

In the Privy Council.

UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES
15539

ON APPEAL FROM THE PROTECTORATE COURT OF APPEAL
OF THE SOMALILAND PROTECTORATE

BETWEEN

ADAN HAJI JAMA, H.T., YUSUF RER SAHAL, SAEED
MOHAMED, H.T., YUSUF RER SAHAL, DEIR
DERIA, H.T., YUSUF RER SAHAL, FARAH
ABDULLAHI, H.T., AHMED FARAH RER
10 ABOKER AHMED APPELLANTS

AND

THE KING RESPONDENT.

CASE FOR THE RESPONDENT.

RESPONDENTS CASE

RECORD

1.—This is an Appeal from a Judgment, dated the 30th May, 1946, pp. 113-125
of the Protectorate Court of the Somaliland Protectorate (Lieutenant-Colonel
Donald Jackson, Legal Secretary), which dismissed the Appellants' appeals pp. 100-111
from a Judgment, dated the 19th December, 1945, of the Protectorate
Court (Major R. J. Quin) and confirmed the death sentences passed on the
Appellants on their conviction on a charge of murder.

20 2.—The proceedings arose out of the murder of two men and attempts p. 2, l. 10—
to murder three other men on the 2nd July, 1945. The murders and p. 3, l. 9
attempts at murder were alleged by the Crown to have been committed
pursuant to the common purpose of an unlawful assembly to attack
non-Muslims. The Appellants were alleged to be members of the unlawful
assembly and to be therefore guilty of murder under Section 149 of the
Indian Penal Code which is in force in the Somaliland Protectorate.

30 3.—At the preliminary inquiry 18 persons were charged but only p. 5, l. 31 ;
14 were committed for trial. Throughout all the proceedings, however, the p.113, l.16-
Appellants have been referred to, and are referred to in this Case, by the p. 114, l. 21
numbers given to them in the preliminary inquiry, being respectively
No. 10, No. 13, No. 17, and No. 18.

4.—With immaterial exceptions the procedure in criminal matters in the Somaliland Protectorate is governed by the Administration of Criminal Justice Ordinance (Chapter 4 of the Revised Edition of the Laws, 1930, as subsequently amended from time to time). By its second schedule this ordinance repealed the Indian Code of Civil Procedure as applied to the Somaliland Protectorate and substituted provisions which include the following provisions :—

5. (1) All offences under the Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained. 10

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CHAPTER XXI.

OF TRIALS BEFORE THE PROTECTORATE COURT.

A.—PRELIMINARY.

220. All trials before the Protectorate Court shall, save where otherwise provided, be with the aid of assessors.

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D.—TRIAL TO CLOSE OF CASES FOR PROSECUTION AND DEFENCE.

226. (1) When the assessors have been chosen, the prosecutor shall open his case by stating the description of the offence charged, 20 and stating shortly by what evidence he expects to prove the guilt of the accused.

(2) The prosecutor shall then examine his witnesses.

227. (1) The statement, if any, of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

(2) The evidence on oath of an accused competent to give evidence on oath, duly recorded by or before the committing Magistrate, may be tendered by the prosecutor and read as evidence. 30

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229. (1) When the evidence of the witnesses for the prosecution and examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

(2) If he says that he does not, the prosecutor may sum up his case ; and if the Court considers that there is no evidence that the accused committed the offence, it may then in a case tried with the aid of assessors, record a finding of not guilty.

* * * *

(4) If the accused, or any one of several accused, says 40 that he means to adduce evidence, and the Court considers that

there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.

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232. If the accused, or any of the accused, adduces any evidence, the prosecutor shall be entitled to reply.

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E.—CONCLUSION OF TRIAL IN CASES TRIED BY ASSESSORS.

236. (1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.

(2) The Judge shall then give Judgment but in doing so shall not be bound to conform to the opinions of the assessors.

(3) If the accused is convicted, the Judge shall pass sentence on him according to law.

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PART VII.

OF APPEAL AND REVISION.

CHAPTER XXVII.

OF APPEALS.

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308. If the Protectorate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his representative of the time and place at which such appeal will be heard.

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309. (1) The Protectorate Court shall then send for a record of the case, if such record is not in Court. After perusing such record, and hearing the appellant or his representative, if he appears, and the Public Prosecutor, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may :—

(a) 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, or commit him for trial, or (2) alter the finding, maintaining

the sentence, or with or without altering the finding, reduce or increase the sentence, or (3) with or without such reduction or increase, and with or without altering the finding, alter the nature of the sentence.

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PART IX.

SUPPLEMENTARY PROVISIONS.

CHAPTER XXXII.

OF THE PUBLIC PROSECUTOR.

356. (1) The Governor may appoint generally, or in any 10 case, or for any specific class of cases, in any local area, one or more officers to be called Public Prosecutors.

(2) In any case committed for trial to the Protectorate Court the Governor may appoint any officer of the administration not being an officer of police below the rank of British Assistant Inspector to be Public Prosecutor for the purpose of such case.

357. The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry trial or appeal.

358. Any Public Prosecutor may, with the consent of the 20 Court, or on the instructions of the Governor, in cases before the judgment is pronounced, withdraw from the prosecution of any person ; and, upon such withdrawal :—

(a) If it is made before a charge has been framed, the accused shall be discharged.

(b) If it is made after a charge has been framed, or when under this Ordinance no charge is required, he shall be acquitted.

359. (1) Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but 30 no person other than a Public Prosecutor or other officer generally or specially empowered by the Governor in this behalf shall be entitled to do so without such permission.

(2) Any such person or officer shall have the like power of withdrawing from the prosecution as is provided by Section 358, and the provisions of that section shall apply to any withdrawal by such person or officer.

(3) Any person conducting the prosecution may do so personally or by a representative.

(4) An officer of police shall not be permitted without the consent of the Magistrate having jurisdiction in the case to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted.

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CHAPTER XXXVIII.

OF IRREGULAR PROCEEDINGS.

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10 393. 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 or revision 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 Ordinance ; or

20 (b) Of the want of or any irregularity in any sanction required by Section 155 or any irregularity in proceedings taken under Section 346 ; or

(c) Of the omission to revise any list of assessors in accordance with Section 243 ;
unless such error, omission, irregularity or want has, in fact, occasioned a failure of justice.

Explanation.—In determining whether any error, omission or irregularity in any proceeding under this Ordinance 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.

30 5.—At the trial the Appellants and the other accused were all defended by Captain Wills. No person acted as prosecutor, however, and the learned judge apparently called the witnesses. After the last witness for the prosecution finished his evidence and before evidence was called for the defence, the learned judge summed up the case for the prosecution, but he explained to the accused that because a case had been produced against them which made it necessary for them to disclose their defence, it did not mean that they had already been found guilty of any offence.

40 6.—Captain Wills thereupon submitted (basing himself on the summing-up) that there was no case against three of the accused except in the case of two of them, on a minor charge. The learned judge agreed

p. 5, l. 49
p. 68, l. 32-
p. 71, l. 51
p. 71,
ll. 49-51
p. 72, ll. 1-9
p. 72,
ll. 11-20

RECORD with the submission and acquitted the three on the charge of murder as
 — members of an unlawful assembly.

p. 118, l. 3-
 p. 119, l. 7
 p. 119, l. 8
 p. 119,
 ll. 9-20

7.—No objection was made to the absence of a prosecutor or to the judge summing up the case for the prosecution either at the trial or in the petitions of appeal prepared by an advocate in Aden. At the hearing of the appeals by the Protectorate Court the accused were represented by the Legal Officer of the Somaliland Protectorate. He, by leave, raised the absence of a prosecutor and the conduct of the trial judge as an additional ground of appeal.

pp. 6-68
 pp. 72-97

8.—At the trial 56 witnesses gave evidence for the prosecution. The Appellants, the other accused, and 49 other witnesses gave evidence for the defence. The Respondent submits that there was evidence to support the conviction of each of the Appellants; that the learned trial judge acted throughout with impartiality and that the absence of a prosecutor and the conduct of the judge caused no miscarriage of justice.

p. 99, l. 17-
 p. 100, l. 5

9.—The assessors in their opinions stated that they were satisfied that on the night of the 2nd-3rd July, 1945, a party of men came into Burao and fired shots which killed two men and wounded a third. As regards evidence of a truck said to have stopped at Sheikh Ismail's tomb where arms and ammunition from it were distributed to a party, the assessors answered "No" to the question "Did any or all the members of the party who fired the shots travel on that truck." They said that four of the accused, including the Appellant No. 10, travelled into Burao on the truck, and that seven of the accused, including the Appellants No. 13 and No. 17, did not travel on the truck. The assessors were of opinion that the truck stopped at the tomb but that the only evidence of arms and ammunition being distributed came from P.W. 55 and they were not prepared to accept anything he said. The assessors thought that there was a stronger case against the Appellant No. 18 than against the other accused, but that (as he had alleged) he was mad.

p. 100,
 ll. 16-20
 p. 5, ll. 47-48

10.—In his judgment the learned trial judge examined in detail the evidence for and against each of the accused. He found that the Appellant No. 10 was a member of an unlawful assembly and guilty of the charge. As regards the Appellant No. 13, the learned judge found that the evidence for the defence was untrue and that the evidence of P.W. 55 (an accomplice) was sufficiently corroborated. He therefore convicted the Appellant No. 13 on the charge, as well as on a minor charge. The learned judge disbelieved the evidence in support of an alibi for the Appellant No. 17, held that the evidence of P.W. 55 against him was sufficiently corroborated, and found the Appellant No. 17 guilty. The undisputed evidence against the Appellant No. 18 justified his conviction, in the learned judge's opinion, and holding that the plea of insanity failed, he convicted the Appellant No. 18 on the charge, and also on a minor charge.

11.—The learned judge stated that he had only rejected the opinions of the assessors where he had been satisfied that the weight of evidence necessitated that course. p. 110,
ll. 20-32

12.—Each of the Appellants was sentenced to death, and the Appellants No. 13 and No. 18 were also sentenced on the minor charge on which they had been convicted. p. 111,
ll. 10-39

13.—The Appellants, and accused No. 11 who had also been sentenced to death, appealed and their appeal was heard by Lieutenant-Colonel Jackson, Legal Secretary, who dismissed it on the 30th May, 1946. He rejected the additional ground of appeal based on the absence of a prosecutor and unconscious bias in the judge who acted as prosecutor, and on an examination of the evidence expressed himself as satisfied that the convictions appealed from were right. He confirmed the sentence of death on each of the Appellants. He allowed the appeals of No. 13 and No. 18 in respect of their convictions on the minor charge. pp. 113-125
p. 119,
ll. 16-36

14.—The Respondent submits that each of the Appellants was rightly convicted and that the appeal should be dismissed for the following amongst other

REASONS.

- 20
1. Because the evidence established that each of the Appellants was guilty of the offence of which he has been convicted.
 2. Because the absence of a prosecutor and the conduct of the trial has not in fact occasioned a failure of justice.

FRANK GAHAN.

In the Privy Council.

No. 95 of 1946.

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RER SAHAL, SAEED MOHAMED, H.T.,
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H.T., YUSUF RER SAHAL, FARAH
ABDULLAHI, H.T., AHMED FARAH
RER ABOKER AHMED ... APPELLANTS

AND

THE KING RESPONDENT.

CASE FOR THE RESPONDENT.

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Solicitors for the Respondent.