

~~C.I. (S.D.)~~

29, 1960

APPEAL NO. 26 of 1960

IN THE PRIVY COUNCIL

UNIVERSITY OF LONDON
W.C.1.
- 7 FEB 1961
INSTITUTE OF ADVANCED LEGAL STUDIES

O N A P P E A L

FROM THE COURT OF APPEAL FOR EASTERN
AFRICA AT NAIROBI

B E T W E E N

50921

PETER HAROLD RICHARD POOLE Appellant

- and -

THE QUEEN Respondent

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C A S E F O R T H E A P P E L L A N T

1. This is an appeal by Special Leave against an order pronounced on the 21st March 1960 by the Court of Appeal for Eastern Africa at Nairobi dismissing the Appellant's appeal against his conviction on the 10th December 1959 in the Supreme Court of Kenya for the murder on or about the 12th October 1959 of Kamawe s/o Musunge. The Appellant was sentenced to death.

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2. The Crown's case against the Appellant was that on the 12th October 1959 at Nairobi he had had an altercation with an African named Kamawe s/o Musunge and that in the course of this altercation he had shot the African with a pistol. The African died a few minutes later.

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3. On the 14th October 1959 the Appellant was arrested on a charge of murdering the said African and on the same day pursuant to Section 32 of the Criminal Procedure Code, he was taken before the Resident Magistrate at Nairobi who remanded him in custody. On the 11th November 1959 the said Resident Magistrate held a preliminary enquiry and, pursuant to Section 236 of the Criminal Procedure Code, committed

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the Appellant to the Supreme Court of Kenya at Nairobi for trial on a charge that he did on the 12th October 1959 in Nairobi, in the Nairobi Extra-Provincial District, murder Kamawe s/o Musunge, contrary to Section 199 of the Penal Code.

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4. On the 18th November 1959 an information, signed by or on behalf of the Attorney General for Kenya, was filed in the registry of the Supreme Court charging the Appellant with murder contrary to Section 199 of the Penal Code of which the Particulars of Offence were that the Appellant on or about the 12th day of October 1959 at Nairobi, in the Nairobi Extra Provincial District murdered Kamawe s/o Musunge.

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5. The Appellant's trial upon the said information was fixed for the 30th November 1959. The events of that day are summarised in the judgment of The Vice President of the Court of Appeal for Eastern Africa as follows :-

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"On that date the appellant was arraigned before the learned Chief Justice and pleaded not guilty to the information. A jury was chosen and sworn, and the appellant was given in charge in accordance with the provisions of Sections 280 to 288 inclusive of the Code. Crown Counsel thereupon opened for the Crown and was about to call the first prosecution witness when one of the jurors intimated that he had "a conscientious objection to giving a verdict of guilty in this case on a religious objection". After a short adjournment counsel for the appellant addressed the court, submitting that the juror in question was not incapacitated, or, if he was, that the trial should proceed with eleven jurors. A further adjournment ensued to enable Crown Counsel to consider the position. Upon resumption Crown Counsel is recorded as saying:

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"Submit no power to discharge Juror as he is not incapable. Court may have inherent power to discharge jury. Think it is safer to enter a nolle prosequi and do so now".

Counsel for the appellant submitted that there was no inherent power to discharge the

jury in the circumstances, and that this was not one of the cases in which a nolle prosequi could be entered. The learned Chief Justice then ruled:

"In view of the entry of a nolle prosequi the accused is discharged in respect of the charge for which the nolle prosequi is entered".

10 We were informed by the learned Solicitor-General who appeared for the Crown that Crown Counsel, as he informed the Court that he did not intend to proceed, handed a fresh information, duly signed, to the Reputy Registrar; that the Deputy Registrar, upon the adjournment of the Court after the discharge of the appellant and after he had left the dock, said to him "would you come with me" or words to that effect; that the appellant then
20 accompanied the Deputy Registrar to the anteroom of the Court, where the Deputy Registrar served the new information upon him; and that the Deputy Registrar then executed a warrant as authority for the Prisons Officers to detain the appellant in custody pending his trial upon the new information. The terms of the new information were identical with those on
30 the original information except that the new information was dated 30th November, 1959, and was signed for the Attorney General by the Acting Senior Crown Counsel who was appearing for the Crown. It was not contested that the Acting Senior Crown Counsel was duly authorised under Section 83 of the Code to enter a nolle prosequi and sign an information. It was
40 upon the new information of 30th November that the appellant was subsequently tried, before the learned Chief Justice and a new jury, and was convicted".

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6. The entry and effect of a nolle prosequi in any criminal case are provided for by Section 82 of the Criminal Procedure Code, as follows:-

"S.82(1). In any criminal case and at any stage thereof before verdict or judgment as the case may be the Attorney General may

enter a nolle prosequi, either by stating in court or by informing the court in writing that the Crown intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognisances shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

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(2) If the accused shall not be before the court when such nolle prosequi is entered the registrar, or clerk of such court shall forthwith cause notice in writing of the entry of such nolle prosequi to be given to the keeper of the prison in which such accused may be detained, and also if the accused person has been committed for trial to the subordinate court by which he was so committed, and such subordinate court shall forthwith cause a similar notice in writing to be given to any witnesses bound over to prosecute and give evidence and to their sureties (if any) and also to the accused and his sureties in case he shall have been admitted to bail.

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7. It is submitted that the entry of a nolle prosequi at any stage of a criminal case, and the consequent discharge of an accused person in respect of the charge for which the nolle prosequi is entered, bars all proceedings in respect of the said charge, except subsequent proceedings. It is further submitted that in this context "subsequent proceedings" means proceedings instituted after the entry of the nolle prosequi in manner provided by Section 89 of the Criminal Procedure Code, namely by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without a warrant. The Criminal Procedure Code lays down the procedural steps to be taken thereafter, including the holding of a preliminary investigation, committal for trial, and the signing of an information charging him with an offence.

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8. Subsequent to the entry of the nolle prosequi

in the Appellant's case, as outlined above, no complaint was made against him; he was not brought before a magistrate having been arrested without warrant and no preliminary investigation was held and the Appellant was not committed for trial, nor was any information charging him with any offence signed.

10 9. It is accordingly submitted that all proceedings upon the said information dated the 30th November 1959, which charged him with the charge in respect of which the nolle prosequi was entered, namely the murder on or about the 12th day of October 1959 at Nairobi in the Nairobi Extra Provincial District of Kamawe s/o Musunge, were barred, and his arraignment, plea, trial, conviction and sentence thereon, as hereafter appears, were all void and of no effect.

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20 10. On the 7th December 1959 the Appellant was arraigned upon the said information dated the 30th November 1959, when the Appellant took objection to it by his counsel, which was overruled by the learned Chief Justice. Thereupon the Appellant pleaded "Not guilty" and he was given in charge of the jury.

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30 11. During the ensuing trial an African named Titoro s/o Sabai, who said he was an eye witness of the alleged murder, gave evidence. Part of his evidence was given outside the court-room and in the Appellant's absence, in circumstances summarised in the Vice-President's judgment as follows:-

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40 "His evidence involved specification of the distances between various points at the scene and between the witness and the appellant and deceased at various stages in the episode which terminated in the death of the deceased. It is common practice in East Africa, where the majority of African witnesses are incapable of expressing distances in terms of the ordinary units of measure, for a witness to be asked to give a visual demonstration of any particular distance which may be material. In the instant case, after completion of the examination-in-chief, cross-examination and re-examination of the witness, the learned Chief Justice desired the witness to

give visual demonstration of certain distances which were mentioned in his evidence. The court-room was too small for the purpose, and the learned Chief Justice accordingly adjourned outside the court building where a visual demonstration of the distances was given by the witness. On resumption in the court-room, it was found that the appellant had not been present at the demonstration. The learned Chief Justice then caused the demonstration to be repeated in the presence of the appellant. No objection was taken at the time to the procedure adopted by the learned Chief Justice".

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Full details of this incident are set out in a written report which the learned Chief Justice made to the Court of Appeal for Eastern Africa.

12. The absence of the appellant from the first demonstration involved a breach of Section 193 of the Criminal Procedure Code. It deprived the Appellant of the opportunity of observing the fresh unrehearsed reactions of the witness from which forgotten recollections may have come to mind, and it also removed from the witness until after rehearsal the check upon untruthfulness and exaggeration which the presence of an accused confronting him works upon a witness. It is submitted that the said breach of section 193 of the Criminal Procedure Code, and the consequent prejudice to the Appellant were and are incapable of remedy in the manner ordered by the learned Chief Justice or at all.

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13. The Appellant's trial ended on the 10th December 1959. The jury returned a verdict of guilty and the learned Chief Justice sentenced him to death. His appeal to the Court of Appeal for Eastern Africa was dismissed on the 21st March 1960. Special Leave to Appeal to Her Majesty in Council was granted to the Appellant by Order in Council, dated the 11th May 1960.

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14. It is submitted that the Appellant's conviction for murder should be set aside for the following, amongst other,

R E A S O N S

- (1) That the proceedings in which he was convicted were barred by the entry of a nolle prosequi in respect of the same charge.
- 10 (2) That without the institution of fresh proceedings in respect of the charge for which a nolle prosequi had been entered in his case, and a fresh preliminary investigation and committal for trial, no valid information against the Appellant for the same offence could be signed or filed by the Attorney General, nor had the Supreme Court jurisdiction to try or sentence him.
- (3) That part of the Appellant's trial took place in his absence, without his personal attendance having been dispensed with.
- 20 (4) That the order of the Court of Appeal for Eastern Africa was wrong.

F. H. LAWTON

HAROLD CASSEL

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CASE FOR THE APPELLANT

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