

IN THE PRIVY COUNCIL

No. 1 of 1965

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF
RHODESIA AND NYASALAND

B E T W E E N:

SIMON RUNYOWA

Appellant

- and -

THE QUEEN

Respondent

C A S E FOR THE APPELLANT

RECORD

- 10 1. This is an appeal in forma pauperis by special leave of Her Majesty in Council dated 10th August 1964 on a report from the Judicial Committee of the Privy Council dated 27th July 1964 from the order of the Federal Supreme Court of Rhodesia and Nyasaland dated 26th February 1964 pursuant to that Court's judgment on 17th February 1964 whereby the said Court dismissed the Appellant's appeal against his conviction by the High Court of Southern Rhodesia (the Honourable Mr. Justice Hathorn, Acting Chief Justice, and two assessors) at the Salisbury Criminal Sessions on 20th December 1963 and against the mandatory sentence of death then imposed upon the Appellant by the Honourable Mr. Justice Hathorn in respect of a finding of guilty of contravening Section 33A(1)(a) and (c) of the Law and Order (Maintenance) Act, 1960, as amended.
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2. The main questions which arise for consideration in this appeal are:-
- 30 (a) whether on the facts as found by the trial court there was any evidence against the Appellant to connect the Appellant with the principal offender, Alexander Gendhamu Chirawu.
- (b) whether on the facts as found there was any evidence against the Appellant that the said Chirawu threw the bomb.
- p.155
- p.154
- pp.149-153
- p.133
- p.143

RECORD

- (c) whether the Appellant on the evidence was sufficiently associated with the crime of the principal offender so as to constitute the Appellant a socius criminis
- (d) whether the mandatory death penalty for offences under Section 33A(1)(c) of the Law and Order (Maintenance) Act is unconstitutional, on the grounds that the section contravenes Section 60(1) of the Constitutions of Southern Rhodesia 1961 which provides that "no person shall be subjected to torture or to inhuman or degrading punishment or other treatment", or alternatively, whether the carrying out of the death penalty would involve a breach of Section 60(1) of the Constitution of Southern Rhodesia 1961.

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3. On 9th, 10th, 11th, 12th, 13th, 16th, 17th, 18th and 20th December 1963 the Appellant was charged jointly with Alexander Gendhamu Chirawu and Kassiano Muringwa on an indictment containing the following counts, namely:-

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p.1,L.27-
p.2,L.33.

p.3,L.30-
p.4,L.6.

In that upon or about the 2nd October [amended to read September] 1963 and at or near Harare in the Province of Mashonaland South in Southern Rhodesia the accused did all and each or one or more of them wrongfully and unlawfully and without lawful excuse, by the use of petrol, benzene, benzine, paraffin, methylated spirits or some other inflammable liquid, set on fire or attempt to set on fire a building or structure, that is to say, house number 4093, Semi-Detached Lines, Harare aforesaid, and thus the accused did all and each or one or more of them 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.

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Or otherwise:- That the accused are all or each one or more of them guilty of the crime of contravening sub-section (1) of Section 33 of the Law and Order (Maintenance) Act 1960. In

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that upon or about the 2nd October [amended to read September] 1963, and at or near Harare in the Province of Mashonaland South aforesaid, the

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25 APR 1967
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10 accused did all and each or one or more of wrongfully and unlawfully and without lawful authority or reasonable excuse have in their possession or in or upon any premises occupied by them, the accused, an offensive weapon, that is to say, a glass bottle filled with paraffin or some other similar inflammable liquid, the said bottle also being fitted with a stopper and wick; and thus the accused and all and each one or more of them commit the crime of contravening Sub-Section (1) of Section 33 of the Law and Order (Maintenance) Act 1960.

20 4. The Appellant pleaded not guilty to both charges. No witnesses were called on behalf of the Appellant but he elected to make an unsworn statement. The Court found the Appellant guilty of the main charge but made no finding on the alternative charge. The Appellant was sentenced to death under the mandatory terms of Section 33A (1)(c) of the Law and Order (Maintenance) Act.

p.4.
p.117,L.3-5
p.123,L.28
p.145,L.17
p.144,L.30-33.

5. The offence for which the Appellant was convicted and sentenced to the mandatory death penalty is contained in Section 33A(1) as substituted by Section 4 of the Law and Order (Maintenance) Act 1963 and now contained in Section 37(1) of the Law and Order Maintenance Act, which reads as follows:-

"Any person who, without lawful excuse, the proof whereon lies on him -

30 (a) by the use of paraffin sets or attempts to set on fire any building 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

40 (i) any building 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 that building

RECORD

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

6. Under the Constitution of Southern Rhodesia 1961 it is provided by section 60(1) thereof as follows:-

"No person shall be subjected to torture or to inhuman or degrading punishment or other treatment".

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p.134

7. The learned trial judge and the two assessors found that in the early hours of 2nd September 1963 a paraffin bomb was thrown through the bedroom window of Mr. Luke Chigambura's house at No. 4093 Semi-Detached Lines, Harare and landed on the mattress of the child's cot. There was no sign of charring of the mattress or its covering, and the only damage done was to the window pane. The Court also found that the bomb had been thrown by the said Chirawu, and that the said Muringwa had assisted by, inter alia, carrying the bomb.

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p.134,L.30-31.

p.141.L.40-45.

p.142,L.3-5.

p.142,L.3-5.

8. The Court further found that the Appellant, on his own admission, had assisted in the plan by buying from a local store some paraffin which he handed to the other participators to the plan. The Court found that the other participants to the plan left the Appellant's home saying to the Appellant on his own admission "we are going to our house", which admission the Court concluded that "in the context it can only mean the house which was the subject of the plan." Accordingly the Court found that the Appellant aided and abetted the other participants knowing what crime was contemplated, and that the Appellant was therefore a socius criminis.

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9. The Appellant appealed to the Federal Supreme Court of Rhodesia and Nyasaland against his conviction and sentence. In his appeal against conviction he argued that the trial court had erred in principle in finding that he had participated in the commission of the offence. The Appellant also appealed against sentence, both on the ground that the sentence was excessive and also that the learned judge had erred in

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p.152,L.1-3.

convicting the Appellant under the section of the Law and Order (Maintenance) Act which carries the mandatory death penalty. In the decision of the Judicial Committee of the Privy Council in Mapolisa v. The Queen /1964/ 2 W.L.R. 199 it has been held that the relevant provision in the Law and Order (Maintenance) Act applied equally to a socius criminis, and that such a participant in a crime under that section was subject to the same mandatory penalty as the principal offender.

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p.153,L.5-7.

10. On 17th February, 1964 the Federal Supreme Court of Rhodesia and Nyasaland (Clayton, C.J., Quénet, F.J. and Forbes, F.J.) dismissed the Appellant's appeal set out in the judgment of Quénet, F.J.

p.149-153.

11. The only evidence against the Appellant was a statement /Exhibit 12 at the trial/ made by the Appellant to Dennis Henry Benneyworth, a detective in the British South Africa Police attached to the Criminal Investigation Department, Salisbury, on 4th September 1963, when charged with attempting to set on fire the residence of Mr. Luke Chigumbura at 4093 Semi-Detached Lines, Harare, Salisbury, by throwing a bottle containing the inflammable liquid through the bedroom window. The statement is as follows:-

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p.157-158.

"I have got something to say. I understand the charge but I deny. The one who organised this, that is the setting fire of this house, was one AMON NYAMUKONDIWA. We were four in number. AMON, KASIANO /MURINGWA/, myself and another one whose name I do not know. When we were four AMON was pointing to us, the number of the house that he wanted to set on fire. We passed near to the house for indications. After we had passed this house we went further and than we separated, and I went to my house. Around about 6.00 p.m. KASINO, MURINGWA and the other man whose name I do not know, came to my house. They entered into the bedroom where I was. As they entered in food was ready. We ate food together. After food, this other man who I do not know, asked me whether I could get somebody to go and buy paraffin. I said 'Give me the money'. He gave me sixpence. I tried to find somebody to go and buy this

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RECORD

paraffin but I could not get one. I then went myself and got the paraffin. When I returned back from buying paraffin they were not in, but left a message saying that when I returned I should wait for them as they would be coming back. Before five minutes they arrived. The other man asked me whether I had got the paraffin and I replied 'Yes'. After handing them the bottle of paraffin, they then said 'We are going to our house'. Then they left. At about 2.00 a.m. I heard the Police knocking at my door. That is all I know".

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p. 136,L.23-25. 12. The only other evidence against the Appellant was that the fingerprints of Muringwa were found on the bomb which had been thrown through the bedroom window.

13. The Federal Supreme Court, rightly it is submitted, concluded that the evidence did not establish the Appellant accompanied the others to the scene. That the Federal Supreme Court concluded, wrongly it is submitted, that while the Appellant knew the method to be employed, the Appellant having bought the paraffin and handed it over to Muringwa. But it is respectfully submitted that this evidence did not in any way connect the Appellant with the thrower of the bomb, and that moreover the evidence that Chirawu threw the bomb, as contained in his statement Exhibit 3 at the trial/ admitted in evidence at the trial, was not evidence against the Appellant.

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p.152,L.31-39.

p.136,L.36.

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p.152,L.39-45.

14. The Federal Supreme Court concluded it could see no ground for holding that the trial Court was wrong in its conclusion that "on this evidence the appellant's conduct made him a socius criminis in the commission of the crime"

It is respectfully submitted that, in so far as the evidence showed the Appellant's participation in the commission of the crime, the participation was insufficient to constitute the Appellant a socius criminis. It is respectfully submitted that mere association with a second person in the steps preparatory to the commission of a crime by a third person will not suffice to make the first person an accessory to the third

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person's crime, even though direct assistance be given with a general intent where in fact the help was not rendered with direct knowledge of the third person's proposed crime.

15. The Appellant further submits:

10 (a) Section 37(1) (c) of the Law and Order (Maintenance) Act, in so far as it provides the mandatory death penalty for a socius criminis, contravenes Section 60 of the Southern Rhodesian Constitution of 1961; and, since the legislature did not create two different categories of criminal but intended that the socius criminis should suffer the like mandatory punishment as the principal offender, Section 37(1)(c) is not capable of being severed, and the whole subsection is ultra vires the constitution.

20 (b) Section 37(1)(c), in so far as it provides the mandatory death penalty for a mere attempt to set fire to a building, contravenes section 60 of the said constitution, and section 37(1)(c) is not capable of being severed, thereby making the whole section ultra vires.

30 (c) Section 37(1)(c)(i), in so far as it provides the mandatory death penalty for an offence under the section, although at the time of the commission of the offence no person was present in the building or structure, contravenes section 60 of the said constitution and is not severable, thereby making the whole subsection ultra vires.

Alternatively

40 (d) If, contrary to the Appellant's submission, Section 37(1)(c) of the Law and Order (Maintenance) Act is not ultra vires Section 60 of the said Constitution, nevertheless the execution of the death penalty for any offence under Section 37(1) of the Law and Order (Maintenance) Act is invalid as contravening the prohibitions of Section 60 of the said Constitution.

16. The Appellant respectfully submits that the following are the appropriate questions to be answered in formulating the correct test to be

RECORD

applied to determine whether any particular punishment prescribed by the legislature for any particular common law or statutory offence is "inhuman or degrading punishment" within Section 60 of the said Constitution:

(a) does the imposition of the death penalty for the particular offence violate growing standards of decency that mark the progress of a mature and civilised society; or does it measure up to the standards of decent behaviour more or less universally accepted? 10

(b) is the taking of human life by the State to protect a value other than human life consistent with the Constitutional prescription against "inhuman or degrading punishment"?

(c) can the permissible aims of punishment in a modern penal system be achieved as effectively by a punishment less severe than the death sentence; and, if so, does not the death penalty then become "inhuman or degrading punishment"? 20

(d) is the death penalty "inhuman or degrading punishment" when it is employed, other than in cases where the consummated crime for which it is prescribed, involved the death of the victim or the real endangering of human life?

17. The Appellant will submit that this appeal should be allowed for the following (among other) 30

R E A S O N S

- (1) BECAUSE there was no evidence against the Appellant to connect him with the principal offender of the crime.
- (2) BECAUSE there was no evidence against the Appellant that the principal offender threw the bomb.
- (3) BECAUSE the Appellant was not in law guilty of being a socius criminis.
- (4) BECAUSE Section 37(1)(c) of the Law and Order 40

(Maintenance) Act is ultra vires Section 60 of the Constitution of Southern Rhodesia 1961.

- (5) BECAUSE the carrying out of the death sentence on the Appellant under Section 37 (1)(c) of the Law and Order (Maintenance) Act would be invalid as contravening section 60 of the Constitution.
- 10 (6) BECAUSE the mandatory death penalty is "inhuman or degrading punishment" for any offence which does not involve the loss of life or the imminent threat to the life or lives of individual citizens.
- (7) BECAUSE Section 37(1)(c) is not severable and therefore to the extent that an offence under the section contravenes Section 60 of the Constitution, the whole of Section 37 (1)(c) is ultra vires the Constitution.
- 20 (8) BECAUSE the Federal Supreme Court of Rhodesia and Nyasaland was wrong and its judgment ought to be reversed.
- (9) BECAUSE the judgment of Quénet, F.J. was wrong for the reasons given in paragraphs 13 and 14 of the case.

L. J. BLOM-COOPER.

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