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~~Oct. 62~~

Judgment 1, 1966

IN THE PRIVY COUNCIL No. 1 of 1965

ON APPEAL FROM THE FEDERAL SUPREME COURT OF THE FEDERATION OF RHODESIA AND NYASALAND

B E T W E E N :- SIMON RUNYOWA Appellant

-and-

THE QUEEN Respondent

CASE FOR THE RESPONDENT Record

1. This is an appeal in forma pauperis, by special leave granted by the Privy Council on the 27th July 1964, from a judgment of the Federal Supreme Court of The Federation of Rhodesia and Nyasaland (Clayden C.J. Quenet and Forbes F.JJ.), dated the 17th February 1964, which had dismissed the Appellant's appeal from his conviction by the High Court of Southern Rhodesia (Hathorn A.C.J. and assessors) dated the 20th December 1963, whereby he was found guilty of setting fire to a house by the use of petrol and was sentenced to death. P.155 P.149 Pp.133-144 P.144 l.30

2. The relevant statutory provisions are:

LAW AND ORDER (MAINTENANCE) ACT 1960 (as amended) .....

33A(1) Any person who, without lawful excuse, the proof whereof lies on him -

(a) by the use of petrol, benzene, benzine, paraffin, methylated spirits or other inflammable liquid sets or attempts to set on fire any person building, structure, vehicle, vessel, aircraft or railway engine, tender, carriage, van or truck; or

(b) .....
shall be guilty of an offence and -

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(c) shall be sentenced to death where such offence was committed against any person or in respect of -

(i) any building or structure used for residential purposes and not owned, occupied or leased by the person convicted of the offence, whether or not at the time of the commission of the offence any other person was present in such building or structure; or

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(ii) .....

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

P.1.1.27-P.2.1.10

3. The Appellant was indicted on a charge that on the 2nd October 1963 at Harare he together with Alexander Chirawu and Kassiamo Muringwa had set or attempted to set on fire a house at number 4093, Semi Detached Lines, Harare, contrary to section 33(A)(1)(a) as read with paragraph (c) of the Law and Order Maintenance Act 1960 as amended.

4. The trial took place between the 9th and the 20th December 1963 before Hathorn A.C.J. and two assessors. A preliminary issue was raised as to the admissibility of evidence of statements and physical indications made by the other two accused and a considerable amount of evidence

P.6.1.29-P.12.L.35

was given upon that issue. On the 13th December 1963, Hathorn A.C.J. gave judgment upon this issue, holding that all the evidence tendered was admissible against these accused. Both the statements implicated the Appellant. Neither of the other two accused however gave evidence during the trial and the fact that their statements and physical indications were not evidence against the Appellant was fully acknowledged and referred to in the judgment of Hathorn A.C.J.

5. The evidence led by the Respondent relating to the Appellant included:

P.13

(a) D. Sergeant Crowe had taken one of the accused on the 5th September 1963 to the garden of No.4093 Semi Detached Lines at Harare who had pointed out various things to the witness:

P.17.1.32
P.18.1.17

the house was occupied by Chigambura and was of red brick with an asbestos roof, and inside there were wooden rafters doors and various pieces of wooden and other furniture. P.20.1.7
The Appellants house was number 4089 and was P.20.1.28
about 30 yards away from number 4093: the other two accused had also lived in the neighbourhood close by.

(b) Dectective Inspector Wiltshire had gone at P.27.1.25
2 a.m. on the 2nd September to the house at No.4093 Semi Detached Lines, Harare, where he had seen Chigambura. In the bedroom there was a hole 5 inches across in the window, and on the mattress of a child's wooden cot was a bottle six inches long made into an incendiary bomb, with a fuse of cloth and matches in the top: the bottle was two thirds P.28.1.27
full of paraffin. The top of the wick was charred and the bottle had been capable P.29.1.6
of acting as an incendiary bomb, but there had been no sign of anything in the house having been burnt.

(c) Dectective Bennyworth had charged the P.41.1.9
Appellant on the 4th September with the crime for which he was being tried, and had cautioned him. The Appellant had made a P.41.1.17
statement which was translated, recorded, read back to him, and signed by him. On P.41.1.31-
the 5th September the Appellant had P.42.1.29
voluntarily gone with the witness to the Marowa Shopping Centre where he had indicated No.2 shop as the place where he had bought the paraffin referred to in his statement. The Appellant had gone into the shop with the witness.

(d) Sergeant Hode had translated when the P.45.1.36
Appellant made his statement. In cross-examination he denied that the statement was made during the Appellant's detention on another charge on the 3rd September.

(e) Sergeant Nyamadzawo had been present on the P.52 1.14
5th September when the Appellant had pointed out the shop where he said he had bought the paraffin with which to make the bomb. In P. 55 1.7 -
cross-examination he denied that the P. 58 1.22
Appellant had been asked to point out the shop where he got his groceries.

Record

P.58.1.34- (f) P.59.1.5. P.59.1.29-35 P.60.1.1- P.61.1.10 P.69.1.7-10 P.61 1.22 P.62.1.5. P.63.1.17-37 P.67 1.1 P.67.1.20-23 P.67 1.32 - P.68 1.5

Luke Chigambura said that he lived at 4093 Semi Detached Lines, Harare with his wife and children. On the 1st September he had been in his neighbours garden when he saw the Appellant between 8 and 9 a.m. He had stood a few yards away and appeared to listen to the conversation, which was about politics. The witness supported Sithole's party. The same evening the Appellant reappeared and shouted to the witness that all who supported Sithole were sell outs: he had then come back with Amon and spoken to the neighbour. That night after the family had gone to bed a bomb was thrown through the window and landed on the baby's cot. It had smelt of paraffin but was not alight when he saw it.

P.76.1.15.(g) P.77.1.9 P.77.11. 32-36 P.78.1.34 P.79.11. 30-35 P.80.11. 11-23

Mashingaidze said that he was next door neighbour to Chigambura. On the 1st September he had been talking to him about politics when the Appellant stood near them and listened to them. That evening the Appellant had returned and had called them sell-outs: shortly afterwards he came back with Amon and they had looked at Chigambura in an unfriendly manner.

P.106.1.13(h) P.107.1.9 P.107.1.16

P.C. Cyril said that he had arrested the Appellant in the afternoon of 3rd September. The Appellant had then said voluntarily "I deny the charge, Zanda and Kassiano are responsible for the case".

P.157

6. In the statement produced by Bennyworth, the Appellant had said that he denied the charge: Amon was responsible. The two of them were with the other two accused when Amon pointed out to them the number of the house that he wanted to set on fire. At 6 p.m. the other two accused had come to his house and eaten some food. Then Chirawu had asked him to find someone to go and buy paraffin. The Appellant had said that he would do it, and being given sixpence, he went and bought the paraffin. He returned to his house and the other two accused came collected the paraffin from him, and left saying "we are going to our house". At about 2 a.m. the police had come to his house.

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7. At the trial, the Appellant elected to make an unsworn statement. In it he denied being connected with the bombing in any way. The statement produced had been extracted from him by violence by the police on the first occasion on which he had been arrested on a charge of theft. P.123

8. Hathorn A.C.J. began his judgment by saying that the unanimous verdict of the Court was that all three accused were guilty. He first dealt with the uncontested evidence that a bomb had been thrown into Chigambura's house, which was capable of setting fire to the house. He then considered the case against the first and second accused. The Court accepted the evidence of Chigambura and Mashingaidze. The Crown had proved that the first accused had thrown the bomb. The second accused had admitted being present when the bomb was thrown. As to the case against the Appellant, his statement had been made voluntarily and the Court accepted the evidence of the police witnesses that it had not been forced from the Appellant. The evidence as to the shop which had been pointed out by the Appellant was confused, and the Court would ignore it. The Appellant had used words showing political hostility to Chigambura, and in the company of Amon had behaved contemptously to the complainant, there was accordingly a motive for the Appellant to be implicated in the crime. Finally the learned Acting Chief Justice said: P.133 P.134.l.1. P.135.l.12 P.136.l.1. P.137.l.13 P.138.l.32 P.139.l.26 P.140.l.8 P.140.l.43-P.141.l.19 P.141.l1.20-28

> "Turning to the statement, Exhibit 12, in it the third accused admits knowing that the purpose of the crime was to set fire to a house and the identity of its organiser. He admits knowing which house was to be set fire to, and he admits assisting in the plan by going to buy the paraffin which he handed to the other participants in the plan. Finally, he admits that they left with the paraffin saying: "We are going to our house". In the context "our house" can only mean the house which was the subject of the plan.
>
> In those circumstances the third accused clearly aided and abetted the other participants knowing what crime was contemplated and we find accordingly. On this basis it was common cause that the third accused was a socius criminis and as such liable as a principal." P.141.l.39-P.142.l.11

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P.142.1.26
P.145.1.20 The case was inconsistent with the Appellant being only an inciter. He was found guilty and sentenced to death.

P.147 9. The Appellant appealed to the Federal Supreme Court where his appeal was heard on the 17th February 1964 by Clayden C.J., Quenet and Forbes F.JJ. and was dismissed.

P.149 - P.151.1.48 Quenet F.J. in his judgment, with which Clayden C.J. and Forbes F.J. agreed, described the events relating to the throwing of the bomb, and first dealt with and dismissed the appeals of the first and second accused. In relation to the Appellant, the learned Federal Justice said:

P.151.1.48- P.152.1.45

> "The third appellant, Simon Runyowa, appeals against his conviction and sentence. In his appeal against conviction, he alleges the trial Court erred in holding he participated in the commission of the offence. The remaining grounds of appeal were abandoned at the hearing. In dealing with the statement made by this appellant to the police, Exhibit 12. the judgment reads:
> "..... in it (that is to say, Exhibit 12) the third accused admits knowing that the purpose of the crime was to set fire to a house and the identity of its organiser" - by which I understand the learned judge to mean the appellant was aware of the identity of the person who organised the plan to set fire to the house. The judgment then continues:
>
> > "He (that is to say, the third appellant) admits knowing which house was to be set fire to, and he admits assisting in the plan by going to buy the paraffin which he handed to the other participants in the plan. Finally, he admits that they left with the paraffin saying: 'We are going to our house'. In the context 'our house' can only mean the house which was the subject of the plan.
> > "In those circumstances the third accused clearly aided and abetted the other participants knowing what crime was contemplated and we find accordingly. On this basis it was common cause that the third accused was a socius criminis and as such liable as a principal."

The judgment refers to the fact that the appellant had a possible motive to injure the owner of the house which was to be set on fire. Although the evidence did not establish the appellant accompanied the others to the scene, he knew the house which was to be burnt and he knew the method which was to be employed. He himself had bought paraffin to be used in the project and it was he who handed the paraffin to one of his companions. On this evidence the trial Court concluded that the appellant's conduct made him a socius criminis in the commission of the crime and, as such, was liable as a principal. I cannot myself see any ground for holding that the trial Court was wrong in convicting the third appellant of the crime laid to his charge."

The Appellants' appeal against sentence would also be dismissed, in view of the Court's previous decision in Mapolisa's case, which had held that a sentence of death was obligatory. P.153.11.1-14

10. The Respondent respectfully submits that the judgment of the Federal Supreme Court was correct. The evidence was sufficient to justify the finding of the High Court that the Appellant was a socius criminis in the crime charged against him. It is respectfully submitted that the evidence accepted by the High Court showed that the Appellant was present when the crime was first considered, had a malicious motive against the owner of the house where the crime was committed, and had actively assisted in the preparation for the crime. The Appellant had known the exact purpose for which the paraffin bought by him was to be used. The Appellant as an accessory before the crime was, it is submitted, properly convicted under the law of Southern Rhodesia of the crime charged against him by virtue of the fact that he was a socius criminis of the actual perpetrators of the crime.

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

R E A S O N S

1. BECAUSE the Appellant was properly proved guilty of the crime charged against him.

2. BECAUSE the Appellant was proved to be a socius criminis of the actual perpetrators of the crime.

3. BECAUSE there was sufficient evidence upon which the High Court could find the Appellant guilty.

4. BECAUSE of the other reasons given by the Federal Supreme Court.

5. BECAUSE the Appellant had suffered no miscarriage of justice.

MERVYN HEALD

No. 1 of 1965

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