

~~GC 6-2~~
PC

Judgment
12, 1964

IN THE PRIVY COUNCIL

No.38 of 1963

ON APPEAL FROM THE FEDERAL SUPREME COURT
OF RHODESIA AND NYASALAND

B E T W E E N

TADEYO KWALIRA and JOSEPH DUNCAN

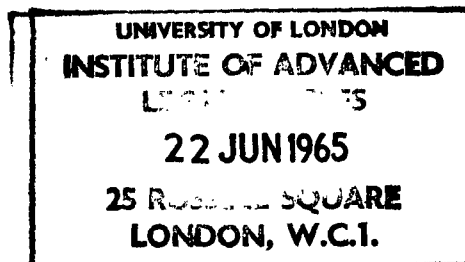
Appellants

and

THE QUEEN

Respondent

RECORD OF PROCEEDINGS



78553

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IN THE PRIVY COUNCILNo.38 of 1963

ON APPEAL FROM THE FEDERAL SUPREME COURT
OF RHODESIA AND NYASALAND

B E T W E E N

TADEYO KWALIRA and JOSEPH DUNCAN Appellants

and

THE QUEEN Respondent

RECORD OF PROCEEDINGSINDEX OF REFERENCE

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IN THE PRIVY COUNCIL

No.38 of 1963

ON APPEAL FROM THE FEDERAL SUPREME COURT
OF RHODESIA AND NYASALAND

B E T W E E N :-

TADEYO KWALIRA and
JOSEPH DUNCAN Appellants

and

THE QUEEN Respondent

RECORD OF PROCEEDINGS

10

No.1

INFORMATION

NYASALAND PROTECTORATE

In the High
Court of
Nyasaland

IN HER MAJESTY'S HIGH COURT OF NYASALAND

The 17th day of February 1962

AT THE SESSIONS HOLDEN AT NCHEU

No.1

Information
17th February
1962

20

ON THE 5TH DAY OF JUNE 1962 THE COURT IS INFORMED BY THE ATTORNEY GENERAL ON BEHALF OF OUR SOVEREIGN THE QUEEN THAT TADEYO S/O KWALIRA, A MALE AFRICAN, TRIBE MTUMBA, VILLAGE SAULOSI AND JOSEPH S/O DUNCAN A MALE AFRICAN, TRIBE MTUMBA, VILLAGE CHAMBONGA BOTH OF CHIEF NJOBVULEMA, NCHEU DISTRICT, WITHIN THE JURISDICTION OF THE SAID COURT DID COMMIT THE OFFENCE STATED BELOW:

Statement of Offence.

MURDER, CONTRARY TO SECTION 209 AS READ WITH SECTION 210 OF THE PENAL CODE.

Particulars of Offence.

TADEYO S/O KWALIRA AND JOSEPH S/O DUNCAN ON OR ABOUT 12th DECEMBER, 1961, NEAR KAVALA VILLAGE IN THE DISTRICT OF NCHEU, MURDERED SILINO S/O MATHEWS. (Sgd)Michael Nicholson
CROWN COUNSEL.

Dated this 17th day of February, 1962.

In the High
Court of
Nyasaland

No.1

Information
17th February
1962
continued

LIST OF WITNESSES.

1. D/Const. Chambize.
2. D/Const. Khumbeni.
3. Kelita d/o Tadeyo Kwalira.
4. Valaliyano s/o Chilodzeni.
5. Davison s/o Tadeyo Kwalira.
6. Antony s/o Silino.
7. Maliko s/o Mathews.
8. Maitas s/o Yohanne Kavala.
9. Eneres d/o Tadeyo Kwalira.
10. Mangarita d/o Donkeni.
11. Jorodani @ Yoswa s/o Tebulo.
12. Odilia d/o Dandalamu.
13. Magombo s/o Kwalira.
14. Gerson W. Kapalamula.
15. Dr. S. V. Bhima.
16. Const. Tombole.
17. Insp. T. A. Lowes.
18. Sgt. Chimenya.
19. Mr. D.S.R. Arthur.
20. S/Insp. Makowa.
21. D/Sgt. Diamond
22. Const. Phiri.
23. l/Sgt. Mbetwa.
24. Dr. Pilbeam.

10

20

NO. 2

PROCEEDINGS

NYASALAND PROTECTORATE

IN HER MAJESTY'S HIGH COURT
OF NYASALAND

5th June, 1962

11.15 a.m. At Ncheu

CRIMINAL CASE NO.14 of 1962

THE QUEEN

versus

{1} TADEYO KWALIRA
{2} JOSEPH DUNCAN

In the High
Court of
Nyasaland

No.2

Proceedings
5th June 1962

10

Coram: Cram, J.

Nicholson, Crown Counsel, for the Crown
Wills, of Counsel, for the First Accused
Mehta, of Counsel, for the Second Accused
Mrs. M. Wright, Court Reporter
C.C.J. Chipinga, Court Interpreter

Charge: MURDER: Contrary to Section 209 as read
with Section 210 of the Penal
Code.

20

1st Accused charged,

pleads: "I deny".

Entered as a plea of Not Guilty

2nd Accused charged,

pleads: "I deny".

Entered as a plea of Not Guilty

ASSESSORS:

1. V. H. BENI CHISEU, Pagan affirmed.
2. MILLION SEMU, Christian sworn.
3. YOUNGSTER SEMU CHILIPA, Pagan affirmed.

30

NICHOLSON, Crown Counsel, outlines the case
for the prosecution.

PROSECUTION EVIDENCE

NO. 4

In the High
Court of
Nyasaland

EVIDENCE OF DETECTIVE SERGEANT FRACKSON
CHAMBIZE

Prosecution
Evidence

P.W.1. No.3382, DETECTIVE/SERGEANT FRACKSON
CHAMBIZE, Nyasaland Police, Christian sworn,
states:-

No.3

Detective
Sergeant
Frackson
Chambize
Examination
5th June 1962

Examined Nicholson:

Q. What is your number, rank and full name,
please.

10

A. No.3382, Detective Sergeant Frackson
Chambize.

Q.I believe that you are normally stationed
at Central Division Headquarters Lilongwe?

A. I am.

Q. And one of your duties there is the
developing and printing of films? A. I am,
My Lord.

Q. Now on the 19th December last year were you
handed one roll of film for processing?

20

A. On the 19th December I was handed by detective
Constable Khumbeni a roll of film for processing.

Q. And did you develop that film and print
copies of each negative?

A. I developed the film and printed six copies
of each negative.

Q. And on the 21st December last year did you
hand the prints back to Detective Constable
Khumbeni? A. I did, My Lord.

Q. And did you retain possession of the
negatives? A. I did, My Lord.

30

Q. Do you still have those? A. I still have
those.

Q. How many are there? A. There are ten.

(A set of photographs are handed to the
witness).

Q. Look at those photographs, numbered one to ten. A. These are the photographs I printed.

In the High
Court of
Nyasaland

Q. Those ten negatives are the negatives of the photographs? A. Yes.

Q. Do you now produce the negatives? A. I do.

Prosecution
Evidence

(The negatives are now put in and marked "EXHIBIT P.1.")

No.3

Cross-examined by K.W.Wills

No questions.

Detective
Sergeant
Frackson
Chambize
Examination
5th June 1962
continued

10

Cross-examined by M.B.Mehta

No cross-examination.

In the High
Court of
Nyasaland

EVIDENCE OF DETECTIVE/CONSTABLE BENEDICTO
PETER KHUMBENI

Prosecution
Evidence

P.W.2. No.3387. DETECTIVE/CONSTABLE BENEDICTO PETER
KHUMBENI, Nyasaland Police, Christian sworn,
states:-

No.4

Detective
Constable
Benedicto
Peter
Khumbeni
Examination
5th June 1962

Examined Nicholson:

Q. What is your number, rank and full name,
please?

A. No.3387, Detective/Constable Khumbeni.

10

Q. Full name? A. Benedicto Peter Khumbeni.

Q. Are you stationed at Ncheu? A. At Ncheu.

Q. On the 14th December last year did you go
somewhere? A. Yes, I went to Kavala Village.

Q. And when you got there, what did you do?
A. I took photographs.

Q. How many photographs did you take?
A. I took ten photographs.

Q. And did you hand the film of those photo-
graphs to Detective Sergeant Chambize?
A. Yes, I did.

20

Q. And did he later hand you back the prints
of the photographs? A. Yes, he did.

Q. Would you look at those photographs there?

(A set of photographs handed to witness)

A. Yes, they are the ones.

Q. Do you now produce those prints? A. Yes.

(The photographs are now put in and marked
"EXHIBIT P.2".)

Q. When you arrived there at the village did
you meet somebody? A. Yes.

30

- Q. Who was that? A. Village Headman Kavala. In the High Court of Nyasaland
- Q. And did you go somewhere with him? A. Yes, I did. Prosecution Evidence
- Q. Were you with other police officers as well? No.4
- A. Yes, I was with other police officers as well. Detective Constable Benedicto Peter Khumbeni Examination 5th June 1962 continued.
- Q. Where did you go?
- 10 A. We went in the bush along another path where we found the dead body lying.
- Q. And was that dead body identified to you?
- A. It was identified to me.
- Q. Who identified it?
- A. Village Headman Kavala identified it.
- Q. Can you look at those photographs. No.1, what does that show?
- A. That is how I found the dead body lying.
- Q. No.2 photograph, what does that show?
- 20 A. That was when I turned the dead body, showing a cut across the left side of the head.
- Q. Can you indicate where the cut wound was?
- A. It was across here (witness indicates).
- Q. Going across the nose? A. Yes.
- Q. No.3 photograph, what does that show - that is when you have turned the body over?
- A. That is showing a cut on the left-hand side.
- Q. Whereabouts? A. Here (witness indicates the left arm).
- Q. No.4, what does that show?
- 30 A. Showing a deep cut on the back of the head.
- Q. And No.5.
- A. That is a panga knife which was found 99 feet from where the dead body was lying.
- Q. Would you recognise that knife again?
- A. Yes, I would recognise it.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.4

Detective
Constable
Benedicto
Peter
Khumbeni
Examination
5th June 1962
continued

Q. Would you look at this please?

WILLS: Before this is shown to the witness may I just ask the Court how he could recognise that particular knife?

Examined Nicholson:

Q. Is there anything about the knife which would enable you to recognise it? A. Yes, I marked with a cut on the leather.

Q. Whereabouts? A. On the leather, I just had to scratch it. 10

Q. It had a leather handle, had it? A. Yes.

Q. Perhaps you could look at that and see if that has got a scratch? (Panga handed to witness). A. It is the one which I scratched. (witness indicates).

(The panga is now put in and marked "3" for identification).

Q. Photograph No.6, what does that show? A. Those are houses of the deceased which were indicated to me by Village Headman Kavala. 20

Q. No.7? A. Views of the next village, nearby village.

Q. Now could you indicate on that photograph where the village is? A. On top of that. (witness indicates at the top of the hill).

Q. That is Kavala Village? A. Yes.

Q. Where were you standing when you took that photograph?

A. I was standing near where the dead body was found, facing the east. 30

Q. Look at that photograph, you had the house of the deceased indicated to you, whereabouts would the house of Silino be? A. The house was behind me.

Q. Whereabouts? A. On the corner (witness indicates the left-hand corner).

Q. How far behind where you were standing?
A. Just about 50 paces.

In the High
Court of
Nyasaland

Q. Now where in that photograph is Bilila stream, do you know? A. It is just near the blue-gum trees. (witness indicates).

Prosecution
Evidence

Q. Which way does the stream run?
A. It is running this way and down. (witness indicates from left to right on the photograph).

No.4

10 Q. Along by the blue-gum trees? A. Behind the blue-gum trees.

Detective
Constable
Benedicto
Peter
Khumbani
Examination
5th June 1962
Continued

Q. What part of it is behind? All of it, or?
A. The blue gum trees are here (indicates) and the stream is running behind those trees.

Q. When you were standing near Silino's house taking these photographs did you look around before you took the photographs? A. Yes.

Q. From the house could you see the stream?
A. Yes, I could see th stream.

20 Q. Now from Kavala village running down the side of the mountain, it looks like a line in the photograph, what is that? A. That is a path.

Q. This one coming down here (indicates) is a path?
A. Yes.

Q. From Silino's house would you be able to see that path? A. Yes, I could see it.

Q. Do you think you would have been able to recognise somebody from Silino's house coming down that path? A. Quite definitely, yes.

30 Q. Yes, it looks as if it is sloping here (Counsel indicates) Is the stream in a hollow, or not? A. It is in a hollow.

Q. It looks as if, to take the photograph, one is looking down at it, is one? A. Yes.

Q. No.8 photograph, what does that show?
A. That is showing a wound on the left eye.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.4

Detective
Constable
Benedicto
Peter
Khumbeni
Examination
5th June 1962
continued

Cross-examined
by K.W.Wills

Q. No.9 photograph?
A. That is showing a cut which was on the neck here (indicated).

Q. And No.10. The final one?
A. A lying position, taken from the west.

Cross-examined Wills:

Q. Just look at photograph No.6. Where is the stream, behind you or in front of you?
A. Behind myself. I was standing in the position where the dead body was found, facing west.

10

Q. So, am I right in saying photographs 6 and 7 were taken from the same place? One looking one way and one looking the other? A. Yes.

Q. You say that was from where the dead body was found? A. Yes.

Q. When you say near, could you indicate on photograph No.7 where the dead body was in relation to where you were?
A. The dead body was just near to where the policemen were standing taking statements.

20

Q. Where those people are? (Counsel indicates on photograph) A. Yes.

Q. Now you have indicated a path going down-hill, can you indicate what happens to the path after it reaches the stream?
A. When it reached the stream it had to come across, coming up. It was from here and coming up here (witness indicates).

Q. Does the path cross the stream in the photograph, or not? Can you see from the photograph where the path crosses the stream?
A. I can see. The path goes right down here, and coming up to the houses here.

30

Q. So the actual point it crosses the stream is just off the right-hand side of the photograph, is it? A. Yes.

In the High Court of Nyasaland

Q. Now after it crosses the stream can you see any part of the path in the photograph, or not? A. No, I cannot see.

Prosecution Evidence

Q. How about where those two people are sitting? Are they on the path, or not? A. They are on the path.

No.4

10 Q. Well, you can see the path? A. I cannot see it, there are grasses there.

Detective Constable Benedicto Peter Khumbeni Cross-examination by K.W. Wills 5th June 1962 continued

Q. If you remember, can you trace with your finger the path from the right-hand side of the photograph.

A. It comes right out from here and goes up here and comes up here (witness indicates from left of photograph, going off the photograph on the right, coming in again on the right and up the hill towards the centre).

20 Q. How does it come up? Trace it with your finger.

A. (Witness indicates). Near to where the people are sitting, going to the house of the deceased.

Q. Between the dark and the light (on the photograph), up to those people?

A. Another passage goes to the house of the deceased. I can't see it because it is bushy.

30 Q. Can you give any indication, roughly?

A. Yes. (indicates).

Q. So the path is going across the photograph like that? (Counsel indicates as described above).

A. Yes.

Q. Where you took the photograph from is another path? You were on a path when you took the photograph? A. Yes, I was on the same path.

Q. The path goes right to left and then curls round? A. Yes.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.4

Detective
Constable
Benedicto
Peter
Khumbeni
Cross-
examination
by K.W.Wills
5th June 1962
continued

Q. Now you said you took photographs 6 and 7 from the same place. Was this one (indicating No.6) directly behind you, or an angle, or what?

A. It was an angle.

Q. Where are these houses on photographs 6 in relation to this photograph? (indicating No.7)

A. They will be behind me on the corner.

Q. That path carries on and goes up there to the house?

A. And there is another path which goes into the village and there is a little path which goes to the house of the deceased.

10

Q. You took these from the same place?

A. Yes, I only turned left and took the photograph.

Q. You turned 90 degrees, did you? (Counsel demonstrates).

A. I turned left. I got this view from the corner here. (witness indicates at an angle of 45 degrees).

20

Q. And these houses, then, were further along a path going on to the left of this photograph? You have indicated a path which goes across there, you have turned left?

A. It goes from here (indicates) up to the corner.

Q. Draw it will you?

(Witness makes a mark on the photograph)

Q. As this path goes off the photograph there, how far are these houses?

A. Must be approximately 50 paces.

30

Q. You have shown on here the path which goes from there down to where the people are standing. How does it get from there to the stream, straight down, or round in a circle?
(Witness indicates).

Q. It turns abruptly and then goes straight?

A. Yes.

Cross-examined Mehta:

In the High
Court of
Nyasaland

Prosecution
Evidence

No.4

Detective
Constable
Benedicto
Peter

Khumbeni

Cross-
examination

by M.B.Mehta

5th June 1962

Q. You have stated that you had a look around when you took the photographs, is that true?

A. Yes.

Q. How would you describe the vicinity, was it short grass, tall grass, trees, how would you describe it? A. The grass is very short.

Q. Only grass round there?

A. Only grass, no trees were there.

10 Q. Now you have already stated that from this point, the left corner of the photograph, the path goes up about 50 paces where the houses are situated? A. Yes.

Q. Does the path go up, down, or the same level, from this? A. It goes into the village.

Q. I will repeat the question. The deceased was somewhere behind these two people (Counsel indicates photograph), from there if you want to see the houses do you look up, straight, or down? A. Up.

20 Q. And from this spot where the dead body was, how far is this other path you saw, in the photograph, near or far? A. It is far, about quarter mile.

Q. You have stated that if you would see a person coming down this path you could see him, probably? A. Yes, I would see. The grass is very short there.

Q. You may be able to see that person, could you recognise the person?

A. If I have been staying with him for a long time I would recognise him.

30 Q. Even though the distance is about a quarter of a mile?

A. Yes, it was up and I would see from up there who it was.

Q. Would it be true to say you could recognise a human being there, but could not recognise the person?

A. I could recognise the person if he was staying with me for a long time.

In the High
Court of
Nyasaland

—
Prosecution
Evidence

No.4

Detective
Constable
Benedicto
Peter

Khumbeni

Cross-

examination
by M.B.Mehta

5th June 1962
continued

Q. Now are there any other paths coming to this particular spot where these two people are, to the Bilila stream?

A. There is only one path where the people are sitting to Bilila.

Q. Look at the photograph and think carefully. Is this the only path that comes from Bilila stream, or is there any other path from a different direction to this particular spot?

A. Where the people are sitting there is only one path. 10

Q. Are there any other footpaths leading to that particular spot?

A. I only know that path which comes from there, because I have not been there for a long time.

Q. You wouldn't know if there are any other paths leading to that particular spot?

A. Yes, I wouldn't know.

Q. You have stated that when you went with Village Headman Kavala you first saw the body of the person identified to you as Silino, is that true? A. Yes. 20

Q. And how far was the panga knife from the deceased? A. That was about 99 feet.

Q. Look at this photograph and indicate, if the dead body was just behind these two people, in which direction this panga knife was lying?

A. Where the people are sitting, that is where the knife was.

MEHTA TO COURT:

30

Your Lordship, the knife was just before these two people and the dead body was where he made a cross.

Q. Now where was this big knife? On the path, in the grass, whereabouts was it?

A. It was on the path.

Q. You have recognised this knife as the knife you saw on that particular spot? A. Yes.

Q. The reason you have given is that you made a scratch? A. Yes. 40

Q. With what did you make a scratch?
A. A Castle Beer opener.

In the High
Court of
Nyasaland

Q. Do you remember whereabouts on this handle
you made the scratch? A. Yes, I remember.

Prosecution
Evidence

Q. Whereabouts? A. Just where you are holding.

No.4

Q. Would you look at this big knife again and
see whether there are any other scratches at all?
A. No, I only noticed the one.

Detective
Constable
Benedicto
Peter

10 Q. Are there any other scratches there, or not?
A. There are no scratches there, apart from mine.

Khumbeni
Cross-
examination
by M.B.Mehta
5th June 1962
continued

Q. How would you describe these marks here,
then? (Counsel indicates on the handle of the
panga).
A. These were marks with a knife.

Q. These scratches, now, you think were made
by a knife? A. Yes, I think so.

20 Q. Now you admit there are many more scratches
on that handle, you agree with me there are many
more scratches?
A. No, I do not agree with you. Those are holes,
not scratches. I only know my scratch which I
marked myself.

Q. Now you are alleging that when you had this
knife in your hand you did not see any other
scratches at that time? A. Those are holes.

Re-examined Nicholson:

Re-examination

Q. Constable, you made a scratch on the handle
of this knife, did you, when you had it near the
stream? A. That is right.

30 Q. When you looked at this knife in Court, was
it precisely the same place on the handle that
you saw a similar scratch? A. That is right.

Court adjourns at 12.25 p.m.

Court resumes at 1.45 p.m.

In the High
Court of
Nyasaland

No. 5

EVIDENCE OF KELITA TADEYO KWALIRA

Prosecution
Evidence

P.W.3. KELITA TADEYO KWALIRA, Christian sworn,
states:-

No.5

Examined Nicholson:

Kelita Tadeyo
Kwalira
Examination
5th June 1962

Q. What is your full name please?

A. Kelita Tadeyo.

Q. Do you see your father in Court?

A. Yes, I see him.

Q. Will you point him out please?

A. That one. (indicating the accused persons) 10

Q. Which one? A. (Indicates the first accused)

Q. Now do you remember several months ago, in last year, being at your father's house and somebody coming there with some pigs? A. Yes, I remember.

Q. Who was it who came? A. Silino.

Q. When he got there what did he do?

A. He assaulted some children.

Q. What exactly did he do?

A. He was assaulting them with a branch of a tree. 20

Q. Who did he assault?

A. Eneres and Vesiya and Damiyano.

Q. Who is Vesiya? A. She is my younger sister.

Q. How about Eneres?

A. Eneres is also my younger sister.

Q. And the small boy, who was he?

A. My young brother.

Q. And did Silino then go away? A. Yes, he went away.

Q. Was your mother there when Silino first came? 30

A. No, she was not there.

Q. Did she return later? A. Yes.

Q. How about your father? Did he return later?
A. Yes, my father was also not there, but he returned later.

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Q. Did he stay there, or did he go away again?
A. I didn't see him go away.

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Q. Now did you see your father later that night? A. No, I didn't see him.

Kelita Tadeyo
Kwalira
Examination
5th June 1962
continued

Q. When did you next see him?
A. I never saw him again until today.

Q. Have you seen Silino since then?
A. No, I have not seen him again.

Cross-examined Wills:

No cross-examination.

Cross-examined Mehta:

No cross-examination.

In the High
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Nyasaland

NO. 6

EVIDENCE OF VALALIYANO CHILODZENI

Prosecution
Evidence
No.6

P.W.4. VALALIYANO CHILODZENI, Christian sworn,
states:-

Valaliyano
Chilodzeni
Examination
5th June 1962

Examined Nicholson:

Q. What is your full name please?

A. Valaliyano Chilodzeni.

Q. And where do you live?

A. I live at Kavala Village.

Q. That is the Ncheu district? A. Ncheu District. 10

Q. Now, do you remember December of last year?

A. Yes, I remember.

Q. Do you remember one day going back from your garden towards the village and seeing something?

A. Yes, I remember.

Q. Now whereabouts were you in relation to the village?

A. I was on the lower side and the village was on the upper side.

Q. Where were you in relation to the Bilila stream? A. The Bilila stream was behind me. 20

Q. And were there any gum trees near you?

A. I had left the gum trees behind me facing east and I had gone on the upper side.

Q. Did you hear anything? A. I did not hear anything.

Q. What did you see?

A. As I was walking from the garden and after crossing Bilila and after walking for a little distance, I saw Joseph Duncan, he caught me. 30

Q. Do you see Joseph Duncan in Court?

A. I see him.

Q. Can you point him out please?

A. That one. (Indicating the second accused)
He snatched a stick from me there.

Q. What sort of stick was that? A. A knobkerrie.

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Q. Can you describe it to us please, this knobkerrie?

A. It had a head on one end and the handle was as long as that. (witness indicates approximately 2 feet).

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Q. What do you mean by a head on one end?

A. That is the head of the stick.

Valaliyano
Chilodzeni
Examination

Q. Do you mean it was thicker at one end?

5th June 1962
continued

10 A. Yes, it was thick on one end and smaller on the other.

Q. Yes, where did he come from?

A. I do not know because it was at night. I was just walking along when he came and caught me, snatched the stick and ran away in the eastern direction.

Q. Was it dark?

A. Yes, it was dark, it was about half past seven.

Q. Had you been at your garden until then?

20 A. Yes, I had been at the garden, I was watching for the guinea fowls.

Q. Was it dark when you were at your garden?

A. It was dark when I was at the garden.

Q. You didn't see where he came from, then?

A. I didn't see, but he just caught me on the path.

Q. Did he say anything to you?

A. He didn't say anything.

Q. Did you say anything to him?

A. I asked him "Who are you?"

30 Q. Did he reply?

WILLS:

Is that admissible? I don't think his reply would be admissible, Your Lordship.

NICHOLSON:

It would, as evidence against Joseph.

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Valaliyano
Chilodzeni
Examination
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continued

COURT:

Not everything an accused person says is evidence. There may be an element of importance in the remark. Did he make a reply?

Q. Did he make a reply? A. He did not reply.

Q. When he came up to you did you notice whether he was carrying anything?

A. I noticed that he had something in his hand.

Q. Could you see what it was? A. Yes.

Q. What was it? A. It was a panga.

Q. Can you describe the panga to us?

A. I can describe it because I saw it, although it was at night, but when he was taking the stick away from me I noticed that he had a panga in his hand. 10

Q. Would you describe the panga to us?

A. It had a broad blade.

Q. How broad?

A. A big one - the usual Portuguese type of panga.

Q. What sort of handle - did you see that?

A. No, it was at night.

Q. How long was the handle? A. A short one. 20

Q. Could you indicate?

A. About that (witness indicates about 18 inches in length).

Q. Is that the blade only, or is that including the handle? A. That is including the handle.

Q. Now you say he ran off. In what direction?

A. In the Eastern direction.

Q. In which direction is that? Towards the stream or away from it? A. No, the stream was behind me.

Q. Did you know a man called Silino? A. I knew him. 30

Q. Do you know where his house was?

A. That was on the way to my garden, because after I had left my garden the house is just as far as from here to that building. (Counsel agree a distance of 70 yards)

Q. At that time, when he ran off, did you hear any noise then?

A. From there I walked away towards the village, and when I was nearing my house I heard voices in the direction of the stream.

Q. Yes, what sort of voices?

10 A. I did not hear what they were saying, but I just took it that there were people who were going to Kavala No.1 village to sleep there, as there was a funeral.

Q. Were they men's voices?

A. Yes, the voices sounded like men's voices.

Q. After Joseph snatched this knobkerrie away from you, what did you do?

A. I walked away along the path in the direction of my house, I did not follow him because it was at night.

Q. And did you see anybody else before you arrived home?

20 A. Before I reached Silino's house I met a boy, Davison.

Q. What was he doing?

A. The boy was coming from the village and I was coming from the garden when I met him. I asked him "Who are you?", he did not reply, but he just turned and proceeded to go in the same direction as I was going.

Q. What direction was he coming from?

30 A. He was coming from the direction of the village, that is where I was going.

Q. Did you notice whether he was carrying anything? A. He had a stick and a panga.

Q. Did you see him again?

A. After I had met him on the path

Q. Yes?

A. After I had met him on the path he turned to go back to the village and I was also going in the same direction, to the village, because we were both from the same village.

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Valaliyano
Chilodzeni
Examination
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continued

40 Q. Did you walk along together? A. No.

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Valaliyano
Chilodzeni
Examination
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continued

Q. Did you see him again, after that?
A. After I had asked him "Who are you?" he just turned to go back to the village, and I walked alone to the village, and he too walked alone.

Q. Now the direction he came from, where was that in relation to the direction that Joseph was running to after he snatched the knobkerrie from you?

COURT:

Mr. Nicholson, what exactly do you mean?

10

NICHOLSON:

The direction Davison came from.

Q. Did you ever get that knobkerrie back from Joseph? A. He has never given it back to me until now.

Q. Just answer "yes" or "no", did you hear something in connection with Silino on the next day? A. I heard.

Q. And in fact since that day have you ever seen Silino? A. I have not seen him again.

20

Q. This boy Davison, do you know whose son he is? A. He is Kwalira's son.

Q. Do you see him in Court, Kwalira?
A. He is here.

Q. Could you point him out please?
A. The first accused, the one in a black coat.

Q. Do you live near him?
A. We live in the same village.

Q. How far away from his house is yours?
A. As far as from here to that tree where the bicycles are. There is one house between mine and his.

30

(Counsel agree a distance of 30 to 40 yards)

Cross-examined Wills:

Q. Is Silino's house and your house the same side of the Belila stream? A. They are on the same side.

Q. How about Village Headman Kavala, is he on the other side or the same side?

A. He is in No.1 and we are in No.2 village.

Q. No.1 is one side of the Belila stream and No.2 the other side? A. Yes.

10 Q. Now, in order to get from the house of the first accused to the Village Headman Kaval's you cross the stream, do you? A. You cross the stream.

Q. And before you cross the stream you pass Silino's house? A. Yes, you pass by Silino's house.

Q. I don't quite understand where you were going that day - from your garden back to your house, were you? A. Yes.

Q. Is your garden the same side of the stream as No.1 village, or No.2 village?

A. On the No.1 side, Kavala Village No.1.

20 Q. You were going from your garden across the stream to Kavala No.2? A. Yes.

Q. When Joseph snatched your knobkerrie from you which side of the stream were you, No.1 village side or No.2 village side?

A. I was on No.2 side.

Q. So you had already crossed the stream?

A. I had already crossed the stream.

Q. How many paces had you crossed the stream?

30 A. After I had crossed the stream I went past a forest and I had walked further than that office on the other side.

(Counsel agree a distance of 70 yards)

Q. Now when Joseph had seized your knobkerrie, did he run back to the stream?

A. After I had left the stream there is a forest on the eastern side of the path and there is a kaffir corn garden, so he ran in the eastern direction.

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Valaliyano
Chilodzeni
Cross-
examination
by K.W.Wills
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Valaliyano Chilodzeni Cross-examination by K.W.Wills

5th June 1962 continued

Q. Did he keep to the path or did he run into the bush?

A. He left the path and went into the bush on the eastern side of the path where the forest is.

Q. If you are going from the direction of No.1 village to No.2 village you cross the stream and then come to a forest? Was the forest on your right hand or your left hand?

A. It is on your left as you go.

Q. As you go up the hill towards Silino's house?

A. Going to my house.

10

Q. Now, when he ran away did you notice whether he ran down-hill or up-hill?

A. No, I was going up-hill and he went down-hill.

Q. So he went back in the direction of the stream did he? A. Towards the forest.

Q. Would that also be more or less towards the stream? A. That is the same side of the stream.

Q. Now you said later on you saw Davison?

A. Yes.

Q. Which way was he going? Was he going from No.2 village towards No.1, or the other way round?

A. He was coming from No.2 village.

20

Q. Was he coming in the opposition direction to you?

A. He was coming in the opposition direction.

Q. So you met him face to face?

A. And we met face to face.

Q. On the path? A. On the path.

Q. After he had met you did he continue to go down towards the stream or did he turn round and go in the same direction as you?

A. He turned round to go back.

30

Q. And he went in front of you?

A. He went in front of me.

Q. He was coming down-hill towards the stream, saw you, and turned back towards where he had come from? A. That is correct.

Cross-examined Mehta:

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Valaliyano
Chilodzeni
Cross-
examination
by M.B.Mehta
5th June 1962

Q. You say that you saw Joseph carrying a knife? A. Yes.

Q. You say you saw it quite close, just answer "yes" or "no"? A. Yes.

Q. Can you possibly give an answer to this question - do you know what was the width of the blade of this panga?

10 A. I have said that the length was that much. (Witness indicates tip of fingers to elbow?. But as you know that it was at night, I could not see clearly.

Q. Would you say the blade of this knife was very broad? A. Yes, with a broad blade.

Q. Would you agree that the middle of the blade was about this wide? (Counsel demonstrates).

A. I do not know the exact size, but as you know this type of knives have got broad blades. It was at night. I was just on my way.

20 Q. Imagine my arm as a blade. The top of the blade was it straight or was it curved?

A. It was not a curve.

Q. Do you know Joseph Duncan? A. Yes, I know him.

Q. How long have you known him?

A. I knew that it was him after he had taken the stick away from me.

Q. How did you come to know his name?

A. I knew that because he comes from the same village.

30 Q. When he came to snatch the knobkerrie from you, you knew him then, did you? A. Yes.

Q. In that case, why did you have to ask him as to "Who are you"?

A. When I asked "Who are you?", he did not reply.

Q. If you knew at the time as to who he was, why did you ask him "Who are you"?

A. I asked because it was at night, I was walking along. He just came up behind me and caught me.

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Valaliyano
Chilodzeni
Cross-
examination
by M.B.Mehta

5th June 1962
continued

Q. Now, when did you ask him as to "Who are you" after he snatched the knobkerrie from you, or before that?

A. I asked him when we were struggling together, because when he caught me I turned round and said "Who are you?".

Q. Before you asked, you saw his face, did you?

A. When I turned round and looked, I knew that it was Joseph.

Q. Then you asked him?

A. I said, "What do you want?"

10

Q. I want to know exactly when you asked "Who are you?"? A. When he was taking the stick away from me.

Q. You were facing him, were you?

A. He came up behind me and caught me, I was not aware of somebody coming behind me. He caught me. That is when I turned round and asked "Who are you?". Then we struggled together, he took away the stick from me and ran away with it.

Q. Have you spoken to him before this incident took place?

A. No, that was my first time to see him.

2-

Q. The first time you saw him?

A. I mean to say that I first knew of his presence there when he was taking the stick away from me.

Q. Would it be true to say that you had just seen Joseph at a distance but had never spoken to him before he got hold of you on that particular day?

A. I used to see him.

Q. Did you speak to him before that? A. No.

Q. When he was trying to snatch this knobkerrie from you did you ask him as to why he was doing that? A. I asked.

Q. What did he say? A. He didn't reply.

Q. Now you said you met Davison whilst you were going up to village No.2? A. Yes.

Q. After Joseph snatched this knobkerrie from you how long did you walk, what distance did you have to walk, before you met Davison?

A. I had walked as far as from here to where we last saw the car, the car which is going, that is beyond this office somewhere there, along the road.

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Valaliyano
Chilodzeni
Cross-
examination
by M.B.Mehta

5th June 1962
continued

10

Q. Imagine that Joseph snatched the knobkerrie from you where you are standing, then you started walking towards your house. From this point how far did you walk before you met Davison?

A. As far as where that man is, the man near the Land Rover.

(Counsel agree a distance of 150 yards)

Q. And he was coming from the opposite direction, from Kavala village No.2?

A. He was coming from No.2.

Q. Did he cross Belila stream?

A. I had already crossed Belila stream myself.

20

Q. Did Davison get at all to Belila stream?

A. No, I met him before he reached the stream.

Q. Where you met Davison, from there could you see Joseph?

A. No, it was at night. You could not see anyone. It was at night.

Q. He was carrying a stick and a panga, was he?

A. He had a stick and a panga.

Q. Can you describe that panga, please?

30

A. He did not come very close to me so as to recognise the panga or the stick, because I asked him "Who are you?" when he was some distance away, and he turned round to go back.

Q. Did he answer you when you asked as to "Who are you?"? A. He didn't answer me.

Q. Then how did you come to know he was Davison?

A. I knew him, because he was a person from the same village and we met on the path, he was not far from me.

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Valaliyano
Chilodzeni
Cross-
examination
by M.B.Mehta
5th June 1962
continued

Re-examination

Q. So he did come close to you?

A. He came close to me, as far as where I am to the garden.

(Counsel agree a distance of 3 yards)

Q. Still you could not manage to see the panga?

A. He was holding it in his hand like that.
(Witness demonstrates)and after I asked "Who are you?" he went away.

Q. It was between his arms?

A. He was just holding it, but I didn't see exactly how he was carrying that.

Re-examined Nicholson:

Q. Just one thing. How long did you know Joseph Duncan?

A. I knew him, because he is at the same village.

Q. How long? How many years?

A. He was born at the same village, but he went to marry in another village.

Q. How many years have you known him?

A. Many years.

NO. 7

EVIDENCE OF DAVISON TADEYO

In the High
Court of
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Prosecution
Evidence

No.7

Davison Tadeyo
Examination
5th June 1962

P.W.5. DAVISON TADEYO.

Examined Court:

Q. Do you know how old you are?

A. Fourteen years old.

Q. Are you at school? A. Yes.

Q. What standard? A. Standard V.

Q. Can you read or write? A. Yes.

10 Q. In English? A. I can read and write in English.

Q. Do you go to church? A. Yes.

Q. Which one?

A. I go to Sangano Catholic Church.

Q. Have you been in Court before? A. No.

Q. Have you ever watched Court proceedings?

A. No.

Q. Do you know the meaning of taking an oath to tell the truth? A. No.

20 Q. Do you know you have come here to tell us what you saw and heard? A. Yes.

Q. Do you know what telling the truth is? A. Yes.

Q. Simply relating, without telling lies, what you saw and heard? A. Yes.

COURT:

Very well, I am not entirely satisfied that this witness can be sworn.

Examined Nicholson:

Q. What is your full name, please? A. Davison.

30 Q. Your father's name? A. Tadeyo.

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Court of
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Davison Tadeyo
Examination
5th June 1962
continued

Q. And do you live at Kavala village in Ncheu District? A. Yes.

Q. Do you remember several months ago, last year, somebody coming to your house with pigs? A. Yes.

Q. Who was that? A. Silino.

Q. Don't tell me what he said, but what did he do when he arrived?

A. He assaulted my two sisters and my younger brother.

Q. Is that Vesiya and Eneres? A. Yes.

10

Q. And the young brother, is that Damiyano?
A. Yes.

Q. Did he then go away? A. Yes.

Q. Was your mother there then? A. No.

Q. Did she later return? A. Yes.

Q. Was your father there then? A. No.

Q. And did he later return? A. Yes.

Q. About what time would it be when your father returned? Was it in the afternoon? A. Yes.

Q. Do you see your father in Court? A. Yes.

20

Q. Will you point him out, please?
A. The first one. (Witness indicates the first accused).

Q. Now you saw your father return, did he go out of the house again? A. Yes.

Q. Was that in the afternoon?

WILLS:

This is leading, Your Lordship. I do object.

Q. When was it?
A. Later in the afternoon, about sunset.

30

Q. When he left the house was he carrying anything? A. Yes.

Q. What was that? A. A stick.

Q. What sort of stick? A. A knobkerrie.

Q. And where did he go, do you know?

A. He went away in the direction of the Mission.

Q. And what did you do? A. I followed him.

Q. Where did you go? A. I just stood at the hill.

Q. Where did he go?

A. He was going downhill towards the stream.

10 Q. And where exactly did he go?

A. To the stream.

Q. On the way to the stream did he pass Silino's house? A. Yes.

Q. Did he stop there? A. No.

Q. Did you pass Silino's house? A. Yes.

Q. When you passed, did you see anybody there? A. I did not see anybody there.

Q. After you passed Silino's house, where did you go?

20 A. I stood somewhere downhill lower than the house.

Q. How far did you get?

A. It was near Silino's house.

Q. Did you see anything happen? A. Yes.

Q. What was that? A. They were fighting.

Q. Would you tell us about that please. Who was fighting?

A. My father and Silino were fighting each other.

30 Q. Where were they fighting?

A. Just at the stream.

Q. How far away were you? Can you indicate to us how far? A. They were as far as that building down there, the one we can see from here, the big building there with the green door.

Counsel agree a distance of 90 to 120 yards)

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Davison Tadeyo
Examination
5th June 1962
continued

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Davison Tadeyo
Examination
5th June 1962
continued

.Q. Now what was the light like at this time?
A. There was a little light.

Q. Could you see from which direction Silino was coming?
A. He was coming from the direction of the Mission.

Q. Where is the Mission? Is that near one of the Kavala villages? A. Yes.

Q. Which one?
A. The village in which the Village Headman lives.

Q. That is Kavala No.1 village. Was he on the path? A. Yes. 10

Q. What happened when they met?
A. My father asked him "Why did you go and assault the children?"

Q. Did Silino reply to that? A. Yes.

Q. What did he say?
A. He said "I assaulted them because of their rudeness".

Q. Was anything said after that? A. Yes.

Q. What was that? 20
A. My father said: "What rudeness did they do?" Silino said "I wanted you because you are the one who make your children rude". As they were quarrelling like that, Joseph appeared on the scene and said to my father "Beat him". When Silino heard that he stabbed my father on the head and on the arm.

Q. Yes, what did he stab your father with?
A. With a panga.

Q. Whereabouts did he stab him? Can you show us? A. On the head. 30

Q. Whereabouts? Could you show us on your head?
A. I do not know which side of the head it was.

Q. What about the one on the arm?
A. I think it was on the wrist. (Witness indicates the right wrist).

Q. Where did Joseph come from? Can you say what direction? A. He was coming from his garden.

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Q. Where is that, how far away? A. It is near the same stream.

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Q. Was he carrying anything when you saw him? A. Yes.

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Q. What was that? A. He had a panga.

Davison Tadeyo Examination 5th June 1962 continued

10 Q. Now could you describe either of these pangas, the one that Silino had and the one that Joseph had? A. No, I can't describe them.

Q. Did you notice anything unusual about either of them? A. Unusual in what respect?

Q. Now before Joseph appeared on the scene and cried out, said something, Silino and your father were speaking, is that right? A. Yes.

Q. Then after Joseph had come and said something about "Beat him", Silino stabbed your father on the head and arm? A. Yes.

20 Q. What happened after that? A. Valaliyano was passing by somewhere near there. Joseph ran after him and snatched a knobkerrie from him.

Q. Yes, now at that time what was the light like? A. The sun was just setting then.

Q. The sun was just setting? A. It was after sunset.

Q. How clearly could you see? A. It was a little clear.

30 Q. How far away from the scene of the fight was Valaliyano?

A. He was passing as far away as from here to those terraces, the first one.

)Counsel agree a distance of 20 to 30 yards)

Q. And what happened when Valaliyano appeared? A. When he came to where I was he said to me "Let us go to the village".

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Q. I think you did say Joseph snatched a knobkerrie from him?

A. Joseph snatched a knobkerrie from Valaliyano.

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Q. Did you see what happened after he snatched that knobkerrie from Valaliyano?

A. Joseph ran to where Silino and my father were. Valaliyano went away and I did not see him again.

Davison Tadeyo
Examination
5th June 1962
continued

Q. But did you see what happened when Joseph ran back? A. No, I did not see.

Q. What was the last thing you saw happening in this fight? 10

A. The last thing I saw was Joseph running in that direction with the knobkerrie.

Q. That was the last thing you saw at all?

A. Yes.

Q. And then what did you do?

A. I went home together with Valaliyano.

Q. Were you carrying anything?

A. I was carrying a small branch of a tree.

Q. Is that all? A. Yes. 20

Q. Now when did you next see your father after that? A. I saw him at the house.

Q. What time was that? A. In the evening.

Q. Yes, was he by himself? A. Yes.

Q. Now the next day did you stay at your village or did you leave it? A. My father left the village.

Q. How about you? A. I stayed there.

Q. Yes, and did you later leave the village?
A. Yes.

Q. Where did you go? A. I had gone to my uncle. 30

Q. Where does he live?

A. He lives at Dambwe Village.

Q. During this fight how many blows did you see struck? A. I just saw one blow.

Q. Which one was that?
A. When Silino struck my father.

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Q. That was the only blow you saw, was it?
A. Yes.

Prosecution
Evidence

Cross-examined Wills:

No.7

Q. You said that you followed your father past
Silino's house then you stood on the Hill? A. Yes.

Davison Tadeyo
Examination
5th June 1962
continued

10

Q. You then said that from there you saw some-
thing the distance between where you are and that
house you pointed out? A. Yes.

Cross-
examination
by K.W.Wills

Q. Was that distance where the fight was or
where the stream was? A. That was where the
fight was.

Q. Did you go nearer the fight than that?
A. No.

Q. You say Silino struck your father on the head
and on the right wrist? A. Yes.

20

Q. Was that in one blow, or was it two blows,
the bit on the head and then the stab, or how did
it happen? A. There were two different blows.

Q. Can you remember which blow was first? The
one on the head or the one on the hand?
A. I don't remember.

Q. Do you remember how either of them were
struck? A. Yes.

Q. Well now, the blow on the head, will you
illustrate how that was struck?
A. He struck like that. (Witness demonstrates
a downward movement).

30

Q. Did your father try and protect himself, or
what? A. He tried to protect himself.

Q. And he failed, did he? A. Yes.

Q. What was he trying to protect himself with?
A. He was protecting himself with his hand.

Q. Had he got a knobkerrie in his hand?
A. Yes.

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Davison Tadeyo
Cross-
examination
by K.W.Wills
5th June 1962
continued

Q. So he was trying to protect himself with a knobkerrie? A. Yes.

Q. Now the wound on the wrist, how was that? Did you see that struck as well?

A. No, I just saw the wound at home.

Q. So the only blow you saw was Silino trying to strike your father like that (Counsel demonstrates) and your father trying to protect himself, is that right? A. Yes.

Q. Now, I don't understand. You say you heard your father and Silino talking by the stream, is that so? A. Yes. 10

Q. And you said you heard what they said? A. Yes.

Q. I don't understand how. You were there, and your father and Silino were as far as that house, how could you hear what they said. You might well have heard them talking but how did you hear what they were saying? A. Yes, I could hear.

Q. Now, you see, what you have got to tell the Court is what you saw and what you heard, not what other people told you afterwards. Do you understand me? A. I understand. 20

Q. You have got to be very careful. You said you saw the blow hit your father's wrist, and when you were asked about it you said "No, I only saw the wound afterwards". What I want to know is, did you see the blow which struck your father on the wrist, or did you merely assume there had been a blow because you saw the wound afterwards?

A. I just assumed, because I saw the wound. 30

Q. So you didn't see your father actually struck on the wrist? A. No.

Q. Now, you know your father had a wound on the head and you described the blow. Did you really see that blow or did you assume that blow?

A. I saw it.

You actually saw that, did you. A. Yes.

Q. Now this conversation which was supposed to have taken place at the stream and you were supposed to have heard. Did you hear it then, or did someone else tell you about it afterwards?
A. I heard it then, myself.

Q. Although you were there (counsel indicates) and the conversation was taking place at least that far away? A. Yes.

10 Q. Now you say you passed Silino's house?
A. Yes.

Q. So you were downhill? A. Yes.

Q. Now indicate to us how far downhill you were, how many paces were you from Silino's house? How far from Silino's house were you when you saw the fight?
A. As far as from here to where the lorry is. (No measurement indicated).

20 Q. So, am I right in thinking Silino's house was on top of the hill, you were that distance down and the fight another distance beyond that, as far as where you indicated? A. Yes.

Q. So Silino's house was up the hill, then you, then the fight at the bottom? A. Yes.

Cross-examined Mehta:

Q. You say that you saw Joseph coming to where your father and Silino were fighting? A. Yes.

Q. Do you know from which direction did he come?
A. He came from his garden.

30 Q. That is Kavala No. 1 or 2?
A. On the side of Kavala 1.

Q. Now when Joseph was coming to where your father was with Silino, where were you standing?
A. I was standing up-hill.

Q. How far from Silino's house?
A. The same distance as I have already indicated.

Q. So you were standing all the time where you have indicated before?
A. I was just standing there all the time.

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Davison Tadeyo
Cross-
Examination
by K.W.Wills
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continued
Cross-
examination
by M.B.Mehta

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No.7

Davison Tadeyo
Cross-
examination
by M.R Mehta
5th June 1962
continued

Q. Now isn't this true, that before Joseph arrived at the scene your father and Silino were already fighting? A. No.

I don't mean hitting with a knife, but striking each other either with a fist or something to that effect? A. No, they had not started fighting then.

Q. Isn't it true that Silino in fact caught hold of your father? A. I did not see.

Q. Can you describe to the Court as to how did Joseph say "Beat him". Did he shout, or in a normal voice, or how did he say it? A. He said it loudly. 10

Q. Will you please try to think carefully and I will repeat the question. Did he say it loudly or in a normal voice? A. He said that a little loud.

Q. When he came near where your father and Silino were standing, he pushed Silino aside with his hand? A. I did not see.

Q. Would you agree with me if I would say that Joseph came and said "Don't fight".? A. No, he did not say that. 20

Q. Would you please tell the Court, what did he do - he said "Beat him", and then what did he do? A. Then Silino stabbed my father on the head.

Q. What did Joseph do after he said "Beat him".? A. He ran towards Valaliyano and snatched a knobkerrie from him.

Q. He didn't go near your father or Silino? A. He went there.

Q. What did he do there, do you know? A. No.

Q. Where were you looking at that time? A. I do not know where I was looking at that time. 30

Re-examination Re-examined Nicholson

Q. The conversation between your father and Silino, in what tone of voice was that carried on? A. It was going on in low voices.

Q. How were you able to hear it then? A. I was just able to hear.

Q. You say you didn't see it - this business about pushing Silino aside, and so on - Joseph pushing Silino aside - were you looking when Joseph went there?

A. It was on the side of the path, it was on the path itself where they were talking to each other, and Joseph got them there and at the same time Valaliyano was passing by and Joseph ran to him and snatched the knobkerrie from him.

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No.7

Davison Tadeyo
Re-examination
5th June 1962
continued

10

Court adjourns at 3.45 p.m.

The hearing is resumed at 8 a.m. on Wednesday the 6th June, 1962. All present as at previous hearing.

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Court of
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NO. 8

EVIDENCE OF ENERES TADEYO KWALIRA

Prosecution
Evidence

P.W.6. ENERES TADEYO KWALIRA, Christian sworn, states:

No.8

Examined Nicholson:

Eneres Tadeyo
Kwalira
Examination
6th June 1962

Q. What is your full name, please?
A. Eneres Tadeyo.

Q. Where do you live?
A. I live at Kavala Village.

Q. That is in Ncheu District? A. Yes.

Q. Do you live there with your father and mother?
A. Yes.

10

Q. Do you see your father in Court? A. Yes.

Q. Would you point him out please?
(Witness indicates the first accused)

Q. Do you remember several months ago somebody
coming to your house with some pigs? A. Yes.

Q. Who was that? A. Silino.

Q. And who was the owner of the pigs?
A. They were Yoswa's pigs.

Q. Who is that? A. His name is Yoswa.

Q. Is he related to you? A. Yes, he is my uncle.

20

Q. When Silino came to your house what did he do?
Not what he said - what did he do?
A. He came and said "Shut these pigs up" and then
assaulted us.

Q. You say he assaulted you. The people he
assaulted, were they injured in any way?
A. He assaulted my younger sister first with a
stick, and the stick he was using broke. He picked
up another stick, but my younger sister ran away.
Then he went for me and assaulted me. I had a
child on my back.

30

Q. Did he injure any of you?
A. He injured me when he assaulted me.

Q. What sort of injury?
A. He struck me on the left arm first, and then on the right arm, and the other blow landed on my face.

Q. Did any of these blows leave any mark?
A. There were cuts.

Q. Did your mother later return to the house?
A. Yes.

10 Q. Did you speak to her?
A. Yes, I spoke to her and told her what had happened.

Q. Did your father later come back? A. Yes.

Q. Do you know, did he go out again?
A. No, I did not see him go out again.

Q. What time did you see him?
A. I saw him in the afternoon, when he came back.

20 Q. Did you see him later on that day?
A. I mean to say that I saw him when he came back after he had been injured?

Q. Would you tell us about that? What time was that? A. That was at sunset.

Q. Yes, now when you saw him was he carrying anything? A. He had a stick only.

Q. What sort of stick? A. A stick, not a knobkerrie.

30 Q. Now you say you saw him injured, when was that?
A. As he returned he went straight into the big house and I saw him after dark.

Q. And what injury did you notice?
A. He had an injury on the head and on the arm.

Q. Could you indicate where, on yourself?
A. On the left-hand side of the head.

Q. And on the arm, where was that?
A. I have forgotten whereabouts on the arm the injury was.

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No.8

Eneres Tadeyo
Kwalira
Examination
6th June 1962
continued

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Evidence

No.8

Eneres Tadeyo
Kwalira
Examination
6th June 1962
continued

Q. These injuries, were they bleeding at the time? A. Yes.

Q. How did he appear to you at that time, what sort of mood was he in?

A. You mean the appearance of his face?

Q. No, I mean his behaviour, his mood.

A. He just came and stood there.

Q. What about his mood, did he appear to be calm to you? A. He appeared to be calm.

Q. Now, when did you next see your father after that? A. I didn't see him again after that. 10

Q. How about your brother Davison and your mother, did you see them after that? A. On that day?

Q. No, the day after that, did you see them on the day afterwards?

A. They were there on the following morning.

Q. Did they go away at all?

A. They went away in the afternoon.

Q. When did they come back?

A. I do not know the day on which they came back, but we found them at home after we had returned from Ncheu. 20

Q. Do you live in the same house as Tadeyo, your father? A. Yes.

Q. Does he possess a panga? A. Yes, he had one.

Q. Where is that now? A. It is at home.

Q. At the time when you saw him with the injury at home, was that panga in the house then?

A. No, he did not have it.

Q. Was that in the house at all? A. Yes. 30

Q. Did you see it that day? A. Yes.

Q. Where? A. In the house where it is kept.

Q. At what time? A. At the time he returned.

Q. Before he returned, or afterwards?
A. It was in the house all the time.

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Q. Was it just the one panga he possessed?
A. Yes, he had only one panga which he used for
working.

Prosecution
Evidence

Cross-Examined Wills:

No.8

Q. When you saw the injury on your father's
head, was it still bleeding.
A. Yes, it was bleeding.

Emeres Tadeyo
Kwalira
Examination
6th June 1962
continued

10

Q. And that was some time after he returned,
was it? A. That was after he had returned.

Cross-
examination
by K.W.Wills

Q. When he returned you say he went to the
big house? A. Yes.

Q. And then he came out and you saw his injuries,
is that right? A. Yes.

Q. How long did he stay in the big house?
A. He stayed in the house for a little while.

20

Q. As long as you have been in the witness
box this morning, or longer?
A. He was there for some time.

Q. Now this injury to his hand, was that still
bleeding when you saw it, or had it stopped?
A. I did not see that clearly, because it was at
night.

Cross-examined Momba:

No cross-examination.

Re-examined Nicholson:

No questions.

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NO. 9

EVIDENCE OF MARGARITA DUNKENI

Prosecution
Evidence

P.W.7. MARGARITA DUNKENI, Christian sworn, states:

No.9

Examined Nicholson:

Margarita
Dunkeni
Examination
6th June 1962

Q. What is your full name, please? A. Margarita.

Q. Your father's name? A. Duncan.

Q. Do you live in Kavala Village in Ncheu District? A. Yes.

Q. Are you married? A. Yes, I am married.

Q. What is the name of your husband? 10
A. Tadeyo Kwalira.

Q. Do you see him in Court? A. Yes, I see him.

Q. Point him out please? A. That one (indicating the first accused).

Q. How were you married? What ceremony did you go through? A. It was a marriage with witnesses.

Q. Was it a marriage recognised under African law and custom? A. Yes.

Examined Court:

Q. It was a proper customary marriage, was it? 20
A. Yes.

Q. I have to inform you that you are not obliged to give evidence against your husband, but you may do so if you wish. If you say you don't want to, you may stand down. Do you understand? A. Yes.

Q. What do you wish to do?
A. I will give evidence of what I saw.

Examined Nicholson:

Q. I think it is Kavala No.2 village you live at, isn't it? A. Yes.

Q. Do you remember several months ago going to Kavala No.1 to attend a funeral? A. Yes.

Q. Did you go alone, or did you go with your husband? A. I went there with my husband.

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Q. And did you go home later on? A. Yes.

—
Prosecution
Evidence

Q. Did you go home alone, or with your husband? A. I went back home alone.

—
No.9

Q. When you arrived home were you told something? A. Yes, I was told something.

Margarita
Dunkeni
Examination
6th June 1962
continued

Q. Did your husband later return home? A. Yes.

10 Q. And did you tell him something? Answer "yes" or "no". A. Yes, I told something.

Q. Now, when you arrived home did you look at your children?

A. Yes, I looked at them and noticed that they had been assaulted.

Q. What did you see?

A. My children, three children, had been assaulted; the eldest one, the second, and the baby on the back had also been assaulted.

Q. Yes, but what marks did you see?

20 A. They had no injuries, but he just assaulted them.

Q. They had no injuries. Now did your husband leave the house again?

A. Yes, after he had returned he went out again.

Q. What time would that be in the day?

A. I didn't see him go away, I just noticed that the house was shut and he was not there.

Q. Did you see him later on that day?

A. Yes, I saw him in the evening.

30 Q. Where was that?

A. In our house, inside the house.

Q. Did you notice anything about him?

A. Yes, he had something on him.

Q. What was that?

A. He had an injury on the head.

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Prosecution Evidence

No.9

Margarita Dunkeni Examination 6th June 1962 continued

Q. Any other injuries? A. Yes, on the arm.

Q. And what did he do?

A. He didn't say anything, he just called a child and said "Boil some water".

Q. Now did he say anything to you at all that evening about these injuries?

WILLS:

My Lord, that comes under the proviso, Section 159 of the Criminal Procedure Code.

NICHOLSON:

10

I see, yes. My Lord, I hope she is competent to give evidence about communications, not compellable, but competent.

WILLS:

The privilege is the husband's in this case, Your Lordship.

NICHOLSON:

My question was whether he said anything to her about the injury.

COURT: Is that objected?

20

WILLS: Yes, Your Lordship, it is.

COURT: You wish to argue this point, Mr. Nicholson?

NICHOLSON:

My Lord, merely to say that the wife is not compellable but competent, certainly as regards communications.

WILLS:

Your Lordship, I submit that she is not competent to give evidence of disclosures made during marriage, otherwise the proviso becomes completely superfluous.

30

Wills now outlines his objection

Nicholson answers

NO.10
RULING ON OBJECTION TO EVIDENCE
BY MARGARITA DUNKENI

Court adjourns at 9.50 a.m.

Court resumes at 10.30 a.m.

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Evidence

No.10

Ruling on
Objection to
Evidence by
Margarita
Dunkeni
6th June 1962

RULING

10 The wife of the first accused, having been called by the Crown as a witness and proved joined in a matrimonial union recognised by customary law, was warned by the Court that she need not give evidence unless she wished to do so. No inquiry was made of the accused whether he objected to his wife giving evidence. Having led some evidence, learned Crown Counsel asked the witness to disclose a communication made to her by her husband, but Defence Counsel objected to the competency, relying on the proviso to Section 159 of the Criminal Procedure Code. The Court has had the advantage of reference to the judgment in the case of

20 Kalodia Gabriel v. The Queen, Criminal Appeal No. 200 of 1960, decided in this Court; but that case was entirely different as to fact and law because it concerned the prosecution of an African husband who had allegedly assaulted his wife, nor was it concerned with the proviso to Section 159. In that trial, the wife of the prisoner was produced as the principal witness against her husband, for the Crown. The learned Judge decided that Section 152 of the Code (now Section 159) did not at all

30 detract from the Common Law, and at Common Law the wife assaulted by her husband was both a competent and a compellable prosecution witness, so that the prisoner could not have been prejudiced by calling her.

As the wife of the first accused does not fall within any of the exceptions of the Common Law, which are high treason, personal injuries one to the other and forcible abduction followed by marriage, the issue now before this Court is at large.

The Common Law of England was applied to this Protectorate by Article 51 in British Central Africa

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No.10

Ruling on
Objection to
Evidence by
Margarita
Dunkeni
6th June 1962
continued

Order in Council, 1902, and maintained by Article 83(1)(b) of the Nyasaland Constitutional Order in Council, 1961. At Common Law this woman would not be a competent Crown witness nor would she come in aid of the Crown by any statutory exception to the Common Law (see R. v. Thompson (1872) L.R.1, C.C.R.337). The incompetency at Common Law also extends to cover the case of the second accused, nor would any statutory exception assist the crown: The Queen v. Metcalfe, 24 Cr.App.R. 135. I am, of course, referring to statutory exceptions in England. 10

The origin of the rule is considered in Iush's "Law of Husband and Wife", 3rd Ed., p.3, where it is stated: "From the earliest times it has been laid down as a fundamental principle of law, a principle upon which the whole law relating to husband and wife has hitherto depended, that by virtue of the marriage a husband and wife become one person in law": see Firebrass d. Symes v. Pennant (1764) 2 Wils.K.B.254. 20

It was recognised from that maxim that neither husband nor wife could be a witness against the other as it was impossible to divide that unity: see Phillips v. Barnett, 1 Q.B.D. 436. The matter has also been the subject of statutory enactment in some 25 or 26 statutes in England. The first statute which dealt with the subject was the Evidence Act, 1851, which, by section 2, made parties to any civil action "competent and compellable" witnesses, but by section 3, preserved the existing state of the Common Law as regards criminal proceedings. In these statutes, which are set out in Russell on "Crime", 7th Ed., p.2272, wherever the wife is mentioned a distinction is made; she is either called "competent" or "competent but not compellable". But one statute under which the wife is made the compellable witness either for the prosecution or the defence is the Married Women's Property Act, 1884, where, by s.1: "A husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence". 30 40

A distinction could be drawn between "competent", which must mean that the witness must obey a subpoena, and "compellable", which could mean "must give evidence", and it is distinctly arguable that, being one person, so long as the husband

remains uncompellable the wife must too, except with express words in the statute. The prisoner in a criminal trial, while he may elect to give evidence on his own behalf, is, of course, never a compellable witness.

In the High Court of Nyasaland

Prosecution Evidence

No.10

Ruling on Objection to Evidence by Margarita Dunkeni 6th June 1962 continued

10

In R. v. Leach, 7 Cr.App.R.84, the Court of criminal Appeal construed Section 4(1) of the Criminal Evidence Act, 1898, to mean that, in cases therein mentioned, the wife of the husband who was the defendant was a compellable witness, but this decision was reversed by the House of Lords: see 7 Cr.App.R. 157, and followed by the Court of Criminal Appeal in R. v. Acaster, 7 Cr.App.R.187. The section is differently worded from Section 159 of the Criminal Procedure Code, so that the judgments are persuasive as to principle merely since they are not interpreting identical words. It was argued in that appeal by the Crown that the common law principle is that all competent witnesses are compellable, but it was not necessary to decide the point. But this argument was affirmed by the Court of Criminal Appeal in R. v. Lapworth (1930) 22 Cr.App. R.87.

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30

40

In Leach's case the Earl of Halsbury said: "I should have thought that if the known state of the law was that in order to confer competency you had to enact it, the fact you simply used the word "competent" did not necessarily mean against his or her will"; and in the same case Lord Atkinson said: "...she is unlike all other witnesses inasmuch as she is the prisoner's wife. You would certainly expect a distinct enactment excluding the application of the common law principle". The Lord Chancellor said: "...it is a fundamental and old principle to which the law has looked that you ought not to compel a wife to give evidence against her husband, especially in matters of a criminal kind.If it had not been for section 4 the wife could not have been allowed to give evidence, and the result was that the wife would not have been compelled to do so and was protected against compulsion. The difference between leave to give evidence and compulsion to give evidence is recognised in a series of Acts of Parliament". Lord Atkinson added: "I think the principle that a wife is not to be compelled to give evidence against her husband is deep-seated in the common law of this country, and I think that if it is to be overturned it must be overturned by a clear,

In the High Court of Nyasaland

Prosecution Evidence

No.10

Ruling on Objection to Evidence by Margarita Dunkeni 6th June 1962 continued

definite and positive enactment, not by one so ambiguous as that relied upon in this case".

Since the origin of the rule was the conception of a married couple as one person in law, and since the prisoner could not either be called or compelled to give evidence, it would follow that this legal persona, when represented by the wife, could not be called or compelled to give evidence. There are two concepts involved, one of competency, and one of compellability.

10

Section 159 of the Criminal Procedure Code runs as follows:-

"In any inquiry or trial the husband or wife of the person charged shall be a competent witness:

Provided that no person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married".

There is no reservation by the words "for the defence" to be found in Section 1 of the Criminal Evidence Act, 1898. The law of procedure in this Territory is codified. The Ordinance specifically declares it is a code, and the code is to be interpreted by the very words of the legislation, free from any glosses of the law of England or elsewhere. I consider it must be accepted that the use of the word "competent" in the section intends that husband or wife subpoenaed to attend at a trial cannot refuse to attend, and therefore the section makes a very serious inroad into the Common Law applied to the Territory. In my view, it must be held to declare that going beyond the common law exceptions and without the consent of either the prisoner or his wife the Crown may insist that the wife enters the witness box; but it does not, in my view, abrogate the rights of the husband or wife so called as a witness to refuse to give evidence, because that common law right has not been expressly taken away by the legislation. It would seem, further, that the appropriate procedure is that laid down in R. v. Acaster (supra), that where a spouse is called he or she ought to be warned by the Judge that she has a right to refuse to give evidence, and it may well be that a right resides in a prisoner that such a warning should issue.

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With this interpretation, the proviso is redundant. In my view, it cannot restore the right of the prisoner or his wife to refuse to enter the witness box, and it merely reaffirms the right of the witness, who is already protected by the section, to refuse to disclose communications made during marriage; but it may mean that the witness should be additionally warned. It could be that the framers of the Code desired merely to follow the Criminal Evidence Act, 1898, but omitted the words "for the defence". But the Ordinance must be interpreted as it stands, and the proviso, therefore, in my opinion, while it adds nothing to the section, does not take anything away from it.

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The final point for decision is whether the words "husband and wife" appearing in section 159 must be construed as restricted to the case of a monogamous marriage since the marriage proved here is potentially polygamous.

A somewhat similar point came up before the Privy Council in the appeal of Laila Ghina Mawji & Another v. The Queen, (1956) 23 E.A.C.A. 609. The appellants were husband and wife who had been convicted of a conspiracy to defeat the course of justice, and the Court of Appeal for Eastern Africa had held that while the English rule of law, that there can be no conspiracy within the unity represented by husband and wife, applied generally in Tanganyika, it did not apply in this case as the marriage was potentially polygamous. The Board accepted a submission that the rule is an example of fiction that husband and wife are regarded for certain purposes as in law one person, but in the criminal law of Tanganyika the words "husband and wife", if unqualified, are not restricted to monogamous unions. There, if it were desired to deal with monogamous as distinct from other marriages, express words were used. (For example, Section 155 of the Tanganyika Criminal Procedure Code, which treats the same point as Section 159 of our Code, deals generally in sub-section(1), with the competence of the wife or husband of a person charged as a witness for the prosecution; but sub-section (2) (which is absent from our local law) restricts the competence virtually to common law exceptions in the case of a monogamous marriage). The Board said: "It is clear, of course, that the marriages

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Ruling on
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Dunkeni
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primarily contemplated by the rule in England were monogamous marriages, but the rule being now part of the criminal law of Tanganyika, their Lordships are of the opinion that it applies to any husband and wife of a marriage valid under Tanganyika law". They continued: "The rule plainly applies here, at least to marriages recognised as fully valid (that is, in England), and it should therefore apply in Tanganyika to marriages recognised as fully valid there". It was not suggested that the appellants' marriage was not potentially polygamous.

10

To apply that reasoning to the instant point, the rule of the Common Law was applied generally to this Territory, and no doubt it originated in contemplation of monogamous marriage as the only marriage valid in English law. But here it must be intended to contemplate generally marriages valid by the local law unless restricted by express words. By this reasoning, the words "husband and wife of the person charged" in section 159 should be held to include the husband and wife of any matrimonial union recognised as valid by the local law of Nyasaland, although potentially polygamous.

20

In my view, therefore, the wife of the prisoner could validly be called as a Crown witness against her husband; but she could not be compelled to give evidence, and she was properly warned. It has occurred to me that a rather esoteric meaning to be extracted from the section is that, even if a wife has consented to testify generally she may have a further right of election to refuse to disclose communications from her husband and should receive an additional warning. That warning she did receive here.

30

Dated at Ncheu the 6th day of June, 1962.

COURT:

Recall the witness. If she is asked to disclose any statement made to her by her husband she may decline.

40

No.11EVIDENCE OF MARGARITA DUNKENI
(RECALLED)In the High
Court of
NyasalandP.W.7, MARGARITA DUNKENI, recalled. (Warned
still on oath).Prosecution
EvidenceExamined Nicholson:No.11Q. Now did your husband, when he returned, say
anything to you about the injuries?Margarita
Dunkeni
(Recalled)
Examination
6th June 1962
continuedCOURT:

If you wish, you need not disclose it.

10 A. No, he didn't tell me anything:

COURT:

There is a very big difference. You are on
oath to tell the truth. There is a big difference
in saying you don't want to say what he said and
saying he didn't say anything. If he did say
something to you you must tell us the truth unless
you wish to decline. On the other hand you can
say to us "I avail myself of the protection of the
law, I don't want to say anything".

20 Q. Did he say anything to you about the
injuries?A. He did not say much, he merely said "I have
been injured in this way and if I die what are
you going to do", that is all he said. He said
nothing more.NICHOLSON to COURT:My Lord, I don't think I will pursue this
matter.30 Q. Now what treatment for the injuries, if any,
was given?A. He did not do anything, he just went away
early on the next morning. I did not know he had
gone away.Q. But on that particular night was any treat-
ment at all given to his injuries?A. I was at the kitchen then, and my husband was
at the big house. When I was returning from the
kitchen I just noticed that he had a white cloth
around his head.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.11

Margarita
Dunkeni
(Recalled)
Examination
6th June 1962
continued

Q. Yes, I think you said that he went away next morning, is that right?

A. Yes, he went away early on the next morning.

Q. Where did he go, do you know?

A. I don't know where he went because he did not tell me where he was going to.

Q. When your husband went out the day before, around sunset, where was Davison, your son?

A. On the day my husband was injured, Davison was at the house and I do not know how he followed his father. 10

Q. But when his father went out, did you see where Davison was? A. He was at the house.

Q. Where?

A. He was at our big house, which he left and came to the kitchen, but I did not see him go away.

Q. You were in the kitchen, were you?

A. Yes, I was at the kitchen.

Q. Now did your husband spend that particular night with you? 20

A. Yes, he spent the night with me.

Q. And did he at all, during the night, say anything about the injuries.

A. He said "He is the one who has injured me". At that time I noticed that he was becoming very weak, I asked him "Why are you breathing like this?", he said "No, I am awake", that is all he said to me.

Q. Well, you say he said "He is the one who has injured me", who was that? A. Silino. 30

Q. Just answer "yes" or "no". Did you in fact hear something about Silino on the next day?

COURT:

That is a leading question, also it may well be hearsay.

Q. You heard something next day?

A. I didn't hear anything in the morning.

Examination continued

In the High
Court of
Nyasaland

Q. Did you hear something during the day at some time?

A. No, I did not hear anything until about sunset.

Prosecution
Evidence

Q. Yes and then did you hear something, yes or no? A. Yes.

No.11

Q. As a result of that what did you do?

Margarita
Dunkeni
(Recalled)
Examination
6th June 1962
continued

WILLS:

That is hearsay really, Your Lordship, too.

10 COURT:

It is regarded by the Court as an oblique way of getting in hearsay.

Q. That particular day, the day after the injury, where did you sleep?

A. I slept at my brother-in-law Magombo's house when I informed him that my husband was not at home, he had gone away.

COURT:

20 A statement made in the presence of the prisoner to another person is also getting near hearsay.

Q. Where does your brother-in law Magombo live?

A. He lives at Palasido, Mafuta's place.

Q. Where is that?

A. Within this same district, at Mafuta's.

Q. Is that in Nyasaland? A. Yes.

Q. On this day when your husband was injured, do you remember what he was wearing?

A. No, I do not know what he was wearing.

30 Q. When you arrived at Magombo's house, who did you see there?

A. I saw his wife there, her husband was not there.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.11

Margarita
Dunkeni
(Recalled)
Examination
6th June 1962
continued

Q. Did you see anybody else?
A. Yes, I saw my husband also (indicating first
accused). After he had returned from where he had
gone I just met him there.

Q. Did you speak to him?
A. Yes, I spoke to him.

Q. What did you say?
A. I said "We have left like this because of you,
it is alleged that it is you who killed Silino."

Q. What did he say?
A. He did not reply, he just said "Is that why
you are walking about in the night like this".

10

Q. And when in fact did you return home?
A. I returned home to our house on Thursday.

Q. On the Thursday. What was the day when your
husband came in with the injuries? How many days
before? A. That was two days later.

Cross-
examination
by K.W.Wills

Cross-examined Wills:

Q. Is it right that your husband was injured on
a Tuesday, that you went to Magombo's on a
Wednesday and you returned on the Thursday?
A. Yes.

20

Cross-examined Mehta:

No cross-examination.

Re-examined Nicholson:

No questions.

NO. 12

EVIDENCE OF JORODANI @ YOSWA TEBULO

In the High
Court of
Nyasaland

P.W.8. JORODANI @ YOSWA TEBULO, Pagan affirmed,
states:

Prosecution
Evidence

Examined Nicholson:

No.12

Q. What is your full name, please?

A. Jorodani Tebulo.

Jorodani
@ Yoswa
Tebulo
Examination
6th June 1962

Q. And where do you live?

A. I live at Saulose Village.

Q. Is that the same as Kavala No.1 village?

10

A. Kavala No.2.

Q. It is Kavala Village No.2? A. Yes.

Q. That is in Ncheu District?

A. In Ncheu District.

Q. Do you remember several months ago being in
your house in the evening? A. I remember.

Q. Do you know a man called Tadeyo Kwalira?

A. I know him.

Q. Do you see him in Court? A. Yes.

Q. Point him out please?

20

A. That one (indicating first accused).

Q. Where is his house in relation to yours?

A. His house is next to mine.

Q. Well now, on this particular day did some-
body come to your house? Just answer "yes" or "no".

A. Yes.

Q. Did you go somewhere? A. To my garden.

Q. Where did you go from there?

A. I went back to stay in my house and Fides
Tadeyo Kwalira came to call me.

30

Q. And did you go somewhere?

A. I went to his house.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.12

Jorodani
@ Yoswa
Tebulo
Examination
6th June 1962
continued

Q. Who is "he", is that Tadeyo? A. Tadeyo's house.

Q. What did you find when you got there?

A. He said "Cut my hair", I said "It is at half past six and it is dark, we have no time, I will come tomorrow morning to cut your hair".

Q. Did you notice anything about his appearance?

A. I noticed something.

Q. What was that. A. A wound.

Q. Where was that? A. On the head.

Q. Did you say anything to him about that?

A. I said something. 10

Q. What was that?

A. I said "What about this wound?", and he said "I was involved in a quarrel with Silino".

Q. Yes, did he say anything else?

A. It was I who asked him further. I said "When you were fighting, with who else were you?", and he said "I was with Joseph".

Q. Yes, did he mention any other names, or did he just say Joseph? A. He said Joseph Duncan. 20

Q. What did you do about the wound on his head?

A. I fetched a razor blade and shaved the hair around the wound, and I took a bandage from his son who is at school and tied it round his head to prevent some more bleeding.

Q. What time would this be that you went to his house? A. At half past six.

COURT:

I should warn the Assessors at this stage. You have just heard that the first prisoner said that during the fight Joseph Duncan the second prisoner was there. Now that is not evidence against Joseph Duncan. What one prisoner says, not on oath, out of the Court, against the other one is not evidence against the other. You are not entitled to infer from what Tadeyo said that Joseph was there. 30

Examination continued

Q. Are you related to Joseph Duncan at all?

A. No, but Tadeyo Kwalira is my brother in marriage, and we are married to sisters.

Q. Is Tadeyo related to Joseph Duncan at all by marriage? A. He is his brother-in-law.

COURT:

How does that work out?

NICHOLSON:

10 My Lord, I think this man is actually the brother of Tadeyo.

COURT to WITNESS:

Are you a brother of Tadeyo?

A. Yes.

COURT:

Blood brother?

A. We have married daughters of the same family.

COURT:

20 Who did Joseph marry? Did he marry a daughter of the same family? A. No.

COURT:

How is it Tadeyo is brother-in-law of Joseph?

A. I and Tadeyo Kwalira married Joseph's sisters.

Q. Do you remember what day of the week this was, that you went over to that house?

A. It was on the 10th December.

Q. Do you remember the police coming to your village? A. I remember.

Q. How many days afterwards was that?

30 A. They came one day afterwards, they came on the second day.

In the High Court of Nyasaland

Prosecution Evidence

No.12

Jorodani
@ Yoswa
Tebulo
Examination
6th June 1962
continued

In the High
Court of
Nyasaland

Prosecution
Evidence

No.12

Jorodani
@ Yoswa
Tebulo
Examination
6th June 1962
continued

Q. In fact on the day after this incident did you see Silino? A. I did not see him again.

Q. Did you see him when he was dead?
A. I saw when an N.G. truck came and the body was placed into it.

Cross-examined Wills:

No cross-examination.

Cross-examined Mehta:

No cross-examination.

EVIDENCE OF ODILIA SANDALAMU

P.W.9. ODILIA SANDALAMU, Christian sworn, states:

Examined Nicholson:

Q. What is your full name, please?

A. Odilia Sandalamu.

Q. Where do you live?

A. I live at Chabonga Village.

Q. Where is that? A. At Tsangano.

10 Q. Is that in Ncheu District? A. Yes.

Q. How far from Kavala Village is that?

A. It is a long distance away.

Q. Are you married? A. Yes

Q. What is the name of your husband? A. Joseph.

Q. Do you see him in Court? A. I see him.

Q. Point him out please?

A. That one in the middle (indicating second accused).

Q. And what sort of marriage is that?

20 A. It is one with marriage witnesses:

NICHOLSON: I accept that they are married, My Lord.

Examined Court:

Q. I must warn you that if you are joined in a customary union with Joseph you need not give evidence against him unless you wish. Do you understand?

A. I understand. I will give evidence, because he is my husband.

Examined Nicholson:

30 Q. Now, do you remember some months ago going to a funeral at Kavala Village?

MEHTA: Your Lordship, it could be that the witness is under the impression she has come here to give evidence for the defence, she maybe doesn't realise that she has to give evidence for the prosecution.

In the High
Court of
Nyasaland
Prosecution
Evidence
No.13
Odilia
Sandalamu
Examination
6th June 1962

In the High
Court of
Nyasaland

COURT: I will explain to her again.

Examined Court:

Prosecution
Evidence

No.13

Odilia
Sandalamu
Examination
6th June 1962
continued

Q. Do you understand that you are called by the Crown to give evidence in this case against your husband? Up to this time your husband has not said anything about the case. You are not obliged to say anything unless you wish to. Because you are here it doesn't mean anything more than this, you can merely accept to give evidence or decline to give evidence, that is the unfortunate state of the law. Do you understand? A. I understand.

10

Q. What do you wish to do?
A. I will give evidence. I have no alternative. What else can I do?

Q. You have an alternative. You can stand down and go home if you want to do. The point is, you have a choice, you are not compelled to say anything. If you want to say something you must tell the truth. Do you still think you have no alternative?

A. On that day when the accident occurred I was not there.

20

Q. From what you say, do you wish to give evidence? A. What else can I do?

Q. You are married to Joseph. You are warned that you have a choice whether to give evidence against him or not. The real reason is that if a wife gives evidence against her husband and it is adverse, later on it has a disastrous effect on the marriage, that is why the law gives you a choice. In other words, if you are put in a very awkward situation by being put into the witness box by the Crown and when you give evidence against the man you married, it could have consequences on your marriage. You have a right to object. Do you understand now? A. I understand.

30

Q. Do you wish to say anything or do you wish to go away home. You are in this position, that if you refuse to give evidence now, no-one will do anything about it. Your husband can call you as a defence witness if he wants to. On the other hand, by explaining to you I do not want to create the impression there is something adverse. It is a position, of course, in which no wife should be put in a murder trial. A. I will give evidence if I am called by my husband.

40

Q. Very well, stand down.

NO.14

EVIDENCE OF MAGOMBO KWALIRA

In the High
Court of
Nyasaland

Prosecution
Evidence

No.14

Magombo Kwalira
Examination
6th June 1962

P.W.10. MAGOMBO KWALIRA, Pagan affirmed, states:

Examined Nicholson:

Q. What is your full name, please?

A. I am Magombo Kwalira.

Q. And where do you live?

A. I live at Mponela in Portuguese territory.

Q. And do you know a man called Tadeyo?

10 A. He is my young brother, he is our last-born.

Q. Do you see him in Court? A. I see him.

Q. Would you point him out, please?
(Witness indicates the first accused).

Q. When was the last time that you saw him,
before to-day?

A. I saw him when he came to find me at home
early one morning.

Q. When was that? A. I don't know the date.

20 Q. Do you know whether it was this year, or
last year? A. It was last year.

Q. Do you remember the day of the week?

A. No, I don't know the day of the week.

Q. When he arrived, did he speak to you?

A. He spoke to me.

Q. What did he say?

A. He said "I am going to Matandani for treatment
to my wound".

Q. Anything else?

30 A. He said "I was involved in a fight, I started
the fight".

Q. Anything else?

A. "Having started the fight like that, Jontala
is the one who came to strike the man with a
knife".

In the High
Court of
Nyasaland

Prosecution
Evidence

No.14

Magombo Kwalira
Examination
6th June 1962
continued

Q. Did he mention who the man was?
A. He mentioned who the man was.

Q. Who did he say?
A. I have just forgotten the name.

Q. Did you know who Jontala was?
A. That was his brother-in-law.

Q. Do you see him in Court?
A. Jontala is that one there (indicating the second accused).

COURT: I must again warn the Assessors that this is a statement made by the first accused and it is not evidence against the second accused. When one makes a statement against the other one, not in Court, that is not evidence. 10

Q. Did you go to Kavala Village after you had heard this?
A. Yes, I went there because I thought my younger brother never had any trouble with anybody before, I must go and see this.

Q. And after you had been there some time, did you see the police at the village? 20
A. I had gone back home and I was fetched back, that is the time I met the police.

Cross-
examination
by K.W.Wills

Cross-examined Wills:

Q. Did your brother Tadeyo say he was responsible for this fight?
A. No, he said he had been away to a funeral and when he returned he found that his children had been assaulted and his wheat had been scattered about...

(The witness was here interrupted by Mr.Wills) 30

Q. We don't want that, I didn't ask you that. You said to my learned friend that he said "I started the fight". Did he say he started the fight, or did he say that a fight started between him and the other man?
A. He said that he had been away to a funeral.

Q. Did you understand the question?
A. I don't understand the question.

Q. I am suggesting to you that what your brother said was that the fight started between him and this other person, not that he said he started it.

A. He did not say that he started the fight.

Cross-examined Mehta:

No cross-examination, My Lord.

Re-examined Nicholson:

10 Q. Now, you were beginning to add to what had been said. You said he said he had been away to a funeral?

WILLS: That does not arise out of my cross-examination. My only point in cross-examination was the question of whether he started the fight.

COURT: Yes, but the witness answered he had been to a funeral.

WILLS: But that doesn't arise on my question, Your Lordship.

20 COURT: It arises out of the answer. A witness should not volunteer evidence, but your original question was not so carefully phrased as it was later. The witness did give this narrative that he had been at a funeral and the children were assaulted when he came back. His answer goes beyond your question and could be struck out, but it does seem it was in train of your question. He did go on and you never heard his other words. Re-examination is permissible on what a witness has said in cross-examination. It was in train
30 of your question.

You will have to be careful, Mr. Nicholson, not to go too far.

NICHOLSON: What I was going to put to him - I was going to ask him was anything else said apart from that.

COURT: Isn't that going beyond....He was then stopped by Counsel.

(The witness's original answer is read from the record).

In the High Court of Nyasaland

Prosecution Evidence

No.14

Magombo Kwalira
Cross-examination
by K.W.Wills
6th June 1962
continued
Re-examination

In the High
Court of
Nyasaland

Prosecution
Evidence

No.14

Magombo Kwalira
Re-examination
6th June 1962
continued

NICHOLSON: Yes. My Lord, on the question of whether he said "I started the fight", or whether the fight started, I was going to ask him exactly what the words were that were used.

COURT: That would not be objectionable.

Re-examined Nicholson:

Q. Now, on the question of whether Tadeyo said "I started the fight", or "a fight started", can you tell us exactly as far as you remember what words he actually used? 10

A. He said that, at first, he said "I was away to a funeral", and when he came back he said he found his wheat scattered and his children had been assaulted. Those were his words.

Q. Yes, but you said in your examination-in-chief that he told you "I started the fight", and then in cross-examination you said that he said "a fight started". What I want to know is the exact words he used?

WILLS: I think that is rather wide, that question. Couldn't the question be "what words were used"? 20

Q. What words were used about the actual fight starting?

A. These were his words: "I went to a funeral and when I came back from the funeral I found the children had been assaulted".

Q. Address your mind to when he mentions the fight. What did he say about the fight starting?

A. I am saying that he told me "I had been to a funeral".

Q. Look. In examination-in-chief you said that he told you, amongst other things, that he had started a fight? 30

A. He said "I found the children had been assaulted".

Q. But do you agree that you said that Tadeyo told you that he had started a fight?

A. I am saying that he started a fight because the cause was his wheat having been scattered.

Q. What exactly was it that he said about the start of the fight?

WILLS: Your Lordship, he has given his answer about three times now.

In the High Court of Nyasaland

COURT: He is on oath. He is asked a perfectly simple question on evidence he has already given. He must answer.

Prosecution Evidence No.14

Examined Court:

Magombo Kwalira
Re-examination
6th June 1962
continued

10 Q. The question simply was: When you said he started a fight, will you give us the actual words used. Of course you can say he didn't say these words, and you mistakenly said that.

A. No, those words were the words used by him. He said the cause was his wheat.

Q. Yes, but what about the fight?

A. The cause was the wheat.

Q. The cause of what?

A. He said when he returned from the funeral he found that his wheat had been scattered and his children had been assaulted, and that was the cause of the fight.

20 Q. That was the cause of the fight. Did he say anything else about the fight?

A. No, he didn't say anything else. That was all I heard.

Q. Why did you tell us earlier that he said he had started the fight?

A. I was mistaken when I said that.

Q. Try and recognise your responsibility in a case of this kind, a murder trial.

Re-examination continued

30 Q. Arising from that, were you mistaken about Joseph's name being mentioned?

MEHTA: Your Lordship, there was no mention about this in cross-examination.

COURT: Nevertheless, when the Court asks questions, Counsel are entitled to cross-examine.

Re-examination continued:

Q. Were you mistaken when you mentioned Joseph?

In the High
Court of
Nyasaland

Prosecution
Evidence

No.14

Magombo Kwalira
Re-examination
6th June 1962
continued

COURT: Did I mention that?

NICHOLSON: My Lord, no. In examination-in-chief he said far more than that.

COURT: The only question that arose in cross-examination was about the start of the fight and I do not expect Counsel to go into everything else he said.

Examined Court:

Q. You came here and told us this man started the fight, and he never said such a thing?

10

A. I am saying that the cause of the fight was the wheat that had been scattered.

Q. You are still in the witness box and will stay here all day until you answer my question correctly. We must discover your reliability as a witness. Earlier, when you were giving evidence on oath, you said in a reported speech by Tadeyo "I started the fight". Do you remember saying that? Everybody heard it. Do you remember?

A. I don't remember saying that.

20

Q. Your memory is so bad you can't remember for five minutes? Very well then, you did in fact say these words: "I started the fight". That was something you invented, was it?

A. I am saying that the cause of the fight was his wheat.

Q. When you say "I started the fight", that was an invention was it?

A. I am saying that the cause was the wheat, that is what I said about starting the fight.

30

Q. You did not hear these words said by the first accused? You didn't hear the first accused say "I started the fight"?

A. He said "My wheat has been scattered".

Q. Did he say "I started the fight"?

A. No, he said "My wheat has been thrown away and my children assaulted".

Q. He did not say "I started the fight"?

A. No.

Q. When you told us those words it was something you had made up?

A. I have said that he started the fight because of the wheat.

Q. He didn't say he started the fight, you made it up? A. I just made those words up, yes.

COURT: Any further questions arising out of the cross-examination?

(All Counsel state they have no further questions to put).

Court adjourns at 12.10 p.m.

Court resumes at 1.30 p.m.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.14
Magombo Kwalira
Re-examination
5th June 1962
continued

In the High
Court of
Nyasaland

NO. 15

EVIDENCE OF VILLAGE HEADMAN MATIAS YOHANE KAVALA

Prosecution
Evidence

P.W.11. VILLAGE HEADMAN MATIAS YOHANE KAVALA,
Christian sworn, states:-

No.15

Examined Nicholson:

Village
Headman
Matias Yohane
Kavala
Examination
6th June 1962

Q. What is your full name, please?

A. My name is Matias Yohane Kavala.

Q. And are you the Village Headman of Kavala
Village in Ncheu District? A. Yes.

Q. Are you the Headman of Villages 1 and 2? 10
A. Yes.

Q. And in which one do you live?
A. I live in No.1.

Q. Now do you remember several months ago a man
called Marko Mathews coming to your house? A. Yes.

Q. Just answer "yes" or "no" - did he tell you
something? A. He told me something.

Q. And did you go somewhere?
A. Yes.

Q. Where did you go? 20
A. I followed the one who gave me that
information.

Q. That was Marko was it? A. Yes.

Q. And where did you go?
A. I went to the place where he showed me.

Q. Where is that?
A. The place which he showed me?

Q. Yes? A. I went to Bilila stream.

Q. And what did you find when you arrived there?
A. When I arrived there I first saw blood. 30

Q. Where was that?
A. The blood was near the blue-gum tress.

Q. What did you do?
A. I then called all the people who were working in their gardens.

In the High Court of Nyasaland

Q. Yes, and what did you do?
A. Then we followed the blood.

Prosecution Evidence

Q. How far?
A. We followed the blood along the road for some distance then we found the person dead.

No.15

Village Headman Matias Yohane Kavala Examination 6th June 1962 continued

Q. Who was that you found dead? A. Silino.

10

Q. Do you remember - how far was this blood-trail, can you indicate?
A. As far as from here to the District Commissioner's house. (Reputed to be 800 yards).

WILLS: I understood he said the D.C.'s office.

Q. Can it be seen from here?
A. No, it cannot be seen from here, it is behind those buildings.

20

Q. Yes, did you see anything else?
A. There was also a knife near where the dead body was.

Q. Which did you see first, the knife or the body? A. I first saw the knife.

Q. Did you touch it at all? A. I did not touch it.

Q. Now would you look at this photograph please?

(Counsel hands the witness photograph No.1)

Was that how the body was when you saw it?
A. (No reply).

Q. Have you ever seen a photograph before?
A. I used to see photographs.

30

Q. Now look at that photograph. Do you recognise that body there?

COURT: I think it is recognised now that identifying photographs requires skill.

Q. Don't bother about that. Hand it back. How was the body lying when you saw it?

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Nyasaland

Prosecution
Evidence

No.15

Village
Headman
Matias Yohane
Kavala
Examination
6th June 1962
continued

A. It was lying on his right side, lying on his hand, and his head was facing the stream from where we had come following the blood.

Q. Yes, now do you remember the police coming to your village? A. I remember.

Q. In between the time you found the body and the time the police came, did it rain?

A. Yes, it rained.

Q. When the police came to your village did you meet them? A. I met them. 10

Q. And where did you go with them?
A. I went with them to where the dead body was, to show them.

Q. How about the knife, did you show them that?
A. I showed them the knife.

Q. Now those things, when you went with the police, the body and the knife, were they in the same position as when you had seen them previously?
A. Yes.

Q. How long have you been a Village Headman? 20
A. I have been a Village Headman for about eighteen years.

Q. When you indicated the body to the police, did you identify that body to them?
A. I identified the dead body to them as being that of Silino.

Q. Did you go anywhere else with the police?
A. No, just where the dead body was.

Q. Did you go to Silino's house?
A. Oh, yes, I went with them there. 30

Q. Did you go with the police? A. Yes.

Q. Did you tell them whose house that was?
A. I told them that that was Silino's house.

Q. And is there a grain store and a kitchen near that house? A. Yes.

Q. When the police came were you able to see the bloodstains?
A. We could see the bloodstains a little because it had rained.

Q. When the police came, I am talking about now. Could you see them at all?

A. Yes, they could be seen.

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Q. The panga that you saw lying there, had you ever seen that before?

A. The panga which was lying there, when I was asked about it I thought it was Silino's.

Prosecution Evidence

No.15

Q. What made you think that?

Village Headman Matias Yohane Kavala Examination 6th June 1962 continued

10

A. Because I used to see him carrying it about with him, sometimes.

Q. That particular panga?

A. Yes, that particular one.

Q. Can you describe it to us?

A. It was a small one with a sharp point.

Q. Anything else about it?

A. And it had a leather round the handle.

Q. Yes, how long was it?

A. It was that length (witness indicates from finger-tips to elbow).

20

Cross-examined Wills:

Cross-examination by K.W.Wills

(Counsel hands to the witness the panga, marked "3" for identification).

Q. Is that panga like the one you saw lying on the path? A. This is the one.

Q. And it is the one you have just referred to in your evidence? A. Yes.

Q. You have been a Village Headman a long time. During that time has there ever been a quarrel between the first accused, Tadeyo, and Silino?

A. I never heard of any quarrel between him and Silino.

Cross-examined Mehta:

Cross-examination by M.B.Mehta

Q. As a Village Headman of those two villages, Kavala 1 and 2, you ought to know the area properly. Do you know that? A. Yes.

Q. Is there a forest in between Kavala No.1 and No.2?

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Evidence

No.15

Village
Headman
Matias Yohane
Kavala

Cross-
examination
by M.B.Mehta
6th June 1962
continued

A. There is no forest, but there is a stream and there are trees growing along the stream.

Q. But is there a forest a little distance from the stream? A. There is no forest.

Q. How far is the nearest forest from the stream? A. There is no forest anywhere near the stream.

Q. Well, how would you describe these trees in relation to the stream, how far are the trees from the stream?

A. The trees grow on both sides of the stream. 10

Q. Throughout the stream do you see the trees, on both sides, or do you see certain parts where there are trees and certain gaps where there are no trees?

A. There are very few gaps, but mostly the trees grow all through the stream.

Q. Do you see this photograph. I am referring to photograph No.7. Can you recognise this place?

A. (No reply).

Q. My question is, can you recognise this place? A. I recognise that place. 20

Q. Is it somewhere near Bilila Stream, this place? A. Yes, this is the scene of Bilila stream.

Q. Now, do you see some trees in the middle of the photograph? A. There are some trees.

Q. Are these trees on the side of Bilila stream? A. These are blue-gum trees.

Q. They may be blue-gum trees, but are these trees near the Bilila stream?

A. These are the trees. 30

Q. Are there any other kind of trees there or not?

A. Yes, there are some kinds of trees there, but mostly you find these ones you see in the photograph.

Q. Would you look at the photograph carefully and answer this question. Isn't it true, from the photograph, it clearly appears that the trees are not lying on each side of the stream and there are many gaps. For instance, on the left-hand side of the photograph there are no trees, nor on the right-hand side.

A. At the place where I saw the blood there was a patch of trees growing there, and thereafter there were trees, with gaps, growing along the stream.

10

Q. Now, how far is a tree from the bloodstains you saw. The nearest tree?

A. There were blue-gum trees growing as far as from where I am to the grass outside.

Q. Imagine yourself coming down from Kavala No.2, would you come across any trees before reaching any bloodstains, or were the trees behind the bloodstains? A. No, there are no trees.

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Prosecution Evidence

No.15

Village Headman Matias Yohane Kavala

Cross-examination by M.B.Mehta 6th June 1962 continued

In the High
Court of
Nyasaland

NO.16

EVIDENCE OF MARKO MATHEWS

Prosecution
Evidence

P.W.12. MARKO MATHEWS, Christian sworn, states:

No.16

Examined Nicholson:

Marko
Mathews
Examination
6th June 1962

Q. What is your full name please? A. Marko Mathews.

Q. And where do you live?

A. I live at Kavala Village.

Q. In the district of Ncheu? A. Yes.

Q. And did you have a brother called Silino?

A. Yes.

10

Q. Where was he living?

A. He was living in Kavala No.2.

Q. And who was living with him?

A. He was living with his son.

Q. How old is his son?

A. I have got him here with me. Maybe four or five years old.

Q. And did he have a wife living with him?

A. He had a wife, but she married another man and went away. He was living there alone.

20

Q. With Antony, the son? A. Yes, with Antony.

Q. Do you remember at the end of last year going to a funeral at Kavala No.1 village? A. Yes.

Q. Do you know what date that was?

A. I think it was on the 12th, or on the 10th, I have forgotten.

Q. What month? A. December.

Q. Do you remember the day of the week?

A. On a Monday.

Q. Did you see your brother Silino there?

A. I saw him at the funeral.

30

Q. What time did you leave the funeral?
 A. Silino left the funeral first, in order to go and cook for his son Antony at his house.

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 Court of
 Nyasaland

Q. And what time did you leave?
 A. I left late in the afternoon. (Witness indicates about four o'clock).

Prosecution
 Evidence

No.16

Q. Did you see Silino again that day?
 A. Yes, I met him again at about sunset, when I went across to Kavala No.2 Village.

Marko
 Mathews
 Examination
 6th June 1962
 continued

10 Q. Whereabouts did you meet him?
 A. I met him at a distance where my house was as far as from here to that building. Yes, my house was as far as that and he was going to his house.

Q. Which side of the stream is this?
 A. I first met him on the side of Kavala No.1 when he was leaving for his house.

20 Q. Where was it you met him about sunset, where exactly?
 A. After he had left the funeral he had gone to his house in order to cook for his child and then went back to my house....

Q. Where was it you saw him exactly? Was it somewhere near your house, or not?
 A. Not actually near my house, but he was coming from the direction of my house and was on his way home to sleep, and I was coming from the other side to my house, and we met.

Q. Was he on Kavala No.1 side of the stream?
 A. Yes, going towards Kavala No.2.

30 Q. How far from the stream was that?
 A. The stream was as far as the stream we see down below there (witness indicates).

Q. Which one is that? A. That one there, but my house is much higher than the stream.

Q. Which stream is that? A. I mean that piece of land we can see across the bushes, you can see some bare ground there. (Witness indicates)

Q. Your house is about a quarter mile away from the stream, is it? A. Yes.

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Evidence

No.16

Marko
Mathews
Examination
6th June 1962
continued

Q. And how far from your house were you when you met Silino?

A. I am saying that it is as far as from here to that bare ground beyond the trees and beyond the house with the green door.

(Counsel agree a distance of half a mile).

Q. When you saw your brother Silino then was he carrying anything?

A. No, when I met my elder brother Silino there he was not carrying anything, but he just told me how he had moved from the funeral and what had taken place at his house.

10

Q. Did you then continue on the way to your house?

A. After he had told me what had taken place at his house I continued on my way to my house.

Q. And he went on in the other direction, did he?

A. And he went on in the other direction, towards his house.

Q. Now the next day; did you see somebody on the next day?

A. On the next day I saw a boy who told me something about his father.

20

Q. Who was the boy?

A. That is Antony, his son.

(A small boy comes into Court).

NICHOLSON: Would you ask him what his name is, Mr. Interpreter?

The child answers "My name is Antony" and leaves the Court.

Examination continued

30

Q. Is that the Antony you referred to as Silino's son? A. That is the one.

Q. Did you go somewhere?

A. I went to my garden on this day and I was called back from the garden.

Q. And you saw the boy?

A. I saw the boy at my house.

Q. Where did you go after you had seen him?
All I want to know is where did you go after you saw him?

A. I went to Bilila stream after seeing the boy.

Q. Whereabouts at Bilila stream did you go?

A. I went to the side of Bilila stream where I said that I had met my brother on his way to his home, that is in the direction of Kavala No.2.

Q. And where exactly did you go?

10 A. I went to see a place where I had been told that a fight.....

Q. You went to see a place. Where did you go?

A. I went to a place at Bilila stream.

Q. What did you find when you arrived there?

A. When I arrived there I saw some bloodstains.

Q. And what did you do when you saw those?

A. After seeing the bloodstains I went back to inform the Village Headman Kavala.

Q. And what did you do after you had seen him?

20 A. After I had seen the Village Headman, we went to the same place together with the Village Headman and some people whom he had called.

Q. What did you find?

A. After we had searched there we found my elder brother Silino who had been killed and who was lying down there.

Q. Did you see anything else?

A. We found a knife near the place where he had been killed.

30 Q. Had you ever seen that knife before?

A. I had never seen that before.

Q. Did your brother Silino own any knives, pangas?

A. He owned one knife which we found in his house. I only saw one.

Q. When was that - you found a knife in the house?

A. We found the knife on the day that we were accompanied by the police after they had arrived. The police had come from Ncheu and we found the knife underneath the bed.

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Nyasaland

Prosecution
Evidence

No.16

Marko
Mathews
Examination
6th June 1962
continued

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Nyasaland

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Evidence

No.16

Marko
Mathews
Examination
6th June 1962
continued

COURT: And what happened to the knife?
A. The police instructed me to carry that knife,
which I did, and brought it to Ncheu.

COURT: What did you do with it?
A. On my arrival at Ncheu I kept it in my possession,
and on the next day when I was coming back home I
asked what I was to do with the knife, and as a
result of what I was told I took it back to my
house.

COURT: Where is it now?
A. After I had taken it back home, the police came
again on another day and took it away. 10

COURT: Have you seen it since. A. No.

Q. Could you describe that panga to us?
A. I could describe it because I recognised it
when I saw it.

Q. What is it like?
A. It is a long one, it has three lines running
along the blade and it has got a leather round its
handle. 20

Q. Would you have a look at this please?

(Counsel hands a panga to the witness)

A. This is it.

(The panga is now put in and marked "4"
for identification).

Q. When you found that under the bed, was there
a police officer with you?
A. Yes, there was a policeman with me, he was also
searching the other side of the bed, and I was
searching the other side, but it was I who pulled
it out from underneath the bed. 30

Q. Now when the police came, did you go to the
scene with them?

A. On the day they came to take away the panga
they returned to my house, I didn't take them
across the other side.

Q. When they first came to your village, did you
go to where the body was with them?

A. Yes, I was with them.

Q. Now, on that particular day did you see any bloodstains?

A. Before the police were called it had rained, but it was not raining when they came.

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Q. No, but could you see any bloodstains?

A. Very few bloodstains could be seen because it had rained heavily.

Q. When you went to look for this knife in Silino's house where had you been just before that?

A. We had been to Bilila stream first, to the place where we had first seen the bloodstains.

Marko
Mathews
Examination
6th June 1962
continued

Q. With the police? A. With the police, yes.

Q. And then you went on to the house, did you?
A. Then we went on to the house to look for the knife.

Q. Now, did you come to Ncheu a day or so after that and identify the body of your brother to a doctor here?

A. On the next day after we had arrived at Ncheu I identified the body of my elder brother to the doctor.

Q. Do you know the doctor's name? A. Doctor Bhima.

Cross-examined Wills:

Cross-
examination
by K.W.Wills

Q. You were at this funeral at Kavala No.1 were you? A. Yes.

Q. Your brother was also there? A. Yes.

Q. And as I understand it, your brother left before you did?

A. Yes, he said he was going to cook for the child.

Q. How long after did you leave?

A. After he had left for his house some little time elapsed because he left in the morning, about ten o'clock, and I left late in the afternoon.

Q. When you left you went back to your house, did you, that is on the side of No.2 Kavala, did you?

A. Yes, but after I had arrived at my house I went to the garden to scare away the guinea fowls. That is on the side of No.2 Kavala.

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Prosecution
Evidence

No.16

Marko
Mathews

Cross-
examination
by K.W.Wills
6th June 1962
continued

Q. Would you just answer my question? My question was: Is your house in Kavala No.2 village?
A. No.1 village.

Q. Your house is in No.1 village? A. Yes.

Q. After you left the funeral where did you go?
A. I went to No.2 where the garden is.

Q. I see. So you go down to the Bilila stream, do you, from No.1, and then you cross the stream and go up to No.2? A. Yes.

Q. You went to your garden. Which side of the stream is your garden? 10
A. It is on the side of the Bilila stream, just after crossing you go along it then to my garden.

Q. Yes, which side of the stream? No.1 or No.2? A. On the side of village No.2.

Q. So, just over the stream on the side of No.2?
A. Yes, the stream is in between us, No.1 one side and No.2 the other side.

Q. What did you do at your garden?
A. When I arrived at the garden I just made some fire in order to scare away the guinea fowls, and started off to go back because I arrived at the garden very late. 20

Q. You made the fire at your garden, and then did you go back up the hill to Kavala No.1? A. Yes.

Q. Now, when was it that you saw your brother Silino? When you were at the garden, before, or after?
A. No, after I had left the garden and I was on my way home. I had already crossed the stream and it was some distance away behind me. 30

Q. And you were climbing up to No.1?
A. Yes, to my house.

Q. Did you talk to your brother at all?
A. I talked to him.

Q. And he had a panga then, didn't he?
A. No, he had no panga at that time.

Q. What had he got?
A. He had a bag with him in which he was carrying maize.

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Q. I suggest to you that at that time your brother had a panga?
A. I didn't see him carrying a panga, I just saw the bag only.

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Evidence

No.16

Cross-examined Mehta:

Marko
Mathews

No cross-examination, Your Lordship.

Cross-
examination
by K.W.Wills
6th June 1962
continued

10

Re-examined Nicholson:

No questions.

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Nyasaland

NO. 17

EVIDENCE OF DOCTOR SAMUEL VALLA BHIMA

Prosecution
Evidence

P.W.13, DOCTOR SAMUEL VALLA BHIMA, Christian sworn,
states:-

No.17

Examined Nicholson:

Doctor Samuel
Valla Bhima
Examination
6th June 1962

Q. What is your full name, please?
A. Samuel Valla Bhima.

Q. And what are your qualifications?
A. My qualifications are L.M.S. (East Africa),
L.A.H. (Dublin), L.M. (Rotunda Hospital). 10

Q. And are you the Government Medical Officer
at Ncheu? A. That is correct.

Q. On the 15th December of last year did you
carry out a post-mortem examination on a male
African adult? A. I did.

Q. What time did you carry that out?
A. I carried out this post-mortem at 11.15 in the
morning.

Q. Was that body identified to you?
A. The body was identified to me by a man called 20
Marko Mathews as that of Silino Mathews.

Q. And how long did you think this body had
been dead?
A. I formed the opinion that death had occurred
some 2½ days before the examination.

Q. And what did you think was the cause of death?
A. I formed the opinion that death had been due to
haemorrhage and shock accelerated by brain injury.

Q. And what did you find on your examination,
doctor? 30
A. I found that the body had several wounds, most
of which were confined to the head. (The doctor
here produced a skull on which to demonstrate the
wounds).
The first wound which was 6 inches long was placed
across here in this region (indicates left side of
head just below the ear), cutting a big muscle, this
stretch of muscle that arises from this bone, and
also cutting through the muscles of the jaw. Here it
was deep to the bone itself and exposed to the jaw.

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Prosecution
Evidence

No.17

Doctor Samuel
Valla Bhima
Examination
6th June 1962
continued

10

The second wound was another big cut wound, 7 inches long. This was placed across this aspect of the skull at the top and it had cut through and exposed the bone. The third one was a wound in front of the ear, across this bone, cutting through this face bone here, right across the bridge of the nose. The bridge of the nose was cut through and was reduced to small pieces of bone. The fourth and fifth wounds were placed on the left fore-arm, one on the back of the hand and the other on the left aspect of the fore-arm, and the sixth wound was a small cut wound about an inch long, this was placed just on the lower aspect of the left fore-arm. Those were the wounds I discovered on the body. The injury on the skull itself, was on the left parietal bone and had produced a fracture 8 inches long. This fracture exposed the bone and had cut through the dura matter, that is the membrane that covers the brain tissue itself, and there was haemorrhage in the brain.

20

Q. How old do you think this man was, doctor?
A. I put his age at about forty years.

Q. Now the wounds 4, 5 and 6 are obviously the not so serious ones compared with the others. As far as the first three wounds are concerned, that you have described, which of those could have caused death?

30

A. They all could have caused death, but the first two, death would have been due to haemorrhage, and the third one, which involved the skull itself opening into the brain, would have caused death by brain injury.

Q. Would you look at this photograph, doctor. Photograph No.2. Is that a photograph of the third injury that you describe?

A. Yes, this is the wound I described.

Q. Would you look at photograph No.4 please? Which wound is that?

A. This one is the wound which I have described as being that over the left parietal region, involving the parietal bone.

Q. That was the second wound you described, was it? A. Yes, that was the second one.

Q. And photograph No,3, does that show one of the wounds on the left arm? A. Yes, it does.

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Doctor Samuel
Valla Bhima
Examination
6th June 1962
continued

Q. Could you look at photograph No.9? Does that one show a cut wound on the neck below the back of the head?

A. I can't see anything here, but it looks like a cut wound.

Q. Doctor, what sort of thing could cause these injuries?

A. A sharp-edged weapon would have caused these injuries.

Q. Can you say anything about the weight of the weapon? 10

A. I think it would have to be fairly heavy, and inflicted with quite a good deal of force.

Q. Doctor, on the 16th December did an African constable come to you with a panga and a pair of shorts?

A. I remember a constable coming to me with a panga, but I don't remember about the shorts.

Q. Did you in fact examine the panga? A. I did.

Q. And what did you find when you examined it? 20

A. It was $22\frac{1}{2}$ inches long from the end of the handle to the tip of the blade. The handle itself was 7 inches long and about 2 inches wide. It was made of wood and covered with hide, and it was stained with dried blood. The blade was $15\frac{1}{2}$ inches long and $1\frac{1}{2}$ " wide, but from about 6 inches it narrowed down to a sharp point. The first 4 inches of the blade was blunt and the rest was sharp. Most of the blade itself was stained with blood, and the whole panga weighed $1\frac{1}{4}$ pounds. 30

(The panga, marked "3", is shown to the witness).

A. This appears to conform to the description I have given.

Q. Was the constable with you while you examined it?

A. Yes, he was in the office all the time I did the examination.

Q. And did he take it away with him?

A. Yes, he did. 40

Q. Now, on the 19th December of last year were two people brought to you for examination?

A. That is so.

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Q. Who were they?

A. One was called Tadeyo Kwalira and the other one was Joseph Duncan.

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Evidence

No.17

Q. Could you recognise them again, do you think?
A. Yes, I recognise them.

Doctor Samuel
Valla Bhima
Examination
6th June 1962
continued

Q. Can you point them out to me?

10

A. Tadeyo is on my left in the dock opposite, and Joseph Duncan is on my right (indicating first and second accused).

Q. What did you find when you examined Tadeyo?

A. I found him to be mentally sound. He was a healthy-looking man. He had a small healing scalp wound on the left side of the head, about $\frac{1}{4}$ " diameter, and he also had a small healing wound on the back of the right hand.

20

Q. Doctor, how big exactly was this scalp wound on the left side, how serious?

A. It was not serious, it was a very superficial wound.

Q. How about the one on the back of the right hand?

A. That was equally small - a very small wound.

Q. Did they look recent? You said they were healing? A. They looked recent.

30

Q. Now, Joseph Duncan, what did you find when you examined him?

A. He was also mentally sound when I examined him, and he had a small healing wound on the upper aspect of the left upper arm. Otherwise he was in general good health.

Q. What sort of wound was that?

A. It was a very small wound. I could not describe it as to whether it was a cut wound or not. It was already healing and I could not decide whether it was a cut wound or not.

40

Q. How about Tadeyo's wounds? Could you decide what had caused those?

A. The one on the head appeared to have been an abrasion.

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Nyasaland

Prosecution
Evidence

No.17

Doctor Samuel
Valla Bhima
Examination
6th June 1962
continued

Q. Now, when you saw the body of Silino did you consider taking a sample of blood from that?

A. I did not make any note of that, but I have a feeling that I must have taken a blood specimen as a matter of routine.

Q. What I was wondering - was the body in a good enough condition to take it after about 2½ days?

A. At that stage of the body it is usually in a state of decomposition, where it is not very easy to secure blood for a test.

10

Q. Now on the 28th December did you see Tadeyo Kwalira and Joseph Duncan again?

A. I can't remember whether I saw them or not.

Q. Do you remember whether you ever took a sample of blood?

A. I do not now remember. I saw the two and I took specimens of blood.

Q. And in fact did you ask for their consent before you did that? A. I did, yes.

Q. And did you give specimens of their blood to the same constable who had brought the knife to you? A. That is right.

20

Cross-
examination
by K.W.Wills

Cross-examined Wills:

Q. Would you mind examining the first accused now and see if those injuries are still there?

(The first accused leaves the dock and is examined by the doctor)

A. the only thing I can see is a small scar on the left side of his head, and a small one on the back of his right hand.

30

Q. Now, the scar on the head, could it have been caused by a glancing blow from that panga? (Counsel indicates the panga marked "3").

A. Having looked at it now, from the appearance of the scar I would say it could easily have been caused by a glancing object.

Q. Such as that? A. Such as that.

Q. And could the wound on the hand have been caused by the end of that panga, the sharp end, the point?

A. I think so. That could easily have caused that type of wound.

Q. Now, if the wound on the head had been caused by a glancing blow from that panga, would it be likely to bleed? A. It would bleed, yes.

Q. Quite a lot?

10 A. It would depend, perhaps, whether the blow was superficial or not.

Q. We have evidence there was quite a lot of bleeding, that would not be inconsistent with your findings, would it?

A. I think a lot of bleeding would be inconsistent.

Q. So in your view it would bleed a certain amount? A. A certain amount, but not very much.

Q. The dead body that you saw, how tall was it?

20 A. I can't remember how tall he was, but I think he was of average height.

(The panga, marked "4", is shown to the witness).

Q. Presumably any of those wounds you described could quite easily have been caused by an instrument like this, could they? A. Yes.

Q. How about the wound to the first accused on the wrist, would it be more likely to be caused by a panga like this (marked "3") or one like that (marked "4"), assuming it was caused by the point?

30 A. I think this is sufficiently sharp to pierce the soft tissue (indicating panga marked "4"). I find it very difficult to form an opinion as to whether that one, or that one, would have caused the wound.

Q. You can't say whether that one (indicating panga marked "3") is more likely to have caused the wound?

A. This is more likely to produce a stab wound (indicating mark "3") than this one. This point is not very sharp, or as pointed as the other one. (The doctor indicates first the panga marked "4").

In the High
Court of
Nyasaland

Prosecution
Evidence

No.17

Doctor Samuel
Valla Bhima

Cross-
Examination
by K.W.Wills
6th June 1962
continued

In the High
Court of
Nyasaland

Prosecution
Evidence

No.17

Doctor Samuel
Valla Bhima

Cross-
examination
by K.W.Wills
6th June 1962
continued
Cross-
examination
by M.B.Mehta

Q. Doctor, is "O" group blood the most usual blood there is?

A. "O" group is the usual group for donors.

Q. Most people walking about have got "O" group?

A. I am not prepared to say what percentage it is, but it is the commonest blood group.

Cross-examined Mehta:

Q. Doctor, you have described these wounds. Could any of these wounds by itself cause the death of the deceased? 10

A. I have said before that the first three wounds would have caused death. The first two would have caused death by haemorrhage and the third one connected with the brain would have caused death as a result of brain injury.

Q. Well, supposing the wound inflicted on the deceased was the first wound described by you?

A. These were incised blood vessels and the chances are if he was left lying he would probably have bled to death. 20

Q. So for wound No.1 to cause death by itself there should have been a lot of bleeding?

A. That is correct.

Q. What about No.2.

A. No2 would have produced just as much haemorrhage.

Q. What about wound No.3?

A. Wound No.3 would have produced haemorrhage, but there you have the brain being injured and that would have accelerated death. 30

Q. Do you mean from that, wound No.3 would just have accelerated death, or would have been a cause of death by itself?

A. You are asking me about the third wound by itself? There would have been a lot of bleeding, and the brain was involved in it, and while bleeding alone would cause death, the brain injury accelerated the death.

Re-examined Nicholson:

No questions.

NO. 18

EVIDENCE OF CONSTABLE TOMBOLE

In the High
Court of
Nyasaland

Prosecution
Evidence

P.W.14. No.5313 CONSTABLE TOMBOLE, Nyasaland
Police, Christian sworn, states:

No.18

Examined Nicholson:

Constable
Tombole

Examination
6th June 1962

Q. What is your number, rank and full name,
please? A. No.5313, Constable Tombole.

Q. And are you stationed at the Police
Station Ncheu? A. Yes.

10

Q. On the 14th December of last year, in the
morning, did you go to Kavala Village? A. Yes.

Q. And were you in fact one of the police party
that went there? A. Yes.

Q. Where did you go when you arrived?
A. We went to Kavala Village No.1.

Q. And did you see somebody there?
A. We visited the scene where Silino Mathews met
his death.

20

Q. And were you with the Village Headman?
A. Yes.

Q. Did you there see a dead body?
A. Yes, we saw a dead body.

Q. Did you see anything else on the ground?
A. Yes, we saw something else.

Q. What was that?
A. I found a knife which was near a road and
from where the dead body was it was at a distance
of 99 feet.

Q. Would you have a look at photograph No.5?

30

(Photograph handed to witness). Is that a
photograph of the knife you found? A Yes, this is it.

Q. Did you notice anything about the knife?
A. Yes, I noticed something about the knife.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.18

Constable
Tombole
Examination
6th June 1962
continued

Q. What was that?

A. The handle of the knife was covered with hide, and secondly it had bloodstains.

(Panga marked "3" shown to witness)

Q. Is that the knife?

A. Yes, this is the knife.

Q. What did you do with that?

A. When we found the knife, Detective Constable Khumbeni made a mark on it as a means of identification.

10

Q. And what did you do with the knife?

A. I wrapped it in paper and brought it to Ncheu.

Q. And did you hand it to Sgt. Chimenya who is in charge of the exhibits store?

A. I did not hand it to him but I asked him to open the exhibit room and I placed it in there myself.

Q. On the 16th December did you take an article of clothing from somebody? A. Yes.

Q. Who was that? A. Tadeyo Kwalira.

20

Q. And what was it you took from him?

A. I took a pair of khaki shorts from him.

Q. And what did you do with those?

A. Having taken those, on the same day I asked Sgt. Chimenya to open the exhibits room and I took the knife together with the shorts to Doctor Bhima for examination.

Q. Would you have a look at this please?

(A pair of khaki shorts shown to witness)

Are these the shorts?

A. Yes, these are the shorts.

30

(The shorts are now put in and marked "5" for identification).

Q. And were you there whilst Dr. Bhima examined the knife? A. Yes, I was there.

Q. And did you then take the khaki shorts and the knife back to the police station? A. Yes.

Q. And did you then put them again inside the exhibit store? A. Yes.

In the High
Court of
Nyasaland

Q. And on the 28th December of last year did you go with two persons to Dr. Bhima? A. Yes.

Prosecution
Evidence

Q. Do you see them in Court?
A. Yes, I see them in Court.

No.18

Q. Will you point them out, please?
A. Tadeyo Kwalira, the first accused, and Joseph Duncan, the second accused.

Constable
Tombole
Examination
6th June 1962
continued

10 Q. Did Dr. Bhima take blood from them and give it to you in bottles? A. Yes.

Q. And on that same day, the 28th December, did you take from the exhibits room the panga knife and the short khaki trousers and the two bottles of blood to Blantyre? A. Yes, I did.

Q. And did you there hand them to Mr. Arthur at the Queen Elizabeth Hospital? A. Yes, I handed them to him.

Cross-examined Wills:

Cross-
examination
by K.W.Wills

20 Q. Would you look at this photograph, No,5, of the knife? You see where the point of the knife is? A. Yes, I see.

Q. Is that on the path?
A. Yes, that is on the path.

Q. You see where the handle is? A. Yes, I see it.

Q. Beyond the handle is that bush, or is that another part of the path?
A. That is the bush, consisting of short grass.

30 Q. Now, you said you found where the body was and the knife and they were 99 feet apart. Which was the higher up the hill, the knife or the body?
A. The body was high up and the knife was lower.

Cross-examined Mehta:

No questions.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.18

Constable
Tombole

Re-examination
6th June 1962

Re-examined Nicholson:

Q. Look at photograph No,5, when you say there was short grass, you see beyond that it is taller. Was the grass like this in the photograph or was it longer than that?

(Counsel indicates the two different grasses on the photograph).

A. The grass we saw there was shorter than that.

NO .19

EVIDENCE OF INSPECTOR THOMAS ALAN LOWES

In the High
Court of
Nyasaland

P.W.15. INSPECTOR THOMAS ALAN LOWES, Nyasaland
Police, Christian sworn, states:

Prosecution
Evidence

Examined Nicholson:

No.19

Q. What is your rank and full name please?

A. I am Thomas Alan Lowes, Nyasaland Police
stationed at Ncheu.

Inspector
Thomas Alan
Lowes
Examination
6th June 1962

10

Q. On Friday the 19th January did you go to
Blantyre to collect from Mr. Arthur certain
articles?

A. Yes, on Friday the 19th January, this year, I
went to the Queen Elizabeth Hospital, Blantyre.
Mr. Arthur, the Government Analyst at the Hospital
handed me a panga, labelled Exhibit 1, and a pair
of khaki shorts, labelled Exhibit 2.

Q. And were they also labelled with the number
of the police file concerning this case?

20

A. Yes, they were labelled with the registered
number of the police station.

(Panga, marked "3" shown to witness)

A. This is the panga, labelled 10.12.61, which is
the registered mark at the police station.

(Shorts, marked "5" shown to witness)

A. These are the shorts, My Lord, that I brought
from the Hospital, with the Crime No.10.12.61, on it.

Q. And did you bring this back and hand it on the
22nd January to Sgt. Chimenya? A. I did, My Lord.

30

Q. And he was in charge, in fact, of the exhibit room,
was he? A. He was at that time, My Lord.

Cross-examined Wills: No cross-examination.

Cross-examined Mehta: No cross-examination.

Court adjourns at 3.45 p.m.

The hearing is resumed at 8 a.m. on Thursday 7th June, 1962

All present as at previous hearing

In the High
Court of
Nyasaland

EVIDENCE OF SERGEANT MACLEAN CHIMENYA

Prosecution
Evidence

P.W.16. SERGEANT MACLEAN CHIMENYA, Nyasaland
Police No.2055, Christian sworn, states:

No.20

Examined Nicholson:

Sergeant
Maclean
Chimenya

Q. What is your full name and rank,
please?
A. No.2055. First/Sergeant Maclean Chimenya.

Examination
7th June 1962

Q. And are you stationed at the police station,
Ncheu? A. Yes, My Lord. 10

Q. On the 14th December last year did you attend
the post-mortem of a man called Silino Mathews?
A. Yes, My Lord.

Q. And on the 14th December did you receive a
panga from Constable Tombole? A. Yes, My Lord.

Q. Did you open the exhibit room for him to put
the panga inside? A. I did, Your Lordship.

Q. Would you recognise that panga again?
A. Yes, Your Lordship, if I saw it.

-(Panga marked "3" shown to witness) 20

A. Yes, this one.

Q. And on the 16th December did Constable Tombole
take out that panga from the store again?
A. Yes, Your Lordship.

Q. And did he come back later the same day with
that panga and a pair of short khaki trousers?
A. Yes, Your Lordship.

(Khaki shorts, marked "5", shown to witness)

A. Yes, it is it.

Q. Were these placed in the exhibit store? 30
A. Yes, My Lord.

Q. On 22nd December did you open the store and
did Detective-Sergeant Diamond take the panga out?
A. Yes, My Lord.

Q. And was that replaced on the same day?
A. Yes, My Lord.

Q. On the 28th December of last year did Constable Tombole take out of that exhibit store the panga and the pair of khaki shorts?
A. Yes, My Lord.

Q. And on the 22nd January did you receive back that pair of shorts and the panga from Inspector Lowes? A. Yes, Your Lordship.

10 Q. And those were put in the exhibit store, were they? A. Yes, Your Lordship.

Q. On the 31st January of this year did you hand over the keys of the exhibit store to Sub-Inspector Makowa? A. Yes, Your Lordship.

Q. And the exhibits were in the store at that time, were they? A. Yes.

Cross-examined Wills: No cross-examination.

Cross-examined Mehta: No cross-examination.

In the High
Court of
Nyasaland

—————
Prosecution
Evidence

—————
No.20

Sergeant
Maclean
Chimenya
Examination
7th June 1962
continued

In the High
Court of
Nyasaland

NO. 21

EVIDENCE OF DOCTOR SAMUEL VALLA BHIMA
(RECALLED)

Prosecution
Evidence

NICHOLSON:

No.21
Doctor Samuel
Valla Bhima
(Recalled)
Examination
7th June 1962

There was one point I should have put to Dr. Bhima, My Lord. I wonder if I might have leave to recall him. The point is whether after the infliction of the three main wounds, whether the deceased would have been able to walk or run after the infliction of any one of those wounds, or all of them.

10

COURT:

Surely that is a question which should have occurred to you in chief?

NICHOLSON:

I see it should have been done.

COURT:

There was a long blood-trail. Very well, unless the defence is going to object, it would assist the Court and the Assessors.

20

WILLS:

Your Lordship, I am bound to object, of course.

MEHTA:

I do object also.

COURT:

My view is, of course, the question should have been put in examination-in-chief. Naturally the defence are formally objecting. However, in the course of justice I think the witness should be recalled.

30

P.W.13. DR. SAMUEL VALLA BHIMA (Recalled)

(Witness is warned he is still on oath)

Examined Nicholson:

In the High Court of Nyasaland

Prosecution Evidence

No.21

Doctor Samuel Valla Bhima (Recalled)

Examination 7th June 1962

10

Q. Dr. Bhima, yesterday you told us about the wounds you saw on the body of the man, Silino, and you described to us in particular what I shall call the first three wounds which were the serious wounds. Now, what I want to know is, after the infliction of any one of those wounds would the deceased have been able to walk or run?

A. My Lord, I think with the wound that was across here (indicates the jaw), the one that cut this muscle and the muscle of the jaw, he would have been able to walk. But with either of the other two, the wound over the left side of his head or the other one across the face which cut through the bridge of the nose, he would not.

Q. In fact, doctor, he would fall at the place where he was struck?

A. I think he would have fallen in the spot where he was struck.

20

Q. You did tell us, as well, that there was very extensive damage to the skull? A. I did.

Q. Just one more thing - the wound where he would have been able to walk, for how far would he have been able to walk?

A. I don't think I would be able to say.

Cross-examined Wills:

Cross-examination by K.W.Wills

30

Q. Why do you say he would not be able to walk after the other two wounds?

A. First of all, the wound on the parietal region on the left-hand side of the head, he would have been stunned, that would have produced immediate concussion leading to unconsciousness immediately; and the one across the face, the extent was such that it would have produced immediate -- not -- concussion.. but the force alone would have produced immediate shock which would have rendered him unable to move.

Q. Doctor, it very often happens when a man is concussed he continues to walk - plays a whole game of football while being concussed.

A. Yes, that is correct, concussion alone without serious brain damage, a person could walk, but in this case there was brain damage.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.21

Doctor Samuel
Valla Bhima
(Recalled)

Cross-
examination
by K.W.Wills
7th June 1962
continued

Q. Yes, but it has been known that boxers have continued fighting three or four rounds after having suffered very severe brain damage, isn't that so?

A. That is correct, but I think that a serious large open wound on the skull is not quite the same as brain damage without an open skull wound. In the case you mention there is internal brain injury, this is a fracture of the skull.

Q. I am talking about this left parietal injury, that is the one you are talking about?

10

A. Yes, that is the one I am talking about.

Q. It isn't in fact impossible for a man to have walked afterwards - I am talking about that wound?

A. I don't think one would say impossible.

Q. I think you would agree there are Africans out here that do physical things Europeans would never do? A. Yes, I agree.

Q. The third blow across the nose, that smashed the bridge of the nose, I don't understand why he could not have walked after that?

20

A. It was a very deep wound. My impression is that the immediate effect would be that the man would be almost blinded with the severity and force of the injury itself, and that he would probably not immediately be able to walk.

Q. No, not immediately, obviously, but might he not recover a little bit and walk?

A. He might probably recover and walk for probably only a short distance, the wounds would continue bleeding and he would become weakened and not be able to carry out any more moves.

30

Q. There would be a lot of blood which would leave a blood-trail, wouldn't it?

A. Yes, there would be a lot of blood.

Cross-examined Mehta:

No cross-examination.

Re-examination Re-examined Nicholson:

Q. Doctor, look at No.2 photograph, please.

COURT: Mr. Nicholson, what are you going to ask now? You were given leave to ask a certain restricted number of questions on points.....

In the High Court of Nyasaland

NICHOLSON: My Lord, I was going to ask, looking at that photograph of the wound across the bridge of the nose.....

Prosecution Evidence

No.21

10 WILLS: Your Lordship, he was only given leave to ask certain questions. I don't think this leads us any further. The doctor has already seen these wounds, he is merely emphasising to the Assessors what has already been said.

Doctor Samuel Valla Bhima (Recalled)

Re-examination 7th June 1962

COURT: What are you going to ask, Mr. Nicholson?

continued

NICHOLSON: My Lord, perhaps I don't need to bother about the photograph.

Q. The wound across the back of the head and the wound across the bridge of the nose, how likely is it that anybody could move after having those inflicted on him?

20 A. It is very difficult to be dogmatic on the wounds on the face. In this particular wound the brain tissue is not directly involved, so that, as I have indicated, the person might be able to move but later would become weak as a result of loss of blood.

Q. How far could he move?

A. That I am unable to say.

In the High
Court of
Nyasaland

NO. 22

EVIDENCE OF CONSTABLE MATSON PHIRI

Prosecution
Evidence

P.W.17. No.4999, CONSTABLE MATSON PHIRI, Nyasaland
Police, Christian sworn, states:

No.22

Examined Nicholson:

Constable
Matson Phiri
Examination
7th June 1962

Q. What is your number, rank and full name,
please? A. No.4999, Constable Matson Phiri.

Q. Are you stationed at Ncheu Police Station?
A. Yes.

Q. On the 16th March of this year did you go out
to Kavala Village. A. Yes, I went there. 10

Q. And did you see somebody there? A. Yes.

Q. Who was that? A. I met Odilia Sandalamu.

Q. Before that, did you meet a man?
A. Before that I had met Marko Mathews.

Q. And did he give you something?
A. He gave me a knife.

Q. What sort of knife was that?
A. A big panga knife with a sharp point.

(The panga, marked "4", is shown to the
witness). 20

Q. Is that the one? A. Yes.

Q. And did you see somebody else after that?
A. Yes, I met somebody else after that.

Q. Who was that? A. Odilia Sandalamu.

Q. And where did you see her?
A. I saw her at Chabonga Village.

Q. Whereabouts? A. Near Kavala Village.

Q. Whereabouts in the village?
A. I saw her at her house. 30

Q. Did you take something away from there?
A. Yes, a knife.

Q. What sort was that?
 A. A big knife which had a wide blade.

Q. What sort of knife, an ordinary knife, or a panga? A. Panga.

(A panga is shown to the witness)

Q. Is that the one? A. This is the one.

(The panga is now put in and marked "6" for identification).

In the High
 Court of
 Nyasaland

Prosecution
 Evidence

No.22

Constable
 Matson Phiri
 Examination
 7th June 1962
 continued

10 Q. And what did you do with those two pangas?
 A. I brought them to Ncheu Police Station.

Q. And did you hand them to First Sergeant Mbetwa?

A. I asked Sergeant Mbetwa to open the exhibit store for me in order to put these exhibits in, whilst waiting to take them to the hospital.

Q. Did you put them inside the exhibit store?
 A. Yes.

Q. Was that on the 17th March this year?
 A. On the 17th March this year.

20 Q. And on the 19th March did you take those knives and another knife to Blantyre Hospital?
 A. On the 19th I took them to Blantyre Hospital.

Q. What was the other knife you took?
 A. That was one with a sharp point.

Q. What sort of handle? A. It was a panga knife.

Q. Would you recognise that again?
 A. I would recognise that.

30 Q. Look at this please (A panga is handed to the witness).
 A. This is the one.

(The panga is now put in and marked "7" for identification).

Q. And did you there hand them to Dr. Pilbeam?
 A. I did.

Q. And did you collect them the same day and bring them to Ncheu? A. Yes.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.22

Constable
Matson Phiri
Examination
7th June 1962
continued

Q. And on the 20th March did you hand those
three pangas to First Sergeant Mbetwa again?

A. Yes.

Cross-examined Wills:

No cross-examination.

Cross-examined Mehta:

No cross-examination.

COURT:

He took two knives away from the village?

NICHOLSON:

10

My Lord, yes, one from the man Marko.

COURT:

That is marked "4". We have had evidence
about mark "4"; he got mark "6" from Odilia, and
mark "7" from the exhibit store. How did it get
into the exhibit store?

NICHOLSON:

My Lord, I will be calling evidence on that.

NO. 23

EVIDENCE OF FIRST SERGEANT MBETWA

In the High
Court of
Nyasaland

P.W.18. No.2378. FIRST SERGEANT MBETWA, Nyasaland
Police, Christian sworn, states:

Prosecution
Evidence

Examined Nicholson:

No.23

Q. What is your number, rank and full name,
please? A. No.2378, First Sergeant Mbetwa.

First Sergeant
Mbetwa

Q. Are you stationed at the Police Station at
Ncheu? A. Yes, My Lord.

Examination
7th June 1962

10 Q. On the 13th March of this year did you take
over the exhibits store from Sub/Inspector Makowa?
A. I did, My Lord.

Q. And on the 17th March did Constable Phiri
come to you with two pangas to put into the
exhibit store? A. Yes, My Lord.

(The witness is shown pangas marked "4" and "6")

Q. Are those the two? A. Yes, My Lord.

20 Q. And on the 19th March did you open the
store again and did Constable Phiri take these
out? A. I did, sir.

Q. And did he at the same time take out another
panga from the exhibit store? A. He did, sir.

(Panga marked "7" shown to witness)

A. This is the one.

Q. And on the 20th March did he return with
those and put them back in the exhibit store?
A. Yes, sir.

30 Q. On the 26th March this year did you hand over
the exhibits and the keys of the exhibit store to
Sub-Inspector Makowa? A. Yes.

Cross-examined Wills: No cross-examination.

Cross-examined Mehta: No cross-examination.

In the High
Court of
Nyasaland

NO. 24

EVIDENCE OF SUB-INSPECTOR GODFREY MAKOWA

Prosecution
Evidence

P.W.19. SUB-INSPECTOR GODFREY MAKOWA, Nyasaland
Police, Christian sworn: states:-

No.24

Examined Nicholson:

Sub-Inspector
Godfrey Makowa

Q. What is your rank and full name, please?
A. My rank is Sub-Inspector, Godfrey Makowa.

Examination
7th June 1962

Q. And are you stationed at the Police
Station at Ncheu? A. Yes, My Lord.

Q. On the 14th December of last year did you go
to Kavala Village? A. Yes, My Lord. 10

Q. And were you with Detective-Sergeant Diamond,
Detective-Constable Khumbeni and Constable Tombole?
A. Yes, My Lord.

Q. At what time did you arrive there?
A. At about 3.45 p.m.

Q. Who did you see when you got there?
A. I saw Village Headman Kavala.

Q. And did you go somewhere with him?
A. Village Headman Kavala took me to the scene
of the crime. 20

Q. What did you find when you arrived?
A. I found a dead body.

Q. Did the Village Headman identify that body
to you?
A. The Village Headman identified the body to me
as the body of Silino.

Q. And did you notice anything about the body?
A. I noticed that the body had a cut wound on
the head and on the neck. Those are the two
wounds which were visible to me. 30

Q. And was there much blood? Did you see much
blood? A. There was not much blood?

Q. Did you see any bloodstains away from the
body, on the path?
A. I did not see any bloodstains on the path.

Q. Where exactly was this body?

A. The body was lying along the footpath on the left side.

In the High
Court of
Nyasaland

Q. Where did that footpath lead to?

A. The footpath leads to Bilila stream coming from Kavala No.2 village.

Prosecution
Evidence

No.24

Q. And the head of the body, was that pointing in the direction of Kavala No.2 or Kavala No.1?

A. The head of the deceased was pointing to Kavala No.2.

Sub-Inspector
Godfrey Makowa

Examination
7th June 1962
continued

10

Q. How far from Bilila stream was the body?

A. It was about a quarter of a mile from Bilila stream to the body.

Q. Did the Village Headman also show you something else on the path?

A. Village Headman Kavala indicated to me a panga knife which was on the same path, about 99 feet from the body.

20

Q. How did you arrive at a distance of 99 feet? A. I measured with a tape measure.

(The panga marked "3" is shown to the witness)

Q. Is that the panga that was at the side of the path?

A. This is the very same panga which was on the path.

Q. Which side of the path was that?

A. It was the same patch leading from Kavala No.2 village down to Bilila stream, below the body down the slope.

30

Q. Which side of the path was it on as you went towards Kavala No.2 village, the left-hand or the right-hand side?

A. coming from Bilila stream, the panga knife was on the right of the path.

Q. And did you also go with the Village Headman to a house in the near vicinity? A. Yes, My Lord.

Q. And did he tell you whose house, grain store and kitchen that was?

40

A. Village Headman Kavala told me that the house, kitchen and grain store were the property of Silino.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.24

Sub-Inspector
Godfrey Makowa

Examination
7th June 1962
continued

Q. Did you measure the distance from the house to where the body was found? A. I measured.

Q. How far was that? A. It was 249 feet.

Q. Was that in a direct line along the path?
A. I did not go along the path but it was from the house direct to the body.

Q. And did you go anywhere else with the Village Headman?

A. Village Headman Kavala and Marko Mathews took me to Bilila stream.

10

Q. And what did you look for there?

A. I was looking for bloodstains, and whether I would get any other weapon.

Q. Was the body of Silino taken to Ncheu Hospital? A. The body was removed to Ncheu Hospital.

COURT: Did you find any bloodstains?

A. I did not find any bloodstains down at Bilila stream, My Lord.

COURT: There was no trail of bloodstains anywhere? A. No.

20

Q. Whilst you were there did you prepare a plan of the area?

A. Whilst I was there at the scene I prepared a plan.

Q. Do you have the original of that plan with you? A. I have the original with me, My Lord.

Q. Do you now produce that?

A. I now produce it, My Lord.

(The plan is now put in and marked
"EXHIBIT P.8")

30

Q. Now, at the left-hand side of the plan I believe you have marked "Bilila stream"?

A. Yes, My Lord.

Q. And how does one cross that stream to get from the two villages?

A. From Kavala No.2 a person has to descend down and then go to Bilila stream, go up again, going to Kavala No.1.

Q. Now, you see at the stream (indicating on the map), is that a bridge going across there?
 A. It is a tree which was cut down and then laid across the stream.

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Q. Just after you get across the stream from Kavala No.1, on the left-hand side, you have marked something there as "H", what are those?
 A. Those are the gum trees.

10 Q. Now are those clustered thickly there, or are they spaced out?
 A. They are spaced out. They are not very thick.

Q. You have marked "B" on the plan, what does "B" stand for? A. "B" is the panga knife.

Q. And "A"?
 A. "A" is the deceased, Silino Mathews.

Q. What is "G" on that plan?
 A. "G" is a very small Kachere tree.

20 Q. I see you have marked on the plan the distance between the body and the panga, and the direct distance between the body and "D". What is "D"?
 A. "D" is the house of the deceased, Silino.

Q. Did you also measure the distance from the body to the house via the path?
 A. I also measure from the house to the Kachere small tree.

Q. And how far was that? A. 127 feet.

30 Q. And did you measure from the Kachere tree to the body?
 A. I also measured from the Kachere tree to the body and it was 172 feet.

Q. Yes, now what do "E" and "F" stand for on the plan?
 A. "E" is the grain store of the deceased, Silino. "F" is the kitchen of the deceased, Silino.

Q. Did you measure from the kitchen of Silino to Kavala Village No.2?
 A. I measured. It was 250 yards.

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Q. How far altogether would you say is the distance between Kavala Village No.1 and Kavala Village No.2?

A. I should think it is a mile and some yards.

COURT: You have written the word "Bush" on either side of the path. That could mean many things.

A. There are no trees, only small grass.

COURT: Could you give us an idea how high the grass is. Just indicate. A few inches, or more?

A. We have not got the type of grass here. This side is a hilly place where we have small grass. Some of the grass is that high (witness indicates).

10

COURT: Six, nine and twelve inches high?

A. Yes, My Lord.

Q. On the 16th December did you go out again to Kavala Village?

A. On the 16th December I went again to Kavala Village, My Lord.

Q. Do you know where Chibonga Village is?

A. Yes, My Lord.

20

Q. How far from that is Kavala Village?

A. From Kavala Village No.2 to Chibonga Village it is about half a mile.

Q. Did you go to Chibonga Village?

A. I went to Chibonga Village.

Q. Did you see somebody there?

A. I saw Joseph Duncan.

Q. Do you see him in Court? A. Yes.

Q. Could you point him out, please)

30

(Witness indicates the second accused)

Q. What happened when you saw him?

A. When I saw Joseph Duncan I was making enquiries into the alleged offence of murder, and as a result of the information I had I arrested Joseph Duncan and cautioned him with the offence of murder.

Q. And what caution did you give him?
A. I made a short caution.

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Q. What did you say?
A. I said in Chinyanja that "I am arresting
you".

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Q. Can you say it in Chinyanja and let the
interpreter interpret it?

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10 A. I told Joseph Duncan that I was arresting him
with the offence of the murder of Silino. I told
him: "You are not obliged to say anything. What-
ever you may say may be given in evidence", and
he made a reply, voluntarily.

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continued

Q. And did you write that down?
A. Yes, I wrote that in my police notebook.

Q. And after you had written it down, what
did you do?

20 A. I read the statement over to him in Chiny-
anja and he agreed that it was correct and
thumbprinted it, and it was witnessed by
Detective Constable Kaunda.

Q. Do you have that notebook with you now,
please? A. I have got it, My Lord.

NICHOLSON: My Lord, I....

COURT: He could refresh his memory from the book.

Q. Refreshing your memory from that, what reply
did he make?

30 A. The accused said in reply: "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 Chabonga.
That is up to them at Kavala here".

Q. And on the 17th December did you formally
charge and caution him with the offence of the
murder of Silino? A. I did so, My Lord.

Q. And did he make a reply?
A. The accused made a voluntary statement which
I wrote down on a piece of paper.

Q. And after you charged him, did you caution
him? A. I cautioned him, My Lord.

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Q. And after you had written it down, did you read it back to him? A. I did so, My Lord.

Q. And what did he do?

A. He agreed that the statement was correct, by thumbprinting.

Q. And was Detective Sergeant Diamond present whilst that was going on?

A. Detective Sergeant Diamond witnessed that, My Lord.

(A document is handed to the witness)

10

Q. Would you look at this please? Is that the statement? A. This is the statement.

(The statement is now put in and marked "EXHIBIT P.9").

NICHOLSON: Does your Lordship wish the whole statement to be read, or merely the reply?

COURT: Only the accused's reply.

(The reply is now read out).

Q. On the 18th December last year, did you see somebody else in the morning?

A. On the 18th December I saw Tadeyo Kwalira.

20

Q. Do you see him in Court now? A. Yes, My Lord.

Q. Would you point him out please?

(Witness indicates the first accused).

Q. Where did you see him?

A. He came to the Police-station, Ncheu.

Q. And did he in fact come of his own accord?

A. He came alone, My Lord.

Q. And when you saw him, what did you do?

A. When I saw him I arrested him and cautioned him for the offence of the murder of Silino.

30

Q. And what did he say?

A. The accused said that he had nothing to say.

Q. Now, later on that same day did you formally charge and caution him with the murder of Silino? A. Yes, My Lord.

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Q. And did he make a reply?
A. He made a voluntary statement, My Lord.

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Q. And did you write that down? A. I did so.

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Q. And after you had written it down, did you read it back to him?

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A. I read back the statement to him, My Lord.

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continued

10 Q. What did he do after you had read it back?
A. He signed it as being correct.

Q. And did you and Detective Sergeant Diamond sign as recorder and witness, respectively? A.Yes.

(A document is handed to the witness)

Q. Is that the document we have been speaking about? A. This is the statement I wrote, sir.

(The statement is now put in and marked "EXHIBIT P.10")

Q. Would you read out the reply in Chinyanja, please, for the Court Interpreter to interpret it?

20 (The reply is now read out).

COURT: I must tell the Assessors that where these two men accuse each other in their statements, it is not evidence against either accused. When Tadeyo says in his statement to the Inspector "I deny that I killed Silino, it was Joseph who killed him", that is not evidence against Joseph. The Court will use Tadeyo's statement in assessing evidence against him. The reason is, it is too easy to transfer the blame when you have got two
30 accused persons.

Q. Now, did you later see Tadeyo again?
A. Yes, sir.

Q. What was the purpose of that?
A. The purpose for seeing Tadeyo for the second time was to furnish him with a copy of the statement.

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Q. Of the statement? Was that the one made by Joseph? A. The one made by Joseph.

Q. What happened on that occasion.

A. He made a statement which I wrote on a piece of paper, read it back to him and he signed it as being correct.

Q. Would you have a look at this, please?

(A document is handed to the witness)

A. This is the very same statement, sir,

Q. Now, could you tell us, what did you say to Tadeyo when you gave him the statement that Joseph had made? 10

A. I said it in Chinyanja: "You, Tadeyo Kwalira, I have got a charge statement which Joseph Duncan has made, which you can read if you wish to do so. That statement had been written down in Chinyanja. If you wish to make another statement in reply, I must inform you that I am not compelling you to say any words, but whatever you may say may be produced in evidence." Reply: 20

WILLS: Before that comes in, did the accused read it? A. He read it.

(The reply is now read out)

(The statement is now put in and marked
"EXHIBIT P.11")

COURT: Warn the Assessors again that what Tadeyo says is not evidence against Joseph. His explanation of how he got his injuries will be evidence against him. Do you see the difference?

ASSESSORS: We see the difference. 30

WILLS: May I look at that statement? I am not very happy about the interpretation. There is a full-stop there. Translate that last sentence.

COURT: Are you asking the witness if there is a full-stop?

Witness: There is a full-stop, sir.

COURT: After the word "Silino"? Would you read it again after the full-stop.

A. "When trying to stop them he injured me".

Q. Did you say, the first time, "as well"?

INTERPRETER: Yes, at first he said, "he injured me as well", but he has not read that out now.

Q. But it is there, isn't it?

INTERPRETER: It is there, but he hasn't read it out.

10 COURT: Read it again.

A. "When trying to stop them he injured me as well".

WILLS: Your Lordship, the only question is, which Chinyanja word means "as well"?

INTERPRETER: "Nso", the one word from the last.

WILLS: "Kanso ini", "Ini" is "me" is it?

INTERPRETER: Yes.

Examination continued:

20 Q. Did you after that, or at some stage, see Joseph Duncan? A. After that I saw Joseph Duncan.

Q. And what was the purpose of that?

A. The purpose for seeing Joseph Duncan was to furnish him a statement which was made by Tadeyo Kwalira.

COURT: Which statement?

A. The cautioned statement, the first cautioned statement.

Q. And did he make a reply? A. He made a reply.

30 MEHTA: Your Lordship, before he comes to that, I would like to know whether the second accused read the statement, or was informed about it, or what?

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continued

Examination continued:

Q. Did you tell him you had a statement from Tadeyo? A. I told him.

Q. What did you say to Joseph Duncan when you saw him?

A. I told Joseph Duncan that I had a cautioned statement made by Tadeyo Kwalira, and that if he wanted to say something in connection with that statement he was not obliged to say so, but whatever he would say would be written down and may be given in evidence. 10

Q. Did you tell him that he could read the statement himself if he wished to?

A. I told him so, but the accused said he was unable to read.

Q. So what did you do after that?

A. I asked him whether I could read the statement to him, he said "yes", and therefore I read the statement to him.

NICHOLSON: My Lord, I hope there is an East African authority which says that is perfectly proper. 20

COURT: What is your authority?

NICHOLSON: My Lord, it is only in the Digest. A fairly clear note of it on page 46, Odurani Omiyot & Another v. The Queen, and that is (1955), 22 E.A.C.A. 519.

COURT: I must say, with all due respect, one must be very careful what the note says. One really has to know the case itself. What does the Digest say? 30

NICHOLSON: Rule 8 of the Judges Rules provided ...(reads Rule 8).

COURT: You hand them a copy of the statement, furnish them with a copy of the statement. It has been said in these circumstances it would be proper to read the statement, but nothing should be said or done by the police to invite a reply. Could you say that is what happened here?

NICHOLSON: With respect, My Lord, I think the Sub-Inspector acted perfectly properly and put the position very clearly before the accused as to what his position was about making a reply.

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10 COURT: He went on, I think, and cautioned him, which in England would not have happened. He would be simply furnished by a prison officer with a copy of the statement. He went on to caution him again, and as a result a reply came out. The Court, of course, has a discretion, even though some slight breach of the Rules took place the Court would still have a discretion. If he wants it read, the proper course is to read it and say no more. To caution a person is, in a sense, inviting a reply; going a step further beyond the Rule. His purpose in going was to see what the other man would say when he read the statement. That is why the Rule came into being, to protect the accused person.

20 NICHOLSON: My Lord, in fairness to the accused, he should be given a chance to see what the other person is saying.

COURT: Yes, but nothing at all should be done by the investigating officer to invite a reply. If he is about to reply then, of course, he should be cautioned.

Examination continued:

Q. And after you had read it to him what did he do?

30 A. He made a short statement which I wrote down, read over to him and he thumbprinted it as being correct, Sergeant Diamond witnessed it, and I signed as recording officer.

NICHOLSON: My Lord, I tender that in evidence.

(The statement is now put in and marked
"EXHIBIT P.12")

Q. Can you tell us what his reply was?

A. "I have no words".

Q. Now on the 21st December last year did you go to Kavala Village again? A. Yes, My Lord.

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Q. And who did you see when you got there?
A. I saw Odilia Duncan.

Q. And where did you see her?
A. At her home at Chibonga Village.

Q. Was that the place where you had gone to
arrest Joseph? A. That was the place.

Q. And did you take something from that place?
A. I took a panga knife from that place, My Lord.
Odilia Duncan produced it to me.

MEHTA: Can it be described, Your Lordship?

10

COURT: If it is possible to trace an exhibit,
these descriptions are not important, are they?
However, he may describe it.

Q. Can you describe that panga?
A. It is a small panga knife with a wooden handle,
and part of the handle is broken.

(The panga, marked "7", is shown to the
witness)

Q. Is that the one? A. This is the one.

Q. And what did you do with that?
A. I took the panga knife into my possession, and
came with it to the Police, Ncheu and it was kept
in the exhibit store by First Sergeant Chimenya.

20

Q. Now, when you went to the scene on the 14th,
you were with the Village Headman going to these
various places, and I believe you said Marko
Mathews was with you as well? A. Yes, sir.

Q. And he was going around to the various places
with you, was he? A. Yes, sir.

WILLS: I don't know what this is leading up to,
and I prefer Counsel not to lead.

30

Q. From the stream, and so on, where did you go
from there? From looking at the body and the
panga and the stream, then where did you go?
A. Well, from the stream, having looked at the
body and the panga knife, I went to the house of
Silino with Marko Mathews and Village Headman
Kavala.

Q. And what happened when you arrived at the house?

A. Marko Mathews entered the house and produced a panga knife underneath the bed.

Q. Did you go into the house as well?

A. I was with him in the house.

COURT: You are quite sure he got the panga in the house?

A. I am quite sure, My Lord.

10 Q. Did he have a panga before he went into the house?

A. No, he did not have any panga before he went into the house.

Q. What did you do with that panga?

A. I did not take possession of that panga. I told Marko Mathews to keep the panga knife.

Q. Would you recognise that again?

A. I could recognise it if I saw it again.

Q. Can you give a description of it?

20 A. It is a little longer than the first panga knife which I have been shown in this Court, and has a wooden handle covered with a leather skin.

WILLS: If this is going to be produced, may Exhibits 3 and 4 be produced to the witness at the same time, and may the witness not look at the labels.

Q. Which is the one that Marko produced?

(Pangas marked "3" and "4" are handed to the witness)

30 A. The one I am holding in my right hand. (Witness identifies the panga marked "4").

Q. Now on the 31st January of this year did you take over the exhibits store from First Sergeant Chimenya? A. I did, sir.

Q. And on the 13th March did you hand over the exhibits in the exhibit store to First Sergeant Mbetwa? A. I did, sir.

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Q. And on the 26th March did you take over the exhibits store again? A. Yes, I did.

Q. And have these exhibits there been in your custody since then?

A. All exhibits have been into my custody from the time I took over from First Sergeant Mbetwa.

Q. And did you bring them to Court? A. I did so.

Q. And do you now produce all of these exhibits?

A. Yes, I now produce all the exhibits, My Lord.

Q. When you took over the exhibits store was there a pair of khaki shorts? 10

A. There was a pair of khaki shorts.

(The shorts, marked "5", are shown to the witness).

A. This is the very same pair of shorts.

COURT: You don't know where those shorts came from? A. Tombole took them off the first accused, Tadeyo.

Q. Who was wearing those shorts, do you know?

A. Tadeyo Kwalira was wearing the shorts. 20

COURT: When they were taken away he was wearing them and was asked to remove them?

A. They were taken away from him by Constable Tombole, when he was wearing them.

(The first panga, marked "3", the second panga, marked "4", the shorts, marked "5", the third panga, marked "6", and the fourth panga, marked "7", are now put in and marked respectively, as follows:

Panga, "EXHIBIT P.3"; Panga, "EXHIBIT P.4";
Shorts, "EXHIBIT P.5"; Panga, "EXHIBIT P.6"
and Panga, "EXHIBIT P.7". 30

NICHOLSON: We have got Tadeyo surrendering shorts to Dr. Bhima two days before he surrendered himself.

Q. Inspector Makowa, when these shorts were taken from Tadeyo were you present?

A. I was present when Tombole was taking off a pair of shorts from Tadeyo.

Q. What date was that?

A. That was on the 18th December, 1961.

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Q. Was that the same day in fact that Tadeyo had come in to the Police-station?

A. That was the very same day when Tadeyo surrendered himself?

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Q. Yes, when you arrested Joseph Duncan what was he wearing?

A. Joseph Duncan was wearing a ragged shirt.

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10 Q. And did you look closely at those clothes.

A. I did.

Examination
7th June 1962
continued

Q. And were you able to see anything?

A. I did not see anything, My Lord.

Cross-
examination
by K.W.Wills

Cross-examined Wills:

Q. How many yards do you reckon it was from the dead body to the Bilila stream?

A. I have already said that it was about a quarter of a mile.

20 Q. I didn't ask you that, I asked you how many yards?

A. I do not know how many yards it is from Bilila to the dead body.

Q. So you haven't any idea how many paces a quarter of a mile is?

A. I had just an approximate idea that it was a quarter of a mile from the dead body to Bilila stream.

Q. You heard it, did you estimate it yourself?

A. I did.

30 Q. How many paces do you reckon it was?

A. I should think 440 paces.

Q. When you estimated, you just said "I thought it was a quarter of a mile", at the time you didn't consider the number of paces, you just considered in relation to a mile?

A. Yes.

Q. And did you measure it at all?

A. I did not measure.

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continued

COURT: On this subject, Inspector, look at your plan. It is not drawn to scale, is it? Your plan can be a little misleading. From "A" to "B" is 99 feet. The body is at "A", is that right?

A. The body is "A".

COURT: If it is going to be a quarter of a mile to the stream, that is roughly ten times the distance between "A" and "B". Your plan can be misleading there, it shows the stream much closer.

A. My Lord, the plan was not drawn to scale, that is why the body seemed to be nearer the stream.

10

COURT: So in actual fact the stream was very much further away from "B" than it shows on the plan? A. Yes, My Lord.

Q. You say that now, and you say the plan was not drawn to scale, but you have in fact attempted to draw it to scale, haven't you?

A. There is no attempt showing that the map was drawn to scale. I only measured the distance from "A" and "B", from "A" to the house, to the Kachere tree and from the Kachere tree to the house, but I only estimated that from "A" just to the Bilila stream is about a quarter of a mile.

20

Q. Nevertheless you had the right paces shown on the plan from "A" to "B".

COURT: 249 feet is roughly three times 99 feet.

Q. So there has been an attempt to draw to scale.

NICHOLSON: With respect, the 127 feet is longer than the 172 feet, shown.

30

NICHOLSON: He said he measured from the tree to "A" and from the tree to "D".

WILLS: It depends where you put the tree exactly.
A. There was no attempt made to draw this plan to scale.

Q. It is just coincidence that you have more or less drawn the top part to scale?

A. I don't agree on that point.

Q. The plan speaks for itself. Will you answer my question, please? A. (No reply).

(Counsel asks for Exhibit 11).

Q. Now when you obtained the last statement from Tadeyo you said you wrote it down, is that right? A. I wrote it down, sir.

Q. In your hand-writing?
A. It was by a typewriter.

10 Q. Now, whereabouts was this statement taken?
A. It was taken in the office.

Q. And as he said those words, were you typing them? A. I was typing when he said the statement.

Q. Did you listen to the words... and then type, or were you typing the whole time as he said them?
A. I listened to the statement and then typed it, and he continued....(interruption by Mr. Wills).

Q. Did you see Tadeyo when he surrendered himself? A. I saw him.

20 Q. By that I mean, did you see him walk into the Police-station?
A. When I came into the Police-station I found Tadeyo standing behind the counter.

Q. That was on the Monday morning, was it?
A. That was on the 18th.

Q. Was it on a Monday.
A. I don't really remember whether the 18th was a Monday, but it was the 18th.

30 Q. You only know it was the 18th because you wrote it down. I suggest to you that Tadeyo surrendered himself to the Police round about two o'clock on Sunday the 17th. Can you confirm that, or not, that it was Sunday?

NICHOLSON: Is that 2 a.m. or p.m.?

Q. Round about two o'clock in the afternoon.
A. I don't confirm it, sir.

Q. Were you in the Police-station at that time?
A. I was not in the Police-station at that time.

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Cross-
examination
by M.B.Mehta
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continued

Cross-examined Mehta:

Q. Inspector, looking at the map which you have drawn, can you indicate as to where is Chabonga Village? In which direction? (Witness indicates).

Q. The left-hand top corner, is it? Middle, top - East? A. Should be north-east.

Q. And you have indicated on the map the distance between "F" and Kavala Village No.2 as being 250 yards. Which part of Kavala Village did you measure to this house?

A. From the first house at Kavala Village. 10

Q. Isn't it true that in Kavala Village No.2 there are many houses scattered around?

A. At Kavala 2 Village there are few houses.

Q. Scattered around? Not in one particular place where you can say "this is the first house". They are scattered around at a distance? A. No.

Q. Are you alleging that the houses at Kavala Village No.2 are all in one place nearby and you could easily find the first house?

A. From "F" to Kavala Village you first get a house and then, going that way, is where you get other houses. 20

Q. Weren't there any other houses on the right-hand side and the left-hand side as you approached that house? A. Far away from that house.

Re-examination

Re-examined Nicholson:

Q. Now, you were being asked about how you took the statement which you typed, and you were saying that you listened to the statement, you typed, and he continued, and then you were interrupted. What were you going on to say? 30

WILLS: Your Lordship, is this going to be in further answer to my question? The question was quite simple.

COURT: It is part of your cross-examination. I think Counsel is entitled to clear up the point.

Q. When you said "I listened to the statement, I typed it and he continued", did you intend to finish that sentence at "continued"?

A. The statement was made in Chinyanja. He was making Chinyanja sentences, saying those words. I typed those words. When I had finished I just kept quiet and then he continued and then I typed. That was all, My Lord.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.24

Sub-Inspector
Godfrey Makowa

Re-examination
7th June 1962
continued

10

Q. Now, you were asked as well about Tadeyo surrendering himself on the Monday, and if you were there on the Sunday. Were you in the Police-station at all on the Sunday?

A. On Sunday I went to the Police-station for inspection and I didn't see anyone.

Q. What time was that?

A. That was in the morning and in the afternoon.

Q. What time in the afternoon?

A. That was half-past-three in the afternoon, and half-past-seven in the morning.

20

Examined Court:

By Court

Q. Who was in charge of the Police-station during the day? A. There was an O.B. keeper, My Lord.

Q. Who had the O.B. book?

A. I can't remember now, sir.

Q. But if anyone came in during the Sunday it would be entered in the O.B. book?

A. Whenever something occurs at the Police-station I am only the first African policeman to be informed of it.

30

Q. Have you a literate constable in charge of the station in your absence, in charge of the O.B. book?

A. There are always constables doing the work of the O.B. in shifts. One starts at 6 to 2, and another one takes over from 2 to 10 and the third one from 10 to 6 a.m.

Q. Supposing a man comes in and surrenders himself, would that be entered in the Occurrence Book?

A. In that case I would first of all be informed about it.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.24

Sub-Inspector
Godfrey Makowa

Re-examination
7th June 1962
continued

Q. You would be informed?
A. I would be informed.

Q. Did you receive any information on Sunday
that anyone had arrived? A. No, My Lord.

Re-examination continued:

Q. Were you in fact in charge of the Police
Ncheu at that time?
A. I was in charge of the Police-station Ncheu as
all my officers were on sick leave.

COURT: Any examination arising out of any
questions the Court asked?

10

WILLS: No questions, My Lord.

MEHTA: No questions, Your Lordship.

NO. 25

EVIDENCE OF DETECTIVE-SERGEANT
DIAMOND

P.W.20. No.2804 DETECTIVE SERGEANT DIAMOND,
Nyasaland Police, Christian sworn, states:

Examined Nicholson:

Q. What is your number, rank and full name, please?

A. I am No.2804 Detective Sergeant Diamond of the Nyasaland Police, Ncheu.

Q. On the 22nd December last year did you take a panga out of the exhibits store at Ncheu?

A. Yes.

Q. What did you do with that?

A. I showed it to the witnesses.

Q. Would you recognise that panga again?

A. Yes, if I saw it.

(Exhibit 3 shown to the witness)

A. This is the one.

Q. Did you return it the same day to the exhibit store, to First Sergeant Chimenya's safe-keeping? A. Yes.

Cross-examined Wills:

Q. Did you show the panga to Village Headman Kavala? A. No.

Cross-examined Mehta:

No questions.

Re-examined Nicholson:

No re-examination.

In the High
Court of
Nyasaland

Prosecution
Evidence

No.25

Detective-
Sergeant
Diamond

Examination
7th June 1962

Cross-
examination
by K.W.Wills

In the High
Court of
Nyasaland

NO. 26

PROCEEDINGS

Prosecution
Evidence

No.26

Proceedings
7th June 1962

NICHOLSON: My Lord, I propose at this stage to read the report of Mr. Arthur, the Government Analyst, under the provisions of Section 156 of the Criminal Procedure Code.

COURT: Is it signed by the Analyst?

NICHOLSON: My Lord, it is.

WILLS: Your Lordship, may I see the Report?

(The report handed to Defence Counsel)

10

(The report is now read out)

NICHOLSON: I now produce that.

(Government Analyst's Report is now put in and marked "EXHIBIT 13")

NICHOLSON: Gentlemen Assessors, I don't think you have had an opportunity of seeing these shorts yet and perhaps you would like to have a look at them.

(Exhibit 5 shown to the Assessors)

ASSESSORS: We have seen it.

20

NICHOLSON: My Lord, I also propose to read the report of Dr. Pilbeam under the provisions of the same section. He is the Government Pathologist.

WILLS: Your Lordship, have we any evidence he is the Government Pathologist. He doesn't sign as such.

COURT: May I see the report? (The report is handed to the Court.)

NICHOLSON: My Lord, in fact he is the Government Pathologist, but I have no evidence of that. If my friend objects to it, I won't put it in. I have no intention of adjourning to get Dr. Pilbeam up to say he is the Government Pathologist.

30

COURT: Very well, the Crown does not propose to put in this report.

NICHOLSON: My Lord, if I might draw your attention to the list of witnesses. There are two, apart from Dr. Pilbeam, who have not been called. Gerson Kapalamula, I don't propose to call him, but he is available if either of my friends wish him. The other is Antony Silino, Your Lordship did see him in Court yesterday. He is a very small child of about four or five years of age, and I take the view on behalf of the Crown that although he might be of assistance, it seems undesirable - referring to the case of The Queen v. Wallwork (1958 Cr.App.R)

In the High
Court of
Nyasaland

Prosecution
Evidence

No.26

Proceedings
7th June 1962
continued

10

WILLS: Your Lordship, I would like to cross-examine Gerson.

In the High
Court of
Nyasaland

NO. 27

EVIDENCE OF GERSON KAPALAMULA

Prosecution
Evidence

Examined Nicholson: - Nil.

No.27

Cross-examined Wills:

Gerson
Kapalamula
Cross-
examination
by K.W.Wills
7th June 1962

Q. What is your full name please?

A. Gerson Wilson Kapalamula.

Q. Are you a medical assistant working at Matandani Mission? A. Yes, My Lord.

Q. Is the Mission in Ncheu District?

A. It is in Neno District, but it is under Blantyre. 10

Q. In the Neno Sub-District of Blantyre?

A. Yes.

Q. On the 13th December do you remember a man called Tadeyo Kwalira coming to you? A. Yes, My Lord.

Q. Would you recognise him if you saw him again?

A. I would.

Q. Can you see him in Court?

A. Yes, there. (witness indicates the first accused). 20

Q. The one in the overcoat? A. Yes.

COURT: The one in the dark clothes?

A. Yes, My Lord.

Q. Was he treated?

A. When Tadeyo came I saw him, I noticed that he had a wound on the left side of his head, an adhesive plaster had been applied to the wound somewhere, maybe at his home. I removed the adhesive plaster and looked at the wound and put an adhesive plaster again and told him to wait so that I would give him the full treatment later, but after I had said that he went away, I did not see where he went to. 30

Q. Now, you say you were going to give full treatment later, what treatment were you going to give him later?

A. I meant to examine the wound and see how big it was, and then to cut the hair round the wound, because it was on the head, and then give him treatment accordingly.

In the High Court of Nyasaland

Prosecution Evidence

No.27

Q. So you didn't examine this wound very carefully? A. No.

Gerson Kapalamula Cross-examination by K.W.Wills 7th June 1962 continued

Q. But it was sufficiently serious for you to want to examine it properly later? A. Yes.

10 Q. Do you remember whether the wound was actually still bleeding, or had it stopped bleeding?

A. It was not bleeding, but it was a fresh wound.

Cross-examined Mehta:

No cross-examination.

Re-examined Nicholson:

Re-examination

Q. Do I understand your evidence correctly? You didn't look very closely at this wound?

20 A. I mean that I saw the wound, but I did not measure it for how deep it was. I told him to wait so that I would examine it closely later and give him full treatment.

NICHOLSON: My Lord, that is the Crown Case.

CLOSE OF THE CASE FOR THE PROSECUTION

In the High
Court of
Nyasaland

NO. 28

PROCEEDINGS

WILLS: Your Lordship, I would ask for permission to submit I have no case to answer on a charge of murder, as opposed to a case of manslaughter.

No.28

Proceedings
7th June 1962

Wills now outlines his submission.

MEHTA: May it please Your Lordship, I wish to submit no case to answer on behalf of the second accused.

Mehta now outlines his submission.

10

Nicholson answers.

Court adjourns at 12 noon

Court resumes at 1.30 p.m.

COURT: A case has been made out sufficiently to require a defence of both accused persons.

Court now puts Section 277(2) of the Criminal Procedure Code to the accused persons.

FIRST ACCUSED: "I will give evidence on oath".

Court: Are you calling witnesses.

WILLS: No, My Lord.

20

SECOND ACCUSED: "I will go into the witness box"

Court: Are you calling witnesses?

MEHTA: No witnesses, Your Lordship.

DEFENCE EVIDENCE

NO. 29

EVIDENCE OF TADEYO KWALIRA

In the High
Court of
Nyasaland

Defence
Evidence

No.29

Tadeyo Kwalira
Examination
7th June 1962

D.W.1. TADEYO KWALIRA, Christian sworn, states:

Examined Wills:

Q. What are your full names?

A. Tadeyo Kwalira.

Q. Where do you live?

A. I live at Kavala Village.

Q. No.1 or No.2? A. No.2.

10 Q. Do you remember a day in December on which
you attended a funeral at No.1 village?

A. Yes, I remember.

Q. After the funeral was finished, where did
you go? A. To my house.

Q. Now, to get from No.1 village to No.2
village, how do you go?

A. I go across Bilila and up-hill to No.2.

Q. Now will you answer "yes" or "no", when you
got to your home did anyone tell you anything?

20 A. Yes.

Q. Who was it told you?

A. It was my wife who told me something.

Q. As a result of what your wife told you,
what did you do?

A. I set off to go to Kavala to report the
matter.

Q. And by Kavala you mean the Village Headman?

A. Yes, at Village No.1.

30 Q. What was it you intended saying to Village
Headman Kavala.

A. Because of the children who had been assaulted
at the house.

Q. You were going to report that, were you?

A. Yes, sir.

In the High
Court of
Nyasaland

Defence
Evidence

No.29

Tadeyo Kwalira
Examination
7th June 1962
continued

Q. Were you going to tell Village Headman Kavala who you thought had done the assault? A. Yes.

Q. Who were you going to blame? A. Silino.

Q. Where does he live?

A. He lives at Kavala Village.

Q. Which? No.1 or No.2? A. No.2.

Q. When you went, did you take anything in your hand? A. A stick.

Q. What kind of stick?

A. A knobkerrie with a head as big as my forearm. 10

Q. Was the head round? A. Yes, the head was round.

Q. Could you indicate how much round - as that fist, two fists.

A. It was as round and as big as my forearm below the wrist.

Q. How long was it?

A. As long as that. (witness indicates about a yard).

Q. Why did you take this knobkerrie with you?

A. It was late that afternoon, it was about four o'clock. 20

Q. Why did you take a knobkerrie?

A. Because I knew that I will be returning home after dark and I wanted to be equipped with something with which I could protect myself.

Q. Did you take anything else? A. No.

Q. Did you take a panga? A. No.

Q. Now, you were going to Village Headman Kavala, where in fact did you go?

A. I went down to Bilila stream.

Q. On the way down to Bilila stream did you pass Silino's house? A. Yes, I go past the house. 30

Q. Is Silino's house on the path or is it set back from the path?

A. It is a little distance away from the path, but there is another path which leads to the house.

Q. How far is it from the main path?
 A. As far as from the witness box to that tree,
 the tree where the woman is sitting.

(Counsel agree a distance of 25 yards)

(Photograph No.6 shown to the witness)

Q. Does that show a photograph of Silino's
 house, or what? A. Yes, that shows Silino's house.

Q. Where is the main path going down to the
 stream from there?

10 A. It is behind that house, that side of the
 house.

Q. So you are looking towards the path there,
 are you? A. Yes.

Q. It is as far behind as you are from that
 tree, is that so? A. Yes, as far as that tree.

Q. When you went down towards Bilila stream,
 did you go along the path to Silino's house?

A. No, I did not go there.

20 Q. Did you go off the main path going down to
 the stream at all?

A. No, I never went off the main path.

Q. Did you reach the Bilila stream?

A. I reached Bilila stream.

Q. Did something happen at the Bilila stream?

A. I saw Silino come along a path on the side of
 the stream.

Q. Now, did you see him before you got to the
 stream, or was that the first time you had seen
 him?

30 A. I saw him before I reached the stream. There
 is another path which goes along the stream, he
 was coming from the stream.

Q. Did you see him after or before you passed
 the turning to his house?

A. After I had gone past the turn-off to his
 house and I was just nearing the stream.

Q. Now, what happened at the stream?

A. He asked me "Where are you going?"

In the High
 Court of
 Nyasaland

Defence
 Evidence

No.29

Tadeyo Kwalira
 Examination
 7th June 1962
 continued

In the High
Court of
Nyasaland

Defence
Evidence

No.29

Tadeyo Kwalira
Examination
7th June 1962
continued

Q. Which side of the stream was he when he asked that, Kavala No.1 or Kavala No.2?

A. I was on No.2 side of the stream and he was No.1 side.

Q. Were you where the path crosses the stream, or somewhere else?

A. Just at the stream where the path crosses.

Q. He said "Where are you going?", did you answer him?

A. I answered him, I said "I am going to the Village Headman".

10

Q. Yes. Did he say anything to that?

A. He said "You must go back, I already know".

Q. He already knew - what was he referring to?

A. He said "You are going to the Village Headman because I have assaulted your children".

Q. Did you agree with that, or not?

A. I said "No, I can't go back, I must proceed"

Q. Now, this conversation, was it a short one, or did it last some time?

A. It lasted for some time.

20

Q. What was the outcome of it?

A. I said "I am going back".

Q. Yes, why would you go back?

A. I went back because he asked me to go back.

Q. But you wanted to report to the Village Headman, didn't you? Why didn't you go on and do what you intended doing? A. Because I was afraid of him.

Q. Why were you afraid?

A. That he was going to injure me.

30

Q. He is one side, you are the other, you want to go on, he wants to stop you going on, why didn't you go on?

A. I feared, because he had a panga in his hand.

Q. Did you have anything else?

A. I only saw the panga.

Q. Which hand did he have it in?

A. In his right hand.

Q. You say that you decided to go back, what happened then?

A. Then he crossed the stream and found me on that side as I was going back.

Q. What did he do?

A. I turned round to look at him and noticed that he was very close to me and I stopped.

Q. Did he do anything?

10 A. He struck a blow with the panga and I warded it off.

Q. Will you show how he struck the blow?

A. He struck like that. (witness demonstrates).

Q. And how did you ward it off?

A. With the stick, like that (witness demonstrates).

Q. You mean your knobkerrie? A. Yes.

Q. How were you holding your knobkerrie?

A. I held it like that (demonstrates).

Q. How did you ward it off?

A. I raised it up, like that (demonstrates).

20 Q. The first time you illustrated two hands, now one hand - did you ward off with one hand or with two hands?

A. I warded it off with my right hand.

Q. What happened after that?

A. Secondly, he held the panga like a spear and he stabbed me on the hand with it.

Q. What part of the panga did he stab you with?

A. The point of the panga.

(Exhibit 3 shown to witness)

30 A. That is the panga.

Q. He struck you on your right hand - did it bleed at all? A. Yes, it did bleed.

Q. What happened then?

A. I ran away for some distance and stood afar from him.

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Court of
Nyasaland

Defence
Evidence

No.29

Tadeyo Kwalira
Examination
7th June 1962
continued

In the High
Court of
Nyasaland

Defence
Evidence

No.29

Tadeyo Kwalira
Examination
7th June 1962
continued

Q. What happened then?
A. I ran away from him and he followed me there.

Q. What happened when he followed you?
A. Then Joseph arrived, (witness indicates second accused), and caught him and said "Why are you injuring your friend with a panga?"

Q. How did he catch him?
A. He held him on the chest and pushed him backwards, (witness demonstrates), but he struck Joseph with the panga. 10

Q. Where did he strike Joseph? A. On the back.

Q. Now, at that time, had Joseph got a panga?
A. No, he did not have it at first.

Q. Yes, what happened then?
A. When he came back after he had been pushed he came straight on to me again.

Q. Joseph pushed him away, he then hit Joseph with the panga?
A. The deceased pushed Joseph so that he fell down, and then he went up and struck him with a panga. 20

Q. So when Joseph was struck on the back he had fallen down, had he? A. Yes.

Q. After Joseph was struck, what did Joseph do?
A. He ran and snatched Valeliyano's stick.

Q. And what did you do?
A. I stood still, I did not go away, and he came back and struck me with the panga on the left-side of the head.

Q. Who did? A. Silino.

Q. That was when Joseph was away getting the stick? A. Yes. 30

Q. Now, he struck you on the head, did you try and ward that blow off?
A. I did not, because my hand was painful because of the stab I had.

Q. Did you try and ward it off?
A. I tried to ward it off but I was not strong enough to ward it off.

Q. What did you try and ward it off with?
A. With my hand.

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Q. How about the knobkerrie? Where was that?
A. It was broken, it was cut, he cut it with the panga.

Defence
Evidence

Q. Did he cut it with that stroke, or had it been cut before?
A. He cut it off at the beginning.

No.29

10 Q. Now this wound you got, where was it on the head?
A. It was there (witness indicates above the left ear).

Tadeyo Kwalira
Examination
7th June 1962
continued

Q. What part of the panga struck it, do you know? A. With the sharp edge of the blade.

Q. What happened after you were struck?
A. I fell down.

Q. What happened after that?
A. When I woke up I stayed still, I did not walk.

20 Q. When you woke up? What do you mean?
A. Just to get up and then sit.

Q. You got up and then sat down again?
A. Yes.

Q. While you were doing that, what was happening with Silino and Joseph, do you know?
A. The two struggled together.

30 Q. Had Joseph got anything in his hand?
A. It was a little dark then, and the wound on my head was bleeding and the blood was running down my eye. I could not see clearly, but I could only see they were struggling together.

Q. What were they struggling with? What weapons? A. Joseph was struggling with Silino.

Q. Yes, had Joseph got a panga?
A. When he came there I did not see that he was carrying a panga and a stick.

Q. When he was struggling with Silino. We know Silino had a panga. Had Joseph got a panga when he was struggling?

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Nyasaland

Defence
Evidence

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Tadeyo Kwalira
Examination
7th June 1962
continued

A. I am saying that I had fallen down at that time, and I did not see clearly.

Q. It is in your interests to tell what you saw. You are not here to protect your brother-in-law.

A. I am speaking the truth, that after I had fallen down and then got up my face was covered with blood, I was not seeing clearly.

Q. But what did you see?

A. I saw Silino's panga, but after Joseph had gone to get a stick I did not know that he got a panga as well.

10

Q. What happened?

A. Then the second accused came up to me and said "Get up". He helped me up and I got up.

Q. Who was the second accused? A. Joseph.

Q. After you had been hit on the head with the panga did you take any part in the fight? A. No.

Q. When Joseph came and told you to get up, where was Silino, could you see?

A. After we had jumped the two trees which lay across the path, I saw that Silino was coming up behind us, but there was Joseph in between us.

20

Q. Where was Silino coming from?

A. He was coming from where Joseph had left him.

Q. Where had Joseph left him?

A. Where they went struggling about.

Q. As I understand it, you were on the path just where it crosses Bilila stream, is that right?

A. Yes.

Q. Where were Joseph and Silino struggling?

A. At Bilila.

30

Q. Were they at a place on the path, or off the path? A. I fell on the side of the path.

Q. Were they struggling where you were, or were they struggling a distance away?

A. They had gone down a little distance away, down the stream.

Q. Yes, how far?
 A. Not very far, as far as from here to that tree.

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(Counsel agree a distance of 10 to 15 yards).

Defence
 Evidence

Q. Now, you say they were along the stream, were they off the path along the stream? A. Yes.

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Q. Going towards Kavala Village No.2 was it on the right or the left of the path?

Tadeyo Kwalira
 Examination
 7th June 1962
 continued

A. On the left, going towards No.2.

10 Q. Let's get that clear, it was on Kavala No.2 side of the stream, was it?

A. On Kavala 2 side of the stream.

Q. And as you cross the stream and start going up the hill, was it on the right or the left?

A. On the left as you go towards Kavala 2, in the eastern direction.

Q. Now, where the struggle took place, were there blue-gums or an open space?

A. There were blue-gums there.

20 Q. You saw where they were struggling, you must have seen something of the struggle. Tell us about it?

A. That is what I saw, because I had fallen down and I did not see exactly what was happening there. If I was up on my feet I might have seen something.

Q. Was it a struggle between two people with pangas, or one man unarmed and one with a panga?

30 A. To speak the truth, after Joseph had gone to get the stick I did not see clearly because I had fallen down there.

Q. You say Joseph came along and told you to get up, and you and Joseph started walking up the hill, and I think you said Silino was behind?

A. That is correct, sir.

Q. When you last saw Silino how far up the hill was he?

A. We walked up the hill as far as near Silino's house, and from there we walked faster and left him behind, going to our houses.

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Defence
Evidence

No.29

Tadeyo Kwalira
Examination
7th June 1962
continued

Q. Could you give any indication how far from the stream Silino was when you last saw him?
A. He was by the garden.

Q. It is quite a long hill up isn't it? Was he half way up the hill or just left the stream when you last saw him?

A. He had left the stream far behind him, and he was right up the hill.

Q. Was he still standing when you last saw him, or had he fallen down? A. He was standing.

10

Q. Did you get home? A. I got home.

Q. What did you do when you got home?

A. I called a child, saying "Give me some water, I want to clean my wound, Silino has injured me".

Q. Which child did you tell? A. Eneres.

Q. She is your daughter, is she? A. Yes.

Q. Did she bring the water?

A. She brought the water.

Q. What happened? A. I washed the wound.

Q. Did you do anything more to the wound, after that? 20

A. She brought a piece of cloth with which she used to play, and I said "Give it to me, I want to tie it around the head because the wound is bleeding".

Q. Did you do so? A. I did that.

Q. And was anything else done to the wound that night?

A. That night I called that friend of mine, saying "Come and cut my hair so that it doesn't interfere with the wound". 30

Q. That friend you referred to, has he given evidence? A. Yes.

Q. Jorodoni? A. Yes.

Q. Did he do anything to the wound?

A. He said "It is late at night, I will cut your hair tomorrow".

Q. Did he do anything to it? A. No, he did not.

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Q. That night, did he bandage it?
A. He bandaged it with that piece of cloth, that's all.

Defence
Evidence

Q. That night? A. That night.

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Q. Now your daughter, did she bandage it or did she just wash it?

A. My daughter just gave me the water.

Tadeyo Kwalira
Examination
7th June 1962
continued

10 Q. Was it bleeding a lot at that time?

A. Yes, it was still bleeding.

Q. You are talking about the wound on your head, are you? A. Yes, the wound on my head.

Q. The other wound on your hand wasn't very serious, was it?

A. The wound on the hand bled at first and it did not bleed afterwards.

Q. The next day did you go anywhere?

A. The next morning I woke up at three o'clock.

20 Q. Did you go anywhere? A. I went to Matandani.

Q. On the way did you call anywhere?

A. I called at my elder brother's place on my way.

Q. What is his name? A. Magombo.

Q. Has he given evidence here? A. Yes.

Q. Why were you going to his place?

A. I went there to tell him that I was going to the hospital and if I was not seen at home I was there.

30 Q. And then did you go to Matandani Hospital?

A. Yes, I went to Matandani.

Q. Did you have your wound seen to there?

A. Yes.

Q. Did you tell Magombo what had happened? Did you say anything to Magombo about the fight?

A. I told him "Silino has injured me and I am going to the hospital".

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Defence
Evidence

No.29

Tadeyo Kwalira
Examination
7th June 1962
continued

Q. Yes, did you say anything about Joseph?
A. I didn't say anything about Joseph.

Q. Why is it Magombo comes into the Court and says you said Joseph was the one who came to strike with the knife?
A. No, I didn't tell him that.

Q. Why does he come into Court and say that?
A. He was just mistaken, he did not understand me well, I did not tell him that.

Q. At that time you knew Silino had been struck by a knife, didn't you? 10
A. I did not know at that time that Silino had been struck by a knife, because after I had fallen down I did not see anything that had taken place.

Q. Did you know Silino had been hurt?
A. I just noticed him get up and follow us. I did not know at the time that he had been injured, but I just took it that they had injured each other.

Q. Now after you had gone to Matandani where did you go? 20
A. After I had returned home from Matandani I heard that constables had come to look for me to go to Ncheu.

Q. That wasn't my question - after you left Matandani where did you go that night?
A. I stayed the night on the way from Matandani, because it was late.

Q. You went to Magombo's, you then went to Matandani. The question is very simple, where did you stay that night? 30
A. I stayed that night at my house.

Q. The day in which this fight took place was a Tuesday, was it? A. It was a Tuesday, yes.

Q. The next day you went to Matandani, did you?
A. On a Wednesday.

Q. So Tuesday night you spent in your own house at Kavala No.2 village? A. Yes.

Q. On Wednesday you went to Matandani, where did you stay that night?

A. I stayed that night on the way back, I did not reach my home.

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Q. On Thursday where did you go?

A. On Friday I set off to go to Ncheu, and stayed the night at Doviko's place.

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Q. Where is that?

A. Just at home, at Sangano.

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Q. When did you reach Ncheu?

A. I reached Ncheu on the Sabbath, on Sunday.

Tadeyo Kwalira
Examination
7th June 1962
continued

10 Q. The night before, where did you stay?

A. I stayed that night at Mpila.

Q. That is just up the road here?

A. Yes, up the hills.

Q. And when you came to Ncheu on the Sunday, where did you go?

A. I went to the District Offices.

Q. And did you do anything?

A. From here I was accompanied by a policeman to the Police-station.

20 Q. Where did you spend Sunday night?

A. I stayed Sunday night in the Police-station.

Q. This policeman that you saw, has he given evidence in Court? A. No, I have not seen him.

Q. Has he been around? Have you seen him anywhere?

A. I saw him some time ago around the Court, but I do not see him now.

(Exhibits 3 and 4 shown to the witness)

Q. Are either of these pangas yours? A. No.

30 Q. Do you know who either of those pangas belong to?

A. The one which is nearer to me, I know it.

Q. This one? (indicating Exhibit 3).

A. That is Silimo's.

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Tadeyo Kwalira
Examination
7th June 1962
continued

Q. How do you know?

A. I know it because it is that with which he struck me.

Q. One panga looks very much like another.

A. Yes they do, but I recognise this one.

Q. How? They have both got leather handles, both got lines, both go to a point.

A. Because I saw it when he stabbed me, and all the time that we were talking to each other he had it in his hand and I could see it.

10

Q. When you left the house on the evening of the fight, did your son Davison go with you? A. No.

Q. Do you know whether he followed you afterwards?

A. I did not see him follow me afterwards.

Q. Did you see him at all?

A. I did not see him at all.

COURT: You have never discussed this with Davison, have you? A. No, I never met him again.

Q. From the time you left for Matandani Mission, did you see Davison between that time and the time you gave yourself up to the Police?

20

A. I did not see him.

Q. You didn't see him at Magombo's?

A. I did not see him at Magombo's. We crossed each other on the way when I was going to bid farewell to my mother, to say I was going to Ncheu.

Q. That was after you had been to Matandani?

A. Yes, after I had been to Matandani.

Q. You saw Davison then?

A. I just saw him at his uncle's place.

30

Q. That is Magombo? A. Yes.

Q. You did see him at Magombo's?

A. Yes, I just saw him there.

Q. Did you discuss the fight with him at all?

A. No, I did not talk to him.

Cross-examined Mehta:

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Q. When Joseph arrived was it dark, or light?
What were conditions like?

A. There was a little light.

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Evidence

Q. How far could you see with your naked eyes
in that light?

A. It was at dusk, just after sunset.

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Tadeyo Kwalira
Cross-

10 Q. Could you see a person standing about as
far as that house with a shining white roof,
without the assistance of any light? (Counsel
indicates a distance of about 90 yards).

A. You could just see that it was a figure of a
human being, but you couldn't recognise it.

Examination
by M.B.Mehta
7th June 1962

Q. When Joseph arrived were you already
assaulted by Silino, or not?

A. I had already been stabbed, but before he
struck me on the head.

Q. Do you know from which side did he come?

A. Joseph came from the same side as Silino did.

20 Q. Kavala Village No.1? A. Yes.

Q. Did he come actually near you, where you
were, or at a little distance?

A. He came near me.

Q. What did he first do when he came near you?

A. He pushed Silino away.

Q. Did he say anything at the time?

A. He said "Why are you hurting your friend like
this"?

30 Q. Did he say anything else?

A. Those were his first words.

Q. What followed?

A. Then they started struggling together.

Q. What do you mean by "they started struggling
together", who struggled?

A. I am saying that Joseph caught Silino first
and pushed him away, saying "Why are you hurting
your friend?"

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Tadeyo Kwalira
Cross-
examination
by M.B.Mehta
7th June 1962
continued

Q. And then?
A. After he had done that, Silino turned round and struck a blow with his panga and Joseph fell down.

Q. Do you know exactly where he struck the blow on Joseph? A. On the back.

Q. Where?
A. There. (Witness indicates the middle of the back between the shoulder-blades).

Q. When you say "hit him there", did he hit him with the panga? A. Yes, with the panga. 10

Q. And was it bleeding? A. No.

Q. What were you doing at the time.
A. At that time that is when he had just stopped him from hurting me and I was standing aside.

Q. Didn't you go to rescue Joseph? A. No.

Q. What did Joseph do after that?
A. After that he ran after Valaliyano.

Q. And what were you doing when he ran after Valaliyano? A. I was just standing there. 20

Q. What was Silino doing?
A. Silino came running towards me from where he had been.

Q. Where had he been?
A. Where he was struggling and pushing each other to the ground with Joseph.

Q. I can't understand how they had been away, you were there as well?
A. It was just there, but they moved away as they struggled. 30

Q. Now, when he hit you on your head with the panga, did you scream? A. I fell down immediately.

Q. Yes, but did you scream?
A. I did not scream, I merely fell down.

Q. Wasn't it painful? A. Very painful.

Q. And you didn't scream at all?
 A. You scream when the pain is not very severe, but instead of screaming I just fell down.

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Q. And when Joseph came the first time, was he carrying anything in his hand?

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A. When he came the first time he had a panga with him which he put down on the ground.

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10 Q. Now you have told us that after the hit on your head you were lying, then when you got up you saw Silino and Joseph struggling? A. Yes.

Tadeyo Kwalira
 Cross-
 examination
 by M.B.Mehta
 7th June 1962
 continued

Q. Did you see actually who started the struggle?

A. Joseph was turning to stop the fight.

Q. What made you think that Joseph was again coming to stop the fight?

A. I saw him catch hold of Silino and push him away.

Q. That is the second time? A. No, first time.

20 Q. Now, he went towards Valaliyano and he came back. When he came back you say that you saw him and Silino struggling?

A. That was the time I fell down. When he came back he found me lying on the ground.

Q. You say you saw that struggle?

A. I saw that struggle.

Q. Do you know as to who started the struggle? Was it Joseph, or was it Silino?

A. Joseph went to get the stick and came to where Silino was.

30 Q. Then what happened, when Joseph came near Silino with the stick? What happened?

A. They moved away towards the blue-gum trees, struggling with each other.

Q. How did the struggle start, who started the struggle?

A. I am saying that when Joseph returned from where he went to get the stick he went straight to where Silino was, and they started to struggle together.

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Tadeyo Kwalira

Cross-
examination
by M.B.Mehta
7th June 1962
continued

Q. As soon as he arrived there both of them started to struggle together? A. Yes.

Q. Did you hear Joseph say anything to Silino at that time? A. They were not talking.

Q. But did you hear Joseph say anything to Silino before the struggle started?

A. I am saying that when he came back he did not speak, just started struggling together straight away.

Q. Now when they were struggling didn't you go and try and part them, or try to assist in any way? 10

A. No, I was weak then.

Q. Were the injuries that you received so serious that you were that weak?

A. It was serious, although I can't see it, but I just noticed that I was becoming weak.

Q. And you continued to be weak, did you?

A. After I had fallen down, I got up, and then sat down there.

Q. And you were still very weak? 20

A. I was still very weak.

Q. How is it that when Joseph came after a while you could manage to run with Joseph?

WILLS: He didn't say they ran.

Q. How is it that you

WILLS: What he was saying at that stage was that he walked faster than Silino was.

Q. When you said in your evidence-in-chief that you, together with Joseph, jumped over two trees and walked faster, what exactly did you mean? 30

A. He helped me to get up and after he had done that he said "Let us go".

Q. What did you mean by you walked faster up the hill?

A. I meant that he was following us, as he was running after us Joseph said "Let us walk faster, he will catch up with us".

COURT: He was running after you? A. Yes.

Q. And you could walk fast by then, could you?
A. Yes, we walked faster.

Examined Court:

Q. When you were walking up the hill, did Joseph have a panga? A. Yes, he did.

Q. Was there any blood on that panga?
A. We could not see because it was dark.

10 Q. Did Silino have a panga at that time?
A. He had a panga at that time.

Q. There were two pangas?
A. Yes, two pangas, counting the one Joseph had as we went up the hill.

Q. That is the one Joseph put down on the ground?
A. Yes, the one he had put down on the ground when he came at first.

20 Q. Can you describe this panga?
A. I can describe it. It is a Portuguese type of panga with a wide blade.

Q. Is the top curved, or straight?
A. The Portuguese type of pangas are not curved, they are straight.

(Exhibit 6 shown to witness)

A. I don't know whether it was this, because it was at night. I saw it, but I do not recognise this one.

Q. Is that a Portuguese type?
A. Yes, that is a Portuguese.

30 Cross-examination continued:

Q. It was similar to this, was it?
A. Yes, this is it.

Q. Now, when Silino was following you two, did he say something? A. No, he did not speak.

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examination
by M.B.Mehta
7th June 1962
continued

Q. Didn't he in fact say "Wait. I still want to fight with you people"? A. No.

Q. Was Silino bleeding at that time?

A. I could not see because it was dark.

Q. Is it true that Joseph came there to stop the fight and assist you, or not?

A. That is correct, sir.

Q. Why do you say that?

A. You are asking me whether Joseph came there to stop the fight and I am saying that is correct

10

Q. Did he come there to stop the fight?

A. That is correct.

Q. Did he come there to assist you?

A. He came to rescue me because I was being hurt.

Q. And you did not go to rescue him while they were struggling? A. I had already been hurt, then.

Cross-examined Court:

Q. What sort of man was Silino?

A. I don't know, sir.

Q. You don't know whether he was a quiet man, a quarrelsome man?

20

A. I am unable to know that, sir. The Village Headman is the right man to know this because he is the one who looks after us and he is the one to say whether he was a quarrelsome man or a quiet man.

Q. Didn't you live beside him?

A. Although I lived beside him I can't tell whether he was a quiet man or quarrelsome.

Q. He was quite normal, otherwise you would have noticed it?

30

A. I don't know because I just found him like that, and I can't tell whether he was quite normal or otherwise.

Q. You never noticed anything abnormal about him?

A. I never saw anything abnormal about him except this incident when he assaulted the children.

Q. Did he do anything else at your house beside assaulting the children
 A. I just saw that he assaulted the children only on that day.

Q. Nothing about your wheat store?
 A. He found the children at the wheat.

Cross-examined Nicholson:

Q. Did he in fact scatter that wheat around?
 A. He scattered the wheat around.

10 Q. That is what you told your elder brother Magombo, isn't it?

WILLS: Isn't it rather getting into hearsay?

COURT: That is what this witness told Magombo, not what Magombo told him.

WILLS: It is in evidence he wasn't there when Silino came, he can't say whether he scattered the wheat around, he doesn't know.

Q. When you arrived home did you see the wheat?
 A. I saw the wheat.

20 Q. And in what condition was it?
 A. It was scattered around

Q. And did you mention that to Magombo?
 A. After I had told Magombo that I had gone to Matandani, and he left his home and went to my home in order to find out what had happened exactly.

Q. Did you mention the wheat being scattered at the same time as you mentioned Joseph?
 A. No, I did not mention.

30 Q. Did you mention Joseph at all?
 A. I mentioned him.

Q. What did you say about him?
 A. At the beginning or at the end?

Q. What did you say to Magombo about Joseph?
 A. I did not tell Magombo anything about Joseph.

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Cross-examination by M.B.Mehta 7th June 1962 continued

Cross-examination by M.Nicholson

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Cross-
examination
by M.Nicholson
7th June 1962
continued

Q. So he is mistaken if he thinks that Joseph's name was mentioned?

A. He had come to my house from his house, that is where he heard all that.

Q. Now when you went off with Joseph, with Silino running up behind you, did Joseph turn back at all? A. To go back?

Q. Yes, did Joseph turn back at all?

A. No, he left me at the village and he went to his home. I do not know if he went back or not. All I know is that we went past the house together.

10

Q. Now when Silino was running up after you was he carrying a panga? A. He had his panga with him.

Q. When he was running?

A. I am saying that he had it because I saw him with it where we had been, but at the time he was running after us I did not see that he had it, but I just took it that he had it with him, because it was dark.

Q. How dark was it? You went out at about four o'clock, did you not?

20

A. I went out at four o'clock. The sun set when I was at Bilila.

Q. And you were going to Kavaba No.1 village, which is about a mile away?

A. That is correct, sir.

Q. Now when this fight was going on, that was around sunset, was it? A. After sunset.

Q. How long did you take to get to Bilila stream?

30

A. I just walked, sort of running, because I wanted to get back quickly.

Q. When Joseph was going along by your side, when you were leaving, are you saying it was too dark to see blood on the panga? A. Yes, sir.

Q. And the last that you saw of Silino, he was running, was he, behind you?

A. Yes, when he followed behind us.

Q. Now, as I understand it, when you were giving your evidence-in-chief, you said you didn't see that Joseph was carrying a panga and a stick? A. I have said so.

Q. Later on you said, in fact, Joseph had a panga which he put down?

A. That is when we were going up the hill that I saw it in his hand.

10 Q. Was that the first time you had seen the panga, when you were going up the hill?

A. I first saw it when he arrived and he put it down.

Q. Why did he put it down?

A. He put it down in order to stop the fight.

Q. How did he catch hold of Silino?

A. He caught hold of him on the abdomen and pushed him.

Q. Didn't he try and hold Silino's hands down, his arms down, anything like that? A. No.

20 Q. You had been to the funeral and arrived back at your house, how long were you in your house then, before you went out?

A. I did not stay at the house for a long time.

Q. Did you go out, in fact, almost immediately after you came back?

A. I mean to say that I did not stay there for a long time. I stayed for a little while and then went away.

30 Q. When you got home did you examine your children? A. I examined them.

Q. Did you see any marks on them?

A. No, but bruises only.

Q. Now when you left your house, were you angry at that time?

A. My anger was that I should go and inform the Village Headman what had happened.

Q. When you left your house, were you angry with Silino? A. I was angry, yes.

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Cross-
examination
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continued

Q. Why didn't you stop at Silino's house to see if he was there? A. No, I did not do that.

Q. Yes, but why not?
A. I feared that if I did so we were going to quarrel.

Q. Yes, but you were angry at that time, weren't you? A. I was angry, yes.

Q. What were you going to do after you had seen the Village Headman, then?
A. I thought that after I had seen the Village Headman, he, the Village Headman, would go and ask him and warn him that what he was doing was not good. 10

Q. Yes, the Village Headman would have gone to see him the next day?
A. Whatever the Village Headman was going to tell me about the time of his coming, that was all right for me.

Q. Why didn't you wait until the following day before you went to see the Village Headman?
A. I thought that if I wait long then the Village Headman may not accept my complaint, he will say "Why are you reporting this to me when it was done yesterday?", and it would appear as if I went there for something else. 20

Q. Yes, but you had a lot of witnesses, hadn't you?
A. A lot of witnesses who saw me leave the village.

Q. You had a lot of witnesses, did you, when you were going to complain?
A. Yes, all the people at the village knew what I was going there for. 30

Q. I suggest to you the reason why you went out straight away was that you wanted to see Silino?
A. If that was my intention, why did I go past his house?

Q. He wasn't at his house, was he?
A. I should have gone to his house to check up, to see.

Q. Didn't you in fact go to see if he was there? A. I did not go.

Q. Couldn't you in fact see from his house that he was coming down on the opposite side from the other Kavala Village? A. No.

Q. You get a clear view across, don't you, to the path that is leading down from Kavala Village No.1? A. Yes, you get a clear view.

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Cross-examination by M.Nicholson 7th June 1962 continued

10 Q. And I suggest that you looked across and you could see Silino coming down that path towards Kavala Village No.2.

A. That was not the path he had taken. He came along a little path along the stream, which is not visible.

Q. You heard his brother Marko? He met him on the main path shortly before this?

WILLS: Your Lordship, if evidence is to be put to this witness it should be put correctly.

20 COURT: Are you reading from notes you took at the time, Mr. Nicholson?

NICHOLSON: My Lord, this was probably in examination-in-chief.

COURT: If it were examination-in-chief, Mr. Wills would have a note of it. It is undesirable to put to a witness something another witness didn't say.

WILLS: It was about the same time, Your Lordship, but the two instances are not related.

30 Q. You are saying he was coming from some path that runs alongside the stream, are you? A. Yes.

Q. Joseph's garden, where is that?
A. It is on the same side of the stream.

Q. In fact when you met Silino, would Joseph be able to see you from his garden?

A. It is a bit hidden, that it cannot be seen.

Q. Was it a coincidence then that he arrived on the scene? A. Yes, it was a coincidence.

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Cross-
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continued

Q. That he should happen on the scene just as you were having a fight? That was a coincidence was it? A. That is correct.

COURT: Wouldn't it be reasonable he was working around his garden, hears a sound of trouble and runs to give assistance? A. I do not know, sir.

COURT: It could have happened?
A. It might have happened, but I do not know. I do not know what he was thinking about when he was at his garden.

10

Q. Now, this knobkerrie you took with you. You didn't want to travel in the dark and that is why you took the knobkerrie, isn't it?
A. That is correct, sir.

Q. Why, if you were so afraid of travelling in the dark, why didn't you wait until the next day before seeing the Village Headman?

A. I feared that if I waited until the next day, the Village Headman was not going to believe me.

Q. When you met Silino did he say to you "I want you because you are the one who made your children rude"? A. He told me that.

20

Q. He did say those words, then?
A. He said those words, yes.

Q. When Joseph appeared on the scene, didn't he in fact say in a loud voice "Beat him, beat him"?
A. No, I did not hear those words.

Q. Are you and Joseph on very friendly terms?
A. No.

Q. Aren't you married to his sister?
A. I am married to his sister.

30

Q. Davison says when you left the house you went with a knobkerrie, and that is right, is it? You did leave with a knobkerrie?
A. That is all right, I carried a knobkerrie.

Q. And you were using that to protect yourself?
A. As you know, sir, that it is a usual thing for everybody else to carry about a stick.

Q. But what I am saying - you were using that to protect yourself when you were attacked by Silino?

A. No, I do not know that, because even when I was going past his house I did not go up to his house.

Q. When Silino was attacking you, you used the knobkerrie to protect yourself?

A. That is correct, sir.

10 Q. This blow that was struck on your head. How did you say Silino struck that blow? Can you show us?

(Witness indicates a downward movement).

A. He struck like that.

Q. Davison saw one blow being struck which hit you on the head, and he said that was struck in a stabbing way, is that wrong? How powerful a blow was it?

20 A. The blow was weakened by me warding it off with the stick, but I could not do that successfully because my hand was painful, that is why it landed on my head not with a very great force.

Q. But he had struck one blow before that, hadn't he?

A. He struck one blow before that, and stabbed me on the hand.

Q. No, that is not right, is it? Didn't you say "he struck a blow with the panga and I warded....."

30 WILLS: He said he was struck, the first blow warded off, then quite a time later, Joseph had gone to get the knobkerrie, he was struck again.

Q. Two blows were struck at your head, were they not? The first one you warded off with a stick?

A. Yes, that was before I was cut on my hand.

Q. But that wasn't when you were injured, was it, on the head?

A. No, he first stabbed me on the hand.

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examination
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Q. Now, I thought you told us that the stick was broken after the first blow?

A. With the first blow he cut the stick, and the second blow broke it completely.

Q. After this first blow, how much of the stick was left?

A. I did not look at the stick at all, I was just watching the one who was intending to kill me.

COURT: Did the knob of the knobkerrie fall off after the first blow?

A. No, the first blow just cut the stick and it never fell down.

10

Q. Now, this second blow which came to your head, did you try and ward that off with the knobkerrie?

A. I tried to ward it off with my knobkerrie, when it fell off.

Q. Are you sure about that? A. It is true.

Q. This is the blow on the head I am talking about now? A. Yes.

Q. You told us in examination-in-chief that you didn't try and ward it off because your hand was painful?

A. I am saying that with the injury on my hand and the breaking of the stick I could not ward the blow off, that is why it landed on my head.

20

Q. But you said "I did not try to ward it off because my hand was painful". Which is right? Did you try, or not?

A. I am saying that my hand was painful, and it was not so powerful as to be used to ward off the blow. I tried, of course, to raise it up, but I was not successful.

30

Q. How much of the blow did you manage to stop? A. I tried to ward it off very weakly.

Q. And was it a very powerful blow? A. I do not know what force he had used.

Q. That was the wound, was it, that was seen by Dr. Bhima several days later? A. Yes, that one.

Q. A superficial wound?
A. I do not know whether it was a superficial wound or not because it was on my head and I couldn't see it.

Q. I suggest to you, if you were not in a very good position to defend yourself, and that was all the damage it caused, that wasn't a very heavy blow?

10 A. I cannot fail to agree with that, because I had been weakened by the first blow.

Q. Was it that scar that Dr. Bhima saw that was bleeding in such a way that you weren't able to see what was going on? A. That was the one.

Q. That was a very small scar, wasn't it? It wasn't bleeding very much?

A. Dr. Bhima saw me a week afterwards.

Q. Where is this scar? A. There. (Witness indicates the left side of the head).

20 Q. Are you saying that the blood coming from that side of the head was blinding you?

A. It came down my face like that (witness demonstrates), and I was trying to rub it off with my hand and then it blinded me.

Q. Wasn't it running down the side of your head?

A. There was some blood running down the side of my head, but most of it ran down my face.

Q. Are you saying it was so much that you couldn't see what was going on?

30 A. It was bleeding a lot.

Q. Or when you say that, are you trying to protect Joseph?

A. No, I am not trying to protect Joseph.

Q. You say this little blow on your head made you very weak? Could you have a look at photograph No.2 please? When Joseph and you started to go up the hill, how far away was Silino?

A. He was as far away behind us as that tree, the tree against which the bicycle is leaning, the first tree, but it was at night.
(Counsel agree a distance of ten to fifteen yards).

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Cross-
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Tadeyo Kwalira

Cross-examination by M.Nicholson 7th June 1962 continued

Q. Now, when he was coming up behind you, were you turning round to look at him?

A. We turned round to look at him twice.

Q. How clearly could you see?

A. It was dark, we were not seeing him clearly, but we could see his figure.

Q. What about his face? Could you see his face?

A. No.

Q. How about his arm? Could you see his arm?

A. No.

Q. And did he appear to you to be running quite normally? A. He was just walking.

Q. Look at photograph No.2. Can you offer any explanation as to how Silino came by that injury?

A. He got that injury just there. I can't say he got it from anywhere else.

Q. You know he got it there, don't you?

A. I know that he got it there. I think that he was injured at the place where he and Joseph had gone struggling.

Q. You say he was running with that injury?

A. I am saying he was not running, it was ourselves who were running.

Q. You were walking faster because he was running behind you? A. He was following us.

Q. I thought you said he was running after you?

A. No, I have said that he followed us, we were running in front. We were going faster.

Court adjourns at 3.30 p.m.

8th June 1962

The hearing is resumed at 8 a.m. on Friday, the 8th June, 1962. All present as at previous hearing.

(The witness is warned he is still on oath)

Cross-examined Nicholson:

Q. What build of a man was Silino?

A. He was a man.

10

20

30

Q. Was he bigger than you?
A. He was just like me.

Q. Or fatter than you?
A. He was fatter than I am.

Q. Now when you met him and you were having this conversation at the stream, was he angry then? A. Yes, he was angry.

Q. And when he told you to go back, were you frightened. A. Yes, I was frightened.

10 Q. Did he threaten you at all?
A. He threatened me.

Q. What did he say?
A. He said "You must go back".

Q. Yes, but what was the threat?
A. He had a knife in his hand.

Q. Did he threaten you with the knife? A. Yes.

20 Q. What did he say?
A. He said, "You must go back, you don't proceed", and as he was waving the knife in his hand I knew that he intended to strike me with it.

Q. Altogether, as I understand it, he attacked you twice and struck three blows at you, is that right? A. Yes.

Q. Now, did he seem intent on hurting you in those attacks? A. Yes.

Q. And did he press home a determined attack on you?
A. I ran away whilst he was still attacking me.

30 Q. But he was the aggressor throughout?
A. Yes, he was the aggressor.

Q. My difficulty is this: I don't understand, if what you say is right, how you and Joseph received such remarkably small injuries. Can you explain such slight injuries? You received what the doctor described as an abrasion. You had what was described by the doctor seven days later as an abrasion on the head and a small cut on the

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wrist. Joseph had a very slight injury on the upper part of his left arm. Could you explain why you only received those very small injuries?

A. The only explanation is that whilst I was there I did not intend to attack him the whole time, all I was trying to do was to get away from him.

Q. Yes, but you were...this knobkerrie that you had, where did you leave that? The one that was broken?

A. It broke there, and I left it there. 10

Q. You left it there? A. Yes.

Q. Whereabouts was it? A. Just at Bilila stream.

Q. You are sure about that? A. It is true.

Q. If anybody was looking, they would have been able to find it, would they?

A. Perhaps one could not have seen it, because after it broke the head went away and I was remaining with the handle only, which I dropped to the ground. 20

Q. On the path? A. On the path.

Q. Now, you see, I still don't understand. You say these were two determined attacks on you, but you still only received very small injuries.

A. You may not be able to understand that, but what I am saying here is the truth, that he was determined to attack me.

Q. Now, when you went out you were afraid of coming back in the dark, were you not? A. Yes, sir.

Q. So you took a knobkerrie with you for your protection in case you had to come back in the dark? 30

A. Yes, sir.

Q. Why didn't you take a panga as well?

A. I did not take a panga as well because I was not suspecting to meet anything, but I carried a stick just as we usually do.

Q. But I mean you were apprehensive enough to take a stick with you? A. We are used to that.

Q. Now this path you saw Silino coming from, where does that lead to?

A. It leads to Maliko village.

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Q. But you saw Silino coming from a path along the stream, didn't you? A. Yes.

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Q. Well, Marko's village, that is No.1 village, up on the top of the hill?

A. There is a junction. Maliko's village is on the east and No.1 village is on the other side, and two paths lead to these villages.

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Q. When you say Maliko, do you mean Marko Mathews, or is that just the name of the village?

A. No, I mean Marko Mathews' village.

Q. I thought he lived at Kavala No.1?

A. At Kavala Village No.1, there is a stream in between.

Q. This path that you met Silino on, was that the main path coming down from Kavala No.1 to Kavala No.2?

20

A. That is the one, the two paths meet at the stream.

Q. So in fact it is the one path, is it, that continues across the stream?

A. There are two paths before you cross the stream, but they meet immediately before crossing, and only one crosses the stream to Kavala No.1.

Q. Now Kavala No.1 village, that is where Marko lives? A. Yes.

Q. How far from the stream is that?

30

COURT: There is no difference between Marko's village and Kavala No.1?

Q. Marko's village is the same as Kavala No.1?

A. It is the same as Kavala No.1, but the houses are just far apart.

COURT: And you are saying there are two paths from Kavala No.1 down to the stream? A. Yes, sir.

Q. And Silino came along the path that led to Marko's house? To that part of the village of Kavala No.1? A. Yes, sir.

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Q. Was he carrying a bag of maize? A. No.

COURT: The Crown has not established that a bag of maize was found?

NICHOLSON: My Lord, no, but the brother said he had a bag of maize.

Q. Before this particular incident when you went down to the stream and met Silino there, were you afraid of Silino? A. Yes, I was afraid of him.

Q. Why was that?

A. Because of the panga he was carrying in his hand.

10

Q. But before you met him at the stream, on the days before that, were you afraid of him?

A. When I left the village I was afraid of him.

Q. What village? A. From Kavala No.2.

COURT: On earlier occasions when you met him, had you cause to be afraid of him?

A. No, I was not afraid of him.

Q. You see, that is what I can't understand - why you didn't call in to see him on the way down to see the Village Headman. He was the man to see, was he not?

20

A. Because that was after he had assaulted the children, and I would not have gone to see him.

COURT: Why did he assault your children?

A. I don't know why he assaulted the children, I was just informed that the children had been assaulted, and the children themselves didn't tell me why they had been assaulted.

COURT: Didn't you know why they had been assaulted? 30

A. After I had returned from the funeral, that is when I was informed of the assault on the children, and the wheat that had been scattered around, that is why I went.....

COURT: And they gave you no information at all as to why he had assaulted them and scattered the wheat?

A. When I came the children told me that the deceased had come to my house with a pig, because this pig had gone to his house.

40

Examined Court:

Q. Whose pig was it? A. Yoswa's pig.

Q. What has Yoswa's pig to do with you?
A. It had nothing to do with me.

Q. You were told that the deceased brought a pig to your house and assaulted your children and scattered your maize? A. Yes.

Q. Was that the act of a balanced person?
Didn't that strike you as being strange?

10 A. That is why I went to the Village Headman, so that the Village Headman should find out from him why he did that, or whether there was anything wrong with his mentality.

Q. Did you have a reason to suspect he was unbalanced before?

A. I can suspect him a little that his head was not balanced.

Q. Why?

20 A. Because when he comes to somebody else's house he doesn't come peacefully.

Cross-examination continued:

Q. Are you just talking about this one occasion that he didn't come peacefully, or had he done it before?

A. That is what I am saying, because if he was a balanced man he should have waited for me and then told me what had happened.

30 Q. But are you talking about this one occasion when you say he didn't come to somebody else's house peacefully, or had you got any other occasions in mind?

A. I can't say that he had done it to someone else, but I am speaking the truth that he had done that somewhere else.

COURT: Was he a bit of a nuisance?

A. Yes, he was a bit of a nuisance.

Q. Had he ever done anything to annoy Joseph, do you know?

40 A. I do not know if he had done anything to annoy Joseph at any time.

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Q. Now, down by the stream when you were talking to him, he stopped you, you said that conversation lasted for some time. Will you tell us exactly what was said between you and Silino?

A. He was saying "Go back, because I already know that you want to go to the Village Headman to tell him about what I was doing to your children".

Q. This is a conversation that lasted for some time. What else did he say?

A. That is the conversation which lasted a long time, because we were speaking in turn.

10

Q. And weren't you in fact having an argument?

A. We were having an argument.

Q. Now, were you angry then?

A. I was angry then, because he was asking me to go back, when I intended to go and inform the Village Headman.

Q. Were you on different sides of the stream?

A. We were on different sides of the stream.

Q. And he crossed and found you as you were going back? A. Yes, he ran after me.

20

Q. You knew he was running after you? A. Yes.

Q. Now you say you noticed he was very close to you and you stopped? A. I stopped.

Q. Were you running?

A. I was just walking when I was going back.

Q. When you saw him running after you with a panga in his hand, why didn't you run?

A. I did not run, I just stopped.

Q. Why didn't you run?

A. I did not run because I knew that he was very close to me.

30

Q. Yes, when you started off he was on the other side of the stream though, wasn't he?

A. Yes, when I started off to go back he was on the other side of the stream.

Q. Now, this determined attack when he stabbed you on the hand, and held the panga like a spear, that is hardly an effective way to wield a panga, is it?

40

A. He held it like a spear and intended to stab me with it.

Q. But he didn't hack you with it?

A. He stabbed me on the right hand with it.

Q. You say you ran away for some distance and you stood afar and he followed you? A. Yes.

Q. What were you standing waiting for?

A. I did not stand and wait, I am saying that he was running after me.

10 Q. I thought you said "I ran away for some distance and stood afar and he followed me there". Now what did you mean by that?

A. I am saying that after I had turned round to go back at the stream he crossed and ran after me, and when he was very close to me I stopped.

Q. I am not talking about that. After your hand had been stabbed you ran away for some distance and stood afar and he followed you there.

A. That was after the fight had started.

20 Q. Now what do you mean by that? Were you waiting for something?

A. I am saying that after he had caught me there and stabbed me on the hand we fought each other, and that is when I was trying to run away from him.

Q. Now Magombo, who in some ways may be a hazy witness, was adamant about one thing: that the cause of the fight was the wheat. He kept repeating that. Now did you tell him that?

30 A. I am saying that what caused me to go to the Village Headman was the wheat and the assault on the children.

Q. Let us get this picture of Joseph arriving. When he arrived he had a panga in his hand, which he put down on the ground, is that right? A. Yes.

Q. And where did he put that panga? How far away from where you and Silino were?

A. He didn't put it far away. We were just together there and he just put it down near where we were.

40 Q. He put it down and pushed Silino back, did he? A. Yes.

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Q. Did he pick up the panga then?
A. I am saying that I did not see him pick it up again, because after he had pushed Silino, and Silino struck me with the panga, I fell down, and I was still on the ground when Joseph went to get the stick and pick up the panga.

COURT TO ASSESSORS: Although I warned you that what the accused said against each other out of Court was not evidence, now the accused is on oath and it is evidence. Of course we look for corroboration of his evidence before we accept it. 10

Examined Court:

Q. Joseph went for a stick and came back with the stick and picked up the panga?
A. I am saying that all the time he was getting the stick and picking up the panga I had fallen down and I did not see.

Q. You didn't see him picking it up?
A. I am saying that I did not see him get the stick or pick up the panga because I had fallen down. 20

Cross-examination continued:

Q. I thought you told us in your examination-in-chief that Joseph ran and snatched Valaliyano's stick?
A. I am saying that when he went to Valaliyano to get the stick and pick up the panga I was on the ground.

Q. But did you see him going to get the stick?
A. I saw him run towards him. 30

Q. Now, when he ran towards Valaliyano, did he have the panga in his hand?
A. The panga was near me.

Q. On the ground? A. Yes.

Q. Where Silino could pick it up?
A. No, Silino could not have picked it up, he was far away.

Q. How did he suddenly become far away?
A. They went pushing each other further away from me, and then Joseph left him there and ran towards Valaliyano. 40

Q. Couldn't Silino have run and got hold of Joseph's panga which was on the ground?

A. Valaliyano was on the path and I was on the same path lower than him, and Silino was the one who was further away from us.

COURT: Valaliyano came across the bridge, did he?

A. Yes, he had crossed and he was on the same side.

10 COURT: And passed you close by?

A. Yes, he passed by me.

COURT: He must have seen you?

A. I saw him pass by.

COURT: How close?

A. As far as from here to the path where the bricks end.

(Counsel agree a distance of 15 yards)

Q. It was close enough for you to see him?

2 A. Yes, close enough for me to see him.

Q. If he had looked he could have seen you?

A. He saw us.

Q. Did you actually see Joseph snatch the stick from him? A. I saw that.

Q. You are not here to make things worse for Joseph, for your own benefit. Did you see Joseph pick up the panga?

A. I did not see him come to where the panga was because I was lying on the ground then, but I saw him going.

Q. Did you never see Joseph with a panga apart from when he arrived?

A. That was the time I was rubbing the blood.

Q. Did you ever see Joseph with a panga apart from when he arrived?

A. I saw him with the panga in his hand when he came to help me up as we were going away.

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Q. His own panga? A. His own panga.

Q. But you didn't see him pick it up?

A. I did not see him pick it up but I saw it when he came to help me up.

Q. He could have picked it up after the incident?

A. That was after the struggle with Silino, and we were going away.

Q. The important point is, the panga which caused the injuries to Silino could have been Silino's own panga snatched from him.

A. I can't say that it was Silino's own panga, he had a panga.

10

Q. You can't say it was Joseph's panga or Silino's panga that caused the injuries?

A. I could not know that he had snatched Silino's panga because when he came to help me up he had his own panga in his hand.

Q. Are you able to say whether Joseph, if he used a panga on Silino at all, used his own panga, or he could have snatched Silino's panga and used it?

A. If he had snatched Silino's panga at all, he would not have his own panga when he returned to me.

20

Q. Don't speculate. You don't know which panga caused the injuries? You didn't see? A. Yes.

Q. You are here to tell us what you know and the Assessors are here to compare the facts. You just tell us what you know. You saw Joseph lay his panga down? A. I have said so.

Q. You never saw him pick it up?

A. I have said so.

30

Q. Though he did have it when he picked you up?

A. He had it in his hand.

Q. He snatched a stick? A. Valaliyano's.

Q. He ran back to Silino? A. That is correct.

Q. Silino had a panga?

A. Silino had his own panga.

Q. Later on, Silino was found suffering from a panga wound? A. That is correct.

Q. Can you assist us as to which panga Joseph could have used? A. No, he did not use Silino's panga.

Q. How can you be so sure?

A. I am so certain because when Joseph came to pick me up he had his own panga in his hand, and Silino had his.

10 Q. Silino still had his?

A. That is the one he dropped on the path.

Q. Did you see Silino with a panga after the struggle?

A. I did not see it after the struggle, but I saw it after he had stabbed me with it.

Q. After you and Joseph were coming up the hill and seeing Silino behind you?

A. It was dark, we could not see clearly.

20 Q. But you were saying a few minutes ago that Joseph couldn't have used Silino's panga because Silino still had it. A. Yes.

Q. Do you still maintain that Silino had it after the fight?

A. I just saw Joseph with his own panga.

Q. You are not being of assistance to us when you keep changing your mind.

30 A. You have asked me whether Silino had his panga with him after he had got up from where he had fallen as a result of the struggle and I am saying I did not see him with it because it was then dark, but Joseph, because he was near me, I noticed he had his in his hand.

Q. Very well, then. We are not much further forward, are we? It is a very important point. Go through your evidence again. First of all Joseph laid his panga down? A. Yes.

Q. Then he pushes Silino away from you and the struggle goes on at a distance? A. Yes.

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Q. Then he runs to Valaliyano and snatches his stick? A. Yes.

Q. Then does he run straight back to Silino, or does he come near you? A. He came to where I was.

Q. Could he have picked up his panga?

A. I just heard the sound of his foot as he was passing by where the panga was lying, because this time I was lying on the ground.

Q. He could have picked it up, or he could not have picked it up?

A. He could have picked it up at that time. 10

Q. Or he could have left it?

A. He could have left it there.

Q. After all, he had just armed himself with a stick?

A. He had picked up his panga because when he was returning from the struggle with Silino he had the panga in his hand.

Q. You didn't see the struggle with Silino?

A. I am saying that I had fallen down, and when I got up I sat down there, whilst the two were struggling there. 20

Q. Could you see them struggling?

A. Yes, I saw that.

Q. Did you see a panga move?

A. I am saying that it was a bit dark, and they were as far away from me as from the witness box to that tree (as previously indicated), and I could not see the pangas.

Q. You didn't see the pangas? 30

A. I didn't see them.

Q. If a panga were used to inflict these injuries, did you know which panga did it?

A. I am saying that the panga might have been similar to that of Joseph.

Q. Don't imagine or infer. You didn't see a panga, so you don't know which one inflicted the injuries. As a matter of fact you are quite entitled to have your own opinions, but we are trying

to get out of you what you actually saw. Now, you didn't see a panga used on Silino? You didn't see Joseph strike Silino? A. I did not see.

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Q. You wouldn't be able to see, then, which panga caused the injuries? A. No.

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Q. You didn't see any particular panga used, did you? A. It was at night, sir.

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Q. I accept that you didn't see any particular panga. Now later on Joseph picked you up?

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10 A. He picked me up.

Q. At that time he had a panga?
A. That time he had a panga.

Q. His own one? A. Yes.

Q. Now be careful. Did you see him pick it up? Don't imagine things, tell us what you saw. Either you saw him pick it up or you didn't. If you saw him later with it in his hand you assume he picked it up. Did you see him pick it up?

20 A. I did not see him pick it up because I had fallen down then and I did not see clearly.

Q. From the time you saw him lay it down to the time he picked you up and he had a panga in his hand, you never saw him touch it? A. No.

Cross-examination continued:

Q. Now, I want to get this picture clear, it is still not clear to me. When Joseph pushed Silino back, what did Silino do?

30 A. The struggle between Joseph and Silino started after Joseph had pushed Silino back, and they went away pushing each other.

Q. When was it that you were injured on the head with a panga, then?

A. After they had gone away pushing each other, he returned and struck me on the head. He did not waste time.

Q. Was it when he returned to strike you on the head that Joseph was going off to get this stick from Valaliyano?

40 A. Yes, that was the time when he went to get the stick.

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Q. Now, how far did this struggle move from where you were?

A. The struggle, as I have already said, moved as far as to that tree, the nearest tree outside the Court. (as previously indicated).

Q. All that was wrong with you at that particular time when they went from there was that your hand had been stabbed? A. Yes.

Q. Well, why didn't you help Joseph?

A. I did not help Joseph because he was stopping the fight and separating us. 10

Q. Yes, but Silino had a panga which he had already used?

A. Yes, he had already stabbed me on the hand with it.

Q. Why didn't you go over and help Joseph to take away the panga from him.

A. I was frightened. He had separated us and went pushing him away, and I just stood there.

Q. Why didn't you run away? 20

A. I just stood there, instead of running, I did not go far.

Q. But why didn't you run away?

A. I just stood there, I did not run away.

Q. And you waited for Silino to come back and attack you again?

A. No, I did not wait for that, because he had been pushed away, and I was then thinking of going home.

Q. Now, look - when the struggle broke apart, as far as that tree is away from you, and Joseph ran off in one direction, Silino was left there with a panga in his hand, did you try and run away? 30

A. It was then dark, and when Joseph was running to where Valaliyano was, I moved a little to the path.

Q. Now, when Joseph arrived on the scene you had just been injured with this panga and your hand was bleeding? A. That is correct.

Q. Are you saying that Joseph then put down his panga to deal with somebody who had a panga? 40

COURT: Mr. Nicholson, you are asking him to tell us about what was in Joseph's mind. He is here to tell us about the facts.

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Q. When Joseph pushed Silino back, were they holding on to each other, or were they separated?

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A. They were holding on to each other, and pushing each other away.

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Q. Now, this struggle you saw going on at various times between Silino and Joseph, what form did that take?

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10

A. I am saying that there, where I had been rescued, they went away pushing each other. That was before they started fighting each other.

Q. And Silino then had a panga in his hand, did he? A. He had his own panga in his hand.

Q. Now when Joseph came to help you up, what was Silino doing?

COURT: What I am not clear about now is: first of all he was rescued, and Joseph pushes away Silino, runs away for a stick, Silino then moves back. What happened when Joseph came back? You told us that Silino came back to you while Joseph was getting the stick? A. I have said that.

20

Examined Court:

Q. Struck you on the head? A. That is correct.

Q. Joseph then ran up? A. Yes.

Q. And the struggle must have recommenced beside you?

A. He just came running and got him where I was standing.

30

Q. So Silino was beside you? He had just struck you with a panga? A. Yes, he had come close by.

Q. Then they started struggling beside you again? A. He did not start struggling with him again, he just struck me.

Q. And then Silino and Joseph began to struggle beside you? A. Yes, and they went away struggling.

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Cross-
Examination
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continued

Q. Did you hear any blows struck?
A. I was hearing blows being struck.

Cross-examined Nicholson (continued)

Q. After Silino hit you on the head with the panga, you fell down? A. Yes, sir.

Q. Now, did Joseph arrive on the scene before Silino could strike a second blow?

A. Do you mean when he came the first time to stop the fight?

Q. No. Joseph and Silino went off struggling, Joseph went off to get the stick from Valaliyano. Silino ran over to you and struck you. That's right, isn't it? A. Yes. 10

Q. And you fell down? A. Yes.

Q. Now, did Joseph arrive on the scene before Silino had time to deal a second blow?

A. Yes, before he struck a second blow.

Q. Was Silino getting ready to strike a second blow? A. I do not know.

Q. Now, when you had fallen down and Joseph came up to you and helped you up, did you speak to him? A. He just said "Let's go". 20

Q. Nothing else?
A. I did not hear him say anything else.

Q. Did you ask what had happened to Silino?
A. He just said "There goes Silino."

Q. And then you jumped two trees, did you? A.Yes.

Q. And Silino jumped them after you? A. Yes.

COURT: Why was it necessary to jump two trees?

Q. What does that mean, jump two trees? A. Two blue-gum trees had fallen across the path. 30

Q. What did you have to do, climb over them?
A. We climbed over those two trees.

Q. And Silino came over them after you? A. Yes.

Q. And Joseph was between you and Silino?
A. Yes, Joseph was between me and Silino.

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Q. Did Joseph go back at all?
A. No, he did not go back.

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Q. Now, this struggle between Joseph and Silino, that had been down near the Bilila stream, had it? Fairly close to that?

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A. Yes, just at Bilila stream itself.

Tadeyo Kwalira

10 Q. Can you explain how Silino's body was found so far away?

Cross-
examination
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continued

A. It is true his body was found so far away from the stream because he had walked that much by himself.

Q. Well, you were in no state to appreciate what was going on after you had received this blow here, were you? (Counsel indicates the head).
A. Yes, sir.

20 Q. Now where exactly did you and Joseph part that night?

A. Joseph left me at the door of my house as I was entering.

Q. Did he go into the house?
A. He did not go into the house.

Q. He was at the door, was he?
A. Yes, he turned at the door.

Q. Was there a light in the house?
A. There was no light in the house, but I struck a match after I had entered.

30 Q. Did Joseph say anything to you on the journey back to your house?

A. He spoke to my wife, he said "He has been injured by Silino".

Q. Did he say anything to you?
A. He did not say anything to me.

Q. Did you discuss the fight on the way home?
A. The discussion we had on the way was that he said to me "Silino is coming up behind us, let us walk faster".

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continued

Q. The last time that you saw Silino coming up fast behind you, how far away from his house would he be? Can you give us any indication?

A. I last saw him come up behind us at a distance as far as from here to the fences, the witness box being his house. (Counsel agree a distance of over 200 yards). At that time we were about half that distance, we were in between him and his house.

COURT: Did you ever see him fall down again?

A. No, I did not see him fall down.

10

Q. The next morning you got up at three o'clock and went to Matandani. Why did you get up so early?

A. I feared to travel in the heat of the sun because of the wound on my head.

Q. Are you sure you weren't getting out before Silino's body was discovered? A. No.

Q. How far away is Matandani from Kavala Village? A rough idea?.

A. It is some distance away. I left at three o'clock in the morning and arrived there at nine o'clock.

20

Q. Was that the nearest hospital, or dispensary, or Mission? A. That was the nearest.

Q. When you went there for treatment, why did you leave before the treatment was properly carried out?

A. They gave me treatment, and applied an adhesive plaster to my wound, and I still had it on when I came to Ncheu.

Q. But weren't you told to wait to get more treatment, proper treatment?

A. He told me, "Come again on Sunday for further treatment".

30

Q. Now you said that you noticed Silino "get up and follow us, I did not know he had been injured". What do you mean: "get up"? Where was he?

A. That was at Bilila itself.

Q. What did you mean there by "get up"?

A. He got up from where he had fallen down as a result of the struggle with Joseph.

40

Q. You saw him getting up, did you?
A. I saw him getting up, yes.

Q. Did you see how long he was on the ground?
A. I do not know how long he was on the ground, because after Joseph had come to pick me up, and I got up, I then saw Silino getting up.

Q. Now, when did you first learn of Silino's death?
A. After I had returned from Matandani.

10 Q. When was that? When was it you got back?
A. I got back from Matandani on Thursday. I arrived back home on Thursday.

Q. And is that when you heard about Silino's death?
A. Yes.

Q. What made you decide to come to the Police-station at Ncheu?
A. I hear that police were looking for me.

Q. You got home on Thursday?
A. Yes.

Q. What time?
A. In the evening.

20 Q. You just missed the police, in fact, did you?
A. I just missed them.

Q. Why didn't you come into the Police-station the next day?
A. It is a long distance away. I was walking, and I stayed two nights on the way.

Q. What time did you get to the Police-station at Ncheu?
A. At two o'clock.

30 Q. Did you see Inspector Makowa when he came on his afternoon inspection at half past three?
A. When I arrived at the Police-station I met that gentleman at the D.C.'s office.

Q. Which one?
A. That one (witness indicates a constable, No.4999).

COURT: He can call him as a witness if he wants.

Q. Now that panga you say you saw Silino with - have you ever seen him with it before?
A. We live at the same village and I used to see it always.

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Q. That panga? A. That one, yes.

Q. Wasn't it the other one you used to see?
(Counsel indicates Exhibit 4).

A. No, this one (witness indicates Exhibit 3). He
was fond of going about with this.

COURT: This is the one Silino went about with?

A. Yes.

Examined Court:

Q. Have you ever seen the other one before?

A. I have never seen him with the other one. Of
course he used to carry it about when he intended
cutting something with it, but he carried about No.3. 10

Q. Did he carry No.4 when he went about cutting?

A. Yes.

Q. You have seen them both, then?

A. I saw No.4 on certain occasions, but No.3 is the
one he moved about with all the time.

Q. You say that as a neighbour of Silino you saw
him in possession of both these pangas from time to
time? A. Yes. 20

Q. And No.4 is the one he used for cutting?

A. Yes.

Q. What is the purpose of No.3?

A. He used to carry this about, just as a stick,
he did not usually carry a stick but he carried
this panga.

Q. Instead of a stick? A. Instead of a stick.

Q. Is that a usual practice in your community, to
carry a panga instead of a stick?

A. I used to carry a stick about, not a panga. 30

Q. Did other men carry a panga?

A. Many used to go about carrying pangas.

Q. It is nothing out of the way if Silino
preferred to carry a panga instead of a stick?

A. That was nothing unusual.

Cross-examination continued:

Q. I believe you said that when Joseph arrived there was a little light, and it was at dusk, just after sunset? A. I have said so.

Q. How long did this struggle last after Joseph arrived? A. It lasted for some time.

Q. How long, about?

A. I do not know how long because I did not have a watch with me.

10 COURT: Was it a continuous quick sequence of events, or was it slow? Did one thing happen after another, straight off?

A. It was continuous, one after the other. They went away pushing each other, then started again.

Q. Yes, because you see, when Joseph arrived, you said that one could see a human figure about 90 to 120 yards away.

A. Yes, but you could not see his face.

20 Q. But you could see a figure about 90 to 120 yards away? A. Oh, yes, you could see a figure.

Q. When Silino was coming after you, I think you said he was about as far away, at one stage, as the tree? How near was Silino to you when he was coming after you?

A. I do not know, because I saw him in the dark and I could not tell whether he was close to us or far away from us. It is difficult to tell distances in the dark.

30 Q. When Joseph arrived, he said "Why are you hurting each other like this?".

A. Yes, he said that.

Q. Well, were you hurting Silino?

A. No, I was not hurting Silino, I was just warding off the blows.

Q. And he also said something about "Why are you injuring your friend with a panga?", he said that to Silino. Were you a friend of Silino?

A. Silino is a friend of mine, in that he was a cousin to my wife, they are related.

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Q. Now, this struggling, there is a lot about struggling, did it take the form of grappling with each other?

A. You know that when you want to stop a fight you have got to catch hold of each other and struggle.

Q. I suggest to you that the effect of this blow on the head wasn't to make you weak, but to make you angry. A. No, sir.

Q. Did it make you angry?

A. It made me angry in that I fell down, I was weak. 10

Q. How about the pain? A. It was very painful.

Q. Didn't that make you angry?

A. How could that not make me angry? I was feeling pain.

Q. You see, Davison has said that before Joseph arrived on the scene, you and Silino were not fighting. Is that wrong?

COURT: If Counsel are going to use this type of examination they must be certain they are accurate. When a question of this sort is put, we are entitled to be clear from the record what is said. 20

(Part of Davison's evidence read out).

Q. Davison has said that before Joseph arrived on the scene you and Silino were not fighting. Is that wrong?

A. The boy is telling the truth and he is also telling lies, because I did not see where the boy was, neither did I see the direction in which Joseph came, but I could only see Silino.

Q. You heard the Village Headman talk about following a trail of blood, and at the end of that trail of blood he found the body of Silino? 30

A. I heard that.

Q. You weren't leaving a trail of blood behind you, were you?

A. I do not know, but I was still bleeding and the blood ran down my trousers.

Q. Are those the khaki shorts that have been produced?

A. Yes, the blood from my head was running down my shorts.

Q. Can you look at those, please?

(Exhibit 5, the shorts, handed to witness)

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Did you wash those afterwards?

A. I did not wash them, but the drops went down like that. (witness demonstrates).

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Q. Those few drops on the left-hand side of the shorts? A. Yes.

10 Q. And that is the sort of blood that was coming down from your head? A. Yes.

Q. But, you see, the Village Headman followed a trail of blood for some considerable distance, and I put it to you that that was a trail of blood left by Silino.

A. I do not know, because we all went along the same path.

20 Q. Joseph had a cut on the arm, and you had this one on your head which dripped onto your shorts. You can see what your shorts are like. I am suggesting that was Silino's blood, and I am also suggesting that was from his arm, the three injuries on his arm.

COURT: That is speculation. According to the medical evidence his head wounds would bleed very heavily.

NICHOLSON: If your Lordship would look at photograph No.3, I think it is clear from that photograph that the arm must have been bleeding to a great extent.

30 Q. What I suggest to you is that Silino was running up that path with only his arm injured, until somebody, either you or Joseph, delivered blows to his head which killed him at the spot where he was found. A. There I can only say that perhaps my friend went back after he had left me at the house.

Q. Yes, but when you saw Silino he was fairly near to his house, wasn't he? A. He was near to his house.

40 Q. Are you sure that Silino didn't flee, pursued by you and Joseph, and that you struck him down? A. No, I am denying that.

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Q. Are you sure that he wasn't chasing you, dropped his panga whilst he was chasing you, and that Joseph then turned round and struck him down?

A. No, because I and Joseph arrived at my house together.

Q. I want you to be fair to yourself, and to understand your position, and that there is such a thing as misguided loyalty. A. That is true.

Q. Now, I am asking you again, are you lying in order to protect Joseph.

A. No, I am not protecting Joseph.

10

Q. Very well, do you remember when you went to the Police-station and surrendered yourself?

A. That is correct.

Q. Do you remember that you were seen by Sub-Inspector Makowa? A. Yes, I met him.

Q. And do you remember that he charged you with the murder of Silino, and that you made a reply?

A. That is correct.

Q. You heard that reply in Court, do you agree that that is correct, that is what you told him?

20

WILLS: Your Lordship, he gave three statements to Sub-Inspector Makowa. I think it is fair the statement should be put to him.

Q. The first one is when you were arrested. You had nothing to say? A. Yes.

Q. And then you were charged?

COURT: Perhaps the witness would tell us he went to the police knowing Silino was dead, and knowing what he did, he had nothing to say to the police.

A. No, they did not ask me in that way.

30

COURT: Were you charged the first time?

A. They did not charge me the first time, I was charged later.

NICHOLSON: My Lord, he was arrested on the 18th, surrendered himself, said he had nothing to say, then later on he was charged and cautioned.

Q. Now, would you look at this please?

(Exhibit 10 shown to the witness)

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Q. Is that the statement you made to the police when you were charged? A. (No reply).

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Q. Is that your signature?
A. That is my signature, yes.

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Q. Was that read over to you after it was written down? A. It was read over to me.

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10 Q. And did you agree that it was correct, and sign it as such?
A. Yes, I agreed, because I said I saw Joseph come from there with a panga, and he is the one who killed Silino.

Q. This is what you said: "I deny it is I who killed Silino, but Joseph Duncan is the one who killed Silino with a panga knife. I saw that".
A. Yes.

20 Q. Well, now, are you telling us here, when you said "I saw that", you meant you saw the panga knife and not the blows?
A. I heard the blows as I was still lying on the ground, and when he was returning, leaving Silino there, he had his panga in his hand.

Q. The blows of what?
A. Striking with the knife.

Q. How many blows did you hear?
A. I was not counting the blows.

Q. More than one?
A. Not only once, more than once.

30 Q. And then Joseph returned?
A. Yes, he returned and got me.

Q. You could see by looking at Joseph that those blows hadn't landed on him, couldn't you?
A. I could see that he had no wound.

Q. Didn't you ask him what had happened to Silino?
A. No, I did not ask him.

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Q. Why not?

A. I was also unwell at that time, I had been injured, I did not ask.

COURT: Of course, it would not be necessary to ask if you knew, would it?

A. To know that the person had been killed?

COURT: Been struck down?

A. When I heard the blows as I was on the ground I knew that they were hurting each other there.

COURT: You saw Silino on the ground?

A. When Joseph was returning, I saw Silino getting up.

10

COURT: Joseph was uninjured? A. He was uninjured.

Q. You knew from that, did you not, that Silino had been injured? A. I knew.

Q. Why didn't you go to his house the next morning to find out if he was all right?

A. I left very early to go to the hospital for treatment to my wound.

Q. But you must have known that Silino was more badly injured than you were. You had heard the blows striking him. Why didn't you go to find out what his health was like?

A. As I had also been injured, and I knew that if I waited long the injury on my head should have been infected, that is why I went very early, and did not think of going to see him first.

20

Q. How far from Silino and Joseph were you when you heard the blows - about?

A. It was as far as from the witness box to that tree, the nearest tree outside the court (as previously indicated).

30

Q. And you heard the blows striking down?

COURT: Of course you don't hear a blow striking down.

Q. You heard the blows being struck?

A. I could hear the blows.

Q. And Silino was on the ground?
A. I did not see, because I was on the ground, but when I got up and I was rubbing the blood from the wound, that is when I heard the blows.

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Q. Didn't you say you saw Silino getting up?
A. After Joseph had come to pick me up, it is when I saw Silino getting up.

10 Q. But after you had heard the blows being struck, did you see Silino on the ground.
A. I am saying that after I heard the blows, and Joseph had come to pick me up, that is when I saw Silino getting up.

COURT: Getting up off the ground?
A. Yes, getting up from the ground.

Q. Did you ever think, all that time, of going to see whether you could help Silino?
A. I had no strength to go there.

Examined Court:

20 Q. On this point, is it possible that when Silino struck you on the head, as you say, he struck you with the back of the panga, not the blade?
A. No, I was not severely struck, he was the one who was severely struck.

30 Q. What I mean is, if he had struck down and the panga turned on your stick, so that you received the flat of the panga rather than the blade, you would have received a hard blow, and superficial injuries.
A. You mean if he came up to me a second time?

Q. No, when he struck you on the head and made this wound, you held up the stick. It is possible that the panga turned and struck you flatly on the head. A. Yes, that is correct.

Q. That would give you a hard blow on the head, but only a slight injury visible.
A. It was a slight injury, but it weakened me a lot, so much that I fell down.

40 Q. A man isn't likely to fall down with a small cut like you got. A. I certainly fell down.

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Q. Did you feel a hard blow?
A. I do not know because I could not see there.

Court adjourns at 10.10 a.m.

Court resumes at 10.30 a.m.

(The first accused is warned he is still on oath).

Cross-examination continued:

Q. Now, do you remember making that statement to
Sub-Inspector Makowa? (Exhibit 11 shown to the
witness). A. I remember.

Q. And was that read over to you and did you
agree it was correct, and sign it as being correct? 10
A. I heard it read over to me.

Q. And did you agree that that was what you said?
A. I agree, that is what I said.

Q. You said "I have understood, because it was
him who came with a knife with which he struck
Silino?" A. I said so.

Q. Now the "Him" and the "he" do they refer
to Joseph? A. Joseph.

Q. "I had no weapon all the time, but he is
the one who injured Silino"? A. I said so. 20

Q. And that "he" refers to Joseph as well?
A. I referred to Joseph.

Q. "When I was trying to stop them, he injured
me as well"?
A. That was wrongly written. I meant to say "When
he wanted to rescue me he injured me as well".

Q. When it was read over in Court, why didn't you
say it was wrong?
A. You didn't ask me to comment on that. 30

Q. It was read over to you by Sub-Inspector
Makowa, wasn't it?

A. He read over the top part to me, but I was
saying that "when he was rescuing me".

COURT: Joseph was rescuing you? A. Yes.

COURT: You mean Joseph injured you in the course of rescue? In the High Court of Nyasaland

A. I said "when Joseph was rescuing me after Silino had injured me".

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COURT: That is what you say now, but that wasn't what you said to Sub-Inspector Makowa, was it?

A. I mean the last sentence only, part of it is correct, the first part is correct.

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10 Q. Did you read the whole thing yourself before you signed it? A. I was not given it to read.

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Q. But it was read over to you?
A. He read it over to me, but I did not quite understand that particular sentence, otherwise I would have objected at the same time.

Q. Didn't you in fact say that? "When I was trying to stop them he injured me as well"?
A. No, I did not say that.

20 Q. So was that wrongly recorded?
A. That is not what I said. I said "When he wanted to rescue me, after he had injured me".

Q. Because you see, it makes sense, read with all the rest: "Joseph came with a knife with which he struck Silino. When I was trying to stop them, he injured me as well".
A. No, I meant to say "When rescuing me, that is when Silino injured me".

30 Q. Because, you see, that would explain why you received such small injuries.
A. I have no more words to say. I have said everything that I have to say, that Joseph came with a panga, and it is that panga which was used in that accident, because I saw it when he came with it, and he put it down, and when he left that place to go where my friend was on his return from there I saw it in his hand. Those are my words, I have nothing more to add.

40 Q. Now, let me put this suggestion to you, and tell me what you think about it: that Silino fled up the hill carrying his panga; that he dropped it, and at that time only his arm was injured; that you picked it up, and when Joseph pursued Silino on up the path, that both of you then struck Silino; and that you

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Re-examination

went back and put the panga at the side of the path?
A. No, I am sorry, that is not what I did.

Re-examined Wills:

Q. Now you said that when you went from your house it was about sunset? A. That is correct, sir.

Q. Was it a fine day, or was it a cloudy day?
A. It was a fine day.

Q. Look at this photograph (Photograph No.7 shown to the witness). Would you indicate where the sun set that day, if you can, from the photograph. Did it set over those hills, or where did it set? First of all, when you left your house, had the sun actually gone down behind the earth, or was it still in the sky?
A. It was still up in the sky.

10

Q. When you went down to Bilila stream you came down that path there, didn't you, past where those people are in the photograph?

(Witness indicated about 15 degrees).

A. I came down that path, passing where those people are.

20

Q. When you were where those people are, where was the sun?

A. That is Bilila is it? (witness indicates the right-hand bottom corner of the photograph).

Q. Where you cross the stream is just off the photograph.

A. The sun was down below, when I was there.

Q. When you were where the people are?
A. The sun was still up in the sky when I was there.

30

Q. In which direction was it?

(Witness indicates the top left-hand corner of the photograph).

COURT: That is where the sun set?
A. That is where the sun set.

COURT: And you were at the bridge?

A. Yes, I was at the bridge.

Q. I asked you was that where the sun was when you were where the people are?

A. Yes, because the bottom right-hand corner is the east on the photograph.

Q. The sun was setting on the top left-hand corner, and as I understand, it was fairly low in the sky, just about to set?

10 A. It was fairly low.

Q. As you went down the hill, did the sun disappear, and you were in the shadow, or when you got to the bottom of the hill was the sun still in the sky?

A. I did not go up the hill, I turned just at the stream.

Q. Yes, you went down to the stream?

A. I got as far as the stream, that is where I turned to go home.

20 Q. What I am getting at is, when you got to the stream were you in shadow or were you in sunshine?

A. I was still in the sunshine, because that is not a very high hill, it is just high ground.

Q. Thank you. Now another point I want to ask. You say that when you got this cut on the head you were weak? A. That is correct, sir.

30 Q. What I don't understand is how you were weak. Were you weak in your legs, arms, body, head, or how were you weak?

A. I mean to say that I was shocked, and I fell down.

Q. You were shocked. Can you explain that? What do you mean by "shocked"?

A. I mean sort of unconscious.

Q. You say you fell down, got up again, and then sat down again? A. Yes.

40 Q. Did you sit down again because you found it difficult to stand, or simply because you wanted to sit down?

A. I wanted to restore my breath, that is why I sat down.

In the High
Court of
Nyasaland

Defence
Evidence

No.29

Tadeyo Kwalira
Re-examination
8th June 1962
continued

In the High
Court of
Nyasaland

Defence
Evidence

No.29

Tadeyo Kwalira
Re-examination
8th June 1962
continued

Q. I still don't understand what you mean by "shocked". Where were you shocked?

A. When you are injured, when you are in great pain, you sort of fall down to the ground.

Q. But there may be lots of reasons why you fall down to the ground. Were your legs so weak you collapsed, or simply dizzy, or for any other reason - from loss of blood, or anything like that?

A. That is what I am saying, because after he had struck me I fell down immediately.

10

Q. What part of you was weak?

A. I cannot say which part of me was weak.

COURT: You heard the doctor's evidence, that the wound you had on the head was a trivial wound. It is not ordinary experience that a man would be in such a state after such a wound.

A. Well, My Lord, a man may be pricked by a pin and then die from that.

COURT: Ordinary experience suggests a small cut on the head wouldn't cause such grave effects. If the blow had been delivered by the edge of the panga it would have caused damage, but if it hit with the flat of the panga it would not cause much damage, but it would give you a headache.

20

A. If I was struck by the side of the panga I would not have sustained a cut.

WILLS: Your Lordship, Dr. Bhima changed his mind when he looked at the cut, and he then said it is a cut and not an abrasion.

Q. Did this give you an ache in the head, this blow? A. Yes.

30

Q. Was it the kind of headache that makes you dizzy, or was it just painful?

A. A kind of headache that makes one dizzy.

Q. Now, you said that after you and Joseph went up the hill you had to get over some blue-gum trees?

A. We went over the blue-gum trees which had been fallen down.

Q. How far were they from Bilila stream? Near?

A. Just at Bilila itself.

40

Q. How high were they?
A. About that in thickness. (Witness demonstrates about 15 inches).

In the High
Court of
Nyasaland

Q. Were they both the same height, or one higher than the other?

Defence
Evidence

A. They were both of the same size, but one was a little higher than the other.

No.29

Q. Now, you were asked when you first knew that Silino was dead, and you said you knew when you came back, you knew on the Thursday?

10

A. Yes, after I came back from Matandani.

Tadeyo Kwalira
Re-examination
8th June 1962
continued

Q. Where did you come back to from Matandani on the Thursday?

A. I proceeded with my journey and stayed the night at Doviko's place, that was on the Friday.

Q. Where did you stay on Thursday night?

A. On Thursday I went to bid farewell to my mother, saying I had heard I was wanted at Ncheu.

Q. Who told you Silino was dead?

20

A. I met certain boys on my way back from Matandani, who told me that.

Q. That was on Thursday, was it?.

A. On Thursday.

In the High
Court of
Nyasaland

NO. 30

EVIDENCE OF JOSEPH DUNCAN

Defence
Evidence

D.W.2. JOSEPH DUNCAN, Christian sworn, states:

Examined Mehta:

No.30

Joseph Duncan

Q. What is your full name? A. Joseph Duncan.

Examination
8th June 1962

Q. And what is your occupation?
A. I cultivate my garden. A peasant.

Q. And where do you live?
A. I live at Chabonga Village.

Q. Do you remember a certain day some months ago when there was a funeral near your village? A. Yes, sir. 10

Q. Where were you on that day?
A. I was at my garden, scaring the birds.

Q. Where is your garden situated?
A. It is on the side of Kavala No.1.

Q. Near the Bilila stream, or far away from it?
A. Near the Bilila stream, but a bit far from it.

Q. How long did you stay in the garden, that day?
A. I left in the evening, after sunset.

Q. When you left the garden was there any light, or was it dark already? A. There was a little light when I left the garden. 20

Q. Where were you going to?
A. I was going to the village.

Q. Which village?
A. In the direction of Village No.2, because there is a junction on the path which leads to our home.

Q. Is this junction near Kavala Village No.2 or near the Bilila stream?
A. Just where the fight took place. 30

Q. Now, what happened when you were going towards Kavala No.2? A. I found Tadeyo fighting with Silino.

Q. Did you see the fight begin, or did you find them fighting?

A. I found them quarrelling before they actually started fighting each other. When Silino saw me he crossed the stream to attack the other man.

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Court of
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Q. If I correctly understood you, then, when you were going to Kavala Village No.2, Silino was standing at a distance from Tadeyo, quarrelling by words, shouting at each other?

Defence
Evidence

No.30

Joseph Duncan
Examination
8th June 1962
continued

10 A. Yes, they were scolding each other. One was saying "If you cross you are going to die there," and the other one said the same thing.

Q. Who said "If you cross you will die"?

A. Tadeyo is the one who was saying that.

Q. To whom?

A. He was saying that to Silino, he was saying "If you cross you will die there, because you have assaulted my children".

Q. How far were you when you heard Tadeyo say this?

20 A. I was as far as from here to where the women are sitting.

(Counsel agree a distance of 15 yards).

Q. And how far was Silino from you when you heard them talking?

A. Tadeyo was as far as where the women are, and Silino was as far as where the wall is, with the stream in between.

(Counsel agree a distance of 10 yards).

COURT: In between Tadeyo and Silino?

A. Yes.

30 Q. Now, when Tadeyo said this to Silino, "If you cross the bridge you will die because you have assaulted my children", what did Silino say?

A. Silino said "You can't kill me, I have assaulted your children because of the pig that trespassed at my house".

Q. Did you hear anything else apart from what you have just stated?

A. I did not hear anything else. Silino crossed to the other side of the stream.

In the High
Court of
Nyasaland

Defence
Evidence

No.30

Joseph Duncan

Examination
8th June 1962
continued

Q. And what were you doing at that time?

A. I was just standing, I did not speak.

Q. What happened when Silino crossed the bridge?

A. They started fighting each other.

Q. Who started the fight?

A. Tadeyo struck first. Silino was passing by Tadeyo, to his side, when Tadeyo followed him and struck Silino.

Q. With what did Tadeyo strike Silino?

A. He was striking him with a knobkerrie.

10

Q. How many times did Tadeyo strike Silino, do you know? A. He struck about three or four times.

Q. Whereabouts on Silino's body did he strike these blows?

A. He was striking him on the head and Silino was warding off the blows with his left hand, like that. (Witness demonstrates).

Q. What happened then?

A. Then Silino, too, felt pain and he struck Tadeyo with his panga.

20

Q. Did you see where Silino struck Tadeyo with his panga? A. He struck him on the hand.

Q. What happened then?

A. After he struck him on the hand, Tadeyo turned round and struck another blow.

Q. You say that Tadeyo turned round and struck another blow, was he going away, or what happened? Why did he have to turn round?

A. He did not go away, but he intended to run away and he then turned round and struck another blow.

30

Q. What made you think that he intended to run away?

A. Because I noticed that he had his back towards him.

Q. Did he make any move, or was he just standing there?

A. He did not make any move, he was just as far as where the interpreter is with his back towards the deceased.

(Counsel agree a distance of two feet).

40

Q. What happened after that?
 A. I ran and stood in between them.

In the High
 Court of
 Nyasaland

Q. When you were coming to the Bilila stream
 were you carrying anything in your hands?
 A. I had my panga with me.

Defence
 Evidence

Q. Anything else? A. No, that is all.

No.30

Q. Why were you carrying that panga with you?
 A. At home we usually carry pangas about instead
 of sticks, or where one is going to his garden he
 carries his panga with him.

Joseph Duncan
 Examination
 8th June 1962
 continued

10

Q. Do you mean you always do that, or the people
 in your area do that?

A. All of us in our area go about with pangas,
 except on Sundays, of course, when we go bare-
 handed.

Q. On Sundays you don't carry any weapon what-
 soever, do you? A. No.

COURT: It might be an implement as well as a
 weapon. Dual purpose. It is an agricultural
 implement. What do you use your panga for?

20

A. I carry a panga for doing any work that may be
 needed at the garden.

COURT: Do you carry it as a weapon, or as an
 implement?

A. We are used to that, and we just carry it in
 the fashion of a stick, because we have to use
 pangas every day.

Q. Now, did you see what was Silino carrying in
 his hand, or did he not carry anything?

30

A. He had his panga with him.

Q. Did you see that panga properly, to enable
 you to recognise it again if you saw it?

A. I did not see it clearly.

Q. What sort of panga were you carrying?

A. My panga is the Portuguese type of panga.

Q. If you would see that panga again, would you
 be able to recognise it?

A. I would recognise my own panga.

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Nyasaland

Defence
Evidence

No.30

Joseph Duncan
Examination
8th June 1962
continued

(Exhibit 6 shown to the witness).

Q. Look at this panga and tell the Court whether this is your panga, or not? A. This is my panga.

Q. Were you carrying this panga, or any other panga? A. I was carrying this one.

Q. Now, you have already stated that then you ran towards them? A. Yes.

Q. What did you do when you ran towards them?
A. I pushed Silino to one side after I had put my panga down on the ground. 10

Q. How far did you put the panga down on the ground from these people?
A. I put it down just as where the corner of the wall is, and they were fighting at a distance as far as from that corner to where the garden is.

(Counsel agree a distance of 8 to 10 feet).

Q. Why did you put your panga down on the ground?
A. I feared that if at all I were to be taken by surprise I might be compelled to use it and hurt someone with it. 20

Q. Why did you run towards them?
A. I noticed that Tadeyo was covered with blood after he had been struck.

Q. What was your intention when you ran towards them. What did you have in your mind?
A. I intended to go and stop them.

Q. Stop them from what?
A. Stop them from fighting.

Q. When you ran towards them what did you do? Did you say anything? Did you do anything?
A. I said "Stop that, don't trouble each other like this. If there is anything at all you will have to discuss that at home". 30

Q. Did you at that time know as to why they were fighting?
A. I had not known, that is why I said "If there is anything at all you will discuss that at home".

Q. Did you say this before you pushed Silino aside, or after?

A. After I had pushed Silino aside.

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Q. Now, when you crossed the river to where they were, who was first towards you, Silino or Tadeyo?

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Evidence

A. Tadeyo was near me, I got up to him first, and then had my back towards him, and then pushed Silino aside.

No.30

Joseph Duncan

Examination
8th June 1962
continued

10 Q. Why did you push Silino, and not Tadeyo, when Tadeyo was first?

A. Because I saw that it was Silino who had a panga and used it in striking the other one.

Q. Having pushed Silino, and having said they should not fight there, they should go home and discuss, what happened?

A. Silino struck a blow with his panga. I warded it off with my left arm, and it struck me on the upper arm, on the upper left arm.

20 Q. Do you know which part of the panga struck your left upper arm? A. He struck me with its point.

Q. Were you hurt as a result of that?

A. Yes, he injured me a little and the wound was bleeding.

Q. How was it bleeding? Heavily, or just a little? A. It was bleeding a little.

Q. How would you describe the pain? Painful, normal, or not very painful at all?

A. It was a little painful, not very painful.

30 Q. Silino having struck you on the upper left arm, what did you do?

A. I ran and stood aside, when I saw Valaliyano passing by some distance away from us.

Q. What was Tadeyo doing while the struggle took place between you and Silino?

A. Tadeyo turned round and was striking Silino with his knobkerrie from behind.

40 Q. Now, when was that? Was it when Silino struck you with his panga, or was it before, or after?

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Nyasaland

Defence
Evidence

No.30

Joseph Duncan
Examination
8th June 1962
continued

A. The time that he struck me with his panga, Tadeyo was also striking him from behind with his knobkerrie.

Q. Whereabouts on his body was he striking with that knobkerrie?

A. On the back and at the back of the head and the back of the arms.

Q. Do you know how many times he struck him at that time?

A. No, I do not know how many times he struck him.

10

Q. Was it once, or more than once?

A. I don't know whether it was once.

Q. Now, you say you saw Valaliyano passing by?

A. Yes.

Q. What happened then?

A. I ran to him. He was carrying a knobkerrie which I snatched and then went back.

Q. And what was happening whilst you ran to Valaliyano, did you hear, or did you see, between Tadeyo and Silino?

A. When I turned from there, that is when I found that Silino's panga was in Tadeyo's hand, and Tadeyo was striking Silino with it.

20

Q. Did you see when Tadeyo snatched this panga away from Silino, or from where he got it?

A. I did not see. He dispossessed him of it at the time I had gone to Valaliyano to get the knobkerrie.

Q. So what did you do when you came back from Valaliyano?

A. I arrived there. I said "You have also stabbed me". I struck Silino with the knobkerrie.

30

Q. Which knobkerrie did you strike Silino with? The one you got from Valaliyano, or any other?

A. The one that I got from Valaliyano.

Q. Whereabouts on his body did you strike?

A. I struck him with it on the right shoulder.

Q. Was Silino standing at that time, seated, or lying on the ground? A. He was standing up.

Q. Was he bleeding at that time, or not?
 A. He was bleeding as a result of the injuries inflicted by Tadeyo.

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 Court of
 Nyasaland

Q. Did you see Tadeyo inflicting these injuries?

Defence
 Evidence

A. I saw, because I found Silino's panga in Tadeyo's hand.

No.30

Q. Did you actually see, with your own eyes, Tadeyo inflicting these injuries to Silino?

Joseph Duncan
 Examination
 8th June 1962
 continued

10

A. I did not see him strike the blows, but I just noticed the bleeding and Silino's panga in Tadeyo's hand.

Q. There was no other panga around there at the time, was there?

A. There was no other panga. Mine was still lying in the same position as I had left it.

Q. Did Silino have, at that time, anything in his hand?

20

A. He had nothing in his hand at that time. He had been dispossessed of his panga.

Q. And what things were carried by Tadeyo? You said he had the panga, was there anything else but the panga?

A. When I came back, Tadeyo had Silino's panga and his own knobkerrie with him. He had already struck him on the head.

Q. Was this knobkerrie as it was before, when you saw it, or was it broken, or how was it?

30

A. It was not broken, then. He is telling lies when he says that it got broken. Even now it is quite sound.

Q. Do you know where that knobkerrie is at present? A. I do not know where it is.

Q. Then how do you say it is in good condition now?

A. Because when we were in the cell here at the Court, his wife brought it and she was told to take it back to the village.

Q. How do you know it was the very same knobkerrie?

40

COURT: Would you recognise this if you saw it?

A. Yes, I would recognise it.

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Defence
Evidence

No.30

Joseph Duncan
Examination
8th June 1962
continued !

COURT: Of course the defence case is in your hands, Mr. Mehta. A search could be made for the knobkerrie.

MEHTA: Maybe I will consider it after cross-examination, My Lord.

COURT: News travels fast. It is an important piece of evidence. You haven't much time, I suggest, if you are going to make a search. It will be necessary to issue a search warrant. Is this house far away?

10

NICHOLSON: My Lord, about 59 miles from here.

COURT: Is there a police post there?

NICHOLSON: No, My Lord, this is the nearest police station.

Examined Court:

Q. You say you saw it in possession of Tadeyo's wife at the cells? A. Yes, I saw it, she brought it.

Q. And she took it away?
A. I do not know whether she took it away with her, because I did not see her go away.

20

Q. But she had it? A. She had it.

COURT: I think a search warrant should be prepared and I will sign it, to search this house for the knobkerrie.

NICHOLSON: My Lord, perhaps Tadeyo's wife could go with the police with the search warrant.

COURT: Very well, she may go.

(The Court signed a search warrant, which was then handed to the police).

Examination-in-chief continued:

30

Q. Now you say when you came back you saw Tadeyo holding a knobkerrie and a panga. Answer this question only if you know definitely. Do you know in which hand was he carrying the knobkerrie and in which hand he was carrying the panga?

A. The panga was in his right hand and the knobkerrie in his left hand.

Q. So what did you do when you arrived back to where they were?

A. I ran and pushed Silino aside. After I had pushed him a second time, he pushed me, and I fell down.

Q. Who pushed you? A. Silino.

Q. And what was Tadeyo doing at the time?

A. At that time Tadeyo was still striking him.

Q. With what?

10 A. With Silino's panga, which he had dispossessed him of.

COURT: He was striking Silino with Silino's panga?

A. Yes, he had dispossessed Silino of his panga and was striking him with it.

Q. Did you see whereabouts on the body of Silino was Tadeyo striking with the panga?

20 A. It was dark, I can't know where the blows were landing because it was in the middle of a struggle.

Q. How dark was it by then? A. It was dark.

Q. Now, Silino pushed you, and you fell down to the ground? A. I fell down to the ground.

Q. What did you do after that?

A. After I had fallen down, Tadeyo came and struck him with the knobkerrie on the forehead, and I did not see how he dropped the panga, it was lying aside.

COURT: After Silino had fallen down?

30 A. No, after I had fallen down, Tadeyo came and struck Silino on the forehead with the knobkerrie. I did not see how Tadeyo had dropped the panga, but it was lying aside.

40 COURT TO ASSESSORS: You will recall what I said to you that statements out of Court are not evidence against the other accused person, but evidence on oath, by one accused, is available generally against the other accused, but of course you will be very careful about accepting such evidence in the absence of corroboration by some other evidence - by looking for some other evidence to show, not

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Joseph Duncan

Examination
8th June 1962
continued

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Joseph Duncan
Examination
8th June 1962
continued

only that Silino was killed, but that the accused killed him. Further, you must consider the case of each accused quite separately, and I will direct you further.

Q. Now, you say that you saw Tadeyo striking a blow with the knobkerrie on Silino's head? A. Yes.

Q. What happened after that?
A. He fell down, and he struck him another blow and yet another.

Q. With what?
A. With the same knobkerrie.

10

Q. What were you doing?
A. I got up, caught hold of Tadeyo and said "Stop this, it is now finished, let's go".

Q. Did Tadeyo say anything then?
A. Tadeyo did not say anything, but as we had walked a little distance, as far as from here to somewhere outside the Court, we saw Silino getting up and following us, and saying "Stop there, I am coming", so we started to run away.

20

Q. How many times did you strike Silino?
A. I struck him two times only with the knobkerrie that I got from Valaliyano.

Q. You have already described as to the one blow which landed on his right shoulder. Do you know where the other blow landed on his body?
A. The second blow landed on his neck, at the back of the head.

Q. Now, were these two blows consecutive, or was it after some time had elapsed that you struck the second blow?

30

A. They were consecutive blows. I struck him on the shoulder and then struck him another blow on the back of the head.

Q. Why did you do that?
A. I was doing that, I was striking him, because he stabbed me when I was trying to stop them from fighting.

Q. Were you angry, exhausted, nervous, how were you at that time? A. I was not angry.

40

Q. You say that after that you asked Tadeyo to stop and not to fight any more, and then you moved?
 A. Yes, sir.

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 Court of
 Nyasaland

Q. Did Tadeyo come immediately with you, or did he hesitate? What happened?

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 Evidence

A. He did not hesitate, he followed me immediately and we set off to go home.

No.30

Q. At any time whilst this fight was taking place, did Tadeyo sit down on the ground, or not?

Joseph Duncan
 Examination
 8th June 1962
 continued

10

A. He did not sit down at any time. That is a lie.

Q. Did you see the physical condition of Tadeyo when you left the place?

A. He was physically quite in good order. He was not in any way weak. Do you expect a man to fight like that, when the other man had a weapon like a panga, to sit down?

Q. Was Valaliyano there all the time when this fight took place, or did he go away?

20

A. He ran away after I had snatched the stick. He ran away towards the village. I do not think that he saw anything of our fight at all.

Q. Was there anybody else around there except you three - Tadeyo, Silino and yourself?

A. No, I did not see anyone else except Valaliyano who I saw, and who went away to the village.

Q. Now, when this fight was taking place did you see anybody around there in the vicinity?

30

A. No, I did not see anyone else in the vicinity.

Q. You didn't see, or you never bothered to see?

A. Although I looked round, but I did not see anyone else in the vicinity, because at the time I arrived there there was a little light.

Q. When you and Tadeyo were running towards Kavala Village No2, what was Silino doing?

A. Silino was following us.

Q. If I correctly understood you before, you said he was on the ground when you left?

40

A. Yes, but I have said that when we reached the path he got up and followed us.

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Evidence

No.30

Joseph Duncan
Examination
8th June 1962
continued

Q. So where did this fight take place? On the path or in the bush? Whereabouts?

A. The fight took place on the side of the path near the blue-gum trees. Beside the blue-gum trees, the path was as far as from the witness box to that tree outside the Court.

(Counsel agree a distance of 15 to 20 yards).

Q. From there you ran towards the path, did you?

A. Yes.

Q. And when you were on the path, in which direction did you run?

10

A. We ran in the direction of Village No.2.

Q. And you said Silino got up, in which direction did he walk?

A. He was following us, that is when he said "Stop there, I am coming", and then we walked faster.

Q. How was he walking? Slowly, normal way, or fast? A. He was walking slowly.

Q. What happened then?

A. We continued to walk towards the village, and he as well followed us. We branched off along another path, which made us go round Silino's house, and then to our home.

20

Q. Now, was Tadeyo carrying anything when you left the place of the fight?

A. He had his knobkerrie with him.

Q. Anything else? A. That's all.

Q. Did you have anything in your hand?

A. I had my panga with me. I had picked it up from the ground where it was lying.

Q. Anything else? A. That's all.

30

Q. What happened to the knobkerrie which you snatched from Valaliyano?

A. I do not know where it fell.

Q. Did you drop that knobkerrie, or what?

A. It fell off my hand, but I do not know where it fell.

Q. Do you know when that happened?
 A. That happened at the same time as we were running away.

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 Court of
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Q. Did you talk to Tadeyo about the fight whilst you were running away?

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 Evidence

A. We did not talk to each other.

No.30

Q. Having gone via Silino's house, to whose house did you get to first?

Joseph Duncan

10

A. After we had gone past Silino's house, there is a bush in between, and we stopped at that bush to see if he was still coming, and we noticed that he was not.

Examination
 8th June 1962
 continued

Q. Were you talking at this time when you stopped to look around?

A. We were talking to each other.

Q. What were you talking to each other about?

A. We said "Let's stop here and see if he is still following us".

Q. Who said that?

20

A. Tadeyo is the one who said that.

Q. Did you stop? A. We stopped.

Q. How long did you wait there?

A. We waited there for a little time.

Q. What happened then?

30

A. We arrived at Tadeyo's house first. Tadeyo went to the verandah of his house. I went around to the kitchen and said to my brother "My brother-in-law has been involved in an accident at the stream. He has injured his friend and we do not know whether he is going to live, but he too has been struck on the head. You must fetch some water and wash his wound", I then went to my house.

Q. You say you told this to your brother. Can you give his name? A. His wife.

Q. Do you mean brother or sister?

A. Your sister is the same as your brother.

COURT: You spoke to your sister?

A. Yes, I spoke to my sister.

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Examination
8th June 1962
continued

COURT: The one who is married to Tadeyo? A. Yes.

Court adjourns at 12 noon

Court resumes at 1.30 p.m.

(The second accused is warned he is still on
oath).

Examined Mehta (continued)

Q. You mentioned this morning that Tadeyo's wife
came to the cell with a knobkerrie. Were you
present with him all the time while she was there
with him in the cell?

10

A. We were both called out to the door and we saw
her with the stick.

Q. Did Tadeyo speak to his wife?

A. Yes, he had a conversation with her.

Q. Were you near them, or were you far away from
them?

A. I could not understand what they were talking
about.

Q. How far were you from them when they were
talking?

20

A. I was as far from them as I am from the garden.

(Counsel agree a distance of 8 feet).

Q. Were they talking in a normal voice,
whispering, or talking loudly?

A. They were speaking in low voices.

Q. Why did you stay there when Tadeyo was
talking to his wife? Were you asked to stay there
or did you stay there of your own volition?

A. Both my wife and Tadeyo's wife had come there.

Q. So whilst Tadeyo was talking to his wife,
what were you doing? Were you talking to your wife?

30

A. I was also talking with my wife.

Q. Do you remember the day when they came to the
cell?

A. No, I can't remember it, but it was before we
went to Zomba.

Q. What time of the day did they come to visit you people? In the morning, afternoon, evening?
 A. I think they came in the afternoon, they had come again in the morning.

Q. They came on that very day twice did they?
 A. They came in the morning and they came again in the afternoon.

Q. When did Tadeyo's wife come with the knobkerrie? In the morning or in the afternoon?

10

A. She came with the knobkerrie in the morning and she said "I brought this knobkerrie here but I have been told to take it back to the village".

Q. You mean Tadeyo's wife said that? A. Yes.

Q. To whom did she say that?
 A. She was telling her husband.

Q. Did you hear anything else, apart from what you have just stated, about the conversation which took place between Tadeyo and his wife?
 A. I did not hear anything else.

20

Q. How often did Tadeyo's wife and your wife visit you people together?

A. They came in the morning, and then in the afternoon, and on the next morning they came again and bade farewell saying "Perhaps today we may get a truck and start off".

Q. Is it true to say that they came on two different days only, or did they come more often?

30

A. They came in the afternoon, and on the next morning, on the following day, they came again and said "Perhaps this is our last time to see you. If there is a truck available we may go back today".

Q. You have already stated they came one morning and in the afternoon, and on the following day they came in the morning. You have now accounted for visits of two different days. Did they come on any other days than on these two days mentioned?

A. They did not come again until we left.

Q. Did they come before the first day you mentioned they came in the morning and in the afternoon?

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A. They did not come again, they went away to the village on a truck.

Q. My question is: Did they come before the first visit you described in the morning and in the afternoon. Did they come any day before?

A. They did not come before.

Q. Now the day when they came in the morning only. The last day you described. Did you leave for Zomba the same day, or did you stay at Ncheu for some days after that?

A. I think we left two weeks afterwards, after their last visit. 10

Q. Now, would you try to think of the fight. I would like to ask you some questions of the fight. You have already stated that you hit Silino with the knobkerrie twice? A. Yes.

Q. Which side of the knobkerrie were you holding, the head or the thin part?

A. I was holding the head and striking with the thin part. 20

Q. What would be the natural way of holding a knobkerrie whilst hitting?

A. I feared that I would have hurt him, because I was there to stop the fight, and it was not my intention to strike him heavy.

Q. Is that the reason why you held the head of the knobkerrie in your hand and hit him with the thin part? A. Yes.

Q. Did you hit Tadeyo as well, or not?

A. No, I hit the deceased because he had stabbed me on my arm. 30

Q. How would you describe your relationship with Silino? Were you friendly? Enemies? Acquaintances?

A. We had never been enemies at all. I do not know what relations were between him and other people.

Q. So you did not have any enmity between yourself and Silino, but did you have any quarrel before, or not?

A. I never had any quarrel with him before. 40

Q. Did you have any quarrel at that time?
 A. At the time I found them fighting each other?

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Q. Yes?
 A. No, I did not quarrel with him.

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Q. And how would you describe your relationship
 with Tadeyo? A. We were on friendly relations.

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Q. What do you exactly mean by friendly rela-
 tions? Do you meet very often, go out together,
 do you know each other very well?

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 continued

10 A. We never went out together at any time, but
 I am not denying the fact that he is my brother-
 in-law.

Q. You have stated this morning that you saw
 the panga on the ground after Tadeyo had already
 assaulted Silino. Do you know whereabouts did he
 drop the panga? In the bush? On the path, or
 where was it? A. Silino's panga?

20 Q. You have stated that Tadeyo had Silino's
 panga, and that later on, just before you left,
 Tadeyo had dropped the panga?

A. He dropped it at the same spot where we left
 Silino.

Q. Was it on the path, or in the bush, or near
 the Bilila stream? Where?

A. Just at Bilila stream itself, where he struck
 him with a knobkerrie, he laid beside Silino and
 I think when he got up from there he picked up
 the panga.

30 Q. Who picked up the panga?
 A. I think the owner picked it up when he got up.

Q. What makes you think so?
 A. I am thinking so, because people say that they
 found it up-hill, near his house, where he had
 fallen.

Q. Now, when you people were running from that
 spot towards Silino's house, did you turn round
 and look at him, as to where he was?

A. Yes, we saw Silino coming up behind us.

40 Q. Did you see whether he was carrying anything
 in his hand, or not?

A. It was dark, and we could not know that he
 was carrying anything in his hand.

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Q. Now, when you saw Silino last, whereabouts was he in relation to Silino's house?

A. We were as far as that tree, the nearest tree, from him. (As previously indicated, 15 to 20 yards)

Q. This distance you have described, would it be a straight line from Silino's house or if you go on the path?

A. We had already gone past Silino's house when we saw him there. We saw him as we were branching at the main path, and we had gone past his house and saw him there.

10

Q. My question is as to when you last saw him how far was he from his own house. Please don't take into account as to how far from you. I want to know how far he was from his own house.

A. He was at a distance further than the fences, as far as the cedar tree behind the fences.

Q. Is it possible for you to give an estimate in this direction, it would be clearer.

A. The last time we saw him he was as far as from the witness box to that house there, where the child is putting clothes on the line. We could not see him clearly but we could just see a figure.

20

(Counsel agree a distance of 90-120 yards).

Q. And where were you people when you saw him last? A. At the junction, where we branched off.

Q. Is this junction before you reach Silino's house from Bilila stream, or after?

A. This junction is down the hill, near the garden, and before you reach Silino's house.

Q. Now, to go to this junction do you have to go on the same path as the path which leads to Silino's house, or not?

30

A. No, there is a different path leading to Silino's house, but we took the other one which goes round Silino's house, down the hill.

Q. Can you understand a photograph or a plan if you see it?

A. I have never looked at a photograph or a plan.

MEHTA: My Lord, I think I may as well just try to put this plan to him.

40

(Exhibit 8 shown to the witness)

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Q. Now, can you see on the left-hand bottom corner is a bridge across the Bilila stream, from there the path goes up to Kavala Village No.2 and Silino's house. A. Are these Silino's houses there?

Q. Yes, the one marked "D" is Silino's house. Now, can you possibly describe as to how did you go to your house?

10 A. We went up along the main path. Now you say that is Silino's house, but where are Tadeyo's houses, because they are close by? Silino's houses are coming up that path leading to Kavala No.2. The path we took goes round that building, down the hill, and then like that. (The witness indicates on the map). If these are Silino's houses, that means we went around that way to get to Tadeyo's houses.

20 Q. Why did you people take this particular road? Do you usually go around Silino's house like that, or was there any particular reason why you did?

A. We used to go home by the main path, the straight path to Kavala No,2, but we went round there to escape him seeing us.

Q. Who suggested you go on that path, Tadeyo or yourself?

A. He himself (indicating Tadeyo) suggested we should go by the path which goes round.

30 Q. You have already stated that having gone past Silino's house you went up further and stood there for a while looking around to see if he was coming behind you? A. Yes.

Q. And you say you couldn't see Silino any longer? A. We did not see him again, following us.

Q. From there you went to Tadeyo's house? A.Yes.

Q. You spoke to Tadeyo's wife, who happens to be your sister? A. Yes.

Q. And then you went to your house? A. Yes.

40 Q. Did you go straight to your house from Tadeyo's house, or did you go anywhere else?

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A. I went straight to my house at Chabonga Village, I did not go anywhere else.

Q. How far is your house from Tadeyo's house?

A. It is not very far away.

Q. How long would it take? Ten minutes, fifteen minutes, one hour, half an hour?

A. I do not know how to tell the time.

Q. Can you see Tadeyo's house from your house?

A. I can see Tadeyo's house from mine because it is clear of bush. At home there are no trees growing.

10

Q. Is it possible for you to indicate as to how far it is, or not?

A. Well, I don't want to mislead you because it is some distance away: from Tadeyo's house you come to another village, from that village there is yet another one before you come to my village.

Q. Which are these two villages in between?

A. They are both Saulosi's village, but the houses are just in sort of a line.

20

Q. What time of the night did you reach home? Midnight, early in the night, late in the night?

A. I arrived home before people went to bed. I found my wife had just finished preparing food.

Q. Now, did you meet anybody on the way?

A. I was meeting many people on my way home, because that is the main path which is used by many people there.

Q. Did you speak to anyone?

A. I did not speak to anyone.

30

Q. What did you do, then, when you arrived at home?

A. My wife asked me "Why do you come late today, where have you been delayed", I said "I went by mother's village, my mother's village".

Q. Which is your mother's village?

A. Tadeyo's village. My mother lives there.

Q. Then what did you do?

A. I said "Give me water, I want to wash myself".

Q. Then what did you do?

A. After I had washed my hands and washed the wound which he had inflicted on me, I sat down, the food was brought to me and I ate it.

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Q. Did your wife see this wound?

A. No, she did not see it.

Q. Did you tell her anything about the wound, or about the fight?

A. No, I did not tell her anything.

10 Q. What did you do after having had a wash?

A. We began to eat.

Q. Having had your supper, what did you do?

A. We stayed there, chatting.

Q. Did anybody come there any time?

A. No, I did not see anyone coming there.

Q. What did you do after having had a chat with your wife?

A. When bedtime was due, we left the kitchen and went to the house to sleep.

20 Q. What did you do next morning?

A. I went very early to the garden to scare the birds.

Q. Did you go to the same path?

A. I did not go by that path again.

Q. Why not?

A. There was no reason at all, I just went to the garden and after I had scared the birds away I went back to the village.

Q. Did anything striking happen after that?

30 A. I did not hear anything after that until Wednesday, about midday (witness indicates the sun), when we heard that Silino had been involved in a fight with Tadeyo and was dead, he had been killed at the stream.

Q. Anything else happen?

A. Nothing else happened, but on Saturday a policeman came and said "Joseph, we want you". We set off to go to Tadeyo's village, where we stayed the night.

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Q. How many days after the fight did the police come to your house?

A. The fight took place on a Tuesday, and we stayed Wednesday, Thursday, Friday and the policemen came on Saturday.

Q. And you said after the policemen came you went with the police and stayed at night at some village, what night was that?

A. We slept at Tadeyo's village, in Tadeyo's house.

Q. With the police officers? A. Yes.

10

Q. What happened the next day?

A. The next day after we had taken some food we got on to a truck and came to Ncheu.

Q. When you stayed with the police officers at Tadeyo's house, was Tadeyo there, or not? A. No.

Q. When the police came to fetch you did they ask you anything?

A. They did not ask me anything, but when we were at Tadeyo's house they called a boy, Davison, and asked him "Do you know this man, is this the one?"

20

Q. Did you say anything to the police?

A. I did not say anything to them.

Q. Answer this question, "yes" or "no", did they ask you anything?

A. When they fetched me from home?

Q. Yes? A. They asked me.

Q. And did you answer? A. I did not answer.

Q. Did the police ask you again at any time after that? A. They did not ask me anything after that.

Q. When you were at Ncheu did the police people ask you anything? A. Yes, they asked me something.

30

Q. And did you answer? A. I answered.

Q. What did you say?

A. I said "It is not I who has killed the person, he has killed the person himself in order to protect his children".

Q. Now when you people were running from where the fight took place with Silino, did you notice the accused Tadeyo bleeding, or not?

A. His shirt as well as his shorts were covered with blood.

Q. Was he bleeding, or not? A. He was bleeding.

Q. From where did you see that?

A. He was bleeding from his head and the blood ran down his shirt as well as his shorts.

10

Q. Was he bleeding heavily from his head or slight bleeding? A. He was bleeding slightly.

Q. Have you ever been involved before in any fight of this nature, or not?

A. No, I have never been involved in a fight of this nature before.

Q. Any kind of fight?

A. Do you mean a fight to the extent of going to Court?

20

Q. No, I mean a physical fight.

A. Yes, we used to fight with fists.

COURT: The Crown could take a certain course here if they were in possession of certain information.

Cross-examined Wills:

Q. You say you were at your garden on this day?

A. Yes, I was at the garden.

Q. Is your garden on Kavala Village No.1 side of the Bilila stream, or Kavala No.2 side?

A. Kavala No.1 side.

30

Q. So in order to get to Kavala No.2 village you walk along the side of the stream, then turn right up the hill. do you, at the bridge?

A. Yes, then at the bridge, after crossing, you go along the stream, then up the hill.

Q. So to get from your garden to the bridge you walk along the stream? A. Yes.

Q. How far is your garden to the bridge, about?

A. It is far away, it is further than the D.C.'s house.

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by K.W.Wills

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continued

Q. Now, the first thing you heard was quarrelling between Tadeyo and Silino?

A. I did not hear that when I was at my garden.

Q. Well, how far were you when you did hear that?

A. After I had got very near to them.

Q. That was the first time you knew of any quarrel, was it? A. Yes.

Q. Now, you say you were on good terms with Silino, is that right?

A. I never quarrelled with him at any time.

10

Q. Just a month before this happened he had killed three goats of yours, hadn't he?

A. They weren't my goats, they were my younger brother's goats.

Q. Your family's goats, anyway? A. Yes.

Q. What happened about that?

A. I did not say anything, we just skinned the goats.

Q. What happened?

A. We skinned our goats and it ended there.

20

Q. How did he kill them?

A. We do not know how or with what he was killing them.

Q. Does your young brother live with you?

A. No, he lives in a different village, far away.

Q. Was that reported to the Village Headman?

A. No, it was not reported to the Village Headman.

Q. Why not?

A. At home what happens is that if goats or any other animals trespass at someone's place or garden, he just kills them and there is no case about it.

30

Q. So your family didn't mind Silino killing the goats, then?

A. I do not know if they minded that at all, but I was at my house.

Q. It was something which affected you quite closely, wasn't it, when Silino killed your goats?

A. Silino hasn't been killed because of our goats, he has been killed because of children.

Q. But the fact of these goats might have made you a bit angry towards Silino?

A. But how many days afterwards did this incident occur after he had killed the goats; we did not go and ask him, we just kept quiet and the matter ended there.

10 Q. That's the point. Matters in villages don't end if you keep quiet, only if you bring them out into the open, isn't that so?

A. In so saying, do you think that Silino was killed because of goats? Silino was not killed because of goats but because of children. The matter about goats had finished.

Q. But it hadn't finished, had it, because you kept quiet?

A. We did not report to the Village Headman that we wanted a case.

20 Q. You kept it there within your heart, you kept the malice within you, you didn't report it?

A. We did not keep that in our mind. At one time Silino's goats used to trespass in my garden and I used to kill them. We were revenging each other that way.

Q. You had a vendetta? A. That may be so.

Q. You were killing his goats and he was killing yours? A. That is correct.

30 Q. And yet you say you were friendly with him, and there was no quarrel. What do you mean?

A. We were friendly, because we never quarrelled at any time.

Q. You just killed each other's goats?

A. If his goats came to my garden, I killed them, and if mine went to his, he also killed them.

Q. Nice and friendly actions on both sides, eh!?

A. That is friendly relations because we did not quarrel.

40 Q. When you came towards the bridge you heard an argument going on between Tadeyo and Silino.

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Did you walk straight on, or did you stop and listen?

A. I stopped and listened.

Q. How long did you listen?

A. I did not stop to listen for a long time.

Q. You heard both of them talking, more than once? A. Quite a big quarrel, not a play.

Q. No, they were shouting at each other, weren't they? A. Very much.

Q. Both of them? A. Yes.

Q. Both quite angry? A. They were both angry. 10

Q. And wasn't the position that Tadeyo wanted to go across the bridge to the other side?

A. I do not know, perhaps he was after his friend, or heintended to go somewhere as he said, I do not know.

Q. In fact, where he was going was to the Village Headman up the hill to Kavala No.1.

A. That is the way.

Q. And what was happening was that both Tadeyo and Silino were both saying "Don't you cross the bridge", isn't that right? A. Yes. 20

Q. And then Silino did cross, didn't he?

A. Yes, Silino, after I coughed, he turned round and looked at me, he then jumped across the stream, and then went round in order to join the path and escape him, but Tadeyo ran in front of him and started to assault him.

Q. When he saw you?

A. Silino crossed after he had seen me coming. 30

Q. Why? Was he frightened of you?

A. He was not frightened of me.

Q. Now, you said "when Silino saw me he crossed the stream to attack the other person"?

A. Silino crossed and was going round to avoid Tadeyo on the path. Tadeyo is the one who assaulted the other man first.

Q. This morning, didn't you say "When Silino saw me he crossed the stream to attack the other person"?

A. No, I did not say that. No, I have said that Tadeyo was the one who assaulted the other man first. After Silino had crossed, he was going round to avoid him.

(Part of the record is now read out).

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10 Q. You now say that Silino crossed the stream and went beyond Tadeyo, further up the hill, is that right?

A. I am saying so.

Q. In other words he got past Tadeyo?

A. Before he got past him, Tadeyo went in front of him and started fighting him.

Q. You are changing all the time, aren't you? Did he get past Tadeyo, or did he not?

A. He didn't quite get past him.

20 Q. How is it that when you went to separate them, Tadeyo was nearer you?

A. I reached Tadeyo first because he had his back towards me and I went round and stood between them, and pushed Silino to one side.

Q. This was on the path?

A. That was by the blue-gum trees where the fight was taking place and where Silino was falling down after he had been struck with the knobkerrie.

30 Q. I am not talking about that, I am talking about when you first met. You went up and tried to stop them, is that right? A. Yes.

Q. How did you try to stop them?

A. I pushed Silino aside.

Q. Now, you say Tadeyo hit Silino with a knobkerrie when Silino went across the stream?

A. He struck him first, before they went to the place where I got them.

Q. Describe exactly what happened after Silino crossed the bridge, will you?

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A. After Silino had crossed, he went round Tadeyo in order to pass him, but Tadeyo went in front of him and started assaulting him.

Q. Yes, how?

A. They fought each other, and the fight moved to the place where I got them.

Q. Yes, how did it move?

A. They moved, because one was trying to run away from the other.

Q. Yes, who was trying to run away?

A. Silino was retreating. 10

Q. Why, this morning, did you say Tadeyo intended to run away and then turned round and struck another blow?

A. When people are fighting, they don't stay in one place, they move about.

Q. Yes, I know, but it is rather important to know who moved. This morning you said that Tadeyo hit Silino with a knobkerrie. You then said "Silino felt pain and struck with the point of the panga". You then said, this morning, "Tadeyo turned, Tadeyo intended to run away but then turned round and struck another blow". You now say it was Silino who ran. A. I say that. 20

Q. You have said two different things, haven't you?

A. They were both moving. When one saw that he was being struck severely he moved backwards, and so did the other.

Q. Now they moved, about, from here to the tree, did they?

A. They moved as far as from here to the tree. 30

Q. What we want to know is, who made the other person move, do you understand?

A. Silino was retreating and Tadeyo followed, and when Silino had prepared to strike with the panga, Tadeyo also retreated.

Q. Then you say it was after Tadeyo had been struck with a panga he ran away, then turned round and struck another blow? A. Yes.

Q. Now, whilst this was going on, the fight was moving from where you are to the tree, what were you doing?

A. I was watching to see what they were going to do, but after I had seen that one of them was covered with blood I ran, I thought, these people are going to hurt each other.

Q. Which one was covered with blood?

10 A. Tadeyo was covered with blood after he had been struck by that man.

Q. Where was the blood?

A. The blood was coming from the wound on his hand, where he had been struck.

Q. How far were you away when you saw that?

A. I was as far from them as where I am to those people on the form outside. Can't one see blood at that distance? (Witness indicates a distance of 10 yards).

20 Q. I am not suggesting you didn't see blood, I am merely asking where it was. This was a fight, a scuffle going on between one man with a knobkerrie and the other man with a panga, isn't that right? A. Yes.

Q. Who was getting the better of that fight, the man with the panga or the man with the knobkerrie?

A. They were both of the same strength, no-one seemed to be winning, or better than the other.

Q. Although Tadeyo was bleeding?

30 A. Although Tadeyo was bleeding, he did not lose.

Q. Then you say you came to stop the fight?

A. Yes.

Q. Why did you take hold of and push Silino?

40 A. I pushed him in order to stop him attacking the other man first, and I thought if he is a good-hearted man he will stop fighting; but I noticed that he didn't stop, instead he came and struck me with the panga, that is when I ran to Valaliyano for the stick, after I saw him passing by.

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Q. So you took hold of Silino in order to stop him attacking Tadeyo, did you?

A. Yes, I said "If there is anything wrong you have to discuss that at home".

Q. But you took hold of Silino because he was the attacker, didn't you?

A. Yes, he was the one who was very aggressive.

Q. That is why you took hold of Silino and not Tadeyo?

A. I did not take hold of him, I merely pushed him. 10

Q. Yes, you pushed him away. Did he fall over when you pushed him? A. He did not fall over.

Q. Now, I don't understand. Why did you run up to Valaliyano and get this knobkerrie?

A. Because he had stabbed me with a knife, and I thought I should go and get the stick and strike him with it in order to stop him.

Q. How far was Valaliyano from you?

A. He was as far from us as from the witness box to the steps. 20

(Counsel agree a distance of 15 yards).

Q. When you got your knobkerrie from Valaliyano, did you struggle for it, or did he just give it?

A. We did not struggle for it, I just snatched it and returned.

Q. Did you know Valaliyano before?

A. We knew each other, we come from the same area.

Q. Did you ask him for it? 30

A. No, I did not ask for it, I just snatched it.

Q. You rush up and grab someone's knobkerrie without even asking?

A. No I just snatched it and returned.

Q. Did he say "Who are you"?

A. No, he did not ask.

Q. Did he say anything?

A. He might have said something, but I didn't hear because I was running to go back.

Q. Did you have a panga at that time?
A. I had left my panga at the place where I had been pushed, it was lying on the ground.

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Q. So Valaliyano is telling lies when he says you rushed up to him and you had a panga? He is telling lies?

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Evidence

A. No, I had no panga when I went up to him.

No.30

10 Q. Answer the question. You heard Valaliyano say in the witness box that you had a panga at that time?

Joseph Duncan
Cross-
examination
by K.W.Wills
8th June 1962
continued

A. He did not see me at that time with a panga. It was dark then. I had left my panga on the ground where I laid it.

Q. When did it get dark?

A. It was dark, so dark that you could not see someone clearly at some distance away from you.

Q. Valaliyano wasn't a distance from you, was he? You were close together.

20 A. We were close together, but he was facing the other side and I came up behind him. He was holding the stick in his left hand (witness demonstrates), and I came up behind, and snatched and went off.

Q. I thought you said Valaliyano couldn't have seen your panga if you had one, is that right? A. Yes.

Q. Because it was so dark?

A. It was a little dark.

30 Q. If someone comes and snatches a knob-kerrie and then runs away, that person could see him a matter of a yard away, couldn't he?

A. Yes, he could be seen.

Q. Was it so dark that you couldn't see a yard?

A. No, one could see within a yard clearly, because I turned round quickly and I do not know whether he saw me, or not.

40 Q. The reason you gave for it was because it was so dark. Are you still maintaining Valaliyano couldn't see you properly because it was so dark?

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Joseph Duncan

Cross-
examination
by K.W.Wills
8th June 1962
continued

A. He saw me, for I was also able to see him, but if one is going at a long distance away, you could only see his figure.

Q. Valaliyano says he not only saw you, he also saw a panga.

A. No, I had no panga, I had left it at the spot where Tadeyo was.

Q. So you think Valaliyano was mistaken?

A. I do not know, perhaps he was mistaken.

Q. Now, what did you intend doing with this knobkerrie that you got from Valaliyano?

A. I went and struck the one who had stabbed me with the knife, with the thin part of it on the shoulder and somewhere near there, about the neck (witness indicates).

10

Q. Was it then the reason why you went to get Valaliyano's knobkerrie so that you could strike Silino?

A. I struck him with it because he had stabbed me.

20

Q. The reason why you went to get the knobkerrie was so you could strike him with it, wasn't it? A. Yes, because he had stabbed me.

Q. And then you take the trouble to go and get a knobkerrie, and when you get back you turn it round so that you can strike him with the handle?

MEHTA: The question now put is that he had to turn round the knobkerrie. When he snatched the knobkerrie from Valaliyano, how was

Q. When you snatched the knobkerrie from Valaliyano, did you take hold of the tin part, or the knob?

A. I held that by its head, because he had its head behind him.

30

Q. And then when you had taken it by its head did you change your grip? A. I did not change.

Q. Why not? A. That is how I held it.

Q. If you are going to seize a knobkerrie with the object of hitting somebody with it, don't you normally hit the knobkerrie with the thick end?

40

A. I have already said that I feared I would have hurt him with it, because I was there to stop the fight, I was not concerned in the fight, it was between him and Tadeyo.

Q. You have already said you went to get the knobkerrie because Silino had hit you with his panga? A. Yes.

Q. He had hurt you with his panga?
A. He stabbed me with it on the arm.

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Cross-
examination
by K.W.Wills
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continued

10

Q. And that is the reason why you went to get the knobkerrie? A. Yes.

Q. So that you could hurt him back? A. Yes.

Q. And then in order to hurt him back are you suggesting you hit him with the thin end of the knobkerrie?

A. I did not intend to hurt him seriously.

Q. When you were pricked with the panga, were you angry?

20

A. I was not angry, I thought it is my own look-out.

Q. If you were not angry, why did you go and get the knobkerrie from Valaliyano?

A. If I was angry at all I would have picked up my panga which was lying on the ground and strike Silino with it.

Q. Yes, you did pick up your panga.

Q. I did not pick it up, I picked it up to go away.

30

Q. I suggest you picked it up and went to get Valaliyano's knobkerrie so you would be doubly-armed? A. No, I did not pick up the panga,

Q. You have already said you went to get the knobkerrie so you could hit Silino with it?

A. Yes, because he had stabbed me with a panga.

Q. And you knew he had a panga?

A. I knew he had a panga.

Q. So you were going to fight a man with a panga by fighting with a knobkerrie, were you?

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Cross-
examination
by K.W.Wills
8th June 1962
continued

A. I could have protected myself with it in the same way as Tadeyo was protecting himself with the knobkerrie when Silino was striking him with a panga, but he managed to dispossess him of the panga and strike back with it.

Q. You were going to attack Silino with this knobkerrie, weren't you, you weren't going to protect yourself. You said you were going to hit him with it. A. Yes.

Q. Why are you talking about protecting yourself with the knobkerrie when the intention was to hit him with it? 10

A. If you are attacked by a lion and you have a weapon in your hand you have got to use that, you don't take chances.

Q. If you are going to attack a lion, you attack not with a knobkerrie but with something stronger, don't you? A. Yes.

Q. And you were going to attack Silino with this knobkerrie? 20

A. Yes, I should have fought with him with that in the same way as Tadeyo did, never mind if I were injured.

Q. You wanted to be injured, did you?
A. No, nobody is happy of being injured.

Q. Now, you said you got the knobkerrie to protect yourself, that's quite right, isn't it?
A. Yes.

Q. To protect yourself so when you hit Silino with a panga and he tried to hit you back you could then protect yourself? 30

A. I protected myself because if I was foolish I was going to die there.

Q. And what you got the knobkerrie for was to use exactly in the same way as Tadeyo used his, to ward off blows, didn't you? A. Yes.

Q. And you were going to attack Silino, weren't you?

A. Yes, because he did not do a good thing when he struck a person who was trying to stop the fight. 40

Q. What were you going to strike him with, if you were going to use the knobkerrie for warding off blows?

A. One does not depend on warding off the blows, but when you ward off a blow you must also strike at the same time.

Q. Against a man who is armed with a panga?

A. Yes, it is possible.

Q. Not very wise, is it? A. That is wise.

10 Q. Now, when you got this knobkerrie from Valaliyano you then returned to where Silino was? A. Yes.

Q. As you returned, what exactly was Silino doing?

A. He was struggling with Tadeyo, Tadeyo had dispossessed him of his panga.

Q. How was he struggling?

20 A. They were struggling. He had dispossessed him of the panga and they went on struggling. I do not know whether he struck him with it, or not.

Q. Whether who struck who?

A. I do not know whether Tadeyo struck Silino or not, but after I had returned I saw the wound on Tadeyo's head.

Q. I see. And you don't know whether Tadeyo had struck Silino? A. I do not know.

Q. So at that time Silino didn't appear hurt?

A. He didn't appear hurt. He was quite all right.

30 Q. So the position, when you came back from seizing the knobkerrie, was that Tadeyo had a wound on his head, a wound on his wrist, and Silino didn't appear to be hurt at all, is that right? A. No, Silino didn't appear to be hurt.

Q. And then you hit him twice, you say, with the thin edge of the knobkerrie? A. Yes.

Q. And what happened then?

A. Then he pushed me and I fell over.

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Cross-
examination
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continued

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Cross-
examination
by K.W.Wills
8th June 1962
continued

Q. He pushed you and you fell over?
A. Yes, I fell over.

Q. Is he a big man?
A. He was bigger and older than both of us.

Q. You were pushed down. Did you get up again?
A. I did not get up quickly. Before I got up,
Tadeyo came and struck him with the knobkerrie and
he fell down.

Q. So, whilst you were knocked down you say
Tadeyo came and struck Silino with a knobkerrie and
knocked Silino down? A. Yes, he knocked him down. 10

Q. Yes, what happened when you got up?
A. I got hold of Tadeyo by the arm and then ran
away, Tadeyo did not resist, he came with me.

Q. And you and Tadeyo went away together? A.Yes.

Q. And Silino followed?
A. As we were going along the path, Silino got up
and followed.

Q. The blow that knocked Silino down, was it a
hard one or what? 20

A. It was a hard blow, that is why it knocked
him to the ground. Even if you are using your
fist against someone else and you don't hit hard,
he can't fall over.

Q. You were just pushed to the ground, weren't
you?

A. Yes, I fell over, perhaps because I was not
standing firmly.

Q. So it is quite possible to knock someone
down without a hard blow? 30

A. But at the time I fell down I was not hit at
all, I was merely pushed, but I was trapped by
some grass and fell over.

Q. The blow which you say Tadeyo struck was a
hard one on Silino? A. Yes.

Q. How quickly did Silino get up?
A. He got up after we had left and we were
walking up the path.

Q. What happened to Silino's panga?
 A. You mean at the place they were struggling with it?

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Q. The last we heard of it, he had apparently been dispossessed of it?

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A. When I held Tadeyo by his arm in order to take him away he laid the panga down beside Silino.

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10 Q. Why did you take hold of his arm?
 A. I wanted him to stop fighting and that we should go away.

Cross-
 examination
 by K.W.Wills
 8th June 1962
 continued

Q. In fact, you helped him up off the ground, didn't you?

A. I did not help Tadeyo up. He is the one who knocked down Silino with the knobkerrie.

Q. Show how you took hold of his arm.

A. I held him like that (witness indicates) and I said "Stop, let's go". He wanted to resist and I held him firmly with two hands.

20 Q. Just look at photograph No.2 (handed to witness). Do you recognise that?

A. A person in a lying position like that is cannot be recognised. He is not seen clearly there.

Q. Does he look as if he has been injured?

A. He looks to be injured.

Q. He has got a frightful cut right across the bridge of his nose, across his face, hasn't he?
 A. No, I can't see that.

30 Q. Have a good look, don't turn over.

A. I can see that.

Q. It is a frightful cut, isn't it? A. It is so.

Q. You did that, didn't you? A. I did not do that.

Q. And you say it was done by Tadeyo with a knobkerrie?

A. I do not know whether it was Tadeyo who did it, or cut it at the time of the struggle for the panga.

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examination
by K.W.Wills
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continued

Q. It certainly wasn't done with a knobkerrie, was it?

A. I don't know. It might have been done with a knobkerrie or a panga.

Q. Look carefully. You see the cut right across the nose? A. It can be seen, yes.

Q. You think that might have been done with a knobkerrie, do you?

A. No, that can't be done with a knobkerrie.

Q. Look at photograph No.4, will you? (handed to witness). What does that show? 10

A. That is a man.

Q. It is a man's head, isn't it? A. Yes.

Q. Do you see the cut across there?

A. I can see that.

Q. Could that be done by a knobkerrie?

A. That is done with a knife.

Q. So if the story you told is correct, it wasn't done at the Bilila stream, was it?

A. Where did it happen? The fight started at Bilila itself. We did not fight on the path. 20

Q. You have described the blows struck against Silino as knobkerrie blows, haven't you?

A. At the time he fell down he was knocked down with a knobkerrie.

Q. And you heard the Village Headman say there was a trail of blood right from the stream to quite near Silino's house? A. I heard that.

Q. Whose blood was that?

A. It might have been Silino's blood, or someone else's blood, I don't know. 30

Q. You cut Silino at the Bilila stream, didn't you?

A. I did not cut him, I struck him with Valaliyano's stick.

Q. And your very first blow with the panga was that one where you hit him across the face, you went like that, didn't you? (Counsel demonstrates).

A. No, I was holding a stick.

Q. You had a panga there, didn't you?
 A. I laid my panga down on the ground.

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Q. Valaliyano saw that panga.
 Q. I had a panga, but I had laid it down on the
 ground.

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Q. How did Silino get this injury on the arm?
 A. I don't know.

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Court adjourns at 3.30 p.m.

Cross-
 examination
 by K.W.Wills
 8th June, 1962
 continued

10

The hearing was resumed at 8 a.m. on Saturday,
 the 9th June, 1962. All present as at
 previous hearing.

NICHOLSON: My Lord, the search party has
 returned from Kavala Village having executed the
 warrant.

Cross-
 examination
 by M.Nicholson
 9th June 1962

COURT: It would be competent to put to him
 anything that was found. If the defence doesn't
 want to call any of those witnesses, then the
 Court may do so.

Cross-examined Nicholson:

20

(The second accused warned he is still on oath)

Q. Let's talk about this panga that Valaliyano
 said you had. It is a very important point whether
 you had the panga in your hand at that stage or not.
 Now, Davison says you had the panga as well.
 Valaliyano doesn't just say you had a panga, he
 described the panga, a broad-bladed Portuguese
 type of panga. How did he know that if you
 didn't have it in your hand?
 A. He used to see it always.

30

Q. Is that the only panga you have?
 A. That is the only one.

Q. You see, the police got two pangas from
 your house at different times.
 A. The other one they got from my house I do not
 go about with it, I used to go about with the
 other one.

Q. From your garden can you see the place where
 the path crosses the Bilila stream?

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Joseph Duncan

Cross-
examination
by M.Nicholson
9th June 1962
continued

A. If you are up the hill you can see where the path crosses the stream, but if you are lower down you can't see it.

Q. Where is your garden? Up the hill, or lower down?

A. It is at the foot of the hill, on the side of the stream.

Q. Now, when Tadeyo was striking Silino with the knobkerrie was he striking him hard?

A. He was striking hard. 10

Q. Well, you see, we would imagine that would leave bruises and yet Dr. Bhima doesn't say anything about bruises. Are you sure that this is true, all this striking with a knobkerrie?

A. He was certainly striking with a knobkerrie, because he was using the knobkerrie that he had on that day.

Q. And did that have a ball at one end? A. Yes.

Q. And that was the end he was using, was it, the one with the ball? 20

A. He was striking with the head, yes.

Q. We have this from you: First of all he struck three or four times, he was striking him on the head and Silino was warding off the blows with his left hand. After that Silino then struck Tadeyo with a panga on the hand. After that Tadeyo turned round and struck another blow. You see, by that time one has got four or five blows struck by Tadeyo. Then we go on: "I ran and stood aside, when I saw Valaliyano passing by some distance from us. Tadeyo turned round and was striking Silino with his knobkerrie from behind. When Silino struck him with a panga Tadeyo was hitting him on the back and the back of the head and the arms. Whilst this happened I snatched the knobkerrie and then ran back. When I returned from there I found Silino's panga was in Tadeyo's hand, and Tadeyo was striking Silino with it. After that, Tadeyo came and struck Silino on the head with a knobkerrie. After that, Silino fell down, Tadeyo struck him another blow and yet another with a knobkerrie". You see, that is eight or nine blows at the least that Tadeyo struck with this knobkerrie, according to you, but you see, we have not heard from Dr. 30 40

Bhima about any blows, except blows struck by a sharp-edged instrument. Now, are you sure you are telling the Court the truth about that?

A. I am telling the truth.

Q. What happened to the clothes that you were wearing on this night?

A. They are the ones I am wearing now, except the shorts which have been given to me here.

Q. Are you sure about that? A. That is true.

10 Q. Now, this wound on your left shoulder, did that bleed?

A. It was bleeding, that is why the sleeve of my shirt is stained there (witness indicates). The sleeve is stained with the blood from that wound which was inflicted on me.

Q. When you went home, according to you, your wife didn't notice that anything had happened to you? A. No, I did not tell her.

20 Q. Didn't she notice the blood on the sleeve?
A. She didn't notice it.

Q. Now, this knobkerrie you carried, where did you drop that? A. Valaliyano's?

Q. Yes.

A. I do not know where it fell off from my hand, but it fell off at the same place where we struggled.

30 Q. You see, the police found the body, the police found the panga, and they went down as far as Bilila stream looking for other weapons and they didn't find anything else. Are you sure that you dropped the knobkerrie then?

A. I am sure it fell off from my hand just there. I did not drop it purposely.

Q. At one stage you said you feared that if you were taken by surprise that is the reason you put down the panga in the fight, you felt you might be compelled to hurt somebody with it?

A. I said that.

40 Q. Were you afraid that you might lose your temper? A. Yes, sir.

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Joseph Duncan

Cross-
examination
by M.Nicholson
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continued

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Cross-
examination
by M.Nicholson
9th June 1962
continued

Q. Have you got a bad temper?
A. I am short-tempered, yes.

Q. Now, you say you noticed Tadeyo covered with blood after he had been struck? This is in your evidence. After he had been struck on the right hand.

A. Yes, the blood which was coming from his wound on the hand.

Q. Would you look at the shorts, please? (Exhibit 5 handed to the witness). Are those the shorts he was wearing? A. These are the shorts.

10

Q. Can you see anything that looks like blood-stains on the front of the right trouser-leg? Can you? A. I see bloodstains there (witness indicates).

Q. That's the left trouser-leg, look at the other one?

A. There are no bloodstains on the right-hand leg, except on two places - no, three places.

Q. And that was from this wound when Tadeyo was covered with blood, was it?

20

A. The blood was dripping from his wound on the hand, but the blood with which he was covered came from the wound on the head.

Q. You see, you were talking about Tadeyo being covered with blood before ever he was struck on the head.

A. I meant that he was bleeding from his hand, and perhaps when trying to shake the blood away, his shorts got stained.

Q. You knew when you went up, did you not, that Tadeyo had been struck with a panga by Silino on the hand?

30

A. I saw when he was struck on the hand.

Q. That was before you put down your panga?

A. Before I put it down. I had it in my hand, then.

Q. Are you telling the Court that you put down your panga to deal with a man with a panga, who had just used it? A. Yes, I put it down.

Q. But you see, you told us that Silino had just used that panga?

40

A. Yes, he had already struck him on the hand with it, and when I pushed Silino he turned round and struck me on the arm. That is why I ran to Valaliyano to get the stick.

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Joseph Duncan

Cross-
examination
by M.Nicholson
9th June 1962
continued

Q. This blow on your arm, was that a hard blow?

A. No, it was not a very hard blow, because I was trying to avoid it, and he did not inflict a very serious wound.

10

Q. No, well, you see, I suggest if he had been determined to hurt you, he would have inflicted a far more serious wound than he did?

A. He was determined.

Q. And all he managed to do was this very superficial wound on your left arm?

A. Because I moved my arm quickly.

Q. You say that when you returned from going off to get the knobkerrie from Valaliyano: "I found Silino's panga was in Tadeyo's hand, and Tadeyo was striking Silino with it".?

20

A. At that time Silino had already struck Tadeyo on the head. That is the time I found Silino's panga in Tadeyo's hand.

Q. You didn't see the blows from the panga?

A. I did not see the blows.

Q. You say Silino was standing up bleeding as a result of the injuries inflicted by Tadeyo. What part was bleeding?

30

A. I did not see what part was bleeding, but I just noticed the blood.

Q. Well, you must have seen the part that was bleeding, if you saw the blood. Was it the head that was bleeding? A. I did not see.

Q. Now, you also said in examination-in-chief, that: "there was no other panga there, mine was where I had left it". Do you remember that? "Silino had nothing in his hands when I came back, Tadeyo had his own knobkerrie and Silino's panga", that's right, isn't it? A. Yes.

40

Q. And that is when you struck Silino with a knobkerrie, wasn't it? A. That is correct.

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Cross-
examination

by M.Nicholson
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continued

Q. When he was defenceless?

A. He was defenceless. He just caught hold of me and pushed me to the ground.

Q. Now, when you went back you say Tadeyo had the knobkerrie and the panga in his hand. Silino was defenceless. You ran and pushed Silino aside, is that right?

A. When I came back after getting the stick I struck him with the thin part of it, and he turned round and pushed me to the ground.

10

Q. You said this, you see, "Tadeyo had a panga in his right hand and a knobkerrie in his left hand. I ran and pushed Silino aside. Silino pushed me and I fell down". Now, this is the thing, you see. You wanted to stop the fight, didn't you? A. Yes.

Q. Surely the man to catch hold of was Tadeyo, he was the man with the knobkerrie and the panga. Silino had nothing. The man to stop was Tadeyo, was it not?

A. I caught hold of Silino at the beginning when he had a panga and was using it on Tadeyo.

20

Q. But you said that later on you ran and pushed Silino aside, this was after you had come back from Valaliyano. A. That was at the very beginning.

Q. You said then: "Tadeyo was still striking Silino with Silino's panga, it was dark, I can't know where the blows were landing". Did you hear them?

A. I did not see the blows struck, but I just saw the panga in his hand.

Q. Did you hear the blows being struck?

A. I did not hear the blows struck. Perhaps he was struck whilst I was on my way from where I went to get the stick from Valaliyano.

30

Q. Now, you see, you had come back and you had fallen down, and then you say Tadeyo was still striking Silino with Silino's panga?

A. He did not strike him after I had arrived back.

Q. So what you said in examination-in-chief was wrong?

A. I have said that after I had been to Valaliyano I found that Silino's panga was in Tadeyo's hand, but I did not see him strike any blow.

40

Q. Did you see any blood on the panga?
A. The blood could not be seen on the panga because it was dark.

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Q. You say Silino had blood on him, where was the blood?
A. The blood was on his shirt, but I did not see where the wound was.

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Evidence

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Joseph Duncan

Cross-
examination
by M.Nicholson
9th June 1962
continued

10 Q. Now, you say that after you left, Silino got up and followed you?
A. He was following us after we had got to the path.

Q. And you went a different way home to the normal way, to escape him?
A. Yes, we went home by a different way to escape him. It was him (indicating the first accused) who suggested that we should go by that way.

Q. Was that because you were afraid of Silino?
A. We were certainly afraid of him.

20 Q. I can't understand why, because between the two of you you had three trivial injuries. According to you, Silino had been struck eight or nine blows with a knobkerrie - in fact, more than that - eight or nine by Tadeyo and another two by you. You had seen Tadeyo with Silino's panga in his hand, and you had seen Silino bleeding. Later on, when you saw Tadeyo's wife, you told her that he had injured his friend "and we don't know whether he is going to live". A. I said that.

30 Q. Are you now telling the Court that you and Tadeyo were afraid of Silino?
A. We were afraid of him.

Q. But you knew that he had been so badly injured you didn't know whether or not he was going to live?
A. Because I noticed how hard the blows were struck on him.

40 Q. Why didn't you on the next morning go around to see how Silino was?
A. I took it that my friend, the one who lived near him, should go and see how he was getting on, because he was the one who was concerned in the fight.

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Cross-
examination
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continued

Q. Is the normal path from your village to your garden at Bilila stream the one going down fairly near Silino's house? Normally you go through Kavala Village No.2 to get to your garden by Bilila stream?

A. From my garden I go past Marko's house.

Q. Well, Marko lives in Kavala No.1, doesn't he?

A. Yes.

Q. Isn't Chabonga Village the other side of No.2 Village?

A. But there are different paths. There is one which goes alongside the stream, and that was the one I had taken, and that leads to Chabonga Village.

10

Q. Yes, but after you cross the stream you go up again and you go through Kavala No.2 village to get to Chabonga?

A. No, we do not go past Kavala 2 village, we just take the path alongside the stream to our home.

Q. Well now, when you went the next morning, very early, to the garden to scare birds, you say you went by a different path? A. Yes.

20

Q. Was that because you knew what you would find on the path leading from Kavala 2 Village to Bilila stream?

A. No, that is the normal path we use when coming down from the village.

Q. Was this fight over in a very short time?

A. It was over in a short time.

Q. Now, would you agree that when you arrived there was a little light, it was at dusk, just after sunset? A. Yes.

30

Q. Did it get dark very quickly, or does it just get dark when it is convenient to yourself not to see something?

A. We could see a little, we could only see figures.

Q. Your area is a very poor area, isn't it?

A. Yes, it is poor.

Q. The loss of three goats must be a very serious thing to anybody there?

40

A. But who gave a statement about goats? I did not mention goats in my statement.

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Q. You agreed with Mr. Wills that your young brother had had three goats killed by Silino; and what I am suggesting is the loss of three goats in a community like yours is a very serious loss?

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A. I did not make any statement about goats, nor that my goats were killed.

Joseph Duncan

Cross-
examination
by M.Nicholson
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continued

10 Q. I know that, but isn't the loss of three goats in your area s serious business?

A. It is not a serious matter if the goats have trespassed on his land.

Q. And had the goats trespassed?

A. Yes, it is said the goats trespassed at his house.

Q. But you see, in the same way, if pigs trespassed at his house would he be justified in killing them and keeping them?

20 A. That is why he was chasing it towards the village. He intended to kill it but he was not successful. Having failed to kill the pig, that is why he assaulted the children.

Q. Well, now, that's all very well if one is satisfied that the goats have trespassed on somebody else's land, but if you are not satisfied, what is the position then?

30 A. He can't kill any animal unless such animal has trespassed onhis property. You think that if I happened to meet you on the path and we never quarrelled before and without question we just started to fight?

Q. No, but you see, one might have to depend on the person who killed the goats for the knowledge that the goats trespassed, or not. He might not be telling the truth, he might have stolen them. Doesn't a situation like that sometimes lead to a lot of misunderstanding?

40 A. If the goats are killed in the bush, not in his property at all, then we know that he has killed them for nothing, but if he kills them within his area and drags them away, then we know that they have trespassed.

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Q. You say that when you arrived at Bilila stream: "I coughed, Silino went across the stream and went round Tadeyo to go up the hill". What do you mean by you "coughed"?

A. I coughed, because I knew that as they were in the middle of a quarrel they didn't see me, so I wanted to draw their attention to my presence there.

Q. Are you sure you didn't shout out "Beat him"?

A. No, I did not say those words.

Q. Because, you see, immediately after you did whatever you did, Silino dashed across the stream.

A. Do you mean that I told Silino to go and beat Tadeyo?

Q. No, what I am suggesting to you is that you were exhorting Tadeyo to go and beat Silino.

A. I would not do that because I did not know the reason why they were quarrelling.

Q. You see, what I suggest to you is that Silino found himself between you, saying "Beat him", and Tadeyo on the other side of the stream saying "If you cross you are going to die there", and his home lay past Tadeyo, and that he dashed across the stream, finding himself in this position, to get home.

A. He was failing to go across because the other man was preventing him on the other side, but when he saw me, he thought "There is someone now", and he crossed, that is why he went across.

Q. Why I think he went across the bridge in such a hurry was because he realised he was between two fires. Behind were you with a panga, a man whose young brother, a month before, had lost three goats because Silino had killed them, and what I suggest to you is that you shouted out "Beat him", and Silino thought it was time he got on his way home? A. I do not know that.

Q. You say that you saw Silino and Tadeyo fighting. When Silino prepared to strike with a panga, Tadeyo ran away. You were watching. After seeing that Tadeyo was covered with blood, you ran. The blood was coming from a wound on the hand, ten yards away, and then you went on to say "Can't one see blood at that distance?" It was light enough to see blood at that distance, was it? From ten yards away you could see blood on Tadeyo's hand?

10

20

30

40

A. Yes, there was still light to see at that distance.

Q. Are you sure you couldn't see what damage Silino had suffered? A. I did not see it.

Q. Later on, in answer to a question of Mr. Wills, you said "Silino was very aggressive".

A. Both of them were aggressive. Tadeyo was angry, and so was Silino.

10 Q. Was Silino aggressive? According to you, Tadeyo had struck four or five blows with a knobkerrie and Silino's reply to that had been a very small wound on Tadeyo's hand. That is hardly the picture of a very aggressive Silino?

A. Tadeyo was aggressive, because he is the one who was striking Silino, and Silino was trying to get away from him by moving backwards, and when he knew that he could not hope getting away from him, that is why he struck back. He knew that he was going to die there.

20 Q. In fact, he didn't die there, did he? He died further up the hill after he had been chased there?

A. At the place where we struggled with him?

Q. I am suggesting that he didn't die at that place, he died further up the hill at the place where you caught up with him?

A. I do not know the place where he died.

30 Q. Now, later on, you say you didn't mind if you were injured, and that was why you were prepared to go against Silino, he with his panga and you with a knobkerrie. Now, was that because you had lost your short temper?

A. No, I did not lose my short temper.

Q. Now, this knobkerrie you got for warding off the blows, when you returned you no longer needed it for that purpose, did you?

A. I do not know where it fell off from me.

40 Q. But when you returned from getting the knobkerrie, you no longer needed for warding off blows from Silino?

A. I was using it for warding off the blows.

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continued

Q. No, you weren't, you see, because Silino didn't have a panga.

A. Yes, Tadeyo had the panga.

Q. So, you weren't using it for warding off blows?

A. No, I just hit him twice with the thin end. He pushed me and I fell down.

Q. Now, you say Tadeyo laid the panga beside Silino and you then took Tadeyo away.

A. That is the time I had fallen down, when Tadeyo came and struck Silino with the knobkerrie, Silino fell down, Tadeyo struck another blow and yet another one and then laid his panga beside him. I then took Tadeyo away.

10

Q. When you took Tadeyo away you must have been fairly close to where Silino was lying down?

A. I was standing like where I am, and that end of the witness box is Tadeyo, and Silino was lying down like where the end of the interpreter's table is.

20

Q. That's about two feet?

A. Yes, after he had been struck he fell down there, because when I got up I just stood there.

Q. That was the last time Silino was struck, was it? A. Yes.

Q. Didn't you look at him then to see whether he was injured, and if so, how badly?

A. No, I did not look at him, I just got up, caught Tadeyo and went away.

Q. Weren't you interested in whether he was hurt? A. No, I did not see.

30

Q. Weren't you interested in whether he was hurt? A. I am saying that I did not look at him.

Q. I am not asking you whether you looked at him. I am asking you: were you interested in whether he was hurt?

A. I was not interested in whether he was injured, or not.

Q. Are you sorry that he is dead?

A. I am sorry that he is dead, because he was a relation of mine.

40

Q. At that time was Silino stirring, was he moving around, or was he lying very still?

A. I have already said that when we got to the path he got up and followed us.

Q. Yes, I know, but when you were going to take Tadeyo away, was Silino then stirring on the ground or was he lying still?

A. He was lying still.

10 Q. Why didn't you look to see whether he was badly injured?

A. We took it that as he was very aggressive if he got up there we were going to be involved in more trouble, that is why I got hold of Tadeyo and went away.

Q. It is difficult to see why, because you had a panga, Tadeyo had a panga and a knobkerrie, you had a panga and a knobkerrie, Silino had nothing. Now, why were you so afraid?

20 A. We were afraid of him because he was aggressive and his panga was laid down beside him. We were afraid of him and then we went away.

Q. If you were afraid of him and he was aggressive, the last thing to do was to give him his panga, wasn't it?

A. He gave it back to him by laying it down beside him.

30 Q. I am going to read a passage from your examination-in-chief, and a passage from cross-examination by Mr. Wills. This is after you have come back from getting the knobkerrie from Valaliyano: "I ran there, I struck Silino with the knobkerrie. It was the one I got from Valaliyano. I struck Silino on the right shoulder. Silino was standing up bleeding as a result of the injuries inflicted by Tadeyo". Now, this is what you said in cross-examination: "When I returned, Silino was struggling with Tadeyo. I do not know whether Tadeyo struck Silino or not. After I had returned I saw a wound on Tadeyo's head. At that time Silino was not hurt". Now, which is right? When you returned from getting the knobkerrie, was Silino hurt, or not?

40 A. When I came back from getting the stick I noticed that Tadeyo had Silino's panga and Silino was bleeding and the blood was running down his shirt.

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continued

Q. So when you said in cross-examination:
"Silino was not hurt", that wasn't right?

A. I do not know.

Q. Would you look at these four knobkerries,
please. (Four knobkerries handed to the witness).
Now, do you recognise any of those?

A. This is the one he had in the fight, he is
lying when he says that Silino cut it in the course
of the fight, but this is the one.

(The knobkerrie is now put in and marked
"EXHIBIT P.14")for identification)

10

Q. You say you remember this trail of blood
that went along at some distance from near the
Bilila stream to where the body was found? You
remember that? A. He said so.

Q. I suggest that what happened was, Silino was
running away, his arm having been injured?

COURT: I think I should intervene. This evidence
about knobkerries, if Mr. Wills wishes, he should
have an opportunity to cross-examine.

20

WILLS: My Lord, certainly.

Q. I suggest that what happened is, Silino, his
arm having been injured, bleeding badly, was
running away up the hill to his house, and that
he was pursued and struck down dead by a blow on
the head.

A. No, we did not pursue him and attack him
again. We went straight to Tadeyo's house, where
I left Tadeyo.

Q. Because, you see, whilst it is within the
realms of possibility that he might have been
able to get up and go on, it is not within the
realms of possibility with all the other wounds.

30

COURT: He said it was highly improbable.

NICHOLSON: My Lord, he was talking about each
wound individually.

COURT: I think medical men live in a world of
continual surprise, they are not prepared to say
anything is impossible.

Q. What I put to you is, it is so highly improbable that Silino could run on with those three head wounds, that your story about his getting up at Bilila stream and coming on after you is hardly credible?

A. It is true, sir, that he was following us, and we were escaping him by going round to our house.

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10 Q. You heard the evidence, and the body was found away up the hill, more than a quarter of a mile, according to the police. You heard from the evidence there was a blood trail from the blue-gums, from here to the D.C.'s house, which is a long way, and then you heard the doctor's evidence of the three terrible wounds he found on this man's head. It surprised him, as a medical man, to accept that after receiving all those wounds, Silino could have gone very far.

20 If you are telling us all you know, Silino must have received all his injuries down at the stream yet you are asking the Assessors and the Court to believe that, with all these injuries, he was able to walk more than a quarter of a mile, up the hill, carrying his panga, then he dropped it, and walked another 33 yards before he fell?

30 A. I am saying that on oath, that he himself walked up the hill and fell down where his body was found. That is from the stream. No-one else took him there.

Q. Very well, then he must have received all the injuries down at the stream?

A. Yes, perhaps he received them there.

Q. Who inflicted those injuries?

A. I am saying that it was Tadeyo who inflicted these wounds because he is the one whom I found holding a panga after I returned from getting the stick from Valaliyano.

40 Q. It is either you, or Tadeyo, not some unknown third person? A. That may be so.

Q. It wasn't you?

A. It wasn't me, I am denying that.

Q. Nobody else you can suggest? You say Tadeyo? A. There were only two of us.

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Q. Are you asking us to accept, in the course of the incident, because Tadeyo had a panga these terrible injuries were inflicted on Silino by Tadeyo?

A. Yes, I am asking you to believe that, because at that time my panga was lying down on the ground.

Cross-examined Nicholson (continued)

Q. What I suggest to you is that you and Tadeyo ran after Silino and attacked him at the place where he was found dead?

A. I have denied that on oath. I said that we did not follow him up the hill and finish him up there, but we parted at the stream and went off to the village.

10

COURT: You heard that one of these blows fractured the skull and damaged the man's brain. The doctor's view is that would cause concussion and probably unconsciousness. Even for a lay person it is hard to accept that a man with three severe head injuries could walk a quarter of a mile, up a hill, carrying a panga.

20

A. But he walked up the hill by himself, as we were running away.

COURT: It may not be absolutely impossible, I suppose.

A. It is true, sir, he walked up the hill himself.

Q. Anyway, the position is that at the end of the fight you still had your panga. It may have been on the ground but you still had your panga somewhere near, and Tadeyo had Silino's panga, that's right, isn't it? A. Yes.

30

COURT: Isn't it the case, in the course of an attack by you and Tadeyo on this man, he had the injuries from which he died? A. That may be so.

COURT: You both hit him and then he was found dead?

A. We did not know that we were striking him, we just thought that we were defending ourselves in a fight.

Examined Court:

Q. You both had a fight with him and he was found dead, and you thought you were defending yourselves?

40

A. Yes, we were defending ourselves there.

Q. What it boils down to is this: You, Tadeyo and Silino had a fight at the foot of the hill. Later he was found dead from these injuries, and you were defending yourselves?

A. Yes, we were defending ourselves, sir.

COURT: Before re-examination, Mr. Wills, if you are so advised, you may cross-examine on the knobkerrie.

10 WILLIS: Before the knobkerrie is produced, My Lord, I have to show it to my client and get further instructions.

(Mr. Wills consults his client outside the Court - the Court continues to sit).

Cross-examined Wills:

Q. Now this knobkerrie you say Tadeyo had used in the fight, had you seen it before the fight? A. I had seen it with him.

Q. Before the fight?

20 A. I saw it on the same day the fight took place, and I knew it there.

Q. How did you know it there?

A. I knew it because we were walking together.

Q. Before that day had you seen it?

A. I had not seen it before that day.

Q. So, you would recognise a knobkerrie, although you are quite incapable of recognising whether there was blood on a panga, is that right?

A. Yes, I recognise it because I saw it.

30 Q. You recognise it because this is the knobkerrie which Tadeyo's wife brought to him, isn't it? A. Yes.

Q. That is why you recognise it?

A. She brought it here.

Q. Yes, she did, but it wasn't the same one that was in the fight?

A. It is the same one. If it is not this one, where is the one that was in the fight?

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by M.Nicholson
continued
Further
cross-
examination
by K.W.Wills
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continued

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Cross-
examination
by K.W.Wills
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continued

Q. That is not the answer to the question. Tadeyo will answer that in Court. If your story is right and this is the one Tadeyo hit eight or nine times, finishing off with the one on the forehead, you would expect some blood on it, wouldn't you?

A. How could one expect to see blood on it, it is a blunt instrument, it did not cut the skin.

Q. But I thought you said Silino was bleeding?

A. Yes.

10

Q. And you said the last blow was hit on the forehead? A. Yes.

Q. Now, you have seen from the photographs I showed you the injuries which Silino suffered from, haven't you? A. I saw the wounds.

Q. If these blows had been inflicted when the last blow, as you say, was struck by Tadeyo, wouldn't you expect blood on it?

A. He might have washed it. How do you know?

Q. It is rather difficult to wash blood off anything, isn't it?

20

A. You can easily wash away the blood. How did he wash it away from his shorts? What about his shirt, which was heavily stained with blood.

Q. I understood you found blood on his shorts?

A. His shirt was covered with blood but he managed to wash it away.

Q. Now, I suggest to you that the knobkerrie which Tadeyo had in the fight was something like that (Counsel shows the witness another knobkerrie). It had a curved head like that?

30

A. No, no, no. It is that one, the first one.

(The second knobkerrie is now put in and marked "EXHIBIT 15" for identification).

Re-examination Re-examined Mehta:

Q. Now, this business about Silino killing goats of your brother, do you know how long before did that happen? Before this incident took place.

A. I think it was one full month later.

Q. Now, where were these goats? With you, or with your brother?

A. The goats were at my mother's place, at Tadeyo's village.

Q. Did you live there at that time, or at Chabonga Village.

A. I was living at Chabonga Village.

Q. Do you have your own property apart from your brother's property, separate from your brother's property?

10

A. I have not got my own separate property, it is the same property.

Q. So, these goats could be considered as your property as well, could they?

A. Yes, your brother's property is yours as well.

COURT: The goats were common property, is that what you are saying?

20

A. It is his property, but whenever you are in need and you ask him for help he will certainly help you.

Q. And where have you got your own goats, in Chabonga Village, or Kavala Village?

A. I have no goats.

Q. Now, did you ever speak to Silino about this goat business?

30

A. I went to ask him, after I had left my garden I went to his house and said "Why have you killed the goats", he replied "They have been trespassing at my house, they have been damaging my flowers".

Q. Yes, did anything else happen then?

A. That's all, I didn't say anything else, I went away.

COURT: Is it a recognised custom in your community that trespassing animals may be killed without more?

40

A. I do not know what he thought about it, but if goats trespass in a garden you can kill them and it is no offence.

COURT: That is a recognised custom in the local courts in the community?

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continued

A. Yes, it is. It is the Chief who gives such instructions that all goats should be kept somewhere and not be allowed to wander about, and if they are killed that is no offence at all.

COURT: What about the bodies and skins of the animals?

A. If they went about in the streams and hills, that is all right, but if they trespass in the gardens they have to be killed, and the owner of the goats goes to collect them, skin them and enjoy the meat.

10

COURT: And on this occasion you enjoyed the skins and the meat? A. Yes, we did.

Q. I am going to ask you questions to clarify matters which are ambiguous, or not clear.

A. Because you are asking the same questions.

Q. No, there are certain points which you may not appreciate but which in my opinion are ambiguous or not clear. I shall not take very long. You said that Silino crossed the bridge after he had seen you and you said that he was not frightened of you?

20

A. He was not afraid of me.

Q. Was it just a sort of coincidence, a casual walk of his from Kavala No.1 to No.2, or was he running, showing a sign of being frightened of you, or frightened of Tadeyo?

A. He did not cross as if he was frightened of me, but he crossed in the normal way and went round the man who was on the other side, to avoid him.

30

Q. In your evidence-in-chief you first stated that when Silino crossed the bridge he went to attack. Immediately after that, when you were asked in your evidence-in-chief "When Silino crossed the bridge who attacked who first?" you said "Tadeyo attacked Silino first". Now, what made you think that Silino was going to attack Tadeyo when he crossed the bridge?

40

A. It is because of these repeated questions and one is bound to forget.

COURT: One does not readily forget the truth. What is the truth of the matter. Did Silino appear to you to attack Tadeyo, or did Tadeyo appear to

you to attack Silino?

A. Silino crossed and went round Tadeyo, to one side, going past him, but Tadeyo is the one who went in front of Silino and started to fight there.

COURT: If he hadn't done that, Silino would have got away up the hill?

A. Yes, he would have gone away, he intended to go away but because he went to stand in his way.

Q. You have stated that Tadeyo hit Silino with his knobkerrie three or four times in the beginning, and later on Silino hit Tadeyo with his panga on his hand. Now, will you please tell the Court, if you know, exactly as to when Tadeyo hit Silino with his knobkerrie what part of the body did he hit?

A. When people are fighting each other you can't at the same time see exactly where the blows are landing, but they were both fighting each other.

COURT: If what you say is correct, Silino was defending himself from Tadeyo?

A. Yes, he was defending himself from Tadeyo, but having seen that Tadeyo continued to assault him, that is why he replied by striking with the panga.

COURT: He had the advantage of a superior weapon, but from what you say he was forced to use it because of the continued attack from Tadeyo?

A. Yes, that is right.

Q. Now, you have informed the Court that the knobkerrie which you snatched from Valaliyano you dropped it somewhere near where you struggled. Do you know, or remember, whether it was on the path or in the bush?

A. It dropped in the bush, just where we were fighting each other.

Q. Now, which path did you usually use to go to your garden from your village. Is it the one where you fought, or the other one which you described, which goes along the stream?

A. There are two paths. One goes past Marko's village and the other one goes alongside the stream, and it is up to you to choose which one you are going to use.

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continued

Q. Which one did you usually use?
A. You can choose whatever you feel like choosing. You may feel "I will take the short cut", or "I will take the longer one."

Q. Which is the short cut, then?
A. The short cut is the one which goes past Marko's village.

Q. And which path did you usually use?
A. When coming from my village I take the one which goes past Marko's village.

10

Q. And going back?
A. When going back I sometimes take the one which goes alongside the stream, the one I took on that day, or go by the same one past Marko's place.

Q. You said "On that day", the path which you followed - which day?
A. The one I took when I found those people fighting, that is the one I was taking.

Q. The path where you saw Tadeyo and Silino fighting, when the fight took place, is that the usual path you use, or not?
A. One never has one particular path to use every day, or always. It is a matter of choice. You can say "today I will go by this one", or "I will go by that one".

20

Q. Usually when you are going every day to one particular spot you follow one particular road more often than the other. Now which path did you use more often, to go to your garden from the village?
A. Both of them. Sometimes we go by the other one and sometimes by the other.

30

Q. You are saying that Silino was your relation. What relationship did you have with Silino?
A. Silino was my cousin, he was the son of my mother's brother.

Q. You have already informed the Court about the two blows which you struck with the knobkerrie. Did you strike any other blows apart from those two, or not?
A. I did not strike any other blows at that time.

40

WILLS: Your Lordship, I would ask permission to recall my client on the issue of the knobkerrie.

COURT: Yes, I think you should have the opportunity. Leave to recall.

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NO. 31

EVIDENCE OF TADEYO KWALIRA (Recalled)

Defence
Evidence

D.W.1. TADEYO KWALIRA (Recalled)

No.31

(Warned he is still on oath)

Tadeyo Kwalira
(Recalled)

Examined Wills:

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10 Q. Now, Tadeyo, I am only asking you questions about this knobkerrie which has been produced in Court. You must therefore be very careful when you answer my questions, to answer them only with reference to the knobkerrie.

(Exhibit 14 now shown to the witness).

Q. Is this your knobkerrie? A. It is mine.

Q. Where did you get it?
A. I got it from Thinde.

Q. Where is Thinde?
A. At Matandani, where I had gone to the hospital.

20 Q. Was that before, or after the fight?
A. After the fight.

Q. When you got it at Thinde what did you do with it?
A. I went with it straight to Ncheu.

Q. When you surrendered yourself to the police had you got it then?
A. I had it then, when I surrendered myself to the police.

30 Q. What happened to it?
A. There I left my coat, the one I am wearing now, my hat, and the knobkerrie at the police-station, and I was brought to the prison cell.

Q. Did you see this knobkerrie again after you left it? A. Yes, it was brought to me there.

Q. Yes, who by? A. The Inspector brought it there.

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Tadeyo Kwalira
(Recalled)

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continued

Q. Yes, did you keep it in your cell, or not?
A. When it got me there I took my shirt and the knobkerrie and handed them to my child who had come with my wife, and said "Take these back home, I have got many things to look after here".

WILLS: Your Lordship, there is one other question I want to ask, whether within the terms of reference, I want to ask him to compare this knobkerrie with the one in the fight.

COURT: I think that is quite reasonable. 10

Q. In the fight you had a knobkerrie, can you tell us in what respect it was different to this one?

A. It was like the other one (witness indicates Exhibit 15).

Q. Do you mean the head was like that? (As Exhibit 15). A. Yes, its head was like that.

Cross-
examination
by M.B.Mehta

Cross-examined Mehta:

Q. Now, when you left your village to go to the hospital did you carry any knobkerrie with you? 20

A. No.

Q. Didn't you know that it was a long distance from your village to the hospital?

A. Yes, I thought that it was a long distance to go there.

Q. And isn't it true that when you have to go a long distance you usually take some weapon with you, the way you took a knobkerrie whilst you were going to report the matter to the Village Headman?

A. Yes, because I thought I might go to my elder brother first, and then ask him to take me there. 30

Q. How many days did you expect to be away from your village?

A. I did not know how long I was going to stay away from my village. I did not know whether I was going to stay there or to come back quickly.

Q. Would you look at this knobkerrie? (Exhibit 14 shown to the witness). Do you see any deep cuts on this knobkerrie?

A. No, I do not see any, there are none. 40

Q. Will you please study it carefully, where the label is tied?

A. This is the mark which has been there since it has been smoothed.

Q. Doesn't it look as if it has been chipped off? A. No, that is not a cut.

Q. Now, you have said that the knobkerrie which you were carrying on the day that the fight took place was like this? (Counsel indicates Exhibit 15). A. Yes, it was like that.

Q. When you were asked to describe your knobkerrie you never said that the head was bent?

A. I just said that it was a small knobkerrie that I had brought with me. I did not say that the head was curved.

Q. Why didn't you say that?

A. I indicated that its head was as thick as my forearm.

Q. You took pains to give us the diameter of the head, the length, and everything. Why didn't you say it was curved?

A. I left that out, I did not say that.

Cross-examined Nicholson:

(Another knobkerrie is now put in and marked "EXHIBIT P.16")

Q. Would you have a look at this one, please? Is it yours? A. This is not mine.

Q. Is it not? Is that not yours, that one?

A. It is not mine.

Q. Look at it closely, will you?

A. I have looked at it. It is not mine.

Q. Do you see some stains on that?

A. Yes, I see them.

Q. Do they look like dried bloodstains to you?

A. Yes, they look like dried bloodstains. This one may be Joseph's knobkerrie. I think this is the one he got from Valaliyano.

Re-examined Wills: - No re-examination.

In the High Court of Justice

Defence Evidence

No.31

Tadeyo Kwalira (Recalled)

Cross-examination by M.B.Mehta 9th June 1962 continued

Cross-examination by M.Nicholson

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In the High
Court of
Nyasaland

Defence
Evidence

No.32

Valaliyano
Chilodzeni
(Recalled)

Examination
by Court
9th June 1962

COURT: The Court will recall Valaliyano, unless
the defence wishes to call him?

MEHTA: No, Your Lordship.

NO. 32

EVIDENCE OF VALALIYANO CHILODZENI
(Recalled)

P.W.4. VALALIYANO CHILODZENI (Recalled), Christian
sworn, states:

Examined Court:

(Exhibit 16 shown to the witness)

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Q. Have you seen that before?
A. This is my first time to see it.

Q. It is not yours?
A. It is not mine, not the one he snatched away
from me.

Q. Have a look at the other two.

(Exhibits 14 and 15 shown to the
witness).

A. It is not among these.

NICHOLSON: My Lord, there is one more.
There were four, in fact, found, and three
put to him.

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COURT: Very well, he may see that.

(A further knobkerrie is now put in
and marked "EXHIBIT P.17")

(Exhibit 17 shown to the witness).

A. It is not this one either.

COURT: Any questions?

MEHTA: No questions, Your Lordship.

COURT: Are the defence calling any witnesses?

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WILLS: No, Your Lordship.

MEHTA: No, Your Lordship.

In the High
Court of
Nyasaland

CLOSE OF THE CASE FOR THE DEFENCE OF BOTH
ACCUSED

Defence
Evidence

No.32

NICHOLSON: My Lord, there is one thing I am wondering about. The last four exhibits, how are they going to be produced?

Valaliyano
Chilodzeni
(Recalled)

10 COURT: These are articles alleged recognised by the protagonists, I don't propose to go any further into the matter.

Examination
by Court
9th June 1962
continued

Court adjourns at 10.10 a.m.

Court resumes at 10.30 a.m.

Nicholson addresses the Court

Wills addresses the Court

Court adjourns at 12.30 p.m.

The hearing is resumed at 8 a.m. on Monday, 11th
June, 1962. All present as at previous hearing.

Mehta addresses the Court

In the High
Court of
Nyasaland

NO. 33

COURT ADDRESS TO ASSESSORS

No.33

The Court now addresses the Assessors, as follows:-

Court Address
to Assessors

11th June 1962

Gentlemen Assessors, you have now heard all the evidence for the prosecution and for the defence over a period of days, and you have enjoyed the advantage of hearing learned Counsel for the prosecution and for both the accused persons summing up, and the time has arrived when I must ask you to answer certain questions. Before you answer these questions I must advise you as to the standard of proof. Our law assumes that every person is innocent until proved guilty and to show a person is guilty the prosecution must adduce facts acceptable beyond a reasonable doubt. Gentlemen, we must approach the standard of proof in a commonsense way. It is not satisfaction beyond an absolute doubt, and if it is a mere fanciful or remote possibility, possible but unlikely or very improbable, then you could reject that possibility unless you have in your mind a reasonable doubt. All sorts of vague conjectures and speculations can be made about a case like this, flights of fancy and imagination. The standard you might have in your mind is when pursuing your own serious affairs you would not act until you were satisfied so as to be sure, based on an estimation of facts. You see what I mean, it must be more than a probability, it need be less than a remote possibility. You will no doubt come to the conclusion that one of the most important areas of fact is the credibility of the witnesses in this case. After all, we must decide whether a man is telling the truth or not. We cannot go on to decide about the facts until such time. I am going to put to you something about the little boy Davison for your attention. Of course, whatever I say is subject to your own opinions, and the first thing is that he gave his evidence not on oath and you would not be entitled to convict upon his evidence unless it were corroborated. You might think there was corroboration for his evidence, if you accept he was there at the time, but you still have to decide whether he is telling the truth or not. It may have occurred to you this little boy cannot possibly be telling the truth. If you accept the evidence of Valaliyano, and he was as independent a witness, in my opinion, as you would be likely

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to get in this case, then this little boy would have In the High
to have told this Court a deliberate untruth. Valal- Court of
iyano said he had a panga and the boy said he did not. Nyassaland
A boy of tender years was warned to tell the truth
and if found out telling a deliberate lie, what
can you consider? The second point I invite your
attention to about Davison is what he alleges he
heard. He alleges he heard a whole series of
words, a conversation, between his father and the
deceased, speaking in low tones at a distance,
10 you saw, of 90 to 120 yards. Is that distance
correct? Valaliyano said he had come 70 yards
from the bridge over the stream, in his estimation,
when Joseph snatched the knobkerrie, then he
walked 150 yards before he saw or met Davison,
that would be 220 yards. That, of course, puts
Davison, whom he saw coming down the hill, much
further away than Davison alleges. You might well
consider that Davison, in relating he heard this
conversation, might be telling us a pack of lies.
20 Remember he is a young boy living with his father,
who is an accused person, and you might think it
was inconceivable that when his father came back
that night he did not hear something of it. He
might be under his father's domination and giving
evidence favourable to his father. One way of
testing a witness, of course, in cross-examination
is to ask him the sequence of events. This little
boy alleged he saw two blows struck by the
deceased on his father. Asked which one was
30 first, he could not say, then he conceded he
didn't see the blow on the hand but merely saw
that injury at home. Finally, Valaliyano said it
was dark and even the accused persons said it was
dark. How could this little boy, if it was dark,
see what he alleges he saw at a distance and must
we accept he saw it? You might think, in your
opinion, this little boy's evidence is utterly
worthless. You might even consider it was con-
spired. You have, no doubt, also in mind the
40 importance of the panga which was found. Whose
panga was it? You have heard the little boy say
that the deceased had the panga, but you might
accept possibly this would not carry any weight.
You have heard the two accused persons accuse
each other. They cannot both be telling the
truth. You might think from their many contra-
dictions that neither is reliable. It is they who
say the deceased had a panga. Is there anyone
50 who says the deceased didn't have a panga? You
will remember the deceased was coming down the

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No.33

Court Address
to Assessors
continued

11th June 1962

In the High
Court of
Nyasaland

No.33

Court Address
to Assessors
continued

11th June 1962

hill; according to his brother Marko, he was seen approaching the place where next day his body was found. It was after sunset, according to Marko, and the evidence is that death occurred some time after sunset. Marko said he met him 200 yards from the stream. Of course, Marko was the brother of the deceased, but you might consider he was not involved in this dispute in any way beyond his relationship. His evidence, you might think, has not been challenged substantially beyond the panga, and you may remember that Marko said his brother was unarmed when he approached the place. Marko said the panga found beside the body was not his brother's. Marko produced to the police officer a panga from under the deceased's bed and said this was the deceased's panga. The only other person to speak independently was the Village Headman. This Headman said there was no dispute between Tadeyo and the deceased. This is curious. A headman should be aware of a dispute. You might think perhaps he was minimising it. He said he thought the panga was Silino's. He identified, if you will remember, a leather handle, short, with a sharp point. He was not closely examined as to how he identified this panga, whether he had seen it closely or what marks were on it. The panga found under the bed, you remember, had a leather handle and a sharp point so that, gentlemen, if you were to accept Marko's evidence, the deceased approached the place where he was killed unarmed. If that was so, the whole defence case you might consider where of provocation or self-defence, would almost fall to the ground. Marko was examined and cross-examined on the panga and he was quite positive. I have already warned you what the accused persons said out of Court is not evidence against the other. What they say in Court against each other is evidence, but of course you have to be very careful about it. You have to regard them as accomplices, each with an interest to shed the blame and you must look for corroboration. Of course, there is ample corroboration, you might think that they were there, that nobody else was there, and there was a fight, because their own admissions on these points might corroborate accomplices. But you have to consider if they are truthful. I should also issue, I think, a special warning about the evidence of the accomplice's wife, Tadeyo's wife, evidence which is opposed to Joseph, and the evidence of the

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little boy Davison, the son of Tadeyo, you have to accept with very great care, against Joseph. Possibly these persons should have the status of accomplices.

In the High
Court of
Nyasaland

No.33

Court Address
to Assessors
continued

11th June 1962

10 Next we must approach the case of each
 accused person separately although they are
 tried together they must be decided upon
 separately. Before I go on to the case, I
 offer for your consideration the medical evi-
 dence in this case. You will have no difficulty
 in coming to the conclusion that Silino was
 killed by a series of blows. It is alleged by
 the accused persons that all the injuries must
 have been inflicted down near the stream. No-
 one else was there. You might consider, of
 course, one or other or both of the accused
 inflicted these blows. They allege this man,
 with these injuries, came 400 yards, or a quarter
 of a mile, up the hill carrying a panga. Well,
20 you have seen these injuries in the photographs,
 and you might consider them carefully. You
 heard the doctor. He said the bone had been
 exposed and injured and the skull fractured.
 He would expect a man to be unconscious. The
 blow across the nose would be sudden and cause
 almost blindness. The blow on the neck would
 have bled, have caused death by bleeding, but
 the man could have walked. You will remember
 the doctor said it was not impossible for a man
30 to walk and he would not give his opinion that
 it was impossible for the deceased to walk.
 Gentlemen, it is for us and not for the doctor
 to say whether this man could have walked or
 not. The doctor is here to assist us and we
 are here to decide on a standard of proof. Do
 you consider that having received these three
 head injuries this man could have walked up the
 hill 440 yards carrying a panga? You, applying
 your ordinary experience of wounds and of what
40 goes on in your community, having heard the
 doctor and having had suggested to you the
 possibility that this man walked up the hill
 with these injuries after having been knocked
 to the ground, do you consider there is a
 reasonable doubt that he could have done so, or
 is it merely a vague possibility? The evidence
 that he walked up the hill is from two men who
 have contradicted each other and who were both
 involved somehow down at the stream with the
50 deceased. There is no evidence that this body

In the High
Court of
Nyasaland

No.33

Court Address
to Assessors
continued

11th June 1962

was dragged up the hill. If the accused persons left the blood-trail you would expect the blood-trail would go on beyond the body. The blood-trail led to the body, it is said. Such an inference, if you accept that he could not walk after infliction of all the wounds, would depend on circumstantial evidence. Circumstantial evidence is not like an eye-witness, it cannot tell lies. Of course, it can be misconstrued. If you construe it that this man could not have walked with all these wounds, then you would be forced to this position, that after infliction of some injuries at the stream this man walked up, bleeding, and was destroyed where he was found, by these wounds on the head. If that were so, the case presented to you by the defence would be entirely wrong, and if you accept that, the defence case would collapse. You will have no difficulty, I think, in coming to the conclusion that these injuries were inflicted by one or other or both of these accused men. You must ask yourselves whether it was one or the other, or both. If you are unable to say which one or both, then if you consider these men were there assisting, comforting and concerning each other with the attack, both in on it, then they would both be guilty of this offence. If you consider there was a joint assault on Silino, first by one and then by the other, or both together, but you cannot say which one inflicted the fatal blows, they were there each by their persons supporting the other, one diverting the attention of Silino while the other struck him, one intervening with his hands and body or a weapon while the other struck him, one supporting and comforting by words or action, then both would be guilty of the same offence although only one, in fact, could inflict the fatal blow or blows. Of course, it is not essential that these men had a previous plan to attack, a common intention could appear from both of them from their actions. Of course, if you have a case of a body of a person obviously murdered and two men are found standing over the body, and obviously only one person has inflicted the wound and neither will confess to it and there is nothing to sway the balance one way or the other both these men have to be acquitted because the Crown has not been able to show beyond a reasonable doubt which one did it. You might consider this is not such a case.

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In the High
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Nyasaland

No.33

Court Address
to Assessors
continued

11th June 1962

10 The case against Tadeyo presented by the
Crown is that he had opportunity and had a
motive and that he saw or could have seen Silino
coming down the hill from his house. You will
remember that when that was put to Tadeyo he
said "No, he must have come along the stream".
Marko's evidence was he came down the hill. You
may wonder why it was that a man with a grievance
met, by a coincidence, the other party to the
grievance at such a convenient place. You have
heard Tadeyo concede he was there and Joseph was
there, but he asked you to accept it was not he
who inflicted the blows. He further asked you
to infer there was provocation. Provocation
would be if there was a wrongful act or insult
offered to Tadeyo by Silino sufficient to
deprive an ordinary person of the community of
the power of self-control sufficient to induce
him to assault Silino, and his story is, which
20 you must consider, that Silino and he entered
into a fight and Silino struck him with a panga.
You have heard the medical evidence and you have
heard what Tadeyo said. It is for you to decide
whether any such injuries, if they were inflicted
by Silino, could amount to provocation, but you
would not be entitled to accept provocation if the
retaliation was out of proportion to the injuries
inflicted. If you were to consider that there
was provocation by blows you would also have to
consider that if in retaliation these six
30 injuries were not in excess. Provocation by
striking the children, of course, is not sudden.
You might also consider whether Tadeyo was acting
in self-defence. He says he had a knobkerrie,
the other man had a panga. How was it that the
other man got injured by a panga? Tadeyo says
it was Joseph. If you consider that Tadeyo in-
flicted these injuries in self-defence, in an
attempt to defend himself, you will have to
consider if he went beyond an honest belief in
40 self-defence. Again, of course, if the actual
slaying took place partly up the hill none of
these arguments, you might think, will have so
much weight.

The case against Joseph is that he had
opportunity. You might think any motive Joseph
had about the offence is rather remote. Would
he harbour ill-will for such a long time? There
is very little evidence, in fact no direct evi-
dence, that Joseph knew of the attack on the

In the High
Court of
Nyasaland

No.33

Court Address
to Assessors
continued

11th June 1962

children. Well, of course, there was the remarkable coincidence that he happened to be there at that particular time. He was seen by Valaliyano to run towards the scene of the struggle carrying a panga and a stick. You have to consider if that suggests an intention to involve himself in the fray. The provocation which Joseph put forward was that his brother-in-law, a relative, was being attacked. Assuming there were two of them, Joseph and Tadeyo, both armed with sticks and one with a panga, and the other man had a panga and he wounded Joseph, would that be a sudden wrongful act causing Joseph to lose his self-control and assault Silino? If Joseph in his turn assaulted Silino with a panga, was his retaliation out of proportion to the provocation? If Joseph was acting defending himself, if he inflicted these injuries, was it beyond an honest belief of self-defence? Was Joseph there aiding and abetting, assisting Tadeyo in his fight with Silino? He says he did not inflict the injuries. Do you consider also his case is self-defence if you find the assault took place up the slope? These are all the points I propose to put forward to you. I have to ask you some questions :

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No.34

NO. 34

Opinions of
Assessors

OPINIONS OF ASSESSORS

11th June 1962

Q. Do you consider these two men made an attack or not on the deceased, the one aiding and abetting the other?

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1st Assessor - V.H. BENI CHISEU:

A. Yes, I am of the opinion that they were together aiding and assisting each other in assaulting the deceased.

2nd Assessor - MILLION SEMU:

A. I am satisfied it is true.

Q. What is true?

A. That the two were determined to assault the deceased.

3rd Assessor - YOUNGSTER SEMU CHILIPA:

A. I believe it is true that both assaulted the deceased.

Q. Now, I am going to ask you, is it possible for you to make up your minds which one inflicted the blows?

In the High
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Nyasaland

1st Assessor:

No.34

A. Both of them aided each other in inflicting the blows.

Opinions of
Assessors
continued

2nd Assessor:

11th June 1962

A. They all did it together.

Q. Do you mean all, or both? A. Both of them.

10 3rd Assessor:

A. It is quite certain that they both did it together.

Q. I am now going to ask you a simple issue of fact. Was Silino armed with a panga, or not?

1st Assessor:

Q. I don't believe that he had a panga because these two men are the ones who were found with the pangas and they are the people who assaulted Silino.

20 2nd Assessor:

A. He did not have a panga.

3rd Assessor:

A. It is clear that he did not have a panga. These are the people who had pangas because he, the deceased, is the one who was injured.

Q. I am now going to ask you: Did Silino offer provocation to Tadeyo?

1st Assessor:

30 A. Although he did offer him any provocation, what he should have done was to go to the Village Headman.

Q. Who should have gone to the Village Headman?

In the High
Court of
Nyasaland

No.34

Opinions of
Assessors
continued

11th June 1962 2nd Assessor:

A. The first accused whose children had been assaulted should have gone to the Village Headman.

Q. But on this occasion did Silino offer him a wrongful act or insult?

A. No, the first accused had a motive because of the incident which had taken place previously, and he was there waiting for him with a purpose.

A. He waited for him there because of his children's assault.

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3rd Assessor:

A. It is quite clear that all this happened because of the children.

Q. Was Tadeyo acting in self-defence?

1st Assessor:

A. That is not self-defence. He was determined to fight there.

2nd Assessor:

A. They were determined to fight, he was not acting in self-defence.

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3rd Assessor:

A. He was there determined to fight.

Q. Now, did Silino offer any provocation to Joseph?

1st Assessor:

A. Silino did not offer any provocation to Joseph.

2nd Assessor:

A. He did not offer him any provocation.

3rd Assessor:

A. He did not offer him any provocation.

30

Q. Was Joseph acting in self-defence?

In the High
Court of
Nyasaland

1st Assessor:

A. Joseph was not acting in self-defence, but he intended to kill the deceased.

No.34

Opinions of
Assessors
continued

2nd Assessor:

A. He was not acting in self-defence, but he went there with an intention to kill the deceased.

11th June 1962

3rd Assessor:

10 A. A man who is acting in self-defence does not act in that way.

Q. A final issue of fact I am going to ask you. Was the final assault on the deceased person at the blue-gum trees or where his body was found?

1st Assessor:

A. He was first assaulted down the stream and was then chased up the hill - he was running away.

Q. And where was the second assault?

A. At the place where the body was found.

2nd Assessor:

20 A. He was assaulted down the stream first, but that was not very serious and he was running away and at the place where they caught up with him is where they finished him off.

3rd Assessor:

30 A. It is quite clear that the big wound was inflicted at the place where his body was found. Although he was assaulted down stream he was not seriously injured because he could not have walked up the hill after having received that serious wound.

JUDGMENT RESERVED

Court adjourned at 9.30 a.m. on Monday, 11th June, 1962

In the High
Court of
Nyasaland

NO. 35

JUDGMENT

No.35

20th August, 1962. CASE Resumed.

JUDGMENT

20th August
1962

Coram: Cram J.

Nicholson Crown Counsel for the Crown
Wills, of Counsel for the 1st Accused
Mehta of Counsel for the 2nd Accused
Miss Martin Court Reporter
Chola Official Interpreter

Assessors present: Three
Accused present: Two

10

For Judgment.

JUDGMENT

The two accused, Tadeyo Kwalira and Joseph Duncan, are charged jointly with the murder of Silino Mathews on the 12th December, 1961 at Kavala Village in the Ncheu District. The Crown proved beyond any doubt that a body, identified as that of Silino Mathews, was found dead on a slope between Bilila Stream and his house in Kavala Village No.2, on the 13th December, 1961. This stream flows in a valley between a slope to Kavala Village No.1 and a slope to Kavala Village No.2. The No.1 Village is situated on high ground roughly a quarter to half a mile above the stream. The path leads down the hill from the village to the stream over short grassland to a tree felled to make a bridge. The path then ascends for about the same distance across similar grassland to No.2 Village. Some 500 yards up the hill, on No.2 Village side, the path forks at a kachere tree. The left-hand, or main branch, ascends to the village in about 250 to 300 yards, and the right-hand, or minor branch, also proceeds to the village by a slightly longer route. The branches enclose the house and outhouses of the deceased, which lie some 42 yards up the right-hand branch. Beyond these buildings lies the house of the accused Tadeyo, which could be reached by either branch of the path. The second accused resides in another village at about half a mile distance, Chabonga, and he had a garden which he cultivated by the Bilila Stream, on the No.1 Village

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side. A path came down that side of the river to a junction at the tree bridge. The second accused could reach the bridge either by the path along the stream or by proceeding by way of No.1 Village. On the No.2 Village side, a little way across the bridge, on the left ascending, were five or six fairly tall blue-gum trees growing amidst a patch of low scrub, and this area began some 10 to 20 yards from the bridge.

In the High
Court of
Nyasaland

—
No.35

JUDGMENT
continued

20th August
1962

10 On the 13th December, 1961 Marko, a brother of the deceased, who lived in No.1 Village, discovered bloodstains near the stream on the No.2 Village side, and he informed the Village Headman Kavala. They, with a group of villagers, followed the blood-trail from near the blue-gum trees up the hill towards the house of the deceased. They found on the path, first, a panga (Exhibit 3) and, after a short distance, the body of the
20 deceased. These two witnesses did not say anything else relevant, but, of course, they were not investigators; but they did not see a bag of grain or two knobkerries near the bridge, the blue-gum trees or the body.

On the 14th December, a police investigation party arrived and an intensive search took place. They discovered the panga and the body undisturbed according to the evidence. They did not find a bag of grain or two knobkerries. Heavy rain had
30 fallen in the interval and no blood-trail was visible; but there is no reason to doubt the trail was visible on the 13th.

Inspector Makowa estimated that from the Bilila Stream to the body was about a quarter of a mile. By a tape measure, he found the panga was 33 yards from the body down-hill. Also by tape-measure, from the body to the deceased's house was 83 yards in a direct line, and very nearly 100 yards following the path. Nothing else of significance was found at the scene.

40 An autopsy was performed by a government pathologist on the 15th December. Six wounds were discovered on the body. The first described was a wound 6" long on the left side just below the ear, cutting muscles deeply; the second a wound 7" long across the top of the skull, cutting through and exposing the bone, and into

In the High
Court of
Nyasaland

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No.35

JUDGMENT
continued

20th August
1962

and seriously injuring the brain; third, a cut wound across the bone of the face and the nose, deep, and smashing the nose bone. The remaining wounds were on the left arm, that is, on the back of the hand, and a large wound on the front of the forearm and a cut wound 1" long on the lower part of the left forearm. The pathologist was unable to express any opinion as to the sequence of infliction of these wounds. The second wound had caused a fracture of the parietal bone of the skull involving the whole bone, 8" long, cutting into the brain tissue and causing bleeding in the brain itself. In the opinion of the pathologist, which cannot on the issue be criticised, all these wounds could have been caused by a fairly heavy sharp instrument with a sharp edge used with a good deal of force. In my opinion, no reasonable doubt remains that this is correct.

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These wounds could not have been self-inflicted nor were they caused by accident, and from the number, severity and situation an intent to kill is irresistibly to be inferred.

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The police, in course of their investigation, took possession of certain articles and took statements from both accused persons.

An essential prerequisite to a number of major findings of fact must be a decision upon the credibility of certain witnesses and of the two accused persons, both of whom gave evidence. Many of the witnesses live in the same community, and some are closely related. For example, the two accused persons are brothers-in-law, and the witness Marko is a brother of the deceased; and the deceased was related to the accused Joseph. The minor children and wife of the accused Tadeyo, who gave evidence, were living with him and could be biased in his favour and under his domination to give evidence in his favour. Further, it is possible to infer an element of reluctance among members of this small community to reveal all they know when two members of it are on trial for a capital offence. All these factors are understandable and what witnesses are prepared to reveal must be evaluated accordingly. Silence in point of fact where a witness is plainly knowledgeable has its own significance.

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An important issue is the ownership and possession of the panga, Exhibit 3, found near the body, stained with human blood of the "O" group. The blood of both accused persons was proved to be in this group; but, according to the medical expert, this is the commonest group of human blood, and as the blood group of the deceased could not be ascertained, due to decay, this evidence is inconclusive. Moreover, Tadeyo sustained two wounds and his clothes were stained with blood, so that if he had handled or carried the panga the blood on it could have been his own. In my view, these stains could hardly have come from the two small contacts with the edge alleged by Tadeyo with the panga wielded by the deceased. The deceased was bleeding a great deal, and the blood could have been the deceased's. Each of the two accused and Davidson, a son of the accused Tadeyo, all of whom had a strong interest to dissociate themselves with this panga, said that the deceased carried this panga at the commencement of the event. The Village Headman said that he "thought" Exhibit 3 was the deceased's panga as he had seen him carrying it about. He described it as small, with a sharp point, and leather bound at the handle. This witness was not examined as to his opportunity to observe the panga at close quarters in the past, and his testimony must be weakened by the fact that he had seen the panga lying on the ground near the body and so could describe what he had then seen rather than what he had seen in the past. There would be at that time a tendency to associate ownership of the panga with the deceased since it was found lying near the body. The Headman alleged he had not heard of any dispute between Tadeyo and the deceased. I am unable to accept this denial as this dispute must have been notorious in the villages after the incident since several persons had information about it. The full reliability of this witness is therefore suspect, and I consider he was concerned to suppress rather than elucidate the truth. The value of his evidence concerning the ownership of the panga, in my view, did not go beyond an erroneous and possibly biased belief. Marko, the brother of the deceased, testified that he had seen the deceased at sunset on the day before he died, going down the slope towards his house about 200 yards above the stream on the path, on the No.1 Village side,

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without a panga and carrying a bag of grain only. This witness, shown Exhibit 3, denied positively, and reiterated his denial on cross-examination, that if had ever belonged to the deceased. This witness, in the presence of Inspector Makowa, on the 21st December, showed the police officer another panga, which he produced from under the bed of the deceased, which he positively identified as the one owned by the deceased. The panga discovered in the deceased's house also had a leather-bound handle, was also of the narrow-bladed non-Portuguese type and could be said to have a sharp point also. It was longer than Exhibit 3 and was identified by Marko, additionally, by three lines along the blade. It is noteworthy that Tadeyo, after he had heard all the evidence and had time to consider its significance, eventually stated that the deceased owned both pangas, so conceding that the second panga belonged to the deceased, although the concession was of little or no value, in my view; but conflicting with Marko on the point of ownership of Exhibit 3. Marko's evidence is in general accord with the circumstantial evidence and the rest of the independent testimony. Had he wished to make the case worse against the accused out of bias and relationship, as he was in the vicinity plainly, he could, without risk of appearing perjured, have falsely alleged he saw what took place and incriminated the two accused, but he did not do so. He was not shown to be in any way embroiled in the disputes of the damage caused by the mutual killing of domestic animals, the damage to crops and the assaults which were the origin of this trouble. Marko, pressed in cross-examination, maintained that Exhibit 3 was not his brother's panga nor was he in possession of a panga on the evening he met his death. He did not contradict himself nor appear otherwise unreliable. I have considered (although it was not put to the witness) whether he could have been biased in favour of his brother or whether he could have manufactured evidence by putting the panga under the bed and then produced it in the presence of the police; but I have come to the conclusion that he was not biased against the two accused. In the final result, I was most favourably impressed by this witness who, although related, was otherwise completely innocent of any part in the prehistory of the dispute or involved in the incident itself. I am unable to see he

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had any animus to tell a lie about the panga,
Exhibit 3.

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Marko testified that he saw the deceased at
a funeral at No.1 Village on the day before the
body was found. The fact that many persons atten-
ded this funeral that day is well corroborated.
The witness stated that the deceased left the
funeral himself about 4 p.m. and went to his
garden at the stream. He was returning home about
10 sunset, when he met the deceased coming down the
slope and spoke to him about 200 yards above the
stream on the No.1 Village side. Then he saw the
deceased continue on towards his house across
the stream. It was on the next day he found the
body. He said his brother was in possession of
a bag of grain, but nothing else. The bag of
grain was never seen again by any witness, and it
must have fallen somewhere in course of the
struggle. But this is negative evidence, and a
20 bag of grain left lying ownerless could have its
attraction in this poor community. Moreover, the
two knobkerries alleged left at the same place
also were never found, suggesting all three could
have been taken by the accused persons or others.
The missing bag is negative evidence, whereas the
possession of the bag and absence of any panga in
possession of the deceased is positive evidence.
It is inconceivable that Marko should invent
30 possession of a bag of grain if he were well
aware none was or could be discovered, as its
absence would tend to detract from the credibility
of his statement about the panga. In my view, in
all these circumstances the mere fact that no bag
of grain was seen later does not detract from the
witness's credibility. Other items alleged left at
the scene were never found. The important points
are the rejection of Exhibit 3 as the property of
the deceased and the denial that the deceased,
40 immediately before the event and approaching the
locality where he met his death, near the time
when he met his death, was completely unarmed.
It has been submitted that the deceased could
have gone elsewhere after he had encountered his
brother, left the grain and taken a panga; but
there is little to support this conjecture and I
consider this possibility is so remote as to be
unworthy of consideration since he was seen on his
way to his house, 200 yards from the bridge, and
50 it was about sunset and very shortly afterwards
he met his death.

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Adverting to the evidence of Davidson, this witness, examined *voire dire*, said he was fourteen years of age, but he appeared considerably younger. He said he could read and write, and attended church. As he said he did not comprehend the nature of a judicial oath, as well as seeming immature, he was permitted to give his evidence unsworn and, of course, it would not be competent to convict either accused on his evidence, without corroboration, in terms of Section 154 of the Criminal Procedure Code. There are certain material facts proved by a reliable witness Valaliyano, which establish that this boy was on the slope, but further away than the boy himself alleges, about the time of the event, on the No.2 Village side, and these facts could barely amount to corroboration of what the boy alleges he saw. The Court has to consider whether or not this boy is truthful, unsworn and reliable. Although this boy said he did not comprehend the meaning of an oath to tell the truth he plainly knew the meaning of falsehood. As a prime example, of this boy's indifference to truth, after being warned on a solemn occasion in a court of law, he alleged that he himself carried only a stick, whereas the credible independent witness Valaliyano positively testified that the boy was also in possession of a panga. In my view, Valaliyano could not have been mistaken, and he affirmed the point in cross. In all the special circumstances of this presence on the slope by the witness a deliberate lie of this magnitude, for there could be no room for mistake, virtually destroys credibility; the more so in case of a young boy living with his father, who is one of the accused, and, therefore, likely to be biased in his favour and under scrutiny in case he is under his father's domination and tutoring to assist his defence. But there is a good deal more to show this boy's complete unreliability and to emphasise that he is reporting not what he observed but what he has since overheard or has been told to say.

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The boy stated that he followed his father down the hill, and then he went on to describe how he saw the deceased and his father meet, speak, quarrel and fight at the stream, and he recited verbatim a large number of words which he alleged he overheard passing between them. This

easy and, it seemed to me, glib recollection would be in itself a remarkable feat of memory for words overheard at a distance on a disturbing occasion some six months before. Pressed, the boy indicated on the ground that he was about 90 to 120 yards away from the two men, and he alleged that they spoke in low voices, and it was just after sunset and still a little clear. Even at the minimum estimate of distance indicated by the boy, it was obviously impossible for him to have overheard conversation in low voices, or indeed even if conducted in ordinary conversational tones. Moreover, there is reliable evidence which establishes that the witness was a good deal further away than he untruthfully indicated. For example, he himself at first stated he came down the hill and stood down-hill about 100 yards lower than the deceased's house. It has been established that the body lay about 440 yards from the stream, and the house 83 yards further on, making the distance between house and stream about 523 yards in all; so that if this first statement bears any relation to reality the boy was well over 400 yards from the stream. Valaliyano stated he had walked about 70 yards from the stream when the second accused snatched his knobkerrie, and then he walked about 150 yards (both by estimation) when he either saw or met Davidson coming down the hill, and he said Davidson was then 20 to 30 yards from him; that is, the witness was at least some 220 to 250 yards from the stream and 170 to 180 yards from where the knobkerrie was taken. Neither of the accused persons admits he saw this witness near the stream, and, indeed, the first accused said he left the boy at the house and he did not know he had followed him. It is perfectly apparent, therefore, that this boy is telling a complete tissue of falsehood about what he alleges he overheard. In my view, it is an invention from beginning to end.

The next point to consider is whether the boy could have seen what he alleges he saw. The only independent witness as to the time when the struggle was going on is Valaliyano. He said it was dark; his estimate, that the time was 7.30 p.m., I consider vitiated because he was unaccustomed to telling the time by mechanical means. I accept he intended to express that it was dark, and not light, when he was there. Both the accused, when pressed, moved in the direction that it was darker

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rather than lighter and that persons could not be recognised, and that actions could not be observed at a distance of more than a few yards. Valaliyano himself says he saw nothing; but it is possible that to avoid being an observer he hurried on in the poor light and did not look around. He heard voices but did not hear what was being said. Considering once more the minimum distances which this boy could have been at the time he alleges, I am perfectly satisfied he did not see so as to recognise persons or to observe what they were doing, so that his whole testimony is revealed as completely without foundation and another complete invention.

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Another classic test was that, when asked to describe the blows he alleged he had seen, he was forced to concede he could not describe the blow on the wrist or whether the blow on the head or on the wrist was first, and finally he conceded that he had merely seen the wrist wound at home, indicating he was present when his father came and was exhibiting his injuries. He must have seen the head wound and could have heard his father's version of the incident. As a man had been killed this version could be assumed to favour those left alive. Whether or not he observed the second accused snatch the knobkerrie from Valaliyano is a matter of doubt. There is nothing in this boy's evidence he could not learn from what he saw and heard at his home after the event, and, in my opinion, he is as wholly discredited as a witness can be shown to be.

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What is to be inferred from the presence of Davidson on the slope, armed with a stick and a panga if he had believed that his father was merely on his way to report to the Village Headman? He knew his brothers and sisters had been assaulted by the deceased. If, however, he was aware that his father intended to go down to encounter the deceased, this would explain his presence in the vicinity, armed. A panga, at that time of night, could have been of no service to anyone as an agricultural implement - it could have been of service only as a weapon; and unless the boy were there armed because he apprehended physical violence his presence is inexplicable. I am convinced he was there uninvited; the significance is

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that his presence, armed, was natural in case of a boy who believed his father was intending to quarrel with a family enemy.

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The evidence relating to the other weapons is conflicting. I accept Valaliyano's testimony, that Joseph snatched the knobkerrie from him and ran towards the blue-gum trees and the sound of voices, but that Joseph then had a panga. The second accused himself admits this incident but denies he then had a panga, and the first accused agrees with him. The second accused alleges he left the knobkerrie near the stream, but it was never seen there by any witness. The first accused contradicts this, stating that the second accused carried the knobkerrie away with him, which would, of course, explain its absence at the stream. The second accused purported to identify a knobkerrie produced to him in Court as that belonging to Valaliyano, but the latter entered the witness box and firmly refuted this. I consider Valaliyano should be believed. He had no interest in a denial. The first accused alleges he carried a knobkerrie from his house to the stream, and he is supported in this by the boy Davidson, who goes on to allege that his father had no panga. The second accused agrees with this. The first accused maintains that he used the knobkerrie to defend himself, and it was cut in two, and he left it to lie near the stream. The second accused contradicts this, and alleges that the first accused carried the knobkerrie home with him; and he purported to identify a knobkerrie produced in Court as that used by the first accused that night. The first accused repudiated this. Once again there was negative evidence that no cut or whole knobkerrie was found near the stream or on the slope. Neither accused showed any disposition to follow up the issue of where these knobkerries were found as each had an opportunity to do by calling witnesses. The girl Eneris, a daughter of the first accused, alleged she did not see her father leave the house, but that he carried a stick only when he returned. This is not in accord with the first accused's own evidence, or with that of the second accused and, in my view, the evidence of this girl is of no value. The first accused's wife alleges she did not see him go out and that she knew very little of the affair. The second accused, on the other hand, testified that when

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they returned together he made a statement to this woman about the struggle, but she has not admitted this. I consider this woman is suppressing what she knows.

On the whole evidence, I see no reason to doubt both accused had knobkerries at the stream and that the probability is that each carried a knobkerrie away from the scene and later kept them out of the way.

Valaliyano testified that Joseph had a broad-bladed Portuguese type of panga. A panga of this type was recovered by the police from the second accused's wife, and Joseph has said that it was the one he had at the time. The first accused agrees that Joseph did have a panga of this type. Both accused allege that the second accused laid down his panga before he snatched the knobkerrie from Valaliyano; but Valaliyano, a reliable witness, states that at that time the second accused still had his panga and ran off with it in the direction of the voices, showing both accused to be untruthful on a most material point. That is, he ran to the scene of trouble armed with a lethal weapon and did not lay it down beforehand.

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As shall be considered later in this judgment, I am forced to regard the two accused as utterly unreliable and untruthful witnesses, with evidence contradicting one another and affected by self-interest, and, in my opinion, the evidence of Marko should be accepted, that the deceased had no panga; and as the second accused had his own panga and a panga was found (Exhibit 3) on the slope, there is irresistably by elimination, the inference that this panga must have been in the possession of the first accused, and that he must inevitably have gone down the slope carrying both a panga and a knobkerrie to the bridge. In my view, this fact must be well known to his wife and family. Each Assessor was of opinion that it was Tadeyo and not the deceased who had Exhibit 3.

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It is necessary now to consider, on a further issue of credibility of the accused, the factors of position of the body, the blood-trail, the locality of the blue-gum trees, the site of the body and the medical evidence. On the whole evidence, there remains no doubt that a struggle commenced some 10

or 15 yards from the bridge, on the left-side ascending near the blue-gum trees. Valaliyano, a reliable witness, testifies that he heard voices in that direction, and that Joseph snatched his knobkerrie about 70 yards from the stream and ran towards the trees, the inference being that he intended to intervene. Moreover, a blood-trail led from the trees, a quarter of a mile up-hill, to the body. How was it, therefore, that the body was discovered up the slope at the end of a blood-trail? The two accused wished the Court to accept that the deceased, after he had received all the injuries found at the post-mortem, at the stream, was not attacked again; and that no third party inflicted injuries, and yet they saw him running, hurrying or walking up the hill after them, so that the Court should accept that the deceased, after walking up the hill most seriously injured, collapsed and died where he was found. They do not allege they assisted the deceased or dragged his body up the hill, nor is there any evidence that the body was so dragged. There is an irresistible inference, therefore, that the deceased must have reached the spot where he was found on his own feet, and the statements of the two accused, that they saw the deceased coming up the hill after them, is correct. But, in my view, where they cannot be true, is that the deceased received all his injuries at the blue-gum trees. The two accused persons according to the medical evidence, received very minor injuries, and that bleeding from any of these would have been not very copious and not for very long. I am perfectly satisfied that the long blood-trail observed was not caused from blood dropping from the wounds of the two accused. There is an irresistible inference, therefore, that the blood-trail was caused from blood falling from certain wounds of the deceased. The pathologist said that any of the head wounds would have resulted in death by bleeding, while the brain injury would have accelerated death from shock. He continued, that, after the wound he had first described had been inflicted, if first and alone, the deceased would still have been able to walk, whereas after the infliction of either of the second or third wounds he would have fallen where he was struck. In his opinion, the skull injury would have produced concussion and immediate unconsciousness, while the wound across the face, from the force

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which must have been used, would have caused immediate shock and likely blindness so that the deceased would very likely have been unable to move. He conceded that a person can walk and even play games after concussion, but in the absence of serious brain injury. In this instance, serious brain damage was visible with a long open skull-fracturing wound. One result of the face wound would be almost to blind the deceased and he would not immediately be able to walk even for a short distance. The bleeding would continue, and after bleeding he would have become weak. The medical expert, with that diffidence which medical men must exhibit when questioned about possibilities of the human organism, could not commit himself as to how far the deceased could have moved after infliction of all these injuries; but the Court has to decide on the whole evidence whether or not the deceased could then have moved, and using the standard of proof in a criminal trial it is to decide whether or not a reasonable doubt has been raised, that after receiving all these injuries the deceased could still have walked a quarter of a mile up the hill, bleeding and carrying a panga. It is for the Court, on the final issue, as a matter of common experience, to come to this conclusion, taking into account the medical evidence. The fearful injuries inflicted on the deceased are very visible in photographs, and, in my view, it is not ordinary experience that a person suffering from three such wounds could jump trees, run, hurry or even walk up-hill. I am satisfied beyond a reasonable doubt that after infliction of all three of these head wounds the deceased must have been rendered immediately unconscious and to have become so weak from loss of blood and from shock that, if he could have moved at all, it could not have been more than a few yards. It was submitted that an African might show an extraordinary vitality in such circumstances; but it was noteworthy that all three assessors, relying on their ordinary experience of Africans who have been injured, were firmly of the opinion that the deceased could not have walked up-hill with all his injuries; nor do I consider he could. It is to be observed that all the evidence of the deceased to walk up-hill after infliction of all the wounds was produced by the two accused persons, who had both the strongest interest to show that the deceased could still walk and was not destroyed

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on the slope near his house. They knew well enough there was other evidence the struggle had begun at the stream. Any possibility that the deceased walked up the hill with these wounds is so remote that, in my opinion, it can safely be dismissed out of the range of possibility. An irresistible inference, therefore, is that, having received certain wounds at the blue-gum trees, probably the defensive sort on the arms with possibly the least severe head wound, and most probably, as the accused relate, having been beaten to the ground, the deceased was able to rise to his feet and, with blood dripping from the wounds he had received, walked up the hill, and there he was met and finally struck down with two or more fatal blows on the head with a panga. The two accused did not seek to bring any third person into the transaction, and so there is a further irresistible inference that one or other or both of these men, assaulted the deceased in his wounded state and killed him on the slope.

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Another point, which goes to the credibility of the first accused, is that it is obvious that Village No.1 is visible across the valley from Village No.2, for the view is not in any way interrupted. The first accused conceded that had he been looking he could have seen the deceased set off down the hill from the No.1 Village. When it was put to him that he chose to come down to meet the deceased having so seen him leave, he countered by stating that the deceased could not have been seen by him because he came along the path by the stream, and he could not have seen this approach. This statement implies that the accused observed the path and the deceased was not on it, and he infers the deceased used the other path. This allegation, however, is contradicted by Marko, whom I regard as a reliable witness, who said he met the deceased coming down the hill on the path from his house 200 yards from the stream. If this is so, the deceased could not have used the path along the stream. Since I accept that the deceased did go down the hill, and since the first accused could have seen him, and since he too came down the hill at the same time and encountered the deceased at the stream, and since he elected to tell a deliberate untruth on a material point, the inference is that he lied because to admit otherwise would be

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an admission that he did set out deliberately to meet the deceased for his own purposes and these purposes plainly must have been hostile.

A further point going to the credibility of the first accused is in his allegations about the receipt and nature of his wounds. There can remain no doubt that the first accused has greatly exaggerated the severity of his wounds and the quantity of blood which issued from these wounds. The doctor stated that they were very slight, and they seemed to him at first sight abrasions, although he conceded they might have been caused by glancing blows from a sharp instrument. The accused is incredible on and has contradicted himself on this material point; for he asked the Court to accept that he received such a severe blow on the head from the sharp edge of a panga wielded by the deceased, that it knocked him to the ground and he was so dazed that for a considerable time he could not rise. In my view, even although such a blow were blocked by a knobkerrie, as the accused alleges, if it were still severe enough to daze him then the edge of a panga would cause a much more severe wound than has been observed. In an extra-judicial statement (Exhibit 11), made at a time before the accused had time to consider his defence or had heard the evidence in Court, he said that when he was trying to stop the second accused fighting with the deceased he injured him as well, that is, the second accused injured him, and he went on to explain that he had meant that when the second accused wanted to rescue him, the second accused injured him as well. Later, when the accused envisaged the implications of his remarks, he tried to explain them away by saying that the statement was incorrect and he had meant that it was the deceased who had inflicted his injuries. I found these explanations singularly unconvincing. The accused had accepted his statement as correct. In my view, these injuries were the very sort to be expected in course of an assault, or a joint assault, upon the deceased, and they were not compatible with an assault by a man armed with a panga upon a man armed with a club only.

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A still further point as to credibility is the behaviour of the first accused after the event related to his statements regarding his conduct.

I am perfectly satisfied he knew that very severe injuries, even death, had been inflicted on the deceased, and his conscience was apparently troubled, for he admits he rose at 2 a.m. on the next morning and went to a distant Mission Dispensary, alleging he needed treatment. His actions, however, in departing so early strongly suggest keeping out of the way until it became clear if he were suspected or accused. When he arrived at the Mission the dispenser examined his wound and asked him to wait, but the accused did not wait, and his allegation of treatment was denied; and although he gives a not very convincing explanation of what he did thereafter, he has not produced any evidence of his whereabouts until he appeared at the police station on the following Monday. The fact that after going so far for treatment the accused did not wait for it when offered suggests this journey was a mere device to keep out of the way. The second accused, meantime, on the 16th and again on the 17th, had made statements to the police incriminating Tadeyo, and it seems established by inference that the first accused kept in hiding until he had been accused, and then he felt obliged to go to the police to give his version of the incident.

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The accused alleges he went to the police station on Sunday, whereas he was first seen there by another witness on Monday. According to Inspector Makowa, had the accused been at the police station on Sunday he would inevitably have known of it during his rounds. I consider this is correct, and this is a further example of the unreliability of this accused.

On an additional aspect of credibility, each accused in his evidence in Court invites the Court to infer that the other accused was responsible for the wounds, although each is diffident to describe the wounds inflicted or how they came to be inflicted. It is apparent that both cannot be telling the truth. As neither of these men are at all reliable or truthful witnesses, in my view, neither can be accepted as telling the truth or even near the truth about the causes of death. They are the evasions of two men each deeply concerned with the death.

The Crown sought to prove a motive in the case of each of the accused. It was established that,

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in this locality, domestic animals such as pigs and goats were liable to destroy crops, and a harsh and strife engendering rule permitted the slaughter of these animals if discovered trespassing by a crop-owner. The second accused admitted that goats belonging to the deceased had been slaughtered by his family, and the deceased had slaughtered goats belonging to his relative - his younger brother; so that there was room for feud and ill-feeling. Moreover, on the day in question the Crown proved, and the first accused admitted, that the deceased had pursued a pig to his house and had there assaulted his children with a stick and had scattered grain from his store. The assault and malicious damage went far beyond the local rule, and these wanton acts by the deceased were inexcusable and no-one could attempt to defend them. It is readily understandable that these disgraceful acts caused the first accused to be angry although he did not see them, and he admits this.

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Although the two accused persons are tried jointly, they are entitled in the last assessment to have their cases considered separately. That is, the extra-judicial statements made by each accused are not available as evidence against the other, although available in case of the maker. While the evidence given on oath by each accused is available generally, since each defence is accusatory of the other, each accused must be regarded as standing in relation to the other as an accomplice, and therefore corroboration of the evidence of each against the other is to be sought. There are, of course, in addition to mere motive, a number of material facts which go beyond showing that the offence was committed and tending to connect each accused with committing it. Not the least of these are the admissions of each accused against himself, that he was present and involved at the time. The Court, however, has to go beyond the issues of accomplice vel non and corroboration, and to decide whether the evidence of one is truthful against the other or otherwise. I am satisfied that the evidence of either is not truthful. Each accused has had six months to consider his defence, and I am forced to the view that the defence of each is a carefully concocted attempt to incriminate the other person

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while leaving doors open to himself and the other of self-defence and provocation. I have not overlooked that the evidence of Tadeyo's wife and children, while available generally, must be regarded as biased, and his wife may have accomplice status so far as the second accused is concerned.

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10 It is now possible to consider the case of the first accused. It has been proved that he attended a funeral at No.1 Village on the 12th December. In his absence the deceased unwarrantedly assaulted his children and scattered his grain. When the first accused returned to his house in the afternoon he was informed and he was angry.

20 He alleges he set off to make a report to the Village Headman and that he took only a knobkerrie with him. In my view, on the whosle evidence this intention is negatived. No convincing reason for delay in waiting for sunset is given, and I am forced to infer that he waited deliberately until he saw the deceased coming down the hill and then, in his angry mood, set off down the hill to meet him at a suitable place, to have the matter out with him at the bottom. Further, Tadeyo's allegation that the deceased came along the other path beside the stream has been negatived by Marko; as his allegation that the deceased was armed with a panga has also been negatived by Marko. That he had an intent to encounter his enemy receives colour from

30 the fact that his own son, apparently uninvited, followed him down-hill armed not only with a stick but also with a panga, and the presumption is that this boy apprehended violence. On the whcle evidence, by elimination, there is an irresistible inference that Tadeyo had a panga as well as a knobkerrie, and a further inference that he took this advisedly with a view to what could happen in the course of a quarrel with a tiresome neighbour.

40 The remarkable coincidence of the appearance of the second accused, also armed, in the rear of the deceased, suggests a preconcerted design, especially when the second accused has appeared to intervene on the side of Tadeyo. It is inconceivable that events would have taken the same course had Joseph intervened on the side of the deceased or as a mediator. But I am not satisfied that a preconcerted arrangement has been established beyond a reasonable doubt.

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When an angry man sets off, armed, to meet his enemy at a place suitable for a quarrel, it cannot be excluded that he has in his mind a resort to the weapons he carries; a dispute, assault and death did occur, and wounds were discovered inflicted by the same sort of weapons as the first accused possessed.

It has been proved that the second accused appeared, at least shortly, after the commencement of the quarrel, This appears from the evidence of the reliable witness Valaliyano. In my view, it is impossible to say which of the two accused inflicted which wound. As each one was armed with a panga each could have inflicted all of the wounds; or each could have inflicted one or more of the wounds or, of course, there could have been an infliction of wounds in the course of a savage concerted assault in which it would be hardly possible to say who was responsible for any individual wound. The circumstantial evidence, interpreted by the testimony of Valaliyano, is that a first assault causing wounds to the effusion of a good deal of blood took place near the blue-gum trees, but, after the assault, the deceased was still able to go on foot up the hill for a quarter of a mile leaving a blood-trail. Again, it is not possible to elucidate from the unreliable and conflicting evidence of the two accused, which is the only available oral testimony, whether the deceased, after being beaten to the ground at the blue-gum trees, rose and went up the hill preceded by the two accused and was encountered; or whether, wounded, he fled up the hill to escape his assailants but was overtaken; but there can remain no doubt that the two most serious wounds were inflicted at or near where the body was found. Again, it is impossible to say which of the two accused inflicted these final wounds at the time of the second assault, for neither admits a second assault. I accept the first accused's statement, that after an assault, the deceased did go up the hill. At one place Tadeyo says the deceased was running and that he was capable of jumping over trees; and at another that he was hurrying; and still in another place that he was walking. Again, it is impossible to say which of these contradictory descriptions is true, or whether it is true the accused proceeded up the hill in front or not. What is untrue, by unequivocal circumstantial evidence, is that all the wounds could have been inflicted at the stream and, after receiving them, the deceased was still able to come up the hill

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and was not again molested. I accept that the panga found was stained with blood-group "O", that is, the blood-group of both the accused. Accepting that Tadeyo carried the panga, the blood could have been his own. On the other hand, there is a very strong probability that this panga left near the body was used in the second assault on the hill, so that the blood could be that of the deceased. Again, it is impossible to say as an absolute certainty which of the two pangas present was used, or whether both were used. No blood was proved on Joseph's panga but of course he had plenty of time to cleanse it.

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I am perfectly satisfied that, on the night of the assault, Tadeyo must have known that the deceased was dead, and so he felt impelled to leave his home before daylight on a pretext of going to a distant dispensary, and as he remained away from his home it is to be inferred this was deliberate until he must have become aware that the police were looking for him and that the second accused had made a statement incriminating him, and then, and then only, he surrendered himself, nearly a week after the event. Then he made his first report about a killing. Tadeyo's evidence is that he was entirely innocent of the assault, but his failure to make a report for a week is not the conduct of an innocent man. At this late time, after being accused himself, he accused Joseph of causing the death, and in Exhibit 11 he admitted he had intervened in a struggle between Joseph and the deceased and received his injuries from Joseph.

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As the case of the first accused has reached the stage where a difficult question of joint responsibility is raised it is convenient to consider, for the time being, the case of the second accused. At every point where it is possible to test the evidence of Joseph by extrinsic means, his testimony has proved unreliable; his allegation that the deceased had a panga is disproved by Marko; his allegation that Tadeyo had no panga is disproved by elimination of all other possibilities; the allegation that he laid down his panga before snatching the knobkerrie is disproved by Valaliyano; the allegation that Tadeyo struck all the blows with a panga snatched from the deceased is not conceded by Tadeyo; the allegation that Tadeyo struck the deceased eight or nine blows on the head with a club

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is disproved by medical evidence of the absence of any corresponding injuries; the allegation that the deceased received all his injuries at the stream is disproved by the whole evidence; the allegation that no assault followed on the hill is also so disproved; a denial of motive is negatived by the evidence of a mutual dispute with the deceased over the slaughter of domestic animals; and his statements to the police and his evidence that Tadeyo was entirely responsible are not conceded by Tadeyo; his claim that he received a wound from a panga does not receive much assistance from the medical evidence of minor injury. It could have been received in course of an assault. That is, the second accused is shown by every test available to be completely unreliable, and so the whole of his evidence is suspect, and this accused could have completely fabricated an exculpatory story.

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The second accused has alleged that after receiving a blow from the deceased, he deliberately snatched Valaliyano's knobkerrie, ran to the scene and when he struck the deceased he was not angry. That at that time he saw the deceased was unarmed and the first accused was holding a panga, however obtained, and he himself deliberately struck the deceased two blows with the stick or knobkerrie and thereafter the deceased, who was then otherwise uninjured must have suffered his injuries at the hands of Tadeyo, which assault Joseph did nothing to avert or stop; and he went away with the assailant and at no time made any report until approached by the police. This statement considered by itself, quite clearly, is an admission of aiding and abetting the first accused and of helping, encouraging and comforting him, and not dissociating himself from an assault upon the deceased with a panga, for such an assault undoubtedly did take place. Taken by itself it is virtually an admission of being a principal offender. On the other hand, Joseph has proved such an unreliable witness that nothing he himself says can be accepted unless corroborated and, of course, this statement where it can be tested is shown to be untruthful by Marko and Valaliyano and the circumstantial evidence and is in conflict with the testimony of Tadeyo.

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As already observed, this case raises difficult

10 questions of joint responsibility. An English case dealing with joint responsibility, often cited, is R. v Betts & Ridley (1930), 22 Cr.App. R., 148. It was said in R. v Kimbwe Bin Mainza & Another, (1939) 6 E.A.C.A., 152, that the principles laid down in Betts & Ridley were embodied in Section 22 of the Tanganyika Penal Code (which is identical with Section 22 of the Nyasaland Penal Code) and that that case was declaratory of the Common Law. The distinction in Betts & Ridley's case between intention and aiding and abetting is not clearly drawn, and it is obvious these two aspects have no sharp demarcation line. Plainly, in a case where two persons, with a common intention to commit an unlawful act, put the intention into effect one may aid and abet the other, and, of course, in case of a joint or intermittent assault by two persons one after the other, each may aid and abet the attacker for the time being or, by distracting the attention of the assaulted person, or the one assist the other, or one merely by standing by and encouraging by words, gestures or mere presence and by failure dissociate himself from the assault or to make an immediate report, show a common purpose to aid and abet.

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30 Ridley was held to have a common intention with Betts to rob and to have consented to some violence being used. It was held that although he had not specifically consented to such a degree of violence as was in fact used, he was non-the-less guilty of murder when violence used caused the death of the victim.

40 In Kimbwe's case, the Court of Appeal for Eastern Africa was of the view that the principle in Betts and Ridley went far that it should not be extended and should not be applied where there exists a reasonable doubt whether or not the accused was, at the critical time, still aiding and abetting. The ground of acquittal apparent in that judgment is that the appellant who had consented to go with others to burgle a house, all unarmed, and ran away on discovery, while one of the others picked up a weapon and killed the householder. The Appeal Court held the decision might well have been different if the party had gone to the house armed, which could have suggested a common intention to be parties in the exercise of violence while burgling the house. To this decision it might be glossed that where two men go

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to assault another with their hands, if one picks up a weapon and kills the other, the man without the weapon might be guilty of an assault only; but if one of the two men were armed, before the assault, then it might be inferred that the probable consequence of the assault would be the use of the weapon and death and both would be guilty of murder.

R. v. Selemani s/o Ngula & Another, (1947), 14 E.A.C.A. 94, can be distinguished from Betts & Ridley's case. There both accused had formed a common intention to commit a burglary and had set out unarmed but when disturbed, one accused picked up a weapon and killed the householder. It was held that to say that when two persons do a felonious act of burglary together and one kills both are guilty of murder, is too broad a statement of the law. On the other hand, it is arguable that a plan to break into a dwelling house at night is likely to lead to resistance and violence, and injury and even death to the householder is likely in the circumstances.

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Another case is R. v Kelementi Manganga s/o Ochieg, (1943) 10 E.A.C.A. 49, where the prisoner was found to have jointly assaulted a man on the ground. The other party to the assault then speared the man on the ground and killed him. The prisoner refrained from any act preventing the use of the spear, nor did he show any sign of repugnance or horror. From these facts it was held a fair inference that when the prisoner was assaulting the deceased he was doing an act for the purpose of enabling or aiding the other to cause death and so came under Section 21(b) of the Uganda Penal Code, which is identical with Section 21 of the local Code, and so was guilty of the same offence as the other.

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Another case was R. v Tabulayenka s/o Kirya & Others, (1943) 10 E.A.C.A. 51, where it was held that to constitute a common intention to prosecute an unlawful purpose within Section 22 of the Uganda Penal Code, that is, to beat a thief, it was not necessary that there should have been any concerted agreement between the accused prior to the attack; their common intention could be inferred from their presence, their actions and omissions of any of them to dissociate himself from the assault. It

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was said: "If the cumulative effect of the beating carried out by the different accused was such as would probably result in death or grievous harm, and all the accused associated themselves with the assault each accused is responsible for all the acts of the others done in furtherance of their common purpose."

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10 In R. v Okarti, (1941), 8 E.A.C.A. 78, it was said:
"Where several persons together beat another then, though each may have had a different reason and some may join in the beating later than others, it is plain that all have what the law calls a 'common intention', which does not connote any previous concerted agreement among them." 20th August 1962

20 R. v Wanjiro d/o Wamerano, (1955), 22 E.A.C.A. 521, puts forward a proposition that an accused person must be shown to have shared with the actual perpetrators of the murder a specific and unlawful purpose which led to the commission of the offence charged. It was said there that while common intention generally implies a prearranged plan it does not rule out the possibility of a common intention developing in the course of events, though it might not have been present to start with.

30 On the point of joint responsibility, therefore, it has not been sufficiently proved that the two accused had any preconceived design to waylay the deceased. Nor can it be held proved against the second accused that, when he arrived at the stream, he previously expected to find the first accused and the deceased there. The mere fact he was carrying a panga (which is at one and the same time an agricultural implement and a sword according to its use) does not prove premeditation but on the other hand it does not rule out a common intention to assault the deceased, developing as the situation worsened. I am irresistibly forced to the conclusion that such a common intention did develop. A common intention can be inferred inter alia from the actions of the two
40 accused persons; the omission of either to dissociate himself from the assault; the fact that neither held the other back or restrained the use of a panga; or showed any sign of repugnance or horror. Moreover, there were two separate assaults and further, neither accused made any report of the incident to anyone in authority as soon as possible and indeed neither made any report until each felt obliged to do so by

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fear of accusation.

The whole evidence inescapably establishes the development of a common intention to assault the deceased with weapons, emerging from the original intention of the first accused to meet his opponent and from the meeting of the two accused persons with a third person against whom each had a strong reason to feel illwill.

The first accused went armed to meet the deceased. The second accused entered into a quarrel with the deceased, also armed. Had either armed man intervened on behalf of the deceased, to keep the peace, the outcome must have been different. In the result, there is an irresistible inference that these two men jointly assaulted the deceased and aided and abetted one another in an assault upon him with lethal weapons. The probable result of such a common intention and the entering of an assault armed with the death or grievous injury to the deceased. Moreover, after the first assault at the river, the two accused either pursued the deceased up the hill with common intention to assault him further and slew him or, they left him lying beside the stream, after the first assault, but, when they saw him coming up the hill, they formed a common intention to assault him again and killed him on the slope. 10 20

In my view, no reasonable doubt is raised that one or other of the accused persons was innocent of the assault or that at any critical time was not actively assaulting or aiding and abetting. 30

The two accused persons came away together from the incident, they suppressed the severity of the assault from their nearest relatives and neighbours and, when questioned, each gave untruthful accounts of their respective parts. Each, however, blamed the other, for it was apparent to both that unless he took that course the only alternative was a confession of individual guilt. 40

There are cases in the books where two or more men have been discovered beside a dead body but the prosecution has been unable to bring home the assault to either one or all of them and so both

or all, however guilty, were acquitted but the peculiar circumstances of these cases, (which frequently are that the injuries on the dead body could have been caused by one person only and all present deny the offence) are not the same here. Both men admit they were fighting with the deceased. No doubt, the incident went through a series of phases of increasing violence and worsening intent, as the two accused lost their tempers and finally intended to destroy the deceased.

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The Crown, to prove murder, has to negative self-defence and provocation. Neither accused person has explicitly relied upon self-defence or provocation as each wishes to dissociate himself from any of the blows which killed the deceased. Nevertheless the principal testimony concerning these issues has been given by the two accused persons themselves and the boy, David, a discredited witness. The two accused are in my opinion wholly discredited as witnesses. Their evidence is often diametrically opposed. It is the duty of the Court to consider issues of self-defence and provocation whether or not they are substantially raised by the defence.

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Issues of provocation and self-defence in a murder charge arise only after discharge of the Crown's burden of proof that an accused person either inflicted the fatal wounds or aided and abetted in their infliction. Tadeyo denies he inflicted any of the injuries upon the deceased or that he aided and abetted the second accused in inflicting them, or that he had a common intention to assault and wound the deceased. While Joseph's evidence, where in favour of Tadeyo, if accepted, could provide some support of provocation and self-defence, it detracts from Tadeyo's statement that he did not kill the deceased. At one stage Joseph saw that Tadeyo, armed with a panga, was facing the deceased, who was then unarmed and uninjured, at a time when he himself assaulted the deceased with a stick and, it was after his own assault, that Tadeyo must have struck the deceased at least six times on the body and head with a panga. If this were accepted as true there would be little or no room for self-defence. To inflict such a series of head wounds would be to go beyond any reasonable necessity of self-defence nor could Tadeyo have entertained any honest belief that he required to

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continued

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defend himself by such a series of wounds. Even if it were accepted that Tadeyo was provoked by the infliction of two minor injuries his retaliation must have been with a panga and his retaliation bore no reasonable relationship to his own injuries. In any event, Tadeyo, himself, has negated, in Exhibit 11, that the deceased inflicted these injuries upon him. Assuming Joseph were struggling with the deceased with a panga and Tadeyo were lending him physical help, then in that situation of two men against one and considering the extent and number of the respective injuries, in my view, self-defence finds no place. 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. And this is a fortiori once it is accepted that there were two assaults, one minor and one major, the second after an interval of time and upon the wounded man.

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The Crown has to negative self-defence and provocation in the case of Joseph. Once again these issues could arise in a murder trial only upon a finding of fact that Joseph either killed the deceased or aided and abetted in his killing or had formed common intention with the other accused to assault the deceased in such a way that a probable consequence of the assault would be the infliction of at least grievous harm. Some evidence in support of self-defence and provocation is given by Tadeyo but Joseph himself repudiates the substantial part of Tadeyo's testimony.

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Even assuming Joseph intervened to defend a near relative and was provoked on seeing him attacked and assuming he inflicted these injuries his actions bore no reasonable proportion to any provocation he received, even taking into account any superficial wound he had received. Nor was it reasonably necessary in self-defence to go on striking the deceased repeatedly about the head with a panga and I am perfectly satisfied that that action must be held to go beyond any honest belief that it was necessary to continue the assault.

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Further, there is Joseph's own admission, for what it is worth, describing the first situation in which he intervened. That is, the deceased,

10 unarmed, facing Tadeyo, armed, negatives both provocation and self-defence because it is obvious that by that time the deceased was no longer in a position to provoke Joseph nor did Joseph need to defend himself against an unarmed man with a panga. Similarly, provocation and self-defence do not enter into a case where both accused were armed and the deceased was unarmed, but all the more so where there was a second assault the second and major being after an interval of time upon a wounded and unarmed man.

In the High Court of Nyasaland

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I am irresistibly driven to the view by process of elimination that both the accused persons were principal offenders in this killing and that there was an intent to kill the deceased, whether an objective or subjective test is applied, and that both are guilty of murder and are convicted of murder, contrary to Section 209 and Section 210 of the Penal Code.

20 Dated at Blantyre this 20th day of August, 1962.

A.L. CRAM.

J U D G E.

ACCUSED PERSONS UPON ALLOCUTUS:

1st Accused: On this day I did not do anything.

2nd Accused: Nothing to say.

COURT: Before proceeding to sentence I have to inform you that if you wish to appeal against your conviction or the sentence that I am about to pass, you have thirty days in which to do so.

30

J U D G E

Allocates: Convicts asked if they have anything to say why sentence should not be pronounced according to law.

Tadeyo: On that day I did not do anything.

Joseph: I have nothing to say.

In the High
Court of
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continued

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Sentence:

Tadeyo: According to law: To be hanged by the
neck until dead.

(Sgd) A.L. Cram.

J U D G E

Joseph: According to law: To be hanged by the
neck until dead.

(Sgd) A.L. Cram.

J U D G E

Prisoners removed.

Court thanks Assessors.

Court rises.

(Sgd) A.L. Cram

J U D G E

NO. 36

NOTICE OF APPEAL OF TADEYO KWALIRA

IN THE FEDERAL SUPREME COURT

(Appellate Jurisdiction - Criminal)

BETWEEN:

TADEYO KWALIRA

Appellant

and

REGINA

Respondent

In the Federal
Supreme Court
of Rhodesia
and Nyasaland

No.36

Notice of
Appeal of
Tadeyo Kwalira

12th September
1962

NOTICE OF APPEAL

10 TADEYO KWALIRA, the above-named Appellant,
having on the 20th day of August, 1962 been
convicted by the High Court of Nyasaland sitting
at Blantyre of Murder and having been sentenced
to death DO HEREBY GIVE NOTICE that he intends
to appeal to the Supreme Court for an order
setting aside the said conviction on the following
grounds:-

20 1. That Mangarita, Daughter of Donkeni, who
is the lawful Wife of the Appellant should not
have been allowed to give evidence against him.

 2. That the learned Judge was wrong in
finding contrary to the submission made by his
Counsel that the Appellant at the end of the case
for the Prosecution had no case to answer on a
charge of Murder as distinct from Manslaughter.

 3. That the Prosecution failed to discharge
the onus of showing that the Appellant in assist-
ing in the alleged killing was not acting under
legal provocation.

30 4. That the Prosecution failed to discharge
the onus of showing that the Appellant did not
assist in the alleged killing in self defence.

 5. That at the end of the evidence of the
Second Accused, Joseph Duncan, five knobkerries
were wrongly produced in Court and that such

In the Federal production prejudiced the case of the Appellant.
 Supreme Court
 of Rhodesia
 and Nyasaland

 No.36

Notice of
 Appeal of
 Tadeyo Kwalira
 12th September
 1962
 continued

6. That the learned Judge as the case progressed allowed himself to be drawn into becoming an investigator as distinct from an adjudicator.

7. That the learned Judge precluded himself from obtaining the true opinions of the Assessors by expressing his own opinions to the Assessors when summing up the evidence to them.

8. That the learned Judge erred in dealing with the evidence as a whole by taking pieces of the evidence given by each witness and rejecting other pieces of evidence given by the same witness with the result that his decision was arrived at on what he considered to be the balance of probabilities and not on the basis of giving the Appellant the benefit of any reasonable doubt. 10

9. That the learned Judge's decision was in effect based on the assumption that the panga found near the body of the deceased belonged to the Appellant when there was no evidence that this was so and indeed such evidence as was led by the Prosecution indicated either that the panga belonged to the deceased or that its ownership was not known. 20

10. That all the eye witnesses of the fight which resulted in the alleged killing indicated that the Appellant went into the fight unarmed except for a knobkerrie and the finding to the contrary was against the weight of evidence. 30

11. That the finding of the learned Judge that the deceased carried no weapons during the fight which resulted in his death was against the weight of evidence.

12. That the learned Judge based his Judgment on the fact that in his view the actual killing occurred up a hill some considerable distance from the stream where the fight started but on this basis there was no evidence that the Appellant took part in any such killing. 40

13. That the learned Judge in his Judgment treated the evidence of Valaliyano Chlodzeni in an incorrect manner by on the one hand conceding

In the Federal
Supreme Court
of Rhodesia
and Nyasaland

NO. 37

NOTICE OF APPEAL OF JOSEPH DUNCAN

IN THE FEDERAL SUPREME COURT

(Appellate Jurisdiction - Criminal)

Notice of
Appeal of
Joseph Duncan

BETWEEN:

19th September
1962

JOSEPH DUNCAN

Appellant

and

REGINA

Respondent

NOTICE OF APPEAL

JOSEPH DUNCAN, the above-named Appellant, having on the 20th day of August, 1962, been convicted by the High Court of Nyasaland sitting at Blantyre of Murder contrary to Section 209 of the Penal Code and having been sentenced to death DO HEREBY GIVE NOTICE that he intends to appeal to the Supreme Court for an order setting aside the said conviction on the following grounds:-

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1. That the Learned Judge erred in rejecting all the hypotheses of evidence showing the innocence of the Appellant.

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2. That the Learned Judge was wrong in not considering the possibility that the alleged fatal blows could have been inflicted by the first accused, Tadeyo in the absence of the Appellant when he went to snatch a knobkerrie from Valaliyano.

3. That the Learned Judge erred in accepting Marko and Valaliyano as truthful and credible witnesses and that the Learned Judge should have taken into account that Marko was related to the deceased.

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4. That the Learned Judge should not have accepted only part of the testimony of Marko and Valaliyano without doubt while he rejected other material evidence.

5. That the Learned Judge should have considered the lack of positive evidence against the Appellant as regards having ever used a lethal weapon against the deceased.

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6. That the Learned Judge prejudiced his mind by observing that the presence of the Appellant at the scene was a remarkable coincidence.

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Notice of
Appeal of
Joseph Duncan
19th September
1962
continued

10 7. That the Learned Judge erred in inferring that the Appellant had cleansed his panga as there was no evidence that he ever used it.

8. That the Learned Judge erred in finding the Appellant to be completely unreliable.

9. That the finding of the Learned Judge that the deceased carried no weapon during the fight which resulted in his death was against the weight of evidence.

20 10. That the Learned Judge was wrong in finding contrary to the submission made by his Counsel that the Appellant at the end of the case for the Prosecution had no case to answer on a charge of Murder.

11. That the Prosecution failed to discharge the onus of showing that the Appellant was not acting under legal provocation.

12. That the Prosecution failed to discharge the onus of showing that the Appellant did not act in self defence.

30 13. That the Learned Judge precluded himself from obtaining the true opinions of the Assessors by expressing his own opinions to the Assessors when summing up the evidence to them.

14. That having regard to the evidence as a whole and behaviour and conduct of the Appellant when compared to that of the First Accused, Tadeyo, the Appellant should have been acquitted.

15. That the conviction was against the weight of the evidence.

That the Appellant does desire to attend the hearing of his appeal.

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of Rhodesia
and Nyasaland

That the Appellant is not able to pay the
costs of the travelling to and from the Court.

The Appellant is in custody.

No.37

Dated this 19th day of September, 1962.

Notice of
Appeal of
Joseph Duncan
19th September
1962
continued

Sgd.

MEHTA, CHIRWA AND COMPANY OF BLANTYRE

LEGAL PRACTITIONERS FOR THE APPELLANT

NO. 38

JUDGMENT OF FEDERAL SUPREME COURT

IN THE FEDERAL SUPREME COURT

at SALISBURY

In the Federal
Supreme Court
of Rhodesia
and Nyasaland

No. 38

JUDGMENT

(a) Clayden, C.J.
and Qunet, F.J.

12th December
1962

Criminal Appeals Nos. 225 and 226 of 1962

BETWEEN: (1) TADEYO KWALIRA
(2) JOSEPH DUNCAN Appellants

and

THE QUEEN Respondent

10 Before: Clayden, C.J., Qunet, F.J. and
Unsworth, C.J. Ny.

The 21st and 22nd days of NOVEMBER, 1962

JUDGMENT

(a) CLAYDEN, C.J. and QUENET, F.J.)

Clayden, C.J.:

20 The general facts in this case have been set
out by Unsworth C.J. Ny. and it is unnecessary to
repeat them. The difficulty in deciding these appeals
lies in the fact that only three people saw what
happened in the quarrel between the two appellants and
the deceased, and the evidence of all three has been
held to be quite unreliable by the learned trial judge.
The three eye witnesses were Davison, the son of the
first appellant, who said that he saw the beginnings
of the quarrel, and the two appellants.

30 Davison gave unsworn evidence, by reason of his
age, and his evidence was regarded by the learned
judge as completely unreliable and as a reconstruction
of what he had been told. I shall not refer to his
evidence further. The learned judge said of the two
appellants that they were utterly unreliable and un-
truthful witnesses. Though I shall not refer much to

In the Federal Supreme Court of Rhodesia and Nyasaland their evidence it is necessary to do so later to consider explanations given and how they affect liability.

No. 38

JUDGMENT

(a) Clayden, C.J. and Quenet, F.J. continued

12th December 1962

As this is the position in regard to the eye witnesses it is necessary to consider exactly what the Crown did prove to have happened. And at the outset it is necessary to consider two findings of fact made by the learned judge; the one is that the deceased did not have a panga, which was combined with the finding that the panga found must have been that of the first appellant; the other is that injuries were inflicted on the deceased not only where the quarrel began, near the river, but also where the body was found, on the path between the river and the deceased's house and some quarter of a mile uphill from the river.

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In regard to ownership of the panga which was found, blood-stained, some 33 yards downhill from the body, there was the evidence of the brother of the deceased that it did not belong to the deceased and that the deceased had no panga on the evening of his death, and the evidence of the headman that it seemed like one owned by the deceased. In discussing the headman's evidence the learned judge stressed that that witness only "thought" that the panga belonged to the deceased. It does not seem to me that that correctly reflects his evidence. The witness said that that was his impression when he first saw the panga in the path, but he went on to say that he had seen the deceased with it, and he described it. I agree with Unsworth C.J. Ny. that the ground for suggesting bias in this witness was very weak. There are other facts too to indicate that this panga may have been that of the deceased. If it had belonged to the first appellant it is very hard to think of any reason why he should have left it behind. With a community of the sort to which the first appellant belongs such an implement is very necessary in life. Yet, if it was his, it has to be assumed that he abandoned it, and left it, bloodstained, clearly indicating him as the person who had injured the deceased. On the other hand if he had dispossessed the deceased of this weapon there would be every reason to abandon it. And if it was dropped by the deceased there is every reason to think that he might have done so. How it came to be where it was can be better discussed

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in connection with the second question. There is too to show that the deceased had a weapon the fact that both the appellants had slight wounds. The doctor said that the wound on the head of the first appellant might have been caused by a glancing blow with a panga. In a statement to the police the first appellant did use words which indicate that it was the second appellant who, with a panga, caused the injury to his head. I agree with the learned judge that the explanation of this by the first appellant was not convincing, but it was an explanation. And the Crown did prove as part of its case that on the same night he said to his wife that the deceased had injured him. One other matter indicates that the deceased may well have had a panga. When the second appellant went to the place where the first appellant and the deceased were quarrelling although he had with him a panga he at once ran some distance and grabbed a knobkerrie from a villager who was going along the path. At one stage in his evidence he said that he went to get it to protect himself. It is probable that he would fight with a guarding weapon in one hand and an attacking weapon in the other. If the first appellant was armed with a panga and a knobkerrie, and the deceased had no weapon this proved act on the part of the second appellant seems to have no purpose.

With all these indications that the deceased may have had a panga it was I think not enough for the Crown merely to rely on the evidence of the brother of the deceased that he had not. This was obviously a vital issue in the case; and it was obvious from the preliminary enquiry that it was, and would be disputed that the panga found in the path belonged to the first appellant. But there is not one witness who says that it was his. Although the learned judge was impressed by the evidence of the deceased's brother it does not seem to me that so vital a matter can be said to have been proved beyond reasonable doubt. I shall therefore deal with the case on the assumption that the deceased did have a panga when the fight started.

I turn then to the second question. This has been very carefully considered by the learned judge and I can see no reason to interfere with

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(a)Clayden, C.J.
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(a) Clayden, C.J. and Quenet, F.J. judge gives convincing reasons for his finding in this regard.

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It can be accepted therefore that the deceased was injured at the river, for the blood trail to the place where he died was undoubtedly caused by blood from him and not from the small wounds on the appellants. And it can be accepted that further wounds were inflicted at the place up the hill where he died. This involves one of two possibilities and there is no way of deciding between them. Either the deceased ran away, and was followed and hit again, or the deceased, having been left at the place near the river, was later seen to be following, and he was met or there was a return to the place where he was killed. The position of the panga, 33 yards downhill from the place of death, throws no light on the matter at all. There are three possibilities; that it was dropped there by the deceased; that it was dropped there by the first appellant, for the second appellant had his own panga; or that it was thrown there by the first appellant from the place of death. There is no evidence to support the last of these possibilities; the learned judge said that "there is a very strong probability that this panga left near the body was used in the second assault on the hill". With all respect I cannot agree with this. The panga was 33 yards downhill from the body and it is hardly right I think to describe a panga found in such a position as "left near the body". If the first appellant had this panga at the time of the second assault there was no reason whatever for him to go downhill, away from his house, to leave it. So if he had it then it must be assumed that he threw it downhill. The panga was found near the path, and if it was thrown downhill it seems a great coincidence that it should have been thrown to a place where it might so easily have been dropped. No signs were found to indicate that it had struck the ground. I cannot regard it as proved beyond

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reasonable doubt that the first appellant had this panga at the time of the assault up the hill.

The learned Judge's findings as to what happened up the hill are as follows. Early in his judgment he said that it was "most probable" that the deceased walked up the hill after the appellants and was "met and finally struck down". But later he said, correctly, I consider, that it was impossible to say whether he ran away, followed by the appellants, or was following them when he was killed. The case has to be considered on each of these possibilities and if on one there is a view more favourable to either of the appellants that view must I think be taken.

The learned judge's findings in regard to the start of this fight must be qualified when the case is decided on the basis that the first appellant did not initially have a panga. But whether he set out to find the deceased, or was on his way to report to the headman when he met the deceased, there can be no doubt that he must have been angry that the deceased had beaten his children. The learned judge has found that the evidence of the first appellant is an afterthought, designed to lay the blame for the killing on the second appellant. Accepting that that was so one is thrown back on earlier statements by this man. I can see no reason not to accept the evidence of Jorodani, who was sent for to cut away the hair from the wound on the head. He said to Jorodani that he was "involved in a quarrel" with the deceased. There was no suggestion in this statement that the deceased had attacked him. There is no reason whatsoever to think that it was not the first appellant who started the fight. Then the second appellant came on the scene. Coming from his garden he had a panga. He said that when he saw the fight he put down his panga and got another weapon, the knobkerrie, by running to snatch it from the passing villager Valaliyano. But Valaliyano said that he still had the panga when he took the kerrie; this evidence was accepted, and I can see no reason to interfere in that regard. So it was proved that the second appellant went to the fight with a panga and a knobkerrie. The second appellant says that when he got back to the fight the first appellant had got the panga from the deceased and was striking

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(a) Clayden, C.J.
and Quenet, F.J.
continued

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(a) Clayden, C.J.
and Quenet, F.J.
continued

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the deceased with it. Nonetheless he joined in with the knobkerrie. On that statement there was no need at all for him to help the first appellant further, and he was joining in an armed attack on a, then, unarmed man. He did on his own statement earlier receive a slight wound on the arm. This might have made him lose control of himself. But if that had been the case there would have been an immediate use of the panga, which he had at hand, if not in hand. And there was not. He went to get the knobkerrie. If his version is not right then the deceased had the panga, and there may have been some justification to go to the aid of the first appellant at the river.

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But, whatever happened then, that part of the fight ended. If the deceased ran away there was no need whatsoever for either of the appellants to follow him. They had won. And even if at that stage the deceased still had the other panga, so that the first appellant had not one, he would in a chase have been making common cause with the second appellant whom he knew was armed. On the basis that there was a chase after the deceased it can I think be dismissed as a reasonable possibility that the first appellant did not join in it. It would have been so easy for him to have said so.

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The other possibility is that the deceased was killed as he followed after the appellants, in an effort to reach his home. This must be treated on the basis that it was only the second appellant who had a panga, for either the deceased carried his panga up the hill, or the first appellant carried it and dropped it in the path before he reached the place where the deceased was killed. 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. On this basis both the appellants have lied in concealing the fact that further blows were struck up the hill. There was only one panga between them. If the first appellant borrowed it to strike the deceased the second appellant, trying to put the blame on the first as he did, was bound to have said so. And vice versa the position is the same. The only inference to my mind is that the two, who before had made a common cause in the attack on the

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deceased, continued to do so. And in so doing they committed murder.

On all the possibilities which I have considered self defence certainly did not arise when the deceased was killed up the hill. I do not think that there was any provocation, recognised by law, to either of the appellants. Even if there was, what was done up the hill was quite out of proportion to any possible provocation of any sort to either.

In dismissing the appeals reliance is not being placed on the proviso to Section 13(1) of the Federal Supreme Court Act. In Chitata v. R. 1960 R. & N. 199 it was explained that the powers of this Court on appeal differ from those of the English Court of Criminal Appeal. The appeal on fact in this Court is a rehearing, subject to the need to pay regard to advantages enjoyed by a trial Court. 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 enquiry. They are not thereby entitled to have a different verdict entered. They must still show that the verdict is wrong when a different view is taken of that fact. And in that regard I hold against them. Rehearing the case, and finding that the case has to be decided on the basis that initially the deceased was armed, it seems to me, for the reasons I have given, that murder was still proved. Nor I consider does the fact that there were assessors require any different approach. There was no misdirection in summing up to the assessors so as to involve an unfair trial in the sense that the judge was deprived of advice which he should have had. They were asked whether the deceased was armed and gave their opinion that he was not. That they took that view does not prevent a re-consideration of the case on appeal when a different view of that fact is taken. And that that re-consideration has to be without the views of the assessors, because of the different finding of

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JUDGMENT
(a) Clayden, C.J.
and Quenet, F.J.
continued

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In the Federal fact, is necessarily inherent in there being a full Supreme Court appeal on fact.

of Rhodesia
and Nyasaland

The appeals are dismissed.

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(Sgd.) J. CLAYDEN

Chief Justice

JUDGMENT

(a) Clayden, C.J.
and Quenet, F.J.

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1962

continued

I agree.

(Sgd.) V. QUENET

Federal Justice.

J U D G M E N T

(b) Unsworth,
C.J. Ny.

((b) Unsworth, C.J. Ny.)

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This is an appeal from a decision of the High Court of Nyasaland convicting the appellants of the murder of a man named Silino.

The facts of the case are that on the 13th December 1962 the dead body of Silino was found on a path in Kavala Village. It was noted by the village headman that there was a trail of blood leading from a position near the stream at the bottom of the village to the place where the body was found. The distance was about 400 yards. There were no particulars given of the amount of blood and the trail was no longer there when the police visited the scene on the 14th December. A panga was found on the path 33 yards away from the body and in the direction of the stream. There were a number of wounds on the body of the deceased man. There were three wounds on the head and, in the opinion of the pathologist, two of these wounds would have caused death by bleeding and the third by injury to the brain. There were also injuries to the hand and forearm. The cause of death was haemorrhage and shock accelerated by a brain injury.

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The evidence implicating the first appellant was that on the 12th December the deceased went to the house of the first appellant and assaulted three of his children. The appellant returned home

at sunset and left the house when he heard of these assaults on the children. This appellant alleges that he was going to make a report to the village headman but the trial Judge found that he went out with a view to having the matter out with the deceased. It appears that the appellant was followed by his son, Davison, but the evidence of this boy as to what he said that he had seen was not accepted by the trial Judge as a true account for reasons which are set out in the judgment. Later that evening the appellant returned home with injuries to his head and hand and told his wife that it was Silino who had injured him. On the same evening the appellant went to the house of a witness named Jorodani. He asked this witness to attend to the head wound and informed him that he had been injured in a quarrel with Silino. The witness bound up the head wound to prevent more bleeding. On the following morning the appellant saw a witness named Magombo and told him that his children had been assaulted and that he had been involved in a fight. The appellant made two statements after caution and charge and alleged in these statements that it was the second appellant who had killed the deceased. He said in one of the statements that "he injured me as well" and in the grammatical construction of the English translation this would mean that the injuries were inflicted by the second appellant and not the deceased as the appellant maintains and as he told his wife and inferred in the statement to Jorodani on the night of the crime.

The evidence against the second appellant was that about the time of the crime a witness named Valaliyano saw the appellant who was carrying a panga. He seized a knobkerrie from the witness and made off in the direction of the stream. This appellant also made statements in which he said that the first appellant was the one who killed the deceased.

The two appellants gave evidence on oath in the Court below and each said that the other had struck the mortal blow. The first appellant said that he was carrying only a knobkerrie and had no panga. He met the deceased at the stream and, after an exchange of angry words, was struck on the head by a panga in the possession of the

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(b) Unsworth,
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JUDGMENT

(b) Unsworth,
C.J. Ny.
continued

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1962

deceased. He said that he was unable to retaliate on account of his injuries and took no part in any attack on the deceased. The second appellant also said that the deceased struck the first appellant with a panga. This appellant then went to the rescue and was himself struck by the deceased with the panga on the upper left arm. It was after this that he went and took the knobkerrie from Valaliyano. On returning to the scene he found the first appellant striking the deceased with the panga which he had by that time taken from the deceased. The appellant then struck the deceased several times with the knobkerrie. The trial Judge did not accept any part of the story told by the appellants.

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It was found by the trial Judge that the two appellants were together aiding and abetting one another in an attack upon the deceased and I would not disturb this finding. The first appellant went to the scene with reason to be in an angry mood and his story that he was unable to retaliate on account of the injuries inflicted by the deceased is not supported by the medical evidence. He remained on the scene throughout and went away together with the second appellant. He made no report to the authorities at the time and told a witness that he had been in a fight. The second appellant on his own story was aiding and abetting when lethal blows were struck.

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The real point of substance in this appeal is whether the court was justified in holding that the deceased was unarmed and thus ruling out altogether any defence of provocation or self-defence. The trial Judge reached this conclusion largely on the evidence of Marko who was a brother of the deceased. This witness said that he had seen the deceased at about sunset on a path in the village near where the crime took place. The deceased was then carrying a bag of maize but had no panga. Marko also said that he later found a panga in his brother's house which he identified as belonging to his brother. He had not seen his brother with another panga. As against this the village headman identified the panga found on the scene of the crime as one that he had seen the deceased carrying about. The trial Judge accepted the evidence of Marko on this issue and rejected that of the village headman. The ground on which the Judge rejected the evidence of the headman was that he

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was an unreliable witness as he had said that he was unaware of a dispute between the first appellant and the deceased which it was said the headman must have known about. I feel, with respect, that this was a very tenuous ground for rejecting the evidence of a person who appears (except possibly for Valaliyano) to have been the only really independent witness from the village. There was also the point that Marko's evidence does not exclude the possibility that the deceased went to his house with the bag of maize before the quarrel, or that the deceased in fact had two pangas. I am respectfully of the view that there was no sufficient evidence that the deceased was unarmed and, in these circumstances, I do not think that one can properly reject the evidence of both appellants to the effect that the deceased had a panga. There can be no doubt that the first appellant was injured and, if the statements made to the wife and Jorodani be accepted as true, the deceased must have used a panga or similar instrument. I would also not be prepared to support the finding that the first appellant was carrying a panga as this finding was largely based upon the assumption that the panga found on the scene belonged to this appellant and not the deceased. Furthermore, the prosecution called the wife who saw the appellant leave his house before the crime and did not suggest that the appellant was carrying a panga. The panga found at the scene was not identified as belonging to either appellant.

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.

I think that the point of substance in this appeal must be decided in favour of the appellants and I do not think that this is a case for the application of proviso (i) to Section 13(1) of the Federal Supreme Court Act. This was a trial

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JUDGMENT
(b) Unsworth,
C. J Ny.
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and Nyasaland

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JUDGMENT

(b) Unsworth,
C.J. Ny.
continued

12th December
1962

with assessors and it is not possible to know what view the trial Judge and the assessors would have taken if they had found the facts on the basis that the deceased was an armed man though it is clear that great weight was given by the Judge to the fact that the deceased was not armed with a panga. On the basis that a panga was used by the deceased it would have been open to the Court below to have brought in a verdict of manslaughter even if the mortal blows were struck up the hill (see comments of the Judicial Committee in Kwaku Mensah v. The King), (1946 A.C. 83 at p.93).

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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. 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 mention that I have considered the question of self-defence but I am satisfied that the injuries inflicted show that more force must have been used than was reasonably necessary for this purpose. This excess of force would constitute at least manslaughter in accordance with the principles laid down in Jackson v. R. (1962 R. & N. 157).

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I would accordingly allow the appeal. I would set aside the convictions for murder and sentences of death and substitute findings of guilty of manslaughter in respect of each appellant.

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(Sgd.) E. UNSWORTH

Chief Justice of Nyasaland

DELIVERED at SALISBURY this 12th day of December 1962
M.R.Tett for the Appellants.
M.C.Nicholson for the Respondent.
Pro Deo.

NO. 39

No. 39

IN THE FEDERAL SUPREME COURT
at SALISBURY

Order of the
Federal
Supreme Court
12th December
1962

Criminal Appeals Nos. 225 and 226 of 1962.

Between: TADEYO KWALIRA
 JOSEPH DUNCAN Appellants

versus

 THE QUEEN Respondent

Before: Clayden, C.J. Quenet, F.J. and Unsworth, C.J. Ny.

 The 21st and 22nd days of NOVEMBER
 and the 12th day of DECEMBER, 1962

 Upon hearing Mr. M. R. Tett of counsel for
 the appellant and Mr. M.C. Nicholson of counsel
 for the respondent, and having perused the docu-
 ments filed herein

 IT IS ORDERED that the appeals be and they
 are hereby dismissed

 BY THE COURT.

 GIVEN under my hand and the seal of the Court
 the 12th day of DECEMBER, 1962.

 (SGD.) J.M.N. HEARN.

ASSISTANT REGISTRAR.

Written reasons to follow

Order issued...12th ...DECEMBER, 1962.

In the
Privy Council

No. 40

Order grant-
ing Special
Leave to
Appeal in
Forma
Pauperis to
Her Majesty
in Council

29th August
1963

ORDER GRANTING SPECIAL LEAVE TO APPEAL
IN FORMA PAUPERIS TO HER MAJESTY IN
COUNCIL

AT THE COURT AT MALMORAL
The 29th day of August 1963

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY
MR. SECRETARY NOBLE MR. MACPHERSON
SIR MICHAEL ADEANE SIR JOHN HOBSON
MR. MARPLES

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 31st day of July 1963 in the words following viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Tadeyo Kwalira and Joseph Duncan in the matter of an Appeal from the Federal Supreme Court of Rhodesia and Nyasaland between the Petitioners and Your Majesty Respondent setting forth that the Petitioners desire to obtain special leave to appeal in forma pauperis to Your Majesty in Council from a decision on the 12th December 1962 of the Federal Supreme Court of Rhodesia and Nyasaland upholding a verdict and sentence dated the 20th August 1962 of the High Court of Nyasaland whereby the Petitioners were found guilty of the murder of one Silino Mathews and sentenced to death: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal in forma pauperis to Your Majesty in Council from the decision of the Federal Supreme Court of Rhodesia and Nyasaland dated the 12th December 1962 and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to

be granted to the Petitioners to enter and prosecute their Appeal in forma pauperis against the decision of the Federal Supreme Court of Rhodesia and Nyasaland dated the 12th day of December 1962:

In the
Privy Council

No.40

Order grant-
ing Special
Leave to
Appeal in
Forma
Pauperis to
Her Majesty
in Council
continued

29th August
1963

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"And their Lordships do further report to Your Majesty that the proper officer of the said Federal Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal".

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed, obeyed and carried into execution.

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Whereof the Governor-General or Officer administering the Government of the Federation of Rhodesia and Nyasaland for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. N. LANDALE

EXHIBITS

P.8

Plan drawn
by Sub-
Inspector
Godfrey
Makowa

14th December
1961

EXHIBITS

P.8. PLAN DRAWN BY
SUB-INSPECTOR GODFREY MAKOWA

"P.9" - STATEMENT OF JOSEPH DUNCAN (2nd
Accused)

Statement made by the second accused, Joseph
Duncan, on 17th December, 1961, in answer to
the charge and caution.

REPLY:

10 " I understand the charge and I deny it, that
it is not I who killed, it is Tadeyo Kwalira who
killed him by protecting his children, and I have
no further words."

(Translated by C.C.J. Chipinga, Court Interpreter)

EXHIBITS

P.9
Statement of
Joseph Duncan
17th December
1961

EXHIBITS

"P.10" - STATEMENT BY TADEYO KWALIRA
(1st Accused)

P.10

Statement
by Tadeyo
Kwalira

18th December
1961

Statement made by the first accused, Tadeyo
Kwalira, on 18th December, 1961, in answer
to the charge and caution.

REPLY:

" I deny that it is I who killed Silino,
but Joseph s/o Duncan is the one who killed
Silino with a panga knife. I saw that".

(Translated by C.C.J. Chipinga, Court Interpreter)

P.11. FURTHER STATEMENT BY TADEYO KWALIRA
(1st ACCUSED)

EXHIBITS

P.11

Further
Statement by
Tadeyo Kwalira

Further statement made by the first accused,
Tadeyo Kwalira.

" I have understood, because it was him who came with a knife with which he struck Silino. I had no weapon all the time, but he is the one who injured Silino. When I was trying to stop them he injured me as well".

10 (Translated by C.C.J.Chipinga, Court Interpreter)

EXHIBITS

P.12

Further
Statement
by Joseph
Duncan

P.12. FURTHER STATEMENT BY JOSEPH DUNCAN
(2nd Accused)

Further statement made by the second accused,
Joseph Duncan.

"I have no words".

(Translated by C.C.J. Chipinga, Court Interpreter)

IN THE PRIVY COUNCIL

No.38 of 1963

ON APPEAL FROM THE FEDERAL SUPREME COURT
OF RHODESIA AND NYASALAND

B E T W E E N

TADEYO KWALIRA and JOSEPH DUNCAN

Appellants

and

THE QUEEN

Respondent

RECORD OF PROCEEDINGS

JAQUES & CO.,
2, South Square,
Gray's Inn,
London, W.C.1.
Solicitors for the Appellants.

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand,
London, W.C.2.
Solicitors for the Respondent.