

UGANDA / JUDGMENT

Rex v Tharacithio (Criminal Appeal No. 299 of 1945) [1946] EACA 31 (1 January 1946)

[1946] EACA 31

COURT

East African Court of Appeal

BEFORE

Graham Paul CJ, Sheridan CJ, Whitley CJ

CASE / FILE NUMBER

Criminal Appeal No. 299 of 1945

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR JOSEPH SHERIDAN, C. J. (Kenya), SIR NORMAN WHITLEY, C. J. (Uganda), and SIR G. GRAHAM PAUL, C. J. (Tanganyika)

REX, Respondent (Original Prosecutor)**THARACITHIO s/o FARAGU alias THARACITHIO GATE BARAGU. Appellant (Original Accused)**

Criminal Appeal No. 299 of 1945

(Appeal from decision of H. M. Supreme Court of Kenya)

Criminal Law—Murder—Circumstantial Evidence.

The appellant was convicted of the murder of a European girl entirely on circumstantial evidence.

He appealed.

\$Held\$ (5-3-46).—That the evidence led to the irresistible conclusion that the appellant had committed the murder.

Appeal dismissed.

[Editorial Note.—This case is reported as one which evoked considerable public interest at the time.]

Slade for the Appellant.

Phillips, Crown Counsel (Kenya), for the Crown.

JUDGMENT (delivered by SIR JOSEPH SHERIDAN, C. J.).-On the night of the 24th August, 1945, Staff Sergeant Josephine Aston of the A. T. S. was murdered by the banks of the Ngong River at a place a short distance from the left side of the Aerodrome Road, going from Nairobi. The accused, a native military driver, was convicted of the murder by the Supreme Court (Lucie-Smith J., sitting with Assessors). The Assessors were not satisfied that the accused had been proved guilty. The evidence on which the accused was convicted is entirely circumstantial and it is well known to this Court that native assessors experience difficulty in convicting in cases based on such evidence. They like to have eye witnesses for a conviction.

The A. T. S. Camp is situate in Kenton Drive and at the time of the murder it was customary for a truck to leave the Camp every night to collect A. T. S. girls returning to their quarters. The rendezvous was Elliot Street, a small street just off Delamere Avenue and flanked by the Memorial Hall on one side and Hughes' Garage on the other, the MacMillan Library being at the other end of the street (really in Portal Street) looking down to Delamere Avenue. The A. T. S. truck was accustomed to park just by the side entrance to Hughes' Garage, entering Elliot Street from Delamere Avenue and facing the McMillan Library while waiting to collect the girls. On the night in question Staff Sergeant Aston was on duty and accompanied the accused who was the driver of the truck, leaving the A. T. S. Camp at 10.55 p.m. by Corporal Lilian Johnson's watch to fetch the girls. The truck was a six-wheeled liberty truck of the Studebaker make and on this journey it had its tailboard down and steps in position. The journey from the Camp to Elliot Street was reckoned to take about twenty minutes for a slow driver. On the night of the 24th on its way to Elliot Street, Staff Sergeant Aston gave a lift to Sergeant Draper who left the truck in Sadler Street at the back of the Market about 11.04, according to his evidence. From there he

walked in the direction of the Avenue Hotel and as was his custom set his watch by the G. P. O. clock. It was then, he said, 11.07 p.m. The question then arises, and a crucial question it is, as to whether the truck, after dropping Sergeant Draper, entered Delamere Avenue and turned down to the left on the accustomed way to Elliot Street, or indeed went to Elliot Street at all. As to this Sergeant Draper could give no information. The evidence which was accepted by the learned Judge, and the reliability of which cannot reasonably be questioned, is that the truck never entered Elliot Street that night, and the case for the Crown is that. with the exception of the evidence of Sergeant Thorogood and Sergeant Muriel Carter that a six-wheeled truck of the kind used by the A. T. S. with its tailboard down and steps in position crossed from Sadler Street into Delamere Avenue and disappeared from sight between Sirona House and the G. P. O. about 11.12, the truck was never seen again until it was found in the Ngong River about 8.30 a.m. on the 25th quite close to where the body of the murdered girl was found in the river covered with cut vegetation. The defence case was that the truck seen by the witnesses Thorogood and Carter was the truck originally driven by the accused that night but that the accused was not in it at the time it was seen crossing Delamere Avenue. The evidence that the truck never entered Elliot Street

that night is that of Corporal Stacey and Private Mackenzie of the A. T. S. They were in Elliot Street respectively from 10.40-12.20 and 10.50-12 and said that no A. T. S. truck entered or left the street while they were there. They could not reasonably be mistaken for they were specially waiting for this very 11.30 truck and they could not have failed to see and hear a liberty truck of the kind in question entering or leaving the street a few yards from where they were standing at different points. From the evidence of Sergeant Major Preston it would appear that a truck did leave Elliot Street about 11.30 which he said was packed with A. T. S. girls. From the evidence of Stacey and Mackenzie and his own evidence it seems clear that Preston must have mistaken a W. T. S. truck for an A. T. S. truck and in any event his evidence cannot help the defence by establishing that the accused's truck arrived at Elliot Street, for firstly this truck left packed with W. T. S. girls, secondly before it left it was parked facing Delamere Avenue, the way presumably by which it left, and thirdly the time at which it left does not fit in with the time Sergeant Thorogood and Sergeant Carter said they saw a six-wheeled truck with its tailboard and steps down crossing Delamere Avenue from Sadler Street and going by Sirona House in the direction of Whitehouse Road. The case for the Crown is that the accused's truck never entered Elliot Street but continued across Delamere Avenue past Sirona House, by the Church, on to Whitehouse Road and Aerodrome Road, continuing on that road until it was driven across the small ditch beyond the two military camps and the Lone Tree turning, the steps becoming detached in the process, and landed up in the Ngong River. The accused sought to answer the Crown evidence by proving that he had gone into Elliot Street and parked at the usual spot there, the deceased being in the truck with him; that after some difficulty in getting out by the right door of the truck the deceased engaged in conversation with a member of the R. A. F., and that the accused left them there and went away for the purpose of defecating at the Municipal Market where he found the latrine closed, and then had recourse to a ditch in one of the side streets, subsequently returning to Elliot Street and finding that his truck and Staff Sergeant Aston had vanished. This would connote an inexplicable dereliction of duty on the part of the deceased or a forcible abduction suddenly conceived and carried out without the knowledge of Corporal Stacey or Private Mackenzie who were waiting for the truck. All this rested on the accused's own evidence and he said that he made no inquiries from anyone and that he did not report to anyone that his truck was missing. This lack of interest in the

fate of his truck seems a strange reaction and cannot assist him in the unconvincing story he put forward. One would have thought with the warnings he had received from his superior officers as to the duty of reporting missing trucks he would have busied himself with inquiries.

There was no sign of his having defecated at the spot pointed out by him, a fact which he endeavoured to account for by suggesting that a sweeper or dog had disposed of the excreta.

If the story of the accused that he went to his Camp meaning to report the loss of his truck is true he would have had no reason to enter the Camp secretly by a gap in the fence. But on the evidence it is difficult to avoid the conclusion that this is in fact what he must have done. He said that he did enter the Camp openly by the small gate on which there is always a sentry on duty. The sentries on duty at that gate on the night in question were all called and each one of them

denied on oath that he had seen the accused enter the Camp that night. The accused's story is that he spoke to the sentry who admitted him after questioning him as to where he had been and receiving the accused's reply that he had been on duty. The accused said that he never mentioned anything about the loss of his truck to the sentry who admitted him. The suggestion for the appellant is that one of these sentries must have lied for the reason that the admission of the appellant was contrary to orders. It is not a very convincing suggestion that a sentry who would admit the appellant contrary to orders would lie against the same man on trial for his life.

But even if the accused's truck did not enter Elliot Street that night Counsel for the appellant submitted that on the evidence of the synchronization of Miss Carter's watch, the E. A. Standard clock and the G. P. O. clock and her evidence, as well as the evidence of Sergeants Thorogood and Draper, as to times, the accused's truck after dropping Sergeant Draper cannot have continued across Delamere Avenue by Sirona House. Mr. Slade's contention was that if the accused's truck was at the back of the Market at 11.04, on the Crown case it should be crossing Delamere Avenue about 11.06 or 11.07 and that consequently when it was seen crossing by Sergeants Thorogood and Carter about 11.12 or 11.13 it must have proceeded in some other direction after dropping Sergeant Draper. Mr. Slade's argument on this point did not contemplate the other possibility that for some reason the accused might have stopped for a minute or two at some point before entering Delamere Avenue and after dropping Sergeant Draper. We refer later to a possible reason for such a stoppage. Even if either of these alternative causes of delay did happen the difficulty for the defence still remains, viz. that the accused after Draper left was driving the truck, the only other occupant being the deceased, and that, the accused's story about Elliot Street having been rejected, there is no evidence of his leaving the truck or of any other person joining it before it ended the journey at the Ngong River.

It is of course always possible that the discrepancies in time may be accounted for either by there being an absence of synchronization as between the clocks or a failure either of observation or recollection on the part of one or more of the witnesses Carter, Thorogood or Draper. The possibility of witnesses who are months later positive in remembering the exact minute of an event which they had no particular reason for remembering being mistaken has to be envisaged. But giving due weight to the evidence about times it cannot in our opinion be held to have an overriding effect on the other evidence in the case, much of which firmly connects the accused with the crime.

In the first place the fact that the truck never kept its appointment in Elliot Street that night is something which in the absence of explanation is a very strong strand in the rope of circumstantial evidence. There must have been

some reason for the failure to go to Elliot Street and in the absence of explanation how can that fact fail to be connected with the terrible events that took place by the banks of the Ngong River that night. There is also the evidence of Chief Inspector Lanham of the accused's finger prints being the only decipherable ones found on the steering wheel, and his evidence that if a stranger drove that truck from Elliot Street to the scene of the murder he would not expect to find the decipherable finger prints of the accused marked, \$2\$, \$3\$, \$4\$, \$5\$ and \$6\$ in a group intact

and that it is most unlikely that the stranger would have left not a single finger print. The only decipherable finger prints on the wheel were those of the accused. He also said that when decipherable finger prints were found on a steering wheel, in his experience, generally speaking they were likely to be those of the last person who drove the vehicle. Thirdly there is the evidence of the condition of the accused's clothes when they were taken out of his kit bag on the 25th, the day after the murder. We need only refer to some of the clothes. There was the accused's military belt which he admitted having worn on the night of the murder. It was so wet that its state could not be accounted for by the accused's explanation that it had been in the kit bag with other articles which he said he had washed on the day of the 24th. Superintendent Elliot in speaking of the belt said "front of the belt where the buckle is was very wet, the back of the belt was very damp"; he continued and said it was wet through inside and outside to the extent of about 6 inches either side of the buckle, and added that the belt was too wet in front to have got wet through contact with other clothes—that this was not possible. This state of wetness obviously could not have been caused through the belt being in contact with overalls which were "slightly damp all over". Then there was the jumper coat with the sleeves rolled up to the elbow. Mr. Elliot said "it was very wet in front down to waist and damp below waist. The back was damp. Sleeves were very wet right through, that is soaking right up to the top. Folds were soaked through". The accused denied having worn this garment on the night of the murder, his explanation being that he had washed it on the 24th and on the water being turned off he had put it into his kit bag. While one can understand an explanation of this kind in the case of the overalls which were damp according to Mr. Elliot, and as if wrung out according to Mr. Aubrey, it is incredible that the jumper in the state in which it was found with its sleeves rolled up should have been put into the kit bag after being washed and in contradistinction to the overalls it had no appearance of having been wrung out. And it seems a strange thing to wash a jumper with the sleeves rolled up. In short, the condition in which the overalls were found, though consistent with the accused's story that he had washed the *overalls* the day before, when contrasted with the very different condition of the jumper, definitely militated against the truth of the story that the jumper had been washed the day before. Next there is the pair of shorts, and here again the accused said he had not worn them on the night of the murder. Mr. Elliot described them as "wet particularly round the waist and slightly damp down the front; they were also wet on the seat and there was what appeared to be patches of mud. I think it was recent mud". The accused's boots were found to be definitely wet (Sergeant Salter's evidence) and according to Captain Young who received them from Sergeant Salter "They were very wet on the outside; damp inside and a film developing on the boots... There was mud adhering to soles and welt of both boots and grass seeds inside the welt". The accused was wearing these boots on the night of the murder; his explanation as to their condition was that on the evening of the 24th he had washed them at a running tap with a piece of rag at the A. T. S. Camp. Their condition on the 25th was strangely inconsistent with boots that had been washed, as the accused said, and was not explained by the midnight walk which the accused said he had taken (see the evidence of Superintendent Elliot).

The next evidence to which we will refer is that of Dr. Dowdeswell. He gave evidence of the presence of algæ (a green scum) on the accused's clothes, finding as an expert that the kind of algae was such as was found in the Ngong River. On the accused's puttees he said: "I found the remains of what are almost certainly a green alga of the type 1 have already referred to and of diatoms of the type seen on the clothing and in the Ngong River".

There is also the accused's vest to be considered. He admits that he was wearing it on the night in question and on it near the neck Dr. Dowdeswell found traces of algæ such as he found in the Ngong River which in his opinion was unlikely to have been derived "except by splashing—some form of drip or splash". Dr. Dowdeswell said that the algae he found on the accused's clothing was entirely consistent with the algae he found in the Ngong River at the scene of the murder, and his final answer deserves to be quoted:

"Taking all the examinations done into consideration I would say that it is practically impossible that the clothing could have the stains, splashes and other conditions I have found derived from the Nairobi River or the ditch."

The accused could give no explanation as to how this algae came on to his clothes and it appeared certain that he could not have contacted it on the journey back to his Camp by the Nairobi River which he said he made on the night of the murder, nor could his boots or clothes have got into the condition in which they were found if his account of that journey was correct. The significance of all this evidence of the state of his clothes is that it is quite consistent with his having been in the Ngong River and at the spot where the body was found. The state of his clothes was consistent with his chasing the deceased through the river, and there were footprints there of the deceased and of a military boot to indicate that she had been chased, as one can readily envisage having happened. It is of some importance that the casts made by Dr. Leakey revealed that the boot was of the same pattern as those which the accused was wearing that night. That fact by itself proves nothing, for there are thousands of such boots, but in conjunction with the other evidence, particularly the association of the accused with the deceased earlier that evening, it acquires a definite significance.

The first point raised by the defence was the failure of the learned Judge to consider the evidence as to times. To that we have already referred, and our view is that however that evidence is to be explained, it cannot affect the decisions of fact at which the learned Judge arrived on the positive evidence of the witnesses Stacey and Mackenzie.

Second. It is complained that the learned Judge erred in stressing that the algæ did not come from the Nairobi River or the ditch, as the accused had not suggested the Nairobi River, and only indicated the ditch as one among many possibilities. The significance of the reference to the Nairobi River is that the path which the accused said he had taken on the night of the murder crossed that river and consequently the Crown led evidence to prove that the algæ could not have been contacted on that journey. As to the ditch, it was one of the places where the accused said he had been, and the same reasoning applies. At p. 282 of the shorthand notes, after the accused had been cross-examined as to various rivers and other places he had been, and having admitted

that he had not fallen into any river, he was asked "Did you hear Dr. Dowdeswell say that on the shirt there were stains up here (illustrated) of green scum similar to that in the Ngong River" and answered "Yes". Then on being asked "And did you hear him also say that there were similar stains on the shorts on the side and right inside by the stitching at the top. One of the places where Dr. Dowdeswell said there were stains was inside the shorts at the top (illustrated). How do you account for that?" and he replied "I cannot explain where it came from".

Third. It was complained that Mr. Lanham being only a finger print expert he should not have been treated as such in the matter of deductions from the finding or position of finger prints on the steering wheel. In our opinion, Mr. Lanham having given evidence of his experience in such matters, his opinion was entitled to the consideration it received.

Fourth. It is complained that the Judge erred in holding that the accused was wearing certain clothes on the night of the crime. In the circumstances of the case we find no misdirection here.

Fifth. It is complained that too much significance was attached to the finger print evidence. We do not consider that the Judge over-rated the significance of the finger print evidence.

Sixth. It is complained that the Judge attached undue significance to (a) the algorithm on the accused's clothing, (b) the wetness and muddiness of accused's clothing, (c) absence of faecal matter in the lane, (d) failure of the accused to report. All of these points have already been referred to.

Seventh. It is complained that there was a failure to consider various aspects of the accused's clothing, viz. absence of seminal stains and absence of algæ from the folds of the sleeves. Our comment here is that such absence cannot be a determining factor in arriving at the guilt or innocence of the accused. The absence could be explained in ways as to which we find it unnecessary to speculate in any detail.

Eighth. The point is made that the overalls which it is not alleged were worn on the night of the crime were wetter than any other garment. This is not so, for the belt, the sleeves of the jumper and the shorts were wetter. We have already referred to the overalls as having been damp as if wrung out and to the significance of their condition in contrast with that of the jumper.

Ninth. The circumstances in which the accused was found after the murder, his behaviour; demeanour and condition are referred to. It seems to us to be quite impossible to deduce anything from these facts one way or the other.

Tenth. The absence of motive is stressed. As to this the motive for the crime would appear to have been sexual primarily, and the nature of the attack on the deceased is clearly indicative of sadism of an extreme kind. A secondary motive may have been the theft of the deceased's ring which was found missing.

Eleventh. The absence of premeditation is referred to as being inconsistent with the accused's movements. The nature of the crime is quite consistent with its perpetration having been conceived in the briefest possible time.

Twelfth. It is said that the accused knowing the Aerodrome Road well would have chosen the Lone Tree turning. Here we need not speculate as to whether the Lone Tree turning was missed accidentally or deliberately. It may well have been either.

Thirteenth. It is said that the murdered woman did not resist being driven to Aerodrome Road nor try to escape. This is also a matter of speculation. The accused used to go to the R. N. A. S. on duty and might possibly have explained to the deceased that he had to go there before going to Elliot Street; he might have stopped on the way from the back of the Market to

Delamere Avenue to make that explanation; he might, as the learned Solicitor General suggested, have pretended that he had taken the wrong road in crossing Delamere Avenue, saying that he would turn round at Whitehouse Road, and once on Aerodrome Road, where possibly the deceased would become alarmed, it was easy to silence her by bashing her head against the truck. Injuries found on her were consistent with some such thing having happened. That the unfortunate girl did try to escape, but all too late, there is the evidence of her probably having jumped from the truck near the Ngong River and hurt herself in doing so. The open right hand door of the truck and the finding of the deceased's cap indicate this.

Fourteenth. (a) The nature of the injuries to the body and circumstances in which it was found, (b) the various articles found at the scene of the crime. (c) various articles not found at the scene of the crime and which never have been found, (d) attempts to conceal the identity of the body, are referred to. In none of these can we discover any reason for excluding the accused as murderer. When it is remembered that the accused's defence was that the truck had been stolen by someone the object in hiding the body and the clothes might have been to give an appearance of the murder having been committed by a stranger, fitting in with the story of the theft of the truck. As for the match box and pubic hairs we are unable to deduce anything from their presence.

There are a few other points in the Memorandum of Appeal to which, though we have considered them, we have not found it necessary to refer; they cannot influence our judgment. One of the assessors expressed the opinion that the accused, if guilty, would have run away. If he had done so he would surely have been captured, apart from his doing so having the immediate effect of proclaiming him as the murderer. His returning to Camp was necessary to fit his false story that the truck had been stolen by a stranger with the implication that the stranger was not only the thief but the murderer.

We think it necessary to mention shortly the fact that at the request of counsel for the appellant we visited the scene of the crime at the Ngong River along with counsel on both sides. The usefulness of this visit was somewhat discounted by the fact that the conditions had changed so much since the date of the crime. The river, for instance, at the point where the body of the deceased was found had practically dried up. Our visit however did make it clear that the spot was well chosen for the crime. In fact, but for the truck being a fixture at the spot by reason of it having gone into the river, the body might have remained undiscovered for a considerable time. The position of the deceased's cap suggests that she was endeavouring to escape from the truck

just before the truck came near to the river, and her activities and a possible struggle may well have had something to do with the truck accidentally going over the river bank and so preventing the murderer from removing this obvious pointer to the scene of the crime.

We also should refer to the fact that on the application of the appellant we decided to hear fresh evidence on the subject of the prevalence of the plant *Rumex Nepalensis* in the Nairobi district. This had reference to the finding of a ripe seed of this plant attached to the accused's puttees and to the evidence of the botanist, Mr. Bally, who said at the trial that he had found this plant at the Ngong River and that it was not at all common in the Nairobi area. When fresh evidence was called Mr. Bally stated that he wished to revise his opinion expressed at the trial and to say that he had since found the plant was commoner than he thought at the time he gave evidence. Having considered the whole evidence on this point, including the evidence of Mr. Van Someren called for the appellant before us, while we agree that the assessors whose

opinion rejected by the learned trial Judge that **Rumex Nepalensis** grew by many rivers and was not confined to the Ngong River was proved to be right by the additional evidence called, we are definitely of the opinion that the fact that the plant is to be found elsewhere, thus diminishing the value of the evidence on the point at the trial, cannot in the circumstances of the case have affected the decision on the case as a whole. Relatively the finding of one ripe *Rumex* seed on the puttees of the accused was a very small matter in the case. On the one hand it could be said that the seed might have been picked up in the vicinity of other rivers than the Ngong River and on other occasions than on the night of the murder; on the other hand its presence on the puttees was consistent with the accused having been at the Ngong River that night, and on the evidence of Mr. Bally, whether revised or unrevised, inconsistent with his having picked up the seed on the journey which he said he made on the night of the murder. On balance our view is that the presence of a ripe *Rumex Nepalensis* seed on the accused's puttees corresponding in maturity to the ripe seed found by Mr. Bally just after the crime near the scene of the crime is a fact adding something, however little, to the strength of the Crown case. It is a fact which, as Chief Baron Pollock said, in the language of facts whispers faintly the conclusion of guilt which without it must have been arrived at. Realizing that this case is based on circumstantial evidence, our judgment is that the evidence leads to an irresistible conclusion that the accused murdered Josephine Aston.

The appeal is dismissed.

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