Privy Council Appeal No. 1 *of* 1965

Simon Runyowa – – – – – – – – – *Appellant*

v.

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

FROM

THE FEDERAL SUPREME COURT OF RHODESIA AND NYASALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JANUARY 1966

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST

LORD PEARCE.

LORD PEARSON.

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

The appellant was charged together with two other Africans (Alexander Gendhamu Chirawu and Kassiano Muringwa) with contravening certain provisions of the Law and Order (Maintenance) Act 1960. The trial took place at Salisbury Criminal Sessions before Hathorn A.C.J. and two Assessors (see section 223 and section 225 of the Criminal Procedure and Evidence Act) on the 9th, 10th, 11th, 12th, 13th, 16th, 17th, 18th and 20th December 1963. The unanimous verdict of the Court as stated in the judgment of Hathorn A.C.J. was that all three accused were guilty on the main charge. In the indictment which was presented by the Attorney General that charge was expressed in the following words:

> " In that upon or about the 2nd September 1963 and at or near Harare in the Province of Mashonaland South aforesaid, 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 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 ".

There was an alternative charge which does not call for present mention.

The appellant was sentenced to death as was Chirawu. Muringwa who was aged 16–17 years was sentenced to imprisonment for seven years. All three appealed. So far as the appellant was concerned he appealed against his conviction and sentence. The appeals were heard in the Federal Supreme Court before Clayden C.J., Quenet and Forbes F.JJ. Judgment was given on the 17th February 1964. Quenet F.J. delivered the first judgment and Clayden C.J. and Forbes F.J. agreed. In concluding his judgment Quenet F.J. said:—

> " There is also an appeal by the third appellant against the sentence imposed upon him. The first ground alleges that the sentence was excessive, and the second reads: " . . . the learned judge erred in convicting the appellant under that section of the Law and Order (Maintenance) Act that carries the mandatory death penalty ". In *Richard Mapolisa v. The Queen* Judgment No. 91/63 as yet unreported, this Court held that section 33A of the Law and Order (Maintenance) Act applied to a *socius criminis* and that he was subject to the same penalty as the principal offender. It follows, the trial Court had no alternative but to impose the death penalty.

I would dismiss all the appeals. In the case of the third appellant, Simon Runyowa, the attention of the Executive is directed to the fact that leave to appeal against the judgment of this Court in *Mapolisa's* case has been granted by the Judicial Committee of the Privy Council. The third appellant is not himself in a position to finance an appeal to the Privy Council. This Court would respectfully suggest that the appellant be informed that his sentence will not be considered until after *Mapolisa's* case has been decided by the Judicial Committee, or, if that course be not accepted, that he be told so, so that he can make efforts to apply for leave to appeal ".

After a Petition which was considered by their Lordships' Board on the 27th July 1964 special leave was granted on the 10th August 1964 (in forma pauperis) to the Privy Council.

Mapolisa's case, referred to in the judgment of Quenet F.J. was heard in the Privy Council on the 4th, 5th, 9th and 10th November 1964. Their Lordships' reasons for their advice that the appeal should be dismissed were given in a judgment delivered on the 10th December 1964.

The Law and Order (Maintenance) Act was passed in 1960 (Act No. 53 of 1960). By section 33(1) it was provided:—

" Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon or any offensive material shall be guilty of an offence and liable to imprisonment for a period not exceeding ten years."

Among the things included in the definition of " offensive material " was any inflammable substance. By Act No. 12 of 1963 a period not exceeding twenty years was substituted for the period not exceeding ten years.

By Act No. 35 of 1962 the principal Act was amended by the addition of section 33A. That section provided that

" (1) Any person who

(*a*) sets or attempts to set on fire: or

(*b*) by the use of explosives destroys or causes or attempts to cause damage or injury to:

any building or structure in which some other person is present shall be guilty of an offence and liable to imprisonment for a period not exceeding twenty years.

(2) In a prosecution for a contravention of subsection (1) of this section it shall not be necessary for the Crown to prove that the person charged with the offence knew that some other person was present in the building or structure at the time."

By Act No. 12 of 1963 (promulgated on the 29th March 1963) section 33A was amended. As amended section 33A (1) was as follows:—

" (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*) by the use of explosives—

(i) causes or attempts to cause injury to any person; or

(ii) destroys or causes or attempts to cause damage to any building, structure, vehicle, vessel, aircraft or railway engine, tender, carriage, van or truck;

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) any building or structure used for residential purposes and owned, occupied or leased by the person convicted of the offence, or any building or structure not used for residential purposes, or any vehicle, vessel, aircraft or railway engine, tender, carriage, van or truck, in which any other person was present at the time of the commission of the offence, whether or not the person convicted of the offence knew of the presence in such building, structure, vehicle, vessel, aircraft or railway engine, tender, carriage, van or truck, of such other person:

Provided that where a person under the age of sixteen years or a woman with child of a quick child is convicted of any such offence, the High Court may impose any sentence other than the death sentence, and where a person who has attained the age of sixteen years but has not attained the age of nineteen years is convicted of any such offence, the High Court may impose the death sentence or imprisonment for a period not exceeding twenty years;

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

It was under that section (section 33A(1)) that the appellant was indicted. That section is now section 37 of the Law and Order (Maintenance) Act—Chapter 39, and in this judgment the section will be referred to as section 37.

The evidence which was given in the case showed that an attempt was made in the early hours of the 2nd September 1963 to set fire to house number 4093, Semi Detached Lines, Harare in Gatula Street. That was a house in which a man named Chigambura lived. He lived there with his wife and children. On the 1st September he went to bed at 11.0 p.m. In his room he and his wife and a very young child were on a raised bed and two children were lying on a mattress on the floor: in the room there was a baby's cot in which the very young child normally slept. The window of the room was shut. In another room of the house Chigambura's mother and two girls were sleeping. During the night he was awakened by the noise which was caused when something was thrown through the window. The glass pane was broken. On the baby's cot he then found the article that had been thrown. It was a bottle with a wick in it. The wick was not then alight but the top part of it had been burnt. The liquid contents of the bottle were leaking out making the mattress wet. There was a smell of paraffin. The only damage done was to the window pane.

The bottle was found to be a small Mazoe orange crush bottle rather more than half full of paraffin. The wick was a piece of cloth long enough to reach the bottom of the bottle. It had a metal cap with a home-made slot in it. About two inches of wick was protruding from the cap and the wick was charred at the top. On one side of the wick and sticking through the slot was a spent match. On the other side sticking in the slot were three unexpended matches. All matches had their heads protruding.

There was plenty of inflammable material in the house both fixed and movable. There were wooden doors. The internal doors had wooden frames. There were wooden rafters. There was wooden furniture. There were mattresses, blankets, baskets, suitcases and clothes in the room.

Evidence was given by a Police Detective (Bennyworth) that on the 3rd September he charged the appellant who lived in House No. 4089 with a contravention of section 33A(1)(a) of the Law and Order (Maintenance) Act 1960 and that the appellant after being cautioned made a statement. There were some suggestions at the trial that the statement had been fabricated by the police and that the appellant's signature to it was involuntary. Hathorn A.C.J. rejected those suggestions and was satisfied that the statement was admissible. What was said by the Police Detective to the appellant was interpreted by a witness and interpreter who gave evidence at the trial: what was said in reply by the appellant was likewise interpreted. In charging the appellant the Police Detective said: –

"Simon Runyowa you are charged with contravening section 33A(1)(a) of the Law and Order (Maintenance) Act 1960, as amended,

in that upon or about the 2nd day of September 1963, and at 4093, S. D. Lines, Harare, Salisbury, you did wrongfully and unlawfully and without lawful excuse by the use of petrol, benzine, paraffin, methylated spirits or other inflammable liquid attempt to set on fire any person, building, structure, vehicle, aircraft or railway engine, tender, carriage, van or truck, that is to say you threw a bottle containing inflammable liquid through the bedroom window of 4093 S. D. Lines, Harare, Salisbury, the residence of African Luke Chigambura."

The reply which the appellant then made was as follows:—

" 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, Kassiano, 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 then we separated, and I went to my house. Around about 6.00 p.m. Kassiano, 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 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 they 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."

The findings of the Court were that the man who actually threw the bottle containing paraffin was the accused Chirawu and that the accused Kassiano Muringwa (who was the person referred to by the appellant in his statement) was present with Chirawu when he threw the bottle. The Court held that Muringwa's right thumb-print was found on the bottle. It was not suggested that the appellant was present when the bottle was thrown.

There was some evidence given at the trial which pointed to a possible, or, as the Court held, to even a likely, motive which would actuate the appellant to wish to harm Chigambura. Chigambura's house was No. 4093. The semi-detached adjoining house (No. 4092) was occupied by Mashingaidze. The appellant's house was No. 4089. Chigambura and Mashingaidze gave evidence at the trial. On the morning of the 1st September 1963 they had been conversing together and for a time the appellant stood and listened to their conversation. The Court found it proved that the appellant " uttered words to the effect that supporters of Sithole were sell-outs and were selling the country ". The Court also found it proved that the appellant and the man named Amon went to Mashingaidze's house while Chigambura was there and that it was plain that the appellant was contemptuous of Chigambura. The Court came to the conclusion that the evidence indicated that on the Sunday the appellant knew that Chigambura was a supporter of Sithole: and that the evidence shewed that the appellant was against Sithole and his supporters.

It is clear however that the finding of guilt against the appellant depended upon an acceptance of and upon the interpretation of the statement that he made. The appellant did not give evidence on oath. He made an unsworn statement at the trial. The real question at the trial was whether his statement to Police Detective Bennyworth once it was held to have been voluntarily made, did or did not prove his guilt of the charge. It was proved and it was held that there was an attempt to set fire to No. 4093. So far as the appellant was concerned the question was whether he was guilty of the offence of attempting to set fire to the house. It had to be proved that if he purchased and handed on the paraffin he did so knowing that it was to be used in making a fire-bomb and that he was wilfully furthering the purpose of using such

fire-bomb for the purpose of setting fire to or of attempting to set fire to House No. 4093. The judgment of their Lordships' Board in *Mapolisa v. The Queen* [1965] 2 W.L.R.199 sets out the principles which are applicable. In one of the authorities (*Rex v. Peerkhan and Lalloo* [1906] T.S.798) there cited it was said—" 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." The requirement of knowledge is of course important because it supplies the mens rea—the guilty mind—required for criminal responsibility. An accused's culpability depends upon his own mens rea and when he is charged as a socius in a crime the extent of his criminal responsibility must be judged by his own mens rea. (See *Rex v. Longone* [1938] S.A.L.R.(A.D.)532.) Both in the case of offences against the common law and offences against a statute 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.

Their Lordships are unable to say that the learned Judge and the assessors made any wrong approach in their consideration of the statement made by the appellant. With such advantage as is bestowed by knowledge of local conditions it was for them to decide whether on a fair interpretation of the appellant's statement they were sure that his guilt was established. It is true that the judgment of the learned Judge did not contain a finding as to the organiser or organisers of the crime. There was no finding that Amon, the man mentioned in the appellant's statement, was the organiser. He was not charged—and indeed he was called as a witness by the prosecution though the Court placed no reliance whatsoever upon his evidence. There was however a clear finding that the crime of attempting to set fire to house No. 4093 was committed by some persons and so far as the appellant was concerned the question for the Court was whether he (as a socius) was guilty of that crime. Apart from any such evidence as may have suggested that the appellant may have had a motive the case against him depended on the view to be formed as to whether his statement established his guilt beyond reasonable doubt. On behalf of the appellant a close analysis was made before their Lordships' Board of the words contained in the statement. It was said that a strained and unnatural meaning was given to it at the trial. On any basis it would seem to be difficult for a Court to resist the conclusion that when the appellant was charged with attempting to set fire to House No. 4093 and when he said " 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 ", he was not speaking of house No. 4093. It was submitted however that the later part of the statement i.e. in regard to events after 6.0 p.m. ought not to be considered as implicating the appellant in the occurrence of the throwing of the paraffin bottle but should be regarded as a narrative of harmless events which accounted for the appellant's movements during the evening and accounted for them in an innocent manner. It was submitted that the purchase of paraffin was an ordinary domestic incident of a harmless character and that it would be wrong to determine that the appellant's mention of it involved him in any responsibility for what others may later have done with the paraffin or proved that he had any part or complicity in what others later did. It was said that having denied the charge made against him he was merely telling the Inspector something that the Police might think relevant in regard to a fire-bomb throwing incident. These and similar submissions were directed to the contention that the guilt of the appellant was not proved beyond all reasonable doubt. These are submissions that would be presented to or would be in the minds of the learned Judge and the Assessors at the trial. It was for them to decide whether the submissions had validity. The conclusion of the Court was that the appellant " clearly aided and abetted the other participants knowing what crime was contemplated."

In his judgment in dealing with the statement of the appellant Hathorn A.C.J. said:

" . . . in it the third accused admits knowing that the purpose of the crime was to set fire to a house and the identity of its organiser. He admits knowing which house was to be set fire to, and he admits assisting in the plan by going to buy the paraffin which he handed to the other participants in the plan. Finally, he admits that they left with the paraffin saying: " We are going to our house." In the context " our house " can only mean the house which was the subject of the plan.

In those circumstances the third accused clearly aided and abetted the other participants knowing what crime was contemplated and we find accordingly. On this basis it was common cause that the third accused was a *socius criminis* and as such liable as a principal.

Mr. Dumbutshena argued that the furthest that the statement went was to show that the third accused was an inciter, and on that basis he contended that the third accused should be acquitted on the present charge because it does not include an alternative charge as an inciter under section 366A of the Criminal Procedure and Evidence Act (Cap. 28).

I cannot accept this contention. There is not one word in the statement which suggests that the accused incited anyone else to commit the crime. Indeed, the alleged inciter or organiser is named, and the accused also says that it was this person who showed them the house that he, the inciter, wanted to set on fire. All this is completely inconsistent with the third accused being an inciter."

It was submitted that the Court had placed wrong interpretations on the statement. But as their Lordships have indicated the learned Judge and the Assessors possessed the local knowledge which would assist them in applying their minds to an evaluation of the statement and of any other evidence before arriving at their finding. There was material on which their finding could properly be based and on the principles which govern their Lordships' consideration of criminal appeals no ground for impugning the finding of the Court has been shown. As has been stated there was an appeal to the Federal Supreme Court. So far as conviction was concerned the grounds of appeal were as follows:—

" 1. That the learned judge erred in law and on the facts in finding that the appellant was a socius criminis and guilty of the offence charged under section 33A of the Law and Order (Maintenance) Act.

2. That the learned judge misdirected himself in rejecting the defence submission that the appellant was, on the evidence, an inciter and should have been indicted under section 366A of the Criminal Procedure and Evidence Act (Cap. 28) as read with section 33A of the Law and Order (Maintenance) Act.

3. That the Court erred, on the merits, in finding that the appellant had made a statement to the police.

4. That there was insufficient evidence on which the Court could convict the appellant on the main charge.

5. That the conviction could not be justified in law and on the facts."

In his judgment Quenet F.J. said that the ground of appeal which was urged was that the trial Court erred in holding that the appellant participated in the commission of the offence. The other grounds of appeal were abandoned. The Federal Supreme Court must have considered whether the learned Judge and the Assessors had mis-interpreted the appellant's statement or had given it a content which on a fair reading it did not possess. The Federal Supreme Court did not take that view. Their conclusion was expressed by Quenet F.J. as follows:—

" The judgment refers to the fact that the appellant had a possible motive to injure the owner of the house which was to be set on fire. Although the evidence did not establish the appellant accompanied the others to the scene, he knew the house which was to be burnt and he knew the method which was to be employed. He himself had bought paraffin to be used in the project and it was he who handed the paraffin to one of his companions. On this evidence the trial Court concluded that the

appellant's conduct made him a *socius criminis* in the commission of the crime and, as such, was liable as a principal. I cannot myself see any ground for holding that the trial Court was wrong in convicting the third appellant of the crime laid to his charge."

No error in the approach of the Court has been shown.

On behalf of the appellant a further point was taken. It was contended that section 37(1)(c) of the Law and Order (Maintenance) Act is either as to the whole of it or in part ultra vires. It was said that it is invalid as contravening the prohibitions of section 60 of the Constitution. This point, taken in the appellant's case. was not raised either at the trial or in the Federal Supreme Court. The difficulty of allowing a new point to be taken before their Lordships Board was relieved by the fact that the precise point was raised in the Appellate Division of the High Court of Southern Rhodesia in another case (Gundu and Sambo and Hayward and the Attorney General of Southern Rhodesia) with the result that their Lordships have the considered views of the learned Judges of the Appellate Division. In the case just referred to the Judgments were delivered on the 9th June 1965 (No. A.D. 97/65). In the special circumstances their Lordships allowed the point to be taken and heard full argument upon it.

Section 60 of the Constitution is in Chapter VI which has the heading " The Declaration of Rights." The words which precede the sections in the chapter are as follows:—

" Whereas it is desirable to ensure that every person in Southern Rhodesia enjoys the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin, political opinions, colour or creed, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;

(b) freedom of conscience, of expression, and of assembly and association; and

(c) respect for his private and family life,

the following provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to the limitations of that protection contained in those provisions."

Section 60 is in the following terms:—

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

(2) No treatment reasonably justifiable in the circumstances of the case to prevent the escape from custody of a person who has been lawfully detained shall be held to be in contravention of this section on the ground that it is degrading.

(3) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the doing of anything by way of punishment or other treatment which might lawfully have been so done in Southern Rhodesia immediately before the appointed day."

The word " lawfully " is referred to in the Interpretation Section (section 72) where it is provided:—" law " means—

" (a) any provision of any law passed by the Legislature of Southern Rhodesia;

(b) any provision of any instrument having the force of law made in the exercise of a power conferred by that Legislature;

(c) any unwritten law in force in Southern Rhodesia other than African customary law, and " lawful " and " lawfully " shall be construed accordingly."

The argument that was advanced involved a consideration of the meaning, in its context, of the word " punishment ". It was not contended that it

can be said that the death penalty is per se or necessarily an " inhuman or degrading punishment ".

Such a contention could in any event hardly have been advanced in view of the terms of section 57(1) of the Constitution. That sub-section provides that " no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted." The death sentence as a possible sentence is recognised. It was conceded therefore that if in section 60 the words " inhuman or degrading punishment " refer to types or modes or descriptions of punishments, the submission that section 37(1)(c) of the Law and Order (Maintenance) Act is ultra vires must fail. The basis of the argument advanced was that the word punishment conveys the notion of the infliction of some penalty which is deserved or warranted by reason of the commission of some offence. Hence, so the argument ran, a punishment which is out of relation to that which, in particular circumstances or in reference to an offence of a particular nature, is deserved, may be an " inhuman " punishment. The respects in which, according to the argument, it could be said that section 37(1)(c) provided a punishment which was " inhuman " and so was unconstitutional were (a) that it provided for a mandatory death penalty and accordingly gave a Court no discretion in passing sentence to assess the gravity of the conduct in any particular case or to have regard to any extenuating circumstances (b) that it so provided not only in respect of an actual perpetrator of a deed but also in respect of one who is a socius criminis (c) that it so provided in the case of attempts and (d) that it so provided, in the case of a residence, whether or not at the time of the commission of the offence any other person was present in the residence.

The argument involved that sub-section 3 of section 60 should be read as referring to the doing of anything by way of punishment which before the appointed day could have been done in relation to a similar offence with the result that the sub-section covered punishments to the extent to which they were previously attached to or stipulated for particular offences.

The consequences so far as concerns the present case if the argument were successful were not very explicity defined. They need not be fully explored. One suggestion was that section 37(1)(c) should be regarded as unconstitutional and accordingly should be wholly eliminated—while leaving the other parts of section 37(1). On this basis the offences created by section 37(1)(a) and (b) would be left but the statutory penalty struck out. Another suggestion was that, quite apart from appeal procedure, the requirement of section 60 would be met if a Court formed a judgment as to whether the circumstances of a particular case warranted and merited the death penalty and if the court considered that they did not that the mandatory requirement of section 37(1)(c) should be disregarded. Another suggestion was that the requirements of section 60 were such that section 37(1)(a) (and presumably (b)) should be read as though the words " or attempts to " were deleted. Another suggestion was that section 37 should not be read as applying to a socius criminis or should not be read as making the death sentence mandatory in the case of a socius criminis with the result that the punishment for the offence would be in the discretion of the Court. Another suggestion was that though the section itself need not be condemned as unconstitutional with the result that it could be and indeed would have to be fully applied by the Court yet it would be unconstitutional for the Executive to carry out the sentence. The mere statement of these suggested (though alternative) consequences may reveal the difficulties involved in an acceptance of the argument advanced. The argument falls to be considered however purely as a matter of the construction of words in their context.

Their Lordships were referred to certain American authorities (including the majority and the minority opinions in *Weems v. U.S.* 217 U.S. 349). Helpful as the citations were and valuable as must be a consideration of any judgments of the Supreme Court it must not be forgotten that the wording of the Eighth Amendment differs manifestly from the wording of section 60. Different conceptions are involved. The Eighth Amendment provides that— " Excessive bail shall not be required nor excessive fines imposed nor cruel

and unusual punishments inflicted." In *Weems* v. *U.S.* (*supra*) it was held by a majority that the Philippine code imposed a cruel and unusual punishment when it enacted that the falsification by a public official of a public and official document must be punished by fine and imprisonment at hard and painful labour for a period ranging from 12 years and a day to 20 years the prisoner being subject as accessories to the main punishment to carrying during his imprisonment a chain at the ankle hanging from the wrist, to deprivation during the term of imprisonment of civil rights and to perpetual absolute disqualification to enjoy political rights, hold office etc. and to surveillance of the authorities during life. Their Lordships were also referred to certain of the judgments in *Lambert* v. *People of the State of California* 355 U.S. 225 to the effect that a cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment as a cruel and unusual punishment and in respect to the States may even offend the Due Process Clause of the Fourteenth Amendment.

The problem before their Lordships is that of construing the particular words of section 60 of the 1961 Constitution. No person is to be subjected (*a*) to torture (*b*) to inhuman or degrading punishment or (*c*) to inhuman or degrading treatment. As a matter of construction their Lordships (in agreement with the Judgments in the Appellate Division of the High Court of Southern Rhodesia in Gundu and Sambo's Case) consider that the ban that is imposed is upon any such type or mode or description of punishment as is inhuman or degrading. Since it is not suggested that the death penalty is of such type or mode or description it follows that the argument advanced on behalf of the appellant must fail. So far as this conclusion needs any support it amply finds it in the provision contained in sub-section 3. The result of that sub-section seems clearly to be that nothing contained in any written law (e.g. The Law and Order (Maintenance) Act) is to be held to be in contravention of section 60 to the extent that it authorises the doing of anything by way of punishment which might under any provision of any law passed by the Legislature of Southern Rhodesia have been done by way of punishment in Southern Rhodesia immediately before the appointed day. The death penalty was one of the modes or types or descriptions of the punishments known in Southern Rhodesia before the appointed day (see section 360 under the heading " Punishments " in the Criminal Procedure and Evidence Act). Furthermore the words " the doing of anything by way of punishment " would seem to denote a type or form or method of punishment.

The word " punishment " must have the same meaning in sub-section 1 and in sub-section 3. The word " treatment " must have the same meaning in each of the three sub-sections and what is denoted (as sub-section 2 clearly illustrates) is a mode of treatment.

It can hardly be doubted that the word " so " in sub-section 3 of section 60 refers to the earlier words " by way of punishment or other treatment." It was contended however that in the sub-section the words " the doing of anything by way of punishment " should be read as meaning the doing of anything by way of punishment in relation to a similar offence—with the result that the purpose and the effect of sub-section 3 was merely to avoid invalidating future punishments after the appointed day to the extent to which in relation to similar offences they were lawful before the appointed day. Their Lordships cannot agree. Such a construction involves reading in to the sub-section words which are not there. It is to be observed also that there is an express provision in section 70(1)(*b*) which relates to a special saving of previously existing law. Section 70(1)(*b*) provides:—" Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of any of the provisions of sections 57 to 68.— . . . . . .

(*b*) if the law in question was in force immediately before the appointed day and has continued in force at all times since that day." . . . . . .

If the contention of the appellant had been correct the Courts in Southern Rhodesia would be involved in enquiries as to the constitutional validity of legislation which would extend altogether beyond the duty of considering

whether some law contravened section 60 for the reason that it imposed some novel form of punishment which is inhuman or degrading. A legislature may have to consider questions of policy in regard to punishment for crime. For a particular offence a Legislature may merely decree the maximum punishment and may invest the Courts with a complete discretion as to what sentence to impose—subject only to the fixed maximum. There may be cases however where a Legislature deems it necessary to decree that for a particular offence a fixed sentence is to follow. As an example a Legislature might decide that upon conviction for murder a sentence of death is to be imposed. A Legislature might decide that upon conviction of some other offence some other fixed sentence is to follow. A Legislature must assess the situations which have arisen or which may arise and form a judgment as to what laws are necessary and desirable for the purposes of maintaining peace order and good government. It can hardly be for the Courts unless clearly so empowered or directed to rule as to the necessity or propriety of particular legislation. Nor can it be for the Courts without possessing the evidence upon which a decision of the Legislature has been based to over-rule and nullify the decision. As Quenet A.C.J. said (in Gundu and Sambo's case), if once laws are validly enacted it is not for the Courts to adjudicate upon their wisdom, their appropriateness or the necessity for their existence. The provision contained in section 60 of the Constitution enables the Court to adjudicate as to whether some form or type or description of punishment newly devised after the appointed day or not previously recognised is inhuman or degrading but it does not enable the Court to declare an enactment imposing a punishment to be ultra vires on the ground that the Court considers that the punishment laid down by the enactment is inappropriate or excessive for the particular offence. Harsh though a law may be which compels the passing of a mandatory death sentence (and may so compel even where aiding or abetting or assisting is by acts which, though proximate to an offence, are relatively trivial) it can be remembered that there are provisions (e.g. section 364 of the Criminal Procedure and Evidence Act in Southern Rhodesia) which ensure that further consideration is given to a case.

For the reasons which they have set out their Lordships must humbly advise Her Majesty that the appeal be dismissed.

(93477) Wt. 8052/124 90 2/66 Hw.

In the Privy Council

SIMON RUNYOWA

v.

THE QUEEN

DELIVERED BY

LORD MORRIS OF BORTH-Y-GEST

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