

Adan Haji Jama and others - - - - - *Appellants*
v.
The King - - - - - *Respondent*

**THE PROTECTORATE COURT OF APPEAL OF
SOMALILAND**

REASONS FOR REPORT OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
DELIVERED THE 9TH DECEMBER, 1947

Present at the Hearing:

LORD UTHWATT
LORD OAKSEY
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal by special leave from 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 judgment of the Protectorate Court of the Somaliland Protectorate sitting as a court of original jurisdiction dated the 19th December, 1945, and confirming the death sentences for murder passed on the appellants by the latter court.

At the conclusion of the arguments their Lordships announced that they would humbly advise His Majesty that the appeal be allowed, and they now give their reasons.

The question which arises for decision on this appeal is whether the trial of the accused was vitiated by the failure of a prosecutor to appear at the trial, and by the course which the trial took in his absence.

Criminal procedure in the Somaliland Protectorate is regulated by the Administration of Criminal Justice Ordinance, 1926, of the Somaliland Protectorate (hereinafter referred to as "the Ordinance"). The Ordinance provides for a preliminary enquiry to be held before a magistrate, and for committal of accused persons to the Protectorate Court. It is not disputed that the appellants, with others, were properly committed for trial to the Protectorate Court. The provisions of the Ordinance relating to trials in the Protectorate Court in force at the date of the trial of the appellants were, so far as material, as follows:—

Sec. 4 (1).

(g) "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. 220.

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

Sec. 226.

(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 . . .

(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. 232.

If the accused, or any of the accused, adduces any evidence, the prosecutor shall be entitled to reply.

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.

(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.

(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.

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. 393.

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account—

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Ordinance; or

(b) of the want of or any irregularity in any sanction required by Section 155 or any irregularity in proceedings taken under Section 346; or

(c) of the omission to revise any list of assessors in accordance with Section 243;

unless such error, omission, irregularity or want has, in fact, occasioned a failure of justice.

Explanation.—In determining whether any error, omission or irregularity in any proceeding under this Ordinance has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

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.

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.

The trial commenced on the 4th October, 1945, before Major R. J. Quin and three assessors and lasted for twenty-five days. Fifty-five witnesses were called for the prosecution, and nearly fifty for the defence. No public prosecutor appeared and the judge himself examined the prosecution witnesses, presumably from their depositions before the magistrate. The defence were represented by the legal officer of the Somaliland Protectorate. At the conclusion of the prosecution evidence the learned judge summed up such evidence. He explained that he did this in order that the defence might know what case they had to meet. The Ordinance does not provide for the summing up of the prosecution evidence before the witnesses for the defence are called, but the accused would not seem to have been prejudiced by this action of the learned judge.

After the conclusion of the defence evidence the learned judge summed up to the assessors. After dealing with the law relating to the evidence of an accomplice, the learned judge put certain specific questions to the assessors, and, on ascertaining from their answers that they were not prepared to accept as true any evidence given by the accomplice, the learned judge seems to have concluded that it would be useless to sum up to them further, and he did not require each of the assessors to state his opinion as required by section 236 of the Ordinance. It has been argued that the failure of the learned judge to comply with section 236 is a sufficient ground for allowing the appeal of the appellants. Their Lordships are satisfied that the breach of section 236 did not occasion a failure of justice, and by virtue of section 393 of the Ordinance such breach affords no ground for setting aside the conviction.

After the conclusion of the summing up the learned judge gave judgment convicting the appellants as already stated and sentencing them to death. No objection seems to have been taken on the part of the accused to the absence of a public prosecutor, but in his judgment the learned judge referred to the matter in these terms:—

“For some reason, which has not been communicated to me, there has not been a prosecuting officer in this case. Although a judge is entitled to question witnesses, he would be exceeding his duty and acting improperly if his questions could be construed into the cross-examination of defence witnesses. For that reason I have refrained from asking witnesses questions in the nature of cross-examination with the result that the evidence of these witnesses has not been subject to the tests which are normal in a criminal court. This is a matter which has given an unusual advantage to the accused and is an important factor that has largely contributed to my finding that a considerable number of the charges have not been proved.”

The appellants preferred an appeal against their conviction, and the appeal was heard on the 30th May, 1946, before Lieut.-Colonel Donald Jackson, legal secretary. An objection to the trial based on the absence of a public prosecutor was taken by leave of the court as an additional ground of appeal. It seems to have been argued that the trial judge was disqualified from trying the case under section 413 of the Ordinance as having become a party to, or personally interested in the trial. This objection was overruled by the learned appellate judge, and their Lordships agree with him in thinking that section 413 of the Ordinance is not applicable to the case.

The absence of a prosecutor necessarily involved a breach of section 226 of the Ordinance, since he could neither open his case nor examine his witnesses. It is to be observed however that the definition of public prosecutor in the Ordinance contemplates that there may be a prosecutor other than a public prosecutor regularly appointed by the Governor under section 356, and their Lordships cannot think that there would have been any overwhelming difficulty in securing the services of some suitable person as prosecutor, and thus avoiding the acquittal of the accused for lack of evidence tendered against them. That course was not followed and the judge himself undertook the duties of the prosecution. This is the real vice in the trial. Breaches of particular provisions of the Ordinance might have been cured under section 393 but the combination in one person of the duties of prosecutor and judge, in their Lordships' view, prevented the trial from being one conducted substantially in the manner required by the Ordinance. The accused did not have the protection to which they were entitled under the Ordinance, namely to be tried by a judge whose mind was not, and could not have been, affected by assuming the duties of a prosecutor. The curative provisions of section 393 of the Ordinance (which is expressed in substantially the same terms as section 537 of the Indian Code of Criminal Procedure) cannot be called in aid to support a trial conducted in a manner substantially different from that laid down in the Ordinance (*Pulukuri Kotayya and others v. King-Emperor*, 74 I.A. 65). Their Lordships have no doubt that the trial judge did his best to be scrupulously fair to the accused, but it is impossible to be sure that a judge, who himself examines the prosecution witnesses, escapes an unconscious bias in favour of accepting their evidence. The judge rightly refrained from cross-examining the defence witnesses, but it would be difficult for him unconsciously to avoid discounting some of their evidence on the ground that it might have assumed a different aspect if subjected to cross-examination. The chance, perhaps a small one, that some witnesses might have impressed their veracity upon the court by the manner in which they stood up to cross-examination, was lost to the accused. It has been said many times that it is necessary not only that justice be done, but that it may be seen to be done. The accused and their friends can hardly have felt assured that impartial justice would be meted out to them by a judge who was acting as prosecutor. Reference was made before the Board to the case of *The Queen v. Hezell* (1 Cox's Criminal Cases, 348) where Mr. Justice Cresswell seems, under protest, to have examined the prosecution witnesses in the absence of a prosecutor. But that case was tried by a jury, while in the present case the judge himself had to try the case.

For the above reasons their Lordships felt it necessary to advise His Majesty that the conviction of and sentences passed upon the appellants be quashed and that they be acquitted.

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