

Galos Hirad and another - - - - - *Appellants*

v.

The King - - - - - *Respondent*

FROM

THE PROTECTORATE COURT OF THE SOMALILAND
PROTECTORATE

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* VISCOUNT MAUGHAM]

In this case the appellants were charged in the Protectorate Court of the Somaliland Protectorate that on or about the first week in June, 1941, at Harawati Balleh near Bohadle in the District of Burao, Somaliland, each of them did participate in a criminal act, namely intentionally causing the death of Corporal Nur Musa done by several persons in furtherance of the common intention of all and thereby committed the offence of murder punishable under sections 34 and 302 of the Indian Penal Code which applies in the Protectorate.

The trouble in this case seems to have originated shortly after the Italian forces had been driven out of British Somaliland by His Majesty's forces in the year 1941 and was caused partly at least by the circumstance that rifles had been distributed by the Government to a number of the inhabitants to enable them to resist or to protect themselves against the Italians. Rifles were in these circumstances distributed to certain illaloes or native watchmen. In June, 1941, one of the rifles so issued was missing, and it was thought to have come into the possession of a sub-tribe of the Dolbahanta known as the Adan Hagar, to whom also some rifles had been distributed. It was in the course of steps taken by a party of 22 illaloes to recover the missing rifle, which however had already been sent by the Adan Hagar to an illalo post at a village called Garrero, that an affray took place between the illaloes and the Adan Hagar resulting in the death of 11 of the illaloes. The two appellants were alleged to be in a party of the Adan Hagar consisting of about forty men armed with about 20 rifles and a light automatic.

The trial took place in the month of February, 1942, before Captain George Paterson, Legal Secretary, acting as Judge of the Protectorate Court, and three assessors who were Akils (members of a native Court). Nine persons had been charged, but one was too ill to be tried. The appellants belonged to the Adan Hagar sub-tribe. All the defendants pleaded not guilty, the appellant Mohamed Ibrahim relying on an alibi and calling two witnesses in support of it. Mr. Manilal barrister at law was retained by the Government to defend the appellants (amongst others) at the trial and he conducted their defence. A number of witnesses were called.

It seems desirable to state very shortly the somewhat unusual circumstances which were dealt with in the judgment of the learned judge:—

“ In June, 1941, a party of 22 illaloes from Garrero, Bohotleh and Tallabur were investigating the loss of an illalo rifle, and the death of one Iman Mohamed (Abdi Hersi) and for these purposes went to Harawati, where there were some Dolbahanta rer (sub-tribe) Adan Hagar karias. It appears that the missing rifle had come into the possession of the Adan Hagar who decided to send it to the Illalo post at Garrero. This was done and when the Adan Hagar heard that the illaloes were coming they sent a Dolbahanta Akil called Mohamed Abdi and an Elder called Farah Suleman to persuade them to go away. It seems that the illaloes did not believe that the rifle had been returned and they demanded another one as security, possibly because they suspected that this story might simply be a device to get them to return home empty-handed. Anyway, the two emissaries procured a rifle from the Adan Hagar which was handed over to the illaloes. The illaloes did not then leave the neighbourhood and a variety of reasons is suggested as to why they did not do so, the most likely being that as they had also come to investigate a murder they could not leave without finding out something about it.

On the day in question, Mohamed Abdi sent to the Adan Hagar karias, as he said, to arrange for the supply of some milk to the illaloes, leaving them some distance away. Shortly after, he was followed by Farah Suleman and two of the illalo corporals who were themselves members of the Dolbahanta tribe. They had seen three men returning to the karias and thought they might be the men who had returned the missing rifle to Garrero. The remaining sixteen illaloes then went to the Harawati balleh (rain pond) to have a drink and sit in the shade. Ten of them actually reached the balleh, the other six having stopped to urinate some 300 yards to the west of it. Just then a party of rer (sub-tribe or clan) Adan Hagar rer Ali Adan appeared singing. They came from the east and passed about 400 yards south of the balleh going west. Their numbers were variously estimated and it seems that they were about twenty or thirty strong, half of whom were armed with rifles.

According to the prosecution witnesses, this party suddenly saw the illaloes at the balleh, stopped and one of its members fired a round at them, followed by a volley. They say that very shortly after, the rer Ali Adan were reinforced by about forty men (armed with about twenty rifles and a light automatic) of the Adan Hagar rer Farah Adan who came from the karias to the west, and that the illaloes did not return the fire until after the arrival of the second party and one of their number had been hit. They defended themselves to the best of their ability but eventually they were completely surrounded by the Adan Hagar who killed eight of them including Cpl. Nur Musa by rifle fire and hand grenades. At this point the Adan Hagar had succeeded in filtrating between the two parties (of ten and six respectively) and the survivors rose up and fled. In the flight three men were killed including Abdi Badet. All the accused persons were alleged to be in the second party except Mohamed Ibrahim, who was supposed to have been in the first party.”

The judge at the conclusion of the trial addressed the three assessors. All three expressed the opinion that the appellant Mohamed Ibrahim was not present at the fight (accepting his alibi), one of them expressing the view that it was his brother who had been taken for him. All three assessors expressed the opinion that the appellant Galvos Hirad took part in the killing of Nur Musa. The judge found both appellants guilty of murder under the provisions of sections 34 and 302 of the Indian Penal Code and sentenced them to death. They were then properly informed of their right to appeal and the time within which it was to be lodged. The other accused persons were acquitted.

The appellants duly appealed from the conviction and sentence to the Protectorate Court of Appeal of the Somaliland Protectorate. The Court of Appeal had very wide powers amounting in effect to a re-hearing. Mr. Manilal was again instructed by the Government to appear as advocate for the appellants on the appeal, but, owing to difficulties which will be mentioned later, Mr. Manilal was not able to land in British Somaliland before the 2nd July, 1942, and the appeal was heard by the Appellate Court which consisted of Major E. P. S. Shirley on the 22nd June, 1942, in the absence of counsel. The Appellate Judge heard the appellants in person and decided the appeal on a consideration of the record of the case, the judgment of the Trial Judge and the petition of appeal which had been submitted by Mr. Manilal. The Appellate Judge dismissed both appeals. The sentences of death were subject under the law to the confirmation of the Military Governor. The sentences of death were confirmed by Major E. P. S. Shirley (Acting Secretary to the Government) by command of the Military Government on the 26th June, 1942. Special leave to appeal against the judgment of the Protectorate Court of Appeal was granted by His Majesty in Council on the 10th August, 1943.

The main ground of the appeal is that there has been no proper hearing of the case before the Protectorate Court of Appeal for the reason that the Counsel assigned to the appellants was, in the circumstances to be next mentioned unable to appear at the hearing and to conduct the appeal. The Poor Persons Defence Ordinance No. 26 of 1939 provides as follows:—

“ Under Section 3:—

(1) Where it appears, for any reason, that it is desirable, in the interests of justice, that an accused person should have legal aid in the preparation and conduct of his defence at his trial and that his means are insufficient to enable him to obtain such aid—

(a) a certifying officer upon the committal of the accused person for trial; or

(b) a certifying officer at any time after reading the depositions recorded in any inquiry held under Chapter XVI of the Administration of Criminal Justice Ordinance into any of the offences specified in the Schedule hereto; or

(c) a certifying officer upon the framing of a charge against a native on trial for an offence against Section 304 of the Indian Penal Code or an attempt at, or the abatement of such offence; may certify that the accused person ought to have such legal aid, and if it is possible to procure an advocate, such accused person shall be entitled to have an advocate assigned to him.

(2) Any such accused person to whom an advocate has been assigned under the provisions of subsection (1) of this section, shall, if convicted at such trial, be entitled, on his lodging an appeal with the Protectorate Court of Appeal, to have an advocate assigned to him for the preparation and conduct of such appeal.”

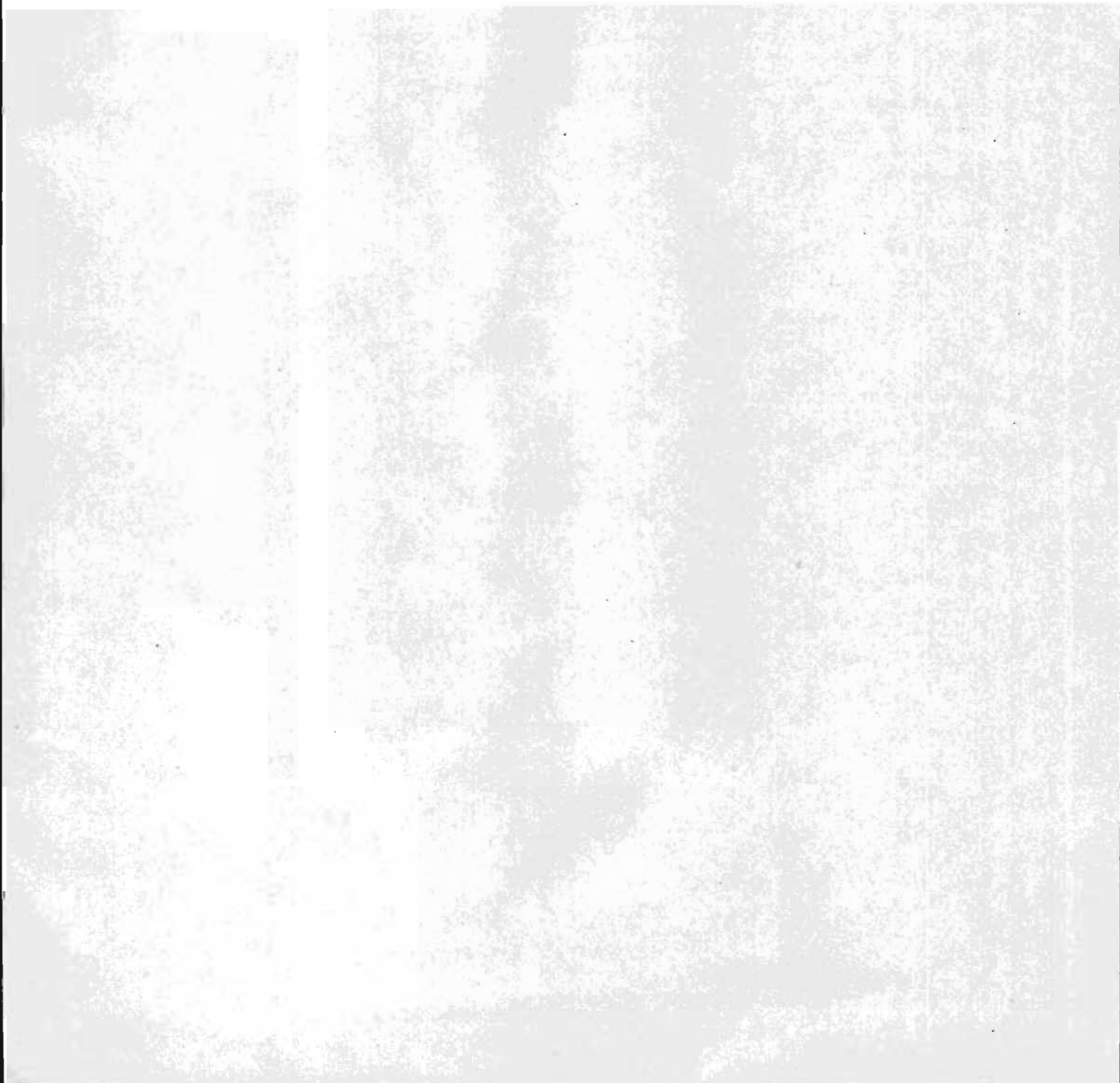
It appears that Mr. Manilal, who is a barrister at law enrolled to practice as an advocate of the Supreme Court of the Colony of Aden and permanently practising in that Colony, is the only person enrolled to practice in British Somaliland and has been in that position for some four years. He has to travel by sea from Aden to Somaliland when required by the British Somaliland Government to defend accused persons on trial on capital charges, and as stated he was retained by that Government to defend the appellants both in the Trial Court and again on the appeal which he was told would take place on 22nd June, 1942, at Hargeisa. The Government had been in the habit of asking the Movement Control Office to arrange passages for Mr. Manilal when his presence as counsel was required, but owing to the war there was no shipping available between Aden and British Somaliland by which Mr. Manilal could arrive on the 22nd June as instructed and, in fact, the authorities in British Somaliland, being well aware of the position, had written to him to make any other possible arrangements if there happened to be any chance shipping. The difficulty of the passage across the Gulf of Aden was well-known and on

some previous occasions the Protectorate Court of Sessions had adjourned a hearing in order that Mr. Manilal should have time to come to Somaliland. No steamship accommodation was in fact available for the journey so as to enable him to appear on the 22nd June, 1942, and it is not suggested that he could be expected to come by a native dhow or similar vessel at this time. However, the case was called on on the 22nd June, 1942. The Appeal Court Judge, so far as the note goes, made no enquiry with regard to the absence of Mr. Manilal or as to the date when he might be expected to arrive, but proceeded with the case. He heard some very short statements by the appellants and dismissed the appeals. In these circumstances it is contended on behalf of the appellants that there was a disregard of section 3 (2) of the Poor Persons Defence Ordinance and that the appeal has accordingly not been heard in accordance with the provisions applicable in the Protectorate and must be treated as not having taken place with the result that there was nothing which the acting Secretary to the Government could validly confirm so far as the sentence of death was concerned.

It seems to their Lordships that the provisions as regards the right of a convicted person are not of a merely directory character. Subsection (2) provides that poor persons in the position of the appellants having been convicted at the trial are entitled as of right on lodging an appeal to have an advocate assigned to them for the preparation and also for the conduct of such appeal. In the case of Somali natives who would probably be illiterate and therefore completely unable to make any criticism on the written judgment of the Trial Judge even if they could read it, it is clear that the provision is of the utmost importance where the penalty is the death sentence. There does not seem to be any reason for a very technical construction to be given to the subsection in question. The necessity for an assignment of counsel for the purpose of "conducting an appeal" seems to their Lordships to involve the necessity of seeing that it will be possible for the counsel to be present at the hearing. An appreciation was called for of the difficulties which, in such a case as their Lordships have before them, might well make it impossible for counsel to cross 150 miles of sea by an adequate ship in time to be present on the date originally fixed for the hearing of the appeal. The assignment of counsel in the present case was made of no effect. These considerations seem not to have been present to the mind of the Judge sitting as the Appeal Court and in the view of their Lordships the provisions of section 3 of the Poor Persons Defence Ordinance so far as regards the appeal have as a matter of substance been disregarded. They will add that there does not appear to have been any special reason why the hearing of the appeal should not have stood over for a few days to enable Mr. Manilal to attend and their Lordships are informed that he in fact arrived in British Somaliland on the 2nd July, 1942, so that a comparatively short adjournment would have enabled him to attend and to argue the case on appeal.

The importance of persons accused of a serious crime having the advantage of counsel to assist them before the Courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel. (See Holdsworth History of English Law, Vol. IX, p. 226 et seq.) This is a much stronger case. Just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so it seems to their Lordships, an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel assigned to him by the Government who was unable, without any default on his part to reach the Court in time to conduct the appeal.

The result is that the appeal to the Protectorate Court of Appeal which appears to have been properly lodged has not been effectively heard. The present appeal must therefore be allowed. Steps must be taken to restore the appeal for hearing either with Mr. Manilal or some other advocate properly assigned to the appellants under circumstances which will enable him to conduct the appeal. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council

GALOS HIRAD AND ANOTHER

v.

THE KING

[DELIVERED BY VISCOUNT MAUGHAM]

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