

*Privy Council Appeal No. 22 of 1965*

**Kesiwe Malindi** - - - - - *Appellant*  
v.  
**The Queen** - - - - - *Respondent*

FROM  
**THE FEDERAL SUPREME COURT OF RHODESIA AND  
NYASALAND**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 21ST JULY, 1966

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*Present at the Hearing :*

LORD MORRIS OF BORTH-Y-GEST  
LORD HODSON  
LORD WILBERFORCE

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

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The appellant was found guilty (a) of conspiring to commit arson and malicious injury to property and (b) of arson. For these offences he was sentenced to 10 years' imprisonment and 5 years' imprisonment respectively. The sentences were to be concurrent. The trial took place in the High Court of Southern Rhodesia before Maisels J. and two assessors. The charges related to a date on or about the 14th May 1962. The trial extended over many days viz. 15th, 16th, 17th, 18th, 19th, 22nd, 23rd and 25th October 1962. The appellant appealed to the Federal Supreme Court. The hearing took place before Clayden C. J., Quenet and Forbes F. J. J. On the 12th August 1963 the appeal was dismissed (Clayden C. J. dissenting). By order dated the 22nd December 1964 special leave to appeal to Her Majesty in Council was granted.

By the first count of the indictment against the appellant the charge was of conspiracy with certain named natives to commit arson and malicious damage to property at certain specified places in the Chinyika Native Reserve contrary to section 366A (2) (a) of the Criminal Procedure and Evidence Act. There was an alternative charge of incitement to commit such crimes. The second count charged arson of the Salvation Army Church at the same Reserve on the same date. The natives referred to in the first count were Hensiby, Masawi, Lovemore, Sixpence, Ronnie and Nowa.

The issues of fact which in respect of the first count called for investigation and decision at the trial were concerned with the events that took place at certain meetings. The prosecution alleged that after an approach made to the appellant on Friday the 11th May 1962 there was a meeting at his house on the 12th May. Certain witnesses (Masawi, Lovemore, Ronnie, Hensiby and Nowa) gave evidence that they met on Friday the 11th May and discussed "taking action" in the Chinyika Reserve. With the exception of Ronnie they went to see the appellant. There was evidence that he approved of "the action" and that he suggested that they should all meet at his house on the following evening (i.e., Saturday the 12th May). There was evidence given by seven persons (all of whom were regarded as having been accomplices) that a meeting was held at the appellant's house on the Saturday evening the 12th May. There were present Sevenzayi (who was said to be the local secretary

of the Zimbabwe African Peoples Union) Masawi, Lovemore, Ronnie, Nowa and Supa. Another (Hensiby) kept watch outside. Another (Sixpence) arrived at the end of the meeting. Evidence was given by Masawi, Lovemore, Ronnie, Nowa and Supa as to what the appellant said at the meeting. There was evidence that they were formed into groups for the purpose of taking action in regard to acts of burning. The case for the prosecution was that as a sequel to the meeting on the 12th May a further meeting took place (this time at a football field in Goromonzi) on the 14th May. At that further meeting the prosecution alleged that the appellant conspired with those named in the indictment. Evidence in regard to the meeting was given by Masawi, Lovemore, Ronnie, Sixpence, Hensiby and Nowa. There was evidence that at the meeting the appellant assigned acts of burning to particular persons. Further evidence was to the effect that after the meeting Masawi and Hensiby went to the latter's house and that the appellant went there at 11 p.m.: that there was a modification of the plan as to the tasks of Masawi and Hensiby: that those two left the house with the appellant who put on a sack and covered his shoes with plastic: that later the appellant parted from them and went in the direction of a church at Chinyika. There was evidence that fires at the Salvation Army Church and at a dip-tank at Chinyika occurred (though it was said between 10 p.m. and 10.30 p.m.) on Monday the 14th May.

After the appellant was arrested (on the 6th June 1962) his house was searched by Police Sergeant Carver. A roneoed strike notice was found (which was made exhibit 7 at the trial) and a red covered book (exhibit 8) and a brown covered book (exhibit 9). Exhibit 8 contained notes and essays and exhibit 9 contained the beginning of an autobiography and an essay. Certain extracts from these exhibits were read in evidence as part of the case for the prosecution. One essay dealt with the unjust distribution of land in the country. From exhibit 9 certain passages were read which indicated views that religion was used to maintain exploitation of the African. No objection was taken in regard to the reading of these extracts or to their admissibility and no complaint has been made in this appeal as to such evidence.

The various witnesses above referred to (except the appellant) and other witnesses were called by the prosecution. Some of the witnesses (Masawi, Lovemore and Hensiby) had been convicted for conspiring to commit arson at Chinyika Reserve. Another witness (Sixpence) was serving a sentence for arson of a school at Goromonzi during May 1962. Three witnesses (Ronnie, Nowa and Supa) who were accomplices had not been charged with complicity in the crimes. Pursuant to section 289 of the Criminal Procedure and Evidence Act they were discharged from liability to prosecution. The evidence called by the prosecution occupied all the days of the hearings down to the 23rd October 1962. It was full and detailed and was recorded in an extensive transcript. The final witnesses for the prosecution gave evidence on that date as did the appellant. The only point which has been argued in the present appeal relates to certain questions which were put to the appellant when he was cross-examined. Originally the appellant was represented by Counsel but he was not represented after the 19th October.

The evidence in chief given by the appellant was short. It is desirable to refer to it. He said:

“ 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 . . .

*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 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.”

In substance the evidence of the appellant was that he did not conspire to aid or procure the commission of arson or malicious injury to property but that on the contrary he declined to participate in illegal action. The appellant was then cross-examined and he was asked questions as to his political opinions. In reference to the meeting on the Saturday night (the 12th May) he said that it dispersed because he disagreed with and disapproved of the wish and desire of others to take part in violent action which was to consist of burnings. Counsel for the prosecution then intimated to the learned judge that he wished to cross-examine the appellant in regard to certain passages in exhibit 8. These were some passages there contained other than those which had been given in evidence (and as to which no question arises) as part of the prosecution case.

Learned Counsel raised the matter with the learned judge “in view of the provisions of section 303 of the Criminal Procedure and Evidence Act.”

Section 303, so far as material, is in the following terms:

“ 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 wherewith he is then charged, or is of 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 . . .

(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.”

Reference may also be made to section 309 of the Act which is in the following terms:

“ 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:

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."

The learned judge was surprised that Counsel should have referred to section 303 and did not consider that Counsel would be cross-examining to show that the appellant was a man of bad character. The matter proceeded as follows:

*"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?

*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."

Learned Counsel accepted the view of the learned judge and then proceeded to cross-examine the appellant about a passage in an essay in exhibit 8. It had been written on the 8th February 1961. The passage was one in which the use of violence was commended and was asserted to be necessary. "Violence is necessary and stones must be thrown to compel them to surrender; and notice here that 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." The witness agreed that those were his thoughts in February 1961 on the day that he wrote his essay: by "wolves" he meant capitalists. The witness was then asked various questions about another note book in which he had written and which had not been produced by any prosecution witness (exhibit 10) in which there was a reference to a stand against colonialists and settler regimes and the total evacuation of all foreign peoples in Africa and the entire abolition of capitalism. That was probably written in 1960. He was further asked about another note book (exhibit 11 which had not been produced as part of the evidence for the prosecution) in which he had written of the time when there would be an end of the oppression of the African by the settlers. That had been written on the 27th August 1960. The witness said that what he wrote was not for anyone else to read and that he had not denoted the destruction of particular property.

The judgment of the learned judge (Maisels J.) which expressed his conclusions and those of the two assessors was careful and detailed. The transcript of it occupies some 38 pages of the Record. The learned judge considered fully the position arising out of the fact that so many of the prosecution witnesses were accomplices. It has not at any time been suggested that the learned judge did not deal correctly with the subject of corroboration. Nor has it been submitted that the judgment contains errors of law. The learned judge examined elaborately and circumspectly the evidence given by the various witnesses. With very great care he reviewed the evidence given by Masawi. In one passage in the course of so doing he said:

"On the important question as to whether, as would appear from Masawi's evidence, it was Ronnie who had suggested action being taken on Monday to coincide with the strike in Salisbury, we reject that as highly improbable, quite apart from the evidence of the other witnesses that this was not so. Ronnie was a new member of ZAPU. He described himself as a novice. He is a raw, uneducated young

man of 21. The accused is a comparatively well-educated man and has pronounced political views and ideas. He was the Headmaster of a school, occupying a position of authority and if any suggestion of action being taken in Goromonzi to coincide with that in Salisbury was made, it seems to us it is far more probable that it would have been made by the accused, a member of ZAPU, of its predecessors the National Democratic Party and the African National Congress, a person who, judged by his writings, cannot be said to be a novice in political thought and action. We shall return to this matter later."

The conclusion of the Court in regard to Masawi was that though there were unsatisfactory features in his evidence he was on the whole trying to tell the truth. Nevertheless, bearing also in mind the witness's position as an accomplice, the Court decided that it would be quite unsafe to place complete reliance on what he said. Similar care was shown in the assessment of the other witnesses. The Court decided not to place reliance on Lovemore's evidence. A corresponding conclusion was reached in regard to Ronnie's evidence. A different view was formed as to Sixpence: he was a simple labourer who appeared to the Court to be trying to give a truthful account: he was thought to be a truthful witness. Hensiby was a young lad under 14 years of age. He appeared to the Court to be a truthful witness. Nowa was a young lad between the ages of 16 and 17: he appeared to be a simple lad and the Court did not think that his evidence was untruthful. Supa was considered to be quite truthful. The evidence of the prosecution witnesses other than the accomplices, was also weighed as well as the evidence of the appellant. The view which the Court entertained of the appellant as a person was expressed in the following passage:

"The accused is a person of strong character and holds strong political views which, of course, he is perfectly entitled to hold. The plan on Sunday night as deposed to by the witnesses was that six separate fires were to take place. In fact, for various reasons, there were only three, and a shelter suffered minor damage. This was plainly a fairly elaborate plan. It was suggested by the accused that Ronnie might have conceived it. Having seen Ronnie in the witness box and considering his position in the movement by contrast with that of the accused, having regard to Ronnie's low standard of education compared with the standard the accused had attained, having regard to the standard of the accused's political education as evidenced by his own writing and indeed by what he said in Court, we entertain not the slightest doubt that if there was a plan to commit arson on the scale on which it was to be committed to coincide with the strike in Salisbury, that it is far more probable that, as the Crown witnesses in fact say, this plan was the plan of the accused and not that of Ronnie. Indeed, we consider it in the highest degree unlikely that Ronnie could ever have conceived such a plan."

In the result the appellant was convicted and in passing sentence the learned judge pointed out that legitimate political activity had not been on trial at any stage in the case but he said that the conspiracy was deliberately timed to coincide with other disorders in other parts of the country in order to bring about chaos. The appellant was headmaster of the Goromonzi Primary School. The learned judge considered that the offences were all the more serious on that account.

The appellant appealed to the Federal Supreme Court both against his conviction and against his sentence. The grounds of appeal were framed as follows:

"(1) That the Court was influenced by essays written by me and produced as evidence against me (2) That the Court was misled by the evidence given by the witnesses which were untruthful (3) I did not commit the crime."

The appeal was argued on the 10th and 12th June 1963 and was dismissed on the 12th August 1963. The learned Chief Justice was of opinion that the appeal should be allowed. He considered that the questions which

related to the appellant's views on violence were questions tending to show that the appellant was of bad character, that the appellant had not put his character in issue, that section 303 fell to be considered and that the questions put in cross-examination were not justifiable: he held also that it could not be said that without the inadmissible evidence the Court must have convicted. Quenet F.J. referred to the judgment of the learned judge and said that references in it to the writings of the appellant could not be construed as indicating that because the appellant had a bad character he was likely to commit the crimes with which he was charged. He considered that the legitimate probative force of the essays was considerable and though the cross-examination was allowed on a different basis it was legitimate for the reason that the appellant in his evidence had given evidence of his own good character. Forbes F.J. was also of opinion that the appeal should be dismissed. He considered that the appellant had in his evidence put his character in issue with the result that the questions in cross-examination were not excluded by section 303.

The first issue which arises is whether the appellant was asked any question tending to show that he was of "bad character" and whether he had given evidence of his own "good character" as those phrases are used in section 303. The language of that section is clearly derived from the language of the English Act of 1898. There was no suggestion that the appellant had committed any other "offence". What then is the meaning of "character"? Their Lordships must refer to the speech of Viscount Simon L.C. in *Stirland v. Director of Public Prosecutions* [1944] A.C. 315 where at p. 324-5 he said:

"There is perhaps some vagueness in the use of the term 'good character' in this connexion. Does it refer to the good reputation which a man may bear in his own circle, or does it refer to the man's real disposition as distinct from what his friends and neighbours may think of him? In *Reg. v. Rowton* (1865) 10 Cox C.C. 25, on a re-hearing before the full court, it was held by the majority that evidence for or against a prisoner's good character must be confined to the prisoner's general reputation, but Erle C.J. and Willes J. thought that the meaning of the phrase extended to include actual moral disposition as known to an individual witness, though no evidence could be given of concrete examples of conduct. In the later case of *Rex v. Dunkley* [1927] 1 K.B. 323, the question was further discussed in the light of the language of the section, but not explicitly decided. I am disposed to think that in para. (f) (where the word 'character' occurs four times) both conceptions are combined."

The questions put to the appellant in cross-examination did not suggest that his reputation was bad. The appellant was asked whether what he had written recorded his views and if so how he reconciled holding those views with the attitude he said he had adopted at the meeting in his house. Did the questions suggest that he was of bad disposition? Here is the crux of the problem in the present case. The enquiry is raised as to why the questions were put. Certain passages of the appellant's writings were given in evidence as part of the case for the prosecution. There was no objection then made and no criticism of their introduction has later been made. It is assumed that the passages were regarded as being admissible to prove intention or motive. The difference between those passages and the passages put in cross-examination is said to be that in the latter there were, while in the former there were not, references to the use of violence. Whether evidence as to the latter passages could have been given as part of the prosecution case is not a question which now calls for consideration. Such evidence was not proffered. The passages were doubtless put in cross-examination to the appellant because the tenor of his evidence was that he had objected to suggestions of violence made by others and had urged lawful procedure. It doubtless became relevant in view of that evidence to suggest to the appellant that he was not one who would be averse to the use of other than peaceful means. The cross-examination was relevant if it went to credit or to establish motive. But the test of relevancy does not over-ride any prohibition

imposed by statutory words. Quite apart from statute any question which is put must satisfy the test of being relevant to an issue which is raised. The words of a statute must however be heeded. (See *R. v. Jones* [1962] A.C. 635.)

Their Lordships cannot think that in any very realistic sense did the questioned cross-examination tend to show that the appellant was of bad character and it is noteworthy that the learned judge was surprised at the thought that section 303 was involved. The events in issue related to May 1962. The writings recorded some thoughts or views privately set down in 1961 and 1960 and not expounded to others. If a person believed in the unlawful use of force he might nevertheless be unwilling himself to undertake it. It would be questionable whether in such circumstances he could in the sense denoted by section 303 be said to be of bad character. But when all this is said there was lurking in the questions a risk that the suggestion was being advanced that the appellant was one with a disposition to resort to violence and that reliance could be placed upon such a disposition when deciding whether the appellant did or did not in May 1962 resort to violence and whether he did or did not conspire with others to encourage others to do likewise. That is an approach against which the law resolutely takes a stand. What the appellant may have thought or written at earlier dates was not material. The issues at the trial raised questions of fact as to what the appellant did or said and as to how he acted in May 1962. Their Lordships consider therefore that when learned counsel sought the guidance of the learned judge before embarking upon his cross-examination in relation to passages in the appellant's writings it did become necessary for the learned judge to consider the application of section 303. It was submitted that the cross-examination was in any event legitimate because the appellant had himself given evidence of his own good character. It is said that by his evidence the appellant had put himself forward as a person who was and was regarded by others as being a moderate and a man of peace and that he had accordingly proclaimed himself as a man of good character. Their Lordships cannot accept this. The matter depends upon an examination of the evidence which the appellant gave in chief. Their Lordships have earlier set it out fully. All that the appellant did was to give a narrative of what he says took place at the meetings in question. He records what he asserted was said at the meetings. He gave his version of events and of conversations. He did no more. He did not, independently of giving his account of what had actually happened and of what had actually been said, assert that he was a man of good character. In their Lordships' view the proposed questions could not be introduced on the basis that he had himself given evidence of his own good character. The problem should therefore have been faced by the learned judge as to whether the proposed questions should be allowed or whether they should be disallowed as tending to show that the appellant was of bad character. It is to be noted that learned Counsel was himself apparently distinguishing between what had been (without any demur) given in evidence as part of the case for the prosecution and the questions he was proposing to ask. As already indicated the facts of the present case make it a difficult and border-line one but their Lordships consider that the right course would have been to disallow the questions.

Though the cross-examination on the passages written by the appellant was pursued it does not seem in the whole setting of the trial to have had great materiality or consequence. The decision reached by the members of the Court (the learned judge and the two assessors) was reached after a detailed and careful examination of the evidence and assessment of the various witnesses. After differentiations the witnesses Sixpence, Hensiby, Nowa and Supa were accepted as being truthful witnesses. In the long judgment of the learned judge there were two references to the writings of the appellant. The parts of the judgment incorporating them have been set out above. Comparisons were at one stage being made between the appellant and Ronnie. The writings were said to show that the appellant was educated, was not a novice in political

thought and action, and was superior both in political and in general education to others who had been at the meetings. There was some other cross-examination unrelated to the appellant's writings which was also concerned with the standard of the appellant's political education. From all this it appears to their Lordships that the findings reached by the Court would have been no different had there been no cross-examination on the additional passages in the appellant's writings and had there been no references to these passages in the judgment. In this connection it is relevant also to remember that the learned judge was of the view that section 303 did not call for consideration. That was for the reason that the cross-examination was not being regarded by him as directed to showing that the appellant was of bad character. There was a considerable volume of positive evidence which if accepted by the Court warranted the conviction of the appellant and it was upon the weight of the evidence which the Court accepted that the conviction was based. Accordingly while proceeding on the basis that some questions in cross-examination should have been ruled out, their Lordships consider that this is not a case in which there was a miscarriage of justice.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed.





In the Privy Council

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**KESIWE MALINDI**

v.

**THE QUEEN**

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DELIVERED BY

**LORD MORRIS OF BORTH-Y-GEST**