Privy Council Appeal No. 66 of 1943

Adel Muhammed El Dabbah – – – – – *Appellant*

v.

The Attorney General of Palestine – – – – *Respondent*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH MAY, 1944

Present at the Hearing:

VISCOUNT MAUGHAM
LORD THANKERTON
SIR MADHAVAN NAIR

[*Delivered by* LORD THANKERTON]

On the 24th March, 1943, the Chief Justice of Palestine, sitting alone as the Court of Criminal Assize at Haifa, convicted the appellant of murder contrary to section 214 (*b*) of the Criminal Code Ordinance, 1936, and sentenced him to death. An appeal by the appellant was dismissed on the 17th April, 1943, by the Supreme Court of Palestine, sitting as the Court of Criminal Appeal, and the appellant, by special leave, now appeals against that judgment.

Mr. Beyfus, in his full and able argument on behalf of the appellant, conveniently submitted his contentions under two heads, viz., those which challenged the constitution of the Court of Criminal Assize by which the appellant was tried, and those which alleged grave impropriety in the course of the trial.

As regards the constitution of the trial court, the Chief Justice sat alone by virtue of regulation No. 3 of the Palestine Defence (Judicial) Regulations (No. 2), 1942, which provided as follows:

> " 3. Whenever the Chief Justice considers it expedient so to do he may, either generally or for the hearing of any particular case, direct that the Court of Criminal Assize shall consist of the Chief Justice or a British puisne judge, sitting alone, or with any one or more judge or judges of the Supreme Court, or with a president, or relieving president, or any one or more Palestinian judge or judges, of the District Court."

At the date of making these regulations, the constitution of the Court of Criminal Assize was prescribed by section 10 of the Courts Ordinance, 1940 (No. 31 of 1940), under which, in the absence of any application by the accused, such court must consist of three judges. No such application was made by the present appellant.

Mr. Beyfus submitted that the Court of Criminal Assize was not validly constituted on three grounds, viz., (*a*) that regulation No. 3 already referred to, which was made by the High Commissioner under the powers vested in him by Article 3 of the Emergency Powers (Colonial Defence) Order in Council, 1939, and the Emergency Powers (Defence) Act, 1939, was not within the powers thus vested in him, and was therefore *ultra vires* of the High Commissioner; (*b*) that, assuming that regulation No. 3 was *intra*

vires of the High Commissioner, any direction made by the Chief Justice under it fell to be made by the Chief Justice himself, and there was no such direction in the present case; and (*c*) that, in any event, such a direction was an order within the meaning of section 7 of the Palestine Interpretation Ordinance, 1933 (No. 69 of 1933), which was applied to the Defence (Judicial) Regulations, 1942, by regulation No. 9 thereof, and which required publication in the Gazette before such an order could have the force of law. These submissions were raised for the first time before this Board.

(*a*) It is unnecessary to refer to the Order in Council of 1939 in detail; it is sufficient to state that its effect was to extend the Emergency Powers (Defence) Act, 1939, to Palestine, and, for present purposes, that the parts of section 1 of the Act which are material may be read as originally enacted, with the substitution of the High Commissioner for His Majesty in Council. The material parts of section 1 are as follows:—

> " 1.—(1) Subject to the provisions of this section, His Majesty may by Order in Council make such Regulations (in this Act referred to as ' Defence Regulations ') as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community."
>
> " (2) . . . . . .
>
> " (3) Defence Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the Regulations to make orders, rules and byelaws for any of the purposes for which such Regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient for the purposes of the Regulations.
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> " (4) A Defence Regulation, and any order, rule or byelaw duly made in pursuance of such a Regulation, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."

Counsel maintained that the discretion conferred on the Chief Justice by regulation No. 3 involved a delegation of his powers by the High Commissioner which was not authorised by subsection 3 of section 1 of the Act of 1939, which only authorised a delegation in general terms of the High Commissioner's power to make regulations under subsections 1 and 2 of section 1, and that, therefore, the attempted delegation in regulation No. 3 was *ultra vires* of the High Commissioner. Counsel also maintained that the right conferred on an accused to be tried by a court of three by the Courts Ordinance of 1940 could not be modified or abrogated by any such regulation made by the High Commissioner, and that, in any event, the intention to modify or abrogate such a right must be made clear beyond any doubt in the regulations.

Their Lordships are unable to accept any of these contentions. In their opinion, it is clear that the High Commissioner satisfied himself that these regulations were necessary or expedient for the purposes stated in subsection 1 of section 1 of the Act of 1939, and, *inter alia*, that a flexibility in the constitution of the courts of criminal assize was necessary or expedient. It was rightly admitted by counsel for the appellant that he was not able to challenge the validity of the High Commissioner's conclusions. Their Lordships are of opinion that the discretion conferred on the Chief Justice involved no delegation of the High Commissioner's powers, but was an executive discretion necessary to the carrying out of the High Commissioner's conclusions. Accordingly, no question can arise under subsection 3 of section 1 of the Act. As regards the other contentions as to modification or abrogation of the appellant's right to a court of three under the Courts Ordinance of 1940, regulation No. 3 of 1942 is clearly inconsistent with it, and, by virtue of subsection 4 of section 1 of the Act, the regulation must prevail. The suggestion made by counsel that the appellant's right was not modified or affected until the Chief Justice exercised his discretion is fallacious; it was modified by the regulation as soon as it came into operation.

(*b*) Regulation No. 3 of 1942 makes no provision for the form which the direction by the Chief Justice is to take. In the present case the constitution of the Court which was to try the appellant was prescribed in the Cause List of the Supreme Court of Palestine for the week ending Saturday, 20th March, 1943, which had been approved by the Chief Justice prior to Monday, 15th March, 1943. Their Lordships can see no ground for suggesting that this course for fixing the constitution of the Court which was to try the appellant, and which is obviously the usual method of administering the business of the Court, was not a proper method by which the Chief Justice should exercise the discretion vested in him.

(*c*) Section 7 of the Interpretation Ordinance, 1933, so far as material, provides as follows:—

> " 7. Where an Ordinance confers power on any authority to make regulations or orders, the following provisions shall have effect with reference to the making and operation of such regulations or orders—
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> . . . . . .
>
> (*d*) all regulations and orders, save where otherwise provided, shall be published in the Gazette and shall have the force of law upon such publication thereof or from the date named therein."

It follows from the views already expressed by their Lordships that the direction by the Chief Justice under regulation No. 3 of 1942 is not a regulation or order within the meaning of the above section, and that there was no need to publish it in the Gazette.

Their Lordships now turn to the second group of contentions raised on behalf of the appellant, which relate to the course of the trial, and are as follows:—(*a*) That the Chief Justice, in his judgment as finally issued by him, made material alterations in the judgment as orally delivered by him; (*b*) that there was no sufficient evidence before the Chief Justice to justify a finding of " premeditation " within the meaning of sections 214 and 216 of the Palestine Criminal Code Ordinance, 1936, and, in any event, that the Chief Justice had neither considered this essential question, nor made any finding thereon; and (*c*) that the refusal by the Chief Justice, at the close of the evidence for the Crown, to rule that there was any obligation on the Crown to tender for cross-examination by the defence, witnesses, whose names were on the information but had not been called, was wrong, and prejudiced the appellant's right to a fair trial.

(*a*) The changes in the judgment finally issued, in view of the information obtained from the Chief Justice at the request of the Board and the limited argument submitted at the hearing before the Board, render it unnecessary for the Board to consider at length the value of the transcript by the shorthand stenographer of the oral judgment as delivered by the Chief Justice on the 17th April, 1943, which the learned Judge now states was full of errors and obvious mistakes, and the latter part of which had to be rewritten by him. In view of this explanation, which was not before the Court of Criminal Appeal, their Lordships would have difficulty in taking the transcript into consideration, but they are relieved from any final conclusion on this point, as the only change from the judgment as orally delivered which the appellant founds upon, is admitted by the learned Judge in his statement, viz., the mention in the oral judgment of Ibrahim Bishara as a witness along with a reference to his evidence which was in fact not given at the trial, but was contained in his deposition at the preliminary enquiries, and which mention was omitted in the judgment finally issued. This point was raised before the Court of Criminal Appeal, and their Lordships agree with their view that, apart from this reference, which was an obvious mistake, there was sufficient evidence on which it could be found that there was enmity not only between the villages but also between the families of the deceased and the appellant, and that this alteration in the judgment cannot be regarded as a substantial one, which would affect the conclusions arrived at by the learned Judge.

(*b*) The appellant was charged under section 214 (*b*) of the Criminal Code Ordinance as having " with premeditation " caused the death of the deceased, and section 216 provides as follows:—

> " 216. For the purpose of section 214 of this Code a person is deemed to have killed another person with premeditation when—
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> (*a*) he has resolved to kill such person or to kill any member of the family or of the race to which such person belongs, provided that it shall not be necessary to show that he resolved to kill any particular member of such family or race, and
>
> (*b*) he has killed such person in cold blood without immediate provocation in circumstances in which he was able to think and realise the result of his actions, and
>
> (*c*) he has killed such person after having prepared himself to kill such person or any member of the family or race to which such person belongs, or after having prepared the instrument, if any, with which such person was killed.
>
> In order to prove premeditation it shall not be necessary to show that an accused person was in any state of mind for any particular period or within any particular period before the actual commission of the crime, or that the instrument, if any, with which the crime was committed was prepared at any particular time before the actual commission of the crime."

Under this section the three essential ingredients are cumulative, and while Mr. Beyfus admitted that there was sufficient evidence to justify a finding under (*b*) and (*c*), he submitted that there was no sufficient evidence to justify a finding under (*a*), and that, subject to his next contention, the learned Judge misdirected himself, and the conviction under section 214 could not be supported. It will seldom be found that there is direct evidence of a resolution to kill; such resolution will more often rest on legitimate inferences from the proved circumstances and the conduct of the accused, and, in the opinion of their Lordships, the circumstances proved in the present case and the conduct of the accused, along with the two others who accompanied him, but whose identity has not been proved, afford ample ground for a finding that the appellant resolved to kill the deceased.

The Court of Criminal Appeal, holding, in effect, that the Chief Justice had pronounced no finding as to premeditation, and forming an independent view of their own upon the evidence, stated, " it is quite clear to our minds that the irresistible inference—the only inference possible from the facts of this case—is that this killing was done with premeditation." While not accepting their criticism upon the judgment of the Chief Justice, their Lordships are unable to come to any different conclusion upon the facts, which are summarised by the Court of Criminal Appeal as follows:—" That the three armed men were seen proceeding from north to south at varying distances up to a maximum of a hundred metres from the house of the deceased; that shots were fired by those armed men into the doorway of the house of the deceased; that the deceased was found lying eighteen metres from his doorway with two shots in the back; that the three armed men were seen immediately after the shots had been heard proceeding together from south to north over the road by which they had approached the scene; that there is no evidence and no suggestion that there was any provocation or quarrel; and that it was night time." On the question of common design, they state, " Three men armed going to the scene of the crime, all returning from the scene together, all three actually shooting into the doorway of the house of the man who was eventually killed, two cartridges found showing that two shots had been fired two and a half and four metres from the place where the body of the deceased was found. From these facts it seems to this Court that common design is proved beyond a shadow of a doubt, and that no other conclusion is possible." It is also well to bear in mind the conclusions of the Court of Criminal Appeal as to proof of enmity between the appellant and the deceased and between their families, which have been already referred to. This evidence of enmity was also treated by the learned Chief Justice as relevant to the question of premeditation. It may be added that the appellant himself admitted that there were broken relations between the deceased and himself.

The appellant's counsel submitted that, in any event, the Chief Justice had neither considered, nor made any finding on, premeditation, and the Court of Criminal Appeal would appear to have accepted this criticism to some extent. In their Lordships' opinion, the learned Judges did not pay sufficient attention to the clear and express language of the Chief Justice. The form of his judgment was provided for by section 51 of the Criminal Procedure (Trial upon Information) Ordinance, 1933, which provides:—

> " 51. Upon the conviction of any person for any offence the presiding judge shall, upon his notes of the proceedings, record the findings of fact on which the conviction is based:
>
> Provided that no conviction shall be invalid for failure to include in such record a finding of a fact if such fact shall appear to be sufficiently established by the evidence given in the case."

It is only necessary to make a short quotation from the judgment of the learned Chief Justice:—

> " It is not necessary for the prosecution to prove a motive for a murder, but it does explain what otherwise might be unexplainable. In this case it explains the shooting in cold blood of the deceased, and it was a premeditated murder.
>
> I therefore find that Adel, accused No 1, was one of the three men who took part in this murder, and I therefore find him guilty of murder as charged. . . . Adel Muhammad el Dabbah, as I said a few moments ago, this is a cold-blooded premeditated murder, of which I find you guilty."

The Court of Criminal Appeal does not pay attention to these findings as to premeditation, which expressly formed part of the charge, and one could not easily assume—even apart from his express reference thereto—that the learned Chief Justice had not considered this outstanding element in the law of murder in Palestine.

(*c*) The last contention of the appellant is that the accused had a right to have the witnesses, whose names were upon the information, but were not called to give evidence for the prosecution, tendered by the Crown for cross-examination by the defence, as was asked for by counsel for the defence, at the close of the case for the prosecution. The learned Chief Justice ruled that there was no obligation on the prosecution to call them. The Court of Criminal Appeal held that the strict position in law was that it was not necessary legally for the prosecution to put forward these witnesses, and that they could not say that the learned Chief Justice erred in point of law, but they pointed out that, in their opinion, the better practice is that the witnesses should be so tendered at the close of the case for the prosecution so that the defence may cross-examine them if they so wish, and they desired to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed in all Courts. While their Lordships agree that there was no obligation on the prosecution to tender these witnesses and therefore this contention of the present appellant fails, their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognises that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the Court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive; no such suggestion is made in the present case.

It will be sufficient to go back to the judgment of Baron Alderson in *R.* v. *Woodhead* [1847], 2 Car. & K. 520, in which he said, "You are aware, I presume, of the rule which the Judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled. He might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in Court, but they are to be called by the party who wants their evidence. This is the only sensible rule." In reply to the counsel for the prisoner, who asked if he was to understand that if he called them he would make them his own witnesses, Baron Alderson said, "Yes, certainly That is the proper course, and one which is consistent with other rules of practice.

For instance, if they were called by the prosecutor, it might be contended that he ought to give evidence to show them unworthy of credit, however falsely the witnesses might have deposed." In a later case—*R.* v. *Cassidy* [1858], 1 F. & F. 79—Baron Parke stated the correct principle to be " that the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury, whose names were on the back of the indictment, he only impliedly undertook to have them in Court for the prisoner to examine them as his witnesses; for the prisoner, on seeing the names there, might have abstained from subpoenaing them. He would therefore follow the course said to have been pursued by Campbell C.J., who ruled that the prosecutor was not bound to call such a witness and that if the prisoner did so, the witnesses should be considered as his own. Cresswell J., who was consulted by Baron Parke, agreed with this view.

It is consistent with the discretion of counsel for the prosecutor, which is thus recognised, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence; and this practice has probably become even more general in recent years, and rightly so—but it remains a matter for the discretion of the prosecutor. Archbold, in the 31st edition, of 1943, contains a list of a series of decisions, but in none of these has the Court superseded the prosecutor's discretion. The most recent of these was an unreported case of *R.* v. *Nicholson,* at the Nottingham Assizes in 1937, where Hawke J. declined to force the prosecution to call a witness whom they regarded as unnecessary. Reference should also be made to an interlocutory remark by Hewart C.J. in *R.* v. *Dora Harris* [1927] 2 K.B. 587, at p. 590, to the effect that " in criminal cases the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury." In their Lordships' view, the learned Judge could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are. It may be noted that under section 41 of the Criminal Procedure (Trial upon Information) Ordinance, 1933, already referred to, the Court has the right, of its own motion, to call upon persons to give evidence.

This last contention of the appellant, therefore, also fails, and, on the whole matter, their Lordships are of opinion that the appeal should be dismissed, and the judgment of the Court of Criminal Appeal should be affirmed, and their Lordships will advise His Majesty accordingly.

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In the Privy Council

ADEL MUHAMMED EL DABBAH

v.

THE ATTORNEY GENERAL
OF PALESTINE

DELIVERED BY LORD THANKERTON

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