

Sunday Kala Alagba and others - - - - - *Appellants*

v.

The King - - - - - *Respondent*

FROM

THE SUPREME COURT OF NIGERIA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
DELIVERED THE 12TH DECEMBER, 1950

Present at the Hearing:

LORD OAKSEY
LORD RADCLIFFE
LORD TUCKER
SIR JOHN BEAUMONT
SIR LIONEL LEACH

[*Delivered by* LORD TUCKER]

On the 30th May, 1949 all the nine appellants were convicted of murder by Mr. Justice Bairamian, sitting without a jury, in the Port Harcourt Judicial Division of the Supreme Court of Nigeria. The first eight were sentenced to death and number 9, being 15 years of age, was ordered to be detained during His Majesty's pleasure. Leave to appeal was refused by the West African Court of Appeal on 2nd August, 1949. The present appeals are brought pursuant to special leave to appeal in forma pauperis granted by His Majesty in Council. The appellants were charged jointly with murder contrary to section 319 of the Criminal Code and the particulars alleged that the appellants on or about 11th day of March, 1949 at Elemiama (Old Shipping) in the Rivers Province murdered Douglas Obene Marian Braide.

Section 319 of the Criminal Code, so far as material to this case, reads as follows:—

“ Subject to the provisions of this section any person who commits the offence of murder shall be sentenced to death.”

The material provisions of section 316 are:—“ Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say:—

“ 1.—If the offender intends to cause the death of the person killed or some other person ;

“ 2.—If the offender intends to do to the person killed or to some other person some grievous harm ;

“ 3.—If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life ;

is guilty of murder.

" In the second case it is immaterial that the offender did not intend to hurt the person who is killed.

" In the third case it is immaterial that the offender did not intend to hurt any person."

Section 8 of the Criminal Code is as follows:—

" When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

The appellants are all members of the Okrikas tribe. The deceased was a member of the Kalabaris tribe. These tribes had been engaged in hostilities but at some date prior to 11th March, 1949 they had resolved their differences and ceased fighting.

The two principal witnesses for the prosecution were Dora Braide, the widow of the deceased man, and Hamilton George.

According to the evidence of Dora Braide she, the deceased, Hamilton George (known as Douglas) and the Braides' two children were going in two canoes from Bakana to Bile. On the way they stopped at Elemiama, which is in the Kalabaris' territory. The deceased and Douglas landed, Dora stayed with the children in the canoe. She saw four canoes approaching. She sent the children to call her husband and Douglas. The occupants of the four canoes wanted to land and said they wished to cut coco-nuts. The deceased, who had by this time returned, replied, " You have not got any coco-nuts here, this is our old town." Whereupon the party, consisting of the nine accused and two others, who had already landed, returned to one canoe and shouted the war-cry of the Okrika people. They then landed again and surrounded the deceased. They hit him with a stick, cut him with a knife and threw a spear at him. He died instantly. Dora, Douglas and the two children ran away. Dora was struck down with a club and her head was cut with a knife. Douglas was cut with a knife. The younger of the two children was beaten and lay in the mud. Douglas and the other child swam across the river and escaped. The assailants then took the Braides' canoes and departed. She said accused No. 5 was the one who struck her. She did not see who injured Douglas. Accused No. 2 was the first to strike her husband with a long stick. All the accused had something in their hands. Nos. 3 and 4 had spears.

Hamilton George (Douglas) gave similar evidence as to the preliminary events and as to the attacking party collecting in one canoe and uttering the words Adu Osu Nye (which Dora had described as their war-cry) before landing for the attack. He said the deceased was hit on the head with a big stick. A spear was then thrown at him. He was hit by one spear in the right forearm and another about the left breast. He fell forward on his face. He (Douglas) ran away. He was chased and hit with a small axe in the back and on the head with a big stick. He had three knife wounds in the head and fell in the swamp where he was left for dead. He said No. 4 was the first to strike deceased. He could not identify the man who threw the spear. It was No. 6 who struck him (Douglas) with a stick. No. 2 struck him on the head with a machet. As the blood poured from his head he could not see who struck him with the axe on the back.

The medical evidence was to the effect that when the body of the deceased was found there were two harpoon-like or spear-like instruments sticking out of the body, one from the inner aspect of the right arm—a little distance from the arm pit, the other from the outer aspect of the left forearm—between elbow and wrist. There was a cut wound about three inches long on the outer aspect of the right forearm and a slight bruise on the left side of the neck. Death was due to the severance of the right brachial artery caused by the harpoon-like spear.

Hamilton George (Douglas) was described as suffering from very serious multiple cut wounds.

The trial Judge after summarising the evidence, including that of the accused all of whom gave evidence, said, "I have believed Dora and Hamilton George and I have not believed the fabricated story of the accused."

The evidence of the accused had been to the effect that Nos. 1 to 6 inclusive together with two other men named Bereburuka and Godwin Brown were out fishing in four canoes when they were hailed by Nos. 7 and 8 who were in a swamp. They rescued them and two others. The four rescued men said they had been attacked and robbed of their canoes by Kalabaris. Accordingly Nos. 1 to 6 and Nos. 7 and 8 proceeded in order to investigate the reason for this attack on their fellow tribesmen. The two other rescued men being exhausted were taken away by Bereburuka. A short distance further on they met a man named Panga Luke and accused No. 9 who was Luke's canoe boy. They told them what had happened and accordingly Luke and No. 9 joined the party of investigation. When they reached Elemiama they saw a party of Kalabaris, more than five in number and containing no women or children, who fired on them, whereupon they sheltered in the water and then landed and engaged in stick throwing with the Kalabaris who were defeated without serious injury on either side.

This was the account which was described by the Judge as "the fabricated story of the accused" and rejected in toto.

The appeal was based on a submission that the accused were tried and convicted as a body without any attempt to distinguish between them and in this connection reliance was placed upon a passage in the judgment of the trial Judge in which he said, "In this case it does not matter which of the accused did what". It was said that the trial Judge was led into an erroneous approach to the case by Counsel for the prosecution and by Counsel for the defence both of whom presented their cases on the basis that it was impossible to distinguish the individual accused. It was submitted that this vitiates the verdict against all. Alternatively it was argued that on examination of the evidence the cases of accused Nos. 7 and 8 and accused No. 9 are distinguishable from the cases of Nos. 1 to 6 and were not in fact distinguished by the Judge. The main issue depends upon the provisions of the Criminal Code set out above from which it is clear that if two or more persons have formed a common intention to attack another or others with intent to kill or do grievous harm or in a manner likely to endanger human life and have in fact taken part together in such an attack on others resulting in death as a probable consequence all are guilty of murder.

It is plain from the evidence of Dora Braide and Hamilton George (Douglas) set out above in some detail, if believed, that a deliberate and unprovoked attack of a kind likely to endanger human life and resulting as a probable consequence in the infliction of grievous harm on one and the death of another was carried out in concert by all the accused in circumstances pointing irresistibly to a common design commencing at latest from the moment when they gathered together in one canoe and shouted their tribal war-cry. In fact the trial Judge drew the inference from all the facts and circumstances—as he was perfectly entitled to do—that the common design was formed when Nos. 1 to 6 met Nos. 7 and 8 and the other two men who had been attacked by the Kalabaris and that "furious at this act of aggression they wanted to have their own back on the Kalabaris and set out with that purpose" viz., to carry out a "punitive expedition on Kalabaris whoever they might be", and that subsequently Panga Luke and No. 9 willingly joined the expedition. Accepting as he did the evidence of Dora Braide and Hamilton George and having come to the conclusion that there was a common design the Judge in dealing with the execution of the common design was correct in saying, "It does not matter which of the accused did what".

In deciding whether there was a common design the cases of Nos. 1 to 6 were indistinguishable. It is clear from the judgment that on this aspect of the case the trial Judge appreciated the possible differences in the cases of Nos. 7 and 8 and No. 9. He inferred that 7 and 8 joined in the common design at its inception and that later No. 9 willingly joined in. This was eminently a matter for the Judge at the trial, but, whether or not he drew a correct inference as to the moment of time when the common design was formed, as already stated the inference of the existence of a common design in all the accused at a later stage is irresistible.

It was urged on behalf of No. 9, who admitted in evidence taking part in the fight, that he was only 15 years of age and was the canoe boy of Panga Luke and as such bound to carry out his orders. There was no real evidence that he was coerced, and having regard to the provisions of section 32 of the Criminal Code any such defence would not have been open to him on such a charge as this.

For these reasons their Lordships are of opinion that the main ground upon which the Appellants' appeals were based is found on examination to be without foundation. One or two subsidiary matters were raised, e.g., the manner in which the trial Judge dealt with the evidence of the witnesses Panga Luke and Godwin Brown who were called for the prosecution and said to be accomplices, but their Lordships do not consider it necessary to refer to these matters as they were clearly not of such a nature as to bring the case within the principles upon which the Board intervenes in appeals in criminal cases, but in so saying their Lordships must not be taken to imply that the judgment or trial was in any respect open to criticism.

Their Lordships have accordingly humbly advised His Majesty that the appeals of all the accused should be dismissed.

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Printed by His MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.
1951