P.C
GG1·G·2

48/1964

IN THE PRIVY COUNCIL No.19 of 1964

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF RHODESIA & NYASALAND

B E T W E E N :-

RICHARD MAPOLISA ... Appellant

- and -

THE QUEEN ... Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal in forma pauperis from an order of the Federal Supreme Court of Rhodesia and Nyasaland (Clayden, C.J., Quénet, F.J. and Blagden, Ag.F.J.) dated the 16th December, 1963, dismissing the Appellant's appeal from an order of the High Court of Southern Rhodesia (Hathorn, Ag.C.J. and assessors) dated the 20th September, 1963, whereby he was found guilty of setting, or attempting to set, fire to a house by the use of petrol or some other inflammable liquid contrary to the Law and Order (Maintenance) Act, 1960, s.33A(1) (a) and (c), and was sentenced to death. p.178 p.169

2. The relevant statutory provisions are:

Law and Order (Maintenance) Act 1960 (as amended)

....

33A (1) Any person who, without lawful excuse, the proof whereof lies on him -

(a) by the use of petrol, benzene, benzine, paraffin, methylated spirits or other inflammable liquid sets or attempts to set on fire any person, building, structure, vehicle, vessel, aircraft or railway engine,

tender, carriage, van or truck; or

(b)....

shall be guilty of an offence and -

(c) shall be sentenced to death where such offence was committed against any person or in respect of -

(i) any building or structure used for residential purposes and not owned, occupied or leased by the person convicted of the offence, whether or not at the time of the commission of the offence any other person was present in such building or structure; or

(ii) .....

(d) in the case of any other offence under this section, shall be liable to imprisonment for a period not exceeding twenty years.

(2) .....

pp.1-2

3. The Appellant was indicted that on the 28th June, 1963 at Salisbury he had set or attempted to set on fire a house at 99 Silcox Avenue, Houghton Park contrary to section 33 A(1)(a) as read with paragraph (c) of the Law and Order (Maintenance) Act, 1960, as amended.

4. The trial took place between the 16th and 20th September, 1963, before Hathorn, Ag.C.J. and two assessors.

The evidence called by the Respondent included:

pp.3-4

pp.181-183

a) Detective McIlveen said he had arrested and charged the Appellant on the 29th June, 1963: the Appellant had then, after caution, made a lengthy written statement, in which he said that he had met one Cyprian on the afternoon of the 27th June. Cyprian had told the Appellant that he (Cyprian) wanted them to take action: Later that evening Cyprian had come to his house carrying a bottle of petrol: the Appellant had told him that he was unwell, but had got up and gone out to get some food: Cyprian had asked him, before he went out, for some old clothes to make a wick, and on his return he had found that

Cyprian had made the bottle into a bomb by putting some paper in it and tying the Appellant's underpants round the neck with some wire: Cyprian had then told him to make copies of a letter he produced, and had left the house to fill the Appellant's pen for that purpose; the Appellant had made eight copies. After visiting a beerhall, they had walked to Beatrice Road, where the Appellant had started carrying the bomb in a paper bag: in Silcox Avenue the Appellant had stopped and Cyprian had taken the bottle: the Appellant had said he was about to cough, and Cyprian had told him to move away: he had moved away about 15 yards, and Cyprian had lit the wick and thrown the bottle: They both then had run off, the Appellant throwing away the paper bag on the way: he had not seen Cyprian again until he saw him on Saturday morning in the C.I.D. office.

The witness said that earlier in the day he had gone to the Appellant's one roomed house at Highfields, where he arrested the Appellant, and took possession of a notebook with a subversive message in it, a black fountain pen and a bottle of ink, a torn blanket and a piece of wire. pp.6-9, 34

After arrest, the Appellant had taken some police officers to 99 Silcox Avenue, where he showed them where the bomb had been thrown by Cyprian in his presence. pp.13-15

b) Detective Inspector Thorne said he had gone to 99 Silcox Avenue early on the 28th June, and had found a bottle of petrol, with cloth tied round the top by wire, on the lawn. pp.25-26

c) Constable Beunk had also gone to the scene at the same time: he had discovered the place from which the bomb had been thrown, identifying the place by a match and a number of shoeprints: these prints were made by a different shoe from those found at the Appellant's house. He had also found nearby four notes, the hand-writing of which was said by another witness to be the same as that in the notebook found in the Appellant's house. pp.28-31 pp.36-41

d) Dr. Thompson, a forensic scientist, said that the cloth found round the petrol bottle came from the blanket found at the Appellant's house. The notes found at the scene were written in the same ink as that in the fountain pen found at the Appellant's house: the ink in the bottle found pp.46-53 pp.53-55

at the Appellant's house was a different ink.

pp.56-60 e) Mr. B.J. Bonham said that he lived at 99, Silcox Avenue with his family: early on the 28th June he had been woken up by his wife, and on going into the lounge had found a bottle wrapped in paper lying burning on the carpet. He had thrown the bottle on to the lawn, where the police found it later.

pp.69-75 f) Sylvester Makoni said that he was a former member of the Zimbabwe National Party, a nationalist movement, to which the Appellant had also belonged as a driver. On the evening of Friday, 28th June he had met the Appellant with Matimbe, the president of the Z.N.P., when the Appellant had said that he had thrown a petrol bomb at a European house in Hampton Park: the Appellant also showed him a note, and had said he had dropped a similar note at the spot at which he had thrown the bomb. On the previous
pp.77-79 Wednesday he and the Appellant had filled two bottles with petrol.

pp.106-113 5. The Appellant gave evidence in his own defence. He said that he had gone to Silcox Avenue in Houghton Park with Cyprian on the night of the 27th/28th June: Cyprian had asked him for the paper bag, and then he had realized that Cyprian intended to throw the bottle into a house: He had then thought of a plan to put Cyprian out, and had said he was going to cough, but Cyprian had just told him to move away: He had moved a short distance, then Cyprian had thrown the bottle; after the throwing they had both run away. Earlier the bomb had been prepared by Cyprian in the Appellant's house: The Appellant had made copies of a note, which Cyprian had taken: When they had left his house, the Appellant had not known where the bomb was to be thrown and had been reluctant to go, but he had not wished to be treated as an informer. Makoni's evidence had not
p.149, ll.4-24 been true. The Appellant admitted in cross-examination that he had thought, when walking along with Cyprian, that the bomb would be thrown in a house where there was a family.

pp.162-169 6. Judgment was given by Hathorn, Ag.C.J. on
p.162,ll.13-34 the 20th September, 1963. The learned Judge said that the unanimous verdict of the Court was that the Appellant was guilty. There had been no dispute that a bomb had been thrown: Whoever threw it had contravened section 33A(1) of the

Law and Order (Maintenance) Act as amended, and incurred the mandatory death sentence under paragraph (c). The Appellant had admitted that he was present at the throwing and that there had been a common unlawful purpose between himself and Cyprian, who, he said, had been the prime mover and had thrown the bomb: he alleged, however, that he was subjected to sufficient compulsion to relieve him of criminal responsibility.

7. The Court considered that the Appellant's evidence was entirely unreliable, as was shown by a number of instances from his cross-examination: it was improbable that Cyprian who had been expelled from the Z.N.P. on suspicion of being a police informer had played the part the Appellant had alleged: however, there was a reasonable doubt whether the Appellant had actually thrown the bomb, and this was shown by the footprints at the scene which were not the Appellants and the fact that the notes had not been written in the ink found in the Appellant's house. Whether the second person at the scene was Cyprian or some other person, it was not possible or necessary to decide. pp.163-165

8. The learned Judge said the Court had no hesitation in rejecting the Appellant's evidence that he was compelled to commit the crime: he did not fear repercussions from his party, and he had had opportunity to break the bottle before the crime was committed. There had been a common unlawful purpose, and subject to one further point the Appellant should be convicted of the crime charged. It had been argued that, since he had not been proved to have thrown the bomb, the provisions of Section 33A(1) as to the compulsory death sentence should not apply, or alternatively that the Appellant should not be convicted at all. These contentions were to be rejected: there was ample authority that in law principal and accessory committed the same crime, (R.v Brett & Levy (1915), T.P.D. 53, per Wessels, J. at p.58). An accessory was properly indicted as though he were a principal. There was no distinction in this respect between common law and statutory offences: R. v. Peerkhan and Lalloo (1906), T.S. 798, which had been followed in other cases. There was a parallel to be drawn with the special provisions of section 346(1) of the Criminal Procedure and Evidence Act, which p.165, ll.14-40 pp.165-168

made it compulsory for the Court to pass the death sentence on a person convicted of murder unless there were extenuating circumstances. Under that section, an accessory had been held to have been properly convicted of murder and sentenced to death. The learned Judge accordingly held that the compulsory provisions of section 33A (1)(c)(i) applied to the case, and he was obliged to pass the death sentence on the Appellant.

p.171 9. The Appellant appealed against this verdict and sentence. His appeal was heard by the Federal Supreme Court (Clayden, C.J., Quénet, F.J. and Blagden, Ag.F.J.) on the 11th December, 1963, and was dismissed on the 16th December.

pp.172-173. 10. Clayden, C.J. in his judgment said that the basis of the conviction was that there had only been an attempt to set the house on fire, and that the Appellant had not himself thrown the bomb, but was a socius criminis of the thrower of the bomb in that he had had a common purpose to carry out the crime. There was ample evidence that such a common purpose had existed and that the Appellant had not acted from fear or dissociated himself from the venture before it
p.173, ll.37-49 was carried out. Two points of law were raised. It was argued that only the actual perpetrator and not any socius criminis could be convicted under section 33A(1) and further that even if a socius criminis could be convicted, the penalty was discretionary and not a mandatory death sentence.

pp.174-176 11. The learned Chief Justice then considered the position of a socius criminis in relation to statutory offences. He was made liable not by statute, but by reason of the common law: Innes, C.J. in R. v. Peerkham & Lalloo (1906), T.S.798, which had been accepted as applying to Southern Rhodesia in R. v. Kazazis (1925), C.P.D. 166. Section 366 A (2) of the Criminal Procedure and Evidence Act dealt with the separate offence of conspiracy and did not provide the sanction against a socius criminis, as was shown by R.v Gilliers (1937), A.D. 278 and the cases referred to in Cheniera v R. (1960), R.& N. 67. It could not be argued that, because section 33A(1) specifically include an attempt to commit certain offences, it thereby excluded the concept of socius criminis from its

ambit; because an attempt was a method of committing a crime, whereas the liability of a socius criminis related to the persons who committed it, and because it was desirable that an attempt should be clearly provided for in the section. There was nothing in section 366(A) which indicated that a socius criminis was not to be liable under section 33A(1).

12. As to the appeal against sentence, Clayden, C.J. said the sentence to be passed on a socius criminus was not passed by reason of section 366A of the Criminal Procedure and Evidence Act, and the conflicting decisions as to whether under that section there was power to go behind the minimum sentence laid down for the principal offender were not in issue. Nor was this a case of committing the common law crime of inciting another to commit a statutory crime, such as R. v. Mackenzie (1952) S.R. 57. To be a socius criminis was not a separate crime at common law, because the socius criminis committed the very crime with which he became associated. He committed the crime by helping to do it, or by making common purpose with one who did it, and so no separate discretion in regard to punishment was to be found outside the crime which was committed. There was no possible basis to conclude otherwise than that the socius criminis was liable to the minimum penalty laid down, if his crime fell within the conditions determined for that minimum penalty. He committed the offence not as an ancillary offender, but by "his own part in the transaction coupled with mens rea". When a minimum punishment was laid down, there was no reason to incorporate a discretion in the case of a socius criminis where the legislature had provided none. The appeal, both against conviction and against sentence, must be dismissed. pp.176-178

13. Quénet, F.J. and Blagden, Ag.F.J. agreed. p.178

14. The Respondent respectfully submits that the Appellant was properly convicted and sentenced, and that his appeal was properly dismissed. The meaning of socius criminis is well known in Roman-Dutch common law as meaning a participant in a crime. There has never been a classification of participants into different degrees in Roman-Dutch law as has existed in English law, and Roman Dutch law has always provided that where a person has been proved to have

participated in a crime, then he is guilty of that crime and no distinction is made as to his degree of participation. This concept was properly applied in the case of statutory crimes in R. v. Peerkhan & Lalloo. The fact that the sanction for the crime arises from statute and not from the common law does not alter the responsibility of those found to have participated in the crime. The submission that that case was rightly decided is reinforced by the consistency with which its authority has been followed both in South Africa and in Southern Rhodesia. The separate common law offence of inciting another to commit a statutory crime does not involve the considerations arising in the present case, for the requirements for proof of that offence and the consequences of such proof may well be different. It is respectfully submitted that it is not necessary for a statute providing criminal sanctions to include expressly provisions as to the culpability of socius criminis, for in law the principal and accessory commit the same crime. It is further submitted that section 366A(2) of the Criminal Procedure and Evidence Act does not expressly or impliedly exclude a socius criminis from liability for the crime with which the Appellant was charged.

15. The Respondent respectfully submits that the Appellant was properly sentenced and that there was no alternative sentence open to the learned trial judge. A socius criminis must be treated as a principal offender, and where a statute provides a mandatory sentence for an offender, there is no alternative sentence which can be passed on a socius criminis. A finding of guilt on the statutory offence charged should be distinguished from a finding of the common law offence of incitement to commit a statutory offence, and also from a finding of participation under section 366A(2) of the Criminal Procedure and Evidence Act. It is respectfully submitted that the only verdict open on the evidence and in particular the Appellant's own evidence was that he was guilty of the offence charged against him and that accordingly the only sentence open to the Court was that laid down in section 33A(1)(c) of the Law and Order (Maintenance) Act as amended.

16. The Respondent therefore respectfully submits that the judgment of the Federal Supreme Court of Rhodesia and Nyasaland was right and ought to be affirmed, and this appeal should be dismissed, for the following, among other,

R E A S O N S

(1) BECAUSE the Appellant was properly convicted of the crime charged against him;

(2) BECAUSE the Appellant was properly found to have been a socius criminis in the crime charged against him;

(3) BECAUSE there was no discretion as to the sentence to be passed on the Appellant;

(4) BECAUSE of the other reasons given by the High Court of Southern Rhodesia and the Federal Supreme Court.

J.G. Le Quesne

Mervyn Heald

No.19 of 1964

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF RHODESIA & NYASALAND

BETWEEN :-

RICHARD MAPOLISA Appellant

- and -

THE QUEEN Respondent

CASE FOR THE RESPONDENT

Charles Russell & Co.
37, Norfolk Street,
Strand, W.C.2.
~~COWARD, CHANCE & CO.,~~
~~St. Swithin's House,~~
~~Walbrook, E.C.4.~~

Solicitors for the Respondent.