was found?

1st Assessor:

A. He was first assaulted down the stream and was then chased up the hill - he was running away.

Q. And where was the second assault?

A. At the place where the body was found.

2nd Assessor:

A. He was assaulted down the stream first, but that was not very serious and he was running away and at the place where they caught up with him is where they finished him off.

3rd Assessor:

A. It is quite clear that the big wound was inflicted at the place where his body was found. Although he was assaulted down stream he was not seriously injured because he could not have walked up the hill after having received that serious wound.

8. The learned trial judge then gave his judgment on the 20th August 1962. He set out the unquestioned facts relating to the finding of the body of the deceased and the police and medical evidence. He considered at length the evidence as to ownership of the panga found near the body of the deceased and reached the conclusion that it had not belonged to the deceased, and there was an irresistible inference that it had been carried by the first Appellant down to the stream: the boy Davidson was a totally unreliable witness as were both the two Appellants, who had each been armed with a panga and with a knobkerrie during the whole of the incident: he found that all the head injuries had been caused to the deceased at the place where his body was found and not near the stream: there was a further finding that the first Appellant had set out deliberately to find the deceased: at the trial each Appellant had tried to put the blame on the other, but the trial judge found that the evidence of both was untrue, and that although it was not proved that there was a preconceived design by both to attack the deceased, it was established that a common design had emerged in the course of the struggle to attack the deceased, who had been maimed throughout. This conclusion excluded the defences of both provocation or self-defence on the part of either Appellant: although these defences had not been specifically raised, it was the duty of the

p.272

p.275 - p.277

p.278- p.281

Court to consider them in the present case: in any event the acts committed by the Appellants went beyond any reasonable proportion to any provocation which could have been given, and those acts also went beyond anything which might have been reasonably necessary in self defence. The irresistible conclusion was that both Appellants were principals in the act and that since they had an intent to kill, they were both guilty of murder.

9. Both Appellants appealed to the Federal Supreme Court, where their appeals were heard on the 21st and 22nd November 1962 and both were dismissed by a majority of two to one on the 12th December 1962.

p.308 L.4 Clayden C.J. said it was first necessary to consider two findings of fact made by the trial Judge, the ownership of the panga found on the scene, and the finding that the serious injuries were inflicted on the deceased at the place where his body was found. After considering the evidence, Clayden C.J. concluded that it was not proved beyond reasonable doubt that the panga which had been found on the scene did not belong to the deceased and he would therefore deal with the appeal on the assumption that the deceased did have a panga when the fight started. Clayden C.J. however saw no reason to criticise the finding as to the place where the final injuries were inflicted: as there had been injuries inflicted earlier which had caused a trail of blood up the hill: this meant that it was not established that the first Appellant had the panga found later when the fatal injuries were inflicted: the learned Chief Justice then reconsidered the whole of the evidence in the light of his conclusion that the deceased had the disputed panga when the fight started: there had been in effect, he concluded, two clearly defined fights and the second had resulted in the murder of the deceased by both Appellants: the defence of self-defence was not available to either Appellant: as to provocation, he did not consider that there was any sufficient offered to either Appellant: "even if there was, what was done up the hill was quite out of proportion to any possible provocation of any sort to either".

p.310 L.11-p.311 L.2

p.313 L.7

p.313 L.11 Clayden C.J. considered that both appeals should

be dismissed; this was not in reliance on the proviso to Section 13(1) of the Federal Supreme Court Act. In Chiteta v. R. (1960) R. & N. 199 it had been decided that the powers of the Court were different from those of the English Court of Criminal Appeal: this Court was able to conduct a rehearing: the appellants had succeeded in showing that one of the findings of fact of the trial Judge was wrong, but in order to succeed they must still show that the verdict was wrong when a different view was taken of that fact: rehearing the case, the learned Chief Justice found that the murder charge was still proved. The view taken by the assessors was vitiated by the view now taken by the Federal Supreme Court, but that was inherent in the fact that there was a full appeal on fact. Quenet F.J. concurred in this judgment.

Unsworth, C.J. Nyasaland, set out the facts, and said that the real point of substance in the appeal was whether the trial Court was justified in holding that the deceased was unarmed and thus ruling out altogether any defence of provocation or self defence: after considering the evidence he concluded that there was no sufficient evidence that the deceased was unarmed. He went on: p.314 p.316 L.29

> "It seems to me that the whole position alters once it is accepted that the case must be considered on the basis that the deceased was armed with a panga and the first appellant not so armed. It is not then a case of persons entering into a conflict with an unarmed man or of entering into such a conflict with an intention of using lethal weapons. It is, furthermore, in these circumstances, difficult to reject the evidence of both appellants to the effect that any lethal weapon was used only after they had both been provoked by blows from the deceased with his panga." p.317 L.32- p.318 L.12

> "I think that the point of substance in this appeal must be decided in favour of the appellants and I do not think that this is a case for the application of proviso (i) to section 13(1) of the Federal Supreme Court Act. This was a trial with assessors and it is not possible to know what view the trial Judge and the assessors would have taken if they had found the facts on the basis that the deceased

was an armed man though it is clear that great weight was given by the Judge to the fact that the deceased was not armed with a panga. On the basis that a panga was used by the deceased it would have been open to the Court below to have brought in a verdict of manslaughter even if the mortal blows had been struck up the hill (see comments of the Judicial Committee in Kwaku Mensah v. The King (1946) A.C. 83 at p.93)"

There was provocation and I do not think that it would be safe to infer from the evidence available that the mortal injuries were inflicted after there was time for passions to cool, or that the case is one for the application of section 213(2) of the Penal Code which relates to the mode of retaliation. The burden of proof remains on the prosecution throughout and, with respect, I would not be prepared to hold in this appeal that the prosecution established beyond all reasonable doubt that the mortal injuries were not inflicted in the course of a continuing fracas after provocation in circumstances which could amount to manslaughter."

p.320 10. Special leave to appeal from this decision in forma pauperis was given by the Judicial Committee on the 31st July 1963.

11. The Respondent respectfully accepts the unanimous decision of the Federal Supreme Court that it was not established that the deceased was unarmed at the beginning of the fight and that it was likely that the panga later found at the scene belonged to the deceased who had used it during the course of the fight, and does not now desire to argue to the contrary.

The Respondent further accepts the unanimous finding that this was not a case where the appeals should be dismissed on the ground that no miscarriage of justice actually occurred under the proviso (i) of section 13(1) of the Federal Supreme Court Act.

However the Respondent does not accept that Chiteta v R. (1960) R. & N. 199 correctly described the powers of the Federal Supreme Court in hearing criminal appeals, and it is respectfully submitted

that section 13(1) of the Federal Supreme Court Act gives only the same powers as those given to the English Court of Criminal Appeal. From that approach it follows, it is submitted, that in any event it was not open to Clayden C.J. to conduct a full rehearing of the case in the course of the appeal and substitute his own views of the facts for those of the trial judge.

It is respectfully submitted that the reasoning of Unsworth, C.J. Nyasaland, is to be preferred, namely that once the question of possession of the disputed panga has been determined in favour of the Appellants, the issue of provocation at once becomes relevant, and can only be dismissed if, on the facts properly found by the Court, it was not open to the Appellants. In the present case, as Unsworth C.J. points out, that defence (but not the defence of self-defence) had become available to the Appellants, and could not be rejected on the basis of the other facts found by the Court.

12. The Respondent respectfully submits that, in the light of the above conclusions, it would not be proper for the Respondent to contend further that the Appellants' convictions for murder should be upheld or that the present appeal should be dismissed.

The Respondent therefore submits that the appeals should be allowed and convictions of manslaughter on the ground of provocation be substituted for the convictions of murder in the case of both Appellants and that the case be remitted for consideration of sentence by the appropriate Court, for the

R E A S O N

THAT the judgment and reasoning of Unsworth C.J. Nyasaland is to be preferred to the judgments of Clayden C.J. and Quenet F.J. in the Federal Supreme Court.

MERVYN HEALD

No. 38 of 1963

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL SUPREME COURT OF RHODESIA AND NYASALAND

B E T W E E N:

TADEYO KWALIRA and JOSEPH DUNCAN
Appellants

- and -

THE QUEEN
Respondent

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