Privy Council Appeal No. 19 *of* 1964

Richard Mapolisa – – – – – – – – *Appellant*

v.

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

FROM

THE FEDERAL SUPREME COURT OF RHODESIA AND NYASALAND

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH NOVEMBER 1964

Present at the Hearing:
LORD REID.
LORD EVERSHED.
LORD MORRIS OF BORTH-Y-GEST.
LORD PEARCE.
LORD DONOVAN.
[*Delivered by* LORD DONOVAN]

This is an appeal *in forma pauperis* by special leave of Her Majesty in Council granted on the 26th February 1964.

The appellant, Richard Mapolisa, is a native of Rhodesia who, at the time of the offence giving rise to the charge against him, was twenty-nine years of age and employed at times as a driver by the Zimbabwe National Party, of which Party he was a member.

He was charged upon indictment in that he did

> " Upon or about the 28th June 1963 and at or near Salisbury in the Province of Nashonaland South, wrongfully and unlawfully and without lawful excuse, by the use of petrol or some other inflammable liquid, set or attempt to set on fire a building or structure, that is to say, a house at 99, Silcox Avenue, Houghton Park, Salisbury, and thus . . . . did commit the crime of contravening paragraph (*a*) as read with paragraph (*c*) of sub-section (1) of section 33A of the Law and Order (Maintenance) Act, 1960, as amended."

The said paragraphs (*a*) and (*c*) of sub-section (1) of section 33A so far as here relevant are in the following terms:

> " 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; . . . . .
>
> shall be guilty of an offence and—
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> (*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; . . . . ."

Shortly after midnight on the 27/28th June 1963 a bottle of petrol was thrown through the window of the downstairs lounge of the house No. 99,

Silcox Avenue mentioned in the indictment. It was occupied at the time by Mr. B. J. Bonham, his wife and two infant children aged respectively seven and nine all of whom were in bed. The bottle was wrapped in rag and paper. There was also a metal cap on the bottle. Cloth was also tied round the top of the bottle and secured by wire. The rag wrapping of the bottle was alight and had already burnt a hole in the carpet of the lounge. The petrol in the bottle had not caught alight when Mr. Bonham, having been awakened by his wife, arrived in the lounge. This would, however, have happened had the petrol come in contact with the lighted wrapping either by the bottle cracking under the heat or by the petrol seeping out through the cap. The contrivance is called a " petrol bomb " and its object is incendiarism. Mr. Bonham picked up the bottle together with its wrapping and threw it out on to the lawn sustaining slight burning from the rag as he did so.

On the evening of the same 28th June the appellant was overheard by another native, who later gave evidence at the trial, saying that he had thrown a petrol bomb into the dining room of a European house the previous evening. On the 29th June the appellant was arrested; and on being charged he made a statement, the voluntary nature of which was not challenged. In this statement (Exhibit 1) the appellant admitted that on the night of the 27/28th June he carried a petrol bomb in a paper bag which he had bought for the purpose, to a spot outside the house in question. He was accompanied he said by a man named Cyprian who had made the bomb earlier that evening at his, the appellant's, home; and had wrapped the bottle in part of one of the appellant's old garments to serve as a wick. Outside the house Cyprian took the bomb out of the paper bag and lit the " wick " and threw the bottle into the house. They then both ran away.

At the trial the appellant maintained that it was Cyprian who had thrown the bomb and not himself. Cyprian he said was also a member of the Zimbabwe National Party, but had been expelled from a conference of the Party because he was believed to be a police informer. Cyprian was not called as a witness for the prosecution at the appellant's trial; but it was there admitted on behalf of the appellant that Cyprian denied being involved in the matter in any way. It appears that no proceedings were taken against him.

After a trial commencing on the 16th September 1963 and concluding on the 20th September 1963 before Hathorn A.C.J. sitting with two Assessors, the Court unanimously found the appellant guilty and he was sentenced to death. The Court found, however, that there was reasonable doubt whether it was the appellant who had actually thrown the bomb. There were foot-prints in the vicinity of the house but these had not been connected with the appellant. Certain written notes were found left at the scene written in ink which was similar to the ink found in the appellant's pen but dissimilar to the ink found in a bottle in his room.

The Court concluded that it was possible that a second person might have been present when the bomb was thrown. The appellant, however, had a common purpose with any such person to throw the bomb and was accordingly properly convicted of the offence.

The appellant appealed to the Federal Supreme Court of Rhodesia and Nyasaland against his conviction on the following grounds:

1. That the trial Court erred in holding that he had associated himself with the crime, in that he only became aware that the bomb was to be thrown at a dwelling house with consequent danger to human life, just before the bomb was thrown.

2. That in terms of section 33A of the Law and Order (Maintenance) Act, 1960, as amended, an accessory cannot be convicted at all of the offences set out in the section.

He also appealed against sentence on the ground that the learned Judge erred in holding that he had no discretion to pass a sentence other than the death sentence.

The appeal came on for hearing in the Federal Supreme Court on the 11th December 1963 before Clayden C.J., Quénet F.J. and Blagden, A.F.J.. On the 16th December 1963 judgment was given unanimously dismissing the appeal.

The Court upheld the findings of fact in the trial Court. Clayden C.J. said this:

> " In the main this appeal is concerned with the proper construction of section 33A(1). But it was initially argued that the trial Court was wrong in finding that the appellant took part in a common venture to burn a house, because his intention was not directed to any type of building, and because prior to the actual throwing of the bomb he had dissociated himself from the venture, as was shown by several acts indicating disinclination to help at earlier stages and a final separation from the thrower at the house. There is no substance in these submissions. They were all carefully considered by the trial Court. The appellant had knowledge that the petrol bomb might be used against a residence on his own admissions, and before the bomb was thrown it was obvious that it would be used in respect of a house; and then the appellant, on the version most in his favour, gave the petrol bomb to the thrower. It was proved that he knew well what would happen. He was given full credit for earlier acts which might show disinclination to take part in the venture, and this was used in his favour to hold that it was not proved that he himself threw the bomb. His evidence that he did what he did through fear was quite disbelieved, and there is no reason to interfere with that finding. Assuming that he was taking part reluctantly he still did take part; he carried the bomb knowing that it would be used, and he handed over the bomb when he knew that it was to be used. Although he went a little apart at the time of the offence he did not go away. There is no indication that he abandoned his purpose, and his fellow criminal, so as to escape criminal liability. On the ground of appeal based on fact the appeal cannot succeed."

The Court went on to hold that as a *socius criminis* the appellant was in law guilty of the offence created by section 33A(1): and that for such an offence the trial Court was bound to pass the fixed sentence of death.

There is no longer any issue as to the facts.

Nor is it any longer disputed that if the conviction under the section is valid, a sentence of death must follow. The sole ground of the appeal to the Board is that the conviction was bad for the following reason of law:

> (1) By section 13 of the High Court Act of Southern Rhodesia passed in 1893, the law to be administered by that Court is to be the same as the law in force in the Colony of the Cape of Good Hope on 10th June 1891, as modified by subsequent legislation having the force of law in Southern Rhodesia. (There is a reservation in the section dealing with Native Law which is not here material.)
>
> (2) The Common law in force in the Colony of the Cape of Good Hope (now part of the Republic of South Africa) on the date specified was, and remains, the Roman Dutch law. Under that law a *socius criminis* is not regarded as committing the self-same crime as the principal perpetrator but as committing instead the offence of aiding and abetting that crime.
>
> (3) In any event, even if the Roman Dutch common law regarded the *socius criminis* as committing the very crime perpetrated, it did so only in relation to crimes which were offences created by that common law.
>
> (4) The position is different in cases of offences created by Statute. There the liability of the *socius criminis* must be determined by the language of the Statute and if that language does not cover the case of the *socius criminis* he cannot be convicted of the statutory offence.
>
> (5) The language of section 33A(1) does not cover the case of the appellant, and he was therefore improperly convicted. It was conceded that he might be convicted of some other offence *e.g.* the common law offence of attempted arson, or the aiding and abetting of that offence.

For the Crown it was contended that in Roman Dutch law anyone who aids, abets, or assists in the commission of an offence becomes a *socius criminis* in relation to that offence, and if convicted of it, may be punished accordingly.

Since Roman Dutch law is the common law of Southern Rhodesia, judicial decisions given in the Courts of what is now the Republic of South Africa have relevance in Southern Rhodesia and are applicable subject to any statutory modification of the law in Southern Rhodesia. The Appellate Division of the Supreme Court of South Africa served until recent times as a Court of Appeal for Southern Rhodesia. During that period its decisions were binding in Southern Rhodesia, and while this is technically no longer so, those decisions continue to have persuasive authority. Their Lordships were accordingly referred by both sides to many of them as well as to decisions in Southern Rhodesia itself. They have also considered the extracts laid before them from the early writers on the Roman Dutch law, such as Matthaeus and Damhouder. For this exhaustive review of the law bearing upon the present problem the Board is indebted to Counsel on both sides. Having carefully considered the whole matter, Their Lordships proceed to state their conclusions, referring to such of the many authorities cited to them as will, in their opinion, best illustrate the position.

First. Under the Roman Dutch common law a *socius criminis* is regarded as committing the same offence as the principal perpetrator where that offence is a crime against that common law. This proposition rests upon many authorities. There is none to the contrary effect. It was urged, however, that this is to be explained because ordinarily the question would be academic. The punishment of the *socius* would at common law be in the discretion of the Court which could adjust it so as to fit the degree of his involvement. There was, therefore, no need, as there is in the present case, to define exactly what crime the *socius* committed. Where, however, the punishment is a fixed one, and particularly the fixed punishment of death, the matter of deciding precisely what crime the *socius* commits ceases to be academic and becomes of vital importance.

This is undoubtedly true, but it does not disturb the clear conclusion to be deduced from the authorities.

In *R. v. Peerkhan and Lalloo* [1906] T.S. 798 (a case to be examined in more detail in regard to the appellant's alternative contention) Innes C.J. says:

> " In the case of common law offences, any person who knowingly aids and assists in the perpetration of a crime is punishable as if he had committed it. The English law calls such a one a principal in the second degree; and there is much curious learning as to when a man is a principal in the second and when in the first degree. Our law knows no distinction between principals in the first and second degrees or between principals in the second degree and accessories. It calls a person who aids, abets, counsels or assists in a crime a *socius criminis*—an accomplice or partner in the crime. And being so he is under Roman Dutch law as guilty and liable to as much punishment as if he had been the actual perpetrator of the deed. Now it is clear that in our Criminal Courts men are convicted for being *socii criminis* without being specially charged in the indictment as such. They are so convicted under ordinary indictments charging them with having actually committed the crime. That is the form of indictment here; and in regard to common law offences the rule is clear."

In *Rex v. Parry* [1924] A.D. 401, Parry and Hirschman were jointly indicted for the common law crime of murder, the victim being Hirschman's wife. The jury found that Hirschman had killed his wife but was insane at the time and he was ordered to be detained as a criminal lunatic during the Governor's pleasure. Parry was found to have counselled and helped Hirschman to commit the murder, and the verdict in his case was guilty of murder. This verdict was challenged on the ground that in view of the verdict in the case of Hirschman, Parry could not be guilty of murder. Dealing with this argument Innes C.J. said:

" The fallacy of that argument lies in the assumption that the guilt of a *socius criminis* who assists in the commission of a crime is necessarily dependent upon the guilt of the actual perpetrator. The true position is that though such a *socius* is equally guilty his guilt results from his own act and his own state of mind. It is the existence of criminal intent in each of those who jointly commit a crime which entails on each a criminal responsibility. *Mens rea* must exist independently in both—not in the chief actor alone. If A assists in a crime which B actually perpetrates, the fact that the latter is found to have been insane at the time cannot affect the guilt of the former."

In *Rex v. Mlooi and others* [1925] A.D. 131, a case which decided that an accessory *after* the fact could not be a *socius criminis*, the same Chief Justice considers the position of a man who assists beforehand. He says at page 134:

" The actual perpetrator of a crime is not necessarily the only person liable to punishment. Anyone who procures or assists the commission of the offence and anyone who after it has been committed intervenes to help the perpetrator to evade justice is also liable to penal sanctions. That must be so, one would think, in every civilised system of law. The position of a man who associates himself with the crime beforehand is well settled. Whoever instigates, procures or assists the commission of the deed is a *socius criminis* and may be indicted, convicted and punished as if he were the principal offender. Nor does his liability depend upon the liability of the latter as pointed out in *Rex v. Parry* (supra). It flows from his own part in the transaction, coupled with the existence of *mens rea* in relation to the crime itself."

Finally in *Rex v. Longone* [1938] A.D. 532 (a case arising in Southern Rhodesia) the accused was charged with being an accomplice before the fact to the crime of murder. He had supplied poison to one Chikokonya in order, as Longone knew, that Chikokonya could poison his, Chikokonya's, wife. Chikokonya left the poison in a pot of drinking water in his own hut thinking that his wife would drink it. Unforeseeably, one Makachi drank the water and died. Chikokonya was convicted of the murder of Makachi while Longone was convicted of being an accessory before the fact to that murder. It was held on appeal that the conviction of Longone must be quashed on the ground that he was not a *socius* in the murder *of Makachi* since he had not assented to it, nor was it a reasonable probability which should have been foreseen by him. The case is of assistance having regard to the observations of Watermeyer J.A. as to the position in Roman Dutch law of a *socius criminis*. He says (p.536):

" Before dealing with the questions reserved I wish to draw attention to the form of the indictment. The accused was charged with being an accessory before the fact to the crime of murder in that he did ' wrongfully, unlawfully and maliciously incite, move, procure and counsel and command ' Chikokonya to commit the crime of murder. Now the word accessory is a term used in English law in a technical sense. English textbooks, such as Russell on Crimes, tell us that ' accessories are only recognised in the case of felonies and that they can be accessories at the fact (also called principals in the second degree), accessories before the fact and accessories after the fact. One of the definitions of an accessory before the fact which he quotes is ' Those who by hire, command, counsel or conspiracy, or by showing an express liking, approbation or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it that he could not be encouraged by the hopes of any immediate help or assistance from them, are accessories before the fact '.

These technical distinctions form no part of our law. It has been pointed out by this Court on several occasions that under Roman Dutch law anyone who is a *socius criminis* can be convicted and punished as a principal offender."

The learned Judge then quoted *Rex v. Mlooi and others* and *Rex v. Peerkhan and Lalloo* (supra). He continued:

" It is therefore unnecessary, in framing a charge under our law, to make use of a technical English legal term such as ' accessory before the fact '. Not only is it unnecessary but it creates difficulties, an example of which occurs in this case."

Their Lordships need not refer to other cases on this first point. The authorities are clear and consistent and they abundantly support the proposition that as regards offences against the Common Law a *socius criminis* is regarded as a partner in the very crime committed and can be indicted and punished in the same manner as the actual perpetrator.

Second. The position is no different where the offence committed is an offence not against the common law but against a statute. This proposition was strenuously contested on behalf of the appellant. It was urged that the position of a *socius criminis* in such a case must necessarily be governed by the language of the statute creating the offence; and that if the *socius* were not within it he could not be convicted under the statute even though what he had done might constitute an offence at common law. For the Crown it was contended that there was no such distinction; and that just as a *socius criminis* is liable at common law for the actual crime committed, when that crime is against the common law the same rule applies when the offence is against a statute.

This matter has also been considered in the Courts of South Africa and Southern Rhodesia. Their Lordships refer again to *R. v. Peerkhan and Lalloo* (supra). The facts were these. A local statute prohibited the dealing in unwrought gold by a person not duly licensed. Peerkhan was present at the purchase of gold by Lalloo and aided and assisted him therein. Neither was duly licensed. Curlewis J. at the trial directed the jury that if Peerkhan knowingly aided and assisted Lalloo in the purchase of the unwrought gold he, Peerkhan, was guilty of the contravention of the relevant sections of the statute.

The correctness of this direction was challenged on appeal to the Supreme Court. Innes C.J., after setting out the position of a *socius criminis* where the crime committed was a crime of common law, proceeded to say:

" But it was argued that when the legislature makes that a crime which was not a crime before, then no man can be convicted of the statutory offence who does not himself actually perpetrate it and thus bring himself within the strict words of the statute. By way of analogy it was urged that the attempt to commit a statutory offence is not a crime unless the law makes it so . . . . .

The true rule seems to me to be that the common law principles which regulate the criminal liability of persons other than actual perpetrators should apply in the case of statutory as well as of common law offences unless there is something in the statute or in the circumstances of the crime which negatives the possibility of such an application.

No such consideration is present here, and I think therefore that a person who knowingly assists another to buy unwrought gold in contravention of the law is himself a *socius criminis* and punishable as such. In my opinion the direction of Curlewis J. was right."

This decision has been repeatedly followed and the law thus enunciated repeatedly applied. In *R. v. Jackelson* [1920] A.D. 486 the Court of Appeal in South Africa was faced with the problem whether the punishment prescribed by statute for a coloured person only was applicable to a white man who aided and abetted the coloured man in the commission of the offence. Section 48 of the Transvaal Ordinance 32 of 1902 made it an offence for a coloured person to be in possession of intoxicating liquor, and the only penalty imposed by the statute for its contravention was imposed on the coloured person so found in possession. Jackelson, a white man, had assisted certain natives to be in possession of intoxicating liquor contrary to the terms of the statute. Among other things he contended that even so he could not be punished under the statute for it imposed no penalty on a white man. The Appellate Division held that the statutory penalty was nevertheless applicable: and Juta J.A., with whom Innes C.J. and De Villiers J.A. concurred, said:

> " All persons who knowingly aid and assist in the commission of a crime are punishable just as if they had committed it."

The learned Judge of Appeal then quoted certain cases including *R. v. Peerkhan and Lalloo* and proceeded:

> " And being punishable just as if he himself had committed the crime he may be sentenced to the same punishment. Whether that punishment is imposed by statute or by the common law can make no difference if the *socius criminis* is just as guilty and liable to as much punishment as if he were the actual perpetrator of the deed."

The case of *R. v. M.* tried in Southern Rhodesia in 1952 ([1952] 2. S.A.L.R. 674) was relied on by both sides. It was a case of the unsuccessful incitement of a native by a European to procure a native woman to have sexual intercourse with the European, M, contrary to the Criminal Law (Amendment) Act of Southern Rhodesia, section 9(*a*). (The incitement was unsuccessful in the sense that M. was arrested before intercourse took place) Section 9 prescribed imprisonment not exceeding two years as the only punishment for such an offence. Nevertheless, the High Court of Southern Rhodesia on a review of the case varied the sentence of imprisonment to one of a fine holding themselves at liberty to do so under the common law. It was pointed out by Mr. Le Quesne in the present case that the incitement in *R. v. M.* had been unsuccessful so that M. could not be regarded as a *socius criminis* since the actual crime had not been perpetrated. The High Court was not, therefore, obliged to inflict the fixed penalty of imprisonment. Mr. Pollak for the appellant replied that section 9 made it in terms an offence to procure or *attempt* to procure. The native concerned in the case had attempted to procure and M. was a *socius criminis* in that attempt. Accordingly the High Court could not ignore the statutory punishment and impose a punishment under the common law unless the statute was subject to the common law in this respect. Their Lordships appreciate the argument, but it is clear from the report that M. rightly or wrongly was not treated as a *socius* in a completed crime but simply as an unsuccessful inciter; and regarding him thus the Court was not bound to apply the statutory penalty.

There are, as their Lordships have said, numerous cases where the rule enunciated in *R. v. Peerkhan and Lalloo* has been applied. They include *Nabi v. Rex* [1909] T.S. 103: *R. v. Kazazis*, [1925] C.P.D. 166; *Tommy and others v. Rex*, [1931], N.P.D. 317: *Rex v. Clark* [1933], T.P.D. 18: *Fitzsimmons v. The King* [1945] S.R. 69: *R. v. Van Der Merwe* [1950] 4 S.A.L.R. 124: *R. v. Mkize* [1960] 1 S.A.L.R. 276: and *S. v. Kazi* [1963] 4 S.A.L.R. 742.

In *R. v. Mkize* (supra) the accused aided and abetted the breaking and entering of a shop without however actually entering it himself. Burne A.J. giving the judgment on review of the Natal Provincial Division said:

> " Many cases have dealt with the question of what a *socius criminis* is in our law. I refer among others to *R. v. Peerkhan and Lalloo*, *R. v. Parry*, *R. v. Mlooi and others* and *R. v. Longone* . . . . .
>
> If a person has acted as a *socius criminis* in the commission of a particular known crime he is guilty of that crime."

Their Lordships thus find that the rule laid down by Innes C.J. in *R. v. Peerkhan and Lalloo* has been followed and applied for nearly sixty years, and was applied in the present case. If, nevertheless, their Lordships considered that the rule was founded on misconception they would say so. But they do not take that view. This is not some technical and refined doctrine applicable to offences against the common law alone. It is grounded upon the moral truth that he who shares with the actual perpetrator of a crime a common purpose to commit it and who aids and abets its commission is as much guilty of the crime as his partner and in law should be so treated. There is no warrant in logic or justice for excluding the rule in the case of criminal offences against a statute. The statute may well not refer expressly to a *socius criminis* as being within its scope. The statute now under consideration does not do so. But having regard to the common law rule repeatedly enunciated and

applied equating the guilt of the *socius* with that of the principal criminal it was unnecessary to do so, as the Legislature in the present instance must have known.

In the Federal Supreme Court it was urged that the liability of the appellant as a *socius criminis* was to be found in the provisions of section 366(2)(*a*) of the Criminal Procedure and Evidence Act of Southern Rhodesia which provides as follows:

> " Any person who
>
> (*a*) conspires with any other person to commit or procure the commission of or to commit; . . . . any offence whether at common law or against any law, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing the offence at common law or against such law would be liable."

The Federal Supreme Court rejected this argument, holding that it simply established the offence of conspiracy but did not affect the liability of a *socius criminis* which still rested upon the common law. Their Lordships agree.

Third. A statute may, however, by express provision or necessary implication exclude the liability of a *socius criminis* as was recognised by Innes C.J. in *Peerkhan and Lalloo* (supra). It is argued for the appellant that this is so in the present case.

Thus section 8 of the Law and Order (Maintenance) Act 1960 provides that any person who " organises *or assists* in organising " a prohibited procession shall be guilty of an offence.

Section 9 provides that any person who " convenes *or assists* in convening " a prohibited public gathering shall be guilty of an offence.

Section 10 provides that any person who " convenes *or assists* in convening " an unlawful gathering as defined in the section shall be guilty of an offence.

The contention is that the specific references in these sections to those who assist in the commission of the offence are to be contrasted with the omission of any such words in the provisions of section 33A(1), and should lead to the conclusion that those who assist in the offences created by this last section are not within its provisions.

Their Lordships were referred to no other provisions in the Act containing the words " or assists " or their equivalent. The Act creates it appears some fifty offences, and it is difficult to suppose that in forty-seven of them the legislature intended to exclude all liability on the part of *socii criminis*. The specific mention of those who assist in three out of the numerous sections of the Act certainly enables the argument to be raised; but the words relied upon will not, as a matter of interpretation, sustain the weight which they are asked to bear.

The question is whether a rule well settled in law regarding the liability of a *socius criminis* is to be excluded simply because in dealing with public processions and gatherings the legislature specifically mentions both those who organise or convene and those who assist in so doing. Much more direct language would, in their Lordships' view, be needed to produce this result; and they cannot hold that it has been achieved by the mere mention of assistance in the three sections in question. It is immaterial to come to any conclusion as to the reason for that specific mention, though there are obvious possible explanations short of the one contended for by the appellant.

In *R. v. Gozo* [1962] 1 S.A.L.R. 400 and again in *R. v. Ngwenya* [1962] 2 S.A.L.R. 659, the High Court in Rhodesia relied upon the express mention of a " class " of person in sections 24, 25 and 26 of the law and Order (Maintenance) Act 1960 to negative criminal liability in respect of a class of person under section 36 of the Act where there was no such specific reference to a " class ". Their Lordships see no reason to doubt the soundness of these decisions but they cannot treat them as establishing the far broader proposition that a *socius criminis* is not within the Act because he is not expressly mentioned.

Fourth. It is further argued that the liability of a *socius criminis* is impliedly excluded because of the fixed penalty of death. The degree to which a *socius* is involved may, it is pointed out, vary considerably from case to case. The legislature could not have intended this fact to be ignored and to have prescribed the punishment of death whether the *socius* was fully implicated in the crime or had made only some minor contribution towards its commission.

Their Lordships have given this argument anxious consideration, but they find themselves unable to accede to it. In the first place the offences in question are extremely serious, and the sentence of death is confined to the setting on fire, or the attempt to set on fire, buildings and structures used for residential purposes, and certain other specified buildings, structures and vehicles in which some person was present at the time. In all other cases the penalty is imprisonment for not more than twenty years, thus giving the Courts a wide discretion as to the punishment to be inflicted. The purpose of providing sentence of death in the defined cases was clearly to preserve human life; and the legislature, if the crimes aimed at were prevalent or seemed likely to become so, may well have sought to deter all those who were concerned in their commission, whether as principals or as *socii criminis*. It is further to be observed that specific discretion is conferred upon the Court by the section in the case of an offender under sixteen, a woman with child, and a person between sixteen and nineteen years of age. In such cases the High Court may prescribe either the death penalty or a term of imprisonment.

In the face of these considerations it is impossible for their Lordships so to construe the provisions of the section imposing the death penalty for the most serious offences in such a way as to exclude altogether any liability thereunder on the part of those who assist in these particular crimes. It will always be a question in any particular case whether the acts of the accused person are sufficiently proximate to the offence to make him a *socius*. No such question arises here, where not only was the appellant fully implicated in the crime but appreciated its possible results. He said in evidence that he realised that danger might be brought about by the petrol, and when asked what sort of danger, replied " the danger was that this petrol bomb would be thrown in a house where there is a family and the family would die."

Their Lordships agree with the conclusion reached by the Federal Supreme Court, and might ordinarily have said little more. In view, however, of the importance of the matter, they have considered it right to express their views at some length. For the reasons indicated they have humbly advised Her Majesty that the appeal should be dismissed.

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In the Privy Council

RICHARD MAPOLISA

v.

THE QUEEN

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