Privy Council Appeal No. 38 *of* 1963

Tadeyo Kwalira and Joseph Duncan – – – – – *Appellants*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE FEDERAL SUPREME COURT OF THE FEDERATION OF RHODESIA AND NYASALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD MARCH, 1964

Present at the Hearing:
LORD MORRIS OF BORTH-Y-GEST
LORD HODSON
LORD DONOVAN
[*Delivered by* LORD DONOVAN]

Tadeyo Kwalira and Joseph Duncan were tried for the murder of one Silino Matthews before Cram J. and three native assessors in the High Court of Nyasaland in June 1962. The trial itself lasted six days. Judgment was reserved and delivered on 20th August 1962. Cram J. in a full and careful judgment in which he reviewed the facts and the relevant law found both appellants guilty of the murder and sentenced each to death.

Each accused appealed to the Federal Supreme Court of Rhodesia and Nyasaland: and in his notice of appeal relied upon the following, among other grounds:—

> " 3. That the prosecution failed to discharge the onus of showing that the Appellant in assisting in the alleged killing was not acting under legal provocation."

The appeals were heard on 21st and 22nd November 1962 before Clayden C. J., Quenet F. J. and Unsworth C. J. Ny. and on the latter day judgment was reserved. On 12th December 1962 judgment was delivered dismissing the appeals, Unsworth C. J. Ny. dissenting. He considered that the proper verdict was manslaughter on the ground of provocation.

Both accused applied for special leave to appeal *in forma pauperis* to Her Majesty in Council which leave was granted by Order in Council dated 29th August 1963.

Save for one point, special to the first appellant alone, the ground of appeal in each case is that the proper verdict, as Unsworth C. J. Ny. considered, should be manslaughter on the ground of provocation. To deal adequately with this contention it is necessary to set out the salient facts of the case. In doing so, their Lordships will refer to the first appellant as " Tadeyo "; to the second appellant as " Joseph "; to the victim as " Silino "; to the High Court of Nyasaland as " the trial court "; and to the Federal Supreme Court of Rhodesia and Nyasaland as " the Supreme Court ".

On 12th December 1961 Silino went to the house of Tadeyo in Kavala Village No. 2 (in which village both he and Tadeyo lived) to complain, it appears, about some pigs belonging to the Tadeyo family not being kept under proper control and in consequence consuming some of Silino's grain. Neither Tadeyo nor his wife was at home. They were attending a funeral in Kavala Village No. 1 which is on the opposite hill. Silino beat some of

Tadeyo's young children and came away. The beating does not appear to have been violent. The children's mother testified that when she returned home from the funeral the children had no injuries.

Tadeyo, after returning home from the funeral on this same day, 12th December, went out again at sunset. Cram J. in the court of trial said as to this:—

> " He " (i.e. Tadeyo) " alleges that he set off to make a report to the village headman and that he took only a knobkerrie with him. In my view on the whole evidence this intention is negatived. No convincing reason for delay in waiting for sunset is given, and I am forced to infer that he waited deliberately until he saw the deceased coming down the hill " [i.e. a hill opposite] " and then, in his angry mood set off down the hill to meet him at a suitable place to have the matter out with him at the bottom."

This finding is not challenged. The angry mood would have been induced by the assault on Tadeyo's young children.

From Tadeyo's house in Kavala Village No. 2 a path ran down hill to a stream. Across the stream it ascended an opposite hill to Kavala Village No. 1. The stream flows down the valley bisecting the two hills.

Silino was coming home to Kavala Village No. 2 from Kavala Village No. 1 and met Tadeyo at the crossing over the stream. The findings of the trial court as to what happened thereafter may be summarised as follows: Blows were first exchanged between Tadeyo and Silino. Tadeyo was armed with a panga and struck Silino with it. Silino was unarmed. Almost at once Joseph appeared upon the scene. He, too, was armed with a panga. From another native passing by, Joseph seized also a knobkerrie. He and Tadeyo acting in concert assaulted Silino and left him lying on the ground. By that time Silino was suffering from injuries inflicted with a panga which were not however mortal. One of two things then happened. Either Silino rose and went up the hill towards his home, pursued by Tadeyo and Joseph: or those two went up the hill followed by Silino. In either event, at the top of the hill mortal injuries were inflicted upon Silino by one or other of the accused, still acting in concert.

Neither of the accused made any report to the authorities of the affair. Silino's dead body was discovered the following day at the top of the hill where he had fallen. Tadeyo left his home on what Cram J. in the trial court found was a pretext of visiting a distant dispensary. He remained away from home for several days and then surrendered himself to the police a week after the killing. He then accused Joseph of the murder. In the meantime, four days after the crime, Joseph had been arrested and charged with the murder. The day following his arrest he made a statement accusing Tadeyo of the murder.

Under the Penal Code of Nyasaland s.295 a judge sitting with assessors may ascertain, when the case on both sides is closed, the opinion of each assessor upon any questions the judge considers it desirable to put to them. The opinions are to be given orally in open court but the judge, in thereafter giving judgment, is not bound to conform to these opinions. Pursuant to this provision Cram J. put a number of questions to the assessors, to which they returned answers.

One such question was whether Silino was armed with a panga, and the assessors answered in the negative. Another question was whether Silino had offered provocation to either accused and again the answer was in the negative.

" Provocation " in relation to homicide is dealt with in the same Penal Code by s.213. By subsection (1) an unlawful killing done " in the heat of passion caused by sudden provocation " and before there is time for such passion to cool, reduces what would otherwise be murder to manslaughter only.

By subsection (2) this result is not to ensue " unless the Court is satisfied that the act which causes death, bears a reasonable relationship to the provocation ". Section 214 proceeds to define provocation. It means and includes, *inter alia*, " any wrongful act . . . of such a nature as to be likely when done . . . to an ordinary person, or in the presence of an ordinary person to another person . . . to whom he stands in a conjugal, parental, filial or fraternal relation . . . to deprive him of the power of self-control and to induce him to assault the person by whom the act . . . is done ".

In his address to the assessors which immediately preceded the questions he put to them, Cram J. directed them upon the meaning and effect of provocation in terms to which no exception is or could be taken. In particular he referred to the requirement that retaliation must bear a reasonable relation to the provocation which occasioned it.

When he came to give judgment the same learned judge again considered the possible defence of provocation, though neither of the accused had put it forward. He was, of course, quite right to do so. He directed himself on the issue in terms to which again no exception is, or could be, taken. He pointed out that it was for the Crown, in order to prove murder, to negative provocation. He then reviewed the facts relevant to this issue and came to a conclusion adverse to each accused. He did so on the basis that (as the assessors had stated) Silino was unarmed, but that (as he, the learned judge, found) Tadeyo and Joseph were each armed with a panga. He said— " Primarily however any possibility of provocation or self-defence is excluded once it is accepted that both accused were armed with pangas and the deceased was unarmed ". He went on to indicate that in any event the mortal blows, given as he found after an interval of time and when Silino was already wounded, bore no reasonable relationship to any provocation received.

The Supreme Court treated the appeal as a rehearing. It did this pursuant to its decision in *Chiteta v. The Queen* (1960) R. & N. 199 to the effect that in a criminal appeal the Supreme Court is free to review the findings of fact in the court below if that court sat without a jury. This decision was reached in *Chiteta's* case after considering, *inter alia*, certain differences in language between the relevant provisions of the Federal Supreme Court Act 1955 and the United Kingdom Criminal Appeal Act 1907. It so happens that in *Chiteta's* case the Supreme Court did not in the end substitute any finding of fact of its own for that made in the court of trial. It merely decided that it was unsafe to uphold a particular finding of fact which was crucial but which was supported only by the evidence of a discredited witness. In so deciding, and in consequence quashing the conviction, the Supreme Court did not go beyond what the Court of Criminal Appeal can and does do in England. Nevertheless the question of the court's power to review findings of fact where the trial was not by jury was fully considered and a decision given. Following this the Supreme Court in the present case reviewed the findings of fact in the trial court and upheld them all except two. They were that Silino was not armed with a panga and that Tadeyo was. These findings the Supreme Court in effect, though not in precise terms, reversed. They considered that the evidence was not sufficient to establish the trial court's findings on these two points beyond reasonable doubt: and in the words of Clayden C. J. who delivered the leading judgment with which Quenet, F. J. concurred, the Court proceeded to deal with the case " on the assumption that the deceased did have a panga when the fight started". This involved the corollary that Tadeyo did not have a panga at the scene for there were two pangas only, one of which was taken there by Joseph and the other was afterwards found some 32 yards from the body of Silino.

The Crown in the present appeal, while not admitting the correctness of the decision in *Chiteta's* case have not asked their Lordships to reverse it. One reason is that the Supreme Court has now ceased to exist, and its place taken in Nyasaland by the Nyasaland Supreme Court of Appeal which (so their Lordships were informed) is governed in criminal appeals by an enactment in like terms to the United Kingdom Criminal Appeal Act 1907, i.e. not exhibiting those differences of language on which the Supreme Court in *Chiteta's* case partly relied. For the Appellants it was contended that

Chiteta's case was correctly decided. This is understandable because the finding that Silino had a panga, involving the corollary that Tadeyo had not, is of advantage to the accused, particularly on the issue of provocation. It is not necessary for their Lordships in the present case to decide on the correctness or otherwise of the view taken in *Chiteta's* case as to the powers of the Supreme Court in criminal appeals where the trial was not by jury; though the reasons given by the Supreme Court for that view seem to them weighty and cogent. They propose in response to the plea of the appellant to treat the appeal to the Supreme Court as a rehearing, and to follow the course adopted by that Court of considering the case on the footing that Silino was armed with a panga and that Tadeyo was not.

The findings of the trial court to the effect (1) that Tadeyo and Joseph acted in concert in attacking Silino, and (2) that the mortal blows were inflicted on Silino at the top of the hill after the fight had begun at the bottom, were upheld in the Supreme Court. But even on the assumption that Silino had a panga at the commencement of the fracas, and that Tadeyo had not, the majority of the Court held that murder had been proved. On the particular issue of provocation Clayden C. J. with whom Quenet F. J. agreed said this:

> " I do not think there was any provocation, recognised by law, to either of the Appellants. Even if there was, what was done up the hill was quite out of proportion to any possible provocation of any sort to either."

Unsworth C. J. Ny. on the other hand said, upon this issue:

> " 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 were struck up the hill . . . "

And then:

> " I should add that I would have reached the conclusion that the proper verdict is one of manslaughter even on the basis that this is a full rehearing. There was provocation, and I do not think 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 . . . I would not be prepared to hold 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."

In the result both appeals were dismissed. For the Appellants it is now contended that the view taken by Unsworth C. J. Ny. is to be preferred to the views of the other two members of the Supreme Court: and that in order to avoid a miscarriage of justice it is necessary that verdicts of manslaughter should be substituted for the verdicts of murder. Somewhat unusually the Crown, after successfully contending for verdicts of murder in the courts below, now agrees with the contention of the appellants. Their Lordships cannot of course dispose of the case simply by giving effect to this agreement. They must come to their own independent conclusion upon the matter, and have accordingly heard arguments upon it from both sides lasting some three days. Indeed, in the circumstances, the case calls for exceptionally careful consideration and their Lordships can, perhaps, begin such consideration in no better way than by recalling their functions in a criminal appeal such as the present:

> " This Committee is not a court of Criminal Appeal. It may in general be stated that its practice is to the following effect. It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside the pale of regular law, or unless, within that pale, there has been a violation of the natural principles of justice so demonstrably manifest as to convince their Lordships, first that the result arrived at was opposite to the result their Lordships would themselves have reached, and secondly that the same opposite result would

have been reached by the local tribunal also, if the alleged defect or misdirection had been avoided." [*Arnold v. King Emperor*, 1914 A.C. 644]

The contention for the appellants was formulated as being this: treating the appeal as a rehearing the majority of the Supreme Court should have found as Unsworth C. J. Ny. did in the last part of his judgment, i.e. that the defence of provocation was not rebutted.

Provocation is something to be found, if at all, on the facts established in the proceedings, or upon those facts together with reasonable inferences to be drawn therefrom. It is not something which is to be found, or not found, by adding to the facts proved or reasonably inferred, mere surmises for or against the accused. This indeed is recognised in the appellants' case, paragraph 2 (1) of which reads:—

" The principal grounds of appeal raised by the Appellants are:—

(1) On the facts as found by the Federal Supreme Court it could not be said to be established beyond reasonable doubt that there was no provocation as would have reduced the offence of killing the deceased to manslaughter."

Turning to the facts found by the Federal Court, they include the following:

1. Tadeyo set out from his home on this occasion in an angry mood because of the assault by Silino on his children;

2. There is no reason to think that it was not Tadeyo who started the fight;

3. Silino was injured at the river;

4. If, as Tadeyo alleges, he was there struck by Silino with a panga, the resulting injury to Tadeyo was minor;

5. The same is true in the case of Joseph who also alleged that he was struck by Silino at the river with a panga;

6. A blood trail led from the river to where Silino's body was found next day and stopped there. Silino had come up the hill bleeding, a distance of 400 yards. He was there dealt one and probably two heavy blows with a sharp weapon such as a panga by one or other of the two accused still acting in concert. On the medical evidence either blow was sufficient to cause death.

If one assumes in favour of the appellants that they struck Silino at the river because they lost their self-control after being struck by him with a panga, it has to be remembered that Silino was not killed by this retaliation. He was killed afterwards at the top of the hill after he had somehow transported himself 400 yards uphill. The question is therefore whether the blow or blows at the top of the hill which killed Silino were struck " in the heat of passion caused by sudden provocation " before there was time to cool: and further whether that blow or those blows bore a reasonable relationship to such provocation.

There is no evidence whatever of fresh provocation offered by Silino at the top of the hill. To assume that he did offer such fresh provocation there would be pure surmise, and counsel for the appellants quite properly does not ask the Board to indulge in such a surmise. The way the case is put, which is the only way it can be put, is that the provocation assumed to be offered by Silino at the bottom of the hill was somehow still operative at the top of the hill and induced the fatal blow or blows.

For present purposes the findings of the trial court and the Supreme Court that the accused were acting in concert when Silino was again struck at the top of the hill are accepted. It is a rather unusual concept that two persons acting in concert to attack a third are each affected by sudden provocation causing each to lose his self-control. But conceding the theoretical possibility the following matters must be borne in mind. Silino had been wounded at the bottom of the hill sufficiently severely to leave a trail of blood behind him as he ascended the hill. He was either followed up the hill by the accused, or they preceded him and waited for him at the top. The journey uphill was one-quarter mile in length. Under the Ordinance provocation, if it is

to be a defence at all, has to be " sudden ". Is it reasonable to suppose that if sudden provocation was offered at the bottom of the hill its effect continued to affect both appellants while the wounded Silino made his way to the top a quarter of a mile distant? On this aspect of the case Clayden C. J. in the Supreme Court said:

> " But whatever happened then " [i.e. at the bottom of the hill] " that part of the fight ended. If the deceased ran away there was no need whatsoever for either of the Appellants to follow him. They had won."

And later:

> "The other possibility is that the deceased was killed as he followed after the Appellants in an effort to reach his home. This must be treated on the basis that it was only the second Appellant who had a panga, for either the deceased carried his panga up the hill, or the first Appellant carried it and dropped it in the path before he reached the place where the deceased was killed. But if, as they said they did, the Appellants did see the deceased coming up the hill after them, a renewal of the attack can only, I think, have been because a man who was thought to have died was seen to be alive and able to blame them."

The learned Chief Justice proceeded to conclude that no provocation such as is recognised by law was offered to either of the appellants at the top of the hill,

But even assuming that the provocation offered by Silino at the bottom of the hill somehow persisted in its effect at the top of the hill, the retaliation must have a reasonable relationship to the provocation if the defence on this ground is to succeed. Was it so in the present case? One can judge this matter objectively only, since neither accused has relied upon the defence, but have simply placed the blame for the killing upon the other. Looking at the facts which were proved, it was established that the wounds Tadeyo received were a small scalp wound about one-quarter inch diameter, and a small wound on the back of the right hand. Joseph received a very small wound on the upper left arm. One or the other, and possibly both, of the following wounds were inflicted on Silino at the top of the hill: a big wound 7 inches long across the skull which had penetrated the flesh, exposed the bone, fractured the skull and damaged the brain. Another wound which cut through the bridge of the nose reducing it to small pieces of bone and damaging one eye. Each of these blows was struck with considerable force by a sharp instrument. Their horrible nature can be seen from the photographs exhibited. On this aspect of the case the majority of the Court of Appeal held that even if provocation were offered by Silino at the top of the hill the retaliation " was quite out of proportion to any possible provocation of any sort . . . "

Their Lordships, while recognising the force of the dissenting opinion of Unsworth C. J. Ny., but proceeding according to the principles which must guide them in this matter are unable to say that the majority of the Supreme Court were wrong in taking the view they did, and in holding that any suggestion of provocation as a defence had been rebutted. For their Lordships to hold otherwise would be to substitute their Lordships' own finding on a question of fact for that of the Supreme Court and this they cannot do.

The second ground of appeal concerns Tadeyo alone. It is said that there was no evidence proving his presence at the top of the hill when the fatal blow or blows were struck. But whether he was there on the spot or not, there was ample evidence that the two accused acted in concert throughout, as both the trial court and the Supreme Court found, and this finding it is impossible for the Board to disturb.

Their Lordships will accordingly humbly advise Her Majesty that both appeals should be dismissed. The length of time which the appellants have been under sentence of death, and the changed attitude of the Crown, will no doubt be taken into account by those in whom the prerogative of mercy is now vested.

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DELIVERED BY

LORD DONOVAN

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