

In the Privy Council.

ON APPEAL

FROM THE PROTECTORATE COURT OF APPEAL
SOMALILAND PROTECTORATE.

UNIVERSITY OF LONDON
OF THE W.C.1.
10 NOV 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES

APPELLANTS CASE

BETWEEN

ADAN HAJI JAMA, H.T., YUSUF RER SAHAL,
SAEED MOHAMED, H.T., YUSUF RER
SAHAL, DEIR DERIA, H.T., YUSUF RER
SAHAL, FARAH ABDULLAHI, H.T., AHMED
FARAH RER ABOOKER HAMED

Appellants

AND

THE KING

Respondent.

Case for the Appellants.

RECORD.

1. This is an appeal by Special Leave from the Judgment of the Protectorate Court of the Somaliland Protectorate sitting as a Court of Appeal (Lieutenant-Colonel Donald Jackson) dated the 30th May, 1946, dismissing the Appellants' appeal from the Judgment of the Protectorate Court of the Somaliland Protectorate sitting as a Court of original jurisdiction (Major R. J. Quin) dated the 19th December, 1945, and confirming the death sentences for murder passed on the Appellants by the latter Court.

p. 113.

p. 100.

2. The Appellants were convicted as being members of an unlawful assembly, certain members of which, in prosecution of the common object of the assembly, had committed murder. The charge is set out in full in paragraph 9 below.

There were a number of other persons charged together with the Appellants. In the proceedings below the accused were referred to by numbers and for convenience this course will be pursued here. Adan Haji Jama is number 10 ; Saeed Mohamed, number 13 ; Deir Deria, number 17 ; Farah Abdullahi, number 18.

3. In addition to the charge of murder there were other charges against certain of the accused that are not material to this appeal. The convictions of Appellants Nos. 13 and 18 on one of these other charges were quashed by the Appellate Court.

4. The substantive criminal law of the Somaliland Protectorate is the Indian Penal Code. Criminal Procedure is regulated by the Administration of Criminal Justice Ordinance, 1926, of the Somaliland Protectorate, the following sections of which are material :—

Sec. 4 (1).

(q) "Public Prosecutor" means any person appointed under Section 356 and includes any person conducting a prosecution on behalf of His Majesty in the Protectorate Court in the exercise of its original criminal jurisdiction.

Sec. 166.

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Any Magistrate empowered to hold a District Court of the First or Second Class may commit any person for trial to the Protectorate Court for any offence triable by such Court.

Sec. 168.

(1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or on behalf of the accused, or as may be called for by the Magistrate.

Sec. 170.

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(1) When upon such evidence being taken, and such statement (if any) being made, the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

Sec. 175.

When the accused is committed for trial, the Magistrate shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Registrar of the Protectorate Court.

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Sec. 183.

When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Protectorate Court may frame a charge, or add to or otherwise alter the charge, as the case may be, having regard to the Rules contained in this Ordinance as to the form of charges.

Sec. 220.

All trials before the Protectorate Court shall, save where otherwise provided, be with the aid of assessors.

Sec. 226.

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(1) When the assessors have been chosen, the prosecutor shall open his case by stating the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

(2) The prosecutor shall then examine his witnesses.

Sec. 229.

(1) When the evidence of the witnesses for the prosecution and examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

(2) If he says that he does not, the prosecutor may sum up his case . . .

10 (4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.

Sec. 236.

(1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.

20 (2) The Judge shall then give judgment but in doing so shall not be bound to conform to the opinions of the assessors.

Sec. 296.

An appeal shall lie from any judgment or order of the Protectorate Court, sitting as a Court of original jurisdiction to the Protectorate Court sitting as a Court of Appeal.

Sec. 356.

(1) The Governor may appoint generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors.

30 (2) In any case committed for trial to the Protectorate Court the Governor may appoint any officer of the administration not being an officer of police below the rank of Superior Police Officer to be Public Prosecutor for the purpose of such case.

Sec. 357.

The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal.

Sec. 358.

40 Any Public Prosecutor may, with the consent of the Court, or on the instructions of the Governor, in cases before the judgment is pronounced, withdraw from the prosecution of any person ; and, upon such withdrawal :—

(a) If it is made before a charge has been framed, the accused shall be discharged.

(b) If it is made after a charge has been framed, or when under this Ordinance no charge is required, he shall be acquitted.

Sec. 359.

(1) Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a Public Prosecutor or other officer generally or specially empowered by the Governor in this behalf shall be entitled to do so without such permission.

(2) Any such person or officer shall have the like power of withdrawing from the prosecution as is provided by section 358, and the provisions of that section shall apply to any withdrawal by such person or officer. 10

(3) Any person conducting the prosecution may do so personally or by a representative.

(4) An officer of police shall not be permitted without the consent of the Magistrate having jurisdiction in the case to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted.

Sec. 413.

No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested. 20

Explanation.—A Judge or Magistrate shall not be deemed to be a party, or personally interested, within the meaning of this section, to or in any case by reason only that he is concerned therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed, or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case.

5. The Appellants submit that there are four grounds on which their convictions should be quashed :—

(1) The failure to provide a prosecutor to conduct the prosecution with the consequent duplication of roles by the Judge who himself acted as prosecutor. 30

(2) The failure of the Judge to obtain the opinion of the assessors.

(3) The absence of any evidence implicating the Appellants other than No. 17 as being members of the assembly in question once the common unlawful object had been declared.

(4) The absence of any material corroboration of the evidence of the accomplice on which the conviction rested.

6. The events directly giving rise to the prosecution of the Appellants were summarised by the Trial Judge when he came to sum up the case for the prosecution (one of the matters complained of by the Appellants) as follows :—

On the night of 2nd/3rd July of this year a party of men assembled outside Burao. They entered Burao armed with rifles and first fired on P.C. 476 Mohamed Saleh, who was the sentry on

duty at the Quarter Guard at Burao Prison. The shots did not injure the sentry or any member of the Guard, but killed a prisoner Hassan Haji Mahamoud and wounded another prisoner Hassan Barud. These prisoners were security prisoners and in accordance with the custom in this country were sleeping outside their cells.

10 The Guard did not reply to this fire but the men who had fired made off. A few minutes later shots were fired at the bungalow occupied by Major and Mrs. Chambers—the District Commissioner of Burao and his wife. Major and Mrs. Chambers were in the bungalow at the time but, most fortunately, were not injured. There were two illaloes on duty at the bungalow as a protection against thieves. One of these illaloes—Ahamed Mirreh—was on the verandah at the front and the other—Saliban Adan—was at the back. This latter illalo, presumably aroused by the earlier shots, had left his post and came round to the other illalo. While Saleban Adan was bending over Ahamed Mirreh, the firing at the bungalow commenced. Saleban Adan was hit and wounded and died from that wound later in the night.

20 Major John Anthony Hunt, of the General Survey, lives in the bungalow next to the D.C. He was aroused by the sound of shots and got into his car with Ali Haji Quabile to investigate. He had turned his car out of his compound and gone a few yards in the direction of the shooting. Shots were fired at the car. Neither Major Hunt or Quabile were hit but some damage was done to the car.

Also at this time while Captain James, the Superintendent of Police, Burao, was starting up his car, a shot was fired at his bungalow.

After these incidents the attacking party made off.

30 7. Some few hours prior to the events referred to in the preceding paragraph, a motor lorry, that had left Las Anod the day before, arrived at Burao, having made several stops on the way. At Gabo (seventy miles from Burao) about twenty persons boarded the lorry, twelve of them being apparently in a party led by a person of some influence in the community known locally as “Sheikh Bashir.” The next stop of the lorry was at the karia (collection of moveable huts) of Sheikh Bashir, where he and some of the other persons who had boarded the lorry at Gabo alighted, asked the driver to wait and later returned with two or three parcels. The lorry continued on its journey and about a mile and a half from the fort
40 at Burao stopped at a point near the tomb of Sheikh Ismail at about 7.45 p.m. Here, in response to a request from Sheikh Bashir, the driver stopped. Sheikh Bashir and some others alighted, taking with them the parcels referred to above. The lorry then proceeded on its way and does not come further into the story. What happened to the party which alighted at the tomb has to be inferred from certain footprints and, in so far as any value is to be attached thereto, from the evidence of an accomplice, one Adan Ahamed, P.W. 55. Evidence was given that some few hours after the firing footprints of some eighteen or nineteen persons were found leading from the place near Sheikh Ismail’s tomb where Sheikh Bashir’s
50 party had alighted to near Burao Prison, and that footprints of a much

pp. 59, 60.
pp. 62-68.

p. 63, l. 34.

p. 65, l. 37.

p. 66, l. 40.

p. 63, l. 45.

p. 66, l. 41.

p. 63, l. 49 to

p. 64, l. 8.

smaller number of persons, probably five, were found leading from near the prison to the District Commissioner's bungalow. The evidence of the accomplice was that Sheikh Bashir had asked him to join a party of men who were going to repair and clean the tomb of the Sheikh's grandfather; that for four or five days before the night in question there had been a continuous "Shir" (meeting of tribesmen) at the Sheikh's karia at which the accomplice saw all the accused, including the Appellants, present from time to time. He gave no evidence—and there was no evidence—that any unlawful project was mentioned at the Shir. He went on to say that on the day in question he, Sheikh Bashir, Appellants Nos. 10 and 18 and four others travelled on the lorry from Gabo to near Sheikh Ismail's tomb, where the lorry was stopped; that after the party had alighted he saw most if not all of the accused with Sheikh Bashir; that Sheikh Bashir opened the parcels (this witness said there were two) and took out rifles and ammunition which he distributed to certain of the party, including the Appellants Nos. 13, 17 and 18; that the Sheikh did not explain the purpose for which the rifles were to be used; that then the party began to walk in the direction of Burao and that after a little while a number of them, including Appellant No. 18, asked Sheikh Bashir where they were going; that the Sheikh said, "Come along, we are going to fight the unbelievers"; that everyone was surprised at this statement; that the Appellant No. 18 then said, "Why did you play this trick on us? We are not going to fight the unbelievers or anyone. We are not going with you." It was now very dark and P.W. 55 was unable to say whether as a result of the Sheikh's statement some of the party left; that the Sheikh then prayed over each man's hand and there were no further protests; that the party—of which he could speak to only seven, including but one of the Appellants, namely, No. 17—went with the Sheikh to a point near the isolation camp at Burao and then stopped; that the Sheikh took away Appellant No. 17, and another of the accused, No. 9, telling the others to remain where they were but gave no reason; that shortly afterwards he, P.W. 55, heard shots and a little later, more shots; that after the second round of shots the three who had gone away, namely, the Sheikh, Appellant No. 17 and accused No. 9 came running back; and that the whole party then went off together walking through the night.

8. The trial of the Appellants and the other accused began before Major R. J. Quin sitting as the Protectorate Court of the Somaliland Protectorate in its original jurisdiction on the 4th October, 1945. The Judge sat with three assessors. At no time during the trial that lasted some twenty-five days did counsel, officer or other person appear to act as prosecutor. In so far as anyone can be said to have conducted the prosecution it was conducted by the Judge himself.

p. 2.

9. The proceedings opened with the reading of the charges by the Judge, the first charge—the only one material to this appeal—being in the following terms :—

I, Roger Joseph Quin, Judge of the Protectorate Court of the Somaliland Protectorate, do hereby charge you—

Ibrahim Haji Abdullahi, H.T., Adan Madoba rer Hassan Adan.

Mohamed Ali, H.T., Ahmed Farah rer Aboker Ahamed rer Ali Aboker.

Jama Hashi, H.T., rer Dahir rer Musa Yusuf.

Nur Billeh, H.T., Ahmed Farah rer Aboker Ahamed rer Abdi Aboker.

Ali Gedi, H.T., Ebran Esa.

Mohamed Hashi, H.T., rer Dahir rer Musa Yusuf.

Adan Haji Jama, H.T., Yesif rer Sahal.

10 Musa Fiddin, H.T., Ahmed Farah rer Aboker Ahamed rer Abdi Aboker.

Ali Haji Aboker, H.T., Yesif rer Robleh.

Saeed Mohamed, H.T., Yesif rer Sahal.

Mohamed Elmi, H.T., Ahmed Farah rer Aboker Ahamed rer Ali Aboker.

Ibrahim Haji Aboker, H.T., Yesif rer Robleh.

Deir Deria, H.T., Yesif rer Sahal.

Farah Abdullahi, H.T., Ahmed Farah rer Aboker Ahamed rer Omer Aboker.

20 that you on or about the 2nd July, 1945, in Burao in the Somaliland Protectorate were a member of an unlawful assembly and in prosecution of the common purpose of that unlawful assembly which was to murder or attempt to murder non-Muslims or to assist or support such murders or attempted murders a member or members of that unlawful assembly murdered Suliban Adan, H.Y. Musa Arreh Hassan Musa and Hassan Haji Mohamoud Dolbahanta Yahia rer Fikki Warfa and attempted to commit the murder of Frederick James Chambers and John Anthony Hunt both Majors in His Majesty's Army and P.C. 476 Mohamed Saleh of the Somaliland Police.

30 and thereby under section 149 of the Indian Penal Code committed the offence of murder.

punishable under section 302 of the Indian Penal Code and within my cognizance and I hereby direct that you be tried on the said charge.

Dated 4th October, 1945.

R. J. QUIN,

Judge of the Protectorate Court.

40 The proceedings at the Preliminary Inquiry that led to the accused being put on trial in the Protectorate Court do not appear in the Record. It is accordingly not known whether the wording of the charges on which the accused were committed for trial was identical with that of the charges that the accused had to meet in the Protectorate Court or whether the Judge exercised the powers given to the Protectorate Court under section 183 of the Administration of Criminal Justice Ordinance.

pp. 6-68.

10. Fifty-six witnesses were called for the prosecution. The most important of these witnesses was the accomplice, Adan Ahamed, P.W. 55. Without his evidence, it is submitted that there was no case against any of the Appellants. As it was held—wrongly, it is submitted—that the evidence of certain other witnesses corroborated P.W. 55 the evidence of the so-called corroborating witnesses is here shortly set out. These witnesses are P.Ws. 21, 22, 23, 25 and 26.

p. 33, l. 31.

P.W. 21 : “ I saw accused 13. I saw him on the lorry at some time after leaving Sheikh Bashir’s karia. I don’t remember where.”

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p. 35, l. 37.

p. 35, l. 40.

P.W. 22 (who collected fares on the lorry) : “ Accused 18 was there . . . The lorry went to Sheikh Bashir’s karia. Sheikh Bashir said he wanted to get some tools to take to his grandfather’s tomb. Sheikh Bashir went in to the karia. A number of men went with him. Accused 18 went with him . . . Before we left I saw a parcel being put on the truck . . . Accused 18 helped to put it on the lorry . . . I saw accused 1, 17 and 18 on the truck. I think I saw accused 14 but I am not sure. I am sure that I did not see any of the other accused.”

p. 36, l. 1.

p. 36, l. 4.

p. 36, l. 9.

p. 38, l. 3.

P.W. 23 : “ Accused 10 was seen by me on the lorry. I don’t know where he got on. Accused 18 got on at Gabo.”

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p. 41, l. 3.

p. 41, l. 10.

P.W. 25 : “ Accused 17, accused 18 were on the back of the lorry . . . The lorry stopped again on the Ber side of Sheikh Ismail’s tomb. I think it was then about 1930 hours. Seven or eight people got off. Sheikh Bashir and Alin Yusuf got off. It was too dark to see their faces but I recognised their voices from the road. I did not recognise anyone else’s voice who got off there . . . I saw accused 1 and accused 17 at Kerit but I did not see them on the lorry. I know accused 18 came as far as Ber.”

p. 41, l. 17.

p. 41, l. 39.

p. 42, l. 12.

p. 42, l. 25.

P.W. 26 : “ Sheikh Bashir . . . and accused 10 were on the lorry . . . The lorry went to Ber . . . I cannot say that accused 10 was on the truck when it left Ber or not.”

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P.W. 27 : “ I saw Nos. 11 and 13 accused on the truck in Kerit. I did not see them get off.”

It is submitted that none of these witnesses corroborated P.W. 55 on the only part of his evidence that was material to the charge, namely, whether the accused mentioned were members of Sheikh Bashir’s party when, as found by the Judge, it became an unlawful assembly, that is, when its common unlawful object was declared after the party alighted at Sheikh Ismail’s tomb.

p. 68.

11. After the last of the prosecution witnesses had been called, the Judge, presumably taking the view that under section 229 it was for him so to do, summed up the case for the prosecution, beginning his observations with the remarks, “ The Court has heard all the evidence for the . . . Prosecution in this case and it is now my duty to sum up and explain that evidence and its bearing on the charges against the various accused so that the Defence may know what case, if any, they must be prepared

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“to answer.” In the course of his summing-up, the Judge made it clear that the assembly did not become unlawful until Bashir said that they were going to fight the unbeliever :—

“I do, however, think it necessary to explain the Prosecution case on one point. That is the time from which the common purpose of the assembly was declared. It is quite clear that if any one of the accused left the assembly before the common purpose was declared, or after the declaration but before any steps had been taken to pursue or further the common purpose, he would not be guilty on the first charge. Now it is quite clear to me that the earliest time that the common purpose of the assembly was mentioned was the occasion when Bashir said they were going to fight the unbeliever.”

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12. Following the summing-up, and no doubt invited by it, defending counsel submitted that accused Nos. 8, 14 and 16 should be acquitted. The Court acceded to the submission.

13. The case then proceeded against the remaining accused. All of the Appellants and most of the other accused gave evidence. Though, as the Record shows, the evidence of all other witnesses was read over to them “and found correct” this precaution appears to have been omitted in the case of the accused.

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14. The Defences set up by the Appellants were as follows. Appellant No. 10 admitted that he got on to the lorry at Kerit and that Sheikh Bashir and others were on the lorry. When the lorry stopped at Sheikh Ismail's tomb he alighted. Sheikh Bashir invited him to help renew his, Sheikh Bashir's, grandfather's grave. No. 10 refused alleging urgent business. Sheikh Bashir thereupon told him to go away, which he did. He went into Burao and slept in the mosque. He called witnesses to support his alibi. Appellant No. 13 stated that he knew nothing about the trouble at Burao and that he was in his karia when it occurred. He also called evidence in support of his alibi. Appellant No. 17 stated that he never left his karia during the trouble and called evidence to support his alibi. Appellant No. 18 stated that because of the state of his mind he did not know whether he was in the trouble at Burao; an endeavour was made to prove that he was of unsound mind.

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15. In all, 49 witnesses were called for the Defence. Defending counsel then addressed the Court. He was followed by the Judge, who, in accordance with the provisions of section 236 (1), began to sum up the evidence to the assessors. He does not seem to have progressed very far with this task, beyond warning the assessors that it would be inadvisable for them to accept P.W. 55's evidence except where it was corroborated, when he began to put to the assessors a series of questions as follows :—

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Questions to the assessors.

1. (A) You have heard the evidence of the events in Burao on the night of 2/3 July. Are you satisfied from that evidence

that a party of men came into Burao on that night, that one or more of them fired shots at the Police Quarter Guard where P.C. Mohamed Saleh was on duty ?

Each assessor answers " Yes."

(B) Are you satisfied that shots from that party killed the prisoner Hassan Haji Mohamoud and wounded the prisoner Hassan Barud ?

Each assessor answers " Yes."

(C) After the firing at the Quarter Guard did members of the party fire at the bungalow occupied by Major Chambers ? 10

Each assessor answers " Yes."

(D) Did one of those shots hit and kill Suleban Adan, an illalo on duty there ?

Each assessor answers " Yes."

(E) Shortly after this did members of the same party fire at the truck driven by Major Hunt ?

Each assessor answers " Yes."

2. (A) You have heard evidence about a truck coming into Burao. Did any or all of the members of the party who fired the shots travel on that truck ? 20

After consideration each assessor answers " No."

(B) Accused Nos. 10, 11, 12 and 14 have said that they travelled on the truck, are you prepared to accept that they did so travel into Burao ?

Each assessor answers " Yes."

(C) Accused Nos. 1, 2, 4, 6, 9, 13 and 17 say that they did not travel on the truck. Have you formed an opinion as to whether or not any of them travelled on the truck ?

Each assessor answers : " None of these accused travelled on the truck." 30

(D) Did the truck stop at Sheikh Ismail's tomb ?

Each assessor answers " Yes."

(E) Were arms and ammunition distributed to a party near the tomb ?

Assessor No. 1 answers : " The only evidence about this comes from P.W. 55 and we are not prepared to accept anything he says as evidence." Assessors Nos. 2 and 3 agree with this answer.

3. Does this answer apply to the whole of this witness's evidence ?

Each assessor answers " Yes." Assessor No. 2 explains that 40 they do not consider that this witness is worthy of belief in any particular. The other assessors concur.

The Record goes on to say that "in view of this answer" (that is, the answer to the last question) "the Court does not consider it necessary to ask further questions with regard to the events in Burao." From this it is submitted clear that the Judge took the view that the case against the accused stood or fell according as reliance could or could not be placed on the evidence of P.W. 55. With this view the Appellants respectfully agree, but they would nevertheless urge that the Judge's mode of dealing with the assessors was in no way a compliance with section 236 (1). p. 100, l. 4.

16. In addition to failing to require of the assessors that they should each state his opinion on the case as a whole, the Judge failed to put any question directed to ascertaining whether there had been any unlawful assembly, which would depend on whether the party committing the crimes consisted of more than five members. Nor, though the Judge had it in mind throughout the case that none of the accused could be found guilty of being members of an unlawful assembly unless they were aware of the unlawful object and had concurred in it, did he address any question to the assessors on this vital part of the case. 10

17. Having ascertained that the assessors attached no credence to the evidence of P.W. 55, the Judge adjourned the hearing, and, on the 19th December, 1945, gave Judgment convicting the Appellants and one other of the accused of murder as being members of an unlawful assembly in Burao on or about the 2nd July, 1945. 20 p. 100.

18. In giving Judgment, the Judge expressly stated that, though he had not been able to accept the substance of the assessors' replies, this was in no way to be taken as a reflection upon them, and that he believed that they had given their opinions honestly and in accordance with their interpretation of the law. He said that he had only rejected their views where he had been satisfied that the weight of evidence necessitated this course; but it is respectfully submitted that it was impossible for the Judge, who had either taken upon himself or had had thrust upon him the role of prosecutor, dispassionately to consider the evidence, and that had he acted as Judge alone he would have come to the conclusion that P.W. 55 could not be relied on as a witness of truth, and that in any event there was no corroboration of P.W. 55's evidence as to any of the Appellants' connection with the alleged unlawful assembly, and that they were accordingly entitled to be acquitted. 30 p. 110, l. 20.

19. Though the Judge warned the assessors not to accept P.W. 55's unsupported statements, it is submitted that he himself failed to adopt this safeguard.

40 Of P.W. 55, the Judge said: "At the beginning of his cross-examination he was for a few moments nonplussed by the method of the attack on him, but throughout both his evidence and cross-examination he did not vary his story on any important detail. I found my mind compelled to the conclusion that he was speaking the truth. His statements had an honest ring to them." When he wrote this, it is submitted, he must have forgotten that his own view of this witness at the close of his examination must have been very different: on the 23rd October, 1945, in answer to one of the assessors, P.W. 55 said "Nobody made me confess, but I thought it best to confess. I was not promised p. 103, l. 37. p. 68, l. 18.

p. 70, l. 25. “pardon. I have not told lies in my life. I would swear it on the Koran;” followed immediately by the Judge saying of this witness in his summing-up on the same day, “He is a man who is an admitted accomplice in the “crime and has bought his pardon by his evidence.”

p. 66, l. 1. The passage in the cross-examination to which the Judge was referring in his Judgment was presumably that where P.W. 55 said, “I have not a “good memory. I am a stupid man. I don’t know how to read or write. “I think my evidence is useless.”

p. 102, l. 25. 20. On the vital question when, if ever, Sheikh Bashir’s party became an unlawful assembly, the Judge said, “It is a fair assumption from the “footprints alone, that when the members of the assembly sat down they “discussed the common object and that all were then aware of it.” He had previously pointed out—as mentioned in paragraph 11 above—that “the earliest time that the common purpose of the assembly was mentioned “was the occasion when Bashir said that they were going to fight the “unbeliever.” At the same time he had correctly stated that if any one of the accused had left the party before this common purpose had been declared, he could not have been convicted of murder. Where, it is submitted, the Judge went wrong was in putting the onus on the accused to show that they did leave the party. Thus he says, “No accused has 20 “pleaded that he was part of the assembly until the intention was made “known and then left it.” It was, it is submitted, for the prosecution to show by evidence that was not impeachable as being that of the accomplice that after the unlawful object was declared, the accused remained members of the party and that the party then consisted of at least five members. This, it is submitted, the prosecution did not show. All that they did show was that *at some previous period* the Appellants had been members of a party, which was then substantially larger than that required by section 141 of the Code.

p. 63, l. 41. 21. Even accepting P.W. 55’s story, it is submitted, it falls far short 30 of what would be required to prove that the Appellants were members of an unlawful assembly. He said that after the common object was declared he did not know whether anyone went away, and added, “I myself was in a frenzy ”; he said that the night was so dark that he could not distinguish any of the accused by sight and that the firing party consisted of but three members. Further, he admitted in cross-examination that Appellant No. 10 may have left and gone to Burao, which was what Appellant No. 10 himself said; and the only Appellant he implicated as a member of the firing party was Appellant No. 17.

p. 105, l. 25. 22. In the course of his Judgment the Judge expressed the view that 40 the absence of a formal prosecutor was “a matter which has given an “unusual advantage to the accused.” In saying this the Judge, it is respectfully submitted, evinced a complete misunderstanding of the functions of a prosecutor in a criminal trial.

23. The Appellants appealed to the Protectorate Court, Lieutenant-Colonel Donald Jackson, sitting as a Court of Appeal, who delivered Judgment on the 30th May, 1946, dismissing the Appellants’ appeal and confirming the death sentence passed upon them.

24. The learned Appellate Judge, having in mind the necessity for P.W.'s evidence being corroborated, dealt with the evidence in regard to each of the Appellants as follows :—

No. 10. This Appellant said that he boarded the truck at Kerit, left it at Sheikh Ismail's tomb and walked into Burao where he slept the night in a mosque. He called witnesses to support his story that he slept in Burao. The learned Judge believed the evidence of P.W. 23 who testified that this Appellant was in fact on the truck before it reached Kerit, and described the dropping of a lighted cigarette end on Appellant. He further accepted the evidence of Haji Sulub (P.W. 26) who boarded the truck at Kerit to the effect that this Appellant was then already on the truck. He finally considered the defence of an alibi and rejected this as false. He then decided that an admission by Appellant that his fare for the truck journey was paid for by Sheikh Bashir, the lie given by P.W.'s 23 and 26 to his statement that he boarded the truck at Kerit, his admission that he got off at Sheikh Ismail's tomb and the alibi which he found to be false were, together, sufficient corroboration of the evidence of P.W. 55 for him to convict this Appellant of a charge under section 149 of the Indian Penal Code. p. 121, l. 50.

The question I must now ask myself is whether the learned Judge was correct in his assessment of these independent particulars of evidence. Are they corroboration in material particulars such as would satisfy the requirements of the principles in *R. v. Baskerville*?

There is no fixed method laid down whereby particular pieces of independent evidence can be pronounced as fulfilling the necessary requirements. . . . It is for the Court to determine in the particular circumstances of the case whether the matter tending to corroborate is worthy of evidence and sufficiently reliable. In the case of this Appellant I do not find myself able to say that the learned Judge was wrong in arriving at his conclusion that the case against this Appellant was proved, and I accordingly dismiss his appeal. p. 122, l. 23.

No. 13. The learned Judge rejected his alibi and refused to draw from the suggestion of the enmity of the two prosecution witnesses (P.W.s 21 and 27) an inference that they were not telling the truth. He held that such rejection coupled with the evidence of P.W. 21 and P.W. 27 to the effect that they saw Appellant on the truck was sufficient corroboration of the evidence of P.W. 55 for him to record a conviction on the first charge. With that finding I agree. I therefore dismiss the appeal. p. 123, l. 15.

No. 17. This Appellant's case was that he was at his karia at Del'ad during the events which occurred at Burao and he called witnesses to support him. He was on the other hand identified as being on the truck at Kerit by both P.W. 25 and P.W. 22. As against these identifications he pleaded that he had had quarrels with both these witnesses. The learned Judge accepted the evidence of the prosecution witnesses and rejected the defence of an alibi put forward by the Appellant and his witnesses. He again refused to draw from the suggestion of the enmity of the two p. 123, l. 38.

prosecution witnesses an inference that they were not telling the truth. Having rejected the story of the defence and obtained corroboration of the evidence of P.W. 55 from that of P.W.s 22 and 25 he found the Appellant guilty and convicted him. I am unable to say that the learned Judge was wrong in coming to this conclusion and I therefore dismiss this appeal.

p. 124, l. 1.

No. 18. At the trial this Appellant, who was charged with both offences, sought to show that he was of unsound mind and he said that he did not know whether he was at either Burao or Horoferengi . . . The learned Judge found the Appellant had failed to discharge the onus of proof of his unsoundness of mind . . . 10

p. 124, l. 20.

p. 124, l. 33.

The learned Judge also found that there was sufficient corroboration of the evidence of P.W. 55 to the effect that this Appellant was a participator in both crimes for him to find him guilty on both. In respect of the first charge it is clear that he travelled on the truck with Sheikh Bashir and that he dismounted at Sheikh Ismail's tomb. I find that the requirements of the law as to corroboration of the evidence of P.W. 55 are fulfilled and that the learned Judge was right in convicting him upon this charge. 20

25. The Appellants submit that in dealing with the question of the alleged corroboration of P.W. 55's evidence, the learned Appellate Judge fell into the same error as the learned Trial Judge in failing to draw any distinction between corroboration of the fact that the Appellants may have mounted the lorry with Sheikh Bashir and dismounted when he dismounted and corroboration of their being and remaining members of Sheikh Bashir's party when it became an unlawful assembly. Neither he nor the learned Trial Judge made any attempt to distinguish between the three different attacks that were made on the night in question or to ascertain the number and identity of the persons engaged in each. 30

26. Having accepted the position that it would not be safe to convict any of the accused on the evidence of P.W. 55 unless his evidence was corroborated in some material particular connecting the accused with the crime, it is respectfully submitted, the learned Appellate Judge overlooked, as did the learned Trial Judge, that—

(i) False evidence as to presence on the lorry or of alibis did not amount to corroboration, nor did such evidence as there was as to footprints, the footprints not being identified as being those of any of the accused.

(ii) There was no corroboratory evidence at all of the Appellants' actions after they had left the lorry and that even P.W. 55 implicated only No. 17 in any unlawful design. 40

p. 119, l. 30.

27. The learned Appellate Judge failed to appreciate the seriousness of the complaint that the learned Trial Judge had duplicated the roles of prosecutor and Judge. He took the view that since there had been a proper police investigation and Preliminary Inquiry and since the learned trial Judge had taken no part in any of the preliminaries and the case had

first come to his notice after the accused had been committed for trial by the Magistrate and when the accused first appeared before him on the 4th October, 1945, there was no substance in this ground of complaint. It is respectfully submitted that the learned Appellate Judge was wrong in so holding, and the fact that the usual and necessary preliminary procedure had taken place could not render unnecessary or non-obligatory the provisions of sections 226, 229, 356, 357 and 359 of the Administration of Criminal Justice Ordinance, still less, as it is submitted, the fundamental requirement of justice that the same person should not
10 be both prosecutor and Judge.

28. The Appellants submit that the Judgment of the Protectorate Court of the Somaliland Protectorate, sitting as a Court of Appeal, dated the 30th May, 1946, dismissing the Appellants' appeal from the Judge of the Protectorate Court of the Somaliland Protectorate, sitting as a Court of original jurisdiction, should be reversed and that their convictions for murder should be set aside for the following among other p. 113.

REASONS

- 20 (1) BECAUSE the absence of a prosecutor to conduct the prosecution at the trial and the duplication of roles by the Trial Judge prevented the accused from having a fair trial.
- (2) BECAUSE of the failure to comply with sections 226, 229, 356, 357 and 359 of the Administration of Criminal Justice Ordinance.
- (3) BECAUSE under section 413 of the said Ordinance the Trial Judge was disentitled to try the case.
- (4) BECAUSE of the failure of the Trial Judge to obtain the opinion of the assessors.
- 30 (5) BECAUSE there was no material corroboration of the evidence of the accomplice.
- (6) BECAUSE there was no evidence that any of the Appellants other than No. 17 were members of the assembly in question once the common unlawful object had been declared, and the only evidence implicating No. 17 was that of the accomplice.
- (7) BECAUSE there was no evidence of an unlawful assembly within the meaning of section 141 of the Indian Penal Code.
- 40 (8) BECAUSE it was not for the Appellants to show that when if ever the party became an unlawful assembly they left it.
- (9) BECAUSE the Judgments of both Courts below are wrong.

PHINEAS QUASS.

In the Privy Council.

ON APPEAL

*from the Protectorate Court of Appeal of
the Somaliland Protectorate.*

BETWEEN

**ADAN HAJI JAMA, H.T.,
YUSUF RER SAHAL
and Others - - -** *Appellants*

AND

THE KING *Respondent.*

Case for the Appellants.

**INGLEDEW, BROWN, BENNISON & GARRETT,
136/138 Minories, E.C.3,
*Solicitors for the Appellants.***