

## **MALESU AND NINE OTHERS v THE PEOPLE (1968) ZR 172 (CA)**

COURT OF APPEAL

BLAGDEN CJ, DOYLE JA AND WHELAN J

17th DECEMBER 1968

### **Flynote and Headnote**

- [1] **Criminal law - Provocation - Presence of person provoked where unlawful act committed.**

It is an essential element of provocation that there be an unlawful act committed in the presence of the person provoked.

- [2] **Criminal procedure - Police practices - Taking statements from persons in custody.**

As a matter of fair practices, it is undesirable for police to take a multiplicity of statements from persons in custody; statements taken at the time of arrest and, if the accused wishes, at the time of charging, should suffice.

Statute construed:

Penal Code (1965, Cap. 6), s. 183.

*Dumbutshena, Legal Aid Counsel*, for the appellant.

*Heron, Senior State Advocate*, for the respondent.

### **Judgment**

**Blagden CJ:** The ten appellants in this case appeal against their conviction before the High Court for the murder of one Jeremiah Mutonga. Jeremiah Mutonga died on 29th February, 1968, and the events which resulted in his death took place on the 13th February. On that day a police party went out in a Land - Rover from Lukulu Police Post to a village which was referred to in evidence as the village of Bernard Kakoma. Here they arrested Jeremiah Mutonga for the murder of one John Ntumbi. The body of Ntumbi was placed in police Land - Rover; Jeremiah Mutonga was handcuffed and also taken into the same Land - Rover. The party then proceeded on their way back to Lukulu.

According to the police witnesses, when they reached the approaches to Chibanda Village they found the road blocked by a structure consisting of two upright poles and a cross - bar. The Land - Rover stopped and then a number of people came out of the village houses a short distance in front and surrounded the vehicle. According to the police these people were carrying sticks and making a considerable noise. It appeared that they were bewailing the death of John Ntumbi, to whom a number of them were related. One member of this crowd, who was identified as the fifth appellant, removed the keys of the Land - Rover and ordered the driver to get out. Constable Nawa who was in charge of the party did get out. Then another member of the crowd, who was identified as the first appellant, after the rear door of the Land - Rover had been opened, pulled out Mutonga and the crowd started to beat him with sticks. As he was handcuffed, he was virtually powerless to defend himself, and Constable Nawa displayed considerable courage and initiative in attempting to get his prisoner away from his attackers. They ran together for a short distance but found themselves unable to cross a canal. Here Mutonga and the constable were forced apart, and the assault on the prisoner was continued by five persons who were identified as the first, third, fifth, seventh, and ninth appellants. After about a quarter of an hour they desisted. Mutonga appeared to be dead but Constable Nawa revived him by means of artificial respiration and took him back to the Land - Rover. The keys were then returned to the driver, and the party then moved off again.

Mutonga was taken to Santa Maria Hospital in a very serious condition. He died sixteen days later, the cause of death being given by the doctor who attended him as pulmonary oedema due to a fracture of the skull and cerebral bruising. The doctor gave it as his opinion that these injuries could not have been inflicted by human fists alone.

The police collected a number of sticks at the scene and on the following day returned and made a number of arrests. The ten appellants who were arrested made various statements to the police thereafter under caution. The admissibility of some of these was challenged

at the trial. Trials within the trial were held, and in the result all the statements were admitted with the exception of two. The number of statements admitted *in toto* amounted to three in respect of each appellant except in the case of the fourth and sixth appellants in respect of each of whom two statements were admitted. In these statements the appellants admitted taking part in the beating of Mutonga but claimed that they had only used their fists, in some cases only striking one blow, and that they had no intention of killing Jeremiah Mutonga or causing him grievous bodily harm. They also maintained that no one used sticks.

At the trial the appellants all elected to give evidence on oath. Their evidence substantially followed the statements which they had made to the police. Their general story was that they and others were weeping on account of the death of John Ntumbi who was their relative. They saw the Land - Rover with the police party stopping at the approaches to their village, but they had no idea who was in it. They claim that there was no obstruction on the road to the village and that the Land - Rover stopped because Constable Nawa apparently wanted to find out why they were weeping. They told him, and in reply Constable Nawa said that the dead body of their relative was actually in the vehicle and not only that but also in the vehicle was the man who killed him. Their story was that they then went to have a look, and as they did so the police in the Land - Rover got out, and Mutonga, who was one of them, started to run away. They caught him to prevent his escape and started beating him but only with their fists. No one had sticks. They gave various reasons for beating the prisoner, some saying that they wished to cause him pain, others that it was because he killed their relative, others to prevent him escaping, and in one or two cases they said that they did not know as they were not thinking while they were beating. They further claimed that despite the beating the prisoner managed to get away and that the crowd did not follow him. They denied that there was any further assault, as described by the police witnesses, at the canal, and indeed some maintained that there was no canal.

The learned trial judge accepted the evidence given by the prosecution witnesses. Of Constable Nawa, he said: "I consider Constable Nawa to be a very good witness and an honest one." He rejected the contention of the appellants that the prisoner was produced to the crowd by the police. He said: "I accept the police evidence of the sequence of events . . . I find as a fact that the crowd were waiting for this Land - Rover in anticipation of it carrying the prisoner and, on finding him in it, pulled him out and proceeded to beat him. Many had sticks, and some beat him with sticks, and when Constable Nawa tried to get him away from them and ended up in a canal a smaller group continued beating him until he was rendered unconscious and left for dead." He found that this was all one continuous transaction. He then proceeded in his judgment to evaluate the evidence which implicated each individual appellant in these events.

He referred to sections 21 and 22 of the Penal Code and found that there was, amongst the participants, clearly a common intention, namely to take revenge on the person who had killed Ntumbi. He found, on the evidence before him, that the first, third, seventh and ninth appellants definitely had sticks, that the fifth appellant was attacking Jeremiah Mutonga in the canal together with those who had sticks, and that quite a number of other persons had sticks as well. He said: "I am also led to the inescapable conclusion that all of them, whether or not they had sticks, were prepared to beat the man who killed their relative as part of a joint enterprise and with the common purpose not simply of assaulting him but of causing him grievous bodily harm . . . The only reasonable conclusion to which I feel I can come is that not only did these persons intend to cause him grievous bodily harm but also those other participating in the beating, even though not armed with sticks, had the same intention in common with those who had sticks." The learned trial judge concluded by finding that the common intention of the participants must have been the infliction of grievous bodily harm and that the probable consequences of the beating in the manner in which it was carried out was that the victim would die from the resultant injuries.

On the totality of the evidence before him, including the statements made by the appellants and their own evidence in court, we feel fully satisfied that the learned trial judge came to the correct conclusion.

On behalf of the appellants, Mr Dumbutshena argued at first that the learned trial judge had misdirected himself on the question of provocation, but reference to the definition of provocation in section 183 of the Penal Code makes it quite clear that the defence of provocation was untenable in this case. [1] It is an essential element of provocation that there be an unlawful act committed in the presence of the person provoked. There was no unlawful act committed by any one in the Land - Rover when it stopped at this village. The unlawful act, namely the killing of John Ntumbi, had taken place some time before and not in the presence of any of the appellants.

Mr Dumbutshena also attempted to convince us that at least some of the appellants could not be regarded as having taken part in any common purpose to cause grievous bodily harm to the deceased, and he attempted to distinguish between those who had been identified as having used sticks and those who had not. He also attempted to distinguish between the conclusion of the attack upon the deceased which took place in the canal and the opening stages which took place outside the Land - Rover. I have already referred to the fact that the learned trial judge found that this was one continuous transaction. We accept Mr Heron's argument that this was so. There is ample evidence to support it. A road block was put up to stop the Land - Rover, and the Land - Rover was duly halted by it. When it was so halted, the crowd, including all ten appellants, surrounded it. The keys were removed from the vehicle to prevent it from being driven away. Jeremiah Mutonga was forcibly pulled out of the vehicle, and the assault then took place in which all the appellants say they participated.

In our view this was clearly a case of common design to take revenge on this unfortunate man and conduct what is known as a lynching operation. In our view these appeals must be dismissed.

There are two other observations we would like to make in conclusion. [2] In the first place it seems undesirable, where persons are taken into custody, that there should be taken from them multiplicity of statements. It is understandable that a statement should be taken from a person on his being first arrested and subsequently a further statement, if he wishes to make it, on his being charged. But what is the object in charging him again and taking a further statement after that? We do not consider this a fair practice.

The other matter we would refer to is this: we have rejected Mr Dumbutshena's submissions with regard to provocation because there was clearly no legal provocation in this case. There was, however, considerable moral provocation and doubtless this circumstance will be considered by the executive authorities in due course. The appeals are dismissed.

*Appeals dismissed.*