

~~661-6-2~~

20, 1966

IN THE PRIVY COUNCIL

No. 22 of 1965

ON APPEAL

FROM THE FEDERAL SUPREME COURT AT SALISBURY,
SOUTHERN RHODESIA

B E T W E E N :

KESIWE MALINDI Petitioner

- and -

THE QUEEN Respondent

C A S E F O R T H E A P P E L L A N T

Record

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1. This is an appeal in forma pauperis by Special Leave granted on the 22nd day of December, 1964, from the Judgment of the Federal Supreme Court at Salisbury; Southern Rhodesia, (Quenet F.J., Forbes F.J., and Clayden C.J. dissenting), dated the 12th day of August 1963, whereby the Federal Supreme Court dismissed the Appellant's appeal from his conviction and sentence by the High Court of Southern Rhodesia (Maisels, J. sitting with assessors) at Salisbury on the 25th day of October, 1962, for the offence of (a) conspiring to commit arson and malicious injury to property, for which he was sentenced to 10 years' imprisonment with hard labour, and (b) arson, for which he was sentenced to 5 years' imprisonment with hard labour, the sentences to run concurrently.

p.410
p.381

pp.339-380

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2. That the principal question arising in this appeal is -

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That the learned trial judge erred in law in that he allowed certain questions relating to the bad character of the accused to be put to him by the prosecution notwithstanding that the accused had not put his character in issue.

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pp.1-4

3. That the Appellant was charged in the Indictment with -

(1) Conspiring with other persons to aid or procure the commission of or to commit the offences of arson and malicious injury to property in contravention of paragraph (a) of sub-section (2) of Section 366A of the Criminal Procedure and Evidence Act (Cap.28), in that upon or about the 14th May, 1962, and at or near Chinyika Native Reserve in the district of Salisbury aforesaid, the Appellant did wrongfully and unlawfully conspire with Hensiby, Masawi, Lovemore, Sixpence and Ronnie and Nowa natives there residing, all and each or with one or more of them, to aid or procure the commission of or to commit offences, that is to say, the offences of wrongfully, unlawfully and maliciously setting fire to and setting on fire -

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(a) a certain hide shed and a certain dip storage shed situated at the Chinyika Dip Tank in the Chinyika Native Reserve aforesaid, the property of the Trustees of the Native Reserves and in the lawful custody of Chawada, a native there residing; and

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(b) certain huts situate in the Chinyika Native Reserve aforesaid, the property of Tigere, a native there residing, or the property of the Trustees of the Native Reserves and in the lawful custody of the said Tigere; and

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(c) a certain church situated in the Chinyika Native Reserve aforesaid, the property of the Roman Catholic Church or the property of the Trustees of the Native Reserves, and in the lawful custody of Ernest, a native there residing; and

(d) a certain hide shed and a certain dip storage shed situated at the Kumswe Dip Tank in the Chinyika Native Reserve aforesaid, the property of the Trustees of the Native Reserves; and

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(e) a certain maize field situate at Baines Hope Farm in the district of Salisbury aforesaid, the property of John Adams Gwynne Hughes, a European farmer there residing;

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with intent to burn and destroy the said hide shed and dip storage shed situated at the said Chinyika Dip Tank, the said huts of the said Tigere, the said school house, the property of the Roman Catholic Church or the Trustees of the Native Reserves, the said hide shed and dip storage shed situated at the said Kumswe Dip Tank, and the said maize field, the property of the said John Adams Gwynne Hughes; and with intent to injure the said Trustees, the said Tigere, the Roman Catholic Church and the said John Adams Gwynne Hughes, all and each or one or more of them, in their property; and thus the Appellant did commit the crime of Conspiring with other persons to aid or procure the commission of or to commit arson and malicious injury to property in contravention of paragraph (a) of sub-section (2) of section 366A of the Criminal Procedure and Evidence Act /Chapter 28/".

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There was an alternative to this charge, namely, that the accused was guilty of the crime of Inciting, instigating, commanding or procuring other persons to commit the offences of arson and malicious injury to property in contravention of paragraph (b) of sub-section (2) of section 366A of the Criminal and Evidence Act (Cap.28). Particulars of this charge were substantially the same as those of the main count.

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(2) Arson, "in that upon or about the 14th day of May, 1962, and at or near Chinyika Reserve in the district of Salisbury aforesaid, the accused did wrongfully, unlawfully and maliciously set fire to and set on fire a certain church there situated, the property of the Salvation Army or the Trustees of the Native Reserves and in the lawful custody of Gudza, an officer of the Salvation Army there residing; with intent to burn and destroy the same, and did then and there and thereby burn and destroy the said church, with intent to injure the Salvation Army or the

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Trustees of the Native Reserves in their property; and thus the accused did commit the crime of Arson."

4. That the case for the prosecution was that at a meeting held at a football field in Goromonzi on the 14th day of May, 1962, the Appellant conspired with Hensiby, Masawi, Lovemore, Sixpence and Ronnie to set alight and to damage the various places mentioned in the indictment and that this meeting was a sequel to a previous meeting held at the Appellant's house on the 12th day of May, 1962, the origin of which was to be found in an approach made by certain of the accomplices to the Appellant on Friday, the 11th day of May, 1962. 10

pp.38, 108,
175; 198,
145, 216,
246

5. That the evidence against the Appellant was mainly that of seven accomplices, namely Masawi, Lovemore; Sixpence, Hensiby, Ronnie, Nowa and Supa. Of these, the first four were convicted and sentenced for their parts in the crimes that they admitted having committed. The last three— Ronnie, Nowa and Supa - had not been charged with complicity in the crimes and as they had duly answered all questions put to them, they were discharged from liability to prosecution under Section 289 of the Criminal Procedure and Evidence Act. 20

pp.41-42;
119, 147,
199, 217

6. That Masawi, Lovemore, Ronnie, Hensiby and Nowa gave evidence that they met on Friday, the 11th day of May, 1962 and they had a discussion about "taking action" in the Chinyika Reserve; that they (excluding Ronnie) then went to see the Appellant who approved of "the action" and suggested that they should all meet at his house on the following evening i.e. Saturday, the 12th day of May, 1962. 30

pp.45, 11,
148; 201;
213, 247,
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7. That all seven accomplices testified that a meeting was held at the Appellant's house on Saturday evening, the 12th day of May, 1962. The meeting was attended by the Appellant, one Agrippa Sevenzayi (the local Secretary of Zapu, the Zimbabwe African People's Union), Masawi, Lovemore, Ronnie, Nowa and Supa. Hensiby remained outside to keep watch and Sixpence arrived at the end of the meeting. Masawi, Lovemore, Ronnie, Nowa and Supa testified that the Appellant asked 40

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at the meeting "what is a nationalist", and that he read passages from a red book to the effect that Africans must not fraternise with Europeans. They also testified that they were formed into groups for the purpose of taking action in regard to acts of burning.

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10 8. That Masawi, Lovemore, Ronnie, Sixpence, Hensiby and Nowa also gave evidence that a meeting was held at a football ground on Monday night the 14th day of May, 1962 which was attended by them all and the Appellant. They testified that at this meeting, the Appellant told them to perform acts of burning as follows:-

pp.55, 115,
152; 177,
203, 222

20 Masawi to burn the house of one Tigere, a police reservist. Nowa and Hensiby to burn the dip tank and shed at Chinyika. Lovemore and Sixpence to burn the church and dip tank at Ruseke. The Appellant to burn a church at Chinyika and Ronnie to burn a maize field of a Mr. Hughes, but Ronnie said he had a sore leg and could not go.

pp.58, 204

30 Masawi and Hensiby also testified that they went to Hensiby's house after the meeting, and that the Appellant came to the house at 11 p.m. but that Nowa did not come. There was a change of plan and Masawi and Hensiby were to go together to burn the dip tank and shed at Chinyika. The two witnesses said that they left the house with the Appellant who put on a sack and covered his shoes with plastic. They went together for part of the way and then parted, they going to burn the dip tank and shed and the Appellant going in the direction of the church.

pp.59, 205

40 9. That there were various contradictions between the evidence in chief, the evidence on cross-examination and the previous evidence in the Magistrate's court of the witnesses Masawi, Lovemore and Ronnie. The learned trial judge found that these accomplices were untrustworthy witnesses. The learned judge, however, found that the evidence of the others - Sixpence, Hensiby, Nowa and Supa - was in its substantial features acceptable. He found that the accomplices corroborated one another substantially.

10. That after the arrest of the Appellant his house was searched and two note books were found,

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a red covered book (Exhibit 8) and a brown covered book (Exhibit 9). Exhibit 8 contained notes and essays and Exhibit 9 was the beginning of an autobiography called "My Life" and also contained an essay called "Zimbabwe". As part of the case for the prosecution, extracts from these exhibits were read. An essay called "My Surroundings Now" which dealt with the unjust distribution of land in the country, and a set of notes called "Nationalist Principles" were read. From Exhibit 9 passages were read which indicated views that religion was used by the capitalists, the Europeans, to maintain exploitation of the African, and that missionaries had come to enable the European to take the country and freedom from the African, and leave the African only with religion.

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11. That the Appellant gave evidence in his own defence as follows:-

p.265

" On the 11th May this year when I was leaving my school, Ronnie and Masawi approached. They asked if they could talk to me. I waited until they came where I was. Ronnie told me that there would be a strike in Salisbury the following Monday. I asked him how he knew. He told me that he had got some information. He told me that the Youth movement in Goromonzi had decided to take action; so they had sent to ask me if I would join them. I told them I had nothing to do with the youth Movement; I was not a youth member. They should go and see the secretary. The following day at about five thirty p.m. the secretary in company of

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BY MAISELS, J.: Is that Sevenzayi? -

Yes, my Lord.

In company of? - Of Ronnie, Masawi, Nowa Hensiby, Supa, and Sixpence, came to my house. They stood outside my garden which is just about five yards from my house and asked if they could talk to me. I invited them into the sitting room. When we got there Sevenzayi repeated what the boys had said the previous day. I asked him what action he had in mind. He gave as an example, churches, dip

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10 tanks, and mealie lands. I told him of the lack of education facilities in Goromonzi. I brought to his knowledge the statement by Mr. Nkomo that no members of ZAPU would act without his directions. I told him about the illegality of those activities he had proposed. I suggested that they make a procession and even told them that that, also, would need permission. An argument then ensued which ended when the whole group walked out of my house with some shouts that I was a moderate and a police informer; that if I revealed this to the police it would act upon me. The whole group left. I remained in my house thinking about what had happened. I then decided to write to the regional office and tell them about what had happened. This I did, and posted my letter. I did not receive any reply until I was arrested.

20 BY MAISELS, J.: When were you arrested?

- I was arrested on the 6th June. That is all, my Lord."

When the Appellant was being cross-examined, Counsel for the Crown indicated to the learned trial judge that he proposed to cross-examine on certain passages in Exhibit 8:-

30 "MR. MASTERSON: (To Court) I wish to proceed with the cross-examination at this stage in relation to certain passages which are included in exhibit 8. Before I do so, I would like to raise expressly the question of the admissibility of my doing so in view of the provisions of section 303 of the Criminal and Procedure Evidence Act.

p.274

MAISELS, J: What is relevant?

40 MR. MASTERSON: I wish to cross-examine the accused on the possibility of his previously having held notions which could possibly suggest that he is a man of bad character.

MAISELS, J.: Surely you are not cross-examining on that to show he is a man of bad character.

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MR. MASTERSON: That is certainly what I would submit to your Lordship.

MAISELS, J.: As I understand it, you are proposing to put to him certain statements here because they are relevant to the question as to whether or not he took part in the matters which have given rise to the present case.

MR. MASTERSON: That is so.

MAISELS, J.: I do not see how section 303 comes into it. This is a document found in his possession. You are not cross-examining that he committed other offences? 10

MR. MASTERSON: No, not other offences, but I will be cross-examining him to the effect that on a previous occasion he has suggested or held views which were consistent with the desirability of offences being committed.

MAISELS, J.: But that has nothing to do with section 303. 20

MR. MASTERSON: I am indebted to Your Lordship. If I may have exhibit 8, I will proceed there."

The cross-examination then proceeded. The Appellant admitted that he wrote the essay in Exhibit 8 which contained the following passage:-

p.275

"Violence is necessary and stones must be thrown to compel them to surrender; and notice here the unity among the masses is most essential. In conclusion, I would like to encourage all nationalists to be brave and uncompromising, to stand up and uphold comrade Nkomo, and throw as many stones as possible to expel these wolves from our land"? 30

p.277

The Appellant said that the essay in which this passage occurred referred to changes in the Southern Rhodesia Constitution announced on 8th day of February, 1961 and

that the essay was written on that day. The Appellant admitted that the passage expressed his thoughts at the time, that "wolves" referred to white settlers and that he had not changed the views expressed. The Appellant pointed out that in all his views there was nothing which referred to the burning of schools and that he would have condemned such acts at all times.

10 12. That Section 303 of the Criminal Procedure and Evidence Act, in so far as it is relevant to this Petition, provides as follows:-

"An accused person called as a witness on his own application shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or has been convicted of, or has been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless -

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(a) he has himself given evidence of, his own good character; or

(b) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged."

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13. That the Appellant respectfully submits that the learned trial judge was wrong in saying that Section 303 has no application because the questions on cross-examination were on a relevant matter. It is submitted that even if the questions put to Your Petitioner on the "violence" passage were relevant to the question as to whether or not he took part in the burning, they could only have been asked if they were covered by the permitting provisions of Section 303. It is further submitted that the Appellant did not put his character in issue in his evidence in chief, but was merely setting up his defence negating the charge of conspiracy. The cross-examination as to his bad character was therefore improper and contrary to Section 303(a) of the Criminal Procedure and Evidence Act. It is finally submitted that this inadmissible cross-examination of the accused on the passages contained in the

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essays was highly prejudicial and must have affected substantially the Court's judgment.

14. That the Appellant appealed to the Federal Supreme Court against conviction and sentence on the following grounds :-

p.380

(a) That the Court was influenced by essays written by the Appellant and produced as evidence against him.

(b) That the Court was misled by the evidence given by the witnesses which were untruthful. 10

(c) That the Appellant did not commit the crime.

pp.400,
407

15. That the appeal was heard by Clayden, C.J., Quenet, F.J., and Forbes, F.J. on the 10th and 12th days of June, 1963. In their judgments dated the 12th day of August, 1963, Quenet and Forbes, F.J.J. dismissed the appeal, whilst Clayden, C.J. considered that the appeal should be allowed and the conviction and sentences set aside. Clayden, C.J. held 20

(a) that the questions relating to Your Petitioner's views on violence were questions tending to show that he was of bad character;

(b) that the trial judge was wrong when he ruled that section 303 had no application because the questions were on a relevant matter;

(c) that the Appellant had not given evidence of his good character and that therefore the cross-examination as to violence was not justified under Section 303(a); and 30

(d) that the verdict must be set aside because it cannot be said that a Court, without the inadmissible evidence would have convicted.

p.406

Quenet, F.J. considered that the evidence in chief of the Appellant amounted to evidence of 40

10 good character and that his cross-examination on the questioned evidence was covered by the permitting provision of Section 303(a); that although the cross-examination was allowed on a different basis, the Appellant did not suffer any prejudice by reason of that fact because, for all practical purposes, the evidential value of the questioned evidence was the same; and that the legitimate probative force of the essays was considerable, and any prejudicial effect resulting from their admission cannot be said to have been out of proportion of their true evidential value.

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Forbes, F.J. agreed with the law as stated in the judgment of Clayden, C.J. but considered that the Appellant had in fact put his character in issue and that the cross-examination as to violence was permissible under Section 303.

p.408

20 The Appellant submits that this appeal should be allowed for the following (among other)

R E A S O N S

1. BECAUSE the admission of prejudicial evidence of bad character resulted in a miscarriage of justice.
2. BECAUSE of the reasons given by Clayden C.J. in his dissenting judgment in the Federal Supreme Court.

E.F.N. GRATIAEN
MONTAGUE SOLOMON

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BETWEEN:

KESIWE MALINDI
Appellant

- and -

THE QUEEN
Respondent

C A S E

FOR THE APPELLANT

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