

KWAKU MENSAH - - - - - *Appellant*
v.
THE KING - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE
11TH OCTOBER, 1945

Present at the Hearing :

LORD PORTER
LORD GODDARD
SIR JOHN BEAUMONT

[*Delivered by* LORD GODDARD]

Their Lordships now give their reasons for the humble advice which they have tendered to His Majesty that this appeal should be allowed and a verdict of manslaughter substituted for that of murder.

The appeal was brought by special leave against a judgment of the West African Court of Appeal dismissing the appellant's appeal against his conviction for the murder of one Abudv Zabrama before Lane J. and a special jury on 15th May, 1943. It appears that in the early morning of 27th November, 1942, the deceased man with some of others of his tribe, the Zabrama, arrived at the village of Kajakron, where the appellant lived, carrying bundles of cloth which they were intending to smuggle into French territory. According to the witnesses for the prosecution they reached the village when it was light, either just before or just after daybreak, while according to the defence they arrived in the dark when the villagers were asleep. An alarm was given by someone, and there were cries of "thief" and a fight ensued. The theory of the prosecution was that the villagers attacked the Zabrama with the object of stealing the goods they were carrying. On the other hand the case for the defence was that the incident started because the tribesmen, or some of them including the deceased, entered the compound of the appellant and tried to break into his home. However the fracas started there seems to be no doubt that in the course of the fight the appellant was stabbed, receiving a wound some four inches long on his hip, and according to his evidence it was inflicted by the deceased. The Zabrama, being outnumbered, made off to the Mohammedan part of the village, the Zongo. The deceased, who was being chased by the appellant among others, entered a house and was followed by some of the villagers, still calling out "thief." The deceased ran out of the house and as he was running away the appellant fired a gun and killed him.

The appellant and nine others of the villagers were charged with murder, the appellant as a principal in the first degree and the others as abettors. The sole defence set up at the trial on the part of the appellant was that he presented the gun with the object of frightening the deceased and inducing him to surrender. The learned judge in the course

of his summing up directed the jury that there were three possible verdicts that they could return, murder, manslaughter and acquittal, and that in his opinion no verdict of manslaughter could be entered unless the jury accepted the appellant's own account as to how he shot the deceased. He further directed them that if they did accept that account the appellant would be guilty at least of manslaughter as pointing a gun at the deceased as he was running away was an unlawful act. The jury found the appellant guilty of murder, but the other nine accused were found by them guilty only of manslaughter. On appeal, the West African Court of Appeal dismissed the appeal of the present appellant, holding that though in their opinion there was a misdirection in saying that on the appellant's own evidence he was at least guilty of manslaughter, a matter with which their Lordships deal hereafter, the jury must have rejected his evidence as was shown by their returning a verdict of murder. With regard to the remaining accused they quashed the conviction on the ground that the jury should have been directed that in their case the only possible verdicts were murder or acquittal. The case of these other nine accused is of course not before their Lordships.

The first submission on behalf of the appellant was that the Court which heard the appeal was not properly constituted in that Mr. Quashie-Idun, who sat as an acting judge, had not been properly appointed in accordance with law. The West African Court of Appeal is constituted and has its powers conferred by various Orders in Council now consolidated in the West African Court of Appeal Orders, 1928-1935, being No. 11 of 1935. By sect. 2 the expression " Judge " includes any person for the time being performing the duties of such office. By sect. 5 the Judges of the Court are the Judges of the Supreme Courts of the Gold Coast and Nigeria and such other colonies to which the Order is applied, and by sect. 9 there must be at least 3 Judges to form a Court. The Supreme Court of the Gold Coast is constituted by Ordinance No. 7 of 1935 which provides for the appointment of a Chief Justice and as many Puisne Judges as the Governor may from time to time appoint by letters patent. By sect. 9 it is provided that in case of temporary illness or absence of any Judge it shall be lawful for the Governor in his discretion to appoint a fit and proper person to fill the office of such Judge until he shall resume the duties thereof. Now it appears that the Chief Justice of the Gold Coast had appointed Monday, 16th August, 1943, for the hearing of this appeal before a Court of Appeal consisting of himself, Fuad and Martindale J.J. but the latter fell ill at the end of the previous week. No other judge was available to form a Court for various reasons, and so to prevent the expense and inconvenience of a long adjournment, the case was put off till 17th August, and in the meantime the Governor appointed Mr. Quashie-Idun, a District Magistrate, to be an acting judge of the Supreme Court, the date of his appointment, as appears from the Gazette, being 17th August. On that day therefore he became an acting judge of the Supreme Court of the Gold Coast.

In their Lordships' opinion he was a person for the time being performing the duties of such office, and it was unnecessary that he should first have acted as a judge in some other cause or proceeding before he was qualified to sit in the Court of Appeal. It was also contended that his appointment was bad because he was not expressly appointed to act in place of Martindale J.; but in their Lordships' opinion he was appointed in fact to act in place of that learned Judge who was prevented by illness from sitting on the appointed day. No doubt another of the puisne judges might have sat in the Court of Appeal had one been available and the acting judge could then have sat in the Supreme Court. But the fact remains that the illness of Martindale J. caused a temporary vacancy, which under section 9 could be filled by the appointment of an acting judge, who during the period of his appointment had all the powers of an ordinary judge. In their Lordships' opinion the decision of the Board in *Butler v. R.* [1939], A.C. 484, on which reliance was placed, has no application to the present case. There the constitution of the Court of Criminal Appeal in Trinidad and Tobago came in question. The legislation establishing that Court at that time was quite different

to the Ordinances that have to be considered in this case, and in particular contained no such provision as is to be found in section 2 of the West African Ordinance.

The next point that was submitted for the Appellant depends partly on the direction of the learned trial judge and partly on the verdict with regard to the prisoners other than the Appellant who were found guilty by the jury of manslaughter only. As has already been said the Appellant's defence was that he pointed the gun at the dead man only for the purpose of frightening him, that he did not know it was loaded and that it was discharged accidentally. The learned trial judge directed the jury that only in the event of the Appellant's evidence being accepted could a verdict of manslaughter and not murder be returned against him. Their Lordships think it is clear that his direction was that if the jury thought that his account was true the Appellant was on his own showing guilty of manslaughter because the pointing of the gun was in itself an unlawful act from which death resulted. The Court of Appeal however held that to be a misdirection, because, they said, pointing a gun which he did not know was loaded was not an unlawful act. On this point their Lordships are in agreement with the learned trial judge and disagree with the view taken by the Court of Appeal. Pointing a gun at a person is an assault unless done in protection of person or property. If it is pointed at a person without legal excuse, and there was none here as the dead man was running away, it is an unlawful act. They need only to refer among the many cases on the subject to *R. v. Jones*, 12 Cox 628, and *R. v. Weston*, 14 Cox 346. But they agree with the Court of Appeal that by their verdict of murder the jury show that they rejected the Appellant's evidence on this subject. Then it is said that as the other accused were only abettors and were found to have abetted manslaughter only it is impossible for the verdict of murder against the accused to stand. Their Lordships have not to consider the case of the other accused whose convictions have been quashed but they are quite unable to agree with the argument that because the jury found those accused persons guilty only of manslaughter that can affect the verdict of murder against the principal offender. There was ample evidence of deliberate firing by the accused and but for the point with which their Lordships will now proceed to deal they would not have been able to advise His Majesty to allow the Appeal.

It was finally submitted on behalf of the Appellant that as there was evidence of matters which could amount in law to provocation sufficient to reduce the crime to manslaughter this ought to have been submitted by the Court to the jury, and the failure to do so on the part of the trial judge and the failure to consider it by the Court of Appeal was enough to justify the Board entertaining the Appeal on the ground that there had been a failure of justice in this respect. It does not appear that any attempt was made in either of the Courts below to argue that there was sufficient provocation to reduce the crime to manslaughter and indeed as the defence relied on was one of accidental killing it is not surprising that counsel for the prisoner did not attempt to set up what would appear to be inconsistent with that defence. But if on the whole of the evidence there arises a question whether or not the offence might be manslaughter only, on the ground of provocation as well as on any other ground, the judge must put that question to the jury. This was distinctly laid down in *R. v. Hopper* [1915], 2 K.B. 431, a case in some respects resembling the present, more especially in that the line of defence adopted was that the killing was accidental and no attempt had been made at the trial to rely on provocation. This ruling was expressly approved by the House of Lords in *Mancini v. R.* [1942], A.C. 1. The reason for the rule is that on an indictment for murder it is open to a jury to find a verdict of either murder or manslaughter, but the onus is always on the prosecution to prove that the offence amounts to murder if that verdict is sought. If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the judge is not

bound to leave it to them to find murder or manslaughter. But if there is any such evidence then whether the defence have relied on it or not the judge must bring it to the attention of the jury because if they accept it or are left in doubt about it the prosecution have not proved affirmatively a case of murder. Now in the present case there was undoubtedly a fracas in which at some stage the prisoner took part and in which he was admittedly stabbed at a time before the shot was fired. The case was that the deceased man tried to get into his house after he had retired for the night and that he received the wound while trying to drive off or capture the intruder.

If that was true the stabbing would undoubtedly have amounted to provocation. The prosecution's case was on the other hand that the disturbance was caused by the villagers attacking the dead man and his fellow smugglers for the purpose of robbing them. As the case developed at the trial the truth of these two versions became immaterial, but on the issue of provocation it was all important. If a man is struck or stabbed while defending himself or his property or while trying to apprehend a thief there can be no question but that it amounts to provocation of the most serious character. The jury accordingly ought to have been told to consider whether the accused received his wound while acting in defence of his property or whether he got it in consequence of an attempt by him to steal from or injure a man who had done him no harm. That would have enabled them to say whether there was provocation in fact. Then another question would have arisen. The law relating to murder and manslaughter in the Gold Coast is contained in the Criminal Code, but in all material respects the Code reproduces the Common Law of England on the subject. Section 233 provides that intentional homicide shall be manslaughter only, if among other matters of extenuation it is proved on the accused's behalf that he was deprived of the power of self-control by such extreme provocation given by the person killed as is mentioned in section 234. Among the matters which may amount to extreme provocation is an unlawful assault of such a kind . . . as to be likely to deprive a person being of ordinary character and in the circumstances in which he was of the power of self-control. Then section 235 excludes the benefit of provocation where the accused was not in fact deprived of the power of self-control and also where after the provocation such a time elapsed or such circumstances occurred that a person of ordinary character might have recovered his self-control. This puts into statutory form what has for long been the law in this country. Now it may be said with a great deal of force that the prisoner's own evidence was that he had not lost self-control. So it might have been in *Hopper's case (supra)*. In both cases it was inevitable that this should be so seeing that the line of defence was accident. But if the jury reject that defence it yet may be that in truth the shooting was due to a lack of self-control caused by provocation. Then again it can be said that as there had been a chase and the dead man had fled to a house and was killed while he was escaping from the house and was shot from behind there must have been time for an ordinary person to have regained control of his passion. In their Lordships' opinion however the question whether in the circumstances the provocation was such as to deprive an ordinary person of self-control and whether sufficient time had elapsed to enable control to be regained are questions for the jury. There may no doubt be cases where the facts were such that they could not be made the subject of extenuation; for instance a blow or wounding one day, and a killing after a night had elapsed. Here though there is no evidence how long after the stabbing the shooting took place it seems clear it was all in the course of one continuing fracas. The tests have to be applied to the ordinary West African villager and it is on just such questions as these that the knowledge and common sense of a local jury are invaluable. In both *R. v. Hayward*, 6 C. & P. 157, and *R. v. Thomas*, 7 C. & P. 817, some time had elapsed between the provocation and the fatal act, but in both cases it was left to the jury to say whether in the circumstances the crime amounted to murder or only manslaughter. It follows therefore that the direction to the jury that the question of manslaughter could only arise if they accepted the accused's

evidence that the shooting was accidental was wrong. It has resulted in a failure to take the opinion of the jury on a matter which, had they accepted the evidence, might have avoided a conviction for a capital crime. The principles upon which this Board acts in criminal cases are well known and need no repetition, but when there has been an omission to place before the jury for their consideration a matter of such grave importance that they were never led to consider whether in this respect the prosecution had discharged the onus which lay on them of proving murder as distinct from manslaughter, their Lordships think that they can properly entertain the appeal. They would add that it must be seldom that they consider a matter which was not only not mentioned in the courts below, but was not included in the reasons given by the appellant in his case. It was not indeed raised till his junior counsel addressed the Board, but in view of the opinion of the House of Lords in *Mancini's case (supra)* as to the duty of the Court in such circumstances as they find existed here, they have thought it right to consider the matter, although not raised in the printed case. It is impossible to say what verdict would have been returned had the case been left to the jury with a proper direction. In these circumstances it is proper to take the course followed by the Court of Criminal Appeal in *Hopper's case (supra)* and substitute for the jury's verdict one for the lesser offence. Their Lordships have accordingly humbly advised His Majesty that this appeal should be allowed and the verdict of guilty of murder and the sentence of death passed on the appellant should be set aside: that the case should be remitted to the West African Court of Appeal with directions to them to substitute for the verdict found by the jury a verdict of guilty of manslaughter and to pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that offence.

In the Privy Council

KWAKU MENSAH

v.

THE KING

DELIVERED BY LORD GODDARD

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