

~~P.C.~~
GGT 6-2

Judgment
20, 1966

1.

IN THE PRIVY COUNCIL

No. 22 of 1965.

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF RHODESIA AND
NYASALAND

B E T W E E N:

KESIWE MALINDI Appellant

- and -

THE QUEEN Respondent

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

RECORD

10 1. This is an appeal from a judgment of the Federal Supreme Court of Rhodesia and Nyasaland (Quenet and Forbes, F.JJ., Claydon, C.J. dissenting), dated the 12th August, 1963, which dismissed an appeal from the conviction and sentence of the High Court of Southern Rhodesia (Maisels, J. and two assessors), dated the 25th October, 1962, whereby the Appellant was found guilty of conspiring to commit arson and malicious injury to property, and of arson, and was

20 sentenced to 10 years' and 5 years' imprisonment respectively, the sentences to be concurrent. p.380

2. The relevant statutory provisions are:

"Criminal Procedure and Evidence Act

303. An accused person called as a witness upon 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

30 wherewith he is then charged, or is of

PC

~~66162~~

RECORD

2.

bad character, unless -

a) he has personally or by his counsel, attorney or law agent asked questions of any witness with a view to establishing or has himself given evidence of, his own good character, or unless the nature or conduct of the defence is such as to involve imputation of the character of the prosecutor or the witnesses for the prosecution; or

10

d) 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 wherewith he is then charged.

* * * *

309. No witness in any criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which, if he were under examination in any similar case depending in the Supreme Court of Judicature in England, he would not be compelled to answer by reason that his answer might have a tendency to expose him to any pains, penalty, punishment or forfeiture, or to a criminal charge or to degrade his character:

20

30

Provided that, anything to the contrary notwithstanding in this section contained, an accused person called as a witness on his own application in accordance with section two hundred and seventy-two of this Act may be asked any question in cross-examination; notwithstanding that it would tend to incriminate him as to the offence charged against him."

40

p.1

3. The Appellant was indicted on two counts; the first count charged conspiracy on the 14th, May 1962 with certain named natives to commit arson and malicious damage to property at specified places in the Chinyika Native Reserve

contrary to section 366A(2)(a) of the Criminal Procedure and Evidence Act, or alternatively incitement to commit such crimes; the second count charged arson of the Salvation Army Church at the same Reserve on the same date. p.4

4. The trial took place between the 15th and 25th October, 1962, before Maisels, J. and two assessors, at Salisbury, Southern Rhodesia. The evidence called on behalf of the prosecution included the following: pp.5-338

10

a) Police Sergeant Carver produced two plans and photographs relating to the places referred to in the indictment: the photographs showed a burnt church and hide-store. The witness said he had arrested a suspect called Sixpence, and had found a note upon him. When he arrested the Appellant, on the 6th June, 1962, he had searched his house, and found a roneo-ed strike notice (exhibit 7). He had also found other documents in the Appellant's house, including a red covered exercise book (exhibit 8). The witness read three passages from this exhibit, which included an essay entitled "My Surroundings Now" and an entry on the back entitled "Nationalist Principles"; the Appellant's name had been written on the front cover. p.11
pp.12, 13
& 14
p.19
11.18-23
p.20 1.23-
p.21 1.37

20 (exhibit 7). He had also found other documents in the Appellant's house, including a red covered exercise book (exhibit 8). The witness read three passages from this exhibit, which included an essay entitled "My Surroundings Now" and an entry on the back entitled "Nationalist Principles"; the Appellant's name had been written on the front cover. p.23 1.14-
p.25 1.39

30 Another document found had been a brown covered book bearing the Appellant's name (exhibit 9), from which the witness read two passages. p.25 1.40-
p.26 1.39

b) Masawi, Lovemore, and Ronnie all gave evidence that they were serving sentences for conspiring to commit arson at Chinyika Reserve, and their subsequent evidence implicated the Appellant in the conspiracy. p.38
p.108
p.145

40

c) Sixpence said that he was serving a sentence for arson of a school in the Chinyika Reserve during May, 1962. On the Saturday before the fires were started he had been called to a meeting with other witnesses by the Appellant at which he had been told that he would be part of a group for an unstated purpose; two days later he had been taken into the bush by the Appellant, and, at a p.175
p.176 1.21
p.177 1.20-
178 1.35

RECORD

meeting with other witnesses, had been told by him to go and set fire to the school, and given paraffin and rags and matches; others present had agreed to go and burn other places. In fact he had later set fire to the school.

- p.198 d) Hensiby, aged 13½, said that he had taken part in causing a fire at the dip tank at Chinyika in May; on the previous Saturday he had attended a meeting at the Appellant's house with other witnesses, and a further meeting on the following Monday, when the Appellant had told different groups which fires they were to start. The meeting had dispersed, and he had later gone with the Appellant to the Chinyika Church, where he had been told to go off and burn the dip-tank, which he had done. 10
- p.200,
1.29
- p.203,
1.23
- p.206,
1.10
- p.216 e) Nowa, aged 16, said he had attended the meetings on the Saturday and Monday before the fires, and had heard the Appellant read from a red book and discuss nationalism; those present had agreed to take "an action"; they had been formed into groups by the Appellant, and the use of paraffin for starting fires had been discussed. The witness had been frightened, and had taken no further part. 20
- p.220,
1.28
- p.224,
1.33
- p.246 f) Supa said he had attended the meeting on the Saturday night, at which the Appellant had read from a red covered book, and had then divided those present into groups delegated to carry out burnings and other things; all present had appeared to agree. The witness had taken no further part in what followed. 30
- p.249,
1.29
- p.254 g) Gudza and Sawada said that the fires at the Salvation Army Church and the dip-tank had happened between 10 and 10.30 p.m. on Monday, 14th May, 1962.
- p.256
- pp.233-237 h) The Appellant, whose counsel had withdrawn from the case during the hearing of the prosecution evidence, made formal admissions that on the night of the 14th May, 1962 malicious fires had taken place at Chinyika dip-tank, St. Dominic's School, Kunswe dip-tanks and Chinyika Salvation Army 40

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

24 APR 1967

25 RUSSELL SQUARE
LONDON, W.C.1.

Church.

5. The Appellant gave evidence in his own defence as follows:

10 " 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.....

p.265
11.1-41

20 BY MAISELS, J.: Is that Sevenzayi?
Yes, my Lord.

30 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 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, 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 happened. I then decided to write to the regional office and tell them about what had happened. This I did, and posted my

40

letter. I did not receive any reply until I was arrested."

During his cross-examination, the following passage occurred between Mr. Masterson, Counsel for the Crown, and the Judge:

p.274, 1.6-
p.275, 1.14

"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 Procedure and Evidence Act.

10

MAISELS, J.: What is relevant?

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.

20

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.

30

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?

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.

40

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

10 The Appellant was then cross-examined at length
about the contents of the notebooks produced in
evidence, including those parts which had already
been read to the Court. These passages tended
to advocate violence and the overthrow of the
government of Southern Rhodesia. The Appellant
asserted that passages indicating that he was a
supporter of peaceful methods and an opponent of
arson had been removed from exhibit 8; and in
any event he had never advocated any particular
acts of violence. In further cross-examination,
the Appellant denied being involved in the
conspiracy alleged by the prosecution witnesses.

p.275-337.

20 6. Maisels, J. began his judgment by stating
the charges and referring to the fact that the
prosecution relied mainly upon the evidence of
accomplices in its allegation that, on the 14th
May, 1962, the Appellant had conspired with the
persons named in the indictment to set alight and
damage the various places specified. The learned
Judge then reviewed in detail the evidence given
by each of the actual or potential accomplices;
all such evidence clearly implicated the Appellant
in the conspiracy. Masawi had been trying to tell
the truth, but it would not be safe to place
complete reliance on what he said; however, the
30 Court did accept certain parts of his evidence,
including the facts that there had been a meeting
on Saturday, 12th May, and at it the Appellant had
read from Exhibit 8, which was confirmed by all
the others who said they had been present. The
evidence of Lovemore had been treated with even
more caution, and the Court thought that it would
be unsafe to place reliance on his evidence,
certainly standing by itself. Ronnie's evidence
was not reliable and the Crown had so submitted.
40 The evidence of Sixpence, Hensiby, Nowa and Supa
was accepted by the Court, as was the other
evidence called by the Crown, with the exception
of that of a witness named Joseph, whose evidence
was entirely disregarded.

p.339-377

7. The learned Judge then considered the
evidence of the Appellant. He set out a number
of reasons for rejecting that evidence, and for
concluding that the Appellant had organised the

p.363, 1.38-
p.377.

RECORD

meeting of the 12th May and had not objected to the plan to start fires. The Appellant had falsely denied that Exhibit 7 (the strike notice) had been in his house, which supported the evidence that he had used it on the 12th May. There was evidence to show that the Appellant had played an important part in nationalist activities; he was a person of strong character and held strong political views, to which he was perfectly entitled; however, the elaborate plan for carrying out several fires could not have been organised by a simple person like Ronnie, as the Appellant had suggested, but the planning pointed strongly towards the Appellant being the organiser, and this was borne out by the activities of the Appellant after the fires, and in particular by his writing Exhibit 6 (a note from him to the secretary of ZAPU). The Court found that the Appellant was an evasive and untruthful witness, an example of which was his false allegation that the police had deliberately mutilated Exhibit 8; his allegation that that Exhibit had contained statements of peaceful intention had only been an attempt to mislead the Court. The Court was satisfied that the Appellant had organised the burnings as a whole, and had taken part in the actual burning of the Church at Chinyika. The learned Judge then directed himself in detail upon the requirements relating to the corroboration of accomplices' evidence, and held that these had been satisfied. The Court accordingly held the Appellant guilty upon both counts of the indictment. He was sentenced to ten years' imprisonment on the first count, and five years' imprisonment on the second count, the sentences to run concurrently.

10

20

30

p.380

8. The Appellant appealed to the Federal Supreme Court, against conviction and sentence, on the grounds that the trial Court had been influenced by essays written by him, that the Court had been misled by witnesses who were untruthful, and that he did not commit the crime.

40

p.409-410

9. The appeal was heard on the 10th and 12th June, 1963 by Clayden, C.J. and Quenet and Forbes, F.J.J. It was dismissed (Clayden, C.J. dissenting) on the 12th August, 1963.

p.381-p.400

10. Clayden, C.J., in his dissenting judgment, referred to the introduction in evidence by the

prosecution of Exhibits 8 and 9, and the use made of them in cross-examination of the Appellant; one such use had been to attack the Appellant's evidence that he had tried to dissuade the other Africans from resorting to burning, and that he was a man of peace. The learned Chief Justice said that whether such cross-examination was permissible depended upon the construction of section 303 of the Criminal Procedure and Evidence Act of Southern Rhodesia, which was the same as part of section 1 of the English Criminal Evidence Act, 1898. The questions which arose in the appeal were whether the cross-examination tended to show that the Appellant was of bad character, and, if so, whether it was admissible to prove motive, or because the Appellant had put his character in issue, or because it went to show his guilt upon the offences charged. After considering authorities upon the English Act, Clayden, C.J. held that the questions objected to did relate to the "bad character" of the Appellant, and further that, on the facts, the questions did "tend to show" such bad character. Maisels, J. ought, therefore, to have considered the application of section 303 before permitting the questions. In the view of the learned Chief Justice, the facts did not show that the Appellant had put his character in issue so as to justify the asking in his cross-examination of the questions relating to Exhibits 8 and 9. The irregularity arising from the asking of such questions could not be said to have had no bearing upon the Appellant's conviction, and the appeal should be allowed.

11. Quenet, F.J. began his judgment by mentioning Exhibits 8 and 9 and the references in the passages read from them to the necessity for the use of violence to achieve nationalism. No objection had been made, or had been open, when these exhibits had been introduced into evidence by the prosecution. The Appellant's defence had been that he was a moderate, and that when he learned of the plan proposed for the burnings, he had dissented; he had sought to show that, because of his peaceful political attitude, it was improbable that he had committed the crimes charged to achieve a political end. The cross-examination on the contents of the notebooks was not directed to character, but to showing the falsity of his earlier evidence. Maisels, J. had in his judgment used the Appellant's answers

p.400,1.24-
p.407

in that sense, and not to support any findings relating to bad character. His use of these answers had been in accord with Roman-Dutch authorities. So far as section 303 was concerned, the questions objected to were admissible because the Appellant had put his character in issue in the circumstances of the case. The legitimate probative value of the contents of the notebooks was considerable, and there was no undue prejudice to the Appellant in admitting them. The appeal should be dismissed.

10

p.407, 1.24-
p.409

12. Forbes, F.J. agreed with the reasoning of Clayden, C.J. upon the effect and application of section 303 of the Criminal Procedure and Evidence Act, in view of the opinions of the majority of the House of Lords in Jones v. D.P.P. (1962), A.C. 635. His difficulty lay in applying the law to the facts of the case. The "character" which was in issue was whether or not the Appellant was a believer in violence to achieve political ends. The offences to which the charges related were offences committed for a political purpose; and it was relevant in order to show motive to lead evidence that the Appellant belonged to a political party engaged in acts of arson, and that he himself held the view that violence should be used to achieve his political aims. On consideration of the Appellant's own evidence, the learned Judge concluded that the Appellant did put his character in issue, and accordingly the questions complained of were not excluded by section 303; so the appeal should be dismissed.

20

30

13. The Respondent respectfully submits that the appeal was correctly dismissed. It is submitted that the admission of Exhibits 8 and 9 as evidence was proper, since they were relevant evidence upon the question of the motive of the Appellant, and thus related solely, or at least predominantly, to the commission of the crimes charged against him in the indictment. It is submitted that any question upon their contents asked of the Appellant in cross-examination were not contrary to any of the provisions of section 303 of the Criminal Procedure and Evidence Act, and were within the provisions of Section 309. In particular, it is submitted that the questions complained of did not "tend to show" that the Appellant was of bad character. Alternatively, any such effect of the

40

10 questions was entirely incidental to their main effect, which was to challenge the Appellant's evidence given earlier and related to an essential issue in the trial. If the questions complained of did tend to show that the Appellant was of bad character, in the sense that he had advocated violence for political purposes, then, it is submitted, such questions were permissible because the Appellant had himself given evidence of his own good character, in the sense relevant in the present trial.

20 14. The Respondent further respectfully submits that in any event the asking of the questions complained of did not cause the Appellant any miscarriage of justice. The judgment of the High Court set out at length its reasons for deciding upon the guilt of the Appellant on both counts, and consideration of those reasons shows that no improper use was made by the Court of the notebooks or their contents. It is respectfully submitted that the inclusion of the cross-examination of the Appellant upon the notebooks did not materially alter the evidence upon which he was convicted, or the considerations properly taken into account by the trial Court. There was overwhelming evidence by which the guilt of the Appellant was established, and the exclusion of all or part of the evidence relating to the notebooks would not have affected the conclusions of the Court upon the issues raised in the trial.

30

15. The Respondent respectfully submits that the judgment of the Federal Supreme Court was correct and should be upheld, and this appeal should be dismissed, for the following (among other)

R E A S O N S

1. BECAUSE no inadmissible evidence was received by the High Court of Southern Rhodesia:
- 40 2. BECAUSE no question was asked of the Appellant contrary to section 303 of the Criminal Procedure and Evidence Act:
3. BECAUSE no questions were asked of the Appellant tending to show that he was of bad character:

RECORD

4. BECAUSE the Appellant gave evidence of his own good character:
5. BECAUSE the cross-examination of the Appellant upon exhibits 8 and 9 was relevant to establish his motive and to discredit evidence which he had given earlier:
6. BECAUSE of the other reasons given in the judgments of Quenet and Forbes, FJJ.:
7. BECAUSE the Appellant has suffered no miscarriage of justice.

10

J. G. LE QUESNE

MERVYN HEALD

No. 22 of 1965

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF
RHODESIA AND NYASALAND

B E T W E E N :

KESIWE MALINDI Appellant

- and -

THE QUEEN Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand, W.C.2

Solicitors for the Respondent.