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Judgment  
12/1964

No. 38 of 1963

IN THE PRIVY COUNCIL

ON APPEAL  
FROM THE FEDERAL SUPREME COURT OF  
RHODESIA AND NYASALAND

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
22 JUN 1965  
25 RUSSELL SQUARE  
LONDON, W.C.1.

BETWEEN :

TADEYO KWALIRA and JOSEPH  
DUNCAN ... .. Appellants

- and -

78554

10 THE QUEEN ... .. Respondent

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal in forma pauperis by special leave of the Judicial Committee granted on the 31st July 1963, from a decision on the 12th December 1962 of the Federal Supreme Court of Rhodesia and Nyasaland (Clayden C.J. and Quenet F.J., Unsworth C.J. Nyasaland dissenting) upholding a verdict and sentence, dated the 20th August 1962, of the High Court of Nyasaland (Cram J. sitting with three assessors) whereby the Appellants were found guilty of the murder of one Silino Mathews, and were sentenced to death. P. 319

2. The principal grounds of appeal raised by the Appellants are: P. 272

30 i) On the facts as found by the Federal Supreme Court it could not be said to be established beyond reasonable doubt that there was no provocation such as would have reduced the offence of killing the deceased to manslaughter.

ii) On the facts as found by the Federal Supreme Court it could not be said to be established beyond reasonable doubt that the Appellants had not killed the deceased in self-defence.

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iii) That the defence of the first Appellant was not considered adequately or at all.

3. In Nyasaland the law relating to provocation is contained in the Penal Code as follows:-

"s.213(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only. 10

(2) The provisions of this section shall not apply unless the Court is satisfied that the act which causes death bears a reasonable relationship to the provocation.

s.214 The term 'provocation' means and includes, except as hereafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master and servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered. 20

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relationship as aforesaid, the former is said to give the latter provocation for an assault." 30

4. In Nyasaland the law relating to self-defence is contained in the Penal Code as follows:-

"s.18 Subject to any express provisions in this Code or any other law in operation in the Protectorate, criminal responsibility for the act of force in the defence of person or property shall be determined according to the principles of English common law." 40

10 5. On the 13th December 1961 the body of Silino Mathews was found on a path leading to Kavala No. 2 village, in which village both he and the first Appellant lived. This village lies on the hillside on one side of a valley traversed by a stream called Bilila. On the hillside on the opposite of the valley lies Kavala No. 1 village and the path upon which the deceased was found links the two villages. The deceased was found some quarter of a mile up the hillside from the stream and some 250 feet down the hillside from his own house, which in turn was some 250 yards from the rest of Kavala No. 2 village.

6. The prosecution called, inter alia, the following witnesses:-

20 a) Detective Constable Khumbeni, who testified that he was taken to the body on the 14th December and that he found a panga on the path 99 feet away from the body in the direction of the stream. P. 6

b) Kelita Tadeyo Kwalira, who testified that he was a son of the first Appellant and that on the 12th December the deceased had called at his (the witness's and first Appellant's) home and, in the absence of the first Appellant and his wife, had beaten the first Appellant's children (the witness's brother and sisters) with a stick. P. 16

30 c) Valaliyano Chilodenzi, who testified that he lived in Kavala No. 2 village and farmed a garden on the Kavala No. 1 village side of the stream. After sunset on a December evening he was walking home from his garden and soon after crossing the stream he was approached by the second Appellant, who was carrying a panga. The witness said that the second Appellant snatched a knobkerrie from him, the witness, and then made off, away from the path and back towards the stream. The witness continued on his way home and was later met by one Davison, who was another son of the first Appellant. Davison was coming from the direction of Kavala No. 2 village and was carrying a panga and a knobkerrie. When Davison met the witness he, Davison, turned and walked back towards Kavala No. 2 village, although not in company with the witness. P. 18

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- P. 29            d) Davison Tadeyo, the fourteen year old son of the first Appellant, who gave unsworn evidence. He said that he had been at home with his brother Kelita when the deceased came to the house and beat his (the witness's) younger brother and sisters. Later his father had come home and had then gone out carrying only a knobkerrie. He had followed his father, down the hill, and from a distance of about 100 yards he had seen his father and the deceased fighting by the side of the stream. The deceased had come from the Kavala No. 1 village side of the stream and was carrying a panga. He said he heard his father ask the deceased why he had assaulted the children and heard the deceased reply that it was because of their rudeness. While the first Appellant and the deceased were quarrelling the second Appellant appeared, carrying a panga, and told the first Appellant to beat the deceased. On hearing this the deceased had stabbed the first Appellant with his (the deceased's) panga on the head and in the arm. The second Appellant then ran to Valaliyano, who was passing somewhere near, seized a knobkerrie from him, and ran back towards the fight. Valaliyano, continuing on his way, reached the witness and said "Let us go to the village", and the witness went home with Valaliyano, seeing no more of the fight. The witness said he was carrying the small branch of a tree and nothing else. In cross-examination he said he had seen the deceased strike only one blow at the first Appellant, this being the blow on the head. He assumed a second blow had been struck because he later saw a wound on his father's wrist.            10
- P. 33 l. 18            20
- P. 36 l. 30            30
- P. 40            e) Eneres Tadeyo Kwalira who testified that she was a daughter of the first Appellant and had been at home with the other children when the deceased came. The deceased was driving some pigs belonging to the witness's uncle and had told the children to shut them up. The deceased had then assaulted the children, including the witness, who had a baby on her back, with a stick. Later her father had come home and had gone out again with a stick, this being at sunset. Later still she saw her father bleeding from wounds to the head and arm. She said her father owned only one panga, that it was in the house when he went out, and that it was still in the house.            40
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- 10 f) Margarita Dunkeni, the wife of the first Appellant who testified that on the day of the assault upon her children she, with the first Appellant, had been to a funeral at Kavala No. 1 village. She returned home in advance of the first Appellant. When the first Appellant returned home he went out again. On his second return, in the evening, he was wounded in the head and the arm. He told her that the deceased was the one who had injured him. P. 44
- g) Jorodani who testified that he lived in Kavala No. 2 village and that the first Appellant came to him at half past six in the evening with a wound in the head. The witness dressed the wound. The first Appellant told the witness that he (the first Appellant) had been involved, with the second Appellant, in a quarrel with the deceased. P. 54
- 20 h) Magombo Kwalira, the first Appellant's brother, testified that the first Appellant came to his (the witness's) home early one morning and said "I was involved in a fight, I started the fight", and "Having started the fight like that, Jontala (the second Appellant) is the one who came to strike the man with a knife". In answer to the Court the witness later said that he had been mistaken in saying earlier that the first Appellant had said: "I started the fight". P. 63 1. 32  
P. 67 1. 26
- 30 j) Matias Yohane Kavala testified that he was the headman of Kavala Nos. 1 and 2 villages and lived in Kavala No. 1 village. He went to some trees on the Kavala No. 2 village side of the stream and there found a trail of blood which led to the body of the deceased. Before the police arrived there was rain and thereafter little remained of the trail of blood. He saw the panga lying where the police found it and recognised it as belonging to the deceased. He had never heard of any quarrel between the first Appellant and the deceased. P. 70
- 40 k) Marko Mathews testified that he was the brother of the deceased and lived in Kavala No. 1 village. He met the deceased at about sunset on the day the deceased was killed. The meeting took place on the Kavala No. 1 side of the stream, and the deceased was going toward's Kavala No. 2. The witness had been to his garden, which was by the stream but on Kavala No. 2 side, and P. 76

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was returning home. Later he was taken to the spot where his brother's body lay and he also saw the panga lying on the path. He had never seen this panga before. His brother owned one panga, and this panga the witness found beneath the deceased's bed when he, with the police, later searched the deceased's house. The witness said in examination in chief that when he met the deceased, the deceased was not carrying anything: in cross-examination he said the deceased was carrying a bag of maize but was not carrying a panga. 10

P. 78 1. 9

P. 83 1. 2

P. 84 1) Doctor Samuel Valla Bhima testified that in his view the deceased had died from haemorrhage and shock accelerated by brain injury. There were six wounds, three serious wounds upon the head and three lesser ones on the arms. They could have been caused by a fairly heavy sharp-edged weapon wielded with a good deal of force. The deceased could have walked after receiving one of the three serious wounds but it was unlikely that he could have walked after receiving either of the two other serious wounds. The panga found on the path was stained with blood. He examined both the Appellants and found the first Appellant had a small healing scalp wound on the left side of his head which would have bled quite extensively, and a small healing wound on the back of the right hand. The second Appellant had a small healing wound on the left upper arm. The witness examined the panga found on the path and also the panga found beneath the deceased's bed. Either of the two pangas could have caused the wounds suffered by the Appellants. He took specimens of blood from each of the Appellants. 20

P. 87 1. 1

P. 106 m) Sub-Inspector Godfrey Makowa testified that on the 16th December he went to Chibonga village, which is some half a mile from Kavala No. 2 village. He there arrested the second Appellant and cautioned him. The second Appellant said: "I do not know the day on which I killed a person. What he quarrelled with Tadeyo for, I don't know it. I cannot join in somebody else's fight. I live at Chibonga. That is up to them at Kavala here". On the 17th December the second Appellant made a further voluntary statement in which he said: "I understand the charge and I deny it, that it 30

P. 111 1.27

Exhibit P. 9 P. 323

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is not I who killed, it is Tadeyo Ewalira who killed him, by protecting his children, and I have no further words". On the 18th December the first Appellant came of his own accord to the police station where the witness formally charged and cautioned him. The first Appellant made a voluntary statement in which he said: "I deny that it is I who killed Silino, but Joseph Duncan is the one who killed Silino with a panga knife. I saw that". The witness then showed the first Appellant the statement earlier taken from the second Appellant. The first Appellant then made a further statement in which he said: "I have understood, because it was him who came with a knife with which he struck Silino. I had no weapon at the time, but he is the one who injured Silino. When I was trying to stop them he injured me as well". The witness also testified that on the 21st December he collected a panga from the wife of the second Appellant.

Exhibit P.10  
P. 324

Exhibit P.11  
P. 325

n) A report by the Government Analyst was put in. This disclosed that both the Appellants belonged to blood Group O, the commonest blood group. The stains on the panga found on the path were also of blood group O. A pair of shorts taken from the first Appellant was stained with blood but it was not possible to determine to which group this blood belonged. No evidence was put in as to the blood group of the deceased: from the evidence of Dr. Bhima the condition of the body when it was discovered might have made it impossible to obtain a blood sample.

Exhibit P.13  
P. 327

7. Each of the Appellants gave evidence on oath:

a) The first Appellant said that he set out from his home to report to the headman, in Kavala No. 1 village, that his (the witness's Appellants) children had been assaulted by Silino. He carried only a stick. He met the deceased at the stream and was asked where he was going. On saying that he intended to report the assault to the headman the deceased told him not to do so but return home. He turned to go home because he was afraid of the deceased, who was carrying a panga. The deceased struck two blows at him, the first of which he warded off with his stick and the second of which, a stab,

P. 133

P. 137 11.9,25

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P. 138 1.24 cut his arm. The second Appellant appeared on the scene and intervened. There was a struggle between the deceased and the second Appellant in which the latter was pushed to the ground and struck in the back with the deceased's panga. The second Appellant then ran to Valaliyano who was passing, and took a stick from Valaliyano. While this was happening the deceased came again at the witness and struck at his head with the panga. The witness attempted to ward off the blow with his stick, which had already received damage, but this blow broke the stick and cut his head. The witness fell to the ground and was weak and dizzy. He was conscious that the deceased and the second Appellant were struggling again, some short distance away, but could not see clearly because it was semi-dark and because blood from his head wound was running in his eyes. The second Appellant, who was then carrying a panga, came to him, helped him up, and together the Appellants went up the path. The deceased was on the ground but got up and followed them and when the Appellants saw this they walked faster. The second Appellant left the witness at the door of his (the witness's) house. Later the witness said the second Appellant was carrying a panga when he first appeared but that he put this on the ground when he intervened. The witness did not see the second Appellant pick up this panga, but it was this panga the second Appellant was carrying when he rejoined the witness. He identified the panga found on the path as the one carried by the deceased and said it belonged to the deceased. He also identified the panga later found under the deceased's bed as belonging to the deceased and sometimes carried by him. He did not learn of the deceased's death until two days later. The witness's wife was the second Appellant's sister. In answer to a question put in cross-examination he suggested the deceased might have been killed by the second Appellant after the latter had left the witness and was returning down the path. Magombo was mistaken in saying the witness told him that the second Appellant came to strike with the knife.

P. 140 1.21

P. 145 1.34

P. 154 1.10

P. 196

b) The second Appellant said that he had been working in his garden, which he left after sunset but when there was a little light. When he reached the stream crossing he saw the first



Appellant and the deceased quarrelling. They were then on opposite sides of the stream. The first Appellant said to the deceased: "If you cross you will die there, because you have assaulted my children." The deceased then crossed the stream and the first Appellant struck him on the head three or four times with a knobkerrie. The deceased attempted to parry these blows with his left hand and then, with the panga he was carrying, struck the first Appellant upon the hand, drawing blood. The first Appellant turned to run away, then turned back and struck the deceased again with his knobkerrie. The witness put down his panga and ran to the fight to try to stop it. He pushed the deceased aside but the deceased struck him (the witness) on the upper arm with the panga. He then ran to Valaliyano and seized the latter's stick. When he returned to the fight he found the first Appellant had already received his head wound but had dispossessed the deceased of the latter's panga. The deceased was also bleeding. The witness struck the deceased twice with the thin end of Valaliyano's stick. The deceased pushed the witness, who fell to the ground. The first Appellant struck the deceased with the latter's panga and then, apparently, dropped it. Thereafter the first Appellant struck the deceased several times on the head with his (the first Appellant's) stick, and the deceased fell. The witness caught hold of the first Appellant and said: "Stop this, it is finished let us go". They went up the hill together, the first Appellant carrying his own knobkerrie and the witness his own panga, which he had picked up. They saw the deceased get up and follow them and they ran. The first Appellant's stick was never broken and he never fell to the ground, so far as the witness saw. The witness did not learn of the death until midday the following day. In cross-examination he said he did not see the first Appellant strike the deceased with a panga and the deceased did not appear to be injured.

P. 197 1.15

P. 200 1. 9

P. 206 1.22

P. 203 1.29

P. 207 1.10

P. 231 1.33

8. The learned Judge in his judgment found inter alia that:

P. 272

- a) The second Appellant was armed throughout with a panga and a knobkerrie;
- b) The first Appellant was armed throughout with a panga and a knobkerrie; that this

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panga was the panga found upon the path, and was carried by the first Appellant when he left his house and went down to the stream;

c) The deceased was unarmed throughout;

d) The two Appellants, after assaulting the deceased by the stream, either pursued the deceased up the hill with a common intent to assault him further or, having assaulted and left the deceased, they formed a common intent to assault him again when they saw him up the hill. Further, that no reasonable doubt was raised that at any critical time both accused were actively assaulting or aiding and abetting each other.

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P. 298 1.13 The learned Judge stated:

"Primarily, however, any possibility of provocation or self-defence is excluded once it is accepted that both accused were armed with pangas and the deceased was unarmed."

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9. The powers of the Federal Supreme Court for the determination of appeals in ordinary criminal cases are contained in section 13 of the Federal Supreme Court Act, 1955. This section was considered in the case of Chiteta v The Queen (1960) R. & N. 199, the headnote to which reads:

"Although there are some similarities between section 13(1) of the Federal Supreme Court Act and section 4(1) of the Criminal Appeal Act of England, yet on a general view of the Federal Act, including differences in wording from that of the English Act, the approach of the Federal Supreme Court to an appeal on fact, in cases other than appeals from the verdict of a jury, should be different from the approach of the English Court of Criminal Appeal; the Legislature intended that the Federal Supreme Court should re-hear the case and should bring to bear its own judgment on every point on which it is in an equally good position to do so as was the Court of the first instance."

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10. The Federal Supreme Court heard the appeals of Your Petitioners as a rehearing and, correctly, it is submitted, they reversed the findings of fact of the learned trial Judge referred to in Paragraph 8(b) and (c) above. The learned Chief Justice (Clayden C.J.), with whose judgment Quenet F.J. agreed, added:

10 "I cannot regard it as proved beyond reasonable doubt that the first Appellant had this panga (the panga found on the path) at the time of the assault on the hill". P. 310 1.49

11. The learned Chief Justice also considered the possibility that the deceased was killed as he followed after the Appellants. He approached this possibility, correctly it is submitted, on the basis that on the second assault only the second Appellant had a panga. He said:

P. 312 1.34

20 "But if, as they say they did, the Appellants did see the deceased coming up the hill after them a renewal of the attack can only, I think, have been because a man who was thought to have died was seen to be alive and able to blame them... The only inference to my mind is that the two, who before had made common cause in the attack on the deceased, continued to do so."

30 12. The learned Chief Justice (Clayden C.J.) considered the possibilities of self-defence and provocation and dismissed them. He continued:

P. 313 1.19

40 "In this case I take a view contrary to that formed by the learned trial Judge on one important fact in the case, whether the deceased was armed at the start of the fight. But that does not involve that there was any misdirection of himself on fact by the learned Judge. The Appellants setting out to show that the verdict of murder was a wrong one succeed in showing that in one of the findings of fact the trial Court erred. But that does not end the inquiry. They are not thereby entitled to have a different verdict entered. They must still show that the verdict is wrong

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when a different view is taken of that fact. And in that regard I hold against them.\*

13. In the Federal Supreme Court, Unsworth C.J. Nyasaland delivered a dissenting judgment. He agreed with the findings of fact made by Clayden C.J. but continued:

P. 317 1.32

"It seems to me that the whole position alters once it is accepted that the case must be considered on the basis that the deceased was armed with a panga and the first Appellant not so armed. It is not then a case of persons entering into a conflict with an unarmed man or of entering into such a conflict with an intention of using lethal weapons. It is, furthermore, in these circumstances, difficult to reject the evidence of both appellants to the effect that any lethal weapon was used only after they had both been provoked by blows from the deceased with his panga...\*. There was provocation and I do not think that it would be safe to infer from the evidence available that the mortal injuries were inflicted after there was time for passions to cool, or that the case is one for the application of section 213(2) of the Penal Code which relates to the mode of retaliation. The burden of proof remains on the prosecution throughout and, with respect, I would not be prepared to hold in this appeal that the prosecution established beyond all reasonable doubt that the mortal injuries were not inflicted in the course of a continuing fracas after provocation in circumstances which could amount to manslaughter."

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\* I should add that I would have reached the conclusion that the proper verdict is one of manslaughter even on the basis that this is a full re-hearing.

14. It is respectfully submitted that the true effect of section 13 of the Federal Supreme Court Act is not what it was held to be in Chiteta v The Queen and that in fact it gives the Federal Supreme Court no greater powers than those possessed by the English Court of Criminal Appeal. When on the re-appraisal of the evidence by the Federal Supreme Court, it became apparent that the issues of provocation and self-defence had

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arisen in new and substantial form, the Court ought to have directed itself that, as these issues had not been considered in that form in the trial Court, the verdict of the trial Court could not be sustained.

10 15. It is respectfully submitted that even if the correct view of the powers of the Federal Supreme Court is the view expressed in Chiteta's case, then nevertheless the Federal Supreme Court went beyond the principles set out in that case. In directing himself that where, as here, provocation and the possibility of self defence had been disclosed by the evidence, it was still for the Appellants to prove that the verdict was wrong, the learned Chief Justice was misdirecting himself as to the principles in Chiteta's Case.

20 16. It is further submitted, respectfully, that in any event, on the changed view of the facts taken by the Federal Supreme Court, that Court failed to direct itself adequately or at all as to the defence disclosed by the first Appellant. On the view that there was a second, fatal assault separated both in time and distance from the first assault, the Court failed to consider whether there was any evidence implicating the first Appellant in such second assault. Had they done so they must have found there was no evidence so implicating the first Appellant and indeed that it was not even established beyond 30 reasonable doubt that he was present.

17. In the premises the Appellants respectfully submit that there has been a grave miscarriage of justice and that their convictions and sentence for murder ought to be set aside for the following (among other)

R E A S O N S

- 40 1. BECAUSE Chiteta's Case does not express the true effect of Section 13 of the Federal Supreme Court Act.
2. BECAUSE the Federal Supreme Court imposed a burden of proof upon the Appellants that was greater than any burden of proof imposed by law.

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3. BECAUSE the defence of the first Appellant was not considered adequately or at all.
4. BECAUSE the Appellants have suffered a grave miscarriage of justice.

GERALD DAVIES.

No. 38 of 1963

IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE FEDERAL SUPREME COURT  
OF RHODESIA AND NYASALAND

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B E T W E E N :

TADEYO KWALIRA and  
JOSEPH DUNCAN ... Appellants  
- and -  
THE QUEEN ... Respondent

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CASE FOR THE APPELLANTS

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