3, 1906

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
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TEL

In the Privy Council.

No. 69 of 1905.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Between MAX HERMAN WEHNER - - *Appellant*,

AND

THE KING - - - - - - - *Respondent.*

RESPONDENT'S CASE.

Case for His Majesty's Attorney-General as Respondent.

1. This is an Appeal by special leave from a Judgment of the Court of Appeal for Eastern Africa (Lindsey Smith Skinner Turner and Murison JJ.) refusing to quash a conviction of the Appellant for murder and order a new trial.

2. The Appellant was tried on the 30th and 31st January 1905 before Mr. R. W. Hamilton at the Sessions Court of the East Africa Protectorate at Nairobi upon a charge directed by the Town Magistrate of Nairobi of having on or about the latter part of October in 1904 shot a native by name Mcharnia with a ·303 rifle and thereby committed the offence of murder 10 under Section 302 of The Indian Penal Code. To this charge the Appellant pleaded not guilty and elected to be tried by a jury. A jury of five persons was accordingly chosen who returned a verdict which was entered as a verdict of murder and sentence of death ~~(since commuted to penal servitude)~~ was pronounced.

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3. The Appellant appealed to the said Court of Appeal on various grounds hereinafter more particularly referred to but which (in substance) were that the case was not lawfully tried by a jury of five that the trial was not regularly conducted that the jury were misdirected and that the verdict did not amount to a verdict of murder. The Court of Appeal dismissed the appeal.

4. The Court before which the Appellant was tried was the Protectorate Court (established by the East Africa Order in Council 1897). By Section 11 (b) of the said Order the enactments mentioned in the Schedule thereto were made applicable to the Protectorate. Among those enactments were the following Indian Acts viz.: the Indian Penal Code the Indian Evidence Act 1872 the Indian Oaths Act 1873 and the Code of Criminal Procedure, including (by virtue of Section 11 (d) of the said Order) Acts amending or substituted for any of those Acts.

5. By virtue of Section 4 of the East Africa Order in Council 1899 the Protectorate Court was constituted (until other provision should be made which has never been done) a Sessions Court.

6. Mr. Hamilton who tried the Appellant was duly appointed a Sessions Judge for the said Protectorate Court on the 19th February 1901. The said East Africa Orders in Council of 1897 and 1899 were repealed by the East Africa Order in Council 1902 which however provided by Section 28 (1) that where no other provision was made by Ordinance any law practice or procedure established by or under the said repealed Orders and all Acts of any legislature in India then in force in East Africa should remain in force until such other provision was made and by Section 28 (2) that every appointment of a Judge or other officer and every Court established and existing at the commencment of the said Order should until other provision was made continue to be as if the said Order had not been passed. No such other provision has been made.

7. The Criminal Procedure Code 1898 which was the Code applicable at the date of the trial contains the following material provisions:—

§ 268. All trials before a Court of Session shall be either by jury or with the aid of assessors.

§ 274. (1) In trials before the High Court the jury shall consist of nine persons.

(2). In trials by jury before the Court of Session the jury shall consist of such uneven number not being less than three or more than nine as the Local Government by order applicable to any particular district or to any particular class of offences in that district may direct.

§ § 276–280 relate to the choice of and objections to jurors and the appointment of a foreman.

§ 281. When the foreman has been appointed the jurors shall be sworn under the Indian Oaths Act 1873.

§ 410. Any person convicted on a trial held by a Sessions Judge or an additional Sessions Judge may appeal to the High Court.

§ 423 (1). The Appellate Court . . . may if it considers there is no sufficient grounds for interfering dismiss the appeal or may

* * * * * *

(b) in an appeal from a conviction (1) reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial . . .

(2). Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him.

§ 536 (1). If an offence triable with the aid of assessors is tried by a jury the trial shall not on that ground only be invalid.

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

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

* * * * * *

(d) of any misdirection in any charge to a jury; unless such error omission irregularity . . . . or misdirection has in fact occasioned a failure of justice.

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

8. By virtue of Section 14 of the East Africa Order in Council 1897 and of Section 2 of the Appeals Ordinance 1902 made under the Eastern African Protectorates (Court of Appeal) Order in Council 1902 Section 2 the appeal given by Section 410 of the Criminal Procedure Code above mentioned lay in the case of the Sessions Court in question to the Court of Appeal for Eastern Africa. 10

8A. No order applicable to the trial of the Appellants directing of what number the jury should consist was made.

9. The Indian Oaths Act 1873 contains the following material provisions:—

§ 5. Oaths or affirmations shall be made by the following persons:—

(*a*) All witnesses

* * * * * *

(*c*) Jurors

* * * * * *

§ 6. Where the witness . . . or juror is a Hindu or Muhammadan, or has an objection to making an oath he shall instead of making an oath make an affirmation. In every other case the witness . . . or juror shall make an oath. 20

§ 13. No omission to take any oath or make any affirmation no substitution of any one for any other of them and no irregularity whatever in the form in which any one of them is administered shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission substitution or irregularity took place or shall affect the obligation of a witness to state the truth.

Rec. p. 17.

10. At the trial of the charge now in question the Appellant (who was not represented by any advocate) elected to be tried by a jury and a jury of five persons was chosen by lot without objection by the Appellant either to their number or to any individual among them. They were however not 30

sworn until two of the witnesses for the prosecution had been examined. They were then sworn no objection on this account being taken by the Appellant. Five native witnesses for the prosecution were not sworn but were warned to speak the truth before giving their evidence. No objection to the admissibility of their statements was taken by the Appellant. It does not appear by the Record whether they were of any religion.

Rec. p. 21.

Rec. pp. 17, 19, 23. 25.

9 (1)

11. Two native boys named Juma and Hamisi gave evidence that as they the Appellant a man named Gibson and the deceased Mcharnia were one night in October 1904 returning to the Appellant's camp outside Nakuru the
10 Appellant in their presence shot Mcharnia with a rifle. Their story was corroborated by evidence to the effect that the remains of a male human body were subsequently found at the spot where the offence was alleged to have taken place together with a blanket and an ear ornament which were identified as belonging to Mcharnia and that close by was also found a lantern and the Appellant's hat which one of the boys said he was carrying and dropped when he ran away on the deceased being shot. It also appeared in evidence that a used rifle cartridge produced at the trial was found by a European witness a few yards from the remains. This cartridge had been hit by the striker of the rifle rather to one side and another cartridge fired by Police Inspector Rayne
20 from the rifle with which the murder was alleged to have been committed was also produced and exhibited the same peculiarity.

Rec. pp. 17-20.

Rec. p. 21, line 37. Rec. p. 23, lines 25-29.

(2)

12. The Appellant did not give evidence on his own behalf at the trial but confirmed the evidence which he had given before the magistrate. This was to the effect that neither he nor Gibson had a rifle with them that night that on the night in question the native boys misdirected them on their way to camp and that he fired his revolver several times to attract the attention of those at the camp and threatened the boys with his kiboko (or whip) and that thereupon the boys ran away dropping the hat which he admitted was his and that it was not possible for Mcharnia to have been killed by a shot from the
30 revolver.

Rec. p. 29, line 32. Rec. p. 10.

The Appellant called witnesses (including Gibson) in support of his statement.

Rec. pp. 30-33.

(3)

13. There was evidence before the Court that on the night in question the Appellant and Gibson had both been drinking but the contention of the

Appellant was that in spite of it he was able to locate his position. The arguments put forward by the Appellant ~~(the Judge's notes of which are set out in the Record)~~ were in effect that he had no rifle with him that night and did not shoot Mcharnia. That he was probably killed by wild animals at a subsequent date and that the whole story was a fabrication. No suggestion was made nor was any evidence given that the death of Mcharnia might have been caused by Appellant under circumstances which would make the crime one of homicide other than murder.

Rec. p. 33.

14. In his charge to the jury the learned Judge stated "if the story of the prosecution is true the verdict must be guilty of murder if the story is not believed or there is any doubt the verdict must be acquittal." ~~No objection at the time was taken to this direction.~~

Rec. p. 34, line 26.

15. The unanimous verdict of the jury was in the following terms "That accused caused the death of the M'Kikuya Mcharnia but that he was not responsible for his actions owing to the influence of liquor." Having regard to the only issue which was raised at the trial this was accepted by the learned Judge as a verdict of guilty of murder and the Appellant was sentenced to death.

Rec. p. 35.
Rec. p. 35, line 19.

16. The Appellant thereupon appealed to the Court of Appeal and prayed that the Court of Appeal would quash the conviction and order a new trial. ~~The grounds of appeal are set out in the Record.~~

Rec. p. 35.

17. In the Court of Appeal only three grounds were urged by Counsel in support of the appeal. They were all based on alleged misdirection or insufficient direction. The Court however in the reasons for their judgment referred to the terms of the verdict and though expressing the opinion that it was ambiguous held that having regard to the issues raised it was properly interpreted by the Judge.

Rec. p. 37.

18. The Court of Appeal dismissed the Appeal but accepting the finding of the jury as amounting to a recommendation to mercy owing to the Appellant's being under the influence of liquor considered that such recommendation should be forwarded to the proper authorities for their consideration. This ~~has been~~ done and the sentence ~~has been~~ commuted to one of penal servitude.

19. By Order of His Majesty in Council dated the 7th day of August the Appellant was granted leave to appeal from the above decision.

20. The Attorney-General submits that the judgment of the Supreme Court now appealed from was correct and that this Appeal ought to be dismissed or in the alternative that it should be directed that the Appellant be retried before the Sessions Court for the following among other

REASONS.

1. Because no failure of justice has in fact been occasioned within the meaning of § 537 of the Code of Criminal Procedure by any error omission irregularity or misdirection complained of.

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2. Because by virtue of § 13 of the Indian Oaths Act neither the omission to swear the native witnesses nor the omission to swear the jury at the commencement of the trial either invalidates the proceedings or makes any evidence inadmissible.

3. Because by virtue of § 536 (1) of the Code of Criminal Procedure the trial was not invalid only because it was tried by a jury.

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4. Because the Appellant claimed to be tried by a jury.

5. Because any objections to the number of the jury or to their not having been sworn at the commencement of the trial or to the admissibility of the evidence of the unsworn witnesses ought to have been taken at the trial when the irregularity if any could have been corrected.

6. Because there was no misdirection.

7. Because the verdict was not erroneous owing to any misdirection by the Judge or to a misunderstanding of the law as laid down by him.

8. Because the Appellant has in fact been fairly tried and there was evidence to support a verdict of murder.

9. Because having regard to the issues raised and the judge's charge the verdict meant that the Appellant was guilty of murder and was in all respects equivalent to an answer in the affirmative to a direct question whether he was so guilty.

10. Because under the Indian Penal Code drunkenness as found by the jury is immaterial.

11. Because if the Judgment of the Sessions Court is set aside by reason of error in the proceedings on the trial or misdirection on the part of the Judge the judgment ought to have been that the Appellant be retried. 10

12. Because the Appellant by his Petition of Appeal only asked for a new trial and on the argument only relied upon misdirection.

13. Because if the verdict did not amount to a verdict of guilty of murder it was no verdict at all.

14. Because even on the view most favourable to the Appellant the charge against him has never been effectually dealt with. 20

15. Because the Appellant has not been acquitted on the said charge.

16. Because on the evidence it would not be just that the conviction should be quashed without a new trial being ordered.

S. A. T. ROWLATT.

In the Privy Council.

No. 69 of 1905.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

WEHNER

v.

THE KING.

Case of the Respondent.

TREASURY SOLICITOR,
LAW COURTS BRANCH,
ROYAL COURTS OF JUSTICE,
STRAND, W.C.

WYMAN & SONS, Ltd., Printers, Fetter Lane, London, E.C.