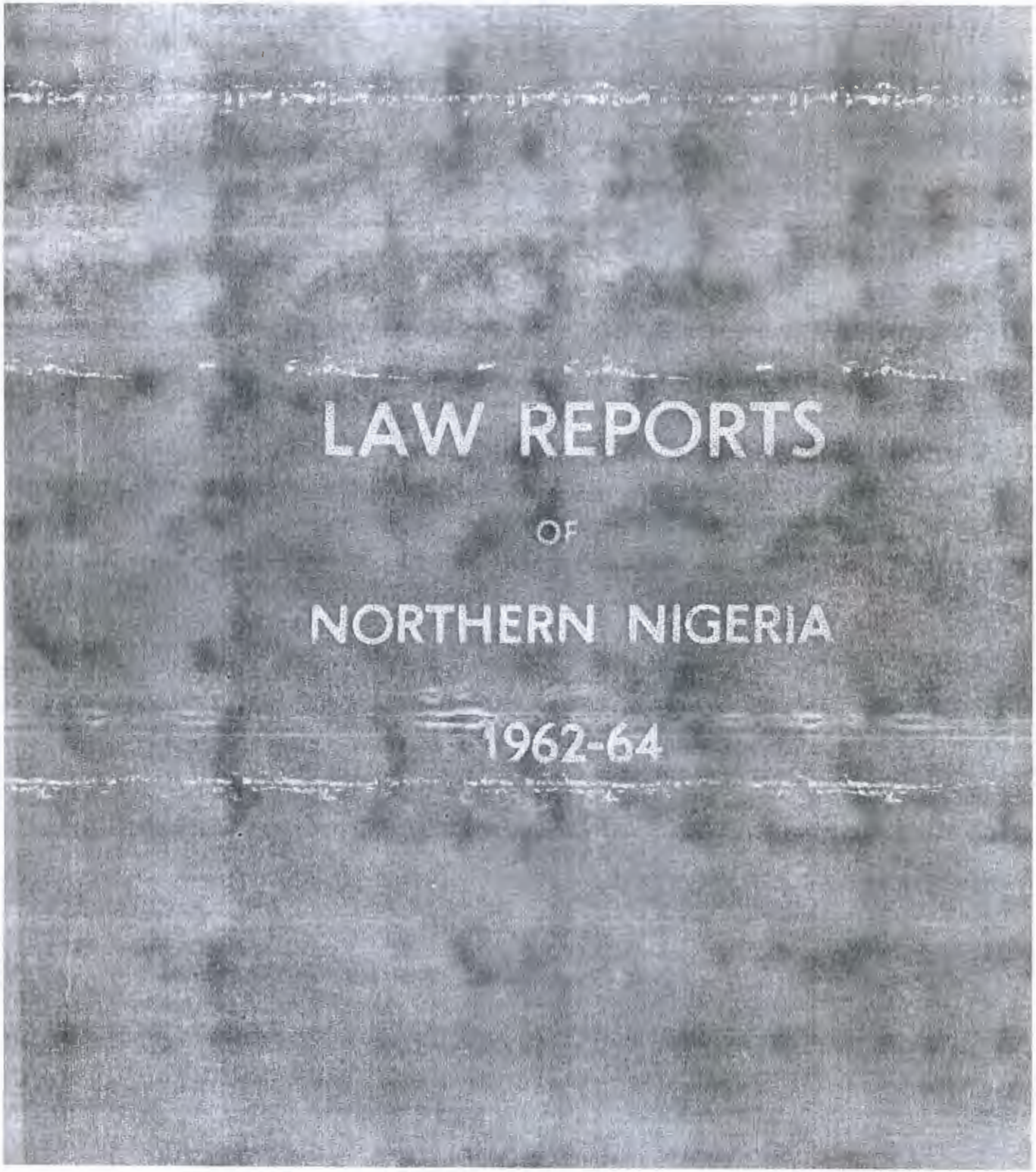
LAW REPORTS
OF
NORTHERN NIGERIA
1962-64

# LAW REPORTS

## OF THE

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## of the Federation of Nigeria

# 1962

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THE HIGH COURT
OF
NORTHERN NIGERIA
1962

Hon. Mr Justice Hurley, Chief Justice
Hon. Mr Justice J. A. Smith, Senior Puisne Judge
Hon. Mr Justice Reed, Judge
Hon. Mr Justice Bate, Judge
Hon. Mr Justice Skinner, Judge
Hon. Mr Justice Holden, Judge
Hon. Mr Justice J. P. Smith, Judge
Hon. Mr Justice Ahmad, Judge

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OF
NORTHERN NIGERIA
1962

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Alhaji A. G. F. Razaq, Barrister-at-Law

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Secondary evidence—document alleged forged—document destroyed.

Patrick Okpalo *v.* Commissioner of Police
1962 N.R.N.L.R. 14 (C.A.)

JUDGMENT AND ORDER

Interest on judgment debt—power to order payment of interest—only when ordering extension of time to pay judgment debt—Supreme Court (Civil Procedure) Rules, O. XLVI. r. 7.

Barclays Bank D.C.O. *v.* Yesufu Alabi Adigun
1962 N.R.N.L.R. 40 (Smith, S.P.J.)

Setting aside judgment—default judgment for plaintiff—plaintiff's motion to set aside—mistake in judgment—mistake plaintiff's not court's—Supreme Court (Civil Procedure) Rules, O. XL, r. 5.

Leventis Motors Limited *v.* G. C. S. Mbonu
1962 N.R.N.L.R. 19 (Reed, J.)

JURISDICTION

Magistrate of the first grade—trial of offence not under Penal Code—offence under Criminal Code—offence punishable with more than five years' imprisonment—Criminal Code, s. 116(1); Criminal Procedure Code, s. 13(2)(*b*).

A. Y. Odiai *v.* Commissioner of Police
1962 N.R.N.L.R. 9 (C.A.)

Power to try offence exceeded—not curable as excess of power to take cognizance—Criminal Procedure Code, s. 12 and Appendix A; ss. 147, 379(*c*) and 380(*h*).

James Gboruko and another *v.* Commissioner of Police
1962 N.R.N.L.R. 17 (C.A.)

Summary trial—magistrate not empowered to try one of two offences charged—whole proceedings void.

Chanver Aba and another *v.* Commissioner of Police
1962 N.R.N.L.R. 37 (C.A.)

LAND

Right of occupancy—alienation—tenancy agreement—tenant in possession—Governor's consent to alienation not obtained—tenancy null and void—tenant suing landlord for trespass—whether agreement illegal—whether landlord can plead agreement was null and void and unenforceable—Land and Native Rights Ordinance, Cap. 105, 1948 Laws of Nigeria s. 11.

Ayo Solanke *v.* (1) Abraham Abed and (2) Mr Ogunlowo
1962 N.R.N.L.R. 92 (F.S.C.)

LANDLORD AND TENANT

Recovery of possession—applicability of Recovery of Premises Ordinance—premises in Kano—proof that premises within area to which Ordinance applies.

Hussein Ali Shour *v.* K. Issardas and Company (Nigeria) Limited
1962 N.R.N.L.R. 67 (Bate J.)

Recovery of premises—Kano—plaintiff's non-compliance with provisions of Recovery of Premises Ordinance—no evidence whether premises within area to which Ordinance applies—non-suit—Recovery of Premises Ordinance, Laws of Nigeria, 1948, Cap. 193, sections 1, 7, 10; Northern Provinces (Increase of Rent) (Restriction) Order, ibid, vol. 8, page 232; Recovery of Premises (Withdrawal of Application to Certain Areas) (Amendment) Order in Council, 1951; Supreme Court (Civil Procedure) Rules, O. 45.

Hussein Ali Shour *v.* K. Issardas and Company (Nigeria) Limited
1962 N.R.N.L.R. 67 (Bate J.)

LEGAL REPRESENTATIVE

Counsel engaged to defend accused person—withdrawal of counsel from case without leave—no other counsel available—adjournment to engage another counsel refused.

Ibrahim Dimis *v.* Commissioner of Police
1962 N.R.N.L.R. 42 (C.A.)

Withdrawal from case without leave—withdrawal from defence of accused person—withdrawal when no-case submission overruled and adjournment refused.

Ibrahim Dimis *v.* Commissioner of Police (2)
1962 N.R.N.L.R. 45 (F.S.C.)

MAGISTRATES

Criminal procedure—magistrate's court—summary trial—jurisdiction—magistrate not empowered to try one of two offences charged—conviction for both offences—whole proceedings void—Criminal Code, ss. 70, 443; Criminal Procedure Code, s. 13, s.—ss. (1), (2)(*a*) and (*b*), s. 380(*h*).

Chanver Aba and another *v.* Commissioner of Police
1962 N.R.N.L.R. 37 (C.A.)

Jurisdiction—summary trial—magistrate not empowered to try one of two offences charged—whole proceedings void.

Chanver Aba and another *v.* Commissioner of Police
1962 N.R.N.L.R. 37 (C.A.)

NATIVE COURTS

Appeal—conviction altered on appeal—appeal from native court—substituted conviction for offence not charged—whether defence would have been substantially affected had substituted offence been charged—prosecution evidence the same in either event—no defence evidence—Criminal Code ss. 7(*d*), 71, 513(1); Native Courts Law, 1956, s. 70(1)(*b*)(*iii*).

Honourable Basharu *v.* Bornu Native Authority
1962 N.R.N.L.R. 50 (F.S.C.)

Judicial privilege—liability of Alkali—action against Alkali in respect of acts done in the exercise of his jurisdiction—acts done in good faith—acts done without just cause—Native Courts Law, 1956, s. 8; Magistrates' Courts Ordinance, Cap. 122, Laws of Nigeria, 1948, s. 61.

Alhaji Wada *v.* Chief Alkali of Birnin Kebbi
1962 N.R.N.L.R. 76 (Reed, J.)



Trial—Evidence—witnesses must testify to court—Court cannot proceed upon evidence given and recorded elsewhere.

Ibrahim Mai Abinkumi *v.* M. Kasimu
1962 N.R.N.L.R.26 (C.A.)

PRACTICE AND PROCEDURE

Appeal—appeal from native court to High Court—entering appeal—no copies of notice of appeal lodged in court below—no deposit in court below towards cost of record—appeal not entered—Northern Region High Court (Appeals from Native Courts) Rules, 1960, O.II, r. 3, 4(1).

Alhaji Audu and four others *v.* Jos Native Authority
1962 N.R.N.L.R. 46 (C.A.)

Infant defendant—guardian ad litem—plaintiff's application to appoint—no default in answering suit by infant defendant—Supreme Court (Civil Procedure) Rules, O. VI, r. 1; Rules of the Supreme Court, 1883, O. 16, r. 19.

J. E. Okoji *v.* (1) Florence Onyibe and (2) S. C. Onyibe
1962 N.R.N.L.R. 12 (Smith, S.P.J.)

Interim attachment—defendant about to dispose of his property—whether intention to obstruct or delay decree—obstruction or delay a possible consequence—no direct evidence of intention—innocent explanation of proposed disposition—Supreme Court (Civil Procedure) Rules, O. 20, r. 1(*a*); O. 19, r. 2.

Tracey Blagden Limited *v.* Mohammed Haway and two others
1962 N.R.N.L.R. 70 (Bate, J.)

Non-suit—absence of evidence whether premises sought to be recovered are within area to which Recovery of Premises Ordinance applies.

Hussein Ali Shour *v.* K. Issardas and Company (Nigeria) Limited
1962 N.R.N.L.R. 67 (Bate, J.)

Setting aside judgment—mistake in judgment—mistake party's, not court's—motion to set aside.

Leventis Motors Limited *v.* G. C. S. Mbonu
1962 N.R.N.L.R. 19 (Reed, J.)

PUBLIC AUTHORITIES

Judicial privilege—native court—privilege of Alkali

Alhaji Wada *v.* Chief Alkali of Birnin Kebbi
1962 N.R.N.L.R. 75 (Reed, J.)

RECOVERY OF PREMISES

Kano—plaintiff's non-compliance with provisions of Recovery of Premises Ordinance—no evidence whether premises within area to which Ordinance applies—non-suit—Recovery of Premises Ordinance, Laws of Nigeria, 1948, Cap. 193, sections 1, 7, 10; Northern Provinces (Increase of Rent) (Restriction) Order, ibid, vol. 8, page 232; Recovery of Premises (Withdrawal of Application to Certain Areas) Order in Council, ibid, vol. 9, page 529; Recovery of Premises (Withdrawal of Application to Certain Areas) (Amendment) Order in Council, 1951; Supreme Court (Civil Procedure) Rules, O. 45.

Hussein Ali Shour *v.* K. Issardas and Company (Nigeria) Limited
1962 N.R.N.L.R. 67 (Bate, J.)

RES JUDICATA

Contract for sale of goods—non-delivery—price recovered in action for money paid—subsequent action for damages for breach of contract.

Alhaji Bature Gafai *v.* United Africa Company Limited
1962 N.R.N.L.R. 73 (Reed, J.)

TORT

Trespass—action by tenant against landlord—premises held by landlord under right of occupancy—Governor's consent to tenancy not obtained—defence that tenancy agreement illegal or unenforceable—Land and Native Rights Ordinance, Cap. 105, 1948 Laws of Nigeria, s. 11.

Ayo Solanke *v.* (1) Abraham Abed and (2) Mr Ogunlowo
1952 N.R.N.L.R. 92 (F.S.C.)



## G. C. U. AGBAKOBA *v.* C. C. MEKA

[C.A. (Reed, Ag. S.P.J., and McCarthy, Ag. J.)—January 28, 1961]

[Jos—Civil Appeal No. JD/55A/1960]

*Contract—illegality—contract legal on its face—burden of proof of illegality—contract by licensed chemist and druggist for supply of poisons—proof of absence of prescription—Pharmacy Ordinance, Cap. 152 of the* 1958 *Revision of the Laws of the Federation of Nigeria, s.* 2, *s.* 14(4), *s.* 32; *Evidence Ordinance, Cap.* 62 *ibid., s.* 141.

The respondent, a licensed chemist and druggist, supplied the appellant with drugs on credit over a period. Some of the drugs were poisons as defined by Part III of the First Schedule to the Pharmacy Ordinance. It is an offence under the Ordinance for a licensed chemist and druggist to sell or deliver any poison as so defined except upon an order signed by one of certain specified persons (which was not in question in this case) or upon a prescription. At the trial of a counterclaim by the respondent for the amount due for the supply of the drugs, the appellant contended that the supply of the poisons was illegal. There was no evidence whether or not the poisons were supplied on prescription. Appealing against a judgment in favour of the respondent for the amount claimed, the appellant contended that the onus lay on the respondent to prove that the supply of the poisons was legal.

*Held:* The contract between the appellant and the respondent for the supply of the poisons was not on its face illegal, and the onus lay on the appellant to prove illegality.

Case referred to:

*The Hire Purchase Furnishing Company Limited v. Richens and Anor.*, (1887) 20 Q.B.D. 387, applied

CIVIL APPEAL FROM MAGISTRATE'S COURT

Appellant in person;
*Rickett* for the respondent.

**Reed, Ag. S.P.J.,** delivering the judgment of the Court, referred to another point raised in the appeal, and continued: There remains only one issue for our consideration. The learned Chief Magistrate gave judgment on the respondent's counter-claim for £96-5*s*-0*d* being the amount due from the appellant for a quantity of drugs supplied by the respondent to the appellant. There was evidence, which the Chief Magistrate accepted, that some of these drugs were poisons as defined by Part III of the First Schedule to the Pharmacy Ordinance. Section 32(1) of that Ordinance states that—

"No selling dispenser or chemist and druggist shall sell or deliver any poison in Part III of the First Schedule except on an order signed by ..."

various persons thereafter set out. Subsection (4) creates an offence if any person fails to comply with the section. There was no evidence before the court below as to whether there was, or was not, a prescription, as defined by section 32(1), for the supply of these poisons. It is clear from the judgment of the Chief Magistrate that he regarded the onus of proof that the contract for the supply of the poisons was illegal as being on the appellant and that he had failed to discharge that onus. This is the issue before us now. Was the Chief Magistrate right in finding that the onus was upon the appellant to prove that there was no prescription or was the onus upon the respondent to prove that there was a prescription?

In our view the onus was upon the appellant to prove that there was no prescription and the learned Chief Magistrate was right in finding that, as he had not discharged that onus, there was no proof that the contract was illegal. The respondent is a qualified chemist and druggist and there is no suggestion that he was not a person licensed to "import, mix, compound, prepare, dispense and sell drugs and poisons"; section 14 of the Pharmacy Ordinance refers. The contract between the appellant and the respondent for the supply of these poisons was, in our view, a legal contract. It was, however, one which could be performed illegally—that is, by supplying the drugs without a prescription. The contract was not on the face of it illegal. We quote from Chitty on Contracts, 21st Edition, volume 1, at page 467, paragraph 894—

"....the presumption of law is in favour of the legality of a contract: and therefore, if it be reasonably susceptible of two meanings or two modes of performance, one legal and the other not, that interpretation is to be put upon it which will support it and give it operation; and it lies upon the party attempting to set aside a transaction for illegality to prove it."

In *The Hire Purchase Furnishing Company Limited* v. *Richens and anor.* (1887) 20 Q.B.D. 387, Bowen L.J. said at page 389—

"There is a broad principle that where a defendant is attempting to set aside a transaction for illegality, and the facts connected with it are equally consistent with the transaction being legal or illegal, it lies on the defendant to prove the illegality. The law presumes against illegality. The principle is ... that no person shall in the absence of criminative proof be supposed to have committed any violation of the criminal law, whether *malum in se* or *malum prohibitum*, and that this





presumption holds in all civil and other proceedings for whatever purpose originated, and whether the guilt of the party comes in question directly or collaterally...."

We do not think that section 141 of the Evidence Ordinance helps the appellant. That section states—

"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

The appellant, to whom the poisons were supplied, was in every bit as good a position to prove that there was no prescription—if that were, in fact, so—as the respondent.

For reasons which we have given we dismiss the appeal. We allow the respondent ten guineas costs.

*Appeal dismissed.*

## REGINA v. NYINYA KWAGHBO

[High Court (Hurley, C.J.)—June 2, 1961]
[Makurdi—Criminal Cause No. JD/15C/1961]

*Evidence—confession—statement to police—uncautioned statement—inducement—statement "obtained" by police constable—accused "agreeing" to make statement.*

After he had been apprehended the accused made a statement to a police constable. The statement was tendered in evidence at the trial as a confession. Giving evidence, the constable said he had "obtained" the statement from the accused, who had "agreed" to make it. It was not shown that the prescribed caution had been administered.

*Held:* There were strong indications that the accused had been induced to make the statement, and there was no satisfactory evidence that it was voluntary.

The statement was excluded from the evidence.

(*Editorial Note.*—See Criminal Procedure (Statements to Police Officers) Rules, 1960, for the prescribed caution).

CRIMINAL TRIAL

*Nasir, Senior Crown Counsel*, for the Crown;
*Shatola* for the accused.

**Hurley, C.J.**, after summarising the evidence, continued: Later the accused made a statement to the police. This also is inadmissible in evidence. The police constable who took the statement spoke of "obtaining" it from the accused, and he says that "after caution" the accused "agreed" to make the statement. A statement must be voluntary if it is to be used in evidence against the person who makes it. When a policeman speaks of obtaining a statement from a suspect, there is a suggestion that he has been trying to get the statement out of the suspect, or that he wanted the suspect to make it. It is none of a policeman's business to get a suspect to make a statement; his sole duty is to give the suspect an opportunity of making one if he wishes, first making sure that the suspect understands that he need not say anything unless he wants to, and that he understands that anything he says may be used in evidence at his trial. If a policeman goes beyond that and sets out to "obtain" a statement, it will appear very likely that he has let the suspect know that he wants him to make the statement. That is something that would tend to induce the suspect to speak, so that he would not be speaking of his own free will or voluntarily. Again, when a policeman tells me that the suspect "agreed" to make a statement, that too suggests that he asked the suspect to make it, or let him see





he wanted him to make it. In the evidence of the constable in this case, there were strong indications that the accused had been induced to make the statement, so that it was not voluntary and should not be admitted in evidence. Since it appeared that the constable, though he said he cautioned the accused first, had in fact no idea of the proper way of cautioning a suspect or the words to be used in doing so, there was no satisfactory evidence that the statement was voluntary. Accordingly it was excluded from the evidence.

## GODWIN OGBU *v.* COMMISSIONER OF POLICE

[C.A. (Hurley, C.J., and Holden, J.)—June 21, 1961]
[Kaduna—Criminal Appeal No. Z/17CA/1961]

*Criminal law—unlawful possession—thing reasonably suspected of having been stolen—existence of grounds of suspicion at time of charge—Criminal Code, Cap. 42 of the Laws of the Federation of Nigeria, s.* 430(1).

On the trial of a charge of unlawful possession, there must be evidence of the existence, at the time when the charge was made against the accused, of reasonable grounds for suspecting that the articles found in his possession were stolen or unlawfully obtained.

Therefore, where there was no evidence that any such grounds of suspicion existed at the time when the accused was brought to court and his plea taken,

*Held*, on appeal, that any grounds of suspicion which came into existence after that time were irrelevant, and the conviction could not be supported having regard to the evidence.

(*Editorial Note.*—s. 430(1) of the Criminal Procedure Code has been replaced by s. 319A of the Penal Code).

Case referred to:

*Ayanshina v. Commissioner of Police*, 13 W.A.C.A. 260 at p. 261, applied.

CRIMINAL APPEAL

*Gaji*, for the appellant;
*Ogbole, Crown Counsel*, for the respondent.

**Hurley, C.J.,** delivering the judgment of the Court: This is an appeal against a conviction under section 430(1) of the Criminal Code, on a charge alleging that the appellant on 4th January, 1960, had in his possession a sewing machine and a leather handbag reasonably suspected to have been stolen or unlawfully obtained and that "you cannot give account of how you came by it". The appeal has been argued on the ground that the judgment cannot be supported having regard to the evidence.

The hearing began in January, 1961, the appellant having been on bail meantime. The evidence was that the sewing machine and the handbag were found by the police in the appellant's possession at the place in Kaduna where he lived when it was searched under a warrant, as a result of information received. The appellant did not deny possession. A coat and a pair of spectacles were also found in the search, but these do not appear to have been made the subject of a charge. The appellant made a statement to the police in which he said that he bought the handbag at Enugu for £8 from one Daniel





Chuku whose address he did not know but who used to stay with him in Kaduna. He had a receipt, but it was with his brother who was on leave. The coat and spectacles were pledged to him for a loan by a clerk in Kaduna whose work-place the appellant knew. The sewing machine had been pledged to the appellant for a loan of £7 by one David Ekpa eight months before it was found. The appellant's brother Okole had collected the machine from David. David had refused to redeem it. The appellant did not mention Nwodo when making this statement. One of the constables who had searched the appellant's premises gave evidence and said that the appellant had told him the handbag had been pledged to him (not sold to him). This witness also said that enquiries about the borrower were made at Kano (not Enugu) without result.

That was the whole of the prosecution evidence. The appellant, who appeared in person, gave evidence and called a witness. The appellant said he had got the handbag from one Nwankwo Ogbodo (not Daniel Chuku) in 1957. He produced a receipt from Nwankwo Ogbodo. He said the sewing machine had been pledged to him by Peter Nwodo (not David Ekpa). He said he had named both these persons to the police when he was making his statement, but the police would not record the names. His witness, Eric Odo, said he had been present when David Ekpa and Peter Nwodo brought the machine to the appellant and the appellant lent Peter Nwodo £17 (not £7).

The learned trial magistrate's notes of judgment were as follows: "I find the accused's attitude throughout has been contradictory and evasive. I am totally unconvinced by his excuses. I find the charge under section 430(1) C.C. Cap. 42 proved".

From this it appears that the appellant did not give an account to the satisfaction of the trial court as to how he came by the handbag and the sewing machine. But to bring the case within section 430(1) in the first place, and to make him accountable for the articles, it was necessary to prove the existence of reasonable grounds for suspecting that they were stolen or unlawfully obtained. And it was necessary to prove that such grounds of suspicion existed at the time when the charge was made against the appellant: *Ayanshina v. Commissioner of Police* 13 W.A.C.A. 260 at page 261. The charge in this case was made, at the latest, when the appellant was brought to court and his plea taken in March, 1960. Any grounds of suspicion that came into existence after that time,

G. Orbu v. C. of P. — Hurley, C.J.

for example any insufficiency or inconsistencies in the explanation the appellant gave in court, or any evasiveness in his attitude in court, were irrelevant for the purpose of making him accountable to the court for his possession of the articles, for they were not grounds of suspicion that existed at the time when he was charged. A man is not to be brought to court to be made criminally accountable for property in his possession on the ground merely that he cannot give the court clear and positive proof of how he got it. To establish that the articles were reasonably suspected of having been stolen or unlawfully obtained, the prosecution had only its own evidence to rely on in this case.

Learned Crown Counsel submits that there was evidence of reasonable grounds of suspicion in the prosecution evidence that the appellant's premises were searched on information received. That was not evidence of any grounds of suspicion at all, much less evidence of reasonable grounds. The grounds of the suspicions which the police presumably entertained were not given. To allow the prosecution to establish their case on the basis of police suspicions grounded on undisclosed facts would amount to leaving an essential part of the case to be decided by the police and not by the court.

The rest of the prosecution evidence discloses no grounds of suspicion either. The articles themselves were not such, or were not shown to be such, as to make their possession by the appellant suspicious. The appellant's account given to the police of how he came by the articles was not disproved by any prosecution evidence. It was not contradictory, for we cannot see any substantial contradiction in the evidence that the appellant said the handbag was a pledge, following which enquiries were made at Kano. It was not an unlikely account, and the fact that it mentioned persons whom the appellant could not immediately trace did not necessarily make it an evasive one.

The conviction cannot be supported having regard to the evidence, and the appeal is allowed.

*Appeal allowed.*



## A. Y. ODIAI *v.* COMMISSIONER OF POLICE

[C.A. (Smith, S.P.J., and J. P. Smith, Ag. J.)—
August 29, 1961]

[Lokoja—Criminal Appeal No. JD/49CA/1961]

*Criminal procedure—jurisdiction—magistrate of the first grade—trial of offence not under Penal Code—offence under Criminal Code—offence punishable with more than five years' imprisonment—Criminal Code, s.* 116(1); *Criminal Procedure Code, s.* 13(2)(*b*).

*Jurisdiction—magistrate of the first grade—offence under Criminal Code, s.* 116(1).

In proceedings commenced after 30th September, 1960, the powers of a magistrate for the trial of offences under laws other than the Penal Code are derived only from the Criminal Procedure Code, and consequently a magistrate of the first grade, being precluded by s. 13(2)(*b*) of the latter Code from trying offences punishable with imprisonment for more than five years, cannot try an offence under s. 116(1) of the Criminal Code which allows imprisonment for up to fourteen years.

(*Editorial Note.—See* Magistrates' Courts (Northern Region) Law, 1955, ss. 19(1)(*c*) and 20(*a*); District Courts Law, 1960, s. 92; Criminal Procedure Code Law, 1960, s. 5(2); and Criminal Procedure Code, ss. 4, 5, 6 and 13.)

CRIMINAL APPEAL

*Razaq* for the appellant;
*Buba Ardo, Crown Counsel,* for the respondent.

**J. P. Smith, Ag. J.,** delivering the judgment of the Court: In this appeal, M. Buba Ardo appeared for the respondent, and Alhaji Razaq for the appellant. The appeal is against a conviction and sentence by the Magistrate Grade 1 for an offence against section 116(1) of the Criminal Code Ordinance. It is important to note that the alleged offence was committed on 23rd September, 1960, that the arrest, if any, took place after 1st October 1960 while the trial took place in January, 1961. We say that it is important to note these dates because the Criminal Procedure Code Law came into force in Northern Nigeria on 30th September, 1960, so that this Law governed the trial and other aspects of cases heard after this date though the substantive law governing offences committed before that date would depend upon the law applicable at the date of the commission of the offence.

Three grounds of appeal were originally filed of which No. 3 was abandoned by counsel for the appellant; application was made to the Court to file a fresh ground out of time and leave to do so was granted. This new ground was numbered

No. 4. This fourth ground of appeal was to the effect that the trial was a nullity, in that the learned trial magistrate had no jurisdiction to try an offence contrary to section 116(1) of the Criminal Code. We propose to consider submissions on this ground first since it goes to the very foundations of the trial.

As a result of the legal changes we have mentioned, introduced on 30th September, 1960, in a case with this chronological background the trial court was bound to use the new procedure but to apply it to an offence laid under the criminal code in force at the time of the commission of the offence. To consider now the submissions of counsel for the appellant, we were reminded that the Criminal Procedure Code Law goes also to the establishment and jurisdiction of the various courts established in Northern Nigeria with criminal jurisdiction. Counsel then pointed out that the trial magistrate was a magistrate Grade I and this was apparent from the record. Now section 13 of the Criminal Procedure Code lays down the jurisdiction of the varying degrees of criminal courts, and section 13(2)(*b*) of this law which we quote lays down the jurisdiction of a magistrate of the first grade in trying an offence under a law other than the Penal Code. Counsel submitted that the Criminal Code Ordinance was such a law, and then referred us to section 116 of that Code, for which the maximum punishment prescribed is fourteen years' imprisonment. Counsel went on to point out that before 30th September, 1960, a person charged under this section, which made the offence a felony, had a right of election of summary trial, but that after this date no such right existed under the Criminal Procedure Code which prescribed jurisdiction in a different manner.

By this argument counsel submitted that the trial magistrate had, after 30th September, no jurisdiction to try a charge laid under section 116, Criminal Code. In his reply counsel for the respondent argued that the Criminal Procedure Code did not deprive the magistrate of his power to try an offence against section 116 of the Criminal Code, and that the provisions of the two enactments were not in conflict.

We accept the arguments of counsel for the appellant, which in our view represent an accurate statement of the law governing these particular circumstances; namely, that accused was charged under a law other than the Penal Code, namely the Criminal Code; that the magistrate could only draw his jurisdiction from section 13(2)(*b*) of the Criminal Procedure Code; that the alleged offence was punishable for a term which might exceed five years; and that therefore the trial magistrate





had no jurisdiction. Indeed we think that on the facts surrounding this trial the only course open to the magistrate would have been to take a preliminary enquiry under the new procedure. (The judgment then dealt with other matters arising on the appeal, and concluded:—)

We must therefore hold that the proceedings before the magistrate Grade I ending in the appellant's conviction on 26th January, 1961, were a nullity by reason of the magistrate's want of jurisdiction.

We do so hold, and allow the appeal, setting aside the conviction and quashing the sentence.

*Appeal allowed.*

## J. E. OKOJI *v.* (1) FLORENCE ONYIBE AND (2) S. C. ONYIBE

[High Court (Smith, S.P.J.)—August 21, 1961]
[Jos—Civil Suit No. JD/57/1961]

*Practice and procedure parties—infant defendant—guardian* ad litem *—plaintiff's application to appoint—no default in answering suit by infant defendant—Supreme Court (Civil Procedure) Rules, O.* VI, *r.* 1; *Rules of the Supreme Court,* 1883, *O.* 16, *r.* 19.

The Court's power under O.VI, r.1, of the Supreme Court (Civil Procedure) Rules, to appoint a guardian *ad litem* of an infant defendant on the application of the plaintiff or of its own motion, does not arise until the infant defendant has made default in answering or otherwise defending the suit. The reason for this is to give the infant an opportunity to appear by a guardian *ad litem* as required by O. 16, r. 19, of the Rules of the Supreme Court, 1883.

Therefore, where an infant defendant without a guardian *ad litem* had purported to appear by counsel and it appeared that the infant wished to defend the suit, the Court made no order on an application by the plaintiff for the appointment of a guardian *ad litem*, and adjourned the suit to give the infant's counsel an opportunity to put matters in order by complying with O.16, r.19.

APPLICATION IN CIVIL SUIT

*Grant* for the plaintiff-applicant;
*Ezekwe* for the infant.

**Smith, S.P.J.:** In this motion on notice to each defendant, the plaintiff prays for an order appointing Amelia Sam Onyibe as guardian *ad litem* of the first defendant, Florence Onyibe.

The plaintiff is suing both Florence Onyibe and S. C. Onyibe, the second defendant, for damages for breach of promise of marriage. It appears from the affidavits of the plaintiff dated 11th July, 1961, and the affidavit of the second defendant dated 8th July, 1961, that Florence Onyibe is an infant: she was born on 16th December, 1945.

The writ of summons has been served on the first defendant who has purported to appear by counsel although her learned counsel has not taken any steps to nominate a person to be her guardian *ad litem* by whom she may defend the suit.

Order VI, rule 1 of our Civil Procedure Rules provides that the court may on the application of the plaintiff or of its own motion, by order, appoint a guardian *ad litem* "where on default made by a defendant in answering or otherwise defending the suit, after service of the writ, it appears to the court that he is an infant . . . . ." It is to be observed that the power given to the court, either on the application of the plaintiff or of its own motion, does not arise until the infant defendant has defaulted. The reason for this is to give the infant defendant the opportunity to appear by a guardian *ad litem* to answer the suit. Our Rules do not lay down how that should be done. We therefore have to resort, by virtue of section 35 of our High Court Law, 1955, to the practice and procedure of the High Court of Justice in England.





The English rule which is applicable is Order 16, rule 19, which reads:

> "19. Every infant served with a petition or notice of motion, or summons in a matter, shall appear on the hearing thereof by a guardian *ad litem* in all cases in which the appointment of a special guardian is not provided for. No order for the appointment of such guardian shall be necessary, but the solicitor by whom he appears shall previously make and file an affidavit as in the last Rule mentioned."

Thus if an infant defendant is going to defend a suit, he or she must appear by a guardian *ad litem*. The practice is for the solicitor of the infant defendant to make an affidavit in which he names the person to be guardian *ad litem*; deposes to the fitness of the person to act as guardian; and to the fact that the guardian has no interest adverse to that of the infant. The affidavit need only go to information and belief as to the fitness of the person to be guardian but it must be positive that the guardian has no interest adverse to the infant: see Form No. 8 Appendix A Part II in the Annual Practice, 1961, at page 2229. The prior consent in writing of the person to be guardian is required; and the affidavit should be filed together with the written consent of the guardian prior to the hearing of any proceedings in the suit.

From what learned counsel for the first defendant has said in the proceedings to date it appears that the first defendant wishes to defend this suit. I am therefore going to leave the plaintiff's motion paper on the file and adjourn this suit to give learned counsel for the first defendant the opportunity to put matters in order by complying with Order 16, rule 19.

*No order on application; suit adjourned.*

## PATRICK OKPALO *v.* COMMISSIONER OF POLICE

[C.A. (Smith, S.P.J. and Holden, J.)—July 24, 1961]
[Jos—Criminal Appeal No. JD/43CA/1961]

*Criminal law—forgery and uttering—document destroyed—secondary evidence—Penal Code, ss.* 364, 366.

*Evidence—document—secondary evidence—document alleged forged—document destroyed.*

The appellant was convicted of forging and uttering a local purchase order. The local purchase order was not produced at the trial. Instead, there was evidence that the appellant had swallowed it upon being apprehended, and there was evidence of its contents.

*Held:* The evidence of the contents of the local purchase order was perly admitted; and the convictions were affirmed.

*Per curiam*: In a trial for forgery, circumstances can arise where secondary evidence (*sc.*, of the document alleged forged) is admissible. A mere notice to produce will not be enough. The usual principles on which secondary evidence can be admitted must be strictly observed.

Cases referred to:

*R. v. Hall*, 12 Cox 159, mentioned;
*R. v. Barris*, 112 C.C.C. Sess. Pap. 822, referred to.

(Editorial Note.—*See* Evidence Odinance, Cap. 63, ss. 94(e) and 96(1)(c).)

CRIMINAL APPEAL

*Ezekwe* for the appellant;
*Nasir, Senior Crown Counsel*, for the respondent.

**Holden, J.,** delivering the judgment of the Court: Appellant was convicted of forgery and uttering contrary to section 364 and section 366 of the Penal Code and of cheating contrary to section 322 of the Penal Code. The story told against him is that he went to the shop of K. Chellaram and Sons Limited in Jos on 14th February, 1961, and enquired about tobacco. Next day he appeared again with a Local Purchase Order apparently issued by the Prisons Department for tobacco. He was sent away to get it properly signed. When he returned a Prison Officer in uniform was there. Seeing the uniform appellant fled but was caught. He voluntarily produced the L.P.O. but instead of handing it over he swallowed it. In his defence appellant maintained there was a mistake as to identity. He was not the man who presented the L.P.O. and he knew nothing about it. He went innocently to the shop and was arrested by mistake. The learned Chief Magistrate





did not believe him. There was ample evidence to support his findings of fact. Mr Ezekwe however raised several points of law which we will consider separately.

First, Mr Ezekwe submits that as no document has been produced in evidence, there can be no conviction for forgery, on the argument that there is no evidence on which to convict. In *R. v. Hall* (12 Cox 159) it was suggested (quoting from the 16th edition of *Archbold* at p. 239) that "upon an indictment for forgery it is the generally understood rule that the prisoner cannot be convicted unless the forged instrument be produced," while the prosecution held the view that if the document were proved lost then secondary evidence of its contents could be brought in. In his judgment Cleasby B. said "without at all adopting the rule suggested, that except the forged document is in the possession of, and produced by the prosecutor the forger cannot be convicted, it is sufficient for the determination of the present question to say that the principle which requires an original document to be accounted for before secondary evidence of it can be received, must be strictly observed in cases of this description, and it is of the highest importance that this should be so, because it is evident that if the prisoner has not an opportunity of showing the document itself to the jury, and asking them whether on inspection they think it to be forged or not, he is under a great disadvantage. But the prosecution here fails on another ground, viz., that the original instrument is not proved to be lost; on the contrary, it is even proved *not* to be lost." The principle there laid down is followed in the 9th edition of *Phipson* on Evidence at p. 569. *R. v. Barris* (112 C.C.C. Sess. Pap. 822) is there given as an authority for saying that though not absolutely necessary to produce a forged document, yet a notice to produce laid no foundation for secondary evidence since it compelled the Judge to decide the prisoner's identity, which was for the jury. Thus it is established that the circumstances can arise where secondary evidence is admissible; that a mere notice to produce will not be enough; and that the usual principles on which secondary evidence can be admitted must be strictly observed. This is reflected in the 34th edition of *Archbold*[1], where the statement in the 16th edition quoted *supra* is modified to read "the forged document must be produced at the trial if possible; but secondary evidence can be given if it is in the prisoner's possession and is not produced." This appears to limit the cases in which secondary evidence is admissible to those where the document is in the prisoner's possession. This is in conflict with the wider statement in *R. v. Hall* (*supra*) which requires only strict observance of

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"the principle which requires an original document to be accounted for before secondary evidence of it can be received." There are several ways of accounting for a document not produced. They can be found in the 9th edition of *Phipson* at p. 567 *et seq.* Relevant are No. (2) at p. 567 "When the Original is in the Possession of the Adversary"; No. (4) at p. 570 "When the Original has been lost or destroyed"; and No. (5) at p. 571 "When Production of the Original is physically impossible or highly inconvenient". In this case there is evidence, which the learned Chief Magistrate believed, that accused himself destroyed the document by chewing it up and swallowing it. We hold the view that secondary evidence of its contents was properly admitted.

(After referring to other submissions made on behalf of the appellant, which are not relevant to the point reported, the judgment continued:—) Fifthly Mr Ezekwe attacked the evidence of the contents of the document. We feel there is little strength in this. There was evidence of three separate people who read the document that it was an L.P.O. No. 1354 for four cases of tobacco worth £450 apparently made out by the Prisons Department. Two say it was the L.P.O. which appellant later destroyed in their presence. The learned Chief Magistrate's findings of fact on this are amply supported by the evidence. (After referring to a further submission made on behalf of the appellant, which related to the conviction under s. 322, the judgment concluded:—) This appeal is dismissed. The convictions and sentences are affirmed.

*Appeal dismissed.*



## JAMES GBORUKO AND ANOTHER *v.* COMMISSIONER OF POLICE

[C.A. (Smith, S.P.J., and Holden, J.)—July 24, 1961]
[Jos—Criminal Appeal No. JD/3CA/1961]

*Criminal procedure—irregular proceedings—powers of trial court exceeded—power to take cognizance—power to try—whether irregularity curable or proceedings vitiated—Criminal Procedure Code, s. 12 and Appendix A; ss. 147, 379(c) and 380(h).*

*Jurisdiction—power to try offence—power exceeded—not curable as excess of power to take cognizance*—ibid.

Where a court tries an offender for an offence which it is not empowered to try, the defect in the proceedings is not cured by s. 379(*c*) of the Criminal Procedure Code, which provides that proceedings are not to be set aside merely on the ground that the court has taken cognizance of an offence of which it is not empowered to take cognizance. On the contrary, by s. 380 (*h*) of the Criminal Procedure Code the proceedings are void.

CRIMINAL APPEAL

*Ezekwe* for appellant;
*Nasir, Senior Crown Counsel*, for respondent.

**Smith, S.P.J.,** delivering the judgment of the Court: At the conclusion of the hearing of this appeal on 13th July, 1961 we allowed the appeal and now set out our reasons for doing so.

The appellants were tried jointly before the Magistrate Grade II at Kafanchan. (After allowing the appeal on the first and second charges, the judgment continued): As to the third charge, the charge of the offence contrary to section 167 of the Penal Code, Mr Ezekwe submitted that a magistrate of the second grade had no jurisdiction to try this offence because Appendix A to the Criminal Procedure Code provides that a court with least powers which may try an offence contrary to section 167 of the Penal Code is that of a magistrate of the first grade.

M. Nasir submitted that it is to be presumed that the magistrate in this case acted within his jurisdiction; and to refute that presumption it must be proved that the magistrate did not have increased jurisdiction under section 19(1) of the Criminal Procedure Code. In our view the presumption is that the magistrate possesses the jurisdiction which is conferred on him by his grade as disclosed on the record of proceedi-

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In the present case the magistrate appears on the record of proceedings to be a magistrate of the second grade and as such he had no jurisdiction to try an offence contrary to section 167 of the Penal Code.

In the alternative M. Nasir submitted if the magistrate exceeded his jurisdiction the proceedings are not to be set aside on that ground only as they came within section 379(*c*) of the Criminal Procedure Code. The relevant part of this section reads:—

> "379. If any court . . . not empowered by law to do any of the following things, namely:—
>
> . . . . . .
>
> (*c*) to take cognizance of an offence under section 143, erroneously in good faith does any such thing, the proceedings shall not be set aside merely on the ground that the court . . . was not so empowered."

Section 143 sets out the circumstances in which a court may take cognizance of an offence, that is to say the steps preliminary to the trial. Section 147 says what is to be done when a magistrate finds, *inter alia*, that he has taken cognizance of a case which he has no jurisdiction to try summarily: it reads—

> "147. If an offence of which a court takes cognizance ought properly to be inquired into or tried by another court or if in the opinion of the court taking cognizance thereof the offence might be more conveniently inquired into or tried by another court it shall send the case to such other court."

There is thus the distinction between taking cognizance of a case and trying it. Where a magistrate tries a case which he has no jurisdiction to try the section which applies is not section 379 but section 380. The relevant part of section 380 reads:—

> "380. If any court . . . . . not being empowered by law in this behalf, does any of the following things, namely—
>
> . . . . . .
>
> (*h*) tries an offender;
>
> . . . . . .
>
> such proceedings shall be void."

We hold that the magistrate, being of the second grade, was not empowered to try summarily an offence contrary to section 167 of the Penal Code and that the conviction thereunder was void by virtue of section 380 of the Criminal Procedure Code.

*Appeal allowed*



## LEVENTIS MOTORS LIMITED *v.* G. C. S. MBONU

[High Court (Reed, J.)—July 18, 1961]
[Jos—Motion in Civil Suit No. JD/90/1959]

*Judgments and orders—setting aside judgment—default judgment for plaintiff—plaintiff's motion to set aside—mistake in judgment—mistake plaintiff's not court's—Supreme Court (Civil Procedure) Rules, O. XL, r. 5.*

*Practice and procedure—setting aside judgment—mistake in judgment—mistake party's, not court's—motion to set aside.*

The plaintiff company claimed £4,204-5*s*-6*d* from the defendant in an action on the Undefended List. When the action came up for hearing the defendant had been served but was not present or represented and had filed no notice of intention to defend. Mistaking his instructions, the plaintiff company's counsel asked for judgment for £294-2*s*-10*d* instead of £4,204-5*s*-6*d*. The Court entered judgment for the smaller amount. The plaintiff company subsequently applied by motion on notice to set aside the judgment. The defendant opposed the motion.

*Held:*

The Court could not set aside the judgment on motion.

Cases referred to:

*Vint v. Hudspith* 29 Ch. D. 322, distinguished;
*Hickman v. Berers*, [1895] 2 Ch. 638, distinguished;
*Ainsworth v. Wilding*, [1896] 1 Ch. 673, followed;
*Re Affairs of Elstein*, [1945] 1 All E.R. 272, applied.

MOTION IN CIVIL SUIT

*Grant* for plaintiff-appellants;
*Agbaroba* for defendant-respondent.

**Reed, J.** (whose judgment was read by Holden, J.): This is a motion on notice by the plaintiffs asking the court to set aside the judgment of Smith J. (as he then was) given in the case on 22nd April, 1960. The motion is opposed by the defendant.

The facts upon which the plaintiffs rely are set out in the affidavit of Mr Quinn, a member of the firm of solicitors who are acting for the plaintiffs. The solicitors acted for the plaintiffs and also for A. G. Leventis and Company Limited, a company separate and distinct from the plaintiffs. On the instructions of the plaintiffs, the solicitors applied for the issue of a writ of summons against the defendant claiming the sum of £4,204-5*s*-6*d*. The writ was issued and the case was put on the Undefended List. A. G. Leventis and Company instructed the solicitors to institute legal proceedings against the defendant to recover the sum of £813-14*s*-0*d* and later

wrote to the solicitors stating that the defendant had paid the sum of £519-11*s*-2*d* in reduction of the debt, leaving a balance due of £294-2*s*-10*d*. On 22nd April, 1960, the case now before me, that is the plaintiff's claim against the defendant for the sum of £4,204-5*s*-6*d* came before Smith J. on the Undefended List. The defendant was not present or represented and no notice of intention to defend had been filed. Counsel who appeared for the plaintiffs mistook the instructions of A. G. Leventis and Company for the instructions of the plaintiffs and asked the judge for judgment for the sum of £294-2*s*-10*d*. Judgment was thereupon entered for that amount with costs. At the time the defendant was indebted to the plaintiffs in the sum of £4,204-5*s*-6*d* and that amount still remains due.

The question is whether the procedure by way of motion on notice is correct. I quote from *Halsbury*, 2nd edition, volume 19, page 267, paragraph 568—

"A judgment given or order made by consent may, in a fresh action brought for the purpose, be set aside on any ground which would invalidate an agreement not contained in a judgment or order, such as that the consent was the result of a mistake or that it was ***ultra vires*** on the part of one of the consenting parties. But unless all the parties agree, an application cannot be made to the Court of first instance in the original action to set aside the judgment or order, except, apparently, in the case of an interlocutory order." In my view Smith J.'s judgment was a consent judgment taken under a mistake. It is true that the defendant did not appear and consent but the case was on the Undefended List and by his failure to appear he is presumed to have consented. Mr Grant referred me to two cases in support of his argument that the correct procedure is by way of motion. One was *Vint v. Hudspith* 29 Ch. D. 322. But in that case the plaintiff had been absent when judgment was given against him and it was he, the plaintiff, who sought to have the judgment given in his absence set aside. It was held that the correct procedure was by way of application to the judge and the same procedure applies here by virtue of Order XL, rule 5, of the Supreme Court (Civil Procedure) Rules. The other case was *Hickman v. Berens* [1895] 2 Ch. 638. But this case was considered and distinguished in a subsequent case, *Ainsworth v. Wilding* [1896] 1 Ch. 673 upon which I rely.

In *Ainsworth v. Wilding* there was a motion to discharge a judgment given at the trial of the action. The application was made in the action in which judgment was given and





the ground of the application was that the judgment, which was based on the consent of the parties at the trial, was consented to under a mistake on the part of the applicant. The respondent raised the objection that the court had no jurisdiction to discharge the judgment on such a motion. Romer J. stated, at page 676—

I think that a fresh action must be brought and that I have no jurisdiction to hear the matter on motion, at any rate without the consent of the parties. I have offered to hear it if all parties will consent; but the required consent has been refused . . . . The Court has no jurisdiction, after the judgment at the trial has been passed and entered, to rehear the case. That is clear . . . So far as I am aware, the only cases in which the Court can interfere after the passing and entering of the judgment are these: (1.) Where there has been an accidental slip in the judgment as drawn up—in which case the Court has power to rectify it under Order XXVIII, r.11; (2.) when the Court itself finds that the judgment as drawn up does not correctly state what the Court actually decided and intended."

Romer J. went on to say that different considerations applied to interlocutory orders. As to *Hickman v. Berens* (*supra*) he said—

"The last case is *Hickman v. Berens*. As to that case, in the first place, the compromise there made was more in the nature of a compromise on an interlocutory proceeding, and no order was drawn up. Moreover, no objection was taken on the ground that the compromise could not be set aside on motion, but only in a fresh action; and it is clear that an objection of that kind must be taken at once, or it will be held to have been waived, as is pointed out in *Gilbert v. Endean* 9 Ch. D. 259. That case, therefore, is no authority for setting aside the judgment on motion."

I also refer to *Re Affairs of Elstein* [1945] 1 All E.R. 272. A County Court judge had made a consent order and later one of the parties applied for a variation of the order on the ground of mistake. The County Court judge refused the application on the ground that the order was exactly what he had intended and as he understood the parties intended it to be. The applicant appealed and Lord Greene, M.R., in the judgment of the court dismissing the appeal said—

"I cannot find that this is a case in which we can say that, according to the ordinary practice, the mistake, if it be a mistake, can be remedied by an application in the proceedings themselves once the order has been completed, as it has been

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completed in this case. If, indeed, there is any remedy in this case, it must be a remedy by independent action on which evidence can be called, and the relevant facts ascertained."

In the case before me the order was final, not interlocutory. Smith J. did not make a mistake; his order was what the plaintiffs intended it to be. There has been no mistake in drawing up the order. The defendant does not consent to this motion. In my view, on the authorities which I have cited, there is only one course open to the plaintiffs to obtain the relief they seek—and that is by way of a separate action. This motion is dismissed with 5 guineas costs to the defendant.

*Application dismissed.*



## PAUL MECHANIC *v.* BEDDE NATIVE AUTHORITY

[C.A. (Hurley, C.J., and Reed, J.)—November 10, 1961]
[Kano—Criminal Appeal No. K/46CA/1961]

*Criminal procedure—police powers of investigation—attendance of witnesses—power to require—by whom and how exercised—Criminal Procedure Code, ss.* 118(1)(*b*)(*i*), 123.

*Criminal law—failure to attend in obedience to order from public servant—witness ordered to come to police station—no proof that order issued by officer in charge of police station or officer deputed by him to investigate the case—Penal Code, s.* 136; *Criminal Procedure Code, ss.* 118(1)(*b*)(*i*), 123.

A complaint was made at a police station against the appellant. A police officer went to the appellant and told him he was wanted in the police station. The appellant refused to go to the police station. He was charged with an offence of failing to attend in obedience to an order from a public servant, contrary to section 136 of the Penal Code, and was convicted.

There was no evidence that the police officer who told the appellant he was wanted in the police station had been deputed to investigate the case by the officer in charge of the police station. And there was no evidence that this order for the appellant's attendance came from the officer in charge of the police station. On appeal—

*Held:* There was no evidence that the order for the appellant to attend at the police station came from a policeman legally competent to issue it; and the offence had not been proved.

*Per curiam:* There should have been evidence that the officer in charge of the police station gave an order that the appellant, being a person whose evidence appeared likely to be of assistance in the case, should attend at the police station; and there should have been evidence that that order, and the whole of that order, was conveyed to the appellant. Such evidence would have shown that the appellant received an order of a kind which he was bound to obey under section 123 of the Criminal Procedure Code, and that the order had come from a person who, under the same section, was legally competent to issue it.

(*Editorial Note.*—The "per curiam" seems to proceed upon the assumption that in fact the police officer who conveyed the order was "acting merely as a messenger" and had not been deputed to investigate the case).

CRIMINAL APPEAL FROM NATIVE COURT

*Nwajei* for the appellant;
*Corcoran, Crown Counsel,* for the respondent.

**Hurley, C.J.,** delivering the judgment of the Court: The appellant was convicted of offences against sections 247, 136 and 173 of the Penal Code. His trial was conducted with

great patience and completely fairly, but two of the convictions must be set aside because all the necessary facts were not proved.

Section 136 makes it an offence for a man to refuse to attend at a certain time and place when he has been required so to attend by an order proceeding from a public servant legally competent to issue the order. The case against the appellant was that he refused to attend at the police station when the police asked him to. One of the things that had to be proved was that the order for the appellant to attend at the police station came from a policeman legally competent to issue it. The appellant knocked a boy's tooth out with his fist, and a complaint was made at the police station. By section 118 of the Criminal Procedure Code, when a complaint is made at a police station the officer in charge must go to the spot and investigate the case or depute another police officer to do so. By section 123, a police officer making an investigation under section 118 may require any person whose evidence appears likely to be of assistance in the case to attend before him, and may question that person; and the person is bound to attend and answer the questions put to him. So the officer in charge of the police station, or any police officer whom he had deputed to investigate the case, was legally competent to issue an order to the appellant to attend at the police station as a person whose evidence appeared lileky to be of assistance in the case. The police officer who ordered the appellant to attend at the police station was Maina Mandama. His evidence was that after the complaint was made he went to the appellant and told him he was wanted in the police station. He did not say that he had been deputed to investigate the case; apparently, he was acting merely as a messenger carrying an order from someone else. But his evidence did not show who gave the order, and there was no other evidence to show who gave it. Therefore there was no evidence to prove that the order for the appellant to attend at the police station came from a policeman legally competent to issue it, and accordingly the offence under section 136 was not fully proved. There should have been evidence that the officer in charge of the police station gave an order that the appellant, being a person whose evidence appeared likely to be of assistance in the case, should attend at the police station; and there should have been evidence that that order, and the whole of that order, was conveyed to the appellant. Such evidence would have shown that the appellant received an order of a kind which he was bound to obey under section 123





of the Criminal Procedure Code, and that the order had come from a person who, under the same section, was legally competent to issue it.

When the appellant refused to come to the police station the police went to arrest him for his refusal and he resisted them, and for that he was convicted under section 173 of the Penal Code. Section 173 makes it an offence to resist lawful arrest. Appendix A of the Criminal Procedure Code shows that a person suspected of an offence against section 136 of the Penal Code cannot be arrested without a warrant. There was no evidence that the police who went to arrest the appellant had a warrant, and so there was no evidence that the arrest was lawful and no sufficient proof that the appellant's resistance was resistance to a lawful arrest and thus an offence under section 173.

(The Court then dealt with the appeal against the conviction under section 247 of the Penal Code and dismissed it.)

*Appeal allowed in part.*

## IBRAHIM MAI ABINKUMI *v.* M. KASIMU

[C.A. (J. A. Smith, S.P.J., and J. P. Smith, Ag. J.)—August 31, 1961]

[Lokoja—Civil Appeal No. JD/15A/1961]

*Native court—trial—evidence—witnesses must testify to court—court cannot proceed upon evidence given and recorded elsewhere.*

A case part-heard in the Kwara Native Court was transferred to the Provincial Court. The judges of the Provincial Court, besides hearing witnesses, read the Kwara Native Court's record of the evidence of a witness who did not appear before the Provincial Court. The Provincial Court was influenced in its judgment by the evidence which the judges read.

*Held:* The Provincial Court should in its judgment only have considered oral evidence of witnesses who appeared before it.

Case referred to:

*Chief Yaw Damoah v. Chief Kofi Taibil* 12 W.A.C.A. 167, at p. 168, applied.

(*Editorial note.*—Cf. *Saanyam Dzakpe v. Tiv Native Authority* 1958 N.R.N.L.R. 135 at 138).

CIVIL APPEAL FROM NATIVE COURT

*Fajemisin* for appellant;
Respondent in person.

**Smith, S.P.J.,** delivering the judgment of the Court: This is an appeal from the decision of the Provincial Court of Kabba Province dated 4th January, 1961, in favour of the plaintiff-respondent, M. Kasimu. The plaintiff-respondent claimed ownership of a house at No. 11 Temple Street, Lokoja, and he brought his case in the Kwara Native Court. Some witnesses gave evidence in that court, including Madam Yartukura. While the suit was still part-heard it was transferred by the Resident for hearing and determination from the Kwara Native Court to the Provincial Court. The Provincial Court only heard the oral evidence of the defendant (now appellant) and his witnesses. The allegation of the plaintiff-respondent was that he bought the house from Madam Yartukura; the defence of the defendant-appellant was that he bought the house from Nnamadi, Madam Yartukura's son. The Provincial Court adjourned the hearing of the suit in November for these two persons to be brought before the court as witnesses. Neither of them appeared. They apparently resided in Jos.





On 4th January, 1961, the Provincial Court proceeded to judgment without hearing the evidence of either of these persons. The court was entitled to come to judgment on such evidence as there was before it without adjourning further for the appearance of Nnamadi or Madam Yartukura. But the Provincial Court should in their judgment only have considered the oral evidence of witnesses who appeared before them. It is agreed by the parties to the appeal before us that the evidence which Madam Yartukura gave orally in the Kwara Native Court and which was recorded in writing in that court, was read by the judges of the Provincial Court. It is also apparent that the Provincial Court was influenced in its judgment by what the judges had read of the evidence of Madam Yartukura in the Kwara Native Court.

It is a fundamental principle that the same court consisting throughout of the same judges should see and hear all the witnesses who are to give evidence before the court from the beginning to the end of the case. It is not permissible for one court to read the evidence given by a witness before another court and to take that evidence—of witnesses whom it has neither seen nor heard—into account in coming to its decision.

We would quote the direction of Harragin, C. J. in *Chief Yaw Damoah v. Chief Kofi Taibil* 12 W.A.C.A. 167 at page 168, where the native court, in order to save time and with the consent of the parties read over evidence already taken before different judges:

"It is with great regret that we find ourselves obliged still further to prolong this litigation particularly as it is difficult for illiterate people to understand what they will undoubtedly imagine to be the unnecessary technicalities of British justice, but it is a principle from which no Court could ever depart. We are aware that most of the native courts appreciate the fact that those giving judgment must have taken part in the whole trial and in fact from a perusal of the record in this case it is clear that this particular native court was well aware of that ruling, but failed to appreciate the difference between having evidence read to them and listening to the oral evidence from witnesses in the box. One of the principal duties of a court of first instance is to form an opinion as to the credibility of witnesses by their demeanour in the box, which is quite impossible if the evidence is read.

"And lastly, should this procedure be permitted the next development would be that one of the parties would send his evidence already written out and, if there was no objection by

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the other side, the court would proceed to adjudicate upon the matter and learned Counsel would endeavour to support this procedure by arguing that it was never objected to by the other side."

For the same reason we allow the present appeal and order a retrial before the Provincial Court, Kabba Province. By retrial we mean that the Provincial Court must hear the *oral* evidence of each of the witnesses from the beginning to the end.

*Appeal allowed.*



## J. S. OLAWOYIN AND SIX OTHERS *v.* COMMISSIONER OF POLICE

[C.A. (Hurley, C.J., and Skinner, J.) —January 15, 1962]
[Kaduna—Appeal No. Z/49A/1960]

*Constitution—fundamental rights—determination of rights—criminal proceedings—fair hearing—accused charged after prosecution witnesses heard—no opportunity of further cross-examining prosecution witnesses—no questions which accused could usefully have asked*—*Constitution of the Federation of Nigeria*, s. 21(2).

——— ——— ——— ——— *presumption of innocence—charge and plea after prosecution witnesses heard—whether presumption displaced—whether prosecution relieved of onus of proving guilt*—ibid., s. 21(4).

——— ——— ——— ——— *opportunity to exercise right—accused ignorant of right—accused not informed of right or invited to exercise it—opportunity neither given nor denied*—ibid., s. 21(5)(*d*).

——— ——— ——— ——— *right to examine defence witnesses on same conditions as prosecution witnesses—prosecution witnesses examined on oath—accused's right to give evidence on oath—opportunity not given—fair hearing—no evidence of accused's desire to give evidence on oath*—ibid., s. 21(2), (5)(*d*).

The appellants were convicted in the Provincial Court of an offence of disturbing the public peace contrary to section 113 of the Penal Code. At the beginning of the hearing the prosecutor made an opening statement. The prosecution witnesses then gave evidence on oath and were each questioned by the appellants.

When the prosecution witnesses had finished giving evidence a charge of an offence under section 113 was read to the appellants. The charge added nothing to what had been disclosed in the prosecutor's opening statement except that it named the hour at which the offence was alleged to have been committed, alleged that it had been committed in a public place whereas in the opening statement it was said that it was committed on a main road, and named the section of the Penal Code under which the offence was punishable. The appellants each pleaded not guilty to the charge. They were not given an opportunity of further cross-examining the prosecution witnesses.

Immediately after the pleas were taken, the first appellant was asked had he anything to say in his defence and had he any witnesses in his defence. He made an unsworn statement and called no witnesses. Each of the remaining appellants was then asked in turn had he anything to say in his defence, and each made an unsworn statement and called no witnesses.

On appeal, it was argued that the appellants had not been given a fair hearing within the meaning of section 21(2) of the Constitution of the Federation of Nigeria because they were not given the opportunity of further cross-examining the prosecution witnesses after issue was joined by the taking of their pleas and trial begun. No question was suggested or apparent at the hearing of the appeal which the appellants could usefully have asked in regard to any of the matters alleged in the charge which had not been disclosed in the prosecutor's opening statement.

*Held*, (1): The appellants had not been prejudiced by not having had the opportunity of further cross-examining the prosecution witnesses and had not been deprived of the fair hearing to which they were entitled by section 21(2).

It was further argued that, by having been called upon to make their defence immediately upon being charged and pleading not guilty, the appellants had been deprived of the benefit of the presumption of innocence to which they were entitled by section 21(4) of the Constitution of the Federation of Nigeria, because the presumption did not arise before issue was joined and the trial began and the prosecution evidence given before ue joined was not evidence in the trial or upon the issue.

*Held*, (2): The Court must look at the question of substance, which was whether the prosecution had been in any degree relieved of the onus of proving guilt because the prosecution evidence was heard before the appellants pleaded; and there was no reason to suppose that the presumption of innocence had been displaced.

It was further argued that the trial court had not given the appellants an opportunity of giving evidence on oath or of calling witnesses on their behalf.

*Held*, (3): Where an accused person is entitled to take some step in his trial but does not know, or is unlikely to know, that he is so entitled, and is not informed of his right to take it or invited to take it, then, in general, while it will not be justifiable to say that the opportunity of taking it is denied to him, it will be difficult to say that it is given to him. From the record, it appeared that the opportunity of giving their own evidence on oath was not given to the appellants. The first appellant having been asked had he witnesses to call in his defence, when each of the other appellants was asked had he anything to say in his defence he had notice that he could call witnesses; and it was impossible to say that the appellants were not given an opportunity of calling witnesses.

It was argued that section 21(5) (*d*) of the Constitution of the Federation of Nigeria entitled each of the appellants to give his own evidence on oath because the prosecution evidence had been given on oath, and that the appellants were not given a fair hearing within the meaning of section 21(2) of the Constitution because they were not given an opportunity of giving evidence on oath. It did not appear that any of the appellants had in fact wished to give evidence on oath or would have been prepared to do so if invited to.

*Held*, (4): The question whether there has been a fair hearing is one of substance, not of form, and must always be decided in the light of the realities of any particular case. The appellants had failed to establish any prejudice to them from the omission to give them an opportunity to give evidence on [illegible] therefore failed to show that the hearing was as a result in fact





Case referred to:

*Kano Native Authority v. Raphael Obiora* 1960 *N.R.N.L.R.* 42, at p. 47, applied.

CRIMINAL APPEAL

*Chief F. R. A. Williams, Q.C.* (with him *Adesiyun*) for the appellants;

*Corcoran, Crown Counsel*, for the respondent.

**Hurley, C.J.,** delivering the judgement of the Court: The appellants were convicted in the Provincial Court of Ilorin Province of an offence of disturbing the public peace contrary to section 113 of the Penal Code. The first appellant was sentenced to six months' imprisonment and the other appellants to three months' imprisonment each. The first grounds of appeal that were considered at the hearing of the appeal were the first and second additional grounds of appeal, which say—

> "1. The Court below erred in law in refusing to permit the first appellant to call evidence on his behalf.
>
> "2. The Court below erred in law (*a*) in failing to give to the appellants an opportunity of giving evidence on oath in their defence and (*b*) of calling witnesses in their behalf."

The record of the trial proceedings shows that the accused were charged and pleaded after the prosecution evidence had been heard. The prosecution evidence was given on oath. Immediately after the pleas were taken, the first appellant was asked "Have you anything or witness in your defence?" We take this as meaning that this appellant was asked had he anything to say in his defence and had he witnesses in his defence. In reply, he asked to be allowed to state his case from a written paper which he tendered. This was refused, and he then made a statement not on oath. He called no witnesses. Each of the other appellants was asked had he anything to say in his defence, and each said something not on oath and called no witnesses.

The case for the first appellant on the first additional ground of appeal seeks to impugn the record of proceedings. The first appellant alleges, in effect, that he was not asked had he witnesses in his defence. He goes further and says that he asked to call witnesses and was not allowed to, and that he asked to give his own evidence on oath and was not allowed to. In support of this he gave evidence by affidavit and orally, and against it oral evidence was given by the

registrar and the interpreter of the trial court. The last-mentioned witness was not an impressive one and does not seem to recollect very clearly what happened, perhaps because, as he says, he was not giving much attention to the proceedings after the first appellant had begun to speak to the Judge in Hausa. The registrar appeared to be a truthful witness. The first appellant's evidence, in our view, was seriously compromised by the recorded and admitted fact that he asked to read a written statement and tendered it to the court; we find it difficult to reconcile this with any expression on his part such as he avers of a desire to give evidence on oath. The evidence from this witness that he said he wanted to call witnesses and was not allowed to, which directly contradicts the record, has not succeeded in satisfying us that the record is false. In our judgment the evidence before us as a whole neither adds to nor detracts from the record. The allegations on which this ground of appeal rests have not been proved, and the ground fails.

The case for the appellants on the second additional ground of appeal is that section 21(5)(*d*) of the Federal Constitution entitled each of them to examine witnesses on his behalf, and also to give his own evidence on oath because the prosecution evidence had been given on oath, and that they were not given a fair hearing within the meaning of section 21(2) because they were not given an opportunity of doing these things. On the record, the first appellant was given the opportunity of examining witnesses on his behalf and did not take it, while nothing was said about witnesses to the remaining appellants and nothing was said about giving their own evidence on oath to any of the appellants. Where an accused person is entitled to take some step in his trial but does not know, or is unlikely to know, that he is so entitled, and is not informed of his right to take it or invited to take it, we think that, in general, while it will not be justifiable to say that the opportunity of taking it is denied to him, it will be difficult to say that it is given to him. From the record in this case, it appears to us that the opportunity of giving their own evidence on oath was neither denied nor given to the appellants. It is different with regard to calling defence witnesses. The first appellant having been asked had he anything to say or any witnesses to call in his defence, it seems to us it must in reason be supposed that when each of the other appellants was asked had he anything to say in his defence he had had notice that he could call witnesses. We cannot say that the appellants were not given an opportunity





of calling witnesses. We do say that they were not given an opportunity of giving evidence on oath. Upon that, and likewise if we are wrong in thinking that an opportunity of calling witnesses was given, the question arises whether the appellants had a fair hearing within the meaning of section 21(2) of the Federal Constitution.

To paraphrase the words of the Federal Supreme Court in its judgment in *Kano Native Authority v. Raphael Obiora* 1960 N.R.N.L.R. 42 at page 47, we think that the question whether there has been a fair hearing is one of substance, not of form, and must always be decided in the light of the realities of any particular case. In this case, there is nothing in the record, and upon the view we take of the evidence before us and upon examination of the appeal proceedings generally, there is nothing elsewhere, to show that any of the appellants in fact wished to give evidence on oath or would have been prepared to do so if invited to. And equally there is nothing to show that any of them wanted to call witnesses or had witnesses to call. We are asked to say that the hearing was not a fair hearing because the appellants were not given an opportunity of exercising certain rights, but we have not been shown even a likelihood that the rights would have been exercised had the opportunity been given. The appellants have failed to establish, and with the exception of the first appellant they have not even attempted to establish, any prejudice to them from the omission to give them an opportunity to give evidence on oath, or from the omission, if omission there was, to give them an opportunity to call witnesses, and so they have failed to show that the hearing was as a result in fact unfair. The second additional ground of appeal fails.

On this second ground of appeal the point has not been argued, though it could have been, that the trial court's error in law consisted in a failure to observe the provisions of section 289 of the Criminal Procedure Code. The trial court did omit to ask the appellants to name the witnesses they intended to call in their defence as that section requires. But section 382 of the Code prevents us from interfering on that ground, because it has not been shown that any failure of justice has been occasioned by the trial court's omission. Our reasons for saying that it has not been shown that a failure of justice has been occasioned are the same as our reasons for saying, as we have just said, that it has not been shown that the hearing would have been unfair by reason of any omission to give the appellants an opportunity of calling witnesses.

The next ground was the third additional ground of appeal, which says—

> "The procedure adopted in the Court below for the trial of the appellants contravened the provisions of section 21(4) of the Constitution of the Federation because immediately upon the appellants being charged for an offence and pleading Not Guilty they were called upon to make their defence".

Section 21(4) says—

> "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty:
>
> Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any person the burden of proving particular facts".

The meaning of this ground of appeal seems to be that the appellants were presumed guilty before there was proof or evidence of their guilt, and that the prosecution were relieved of the onus of proving the appellants' guilt. It is said that that was so because the prosecution cannot operate or the onus fall until issue is joined and trial begins, and because evidence before issue joined is not and cannot be evidence in the trial or upon the issue, and here issue was not joined until the appellants pleaded to the charge after the prosecution evidence had been heard. These seem to us to be purely matters of form, and in our view what we must look at is the question of substance, which is, were the prosecution in any degree relieved of the onus of proving guilt because the prosecution evidence was heard before the appellants were charged and pleaded? Was the court any more likely to be persuaded of the appellants' guilt because the evidence preceded the charge? Did the course followed make it easier for the prosecution? We are totally unable to see any reason for supposing that it did, or that the presumption of innocence was displaced or the prosecution to any extent relieved of the onus of proving their case. This ground of appeal also fails.

The next ground is the fourth additional ground of appeal, which says—

> "The procedure adopted in the Court below for the trial of the appellants contravened the provisions of section 21(2) of the Constitution of the Federation because the appellants were not given the opportunity of further examining the prosecution witnesses after issue was joined and trial begun on 14th November, 1960".





The appellants were not in fact given an opportunity after they had pleaded of further cross-examining the prosecution witnesses, who had testified, and whom they had cross-examined, before the charge was framed and the pleas taken, and the submission on this ground of appeal is that by that procedure the appellants did not have a fair hearing. Again, we think we must look to the question of substance, and ask whether the appellants were prejudiced by not having an opportunity of further cross-examining the prosecution witnesses. At the beginning of the hearing, the prosecutor opened his case with a statement which contained everything that was subsequently alleged in the charge, except that the charge named the hour at which the offence was alleged to have been committed, alleged that it had been committed in a public place whereas in the opening statement it was said that it had been committed on a main road, and named the section of the Penal Code under which the offence was punishable. These were the only matters of which the appellants had not been given notice, in the opening statement, before the prosecution witnesses gave evidence and were cross-examined by the appellants. They were the only matters in regard to which the appellants might have been unable to cross-examine the witnesses and might have wished to cross-examine them further—the time of day, the legal description of the scene of the offence—undoubtedly a correct description—and the reference to the section creating the offence. No question which any of the appellants could usefully have asked in regard to any of these matters has been suggested to us, and we cannot see any. We cannot see that the appellants have been in any way prejudiced by not having had the opportunity of further cross-examining the prosecution witnesses after the framing of a charge, and issue joined thereon, which added only these matters to the matters of which the appellants had notice from the start of the hearing. The appellants were not deprived by the procedure adopted of the fair hearing to which they were entitled by section 21(2), and this ground of appeal fails.

The fifth additional ground of appeal was not pressed in argument. It is that the appellants were not given adequate time and facilites for the preparation of their defence. That is a question of fact, and the fact has not been established. This ground fails.

The first, second, third and fifth original grounds of appeal were abandoned. The fourth original ground is that the appellants elected to give evidence on oath and the trial Court

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wrongly denied them the right to do so. That ground was not pressed in argument either, and the record does not support it. It must fail. The sixth ground of appeal among the original grounds is that the sentence is excessive. The other appellants having served their sentences, this ground was argued only in relation to the first appellant's sentence. Addressing the first appellant, the Provincial Judge said in his judgment "...it seems to me that you are a leader of a political party who ordered your followers to cause disturbance. It is your fundamental duty to safeguard the unity and interest of Offa people. Furthermore, you are an hon. member who should prohibit any act or conduct which in your opinion might cause a riot or a disturbance. In view of this your punishment must be higher than the rest". The evidence was that the first appellant was driving in a procession in a motor-vehicle with other members of his party, and the vehicle turned round and drove in the opposite direction to that in which the procession was going and blocked the road to the vehicles which had been following it, which were occupied by members of an opposing party. The appellant and the other occupants of his car, and the occupants of the first of the cars which it was blocking, got out. Abuse was exchanged, and then blows. There can be no doubt that the way in which the first appellant's car was manoeuvred occasioned the disturbance which followed. The appellant gave no explanation of this. No reason for saying that the appellant's sentence was excessive has been submitted to us or argued, save that it was greater than the sentences of the other appellants. The trial court gave reasons for that, and we cannot say that there was no foundation for the trial court's conclusions or that its opinions were wrong.

The appeals are dismissed.

*Appeals dismissed.*



## CHANVER ABA AND ANOTHER v. COMMISSIONER OF POLICE

[C.A. (Smith, S.P.J., and McCarthy, Ag. J.) September, 1961] [Makurdi—Criminal Appeal No. JD/70CA/1961]

*Criminal procedure—magistrate's court—summary trial—jurisdiction—magistrate not empowered to try one of two offences charged—conviction for both offences—whole proceedings void—Criminal Code, ss. 70, 443; Criminal Procedure Code, s. 13, s.-ss. (1), (2)(a) and (b), s. 380(h).*

*Magistrate—jurisdiction—summary trial—magistrate not empowered to try one of two offences charged—whole proceedings void.*

The appellants were tried summarily by a magistrate in proceedings governed by the Criminal Procedure Code and were convicted of two offences under the Criminal Code. One of the offences was punishable with imprisonment for life, the other with imprisonment for one year. By the effect of section 13(2) of the Criminal Procedure Code, the magistrate had power to try the latter offence but had no power to try the offence which was punishable with imprisonment for life.

*Held:* By the effect of section 380(*h*) of the Criminal Procedure Code, where an offender is tried in one summary trial on two or more charges in a magistrate's court and it appears that the court was not empowered to try the offender on one of those charges then the whole proceedings are void.

CRIMINAL APPEAL

*Shatola* for appellants:

*Nasir*, Senior Crown Counsel, for respondent.

**Smith, S.P.J.,** delivering the judgment of the Court: The appellants, Chanver Aba and Atangeau Iju, were tried summarily in the Magistrate's Court and convicted of the offences of unlawful assembly and of unlawfully setting fire to a house contrary to sections 70 and 443 respectively of the Criminal Code (Cap. 42). The offences were said to have been committed on 11th September, 1960. According to the First Information Report at page one of the record of proceedings the appellants were arrested on 28th October, 1960. The trial was conducted under Chapter XVI—Summary Trials in Magistrates' Courts—of Part VI of the Schedule to the Criminal Procedure Code Law, 1960, which came into force on 30th September, 1960. The charges were framed under the Criminal Code because that was the law creating these offences at the time they were said to have been committed.

Section 13(2)(*a*) of the Schedule to the Criminal Procedure Code Law, 1960, provides that a chief magistrate shall *not* try an offence punishable with imprisonment for a term which may exceed ten years or with a fine exceeding £500; and section 13(2)(*b*) similarly provides that a magistrate of the first grade shall *not* try an offence where the maximum punishment for the offence exceeds five years' imprisonment or a fine of £200. The maximum punishment for an offence contrary to section 443 of the Criminal Code is imprisonment for life. We therefore in this appeal raised the question of the jurisdiction of a magistrate's court to try the appellants summarily.

It was agreed by Counsel both for the appellants and the respondent that neither a chief magistrate nor a magistrate of the first grade is empowered to try summarily an offender for an offence contrary to section 443 of the Criminal Code. The Criminal Code is "any law other than the Penal Code" within section 13(1) of the Schedule to the Criminal Procedure Code Law, 1960. At the time the alleged offences were committed, 11th September, 1960, the Penal Code was not in force. The Criminal Code does not state what courts have jurisdiction to try the offences created by that Ordinance. The law giving magistrates' courts jurisdiction is the Criminal Procedure Code Law, 1960, and it is apparent from section 13 to which we have already referred that neither a chief magistrate nor a magistrate of the first or any other grade has jurisdiction to try summarily an offence for which the maximum punishment is imprisonment for life.

Mr Shatola for the appellants argued that the trial of the appellants in the magistrate's court was not void as regards the conviction under section 70 of the Criminal Code because the magistrate had jurisdiction to try an offender summarily for an offence under that section. Mr Shatola submitted that the charge framed by the magistrate under section 443 of the Criminal Code should be struck out and the conviction thereunder set aside; and that the hearing of the appeal should proceed on the basis of a valid conviction under section 70.

M. Nasir for the respondent submitted that the whole trial was void by virtue of section 380 of the Criminal Procedure Code, 1960.

In considering this problem we have looked at the First Information Report at page one of the record and find that a complaint was made to the police by Igwa Baka and two others that, on 11th September, 1960, the appellants with others unlawfully set fire to the compounds of the complainants. It was apparent from the First Information Report that the offence alleged was one contrary to section 443 of the Criminal Code. Had the learned magistrate appreciated the effect of section 13 of the Schedule to the Criminal Procedure Code Law, 1960, he would have realised on reading the First Information Report that the offence alleged therein was outside his powers of summary jurisdiction and was an offence which should be tried in the High Court. He would then have conducted a preliminary inquiry under Chapter XVII. That was the course he should have taken but in fact he conducted a summary trial. Section 380 (*h*) of the Schedule to the Law of 1960 provides:

> "If any court. . . .not being empowered by law in this behalf, does any of the following things, namely—
>
> . . . . . .
>
> (*h*) tries an offender;
>
> . . . . . .
>
> such proceedings shall be void".

"Such proceedings" read in relation to paragraph (*h*) indicates that the trial must be considered as one whole. Where an offender is tried in one summary trial on two or more charges in a magistrate's court and it appears that the court was not empowered to try the offender on one of those charges then the whole proceedings are void. A magistrate has power under section 160(2) at any stage before signing judgment in the trial of a case to convert a summary trial into a preliminary inquiry where the case is one which ought to be tried by the High Court and that is what the magistrate should have done in the present case when he framed the charges if he had not realised earlier from the First Information Report that this was a case where he should have conducted a preliminary inquiry.

For the reasons we have given we declare the trial of the appellants in the magistrate's court to be void and we order a retrial in the High Court following a preliminary inquiry before another magistrate.

*Appeal allowed; retrial ordered.*

## BARCLAYS BANK D.C.O. v. YESUFU ALABI ADIGUN

[High Court (Smith, S.P.J.) —July 1, 1961]
[Jos - Civil Suit No. JD/15/1961]

*Judgment—interest on judgment debt—power to order payment of interest only when ordering extension of time to pay judgment debt—Supreme Court (Civil Procedure) Rules, O. XLVI. r. 7.*

*Action—claim for interest on judgment debt—Judgments Act, 1838, s. 17; Rules of the Supreme Court, 1883, O. 42, r. 16.*

The plaintiff company claimed £3,989. 9*s*. 8*d*. as money due on a bank overdraft, and interest thereon at 5 per cent per annum from the date of judgment pursuant to Order XLVI, rule 7 of the Supreme Court (Civil Procedure) Rules.

*Held:* Order XLVI, rule 7 empowers a court to order interest to be paid on a judgment when making an order granting time within which to pay the judgment debt, but does not empower a court otherwise to order interest to be paid.

CIVIL ACTION

*Grant* for plaintiffs;

*Agbakoba* for defendant.

**Smith, S.P.J.:** In this action the plaintiff claimed from the defendant:—

(1) The sum of £3,989.9*s*.8*d* as money due from defendant on a bank overdraft.
(2) Interest thereon at 5% per annum from date of judgment pursuant to O. XLVI, r. 7, of our Civil Procedure Rules.
(3) An order requiring the defendant to execute a legal mortgage pursuant to his undertaking to do so in a Memorandum of Deposit of Deed dated 30th October, 1956.

Initially the action appeared in the undefended list. On 10th March, 1961, the defendant admitted liability on item (1) of the claim and judgment was entered against him for the sum of £3,989.9*s*.8*d*. He was given leave to defend items (2) and (3) of the claim; and pleadings were filed in due course.

Item (3) of the claim has been withdrawn and struck out at the instance of the plaintiff.

There remains item (2) of the claim. The defendant has averred that the plaintiff is not entitled to interest after judgment under Order XLVI, r. 7.





Mr Grant for the plaintiff has submitted that by Order XLVI, r. 7, the Court has a discretion to order interest to be paid and in support has cited authorities on the practice in England and in particular Order 42, r. 16 of the English Rules at page 1010 of the Annual Practice, 1961.

In England a judgment ordering payment of a sum of money carries interest by virtue of section 17 of the Judgments Act, 1838. Order 42, r. 16 provides for the procedure of indorsing the writ of execution for recovery of the judgment debt and interest thereon from the date of judgment, if sought to be recovered.

In the matter now before me Counsel has not shown any similar statutory authority in Nigeria for the recovery of interest on a judgment debt. I have been referred to Order XLVI, r. 7 of our Civil Procedure Rules. The rule reads:—

> "The court at the time of making any judgment or order, or at any time afterwards, may direct the time within which the payment or other act is to be made or done, reckoned from the date of the judgment or order, or from some other point of time, as the court thinks fit, and may order interest at a rate not exceeding five pounds *per centum per annum* to be paid upon any judgment, commencing from the date thereof or afterwards".

Mr Agbakoba for the defendant has submitted that this rule only gives the Court a discretion to order interest to be paid on a judgment debt when the Court grants time within which to pay a judgment debt.

Mr Grant has urged that the rule gives the Court two distinct powers each independent of the other: (1) the power to direct the time within which a judgment debt is to be paid: (2) the power to order interest to be paid upon any judgment debt.

If each of these powers were set out in a separate rule I would be inclined to agree with Mr Grant's submission. But they are not. It is one rule not two. And it will be observed that rule 7 consists of a single sentence. By the normal canons of construction that sentence must be read as a whole, each part of it being dependent upon the other. When so read, it means that the Court may grant time within which to pay a judgment debt and may when making such an order also order interest to be paid thereon from date of judgment or afterwards, but not otherwise. I therefore enter judgment for the defendant on item (2) of the claim.

*Judgment for defendant on claim for interest*

## IBRAHIM DIMIS *v.* COMMISSIONER OF POLICE

[C.A. (Reed, Ag. S.P.J., and McCarthy, Ag. J.)—February 6, 1961] [Jos—Criminal Appeal No. JD/7CA/1960]

*Legal representative—counsel engaged to defend accused person—withdrawal of counsel from case without leave—no other counsel available—adjournment to engage another counsel refused.*

Counsel for the accused in a trial at an outstation made a submission which was rightly overruled, applied for an adjournment to the next sessions which was refused, and withdrew from the case without the leave of the court. There was no other counsel available to undertake the defence. The accused asked for an adjournment to engage counsel. The adjournment was refused and the trial proceeded. The accused refused to take any further part in the proceedings. He was convicted.

*Held*, on appeal on the ground, among others, that the trial court erred in law in failing to allow the appellant time to engage another counsel to prepare his defence after the withdrawal of his counsel, and in then delivering judgment without any defence: The appeal should be dismissed. Case referred to:

*Mary Kingston*.—32 Cr. App. R. distinguished.

CRIMINAL APPEAL

*Ezikiwe* for appellant;

*Buba Ardo*, Crown Counsel, for respondent.

**Reed, Ag. S.P.J.**, delivering the judgment of the Court: This is an appeal against the decision of the Magistrate Grade I, sitting at Bauchi, convicting the appellant of an offence under regulation 27(1) of the Elections (House of Representatives) (General Provisions) Regulations, 1954, and sentencing him to a fine of £100 and three months' imprisonment with hard labour.

Nine grounds of appeal were originally filed. Learned counsel for the appellant abandoned grounds 1, 2 and 5. Three additional grounds were filed but additional ground 3 was later abandoned by counsel.

The offence created by regulation 27(1), upon which the appellant was convicted, is not declared to be punishable on summary conviction. The offence is punishable with imprisonment not exceeding one year or with a fine not exceeding £100, or with both. Counsel arguing original ground 3





referred us to the definition of "indictable offence" in section 2 of the Criminal Procedure Ordinance and submitted that the trial magistrate erred in finding that the offence was not an indictable offence. In our view *R. v. Eze* 19 N.L.R. 110 is directly in point and we follow that decision. We find that there is no substance in original ground 3, and it follows that there is no substance in original ground 4.

Original ground 6 states that:

> "The learned trial Magistrate erred in law when he failed to allow the accused time to brief another counsel to prepare his defence after the withdrawal of his counsel and then delivered judgment without any defence".

This trial was held at an outstation, in Bauchi. It appears from the record that Mr Morohundiya, of counsel, appeared for the appellant during the trial on 28th and 29th August, 1959. At the end of the hearing on the 29th the prosecution case was closed. A submission of "no case to answer" was made by Mr Morohundiya but the magistrate ruled that there was a case to answer and amended the charge. Counsel stated that he wished to appeal but the magistrate ruled that he had no right of appeal at that stage. The magistrate refused an adjournment to the next sessions and adjourned the hearing to 31st August. On that day the appellant was represented by Mr Adejonwu, of counsel. Counsel submitted—wrongly, in our view—that the offence with which the appellant was charged was an indictable offence and said that the appellant wished to be tried in the High Court. The magistrate ruled that the appellant had no right to trial in the High Court and overruled the objection. Thereafter the record reads:—

> "Mr Adejonwu withdraws from case having refused to make an election under section 287 of the C.P.O. Accused states he wishes to employ another counsel. Accused asked several times but refuses to make an election under section 287. Adjournment for accused brief further counsel refused. Accused refusal to elect taken as an election to say nothing at all under section 287(*a*)(*iii*). Accused when asked if he wishes to call any witnesses, refuses to answer".

We should like to place on record that in our view it was most improper and unprofessional conduct of Mr Adejonwu to withdraw in these circumstances; it appears that his only reason for doing so was that he disagreed with a ruling of the magistrate. Apparently he did not even have the courtesy to ask the leave of the magistrate to withdraw. It is true that the appellant is not responsible for the conduct of his counsel.

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We have been referred to an English case, *Mary Kingston* 32 Cr. App. R. 183. In this case the appellant was tried and convicted at the Manchester Quarter Sessions. She had briefed counsel to appear for her but, owing to a mistaken belief, counsel was not present when she was tried; apparently it had been wrongly believed that the case would not be reached until 2 p.m. that day. The judgment states:—

> "it was owing to the fact that that member of the Bar (defence counsel) agreed with counsel for the prosecution that neither would go to the court till 2 p.m. that all this trouble arose. In those circumstances, we think it right to say that in our opinion the Assistant-Recorder was perfectly justified in continuing with the trial of a person although she was unrepresented. The jury had to be considered. It would have been quite wrong for the Assistant-Recorder at 10.30 a.m. to waste the jury's time and tell them there was nothing for them to do and that they must come back at 2 p.m. for the convenience of counsel. . . .If the matter rested on the facts which I have stated so far, this Court would not have interfered, but. . . ."

The court went on to say that prosecuting counsel then suggested that there were other counsel present who could hold the brief of defending counsel and the Assistant-Recorder declined the invitation. The court said:—

> "We cannot help thinking that it would have been eminently desirable that the Assistant-Recorder should have accepted that invitation. There were members of the Bar present. Now, it seems to us that that was tantamount to depriving the appellant of the right which she had of being defended by counsel."

In our view this case is quite different from the one before us. The Magistrate's Court Sessions at Bauchi are very different from the Manchester Quarter Sessions and although the record is silent on the point we think it safe to assume that there was no other counsel available to undertake the defence; there is no suggestion that there was one. Indeed if the application for an adjournment had been granted it is probable that the magistrate would have been compelled to adjourn the case to the next sessions in Bauchi—which was what counsel for the appellant had applied for on 29th August and the magistrate had refused. We are not prepared to allow the appeal on original ground 6. (The judgment then dealt with the remaining grounds of appeal, and the appeal was dismissed).

*Appeal dismissed.*



## IBRAHIM DIMIS *v.* COMMISSIONER OF POLICE (2)

[Federal Supreme Court (Brett, Ag. C.J.F., Unsworth, F.J., and Taylor, F.J.)—June 27, 1961]
[Lagos—Appeal No. F.S.C.77/1961]

*Legal representative—withdrawal from case without leave—withdrawal from defence of accused person—withdrawal when no-case submission overruled and adjournment refused.*

Counsel for the accused in a trial at sessions at an outstation made a submission that there was no case to answer which was overruled. Counsel then applied for an adjournment to the next sessions. The adjournment was refused, and Counsel thereupon withdrew from the case without the leave of the court. There was no other Counsel available to undertake the defence. The trial court refused the accused an adjournment to engage another Counsel. The trial proceeded and accused was convicted. On appeal to the Federal Supreme Court—

*Per Curiam:* Counsel has no right to withdraw altogether from a case and leave an accused person unrepresented.

CRIMINAL APPEAL

*J. A. Cole* for the appellant;
*A. A. Oshodi* for the respondent.

This was an appeal from the decision of the High Court reported at p. 42 *supra*. The facts are set out in the judgment of the High Court. The appeal was allowed on the ground of misdirection by the trial court. The "other ground of appeal" mentioned in the extract now reported from the judgment was that the trial court erred in law in not allowing the appellant to bring another counsel after his counsel had withdrawn from the case.

**Unsworth, F.J.**, delivered the judgment of the Court, which upheld the appeal on the ground of misdirection and continued: it is unnecessary for us to consider the other ground of appeal. We would, however, refer to the conduct of counsel in withdrawing from the case without the leave of the Court. The defence can, of course, stand on a point of law but counsel has no right to withdraw altogether from a case and leave an accused person unrepresented, as was done here.

The appeal is allowed; the conviction and sentence set aside and a verdict of acquittal entered.

*Appeal allowed*

# ALHAJI AUDU AND FOUR OTHERS v. JOS NATIVE AUTHORITY

[C.A. (Smith, S.P.J., and Skinner, J.)—October 24, 1961]
[Jos—Criminal Appeal No. JD/56CA/1961]

*Practice and procedure—appeal—appeal from native court to High Court—entering appeal—no copies of notice of appeal lodged in court below—no deposit in court below towards cost of record—appeal not entered—Northern Region High Court (Appeals from Native Courts) Rules*, 1960, *O. II, R.*3,4(1).

The appellants by their counsel filed in time the notice of appeal prescribed by Order II, rule 4 (1), of the Northern Region High Court (Appeals from Native Courts) Rules, 1960, and paid the prescribed fees, but in disregard of the further provisions of rule 4 (1) they did not cause a copy of the notice of appeal to be filed in the court below, did not make a deposit in the court below towards the cost of copies of the record, and did not supply a copy of the notice of appeal to the court below for service on the respondent.

*Held:* An omission to comply with any of the steps prescribed by Order II, rule (4) (1), of the Northern Region High Court (Appeals from Native Courts) Rules, 1960, results in a failure to enter an appeal which the High Court has no discretion to rectify.

Case referred to:

*Kabina Nemmi v. Ediay* 6 W.A.C.A. 56.

CRIMINAL APPEAL FROM NATIVE COURT

*Thanni* for appellants;

*Nasir, Senior Crown Counsel*, for respondent.

**Smith, S.P.J.**, delivering the judgment of the Court: In this appeal, Mr. Nasir for the respondent has made a preliminary submission that there is no appeal before us because of the failure of the parties appealing to comply with certain provisions of Order II of the Northern Region High Court (Appeals from Native Courts) Rules, 1960, which sets out the steps which an appellant is required to follow when entering an appeal in the High Court from a decision of a native court.

The parties appealing were jointly tried and convicted of a criminal offence in the Court of the Chief Alkali. They have been represented by counsel from the beginning of the proceedings in this Court; and on 28th June, 1961, the day following the decision in the Court of the Chief Alkali, a notice of appeal was filed by their counsel in the registry of this Court. It is a single document which purports to be the notice of appeal of five persons. Order II, rule 3 provides that





an appellant or someone duly authorised to do so on his behalf shall enter an appeal by notice in writing containing the particulars specified therein. When persons, as in the present instance, are jointly tried and convicted, each of them has a separate right of appeal; and each of them should file a separate notice of appeal. Order II, rule 3 does not say so specifically but that appears to us to be the clear intention. The document before us contains the particulars required in Order II, rule 3; it contains the names of all five parties appealing, with a common ground of appeal; and is endorsed by our registrar to the effect that five fees for entering an appeal have been paid. We are of opinion that this document may be entertained as a notice of appeal of each of the five parties named therein for the purpose of Order II, rule 3.

The main objections raised by Mr. Nasir relate to Order II, rule 4; and it will be convenient to consider each part of the rule to ascertain what steps should have been taken to enter an appeal; and what steps were in fact taken; and then to consider the legal effect of any omissions or mistakes.

Rule 4(1) reads:—

"An appellant shall enter his appeal—

(*a*) either by delivering the Notice of Appeal by hand at the Registry of the Appeal Court; or

(*b*) by sending the Notice of Appeal to the Registrar of the Appeal Court by registered post,

together with the fee prescribed in the Second Schedule for entering a Notice of Appeal, and by causing a copy thereof to be filed in the court below and such copy shall be accompanied by a deposit of one pound towards the cost of the required number of copies of the record, and by one copy of the Notice of Appeal for service upon each respondent".

This paragraph of rule 4 provides that an appellant shall take the following steps when entering an appeal:

1. deliver a notice of appeal by hand or by registered post to the Registry of the Appeal Court;
2. pay the prescribed fees for entering a notice of appeal;
3. cause a copy of the notice of appeal to be filed in the court below;
4. deposit one pound in the court below towards the cost of the copy of the record of proceedings; and
5. file in the court below, in addition to the copy required in 3 above, one copy of the notice of appeal for each respondent.

All these steps have to be taken within thirty days of the date of the decision appealed from. We have already stated that in the present instance there was sufficient compliance with items 1 and 2 set out above. Mr Thanni, who appeared before us for all the parties appealing, told us from the Bar that the original notice of appeal and two copies thereof were filed in the Appeal Court Registry and submitted that these copies were intended for the court below. If that was so, and we have no evidence thereof, it did not constitute compliance with that part of rule 4(1) which places upon an appellant the duty to cause the copies of the notice of appeal to be filed in the court below. The Registrar of the Appeal Court has no duty under the rules to send copies of the notice of appeal to the court below. We have no evidence that a deposit of £1 was made; and it would appear from the rule that each party appealing is required to deposit £1. It would have been a simple matter to prove this by producing to us the receipt for the deposit paid to the court below. This was not done. Mr Thanni, had he wished, could also have proved the filing of the copies of the notice of appeal in the court below which is situated in Jos by asking leave to call the registrar of that court to give evidence thereof. Mr Thanni did not take this course. He has submitted that the fact that this Court has received the record of proceedings of the court below is evidence that the copies of the notice of appeal were filed there and the deposit paid. The record of proceedings on my file appears to have been filed in support of an application for bail and is not proof of compliance with items 3, 4 and 5 set out above. As we have indicated it was a simple matter to produce direct proof of compliance and as this has not been done we are forced to the conclusion that neither the parties appealing nor their counsel filed the copies of the notice of appeal and paid the deposit in the court below.

Rule 4(1) is mandatory. It places upon a party appealing a statutory obligation to enter an appeal in the manner specified therein. The court below requires copies of the notice of appeal in order to prepare copies of the record of proceedings; to assess the fees thereon; and to effect service as required by rule 4(2). The deposit of £1 is part of the fee which the court below is entitled to charge under the Second Schedule for preparing the copies of the record of proceedings. Rule 4(1) obliges the appellant to comply with each of the steps we have set out in the items above and an omission to comply with any one of these steps results in a failure to enter an appeal. We are equally bound by the rules and are not given a discretion to rectify an omission or mistake made by a party





appealing when entering an appeal under this paragraph of the rule. We have a power under rule 12 to extend the time for paying fees; and we can under rule 11 entertain an application for leave to appeal out of time.

Mr. Nasir further submitted that no appeal had been entered because the Director of Public Prosecutions had neither been served with a copy of the notice of appeal under rule 4(2) nor with a copy of the record of proceedings under rule 4(4). In support of this submission he cited *Kabina Nemmi v. Ediay* 6 W.A.C.A. 56. In that case the law placed upon the party appealing the obligation of giving notice of appeal within six months. It was held that "giving notice" meant giving notice to the respondent within the statutory period and as that had not been done, no appeal lay. That case is to be distinguished from the present in that the service of a copy of the notice of appeal upon the Director of Public Prosecutions is the responsibility, under rule 4(2), of the court below. Once a party appealing has filed the necessary papers in the Appeal Court and the court below and paid the fees and deposit within time, he has in our view fulfilled his statutory obligations under rule 4(1) and entered his appeal. The service of a copy of the notice of appeal upon the Director of Public Prosecutions, being the responsibility of the court below under rule 4(2), and the service of the copy of the record of proceedings, being the responsibility of the Appeal Court under rule 4(4), are out of the control of the party appealing. When failure to serve or delay in service is brought to the notice of the Appeal Court or a judge thereof, we can take steps to have service effected and would postpone the hearing of an appeal until this had been done.

We hold that there is no appeal before us because the parties appealing have not complied with two of the mandatory provisions of Order II, rule 4(1) in entering their appeal. We attempt to do substantial justice and avoid technicalities where we can. But when parties appealing fail to enter an appeal in the proper manner according to law, there is no appeal for us to hear. All we can do, is to entertain an application for leave to appeal out of time which, if granted, will give them an opportunity of starting afresh.

*Appeal struck out.*

# HONOURABLE BASHARU *v.* BORNU NATIVE AUTHORITY

[F.S.C. (Ademola, C.J.F., Unsworth and Taylor F.JJ.)—November, 1961]

[Kaduna—Appeal No. F.S.C.297/1961]

*Appeal—conviction altered on appeal appeal from native court—substituted conviction for offence not charged—whether defence would have been substantially affected had substituted offence been charged—prosecution evidence the same in either event—no defence evidence—Criminal Code ss.* 7(*d*), 71, 513(1); *Native Courts Law*, 1956, *s.* 70(1)(*b*)(*iii*).

The appellant was charged before a native court with provoking members of a political party to take part in a riot, contrary to sections 7 (*d*) and 71 of the Criminal Code. There was evidence that the appellant addressed a meeting of his party supporters and told them to be ready next day with their weapons to attack members of another party. There was no evidence that any riot took place. The appellant did not give evidence. He was convicted.

On appeal, the High Court in exercise of its powers under section 70 (1) (*b*) (*iii*) of the Native Courts Law, 1956, altered the conviction to one of attempting to procure the commission of a riot, contrary to section 513 (1) of the Criminal Code.

On appeal to the Federal Supreme Court, it was argued that the High Court should not have altered the conviction because the appellant's defence before the trial court would have been substantially affected if he had been accused in that court of an offence against section 513 (1).

*Held:* Since the evidence would have been exactly the same if the appellant had been charged in the first instance with an offence contrary to section 513, and there was no reason to believe that the appellant's attitude before the trial court would have been any different if he had been charged under that section instead of under section 71, there was no substance in the argument that the defence had been prejudiced by the alteration in the charge.

CRIMINAL APPEAL

To the facts as set out in the judgment it may be added that the appellant's reason for not giving evidence in the trial court was that, as he said (incorrectly), the case was already before another court.

*Thanni* for the appellant;

*I. M. Lewis, Q.C., Solicitor-General*, for the respondent.

**Unsworth, F.J.,** delivering the judgment of the Court: The appellant in this case was charged before the Alkali at Bornu with provoking members of a political party to take part in a riot contrary to sections 7(*d*) and 71 of the Criminal Code.





The evidence as given by the first witness before the Alkali was that on the night of the 10th August, 1960, the appellant at a meeting attended by about eighty people said:—

> "My party supporters, tomorrow the 11th of August, 1960 there will be a trial of our party supporters, i.e. B.Y.M. before the Alkali of [illegible], Maiduguri when Alkali pass his judgment wrongly against our supporters this time you must be prepared with your weapons and everyone of the N.P.C. members stab them with your knives as well as you would including the Alkali himself any death happen I will be responsible".

The evidence of this witness was supported by two further witnesses, who told substantially the same story, though the actual words alleged to have been used were not identical.

The appellant did not give evidence, for reasons which appeared in the record and are explained in the judgment in the Appellate Division of the High Court. The appellant appealed to the Appellate Division of the High Court of Northern Nigeria, where it was argued that the offence had not been established as it was not found in evidence that the riot actually took place. The Appellate Division accepted this submission and altered the conviction to one of attempting to procure the commission of a riot contrary to section 513(1) of the Criminal Code. The sentence was reduced from three years to eighteen months. In taking this course the Appellate Division said that they were satisfied that the defence of the appellant before the court of first instance would not have been substantially affected if he had been charged before the Chief Alkali with an offence contrary to section 513(1). The Appellate Division exercised these powers in accordance with the provision of section 70(1)(*b*)(*iii*) of the Native Courts Law, which provides that any court exercising appellate jurisdiction in criminal matters under the provisions of the Native Courts Law, may, in the exercise of that jurisdiction:—

> "(*iii*) after hearing the whole case or not and whether in whole or in part substitute any other decision (whether as to guilt or punishment) which the court of first instance could have made but so that, by the decision so substituted, the appellant shall not be found guilty of any offence of which he was not accused before the court of first instance, unless the appellate court is satisfied that the defence of the appellant before the court of first instance would not have been substantially affected if he had been so accused".

Hon. Basharu v. Borno N.A. Unsworth, F.J.

The appellant appealed to this Court and his Counsel put forward very much the same arguments as were made before the Appellate Division of the High Court. He said that the evidence did not prove that a riot took place and submitted that mere intention could not constitute an offence under section 513(1). He also submitted that the evidence of the witnesses, as to what the appellant said, varied with the different witnesses, and argued that the actual words alleged must be proved in order to establish a case under section 513(1). He added, in reply to a submission by the Solicitor-General, that the offence ought not to have been altered in the Appellate Division of the High Court as the defence was substantially affected within the meaning of the Native Courts Law.

The Solicitor-General drew attention to the difference between an attempt to commit a crime under sections 509 and 510 of the Criminal Code and an attempt to procure the commission of an offence within the meaning of section 513 of that Code. He submitted that the latter section is similar to the offence of incitement to commit a crime and referred to *R. v. Cope* 16 Cr. App. R.77 and other cases referred to in *Archbold* 33rd edition at page 1488.

We accept the submission of the Solicitor-General and are satisfied that the evidence given by the witnesses before the Alkali was sufficient to establish the offence of attempting to procure the commission of a riot. We do not think that there is substance in the point that the defence was prejudiced by the alteration in the charge. The evidence would have been exactly the same if the appellant had been charged in the first instance with an offence contrary to section 513 and there is no reason to believe that the appellant's attitude before the Alkali's Court would have been any different if he had been charged under that section instead of section 71.

We have carefully considered the evidence of the witnesses who gave evidence before the Alkali. The substance of the evidence is the same and the differences in detail are such as one would expect to find in the evidence of truthful witnesses who are giving an account to the best of their recollection, of what took place at a meeting.

For the reason given in this judgment the appeal is dismissed.

*Appeal dismissed.*



## SARKIN KINKIBA TSOHO LADAN v. ZARIA NATIVE AUTHORITY

[C.A. (Hurley, C.J., and Skinner, J.)—January 16, 1962]

[Kaduna—Criminal Appeal No. Z/52CA/1961]

*Criminal law—public servant—obstructing public servant in the discharge of his public functions—assaulting a public servant in the execution of his duty—public servant a trespasser—Penal Code, ss.* 148 *and* 267.

*Criminal Procedure—police right of entry—police right of arrest—person reasonably suspected of having been concerned in an offence—grounds of suspicion to be in evidence—Criminal Procedure Code, s.* 26(*c*), *s.* 34.

A police constable entered the appellant's house without the appellant's permission in order to look for and arrest the appellant's son who was suspected of having been concerned in a riot. The appellant obstructed and assaulted the constable. He was convicted of an offence against section 112 of the Penal Code, which was wrong because the riot was over when the constable entered the house. The Court considered whether it could substitute a conviction of an offence under section 148 or section 267 of the Penal Code. There was no evidence to show the grounds on which the police suspected the appellant's son.

*Held:* The constable, having entered the appellant's house without permission, was a trespasser unless he had legal authority to enter by virtue of section 34 of the Criminal Procedure Code as being authorised to arrest the appellant's son by virtue of section 26 of the Criminal Procedure Code. He would have been authorised under section 26(*c*) to arrest the appellant's son if reasonable suspicion had existed that the latter had been concerned in the riot. Since the evidence did not show on what grounds the appellant's son was suspected of having been concerned in the riot, it was impossible to say whether the suspicion was reasonable or not and there was no evidence of any reasonable suspicion against him. *Prima facie*, therefore, the constable's entry into the appellant's house was a trespass and illegal. A public servant who acts illegally in the discharge of his duty is not discharging his duty. It had not been shown in evidence that the constable was acting in discharge of his public functions or his duties and no offence could be said to have been committed under section 148 or section 267 of the Penal Code.

(*Editorial note.—cf. Great Central Railway Co. v. Bates* [1921] 3 K.B. 578; *Davis v. Lisle* [1936] 2 All E.R. 213.)

CRIMINAL APPEAL

Appellant in person;

*Henderson, Crown Counsel*, for the respondent.

**Hurley, C.J.,** delivering the judgment of the Court: The case against the appellant was that he obstructed and assaulted a police constable who was looking for the appellant's son to arrest him on suspicion of being concerned in a riot. The conviction recorded in the case was a conviction under section 112 of the Penal Code, which makes it an offence to assault or obstruct a public servant who in the discharge of his duty is endeavouring to disperse an unlawful assembly or to suppress a riot. That section was not appropriate in this case because the police constable was not trying to disperse an unlawful assembly or to suppress a riot. The riot was over and the constable was looking for one of the supposed participants in order to arrest him. If the facts proved had warranted it, a conviction either under section 148 or under section 267 might have been proper. Section 148 makes it an offence to obstruct a public servant in the discharge of his public functions and section 267 makes it an offence to assault a public servant in the execution of his duty as such. We have power to substitute a correct conviction and we would do so if we thought the facts could support the substituted conviction. But we cannot do so here because we do not think the facts would support a conviction either under section 148 or under section 267.

In order to arrest the appellant's son the constable entered the appellant's house without the appellant's permission and he was therefore a trespasser unless he had legal authority to do so. By section 34 of the Criminal Procedure Code anybody who is authorised to arrest any person and who has reason to believe that the person has entered into or is within any place, may enter the place and search for the person to be arrested. The question then is—had this constable authority to arrest the appellant's son? A police officer's authority to arrest is set out in section 26 of the Criminal Procedure Code. We refer to paragraphs (*a*), (*b*) and (*c*) in that section. The constable had no warrant for the arrest (paragraph (*b*)) and there was no evidence that the appellant's son had committed an offence in the constable's presence (paragraph (*a*)). There was evidence indicating that the appellant's son was suspected of having been concerned in the riot, which would have been an offence for which he might have been arrested without a warrant. Therefore if the constable had any authority to arrest the appellant's son that authority must be found in paragraph (*c*) of





section 26, which gave him authority to arrest any person who had been concerned in the riot, or any person against whom a reasonable complaint had been made, or information had been received, or reasonable suspicion existed, of his having been so concerned.

Now in this case there was no evidence against the appellant's son of any of these things. There was no evidence in this case that the appellant's son had been concerned in the riot or that a complaint had been made against him or information concerning him obtained showing that he had been concerned in the riot. There was evidence to show that there was suspicion of his having been concerned in the riot, but that was not enough. What paragraph (*c*) requires in order that an arrest may be made without a warrant on suspicion is that there should be a reasonable suspicion. The evidence showed that the police suspected the appellant's son but it did not show the grounds on which they suspected him. Since the grounds of suspicion were not given in evidence we cannot say whether the suspicion was reasonable or not and consequently there was no evidence of any reasonable suspicion against the appellant's son. In the result there was no evidence to show that the constable had any authority to arrest the appellant's son and it follows that he had no right to enter the appellant's house without his consent as he did. It is well settled that a public servant who acts illegally in the discharge of his duty is not discharging his duty, and since this was *prima facie* a trespass and illegal, and it has not been shown that any circumstances existed to make it legal, it appears to us that it has not been shown in evidence that the constable was acting in discharge of his public functions or his duties, or that any offence can be said to have been committed under section 148 or section 267.

For these reasons we set aside the conviction under section 112 and do not substitute any other conviction. The appellant is discharged.

*Appeal allowed.*

## AJELOFU EDACHE *v.* THE QUEEN

[Federal Supreme Court (Ademola, F.C.J., Unsworth, F.J. and Taylor, F.J.)—January 5, 1962]

[Lagos—Criminal Appeal No. F.S.C. 334/1961]

*Criminal Law—culpable homicide—whether punishable with death—provocation by words alone—Penal Code, s.* 221 (*and s.* 222(1)); *Federal Supreme Court Ordinance*, 1960, *s.* 26(1).

Provocation by words alone can be sufficient to reduce culpable homicide punishable with death to culpable homicide not punishable with death.

Case referred to:

*The Queen v. Akpakpan*, 1 F.S.C.1, applied.

CRIMINAL APPEAL

*O. O. Sawyer*, for the Appellant;

*I. M. Lewis, Q.C., Solicitor-General* (with him *M. Belgore, Crown Counsel*) for the respondent.

**Unsworth, F.J.,** delivering the judgment of the Court: This is an appeal from a decision of McCarthy, Acting Judge in Northern Nigeria. The charge against the appellant was that on the 13th April, 1961, he did commit culpable homicide punishable with death in respect of Ada Okewa and thereby committed an offence under section 221 of the Penal Code of Northern Nigeria.

The deceased woman was the wife of the appellant. It appears that there had been a marital dispute between them, in consequence of which the deceased woman had left the accused and gone to live in her mother's compound. On the day of the incident the accused had been unsuccessful in proceedings in the Native Court and after the proceedings the deceased woman went back to her mother's compound. The appellant came to the compound and shortly afterwards the deceased woman was heard to cry out "Ajelofu is killing me" or something to that effect. The accused was seen to come from the room and run away by two witnesses who gave evidence in the High Court. Both these witnesses stated that the accused said he had killed his wife, and the accused made a similar statement to the police constable who had arrested him. The appellant in his evidence in the Court below said:—

"That day I told deceased's father that if he did not give me back my wife he should give me my money back. He said when





father abused me and I was annoyed. Deceased told me to go away. She said I was a slave. I said 'I married you and I have come to demand you from your father and you abuse me as a slave'. Then I stabbed her. I wanted to kill her because she abused me and her father would not give her back to me."

The learned trial Judge found the appellant guilty of culpable homicide punishable with death and in dealing with the alleged abusive words said:—"The accused alleged in his evidence that the deceased provoked him by insulting him. Provocation by words alone has never been held to be sufficient to reduce the gravity of an offence even in the case of an individual of the most primitive cultural background who might have less control over his emotions than another. In this case I find that the provocation which accused alleges was offered to him by the deceased is not such as would reduce culpable homicide punishable with death to culpable homicide not punishable with death."

The trial Judge here misdirected himself, as provocation by words can be sufficient to reduce the offence to one which is not punishable with death. This was the position under the Criminal Code formerly applicable in Northern Nigeria in accordance with the decision in *The Queen v. Akpakpan*, 1 F.S.C.1. Insulting words may also amount to provocation under section 222 of the new Penal Code of Northern Nigeria, provided that the provocation otherwise comes within the provisions of that section.

There can be no doubt that the trial Judge erred in law and the only issue that arises is whether we should nevertheless apply the proviso to section 25(1) of the Federal Supreme Court Ordinance and dismiss the appeal on the ground that there has been no substantial miscarriage of justice.

The Solicitor-General, in a very helpful submission, reviewed the facts with a view to drawing our attention to circumstances which might lead us to the conclusion that the case was one in which the proviso might properly be applied. He drew attention to the fact that the alleged provocative words were first mentioned by the appellant in his evidence in the Court below, and that none of the prosecution witnesses had been examined to suggest that these words had been used. He also submitted that the words used could not amount to grave provocation. There was no evidence to show that the appellant came from a primitive community in which the words might be regarded as grave.

We feel that the case is not one in which we should apply the proviso so as to uphold the conviction. At the same time,

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Unsworth, F.J.

there is substance in the submission of the Solicitor-General that the alleged provoking words were first mentioned by the appellant in his evidence in the Court below, and that none of the prosecution witnesses have been examined to suggest that these words had been used. It appears probable that both the prosecution and the defence would have called further evidence if the issue of provocation had been properly raised in the High Court. In the circumstances of this case we think the proper order is an order for retrial. We would accordingly allow the appeal, quash the conviction and order the appellant to be retried by another Judge of the High Court of the Northern Region.

*Appeal allowed; re-trial ordered*



## SAMUEL BOBAYE *v.* KANO NATIVE AUTHORITY

[C.A. (Hurley, C.J., and Reed, J.)—December 16, 1961]

[Kano—Criminal Appeal No. K/60CA/1961]

*Criminal Procedure—trial in native court—failure to inform defendant of his right to state his defence—defendant not admitting the evidence given against him—Criminal Procedure Code, ss.* 386(2), 389.

*Appeal—error, omission or irregularity in trial proceedings—failure of justice—omission to inform defendant of his right to state his defence—defendant not admitting the evidence given against him—Criminal Procedure Code, s.* 382.

*———retrial order—principles on which an appeal court should act in deciding whether or not to order a retrial.*

The appellant in the High Court was convicted by a native court of criminal breach of trust under section 311 of the Penal Code. The trial court omitted to call upon him to state his defence, thus failing to comply with section 389 of the Criminal Procedure Code. The appellant did not in fact admit the evidence which was given against him and he called witnesses in his defence.

*Held:* The failure to inform the appellant of his right to state his defence, whether by giving evidence or otherwise, had occasioned a failure of justice in the sense that the appellant was prejudiced in his defence.

Cases referred to:

*Uhi Vola v. Kano Native Authority* 1961 N.R.N.L.R. 165 followed;

*Tambaya Filani v. Borno Native Authority* 1961 N.R.N.L.R. 100 distinguished;

*Yesufu Abodunda v. The Queen* 4 F.S.C. 70 applied.

CRIMINAL APPEAL

*Agbamuche* for appellant;

*Corcoran, Crown Counsel*, for respondent.

**Reed, J.**, delivering the judgment of the Court: This is an appeal against the decision of the Provincial Court, Kano, convicting the appellant of an offence under section 311 of the Penal Code. One of the grounds of appeal—the third additional ground—reads:

"The trial of the appellant was irregular for failure on the part of the court below to observe the provisions of section 389 of the Criminal Procedure Code N.R. No. 11 of 1960."

Section 389 of the Criminal Procedure Code reads:

"Upon charging an accused person a native court shall call upon him to state his defence and to inform the court of the names and whereabouts of any witnesses whom he intends to call in his defence and the court shall procure the attendance of such witnesses and hear their evidence in like manner in all respects as a magistrate acting under section 163."

Section 386(2) states that all native courts "shall be bound by the provisions" of, *inter alia*, section 389.

At page 2 of the certified true English translation of the record of proceedings in the court below the following question is shown as having been put to the appellant:

"Have you got anything to say or witnesses who can prove that you have not committed the offence. . . . ."

The appellant is recorded as answering:

"I have got witnesses namely. . . . . ."

and thereafter follow the names and addresses of witnesses. These witnesses were duly called and gave evidence but the appellant himself did not give evidence or state his defence.

Upon the application of the appellant the original Hausa record of proceedings in the court below was produced and the sworn court interpreter has interpreted the question set out above as follows:

"Samuel, have you any witnesses to say that you did not commit this offence, that is to say, that you received £350 which you are denying?".

It appears, therefore, that the appellant was not asked if he wished to give evidence on his own behalf, or otherwise state his defence, and did not, in fact, do so.

This court considered the effect of non-compliance with section 389 by a native court in *Ubi Yola v. Kano Native Authority* 1961 N.R.N.L.R. 103. In this case the trial court omitted to ask the appellant for his witnesses. The appeal court stated:

"We note that the language of the section (section 382) requires that there shall be no interference with findings of the trial court unless a failure of justice has actually been occasioned. A mere possibility that a failure of justice might have been occasioned is not enough to justify interference."





The appeal court went on to say that no failure could have been occasioned unless the appellant had in fact wished to call witnesses. The appellant having stated that he had two eye-witnesses, the appeal court "upon the assumption that the appellant has two witnesses" said:

"We are compelled to the conclusion that a failure of justice has been occasioned by the omission of the trial court to comply with section 389"

and allowed the appeal.

It is clear from the record in the case before us that the appellant did not admit the evidence which was given against him and we feel obliged to hold that the failure to inform him of his right to state his defence, whether by giving evidence or otherwise, occasioned a failure of justice. We must, therefore, allow this appeal, the reason being that a failure of justice was occasioned in the sense that the appellant was prejudiced in his defence. He was not given the full scope in defending himself which the law entitled him to. Neither were the appellants in *Ubi Yola's* case (supra) and ***Tambaya Filani v. Bornu Native Authority*** 1961 N.R.N.L.R. 100. In the last mentioned case, however, it made no difference, because there was nothing that could have been added to the defence. Here, as in *Ubi Yola*, there was something that could have been added had the defence been given its full scope—the appellant's own version of his defence as a connected narrative, whether evidence or statement of defence, such as his co-accused delivered. We cannot say that that would have had no weight and without that the defence was embarrassed or prejudiced and there was a failure of justice. If one of his witnesses had not been heard, we would have had to ask, what that witness would have said before we could have been satisfied that there was prejudice or embarrassment. But there is no need to ask what the appellant himself would have said; we know he had something material to say.

We must decide whether to order a retrial. The Federal Supreme Court has set out the principles on which an appeal court should act in deciding whether or not to order a retrial. In *Yesufu Abodundu and ors. v. The Queen* 4 F.S.C 70 at page 73 it is stated:

"We are of the opinion that, before deciding to order a retrial, this Court must be satisfied (*a*) that there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand this Court is unable to say that there has been no mis-

carriage of justice, and to invoke the proviso to section 11(1) of the Ordinance; (*b*) that, leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the appellant; (*c*) that there are no such special circumstances as would render it oppressive to put the appellant on trial a second time; (*d*) that the offence or offences of which the appellant was convicted or the consequences to the appellant or any other person of the conviction or acquittal of the appellant, are not merely trivial; and (*e*) that to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it."

We now apply these principles to the case before us. There has been an error in law of such a character that the trial was not rendered a nullity but we were unable to say that there had not been a failure of justice. The evidence as a whole discloses a substantial case against the appellant. There are no special circumstances such as would render it oppressive to put the appellant on trial a second time. The offence of which the appellant was convicted is not trivial; the consequences to the appellant or to any other person of the conviction or acquittal of the appellant are not trivial. In our view to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it.

Accordingly we make the following order: Appeal allowed and the conviction and sentence set aside. The appellant shall be retried by the Chief Magistrate, Kano.

*Appeal allowed; retrial ordered*



## E. I. ADEOYE *v.* T. A. ADEOYE

[High Court (Skinner, J.)—December 29, 1961]
[Kaduna—Civil Suit No. Z/24/1960]

*Divorce—dissolution of marriage - jurisdiction—"three-year rule"—husband domiciled in Nigeria but not in Northern Nigeria—Matrimonial Causes Act*, 1950, *s.* 18(1)(*b*); *Northern Region High Court Law*, 1955, *s.* 32; *Matrimonial Causes Rules*, 1957, *r.* 4(1)(*f*).

The wife was the petitioner in a suit for dissolution of marriage. The petition averred that the petitioner and the respondent were domiciled in Northern Nigeria. Upon the petitioner's failure to prove that, it was argued on her behalf that her residence in Northern Nigeria for a period of three years immediately preceding the commencement of the suit was sufficient to confer jurisdiction by virtue of section 18(1) (*b*) of the Matrimonial Causes Act, 1950, and section 32 of the Northern Region High Court Law, 1955. The petition did not allege that the Court had jurisdiction by virtue of section 18(1) (*b*), nor had the petitioner pleaded any of the facts required to be pleaded by rule 4(1) (*f*) of the Matrimonial Causes Rules, 1957, in support of such an allegation, including the fact that the respondent was not domiciled in Northern Nigeria.

*Held:* The petitioner could not be heard to argue the converse of her averment that the respondent was domiciled in Northern Nigeria.

*Per Curiam:* The provisions of section 18(1) (*b*) of the Matrimonial Causes Act, 1950, cannot be effectively applied in Northern Nigeria. The second condition of section 18(1) (*b*) requires that the husband, not being domiciled in England, should not be domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man. These territories have no equivalent in the Federation of Nigeria, and consequently the jurisdiction of the High Court cannot be exercised in conformity with section 18(1) (*b*) for the purposes of section 32 of the Northern Region High Court Law, 1955, and the Court has no jurisdiction under the "three-year rule" to hear a wife's petition for divorce where the husband is domiciled in Nigeria but not within Northern Nigeria. It may be otherwise where a husband is domiciled outside Nigeria or where a wife petitioner seeks a divorce on the ground of nullity and the marriage has been celebrated within the jurisdiction.

SUIT FOR DISSOLUTION OF MARRIAGE

*Gaji* for petitioner;

*Atta* for respondent.

**Skinner, J.:** The petitioner seeks the dissolution of her marriage with the respondent on the grounds of cruelty and adultery. No appearance was entered by the intervener named in the petition.

Having heard the evidence of the parties I was not satisfied that they are domiciled in Northern Nigeria as

averred and I therefore invited Counsel for the petitioner to address me on this point. He conceded that this averment had not been proved but submitted that the petitioner's residence in Kaduna for a period of three years immediately preceding the commencement of this action is sufficient to confer jurisdiction for the purpose of these proceedings. This contention rests upon section 18(1)(*b*) of the Matrimonial Causes Act, 1950, which reads as follows:—

"18.—(1) Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say:—

... ... ... ... ...

(*b*) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man."

This section enacts a statutory exception to the ordinary rule that the court of the parties' domicile has exclusive jurisdiction to dissolve their marriage. It applies to a wife's petition where the husband is *not* domiciled within the jurisdiction of the Court in which the proceedings are instituted; and it must be specifically pleaded, as prescribed by rule 4(1)(*f*) of the Matrimonial Causes Rules, 1957. But in the present case the petitioner has sought to establish jurisdiction by averring domicile in Northern Nigeria. That averment has not been made out and she cannot at this late stage be heard to argue the converse, namely that the respondent is *not* domiciled in Northern Nigeria. I consider however that I ought to take this opportunity of expressing my views on the applicability of section 18(1)(*b*) of the Matrimonial Causes Act, 1950, to proceedings for divorce instituted in this Court.

The Matrimonial Causes Act, 1950, is a statute currently in force in England and may therefore be invoked by virtue of section 32 of the Northern Region High Court Law, 1955. But can the provisions of section 18(1)(*b*) be effectively applied in Nigeria? It is to be noticed that there are two





distinct conditions governing the exercise of jurisdiction under the "three-year rule", namely—

(*a*) that the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings and

(*b*) that the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

I am satisfied on the evidence that, reading "Northern Nigeria" for "England", the first condition is met in this case.

The respondent is a technician employed by the Electricity Corporation of Nigeria at Kaduna and has lived there since 1952. His parents come from Ilesha in Western Nigeria and it appears that he spends his holidays there. He stated in his evidence that he had been married to the intervener at Ilesha in accordance with the native law and custom obtaining there. Thus it seems clear that the respondent's domicile of origin was in Western Nigeria. He is an official presently employed here but no evidence has been led to show that there has been a change of domicile. I therefore regard him as still domiciled in Western Nigeria and it necessarily follows that the petitioner is also domiciled there.

The second condition of section 18(1)(*b*) requires that the husband not being domiciled in England, should not be domiciled, at the commencement of the proceedings, in any other part of the United Kingdom or in the Channel Islands or in the Isle of Man. It is a condition which refers specifically to certain defined territories. These have no equivalent in the Federation of Nigeria, and, for this reason, I am of the opinion that the subsection cannot effectively be applied there. Section 32 of the Northern Region High Court Law, 1955, empowers this Court to exercise jurisdiction in probate, divorce and matrimonial causes in conformity with the law and practice for the time being in force in England. It is not possible to conform to this condition by virtue of its specialised nature, and I am not prepared to say, as contended by Counsel for the petitioner, that Western Nigeria should be regarded as a foreign territory for the purpose of section 18(1)(*b*). The condition of non-domicile in the territories mentioned is reciprocal so far as Scotland is concerned (*vide* section 2 of the Law Reform (Miscellaneous Provisions) Act, 1949) and

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it seems to me that nothing short of Federal legislation can give this Court jurisdiction under the "three-year rule" to hear a wife's petition for divorce where the husband is domiciled in Nigeria but not within the Northern Region. It may be otherwise where a husband is domiciled outside Nigeria or where a wife petitioner seeks a decree on the ground of nullity and the marriage has been celebrated within the jurisdiction.

For the reasons earlier given, I find that domicile within Northern Nigeria not having been established, I have no jurisdiction to hear this petition. It is accordingly struck out. The question of jurisdiction not having been raised by the respondent, there will be no order as to costs.

*Petition struck out.*



## HUSSEIN ALI SHOUR *v* K. ISSARDAS AND COMPANY (NIGERIA) LIMITED

[High Court (Bate, J.) —February 3, 1961]
[Kano—Civil Suit No. K/142/1960]

*Recovery of premises—Kano—plaintiff's non-compliance with provisions of Recovery of Premises Ordinance—no evidence whether premises within area to which Ordinance applies—non-suit—Recovery of Premises Ordinance, Laws of Nigeria* 1948, *Cap.* 193, *sections* 1, 7, 10; *Northern Provinces* (*Increase of Rent*) (*Restriction*) *Order*, ibid, *vol.* 8, *page* 232; *Recovery of Premises* (*Withdrawal of Application to Certain Areas*) *Order in Council*, ibid, *vol.* 9, *page* 529; *Recovery of Premises* (*Withdrawal of Application to Certain Areas*) (*Amendment*) *Order in Council*, 1951; *Supreme Court* (*Civil Procedure*) *Rules*, 0.45.

*Landlord and tenant—recovery of possession—applicability of Recovery of Premises Ordinance—premises in Kano—proof that premises within area to which Ordinance applies.*

*Practice and procedure—non-suit—absence of evidence whether premises sought to be recovered are within area to which Recovery of Premises Ordinance applies.*

The plaintiff claimed for possession of premises in Hull Road, Kano, which he had let to the defendants for the term of one year. He did not comply with the procedure for the recovery of premises prescribed by the Recovery of Premises Ordinance and the defendants opposed the claim on that ground. Neither the plaintiff nor the defendants adduced evidence to show whether the premises were or were not within any of the areas in Kano to which the Ordinance applied.

*Held:* There was no satisfactory evidence entitling either party to judgment, and the plaintiff should be non-suited.

*Obiter:* It might be, though it had not been argued, that the burden was on the plaintiff to establish that the application of the Ordinance had been withdrawn from the area in which the premises were situated.

Case referred to:

*Patrick Ede v. Ayo Sabongari*, 1960 N.R.N.L.R. 33, referred to.

CIVIL ACTION

*C. A. J. Nwajei* (with him *R. S. Horn*) for the plaintiff; *E. L. Thomas* for the defendants.

**Bate, J.:** The plaintiff's claim is for possession of premises at 34 E Hull Road, Kano, and for mesne profits. His case is that he let the premises to the defendants for one year from 1st September, 1958, but that the defendants refused to vacate the premises when the lease expired and are still in occupation.

The defendants by their defence allege that the lease was not for one year but for an indefinite period. This is not however supported by the evidence of the only witness whom they called. I accept the evidence adduced by the plaintiff on this point and find as a fact that the plaintiff let the premises to the defendant for one year from the 1st September, 1958.

The first ground on which the defendants resist the plaintiff's claim is that the plaintiff has not followed the correct procedure for the recovery of premises. Counsel for the defendants submits that the Recovery of Premises Ordinance applies, that the plaintiff has not complied with the requirements of this Ordinance and that therefore his claim must fail. Counsel for the plaintiff submits that the Ordinance does not apply. Neither has supported the proposition on which he relies by reference to any legislation with regard to the application of the Ordinance.

As was pointed out in *Patrick Ede v. Ayo Sabongari*, 1960 N.R.N.L.R. 83, the application of the Recovery of Premises Ordinance to Kano depends on the Northern Provinces (Increase of Rent) (Restriction) Order. The effect of this order coupled with the Recovery of Premises (Withdrawal of Application to Certain Areas) Order in Council as amended in 1951 is to apply the Ordinance to Kano Sabon Gari, Fagge, Kano City and Kano Tudun Wada.

In the present case the whereabouts of 34 E Hull Road is no doubt well known to the parties but there is no evidence before the Court whether the premises are or are not within any of the areas referred to in the Order nor has it been suggested that there is any material from which the necessary inference could be drawn. For the plaintiff it is contended that, since the defendants say that the Ordinance applies, the burden is on them to prove it. I cannot accept this because by virtue of section 1 the Ordinance applies to the whole of Nigeria except in so far as its application may be withdrawn by Order in Council. It may be, though this has not been argued, that the burden is on the plaintiff to establish that the application of the Ordinance has been withdrawn from the area in which the premises are situated. However that may be, the fact remains that there is no evidence whether or not the premises are in an area to which the Ordinance applies and I cannot say whether the proper procedure for the recovery of the premises is that laid down in the Ordinance or some other procedure. It cannot be said that, whether the Ordinance applies or not, the correct procedure has been followed. The





plaintiff has not attempted to assert that, if the Ordinance applies, he has followed the procedure laid down by the Ordinance, though I must observe in this connection that his final form of notice is substantially the same as that required by section 7 of the Ordinance. However there has been no writ or summons as required by section 10 and I cannot say that the requirements of the Ordinance have been met.

Neither the plaintiff nor the defendants have adduced evidence to show whether or not the premises are or are not within the application of the Recovery of Premises Ordinance. There is consequently no satisfactory evidence entitling either party to judgment. I therefore order in exercise of my powers under Order XLV of the Supreme Court (Civil Procedure) Rules that the plaintiff shall be nonsuited.

The defendants have counterclaimed for damages for trespass to land which they allege forms part of the premises let to them. The evidence does not support this allegation and I am not satisfied that the plaintiff ever let the land in question to the defendants. There will therefore be judgment for the plaintiff on the counterclaim.

I do not think that either party is entitled to recover costs from the other. There will therefore be no order as to costs.

*Order of Non-suit.*

## TRACEY BLAGDEN LIMITED v. MOHAMMED HAWAY AND TWO OTHERS

[High Court (Bate, J) –June 24, 1961]
[Kano Civil Suit No. K/116/1961]

*Practice and procedure—interim attachment—defendant about to dispose of his property—whether intention to obstruct or delay decree—obstruction or delay a possible consequence—no direct evidence of intention—innocent explanation of proposed disposition—Supreme Court (Civil Procedure) Rules*, O. 20, *r.* 1(*a*); O. 19, *r.* 2.

The plaintiffs sued the defendants for the recovery of £26,454-12*s*-3*d*. The defendants had mortgaged three rights of occupancy to the Bank of West Africa to cover advances. The value of the rights of occupancy far exceeded the amount which the Bank of West Africa was prepared to advance to the defendants, and they proposed to redeem the Bank of West Africa's mortgage and mortgage the rights of occupancy to the Bank of the North for a considerably larger sum, which, they said, they would use to pay off their debt to the plaintiffs. The plaintiffs applied under Order 20, rule 1(*a*), of the Supreme Court (Civil Procedure) Rules for the interim attachment of the defendants' equity of redemption, on the grounds that if the Bank of West Africa were to foreclose a substantial sum would be left over whereas if the rights of occupancy were mortgaged to the Bank of the North and that Bank were to exercise its powers as mortgagee there would be nothing left, and that therefore the defendants by this disposition of their property intended to obstruct or delay the execution of any decree that might be passed against them.

*Held:* The fact that the effect of the defendants' proposed disposition of their property might be to obstruct or delay the execution of a decree against them did not prove that the defendants intended to achieve this effect.

There being no direct evidence of that intention, and the defendants having given an innocent explanation of their proposed action which had not been refuted and was not so improbable that it should be rejected out of hand, the Court found that no intention to obstruct or delay had been established.

APPLICATION IN CIVIL SUIT

*R. S. Horn* for plaintiffs-applicants;

*J. C. S. Hughes* (with him *Alhaji G. F. Razaq*) for defendants-respondents.

**Bate, J.:** The applicants are the plaintiffs in an action for £26,454 12*s* 3*d* owing upon an account stated or in the alternative under an agreement in writing. Their application is for the interim attachment of the defendants' property: it is brought under Order XX, rule (1) (*a*) of the Supreme Court (Civil Procedure) Rules. Their case is that the defendants are about to dispose of their property with intent to obstruct or delay any decree that may be passed against them. The





affidavit in support shows that the defendants have mortgaged three rights of occupancy to the Bank of West Africa to cover advances up to £26,000 but that they purpose to redeem this mortgage and mortgage the rights to the Bank of the North for a considerably larger sum. The defendants' affidavit admits this and shows that the value of the rights far exceeds £26,000 but that the defendants hope to obtain a loan from the Bank of the North equivalent to the full value of the rights. The applicants' case is that if the defendants mortgage the rights to the Bank of the North, the applicants will be prejudiced because, whereas if the Bank of West Africa were to foreclose, there would be a substantial sum left over after the Bank had realised their security, there would be nothing left if the Bank of the North sold the rights under their powers as mortgagees. For the applicants it is contended that the evidence establishes that the defendants are about to dispose of their property and that by doing so they intend to obstruct or delay the execution of any decree made against them.

The defendants deny that they have any such intention. Their affidavit shows that they merely wish to make as full use as possible of their rights of occupancy for the purpose of raising money. They say that the Bank of West Africa will only give them £16,450 on their mortgage, that this is far less than the value of the rights mortgaged and that they therefore intend to redeem the mortgage and raise a larger sum by another mortgage to the Bank of the North which they believe to be prepared to lend them much more on this security. They would, they say, use this money to pay off their debt to the applicants. For the defendants it is submitted that the evidence discloses no intention to obstruct or delay.

There is no direct evidence of any intention on the part of the defendants to dispose of their property with intent to obstruct or delay the execution of any decree which may be passed against them. The fact that the effect of the defendants' proposed disposition of their property may be to obstruct or delay does not prove that the defendants intend to achieve this result. The position is not the same as under Order XIX, rule 2, where the question to be considered is what is the effect of the defendant's action, irrespective of his intention. I am unable to accept the contention that the intent is implicit in the facts proved. The defendants have given an innocent explanation of their proposed action and this explanation has not been refuted nor is it so improbable that it should be rejected out of hand. I find that no intention to obstruct or delay has been established.

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The application is therefore dismissed. The plaintiffs shall pay the defendants' costs assessed at £5 5*s* 0*d*.

*Application dismissed.*



## ALHAJI BATURE GAFAI *v.* UNITED AFRICA COMPANY LIMITED

[High Court (Reed, J.)—December 5, 1961]
[Kano—Civil Suit No. K/7/1961]

*Evidence—estoppel—estoppel per rem judicatam—contract—breach—contract for sale of goods—price paid non-delivery of goods—payment recovered in action for money paid for a consideration that had wholly failed—subsequent action for damages for breach of contract.*

*Res judicata—contract for sale of goods—non-delivery—price recovered in action for money paid—subsequent action for damages for breach of contract.*

The plaintiff agreed to buy a lorry from the defendants for £170-0*s*-0*d* and paid the purchase price. The defendants did not deliver the lorry, and the plaintiff sued them in the District Court and obtained judgment for the sum of £170-0*s*-0*d* as money paid for a consideration which had wholly failed. The plaintiff then sued the defendants in the High Court claiming £500-0*s*-0*d* general damages for breach of the contract for the sale of the lorry. The defendants pleaded the District Court action and judgment. It was argued on behalf of the plaintiff that he had two causes of action, for the refund of the purchase price on a consideration which had wholly failed, and for damages which flowed from the defendants' failure to deliver the lorry.

*Held:* The plaintiff was estopped from bringing the action for damages for breach of contract.

Cases referred to:

*Serrao v. Noel*, (1885) 15 Q.B.D. 549, followed;
*Conquer v. Boot*, [1928] 2 K.B. 336, applied.

CIVIL SUIT

The facts were as stated in the headnote. At the trial, the plaintiff gave some evidence, and then by consent a preliminary objection was argued, based on the District Court judgment which the plaintiff did not deny. In the course of the argument Counsel for the plaintiff observed that it would not have been possible to estimate the damages at the time when the District Court action was commenced because the groundnut season, during which the plaintiff would be operating the lorry, had not then started.

*Nwajei* for plaintiff;
*E. Noel Grey* for defendants.

**Reed, J.:** The defendants have raised a preliminary objection that the plaintiff is estopped from bringing this action on the grounds that he has already obtained judgment in a claim brought on the same cause of action. In the action

before me the plaintiff claims damages for breach of contract by the defendants; the allegation is that the defendants agreed to sell, and the plaintiff agreed to buy, a lorry for the sum of £170 and that, in pursuance of the agreement, the plaintiff paid the defendants £170 and that the defendants failed to deliver the lorry. It is common ground that before the action was commenced the plaintiff had sued the defendants in the District Court, and had obtained judgment for this sum of £170 as "money paid by the plaintiff to the defendants for a consideration which has wholly failed".

Counsel for the plaintiff submits that there are two separate causes of action but I cannot agree. There is one cause of action only, the breach of contract, and that cause of action gives rise to two different forms of relief—(1) the return of the money paid because of the breach of contract and (2) damages for the breach of contract.

The doctrine of *res judicata* is based upon two theories—first, the general interest of the community in the termination of disputes and, secondly, the right of the individual to be protected from vexatious multiplication of suits. Accordingly, as Bowen L.J. said in *Serrao v. Noel* (1885) 15 Q.B.D. 549 at page 559—

"The principle is, that where there is but one cause of action, damages must be assessed once for all."

In that case the plaintiff alleged that the defendant was detaining shares which belonged to the plaintiff. He first brought an action in the Chancery Division claiming an injunction restraining the defendant from parting with the shares and in this action the defendant consented to an order for the delivery of the shares to the plaintiff. The plaintiff later sued in the Queen's Bench Division for damages for the detention. It was held that he could not recover as the damages could have been claimed in the former action; that injunction and damages were only different forms of relief applicable to the same cause of action.

In *Conquer v. Boot* [1928] 2 K.B. 336, Talbot J. said at page 346 –

"There are many authorities on this subject or connected with it, but they all come back to the same test, is the cause of action in the second action the same as that for which the plaintiff had judgment in the first? If it is, the second action cannot be maintained, and (speaking generally) it is immaterial whether the plaintiff knew or might have known, when he brought the first action, the facts on which he relies in the second."





In the case before me the plaintiff could have claimed, and obtained judgment for, damages in the District Court. It does not help the plaintiff to say now that his claim for damages was in excess of the District Judge's jurisdiction; he could have avoided bringing two actions by bringing one action in the High Court claiming both reliefs. Nor does it help him to say that when he commenced the suit in the District Court he could not estimate the damage he had suffered as the ground-nut season had not started.

For these reasons I find that the plaintiff is estopped from bringing this action and I strike it out.

*Struck out.*

# ALHAJI WADA *v.* CHIEF ALKALI OF BIRNIN KEBBI

[High Court (Reed, J.)—January 3, 1962]
[Kano—Civil Suit No. K/124/1961]

*Native Courts—judicial privilege—liability of Alkali—action against Alkali in respect of acts done in the exercise of his jurisdiction—acts done in good faith—acts done without just cause—Native Courts Law*, 1956, *s.* 8; *Magistrates' Courts Ordinance, Cap.* 122, *Laws of Nigeria*, 1948, *s* 61.

*Public Authorities—judicial privilege—native court—privilege of Alkali.*

The plaintiff sued the defendant, an Alkali, in respect of acts done in the exercise of his jurisdiction as Alkali conferred on him by the Native Courts Law, 1956. By section 8 of that Law—

"No person shall be liable to be sued in any court for any act done or ordered to be done by him in the exercise of jurisdiction conferred by this Law, whether or not within the limits of his jurisdiction, provided that he at the time of such act or order, in good faith, believed himself to have jurisdiction to do or order to be done the act in question."

The plaintiff did not allege in the writ or in the statement of claim that the defendant did not act in good faith, but in respect of one of the items of claim it was alleged in the writ that he acted without just cause. The defendant objected that the suit disclosed no cause of action and should be struck out. In reply, it was submitted on behalf of the plaintiff that the onus lay on the defendant to prove that he acted in good faith, and, alternatively, that the statement that he acted without just cause was an allegation of bad faith.

*Held:* The onus lay on the plaintiff to prove that the defendant did not act in good faith. That was not alleged, and therefore no cause of action was disclosed.

Case referred to:

*Onitiri v. Ojomo*, 21 N.L.R. 19, followed.

(Editorial Note.—See also *Ebon Ajao v. Alhaji Amodu and P.C. Aruna*, 1960 N.R.N.L.R. 8; and for the common law see *Halsbury*, 3rd Edition, volume 30, Title "Public Authorities and Public Officers", Part 2, sections 1 and 2, paragraphs 1351-1361.)

APPLICATION IN CIVIL SUIT

*Thanni*, for plaintiff;

*Corcoran, Crown Counsel*, for defendant.

**Reed, J.:** Counsel for the defendant, Mr Corcoran, has raised a preliminary objection. He has submitted that the pleadings disclose no cause of action. He has drawn my attention to section 8 of the Native Courts Law which reads—

"No person shall be liable to be sued in any court for any act done or ordered to be done by him in the exercise of jurisdiction conferred by this Law, whether or not within the limits of his jurisdiction, provided that he at the time of such act or order, in good faith, believed himself to have jurisdiction to do or order to be done the act in question."





The action is brought against "Chief Alkali of Birnin Kebbi." The present holder of that office, Mallam Husseini, has appeared to answer the summons. Mr Thanni at first said he was suing the office of Chief Alkali but he made what he intended clear when he said—

"If Mallam Husseini is the present holder of the office of Chief Alkali of Birnin Kebbi it is Mallam Husseini whom we are suing. We are suing him in his capacity of Chief Alkali."

Mr Thanni concedes that the plaintiffs are suing in respect of acts done by the defendant in the exercise of jurisdiction conferred by the Native Courts Law. That is to say, the plaintiff is suing Mallam Husseini for acts done by him in the exercise of jurisdiction as Chief Alkali which is jurisdiction conferred by the Native Courts Law. The writ claims three items of relief but each is in respect of an act done by the defendant in the exercise of jurisdiction as Chief Alkali.

Mr Corcoran submitted that the suit should be struck out, as disclosing no cause of action, because it has not been pleaded by the plaintiff that the defendant did not act in good faith. Mr Thanni replied that it is for the defendant to prove, if he can, that he acted in good faith. That is to say, this is a defence open to the defendant but the onus is upon him to prove it. Later Mr Corcoran referred me to *Onitiri v. Ojomo* 21 N.L.R. 19 and Mr Thanni replied that, in any event, bad faith was alleged by the plaintiff against the defendant in the pleadings because, in item 3 of the writ, it is alleged that the imprisonment was "without just cause."

In *Onitiri v. Ojomo* a claim was made against a magistrate for false imprisonment. Section 61(1) of the Magistrates' Courts Ordinance reads:—

"No magistrate, justice of the peace or other person acting judicially, shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction:

"Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of."

de Comarmond S. P. J., as he then was, stated at page 23—

"There remains a rather important point to examine. The point is whether it is for the plaintiff in this suit to allege (and prove) absence of good faith, or whether it is for the defendant to allege (and prove) his good faith.

"I am of opinion that the first alternative is the correct one. Subsection (1) of section 61 lays down the general rule that a magistrate is protected. The proviso to the subsection is obviously the exception to the general rule and it is therefore for the plaintiff to establish that the general rule does not apply.

"In the present case no averment has been made that the magistrate was not acting in good faith, and, for the reasons given above, I am of opinion that the preliminary objection succeeds.

"I uphold this preliminary objection and dismiss this suit with costs."

The effect of section 8 of the Native Courts Law is the same as the effect of section 61(1) of the Magistrates' Courts Ordinance and I respectfully follow the reasoning of the learned Judge in *Onitiri v. Ojomo*. The effect of both sections is this: the officer acting judicially shall not be liable to be sued for any act done by him in the discharge of his judicial duty. That is a matter of law. But, as an exception, he may be liable if he has not acted in good faith. The onus of proof that he has not acted in good faith is on the party who makes the allegation. What the sections do *not* say is that the officer acting judicially may be sued for an act done by him in the discharge of his judicial duty but that it shall be a defence if he can show that he did the act in good faith; if it did, then the onus of proof would be on the judicial officer and I would agree that, in the case before me, the plaintiff would not have to plead that the defendant had not acted in good faith.

Nowhere in the Statement of Claim is it alleged that the defendant did not act in good faith. It is true that in the third item of claim in the writ, which is £500 damages for false imprisonment, it is stated that the sentence was "passed on the plaintiff without just cause." Even if I assume that this is a pleading it does not, in my view, amount to an allegation of bad faith. "Without just cause" is the same as saying "without reasonable cause" or that what the Chief Alkali did was unreasonable or unjust. That is quite a different thing from saying that he acted in bad faith. It is quite possible for a judicial officer to do an unreasonable or unjust act in good faith. Indeed one of the grounds of appeal against the decision of a judicial officer is frequently that the decision is "unreasonable"; that certainly does not amount to an allegation that he has acted in bad faith.

For these reasons I find that the pleadings disclose no cause of action.

*Struck out.*



## BALA ABASHE v. COMMISSIONER OF POLICE

[C.A. (J.A. Smith, S.P.J., and Holden, J.)
February 5, 1962]

[Jos Criminal Appeal No. JD/116CA/1961]

*Criminal procedure—recall of witnesses by court—prosecution witnesses recalled after close of defence case—matter arising ex improviso—Criminal Procedure Code, s.* 237; *Criminal Procedure Ordinance, s.* 200.

The appellant was convicted by a Chief Magistrate on a charge of theft. After the prosecution and defence witnesses had been examined and cross-examined and after counsel for the defence had summed up the case for the defence, the Chief Magistrate adjourned the case for judgment on the following day. On that date, the Chief Magistrate said, *inter alia*, "The evidence in this case is inadequate for the just decision of this case. Under section 237 of the Criminal Procedure Code I shall recall the following witnesses" . . . He proceeded to recall a number of prosecution witnesses and examined them on various points. Defence counsel cross-examined them and both prosecutor and defence counsel again addressed the court. The Chief Magistrate convicted the appellant.

On appeal, it was argued that the powers conferred by section 237 of the Criminal Procedure Ordinance should only be exercised when a point arises *ex improviso* and is one which human ingenuity could not foresee.

Held: (1) Section 237 of the Criminal Procedure Code must be interpreted in the same way as section 540 of the Indian Code of Criminal Procedure has been interpreted, that is, in the light of the English authorities and in the same way as section 200 of the Criminal Procedure Ordinance; and therefore,

(2) Where, and only where, a matter arises in the defence *ex improviso*, which no human ingenuity could foresee, a magistrate not only may, but must, recall such witnesses as appear to him essential for the just decision of the case.

*Held*, further, that in the circumstances of this case no such situation had arisen, and therefore the trial court had misdirected itself in acting under section 237.

Cases referred to:

*Ejakolem v. Inspector-General of Police*, 14 W.A.C.A. 161, followed;
*In re Narayanan Nambiar*, A.I.R. 1942 Madras 223, followed;
*Reg. v. Frost*, (1839) 9 C.&P. 129, applied.

CRIMINAL APPEAL

*Ezekwe* for the appellant;
*Nadarajah, Crown Counsel*, for the respondent.

**Holden, J.**, delivering the judgment of the Court: This is an appeal against the conviction of appellant by the Chief Magistrate, Jos, on two grounds of theft. He was charged with stealing first 178 gallons petrol and secondly 20 gallons kerosene, all the property of his employer, the Ministry of Works,

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Jos. There were in effect two grounds of appeal. The first was the general ground that the decision was unreasonable having regard to the evidence, and the second was that "the learned Chief Magistrate erred in law when he exercised his power under section 237 of the Criminal Procedure Code to recall witnesses after the case had been adjourned for Judgment." Hearing of the case started on 11th August, 1961, and was continued on 14th and 15th August. At the close of the defence, both parties addressed the court, and the matter was adjourned to the next day for judgment. On 16th August, 1961, instead of delivering his judgment, the learned Chief Magistrate said:—

"The evidence in this case is inadequate for the just decision of this case. Under s. 237 C. P. C. I shall recall the following witnesses: 2 P.W. (Foster); 3 P.W. (Moses); 4 P.W. (Olu); 3 D.W. (Benninson), and I order that all P.W.D. Jos lorry drivers employed in Jan. and Feb., 1961 be called with log-books."

The evidence before the court at that moment was as follows:—

Accused was a relief storekeeper employed by the Ministry of Works in Jos. Part of his duty covered the supply of oil products for use in the Mechanical Workshops. His duty was to make out requisitions in a duplicate book Exhibit 5 when fresh supplies were needed. This requisition had to be approved by the Assistant Works Manager (2nd prosecution Witness). When the 2nd prosecution witness had signed the requisition, accused's duty was to make out a Form T.N.R. 29, similar to a Local Purchase Order but restricted to oil products. With this he went in a lorry to the suppliers and collected the oil products required, brought them to the Yard, and put them into the store. He was then required to enter these receipts in the relevant tally-board, on which all issues were also entered. On 29th January, 1961, appellant collected 90 gallons of petrol from the 5th prosecution witness on the T.N.R. 29 Exhibit 7. On 1st February, 1961, appellant collected 5 tins of 4 gallons each of kerosene from the 6th prosecution witness on the T.N.R. 29 Exhibit 6. Exhibit 5, the duplicate book, was in appellant's hands all the relevant time, yet there are no requisitions in that book for these three supplies. The petrol tally-board Exhibit 3 shows one entry of 44 gallons of petrol received on 3rd January, 1961. This is supported by a requisition duplicate in Exhibit 5. Exhibit 3 shows no entry reporting the receipts of 90 gallons on 24th January or 88 gallons on 31st January, 1961. The kerosene tally-board Exhibit 2 shows one entry in appellant's writing made on 6th January, 1961. It



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shows no entry reporting the receipt on 1st February, 1961, of a further 20 gallons of kerosene. There is usually a delay of from five to seven days before the bill raised by a T.N.R. 29 can reach the Mechanical Workshops from the suppliers *via* the Provincial Engineer's office. The 4th prosecution witness told how he handed over to appellant, checking the petrol with Moses (the 3rd prosecution witness) and appellant. He also told how when he returned from leave he found several pages missing from the duplicate requisition book Exhibit 5. Several requisitions show in this book between 3rd January, 1961, and 2nd February 1961, for other items, but none for any oil products. On taking over the storekeeper's duties from the 4th prosecution witness when the latter went on leave, appellant told the 2nd prosecution witness that he was satisfied that everything was correct. There is evidence from the 4th prosecution witness that they together with the 3rd prosecution witness checked the stock in the fuel store, but both appellant and the 3rd prosecution witness deny this. The 1st prosecution witness on 21st March, 1961, checked the physical stock in the store. He found no petrol in stock. He found in the course of checking the documents that the two receipts of 90 and 88 gallons of petrol had not been entered in the tally-board. He found $3\frac{3}{4}$ gallons of kerosene on the tally-board, and 4 gallons in stock. On checking the documents, however, he found that 20 gallons received on 2nd February, 1961, had not been entered in the tally-board, so there was in fact a shortage of $19\frac{3}{4}$ gallons. The 4th prosecution witness was aware within a short time of returning from leave that there was a shortage of oil products in the store, and made an interim report to the 2nd prosecution witness on 3rd February, 1961, and a full report on 16th February, 1961. When arrested appellant made a short statement which confirmed the system given in evidence and hinted that there were outstanding shortages when he took over the store. His own evidence is a detailed confirmation of the prosecution story as to how he received the three deliveries of oil products. He says he took all these deliveries to the store. He did not enter the petrol or the kerosene on the tally-boards because the 3rd prosecution witness told him that the 4th prosecution witness had told him not to give the tally-boards to appellant. He said he was not in charge of the oil products store, but his only job was to collect further supplies when the 3rd prosecution witness told him it was necessary. He says that when he made the entry of petrol received on 3rd January, 1961, there was in fact no petrol in stock though the board showed $102\frac{1}{2}$ gallons. He did not report this discrepancy. He also says that when he entered the delivery of kerosene on 6th

January, 1961, the tally-board Exhibit 2 showed a stock of 13 gallons. There was in fact none there, he says. One of the containers leaked, and he reported to the 2nd prosecution witness. He was unable to say how much petrol was lost by that leakage. He claims that when he took the store over there was no petrol in it, in spite of the fact that the tally-board showed 119¾ gallons as being in store. He called two defence witnesses neither of whom helped anyone very much.

This, then, was the state of the evidence before him when the learned Chief Magistrate said the evidence was "inadequate for a just decision in this case". He recalled the witnesses named and they were further questioned by Mr Ezekwe. Both sides addressed again, and the matter was again adjourned for judgment.

In his judgment delivered on 21st August, 1961, the learned Chief Magistrate convicted the appellant on both counts. Referring to his own exercise of his powers under section 237 of the Criminal Procedure Code, he said he considered that these recalls would not have been permissible under section 200 of the Criminal Procedure Ordinance, which he says is identical in wording with section 237 of the Criminal Procedure Code. He considers that the whole tenor of the Criminal Procedure Code changes the position of the magistrate from that of an arbiter between two sides to that of "an examining magistrate with the duty to direct the prosecution and to nurse the defence, and to a large extent of his own motion, to search out the truth or falsity of any information within the wider ambit of the Criminal Procedure Code".

Section 237 of the Criminal Procedure Code reads as follows:—

"Any court may at any stage of any enquiry, trial or other judicial proceeding under this Criminal Procedure Code summon any person as a witness or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

On the question of the recall, Mr Ezekwe made two points. First, he quoted section 540 of the Indian Code of Criminal Procedure, 1898, which reads:—

"Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."





Mr Ezekwe quoted in support of his first point the 2nd Edition of Sarkar on the Law of Criminal Procedure at page 1006 and referred us to the authorities there quoted. This he submits brings the interpretation of section 540 clearly into line with the English decisions in holding that such a power should only be exercised when a point arises *ex improviso* and is one which human ingenuity could not foresee. This is also the burden of the Nigerian decisions in respect of section 200 of the Criminal Procedure Ordinance, such as *Ejukolem's* case, 14 W.A.C.A. 161. In reply, Mr Nadarajah made two submissions which appear to be in the alternative. First, he submits that at the close of the hearing on 15th August, 1961, there was before the court sufficient evidence on which to convict. We think that on the documents in evidence and on the admissions made by appellant this is so. His second submission is that appellant in his defence made two entirely new points of major importance neither of which had been foreshadowed in cross-examination, neither of which was even hinted at in appellant's statement to the police, and neither of which the prosecution could have been expected to foresee. Both, he says, arose *ex improviso* and were beyond human ingenuity to foresee. He appears to adopt Mr Ezekwe's submission that the power to recall given by section 237 of the Criminal Procedure Code should only be exercised when a point arises *ex improviso*, and is one which human ingenuity could not foresee.

This submission is supported by the Indian case to which Mr Ezekwe referred us. This is the case of *Narayanan Nambiar*, reported in A.I.R. 1942 Madras 223. In this the Court said:—

"As will be seen from the wording of s. 540 of the Code of Criminal Procedure, it is extremly wide in its provisions and enables a Magistrate at any stage of any proceedings to examine any person as a witness; and, where it is essential to the just decision of the case, he is bound to do so. The very width of the powers given to the Magistrate require, however, a corresponding caution in using these powers," and later:—

"It is also argued that s. 540, Criminal Procedure Code is intended only for the benefit of the accused. I see no reason why s. 540, Criminal Procedure Code should be so limited.

It is in the interests of justice that a guilty person should be convicted just as it is in the interests of justice that an innocent person should be acquitted. If the Court thinks that in order to give a just finding it is necessary to examine a witness, then it could not be an improper exercise of the powers of the Court to summon the witness under s. 540, Criminal Procedure Code, merely becasuse the evidence supports the case of the prosecution and not that of the accused."

In that judgment the Indian Court quoted with approval the dictum of Tindal C.J. in *Reg. v. Frost*, (1839) 9 C. and P. 129, and applied the principles of that dictum to their decision. In *Reg. v. Frost* the Chief Justice said:—

"There is no doubt that the general rule is that where the Crown begins its case like the plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso,* which no human ingenuity can foresee, on the part of a defendant in a civil suit or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown."

From this it is clear that section 540 of the Indian Code of Criminal Procedure, 1898, is to be interpreted in the light of the English authorities. As the whole construction of that Code is very similar to that of the Criminal Procedure Code now in force in Northern Nigeria, we must clearly interpret section 237 of the Criminal Procedure Code in the same way, and indeed in the same way as section 200 of the Criminal Procedure Ordinance has in the past been interpreted. It thus follows that where, and only where, a matter arises in the defence *ex improviso* which no human ingenuity could foresee, the magistrate not only may, but must, recall such witnesses as appear to him essential for the just decision of the case.

It is now necessary to apply this principle to the case under consideration. Three points were said by the Chief Magistrate to have been raised by the defence not foreseen in the prosecution's case. First, that there had been a leakage of petrol and appellant had reported this to the 2nd prosecution witness; secondly, that entries on the tally-boards are not made till the T.N.R. 29 forms come to the office; and thirdly that even though appellant was storekeeper he had no control over and on duty to check the physical stock of oil products. As to





the first, we cannot agree that this question arose *ex improviso*. There is an entry in red ink at page 45 of Exhibit 5, the duplicate book, which specifically refers to a loss by leakage. This is surely enough to put the prosecution on their guard and to warn them that such a defence might be tried. As to the second point, there was evidence on it both in chief and in cross-examination. The 2nd prosecution witness said under cross-examination at page 4, line 18, of the record "When petrol or kerosene is received from a Company it is the storekeeper's duty to enter it on the tally-board", and at page 5, lines 23-27, he said it was the storekeeper's responsibility either to make the entries himself or to see that they were made. He also said that there was a delay of 5-7 days before the T.N.R. 29 forms returned to the Storekeeper's office. Also the 3rd prosecution witness in chief told how when on 3rd January, 1961, appellant came back with petrol he took it on charge on the tally-board; and later under cross-examination at page 7, lines 9-12, he said that the T.N.R. number is entered on the tally-board the day that the fuel is received. Thus this point had been discussed in evidence, before the prosecution case was over. As to the third point, at the begining of the hearing the magistrate explained the First Information Report to appellant, who replied "I was assistant of the petrol and motor store. I was not in charge of the petrol or kerosene, etc." The 1st prosecution witness dealt with this by saying at page 3, lines 26-31, "He was in complete charge of Mechanical Workshops Stores from some time in December, 1960, up to towards end of February, 1961. His duties when in charge were to safeguard Mechanical Stores, to order them and issue them to Workshops when authorised to do so. There were spare parts and fuel and oil." Thus the question of responsibility for the physical stock was raised and dealt with in evidence in the first three pages of the record. We therefore hold that none of these three points said to have arisen *ex improviso* did in fact so arise. It therefore follows that the Chief Magistrate was wrong in exercising the power or duty of recall he has been given under section 237 of the Criminal Procedure Code.

We now have to decide whether and to what extent the evidence heard on recall influenced the decision of the learned Chief Magistrate. Mr Nadarajah says it had no effect. Mr Ezekwe says it brought about the conviction. He submits that when the Chief Magistrate said the evidence was "inadequate" he meant that there was not enough to justify a conviction, and appellant should therefore have been acquitted. Mr Ezekwe argues that the fact that after hearing the recalled

evidence the Chief Magistrate did convict shows that the recalled evidence made up his mind for him, by filling in the gaps in the prosecution case which had led him to describe it as "inadequate". This we would point out overlooks Mr Ezekwe's opening remark in his final address to the court at page 28 of the record, where he said "Witnesses called by Court favour accused." We feel that the use of the word "inadequate" must be interpreted in the light of the Chief Magistrate's own explanation. In his judgment he went through the prosecution evidence and said "*Prima facie* it shows all the ingredients of the charges. All that has not been shown is what happened to the petrol after accused collected it. Nevertheless, unrebutted, this evidence is a combination of direct and circumstantial evidence upon which a conviction could and should follow." He then went through the evidence for the defence which he said "did not to my mind raise any reasonable doubt of the truth of the prosecution evidence of accused's duties." Later at page 32 he said "It seemed to me that the defence was not well prepared on this point and while it bore not on the question of accused's guilt or innocence, it did have a bearing on the extent of his participation in what was at this stage clearly proved to be a theft in which he had been involved." All this shows clearly that on 15th August, 1961, the Chief Magistrate had already made up his mind that the theft had been proved and that appellant was a party to it, but he hoped by further questioning to elucidate information which might be of assistance to appellant when the time came to consider sentence. This did not affect the question of appellant's guilt or innocence, and although we consider the learned Chief Magistrate was wrong in recalling those witnesses, there was no miscarriage of justice. We therefore apply the proviso to section 47 of the High Court Law and dismiss the appeal. The sentences are confirmed.

*Appeal dismissed.*



## BENJAMIN SHEMFE *v.* COMMISSIONER OF POLICE

[C.A. (Hurley, C.J., and Skinner, J.) —February 24, 1962]
[Kaduna—Criminal Appeal No. Z/55CA/1961]

*Criminal procedure—fair trial—accused's right to counsel · unexplained absence of counsel—adjournment refused—Constitution of the Federation of Nigeria, s.* 21(5)(*c*) *and* (*d*).

Prior to the commencement of his trial on two counts of fraudulent false accounting and two counts of stealing money, the appellant's request for an adjournment to bring his counsel was refused. There was no explanation given as to the failure of counsel to be present or to provide a substitute. The accused conducted his own defence and was found guilty on all four counts. It was argued on appeal that the appellant did not have a fair trial because of the absence of his legal representative.

*Held:* The trial of the appellant was not unfair because of the absence of counsel in the circumstances of this case. Although the appellant had to take charge of his own defence he had not been deprived by the court of his opportunity to have a legal representative, because the lack of assistance was occasioned by counsel himself. The magistrate properly proceeded with the trial in view of the fact that counsel's absence was unexplained and unjustified.

Cases referred to:

*Mary Kingston*, 32 Cr. App. R. 183, followed;
*Galos Hired and Another v. The King*, [1944] A.C. 149, distinguished;
*Karisa Thuri v. R.*, [1958] E.A. 8, distinguished;
*Samson v. R.*, [1958] E.A. 681, distinguished;
*Yusufu Gitta v. R.* [1959] E.A. 211, followed.

CRIMINAL APPEAL

*J. M. Adesiyun* for appellant;
*I. M. Lewis, Q.C., Solicitor-General* (with him *M. B. Belgore, Crown Counsel*) for respondent.

**Hurley, C.J.,** delivering the judgment of the Court: The appellant, a cashier employed by the Ministry of Agriculture at Mokwa, was charged before the Magistrate's Court of the Kano Magisterial District sitting at Minna on two counts of fraudulent false accounting and two counts of stealing money which had come into his possesion by virtue of his employment. The offences were alleged to have been committed in November, 1959. So far as appears on the record, he was first brought before the court at Minna on 14th December, 1960, when Mr Sawyerr appeared as his Counsel. The appellant elected summary trial and pleaded not guilty on all counts, and the case was adjourned to the following day. The appellant was allowed bail in the sum of £50 with one surety. On 15th December, 1960, the magistrate minuted "Adjourned to next sessions". The record does not show who appeared when that adjournment was ordered. The case next came before the

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magistrate on 8th February, 1961, when Mr Sawyerr again appeared for the appellant. The case was again adjourned to the next sessions. No reason for the adjournment is recorded. It came before the court again on 27th June, 1961, a Tuesday, and on that day the appellant appeared in person. The record reads—

"Acc asks for adjournment to bring his Counsel. Telegram read from Counsel asking adjournment to Friday. Court will not be sitting on Friday.

"Prosecution oppose adjournment. Case first before court on 22 February, 1960. Has been adjourned several times. 3 witnesses, 1 from Mokwa, 1 from Zaria and 1 from Ilorin. Great inconvenience and expense. All are here and have been here before.

"Ruling. Application for adjournment must be refused. Trial to proceed."

That is all we know of the circumstances in which the adjournment which the appellant asked for was refused. The telegram from his counsel was not copied into the record and is not before us. It does not appear whether it was addressed to the appellant or to the court. There is no explanation of counsel's failure to attend, or to send another counsel to hold his brief and conduct the defence. Though the record of proceedings begins on 14th December, 1960, it is entirely possible that the case first came before the court the preceding February, because the offences charged were alleged to have been committed in November, 1959. But nothing has been made to turn on that.

The trial proceeded. Three prosecution witnesses gave evidence. All came from Mokwa. The appellant cross-examined one of them, and gave evidence in his own defence. He was convicted on all four counts, and sentenced to imprisonment.

His first ground of appeal reads "That the trial was unfair to me, as I pleaded the Magistrate to allow my Counsel to arrive to defend me, but my trial was hurriedly conducted." It is argued that the appellant, who had entrusted his defence to counsel, must have been embarrassed by having to continue without the assistance of counsel, and that that made the trial unfair. No doubt the appellant was unable to conduct his defence with the same skill as counsel, but that could be said of any defendant, and therefore to say that the appellant's trial was unfair because it went on without his counsel would be to say that wherever an accused person is entitled to the assistance of counsel his trial should never proceed in the absence [illegible]



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counsel. That is not what the law says, and that is not what the law means by "unfair".

The appellant, having briefed counsel, was at common law entitled to the services of counsel: *Mary Kingston* 32 Cr. App. R. 183, *per* Humphreys, J., at page 188. He was entitled to the assistance of a legal representative by virtue of section 21(5)(*c*) and (*d*) of the Constitution of the Federation. In the case of *Galos Hired and Another v. The King* [1944] A.C. 149, the defendants, appealing to the Protectorate Court of Appeal of the Somaliland Protectorate against their convictions for murder, were entitled to the assistance of an advocate by virtue of the provisions of the Poor Persons Defence Ordinance of that territory. The advocate who had been assigned under the Ordinance to conduct the appeal was not present at the hearing of the appeal, and no other advocate was available. The Court of Appeal made no inquiry with regard to the advocate's absence or as to the date when he might be expected to arrive, and the appeals were conducted by the appellants in person and were dismissed. On appeal to the Judicial Committee of the Privy Council, it was shown that the advocate's absence had been due to no fault of his own. It was held that the appeal to the Protectorate Court of Appeal had not been effectively heard and must be restored for hearing in circumstances which would enable an advocate to conduct it. In their judgment, the Judicial Committee, having considered the circumstances of the case, observed that the assignment of counsel had been made of no effect and that the provisions of the Poor Persons Defence Ordinance had, as a matter of substance, been disregarded. They added "Just as a conviction following a trial cannot stand if there has been a refusal to hear 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."

*In Mary Kingston* counsel briefed by the appellant was absent when her case came on for trial and the Recorder proceeded with the trial without waiting for him. Other counsel were present in court and it was suggested that one of them might be asked to hold the brief, but the Recorder declined the suggestion. The Court of Criminal Appeal said "We have had a report in this case from the learned Recorder of Manchester, and it is quite clear from that report that the primary cause of this unfortunate situation was the failure of

and the Court in attending when the case was in the list for trial. If he was unable for any good reason to attend, his duty, as everybody knows, was to see that some other member of the Bar held his brief and was in a position to represent the accused person. It was owing to the fact that that member of the Bar agreed with counsel for the prosecution that neither would go to the Court till 2 p.m. that all this trouble arose. In those circumstances, we think it right to say that in our opinion the Assistant-Recorder was perfectly justified in continuing with the trial of a person although she was unrepresented. The jury had to be considered. It would have been quite wrong for the Assistant-Recorder at 10.30 a.m. to waste the jury's time and tell them there was nothing for them to do and that they must come back at 2 p.m. for the convenience of counsel. No application had been made to the Court to fix the case for 2 p.m., or postpone it in any way.

"If the matter rested on the facts which I have stated so far, this Court would not have interfered . . . . ." The Court went on to consider the Recorder's refusal to accept the suggestion that counsel present in court might be asked to hold the brief, and held that that was tantamount to depriving the appellant of the right she had of being defended by counsel; and the appeal was allowed.

These cases have been considered in a number of cases in East Africa which the learned Solicitor-General has cited to us. We mention three which have some bearing on the case before us. In *Karisa Thuri v. R.* [1958] E.A. 8, the appellant's advocate had been absent at the preliminary enquiry because the court had not informed him of its date. On his appeal against conviction, the Court of Appeal for Eastern Africa thought that for this and another reason the appellant had been prejudiced in his defence, and ordered a new trial. In *Samson v. R.* [1958] E.A. 681, the accused, who was in custody, applied for legal aid six days before the hearing and counsel was assigned two days after the application. At the hearing counsel obtained leave to withdraw on the ground that he had not had time to see his client, and the court proceeded with the trial instead of adjourning to enable the accused to be represented. The appeal to the Court of Appeal for Eastern Africa was allowed, the Court observing that to deprive the accused of the services of an advocate assigned to him under a Legal Aid Ordinance, in circumstances in which the possibility of ensuring their continued availability had not been fully investigated, or indeed investigated at all, was to negative the intention of the Ordinance. In *Yusufu Gitta v. R.* [1959] E.A. 211, decided in the High Court for Uganda, the accused in a magistrate's court appeared on the hearing day, having been on bail for over three weeks, and produced a letter from an advocate who wrote that he had been instructed by the accused and was requesting an adjournment because he was engaged in another court that day. The prosecution was ready to proceed, and the magistrate refused the adjournment. On appeal to the High Court, it appeared from an affidavit made by the advocate that he had only just been instructed by the appellant when he wrote the letter requesting an adjournment. In the view of the High Court, the substantial cause of the appellant's not being represented by an advocate was his failure to instruct an advocate till the eve of the trial. A contributory cause was the advocate's failure to do his duty to his client as that duty is explained in the passage from *Mary Kingston's* case which we have cited. The appeal was dismissed.





In the case before us, as in *Mary Kingston's* case, the appellant was deprived of the assistance of counsel at his trial through counsel's own default, through his unexplained failure to do his duty to his client by appearing to defend him or by seeing that there was another member of the Bar there to conduct the defence. It is not suggested that there was any other counsel present in Minna on the day of the trial who could have been asked to undertake the defence, or that it would have been possible to bring another counsel to Minna before the close of the sessions which was not later than the Thursday. The only way of making the services of counsel available to the appellant would have been to adjourn to the next sessions. On the authority of *Mary Kingston*, it was proper to refuse such an adjournment in the circumstances of this case. It makes no difference in our view that all the prosecution witnesses came from Mokwa, instead of from Mokwa, Ilorin and Zaria. They had come, and they and the prosecution were ready, and it would have been quite wrong for the magistrate to waste their time and send them away until the next sessions upon the unexplained and unjustified absence of appellant's counsel. By proceeding with the trial the magistrate did not deprive the appellant of his right to the services of counsel or to defend himself by a legal representative—it was counsel who did that—and, in the circumstances in which the appellant found himself without counsel, the trial was not unfair by reason of the fact that he was obliged to conduct his defence himself.

(After considering the remaining grounds of appeal, the Court dismissed the appeal.)

*Appeal dismissed.*

# AYO SOLANKE *v.* (1) ABRAHAM ABED & (2) MR OGUNLOWO

[Federal Supreme Court (Ademola, C.J.F., Unsworth, F.J. and Taylor, F.J.)—April 27, 1962]

[Lagos—Appeal No. F.S.C. 289/1961]

*Land—right of occupancy—alienation—tenancy agreement—tenant in possession—Governor's consent to alienation not obtained—tenancy null and void—tenant suing landlord for trespass—whether agreement illegal—whether landlord can plead agreement was null and void and unenforceable—Land and Native Rights Ordinance, Cap.* 105, 1948 *Laws of Nigeria, s.* 11.

*Contract—illegality—tenancy agreement in respect of land the subject of a right of occupancy—tenant in possession—Governor's consent to alienation not obtained—tenant suing landlord for trespass—defence that agreement illegal or unenforceable*—ibid.

*Tort—trespass—action by tenant against landlord—premises held by landlord under right of occupancy—Governor's consent to tenancy not obtained—defence that tenancy agreement illegal or un-forceable*—ibid.

A tenancy agreement whereby the landlord, the holder of a right of occupancy alienates the right of occupancy to a tenant without the consent of the Governor first had and obtained is not an illegal agreement.

The holder of a right of occupancy who alienates the right of occupancy by entering into a tenancy agreement and letting the tenant into possession of the premises in pursuance of the agreement but does so unlawfully by not obtaining the consent of the Governor required by section 11 of the Land and Native Rights Ordinance cannot, as against the tenant suing him for trespass, rely upon his own wrongful act in not obtaining the required consent to as to allege that the tenancy agreement is null and void and unenforceable.

Cases referred to:—

*Delaney v. T. P. Smith, Limited*, [1946] 2 All E.R. 23, distinguished;

*Denning v. Edwardes*, [1961] A.C. 245, mentioned.

CIVIL APPEAL

The first defendant was the owner of a right of occupancy. On 18th August, 1959, he agreed to sub-let part of the premises erected on the plot held under the right of occupancy to the plaintiff. In pursuance of the agreement, the plaintiff paid the first defendant six months' rent in advance and entered into possession of the premises sub-let. The Governor's consent to the sub-letting, required by section 11 of the Land and Native Rights Ordinance, was not obtained. (Section 11 is set out in the judgment of Unsworth, F.J., *infra*). The Resident drew the





first defendant's attention to the omission, and the first defendant informed the plaintiff of what the Resident had said and asked him to vacate the premises. On 22nd November, 1959, at the premises occupied by the plaintiff under the sub-letting, certain alleged events took place in respect of which the plaintiff brought an action in the High Court for damages for trespass committed by the second defendant the servant of the first defendant. The High Court (Reed, J.) held[1] that by the effect of section 11 of the Land and Native Rights Ordinance the sub-letting under which the plaintiff claimed title against the owner of the premises, the first defendant, was null and void and that therefore the plaintiff could not maintain an action for trespass against the defendants. The plaintiff appealed to the Federal Supreme Court.

*J. E. C. David* for the plaintiff-appellant;

*J. G. Bentley* for the defendants-respondents.

**Unsworth, F.J.:** This is an appeal from a decision of Reed, J., in which he dismissed the appellant's claim for damages for trespass by his landlord on the grounds that the alleged tenancy agreement was null and void under section 11 of the Land and Native Rights Ordinance (Chapter 105 of the 1948 Edition of the Laws of Nigeria).

Section 11 of the Land and Native Rights Ordinance reads as follows:—

"Except as may be otherwise provided by the regulations in relation to native occupiers, it shall not be lawful for any occupier to alienate his right of occupancy, or any part thereof by sale, mortgage, transfer of possession, sub-lease or bequest or otherwise howsoever without the consent of the Governor first had and obtained, and any such sale, mortgage, sub-lease, transfer or bequest, effected without the consent of the Governor, shall be null and void."

There can be no doubt that the defendant had failed to obtain consent to the tenancy as required by section 11 of the Land and Native Rights Ordinance. In these circumstances the Government were entitled to revoke the right of occupancy under section 12 of the Ordinance, and recover possession in accordance with the terms of the right of occupancy. This is not, however, the issue with which we are now concerned. The issue here related to the relationship between the owner of the right and the person whom the owner had put into possession. Was the defendant entitled to take advantage of his own wrong as against the plaintiff in this action for trespass and allege that the agreement was null and void or illegal?

Counsel for the defendant (the present respondent) argued that he could, because (*a*) the agreement of tenancy is unenforceable and an action for trespass cannot be maintained on an unenforceable contract, or, in the alternative, (*b*) the agreement was not only unenforceable but also illegal and a party to an illegal contract is entitled to raise the illegality notwithstanding that he is a party to it.

In support of the first point Counsel referred to the case of *Delaney v. T.P. Smith Ltd.* [1946] 2 All E.R. 23 where it was held that the plaintiff in an action for trespass could not, in the circumstances of that case, rely upon an unenforceable contract of tenancy. The case is, however, distinguishable in that the plaintiff in *Delaney's* case had entered into possession without the consent of the owner who had not been guilty of any wrongful act. In the present case the defendant was at fault in that he had failed to obtain consent to the tenancy and the plaintiff had, unlike the occupier in *Delaney's* case, entered into possession of the premises with the consent of the owner after payment of rent. In my view the defendant in this case cannot be heard, as against the plaintiff, to put forward his own wrongful act and say that the agreement was unenforceable because he himself had failed to get the necessary consent under section 11 of the Land and Native Rights Ordinance.

This leads me to consideration of the question whether the agreement was illegal for, if it be illegal, there is authority for saying that the defendant could rely on his own wrongful act for reasons which are fully set out in *Chitty* on Contracts, 21st edition, volume I at page 479. It will, however, be unnecessary to consider whether the principles there set out apply in this action for trespass if the agreement was not, in fact, illegal, and this must first be considered. The question whether a contract declared void by Statute is illegal has been considered in a number of cases which are referred to in *Maxwell* on the Interpretation of Statutes, 10th edition, at page 212, where the position is set out in this way:

"It may, probably, be said that where a statute not only declares a contract void, but imposes a penalty for making it, it is not voidable merely. The penalty makes it illegal. In general, however, it would seem that where the enactment has relation only to the benefit of particular persons, the word 'void' would be understood as 'voidable' only at the election of the persons for whose protection the enactment was made and who are capable of protecting themselves, but that, when it relates to persons not capable of protecting themselves, or





when it has some object of public policy in view which requires the strict construction, the word receives its natural full force and effect."

The Statute at present under consideration says that it shall be unlawful for the occupier to alienate his right of occupancy but the Statute does not provide any penalty for breach of the provision, nor would it appear necessary in the interest of public policy for an agreement of alienation to be treated as illegal. Public policy can be adequately safeguarded by the Government's power of revocation and right of re-entry previously mentioned. In these circumstances I would hold that the contract was not illegal. The reference in *Maxwell* referred to above also deals with the question of a contract being treated as voidable but this issue does not arise in this appeal.

For these reasons I am of the opinion that it was not open to the defendant, in the circumstances of this case, to rely upon his own wrongful act so as to allege, as against the plaintiff, that the agreement of tenancy was null and void and unenforceable under section 11 of the Land and Native Rights Ordinance. The agreement was not illegal.

In the course of argument in this appeal mention was made of a recent decision of the Privy Council in a case from East Africa where the Judicial Committee considered the position under the Kenya Crown Lands Ordinance between the signing of an agreement of alienation and the Governor's consent to the alienation. The case is *Denning v. Edwardes* [1961] A.C. 245 and the Judicial Committee held under the wording of the Kenya law and circumstances of the case that the agreement was not void *ab initio*, but it remained inchoate pending the consent of the Governor.

The appeal succeeds. There are other issues to be decided in this case and I consider that the proper order is an order for retrial. I would accordingly allow the appeal and order the case to be re-tried before another Judge of the High Court. The appellant is entitled to costs in this Court which I would assess at 37 guineas. The order as to costs in the High Court is set aside and the costs in that court should abide the event and be fixed at the conclusion of the further hearing.

**Ademola, C.J.F.:** I concur.

**Taylor, F.J.:** I concur.

# LAW REPORTS

## OF

# NORTHERN NIGERIA

# 1963

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OF
NORTHERN NIGERIA
1963

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Hon. Mr Justice Reed, Judge

Hon. Mr Justice Bate, Judge

Hon. Mr Justice Skinner, Judge

Hon. Mr Justice Holden, Judge

Hon. Mr Justice J. P. Smith, Judge

Hon. Mr Justice Ahmad, Judge

THE LAW REPORTING COMMITTEE

OF

NORTHERN NIGERIA

1963

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E. Noel Grey, Esquire, Barrister-at-Law

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Lamba Kumbin *v.* Bauchi Native Authority
1963 N.N.L.R. 49 (C.A.)

Sentence—'bigamy'—Criminal Code, Laws of Nigeria, 1948, Cap. 48, s. 370.

The Queen *v.* Bartholomew Princewell
1963 N.N.L.R. 54 (C.A.)

CRIMINAL PROCEDURE

Addresses—prosecutor's right of reply—accused giving evidence but calling no witnesses—Criminal Procedure Code, ss. 191(1)(*b*), 194(1), 228.

Agoma Achaji and Others *v.* Commissioner of Police
1963 N.N.L.R. 74 (C.A.)

Appeal from magistrate's court—appeal by complainant in police prosecution—appeal against order to pay compensation—Criminal Procedure Code, ss. 166, 371, 379(1); Constitution of Northern Nigeria, s. 52(3)(*a*) and (4)(*a*).

F. A. Onitiri *v.* Commissioner of Police
1963 N.N.L.R. 63 (C.A.)



Bail—surety—forfeiture of bond—bond not exhibited—whether forfeiture proved—recovery of penalty—imprisonment, when lawful—Criminal Procedure Code, s. 354; s. 304.

Amadu Tea *v.* Commissioner of Police
1963 N.N.L.R. 77 (C.A.)

Case diary—statement of witness—written statement to be included in case diary—inadmissible against maker on his trial—Criminal Procedure Code, ss. 121(1)(*g*), 122(1); s. 126.

Doctor Mohammed Ashard *v.* Commissioner of Police
1963 N.N.L.R. 80 (C.A.)

Committal to another court for sentence—committal after summary conviction on accused's admission before evidence taken—Criminal Procedure Code, ss. 157(1) and (2), 161(2), 257(1)(*b*); Criminal Procedure (Punishment on Summary Conviction) Order in Council, 1960, N.R.L.N. 86 of 1960.

Commissioner of Police *v.* Emmanuel Anthony
1963 N.N.L.R. 13 (Skinner, J.)

Compensation ordered to be paid by offender—enforcing payment of compensation—, seizure and sale of offender's property—whether compensation payable under Penal Code or under Criminal Procedure Code—whether fine imposed—Penal Code, s. 78; Criminal Procedure Code, ss. 365(1)(*b*), 367.

M. Yusufu Wakilin Yaki Da Jahilchi and Another *v.* Zaria Native Authority
1963 N.N.L.R. 82 (C.A.)

Confiscation—property used for commission of offence or regarding which offence committed—property produced before court or in its custody—means property brought to court for purposes of the trial and not for use as compensation—Criminal Procedure Code, s. 357.

M. Yusufu Wakilin Yaki Da Jahilchi and Another *v.* Zaria Native Authority
1963 N.N.L.R. 82 (C.A.)

No case to answer—no submission of no case to answer—duty of trial Judge—only evidence that of accomplice—witness's character of accomplice not apparent at close of prosecution case—accused called on for defence—Penal Code, s. 79; Criminal Procedure Code, s. 191(3); Criminal Procedure Ordinance, s. 286.

Adamu Maiduguri *v.* The Queen
1963 N.N.L.R. 1 (F.S.C.)

Refusal to proceed on the part of court taking cognizance—complainant's remedy—whether appeal or application to appeal court for transfer—Native Courts Law, 1956, s. 62; Criminal Procedure Code, s. 150(1) and (3).

Garba Bauchi *v.* Bauchi Native Authority
1963 N.N.L.R. 45 (C.A.)

Search of premises—search without warrant—two respectable inhabitants of the neighbourhood not present—evidence of result of search, whether admissible—search not under part B of Ch. VI of Criminal Procedure Code—Criminal Procedure Code, s. 78(1); Ch. VI, ss. 74, 76, 77, 81, 85.

Commissioner of Police *v.* Michael David
1963 N.N.L.R. 29 (C.A.)

Sentence—appeal—sentence on summary trial—increase of sentence on appeal—appeal from magistrate's court to High Court—increase of sentence beyond that which magistrate could impose at trial—Northern Region High Court Law, 1955, s. 48(*a*)(*ii*).

Albert E. Nwobu and Another *v.* Commissioner of Police
1963 N.N.L.R. 9 (F.S.C.)

Summary trial in magistrate's court—change of presiding magistrate—whether proceedings can be continued by new magistrate—Criminal Procedure Code, Chapter XVI; ss. 158, 169; s. 184.

Commissioner of Police *v.* Bala Alhaji and Anor
1963 N.N.L.R. 32 (C.A.)

Summary trial—framing charge after hearing prosecution witnesses—presumption of innocence not violated—desirability of framing charge as early as possible—Constitution of the Federation of Nigeria, s. 21(4); Criminal Procedure Code, ss. 158, 159, 160(1), 161(1).

Emmanuel Ibeziako *v.* Commissioner of Police
1963 N.N.L.R. 88 (F.S.C.)

Trial in High Court—no preliminary inquiry—Judge giving leave to prefer charge—Criminal Procedure Code, s. 185 (*b*).

The Queen *v.* Bello
1963 N.N.L.R. 35 (F.S.C.)

CROWN PROCEEDINGS

Claim against private person—officer authorised by law to prosecute—Deputy Sheriff—security taken by Deputy Sheriff for value of attached property claimed by third party—whether claim to enforce security properly brought in name of Deputy Sheriff—Petitions of Right Ordinance, 1948 Laws of Nigeria, Cap. 167, s. 2; Sheriffs and Civil Process Ordinance, ibid, Cap. 205, s. 32.

C. Anueyiagu and Another *v.* Deputy Sheriff, Kano
1963 N.N.L.R. 16 (F.S.C.)

Mandamus—statutory consent to alienation of right or occupancy—whether mandamus lies to compel—Minister's request to Court for directions, whether relevant—Land and Native Rights Ordinance, 1948 Laws of Nigeria, Cap. 105, s. 11.

The Queen *v.* The Minister of Land and Survey
ex parte The Bank of the North Limited
1963 N.N.L.R. 58 (H.C.)

DAMAGES

Remoteness of damage—Damages recoverable where fundamental breach of contract.

I. A. Ogwu *v.* Leventis Motors Limited
1963 N.N.L.R. 115 (C.A.)

EVIDENCE

Accomplice—corroboration—evidence of co-accused—Evidence Ordinance, s. 177(2).

Adamu Maiduguri *v.* The Queen
1963 N.N.L.R. 1 (F.S.C.)



Accused's statement—statement made by accused as witness during police investigation—statement in writing—whether admissible against accused—Criminal Procedure Code, ss. 121 (1) (*g*), 122(1); s. 126.

Doctor Mohammed Ashard *v.* Commissioner of Police
1963 N.N.L.R. 80 (C.A.)

Affidavit—averment of facts or circumstances—extraneous matter averment of opinion—averment of legal conclusions—Evidence Ordinance, ss. 85, 86.

Banque de l'Afrique Occidentale *v.* Alhaji Haba Haba Sharfadi and Others
1963 N.N.L.R. 21 (Bate, J.)

Affidavit—affidavit by counsel in the case—whether subject to objection—whether in breach of client's privilege of secrecy—whether involving counsel personally in the dispute.

Iris Winifred Horn *v.* Robert Rickard
1963 N.N.L.R. 67 (Holden, J.)

Document—public document—mining lease—proof of contents—by certified copy only—Evidence Ordinance, Laws of Nigeria, 1948, Cap. 63, ss. 92, 93, 94(*e*), 95, 96(1)(*e*), (2)(*c*), 108(*a*)(*iii*); Minerals Ordinance, Laws of Nigeria, 1958, Cap. 121, s.34; ss. 3(2), 99, 101.

Bisichi Tin Company Limited *v.* Commissioner of Police
1963 N.N.L.R. 71 (C.A.)

Extraneous matter—legal argument or conclusion—averment of existence of state of affairs on which order sought would be grounded—Evidence Ordinance, 1948 Laws of Nigeria Cap. 63, s. 86.

Iris Winifred Horn *v.* Robert Rickard
1963 N.N.L.R. 67 (Holden, J.)

Lease—expiry—proof of expiry—by proof of lease.

Bisichi Tin Company Limited *v.* Commissioner of Police
1963 N.N.L.R. 71 (C.A.)

Legal practitioners—counsel in the case giving evidence—generally undesirable—whether subject to objection—facts to be deposed to likely to be in dispute—counsel's duty to withdraw and brief other counsel.

Iris Winifred Horn *v.* Robert Rickard
1963 N.N.L.R. 67 (Holden, J.)

Objection—inadmissible evidence—criminal case—no objection taken—evidence nevertheless irrelevant.

Bisichi Tin Company Limited *v.* Commissioner of Police
1963 N.N.L.R. 71 (C.A.)

EXECUTION

Committal—judgment debtor summons—conditional order for committal of judgment debtor—Sheriffs and Civil Process Ordinance, Laws of Nigeria, 1948, Cap. 205. s. 64(1).

Alhaji Salihu Nakande *v.* Barclays Bank D.C.O.
1963 N.N.L.R. 38 (C.A.)

Interpleader—security for value of attached property claimed—bond for stated amount—whether enforceable for amount stated or for amount of any loss or diminution in value of the property –Sheriffs and Civil Process Ordinance, 1948 Laws of Nigeria, Cap. 205, s. 32 (1)(*b*), (2).

C. Anuoyiagu and Another *v.* Deputy Sheriff, Kano
1963 N.N.L.R. 16 (F.S.C.)

HIRE-PURCHASE

Hire-purchase of lorry—No warranty as to description, state, quality, fitness, roadworthiness or otherwise—Different lorry delivered to hirer—Unfit for carriage of goods—Fundamental breach of contract.

I. A. Ogwu *v.* Leventis Motors Limited
1963 N.N.L.R. 115 (C.A.)

JUDGMENT DEBTOR SUMMONS

"Means to pay" judgment debt—Sheriffs and Civil Process Ordinance Laws of Nigeria; 1948, Cap. 205, s. 64(1)

Alhaji Salihu Nakande *v.* Barclays Bank D.C.O.
1963 N.N.L.R. 38 (C.A.)

JURISDICTION

Provincial Court—application to Provincial Court for transfer of criminal case on lower court's refusal to proceed—transfer to court with jurisdiction to hear and determine the case—Provincial Court's jurisdiction to hear and determine on transfer to itself—Criminal Procedure Code, s. 150(3); Native Courts Law, 1956, s. 63(1).

Garba Bauchi *v.* Bauchi Native Authority
1963 N.N.L.R. 45 (C.A.)

LAND

Right of occupancy—alienation—statutory consent—whether mandamus lies to compel consent—Lands and Native Rights Ordinance, 1948 Laws of Nigeria, Cap. 105, s. 11.

The Queen *v.* The Minister of Land and Survey
ex parte The Bank of the North Limited
1963 N.N.L.R. 58 (H.C.)

MAGISTRATES

Magistrate continuing proceedings commenced by predecessor—Summary trial—preliminary inquiry—Criminal Procedure Code, Chapter VI; ss. 158, 169; s. 184.

Commissioner of Police *v.* Bala Alhaji and Anor
1963 N.N.L.R. 32 (C.A.)

PRACTICE AND PROCEDURE

Affidavit in support of notice—averment that sum claimed is not yet due—question to be decided by Court—Supreme Court (Civil Procedure) Rules, O. 3, r. 11.

Banque de l'Afrique Occidentale *v.* Alhaji Baba Haba Sharfadi and Others
1963 N.N.L.R. 21 (Bate, J.)

Counter affidavit, whether admissible—Supreme Court (Civil Procedure) Rules, O. 3, r. 11.

Banque de l'Afrique Occidentale *v.* Alhaji Baba Haba Sharfadi and Others
1963 N.N.L.R. 21 (Bate, J.)



Default in pleading—extension of time—no extraordinary delay—no special circumstances—usual order—extension on terms.

A. G. Leventis and Company Limited *v.* Joseph M. C. Obiako
1963 N.N.L.R. (Reed, Ag. S.P.J.)

Third party—joinder of defendant insurance company—action for damages for negligent driving—joinder of defendant's insurers.

Christopher Nnodi *v.* B. O. Okafor
1963 N.N.L.R. 42 (Reed, Ag. S.P.J.)

Undefended list—notice of intention to defend—notice signed and delivered by solicitor, not by party—whether sufficient—Supreme Court (Civil Procedure) Rules, O. 3, r. 11.

Banque de L'Afrique Occidentale *v.* Alhaji Baba Haba Sharfadi and Others
1963 N.N.L.R. 21 (Bate, J.)

REVENUE

Income Tax—Assessment in default of return of chargeable income—No valid objection to or appeal against assessment before it became final—Whether assessment should exclude consideration of capital allowances in previous years—Federal Board of Inland Revenue not making assessment "to the best of their judgment"—Income Tax Ordinance, Laws of the Federation of Nigeria and Lagos, 1958, Cap. 85, s. 55(3); Companies Income Tax Act, 1961, s. 49(3).

The Federal Board of Inland Revenue *v.* Azigbo Brothers Limited
1963 N.N.L.R. 121 (Smith, S.P.J.)

WORDS AND PHRASES

"As a motive or reward", Penal Code, s. 115.

The Queen *v.* Auta Bokkos
1963 N.N.L.R. 25 (Holden, J.)

"Banker"—Penal Code, s. 311, s. 315, Banking Act, Laws of the Federation of Nigeria and Lagos, 1958, Cap. 19, s. 3(1).

T.U. Akwule and Ten Others *v.* The Queen
1963 N.N.L.R. 105 (F.S.C.)

"Failure of justice", Criminal Procedure Code, s. 382.

Abdu Dan Sarkin Noma *v.* Zaria Native Authority
1963 N.N.L.R. 97 (C.A.)

"Inquiry", Criminal Procedure Code, s. 184.

Commissioner of Police *v.* Bala Alhaji and Anor
1963 N.N.L.R. 32 (C.A.)

"Marries"—Criminal Code, Laws of Nigeria, 1948, Cap. 48, s. 370.

The Queen *v.* Bartholomew Princewell
1963 N.N.L.R. 54 (Reed, J.)

"Valid Marriage", Marriage Ordinance, Laws of Nigeria, 1948, Cap. 128, s. 35.

The Queen *v.* Bartholomew Princewell
1963 N.N.L.R. 54 (Reed, J.)

"Void"- Criminal Code, Laws of Nigeria, 1948, Cap. 48, s. 370.

The Qeeun *v.* Bartholomew Princewell
1963 N.N.L.R. 54 (Reed, J.)

"Witness"– Criminal Procedure Code, ss. 191 (1)(*b*), 194(1), 228.

Agoma Achaji and Others *v.* Commissioner of Police
1963 N.N.L.R. 74 (C.A.)

# ADAMU MAIDUGURI *v.* THE QUEEN

[Federal Supreme Court (Ademola, C.J.F., Unsworth, F.J., and Taylor, F.J.) - November 29, 1961]

[Kaduna - Appeal No. F.S.C. 288/1961]

*Criminal procedure--no case to answer--no submission of no case to answer--duty of trial Judge--only evidence that of accomplice--witness's character of accomplice not apparent at close of prosecution case—accused called on for defence—Penal Code, s.* 79; *Criminal Procedure Code. s.* 191 (3); *Criminal Procedure Ordinance, s.* 286.

*Evidence--accomplice—corroboration--evidence of co-accused--Evidence Ordinance. s.* 177(2).

The appellant and three others were charged with culpable homicide punishable with death. The accused persons hired a taxi in which lethal weapons were hidden and drove to a village where they intended to burgle the post office. During the operation the appellant killed the nightwatchman.

The only evidence against the appellant at the close of the case for the prosecution was the evidence of the taxi driver. Counsel on behalf of the appellant's co-accused made submissions of no case to answer which were overruled. No submission was made on behalf of the appellant. All the accused elected to give evidence.

The appellant's co-accused, who were acquitted, gave evidence implicating the appellant.

The trial Judge found that the taxi driver was an accomplice and warned himself of the necessity for corroboration of his evidence, but found that his evidence was corroborated by that of the appellant's co-accused.

It was argued on behalf of the appellant that:—

(*a*) the appellant's co-accused being accomplices their evidence could not corroborate that of the taxi driver, and

(*b*) as there was no evidence other than that of the taxi driver who was an accomplice against the appellant at the close of the case for the prosecution, he should not have been called upon to offer a defence notwithstanding that no submission was made on his behalf, but it was the duty of the court to draw attention to it and discharge the appellant.

*Held:* (1) The evidence of the appellant's co-accused incriminating the appellant was rightly regarded as not being the evidence of an accomplice having regard to section 177(2) of the Evidence Ordinance.

(2) The question of whether, at the close of the case for the prosecution, there being no evidence sufficient to put the accused upon his defence, in the absence of a submission by counsel on behalf of the accused the court is under a duty to discharge the accused did not arise as the court came to the conclusion that the appellant in this case had a case to answer.

"At the close of the case for the Crown it was not possible on the evidence to say that the taxi driver was an accomplice. His role in that respect became clear after the accused persons had given their evidence. . ."

Cases referred to:—

*Reg. v. Onuegbe and Others* (1957) 2 F.S.C. 10;
*Eregie v. Inspector-General of Police* 14 W.A.C.A. 453;
*R. v. Ajani* 3 W.A.C.A. 3;
*R. v. George* 1 Cr. App. R. 162;
*R. v. Jackson* 5 Cr. App. R. 22;
*R. v. Joiner* 4 Cr. App. R. 64;
*R. v. Power* 14 Cr. App. R. 17; [1919] 2 K.B. 572;
*Reg. v. Abbott* [1955] 2 Q.B. 497; [1955] 2 All E.R. 899;
*Payne v. Harrison* [1961] 3 W.L.R. 309;
*R. v. Coker* 20 N.L.R. 62;
*Reg. v. Oguche* (1959) 4 F.S.C. 64.

CRIMINAL APPEAL

*M. O. O. Sawyerr* for the appellant.
*I. M. Lewis, Q.C., Solicitor-General* (with him *Mallam Belgore, Crown Counsel*) for the respondent.

**Ademola, C.J.F.,** The appellant and three others were tried on the 27th July, 1961, at Kano, Northern Nigeria, on a charge of culpable homicide punishable with death. He was convicted and sentenced to death. He has appealed to this Court against his conviction.

It would appear from the evidence before the learned trial Judge that the appellant and three others hired a taxi in which lethal weapons were hidden; they drove 32 miles out of Kano city to a place called Madobi to burgle the Post Office there. The appellant, who appeared to be the leader of the gang during the operation, killed the nightwatchman, Umoru Nayaya.

The learned trial Judge after an exhaustive and well considered judgment, which deserves our commendation, found that the taxi driver (3rd witness for the prosecution) was an accomplice to the crime; he therefore warned himself of the necessary corroboration of the evidence of this witness. He found corroboration in the evidence of the 1st, 2nd and 4th accused persons who were charged with the appellant and whose evidence seriously implicated the appellant. He came to the conclusion, on the evidence before him, that there was no common intention formed by the accused persons to use violence, and that the act which resulted in the death of the deceased was an entire and independent act of the appellant.





The following four additional grounds of appeal were filed and argued:—

"1. That the learned trial Judge misdirected himself by stating that the other accused persons who gave evidence against the 3rd accused were not to be considered as accomplices.

2. That the conviction of the appellant was based in uncorroborated evidence of accomplices.

3. That the record of proceedings was incomplete—Exhibits 1 and 3 not shown on record.

4. That the accused should not have been called upon at the close of the case for the prosecution."

Ground 3 was not seriously argued and may be considered abandoned.

Arguing grounds 1 and 2 of the additional grounds Counsel directed our attention to the definition of accomplice in Section 79 of the Penal Code and pointed out from the record portions where 1st, 2nd and 4th accused persons can be regarded as actively assisting the appellant in the commission of the crime. He then submitted that these men being accomplices themselves, their evidence cannot corroborate the evidence of the taxi driver (3rd witness for the prosecution) whom the Judge has found to be an accomplice. This argument was, however, disposed of by inviting Counsel's attention to Section 177(2) of the Evidence Ordinance which reads:—

"(2) Where accused persons are tried jointly and any of them gives evidence on his own behalf which incriminates a co-accused the accused who gives such evidence shall not be considered to be an accomplice."

Further, the position of accused persons tried jointly and the duty of the Judge were considered by this Court in the case *Reg. v. Onuegbe and Others* (1957) 2 F.S.C. 10 at page 12 and there is hardly any need for a restatement of the law here. In the present case, the learned trial Judge gave himself the necessary warning. This is what he said:—

"But the other accused who gave evidence against the 3rd accused are not to be considered as accomplices. This does not, of course, prevent me from treating their evidence with reserve. Each was obviously anxious to disclaim any responsibility and was under the strongest temptation to unload the blame on to somebody else. I have given careful consideration to the 3rd accused's allegation that the accused

and presumably Nwosu have deliberately tried to frame him as an act of revenge. I am unable to accept this allegation. I observed no indication in the evidence of the accused that they were prejudiced against the 3rd accused or that they were acting in concert to tell a fabricated story against him."

In regard to ground 4 of the appeal, Counsel drew our attention to the record of appeal and invited us to say that at the close of the case for the prosecution there was no evidence against the appellant and he should not have been called upon to offer a defence. It was submitted that although Counsel for the appellant did not make this submission to the Court, it was the duty of the Court, after the close of the case for the prosecution, to draw attention to it and to discharge the accused person. Reliance is placed on the decision in the case of *Eregie v. Inspector-General of Police* 14 W.A.C.A. 453, and the exposition of the law on submission of no case to answer made in *R. v. Ajani* 3 W.A.C.A. 3 at page 7, by Kingdon, C.J.

The sum total of the argument is that the learned trial Judge by allowing the appellant to give evidence put him into a position unnecessarily that he could comment unfavourably about him. Further, that opportunity was laid open for the other accused persons to go into the witness box and implicate the appellant.

The learned Solicitor-General submitted that on this point of no case to answer, cases are divided into two categories—

(1) If it was not submitted to the Judge that there was no case to answer, it was the duty of the Judge to look at the case on the whole and not to withdraw the case from the jury. He referred to the following cases: *R. v. George* 1 Cr. App. R. 168; *R. v. Jackson* 5 Cr. App. R. 22 at page 23.

(2) The other type of cases in which submissions were made by Counsel after the case for the prosecution had been closed. The following cases were referred to by him: *R. v. Joiner* 4 Cr. App. R. 64; *R. v. Power* 14 Cr. App. R. 17 at page 18 and [1919] 2 K.B. 572 at pages 573-574; *R. v. Ajani* 3 W.A.C.A. 3 at page 7; and *Reg. v. Abbott* [1955] 2 Q.B. 497; [1955] 2 All E.R. 899 at page 900, where *R. v. Power* (*supra*) was fully dealt with. In *Abbott's* case, Goddard, C.J., pointed out that it was wrong to say that *R. v. Power* is an authority for saying that the Appeal Court will sustain a conviction resulting from a case where a judge wrongly overruled a submission of no case to answer and called upon an accused





person whose evidence or that of his co-accused implicates him in the crime. The learned Chief Justice (Goddard, C.J.) at page 505 of the Report (*Reg. v. Abbott* (*supra*)) continued:

"It is then said that *Rex. v. Power* has given a different interpretation to section 4 of the Criminal Appeal Act. There is no question that in *Power's* case a submission had been made on behalf of an appellant to the Comission at the Central Criminal Court which he overruled. Both prisoners went into the witness-box; one prisoner gave evidence against the other, and certainly supplied a great deal of evidence against the appellant. The Court in that case actually quashed the conviction on the ground that the summing-up was entirely defective and had not put the appellant's case to the jury at all. That was the decision of the court, and it is rather remarkable that in the report in the Times Law Reports that is the point which is reported, the point concerning the giving of evidence by one prisoner against the other not being dealt with at all."

To put the position clearly, if at the close of the case for the prosecution, a submission of no case to answer was wrongly overruled and the case continued resulting in the conviction of the accused, an appeal against the conviction resulting from the proceedings will succeed.

The alternative case submitted to us, however, in this appeal is where Counsel made no submission of no case at the close of the case for the prosecution. On this point the learned Solicitor-General referred us to the civil case *Payne v. Harrison* [1961] 3 W.L.R. 309 at page 313 and also *Eregie v. Inspector-General of Police* 14 W.A.C.A. 453. In the latter case reference was made to section 286 of the Criminal Procedure Ordinance which reads:—

"286. If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the defendant sufficiently to require him to make a defence the court shall, as to that particular charge, discharge him".

This is similar wording as section 191(3) of the Criminal Procedure Code of the Northern Region, with which we are concerned. We have been asked to say that in such a case the word "may" in the section gives the trial Judge a discretion in the matter; that he is not bound to withdraw the case or discharge the accused but he may look at the case as a whole. It was submitted that a proper consideration of *Reg. v. Abbott* (*supra*) supports this view.

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The point, we feel, will have to be decided sooner or later, but we think in deciding this appeal it is hardly necessary to give an opinion. We have considered the whole evidence offered by the prosecution before the trial Judge in this case, and we are not able to agree with Counsel for the appellant that, at the close of the case for the prosecution, had a submission of no case been made, it would have succeeded. Counsel for the appellant in the court below must undoubtedly have come to the same conclusion and did not follow up such submissions made by each of the Counsel defending the other three accused persons which were overruled by the learned trial Judge.

We observe from the record that at the close of the case for the Crown it was not possible on the evidence to say that the taxi driver (3rd witness for the prosecution) was an accomplice. His role in that respect became clear after the accused persons had given their evidence; nor did the evidence as a whole when the prosecution closed its case point to the crime having been committed by one rather than the other of the accused persons; the evidence points to the fact that they were acting in concert when they all got out of the taxi cab and proceeded together towards the Post Office.

At the stage when the prosecution closed its case, the question for the Judge was not whether the amount of evidence given against the accused persons was enough to secure convictions but whether there is evidence against them—circumstantial or direct—enough to put them on their defence, or requiring some explanations from them. This point was considered in case *Peg. v. Coker* 20 N.L.R. 62 at page 63, and this Court has sufficiently dealt with it in the case *Reg. v. Ogucha* (1959) 4 F.S.C. 64 at page 65. The 4th additional ground of appeal must, therefore, fail.

None of the original grounds of appeal put up by the appellant himself was argued before us or could be argued at all.

The appeal must, therefore, be dismissed.

*Appeal dismissed.*



## A. G. LEVENTIS AND COMPANY LIMITED v. JOSEPH M. C. OBIAKO

[High Court (Reed, Ag. S.P.J.), February 6, 1961]
[Jos—Application in Civil Suit No. JD/95/1960]

*Practice and procedure—default in pleading—extension of time—no extraordinary delay—no special circumstances—usual order—extension on terms.*

The plaintiffs were ordered to file a statement of claim by 23rd September, 1960. Without having complied with the order, they obtained an extension of time to 11th November, 1960, and on 11th January, 1961, filed an application for a further extension. On 23rd January, 1961, the defendant applied to have the case struck out. At the hearing of the two applications on 6th February, 1961, the only explanation of the plaintiffs' default was that it was due to an oversight on the part of their counsel.

*Held:* There having been no extraordinary delay on the part of the plaintiffs, the court would follow the usual course in the absence of special circumstances such as excessive delay, by giving the plaintiffs time to take the next step upon their paying costs.

The plaintiffs' application for an extension of time was allowed and the defendant's application to have the case struck out was dismissed, and the plaintiffs were ordered to pay the costs of both applications.

Case referred to:

*Eaton v. Storer* (1882) 22 Ch.D. 91, followed.

(*Editorial Note.*—*See Ojikutu v. Odeh*, 14 W.A.C.A. 640, citing *Collins v. Vestry of Paddington*, (1880) 5 Q.B.D. 368, *per* Thesiger, L.J., at page 381).

MOTIONS IN CIVIL SUIT

*Quinn* for plaintiffs;
*Agbakoba* for defendant.

**Reed, Ag. S.P.J.:** On 9th September, 1960, an order for pleadings was made and the plaintiffs were ordered to file a statement of claim within fourteen days. They failed to do so and on 4th November, 1960, the court extended the time within which the statement of claim might be filed to 11th November, 1960. The plaintiffs failed again to file their statement of claim and on 11th January, 1961, they filed an application for a further extension of time within which to do so. On 23rd January, 1961, the defendant filed an application to have the suit struck out on the ground that the plaintiffs had failed to comply with the order of the court. These two applications are now before me for decision. The only explanation before the court of the plaintiffs' failure to comply with the order of the court is counsel's frank admission that he overlooked the matter on account of pressure of work.

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Reed, Ag. S.P.J.

In *Eaton v. Storer* (1882) 22 Ch.D. 91 the facts were as follows: In an action in the Court of the County Palatine of Lancaster statement of claim and defence had been delivered. The time for delivering a reply expired on 25th July and the time was extended to 22nd August. On that day the plaintiff applied for further time and the time was extended to 19th September. On 26th September, no reply having been delivered, the defendant served notice of motion for judgment. On the same day the plaintiff was given leave to serve notice of motion for the following day to have a summons for leave to deliver a reply heard by him. On 27th September the summons was dismissed with costs on the grounds that there had been "gross delay in putting in so simple a pleading as a reply, and the plaintiff was not entitled to further indulgence". No explanation of the delay had been given. On appeal it was held that the application should have been granted on the terms of the plaintiff paying the costs of it. Jessel M.R. said at page 92—

". . .the usual course is to give the plaintiff time to take the next step upon his paying costs, which is a sufficient punishment, and will prevent the rules from becoming a dead letter. This course will not be departed from unless there is some special circumstance such as excessive delay".

The court went on to say that in the case before them there had been "no extraordinary delay".

In my opinion there has been "no extraordinary delay" in the case before me and I shall allow the plaintiffs' application for an extension of time within which to file statement of claim upon payment of costs. It follows that the defendant's application to have the suit struck out must be dismissed.

(The learned Acting Senior Puisne Judge then dealt with another application in the suit, and concluded):—

The plaintiffs are ordered to pay the costs of all these applications which are assessed at £7-12*s*-0*d*.

*Plaintiffs' application allowed;*
*Defendant's application dismissed;*
*Plaintiffs to pay costs of both applications.*



## ALBERT E. NWOBU AND ANOTHER *v.* COMMISSIONER OF POLICE

[Federal Supreme Court (Adetokunbo C.J.F., Taylor, F.J., and Bairamian, F.J.)—June 22, 1962]
[Lagos—Appeal No. F.S.C. 382/1961]

*Criminal procedure—sentence—appeal—sentence on summary trial—increase of sentence on appeal—appeal from magistrate's court to High Court—increase of sentence beyond that which magistrate could impose at trial—Northern Region High Court Law*, 1955, *s.* 48(*a*)(*ii*).

*Appeal—increase of sentence—sentence on summary trial—* ibid.

Section 48(*a*)(*ii*) of the Northern Region High Court Law, 1955, empowers the High Court, in giving judgment in an appeal from a conviction by a magistrate, to increase the sentence, and imposes no express limitation; nevertheless, the power to increase sentence is subject to the limitation that the sentence may not be increased beyond the maximum which the trial magistrate could have imposed.

The appellants elected summary trial before a magistrate of the first grade and were convicted and sentenced to two years' imprisonment each, which were the maximum sentences the magistrate had jurisdiction to impose. On appeal against conviction, the High Court increased the sentences, relying on the power given by section 48(*a*)(*ii*) of the High Court Law.

*Held:* The High Court had no power to increase the sentences beyond the maximum which the trial magistrate could have imposed.

CRIMINAL APPEAL

*J. A. Cole* for the appellant,
*A. A. Isikalu* for the respondent.

**Bairamian, F.J.,** delivering the judgment of the Court: The appellants, who were employees of the West African Airways Corporation at Kano, were convicted on summary trial by consent, the first of stealing a box of gold worth about £7,000 from an aeroplane in transit, and the second of receiving the box knowing it to have been stolen. The trial magistrate imposed the longest term he could within his jurisdiction—two years on each.

Both appealed against conviction, but without success. After dismissing the appeals, the High Court, being of opinion that the sentence was inadequate to the offence, invited argument on the question whether it was not possible to increase the sentence, having regard to the provision in section 46 of the Northern Region High Court Law, 1955, which

empowers the High Court in paragraph (*a*)(*ii*), on appeal against conviction by a magistrate, to—

"Alter the finding, maintaining the sentence or, with or without altering the finding, reduce or increase the sentence."

For the appellants the argument was that, if the Court could increase the sentence, it had no power to increase sentence beyond the term which the magistrate could have imposed. The High Court pointed out that in appeals from Native Courts, section 70(1)(*b*)(*iii*) of the Native Courts Law expressly limited the High Court to making an order which the trial court could have made; also that in appeals from the High Court as a court of trial there was no power to interfere with the sentence on dismissal of an appeal against conviction; but that in an appeal from a magistrate against conviction, section 48 of the High Court Law empowered the Court to increase the sentence but imposed no limit on the power conferred. The Court held that there was nothing in section 48 to prevent the imposing of a sentence legal under the section charged but in excess of the trial magistrate's jurisdiction, and increased the term of the first appellant to five years and that of the second to three.

We declined to give them leave to appeal against conviction, but assigned counsel to argue for them their complaint against the increase of sentence.

The argument for them is that, although the offences charged were such that the magistrate could have held a preliminary inquiry and committed them to the High Court for trial, where they could have been punished more heavily, he did not do that but tried them summarily; that the extent of punishment in the magistrate's court could be no more than he could have imposed upon summary conviction; and that the High Court could not exceed that limit on appeal from what was a summary conviction.

The provision in section 48 empowers the High Court to increase the sentence, and imposes no express limitation. It does not say that the increased sentence must not exceed the maximum which the offence carries; but the High Court, rightly, of course, recognised that limitation, and read it into the provision. There are reasons why the other limitation should also be accepted.

When a magistrate with powers up to two years tries a person summarily for an offence which carries more, he does so because he considers that two years would be enough in that person's case, in the event of conviction. If, after





conviction, the magistrate were to think that the convicted person ought to have more than two years and imposed a longer term, that person could complain on appeal against the illegality of the sentence, and the High Court would have to reduce it to two years at any rate. The course taken by the High Court in the present case means that the High Court may do something which it would have frowned upon if done by the magistrate for precisely the same reason, namely that of giving the accused an adequate sentence in the circumstances of the case. In effect, the increasing the sentence beyond the magistrate's powers means that in the High Court's view he ought not to have tried the case summarily. That may have been so, but, with respect, we do not think that an appeal against conviction can be the means of rectifying that sort of mistake: if it could be, then the right of appeal would turn out to be a trap—which in our opinion could not have been intended. We think that the power to increase sentence is subject to both limitations—(1) the maximum which the offence carries, and (2) the maximum which the trial magistrate could impose. That seems to have been the view taken over the years during which the provision in section 48 of the High Court Law has been in operation; it is an old provision which goes back to 1945 and earlier, and the fact that there is no reported decision on the point lends support to the view that the provision is subject to those two limitations.

It is not altogether possible to avoid frivolous appeals against conviction: if, for example, a person is convicted of an offence punishable with twelve months and sentenced to that term in full, he can appeal against conviction frivolously perhaps, but without any risk of his sentence being increased. The position in the case of a person who consents to summary trial and is given the maximum that the magistrate can give, is that he can appeal against conviction without risk of more.

It occurs to us to add that the order made in an appeal is supposed to substitute, for an erroneous order made by the magistrate, the right order which he ought to have made; on principle, an order which if made by him would have been illegal, cannot with propriety be directed to be entered in his records, at any rate not unless the law expressly authorises it to be done—which is not the case here.

The above considerations were not drawn to the notice of the learned judges who heard the appeal of the appellants. They are in our opinion cogent reasons for allowing the appeal against the increase of sentence. The following order is made:

A. E. Nwobu and Another v. C. of P.

Bairamian, F.J.

"The appeals against the order made on 5th August, 1961, by the High Court of the Northern Region in Appeal No. K/43CA/1961 brought by Albert E. Nwobu and Japhet Mordi, who were convicted by the Magistrate Grade I in case No. KA/450C/60 on 22nd March, 1961, are disallowed insofar as the appeals relate to the order affirming the conviction, but the appeals are allowed insofar as the order increases the terms of imprisonment for two years on each of the appellants imposed by the Magistrate, and those terms are restored."

*Appeals against increased sentences allowed.*



## COMMISSIONER OF POLICE *v.* EMMANUEL ANTHONY

[High Court (Skinner, J.)—May 10, 1962]
[Kaduna—Criminal Matter No. Z/CS/1/1962]

*Criminal procedure—committal to another court for sentence—committal after summary conviction on accused's admission before evidence taken—Criminal Procedure Code, ss.* 157(1) *and* (2), 161(2), 257(1)(*b*)*; Criminal Procedure (Punishment on Summary Conviction) Order in Council,* 1960, *N.R.L.N.* 86 *of* 1960.

The power given by section 257(1)(*b*) of the Criminal Procedure Code of sending a convicted person for sentence to a court having the necessary powers of sentence can only be exercised in cases in which a plea of guilty has been made and accepted on a specific charge framed after supporting evidence has been heard. It is not exerciseable after a summary conviction under section 157 of the Code upon the accused's admission of the offence as started to him under section 156 when he appears in court.

The accused was brought before a magistrate of the first grade on a complaint of theft. The First Information Report was read to him, and he said "I admit. The information is correct." The case was adjourned for a report on the accused's previous convictions. When it was resumed the magistrate convicted the accused and it then appeared that the accused had five previous convictions for stealing. The magistrate committed the accused to the High Court for sentence.

*Held:* The committal for sentence was invalid, and the case should be returned to the magistrate in order that he might proceed to sentence.

*Per curiam:* It is quite clear from the provisions of section 157(2) of the Criminal Procedure Code that punishment on a summary conviction is limited to such maximum term or fine as the Governor in Council may specify. The maximum term so specified is three months and it follows that the High Court has no greater power of punishment, in such circumstances, than that possessed by the lower court.

COMMITTAL FOR SENTENCE

Accused in person;
*Henderson, Senior Crown Counsel,* for Commissioner of Police.

**Skinner, J.:** A summary trial before a magistrate is begun by stating the particulars of an offence to the accused and asking him if he has cause to show why he should not be convicted. If the offence is admitted the magistrate must decide whether or not to convict on the admission—that is to say, without evidence. If he decides to convict there is no necessity for framing a formal charge and the

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immediately proceeds to sentence. The sentence however is in these circumstances restricted to such term as may be ordered by the Governor in Council. The maximum term was fixed at three months' imprisonment in the case of all grades of magistrates by the Criminal Procedure (Punishment on Summary Conviction) Order in Council, 1960.

This case has been committed to me for sentence, purportedly in accordance with section 257(1)(*b*) of the Criminal Procedure Code which provides as follows—

"Whenever a court having jurisdiction—. . . .(*b*) accepts a plea of guilty from a person, and after convicting such person is of the opinion that he ought to receive a punishment different in kind from, or more severe than that, which such court is empowered to inflict, it may record such opinion and submit the proceedings and send the accused to a court having the necessary powers of punishment or to the High Court."

A plea of guilty presupposes a charge. There was no formal charge here and I am of the opinion that this subsection applies only to cases in which a plea of guilty has been made and accepted on a specific charge framed after supporting evidence has been heard (*vide* section 161(2)). The procedure of convicting on an accused's admission under section 157(1) is, I apprehend, designed to facilitate and expedite the disposal of petty criminal offences not meriting a punishment more severe than that prescribed by the Order-in-Council. Where a greater punishment appears to be merited the magistrate should decline so to convict and should proceed instead to hear supporting evidence and frame a charge if such evidence so warrants. In the present case, the learned magistrate recorded the accused's admission as required by section 157(1) of the Criminal Procedure Code and then adjourned for two weeks to enable enquiries to be made as to whether there were any previous convictions. When the case was called on again on 30th April a conviction under section 288 of the Penal Code was recorded and thereafter the prosecutor produced a list of previous convictions whereupon the accused was committed for sentence. That was, with respect, "putting the cart before the horse" for had these convictions been made known to the magistrate immediately the case was resumed he would no doubt have decided not to convict on the accused's admission and would have proceeded with trial. But once he had convicted the question of the accused's bad record became largely academic in view of the restricted power of punishment. The committal for sentence does not help, it being quite



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clear from the provisions of section 157(2) of the Criminal Procedure Code that punishment on such a conviction is limited to such maximum term or fine as the Governor in Council may specify. The maximum term so specified is three months and it follows that the High Court has no greater power of punishment, in such circumstances, than that possessed by the lower court.

This is an unfortunate case, it being manifest that the accused deserves a more severe sentence than that which may now be lawfully passed on him. I consider that this sort of situation might in future be avoided by greater alertness on the part of police prosecutors who should invite the court not to convict on an admission of a petty offence where there is any doubt as to the accused's previous character.

The committal for sentence being invalid, the case is returned to the magistrate in order that he may proceed to sentence in accordance with the law.

*Case returned to magistrate for sentence.*

# C. ANUEYIAGU AND ANOTHER *v.* DEPUTY SHERIFF, KANO

[Federal Supreme Court (Ademola, C.J.F., Unsworth, F.J. and Taylor, F.J.)—January 19th, 1962]
[Lagos—Appeal No. F.S.C. 218/1961]

*Crown proceedings—claim against private person—officer authorised by law to prosecute—Deputy Sheriff—security taken by Deputy Sheriff for value of attached property claimed by third party—whether claim to enforce security properly brought in name of Deputy Sheriff—Petitions of Right Ordinance*, 1948 *Laws of Nigeria*, *Cap.* 167, *s.* 2; *Sheriffs and Civil Process Ordinance*, ibid., *Cap.* 205, *s.* 32.

*Execution—interpleader—security for value of attached property claimed—bond for stated amount—whether enforceable for amount stated or for amount of any loss or diminution in value of the property—Sheriffs and Civil Process Ordinance*, ibid., *s.* 32 (1)(*b*), (2).

The Deputy Sheriff, the respondent, seized a motor lorry in execution of a judgment debt and a third party claimed the lorry. The Deputy Sheriff commenced interpleader proceedings, and pending the result of the proceedings he released the lorry to the claimant after taking security for the purposes of section 32(1)(*b*) of the Sheriffs and Civil Process Ordinance in the form of a bond entered into by the appellants in the sum of £700 conditioned for the successful prosecution of the claim and otherwise to remain in full force and virtue. The claim failed and the claimant returned the lorry to the Deputy Sheriff, who however refused to accept it and sued the appellants on the bond in the High Court for the full £700, which the High Court awarded. On appeal—

*Held*, (1) The claim for the enforcement of the bond was properly brought in the name of the Deputy Sheriff as an officer authorised by law to prosecute that claim within the meaning of section 2 of the Petitions of Right Ordinance.

(2) The bond must be construed as a security against any loss or diminution in the value of the lorry, and could not be enforced for the full £700 unconditionally.

Accordingly, the order of the High Court was set aside and the respondent was awarded such sum as the High Court might assess as the difference between £700 and the sum which the lorry might reasonably have been expected to raise if it had been sold at the time when it was returned to the Deputy Sheriff, and the case was referred back to the High Court to make that assessment.





CIVIL APPEAL

*G. N. A. Okafor* for the appellants.
*P. Oakey* for the respondent.

**Unsworth, F.J.:** This is an appeal from a decision of the High Court of the Northern Region of Nigeria, awarding the respondent the sum of £700 under a bond, which was in the following terms:—

"KNOW ALL MEN by these presents that we C. Anueyiagu of 93 Church Road, Kano, and N. Nwofo of 18 Abeokuta Road Kano are jointly and severally held and firmly bound to THE DEPUTY SHERIFF in the sum of £700 to be paid to the said DEPUTY SHERIFF or his certain attorney, executors, administrators, or assigns, for which payment to be well and truly made we bind ourselves, and each and every one of us, in the whole, our and each of our heirs, executors, and administrators jointly and severally, firmly by these presents. SEALED with our seals, and dated this 18th day of May, 1959. WHEREAS A WRIT of a Fifa has been issued by the said judgment creditors upon which Bedford Lorry KB1762 has been attached by the said Deputy Sheriff, AND WHEREAS O. C. Nwora has claimed as owner of the said property and enters into a bond with two Sureties to prosecute the said Claim. Now the condition of this obligation is such, that if the above bounden O. C. Nwora do successfully prosecute the claim then this obligation shall be void and of none effect, otherwise the same shall remain in full force and virtue."

Counsel for the appellants filed and argued a number of grounds of appeal, but after considering the record, and the submissions of Counsel, I have reached the conclusion that there are only two points of substance for consideration, namely—(*a*) whether the claim for the enforcement of the bond can be brought in the name of the Deputy Sheriff; (*b*) whether the bond must be construed merely as a security against the loss or diminution in value of the property pending the decision of the court in the interpleader proceedings.

The Deputy Sheriff entered into this bond in his official capacity as an officer of the Government and any claim to enforce the bond is therefore a Government claim to which the Petitions of Right Ordinance (chapter 167 of the 1948 edition) applies. The title to that Ordinance is misleading in that the Ordinance deals not only with petitions of right, but also with claims by the Government against private parties. Section 2 of the Ordinance provides:—

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"Claims by the Government of the Federation or a Regional Government or by any department of the Government of the Federation or of a Regional Government against any private person shall be brought by the Attorney-General of the Federation or of the Region as the case may be, or by any officer authorised by law to prosecute such claims on behalf of the Government."

The question for decision on this first point is, therefore, whether the Deputy Sheriff in his official capacity, is an officer authorised by law to prosecute the claim on the bond. The office of Sheriff is created by the Sheriffs and Enforcement of Judgment and Orders Ordinance (chapter 205 of the 1948 edition) and under the definitions in that Ordinance the Sheriff includes a Deputy Sheriff. The Ordinance clearly contemplates in Form 9 of the Schedule, that the Sheriff may be a party in his official capacity to legal proceedings, but it does not expressly provide that he may sue in that capacity. Section 32 of the Ordinance, however, authorises the Sheriff to take a bond in his official capacity, and it seems to me to follow that the legislature must be taken to have authorised him to sue on that bond. In these circumstances I think that the claim for the enforcement of this bond was properly brought in the name of the Deputy Sheriff.

The question whether the bond can be enforced as a security only, necessitates consideration of the circumstances in which the bond was given. The history of the matter is that on the 20th February, 1959, the Deputy Sheriff seized in execution a motor lorry presumed to belong to a judgment debtor named Modozie. A third party named Nwora claimed the lorry and, pending the result of the interpleader proceedings, the Deputy Sheriff released the lorry to the claimant after the two appellants had entered into the above-mentioned bond. The claimant lost the interpleader proceedings and thereupon returned the lorry to the Deputy Sheriff as the Court had held that it did not belong to him. The Deputy Sheriff refused to accept the lorry but sought to enforce the bond for the recovery of the full £700.

Counsel for the Deputy Sheriff argued that he was entitled to look to the strict terms of the bond. On the other hand, Counsel for the appellants submitted that the Court must look to the law under which the bond was taken in order to ascertain whether it is a security only. The bond was taken by the Deputy Sheriff under section 32 of the Sheriffs and Enforcement of Judgments and Orders Ordinance, which provides:—



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"(1) Where a claim is made to or in respect of any property attached in execution under process of a court, the claimant may—

(*a*) deposit with the Sheriff either—

(*i*) the amount of the value of the property claimed; or

(*ii*) the sum, if any, which the Sheriff is allowed to charge as costs for keeping possession of the property until the decision of the court can be obtained on the claim; or

(*b*) give the Sheriff in the prescribed manner security for the value of the property claimed.

"(2) For the purpose of this section the amount of the value of the property claimed shall in case of dispute be fixed by appraisement and where that amount is deposited as aforesaid it shall be paid by the Sheriff into court to abide the decision of the court upon the claim.

"(3) In default of the claimant complying with the foregoing provisions of this section, the Sheriff shall sell the property as if no such claim had been made, and shall pay into court the proceeds of the sale to abide the decision of the court."

I agree with the submission of the appellants that the bond must be read subject to the provisions of section 32, as the Deputy Sheriff had no authority to take the bond except in accordance with the provisions of that section. It seems to me that the section is designed to protect the Sheriff against any loss or diminution in the value of the property, pending the result of the interpleader proceedings. Any other construction would mean that the assets of the judgment debtor would be gratuitously enhanced at the expense of the sureties. The decision in the interpleader proceedings was that the lorry belonged to the judgment debtor, and if the security is then enforced in full, it would mean that the judgment debtor's assets would include both the lorry and the value of the lorry. On the other hand, the claimant or his sureties would lose both the lorry and its value.

For the reasons mentioned above I am of the view that the bond in this case must be construed as a security against any loss or diminution in the value of the lorry. The lorry was properly returned to the Deputy Sheriff on the termination of the interpleader proceedings, and the Deputy Sheriff should then have sold the lorry and enforced his bond only to the extent that the amount recovered on the sale was less

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than the value of the lorry at the time he released it. In this respect I think that the value of the lorry at the time it was released must be assessed at £700, as this is the sum mentioned in the bond and this value was not disputed under subsection (2) of section 32.

For the reasons mentioned above, the appellants must succeed and the only remaining matter for consideration is the relief which should be granted by this Court. It was submitted on behalf of the appellants that the whole claim must fail, but I do not take this view. I think that the pleadings are wide enought to enable the Court to enforce the bond as a security, and that is certainly the course that the justice of this case would dictate. I would accordingly set aside the decision of the High Court and award the Deputy Sheriff such sum as the High Court may assess as the difference between £700 and the sum which the motor lorry might reasonably have been expected to raise if it had been sold at the time it was returned to the Sheriff on the termination of the interpleader proceedings. The case should accordingly be referred back to the High Court for this purpose. I appreciate that assessment will be difficult at this stage, but the Judge must make the best estimate that he can on the information available.

The appellants are entitled to costs in this Court which I would assess at 38 guineas.

I would not set aside the award of costs in the High Court, as the Deputy Sheriff would have been entitled to the costs if he had succeeded to the extent mentioned in this judgment. The costs of the further proceedings is a matter for the High Court.

**Ademola, C.J.F.:** I concur.

**Taylor, F.J.:** I concur.

*Appeal allowed.*



## BANQUE DE L'AFRIQUE OCCIDENTALE *v.* ALHAJI BABA HABA SHARFADI AND OTHERS

[High Court (Bate, J.)—May 17, 1962]

[Kano—Suit No. K/34/1962]

*Evidence—affidavit—averment of facts or circumstances—extraneous matter—averment of opinion—averment of legal conclusions—Evidence Ordinance, ss.* 85, 86.

*Practice and procedure—undefended list—notice of intention to defend—notice signed and delivered by solicitor, not by party—whether sufficient—Supreme Court (Civil Procedure) Rules, O.* 3, *r.* 11.

——— ——— ——— *affidavit in support of notice—averment that sum claimed is not yet due—question to be decided by Court*—ibid. §——— ——— ——— ——— *counter affidavit, whether admissible*—ibid.

The plaintiffs' suit was entered on the undefended list. They claimed under a written agreement between themselves and the first defendant as principal and the second and third defendants as guarantors. Notice of intention to defend signed by the defendants' solicitor was delivered on behalf of all the defendants. It was supported by two affidavits, one sworn by the defendants' solicitor and the other sworn by the first defendant.

The plaintiffs moved for judgment on the ground that the notice of intention to defend and the affidavits did not comply with order 3, rule 11, of the Supreme Court (Civil Procedure) Rules, because they had been delivered, and the notice and one of the affidavits had been signed, by the solicitor and not by the defendants themselves.

*Held* (1): Rule 11 does not contain any express requirement that the notice and affidavit therein mentioned should be signed and delivered by the defendant himself, and such requirement is not to be inferred.

The solicitor's affidavit stated in paragraph (2) that the deponent was informed and verily believed that the sum claimed in the suit was not yet due; in paragraph (3) that the deponent had studied the written agreement and was of the opinion that it was not binding on the defendants; and in paragraph (4) that all the defendants had a good defence to the suit.

The plaintiffs objected to paragraphs (3) and (4) as contravening the provisions of sections 85 and 86 of the Evidence Ordinance.

*Held*, (2): Paragraph (3) was for the most part an expression of opinion and not a statement of facts or circumstances, and the only part which was not an expression of opinion could not stand alone, and paragraph (4) contained only an opinion and a legal conclusion; and these paragraphs should be struck out.

*Held*, further, (3): Paragraph (2) of the solicitor's affidavit expressed the deponent's views on a question which was to be decided by the Court, and

(4): The solicitor's affidavit in no way supported the notice of intention to defend.

*Quaere*, whether Counsel should give evidence in a case in which he is professionally engaged.

The first defendant's affidavit showed that he was illiterate and would rely upon the Illiterates Protection Ordinance by way of defence. The plaintiffs asked leave to file a counter affidavit to show that the agreement on which they relied was prepared by a legal practitioner.

*Held*, (5): It is not the intention of Order 3 to enable the Court to consider the merits of a defence before trial. Notice of intention to defend having been delivered together with an affidavit setting out a ground of defence in relation to the first defendant, whose defence was also the defence of the second and third defendants, his guarantors, rule 11 had been complied with and the suit must be entered in the general list for hearing.

APPLICATION IN CIVIL SUIT

The affidavit of the defendants' solicitor contained the following averments—

"(1) That I am the Solicitor for all the three Defendants in the above mentioned matter.

"(2) That I am informed by the 1st Defendant and I verily believe that the sum of £9,506-11*s* now claimed by the Plaintiff is not yet due to the Plaintiff.

"(3) That I have studied the agreement referred to as 'B' in the affidavit of Albert Derasse of 5th March, 1962 and I am of the opinion that it is not binding on any of the Defendants and I have so advised.

"(4) That as such all the Defendants have a very good defence to this Suit."

*R. S. Horn* for plaintiff,
*F. A. Thanni* for defendants.

**Bate, J.:** The plaintiffs' action has been entered in the Undefended List. A notice of intention to defend has been delivered to the Registrar within the time allowed; it is signed by the solicitor for all the defendants. It is supported by two affidavits; one is sworn by the same solicitor, the other by the 1st defendant. The second and third defendants who are sued as guarantors of the 1st Defendant have filed no affidavits.

The plaintiffs ask for judgment on the ground that the notice of intention to defend and the affidavits do not comply with rule 11 of Order 3 of the Supreme Court (Civil Procedure) Rules. It is contended that this rule requires the notice and affidavit to be signed and delivered by the defendant himself and it is not sufficient for this to be done by his Counsel or Solicitor. I am unable to agree with this. Rule 11 does not contain any such express requirement and I do not consider that it is to be inferred.





Then it is objected that paragraphs 3 and 4 of the solicitor's affidavit should be struck out on the ground that they contravene the provisions of the Evidence Ordinance relating to the contents of affidavits. Paragraphs 3 and 4 of the affidavit in question are as follows:—

"(3) That I have studied the agreement referred to as "B" in the affidavit of Albert Derasse of the 5th March, 1962 and I am of the opinion that it is not binding on any of the Defendants and I have so advised.

"(4) That as such all the Defendants have a very good defence to this Suit."

Section 85 of the Evidence Ordinance provides that "Every affidavit used in the court shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true". Section 86 provides that "An affidavit shall not contain extraneous matter by way of objection, or prayer, or legal argument or conclusion".

Paragraph 3 of the affidavit to which objection is taken is for the most part an expression of opinion and not a statement of facts or circumstances. The only part which is not an expression of opinion cannot stand alone. Paragraph 4 contains an opinion and a legal conclusion. I therefore agree that these two paragraphs are objectionable and order that they shall be struck out. Paragraph 1 of the affidavit is merely introductory. Paragraph 2 expresses the deponent's views on a question which has to be answered by this Court. Consequently the affidavit in no way supports the notice of intention to defend. I say nothing with regard to the question whether Counsel should give evidence in a case in which he is professionally engaged.

But there must also be considered the affidavit of the 1st defendant. This shows that the 1st defendant is illiterate and will rely upon the Illiterates Protection Ordinance by way of defence. No objection has been taken to this affidavit. I find that it sets out a ground of defence. But the plaintiffs ask leave to file a counter affidavit to show that the agreement upon which they rely was prepared by a legal practitioner and that consequently the Ordinance does not apply. It is tempting to grant the application so that the adequacy of the defence may be tested at once and the matter perhaps disposed of with less expenditure of time and trouble than if it were to come to trial in the ordinary course. But Order 3 makes no provision for the filing of counter affidavits for this or any other purpose

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and I do not think that the intention of the Order is to enable the court to consider the merits of a defence before trial. Rule 11 provides that if the defendant within the prescribed time delivers a notice of intention to defend and an affidavit setting out the grounds of his defence the suit shall be entered in the general list for hearing. In the present case I find that a notice of intention to defend has been delivered together with an affidavit setting out a ground of defence in relation to the 1st defendant. There is no affidavit showing the defences of the 2nd or 3rd defendants but, since they are sued as guarantors of the 1st defendant as principal debtor, the defence of the latter is the defence of them all. I conclude that I have no alternative but to transfer the suit to the general list.

I therefore order that the suit shall be entered in the general list for hearing.

The plaintiffs shall file their statement of claim within thirty days; the defendants shall file their defences within thirty days after service of the statement of claim; and the suit shall be heard on Wednesday, 24th October, 1962.

*Suit entered on general list.*



## THE QUEEN v. AUTA BOKKOS

[High Court (Holden, J.)—September 15, 1962]
[Jos—Criminal Cause No. JD/67C/1962]

*Criminal law—gratification—public servant taking gratification in respect of official act—whether fraudulent or dishonest intention an ingredient—immaterial whether act would or would not have been performed if gratification not given—Penal Code, s.* 115(*a*).

*Words and phrases—"as a motive or reward", Penal Code, s.* 115.

The accused, a bandsman in the Jos Native Authority police force and a member of that force, received information that some groundnuts which were being offered for sale by Amadu Yola, the 3rd prosecution witness, were stolen property. Amadu Yola took the accused to the man who had given the groundnuts to him to sell, and this man confessed that he had stolen them together with some groundnut oil, some yams, a calabash, and a dish, and explained that he had sold the groundnut oil, eaten the yams and broken the calabash. All these articles had in fact been stolen in a single burglary. The accused found the dish in the house of the confessed thief, and, accompanied by Amadu Yola, recovered the groundnut oil from the person to whom it had been sold and ordered it to be taken back to the house of the man from whom it had been stolen in the burglary. This man having already resumed possession of the groundnuts, the accused said that as the complainant had got all his property back that would be the end of the matter. He demanded and accepted from Amadu Yola the sums of 5*s* and 2*s*, saying on each occasion in almost identical terms "even if trouble arises, since the thief admits he is the person who gave you the groundnuts, you should not worry." By saying that, the accused meant and was understood to mean that he had in view the possibility that trouble would not arise as far as he was concerned. At that moment he did not intend to report or prosecute the confessed thief, and he never reported or prosecuted him. He accepted the money as a motive for that forbearance. On these facts, he was convicted of an offence of accepting a gratification from Amadu Yola, other than lawful remuneration, as a motive for forbearing to do an official act, the Court holding—

(1) The gist of the offence created by section 115 of the Penal Code is a public servant taking a gratification other than legal remuneration in respect of an official act. It is not material to enquire what effect, if any, the bribe has on the mind of the receiver. Thus there is no need to establish any dishonest or fraudulent intent on the part of the accused, the offence being complete if he accepts the gratification in respect of an official act.

(2) While there must be a clear connection between the payment and the performance of the act, it need not be shown that if the bribe had not been given the act would not have been performed or would have been differently performed.

(3) The words "as a motive or reward" in section 115 appear to mean "on the understanding that the bribe is given in consideration of some official act or conduct". It will not often be possible to prove such an understanding by direct evidence of a clearly defined agreement, and it is permissible to deduce the understanding from the circumstances.

Case referred to:

CRIMINAL CAUSE

*Corcoran, Crown Counsel*, for the Crown;

*Okam* for the accused.

**Holden, J.,** after summing up the evidence and making certain findings, continued: I find it proved beyond any doubt that accused demanded and received from the 3rd prosecution witness the sums of five shillings and two shillings in connexion with the case he was then investigating in his capacity as a police constable. The only question which gives me any difficulty is to decide whether what accused did constitutes an offence under section 115 of the Penal Code. Section 115 of the Penal Code reads as follows:

"Whoever being or expecting to be a public servant accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification whatever whether pecuniary or otherwise, other than lawful remuneration, as a motive or reward—

(*a*) for doing or forbearing to do any official act; or

(*b*) for showing or forbearing to show in the exercise of his official functions favour or disfavour to any person; or

(*c*) for rendering or attempting to render any service or disservice to any person with any department of the public service or with any public servant as such,

shall be punished. . ."

Accused is without doubt a public servant. I have found as a fact that he accepted from the 3rd prosecution witness a pecuniary gratification. There is no suggestion by the defence that this seven shillings was any part of his lawful remuneration or that he had any right to charge it as a lawful fee. What I have to decide is whether he accepted the money as a motive or reward for doing or forbearing to do an official act, which seems to me to be the nearest of the three possibilities (*a*), (*b*) or (*c*) set out above.

Mr Okam has submitted that section 115 of the Penal Code requires a fraudulent intent. The wording of the section does not support this contention. There is nothing in section 115 referring to such intent. Also, section 116 referring to the taking of a gratification in order to influence a public servant expressly refers to "corrupt or illegal means", and section 122 refers to a public servant who "dishonestly receives" money which he is not authorised to receive. Further, section 115 being in almost the same wording as section 161 of the Indian





Penal Code, we are able to look to Indian authorities for guidance. It is clear from pages 378 and 379 of the 19th Edition of *Ratanlal* on The Law of Crimes that fraud or dishonesty in the public servant is not an ingredient required. It is an offence even when the act done for the bribe given is a just and proper one, and against the very person from whom the bribe was received. The gist of the offence is a public servant taking gratification other than legal remuneration in respect of an official act. It is not material to enquire what effect, if any, the bribe had on the mind of the receiver. Thus it seems clear that there is no need to establish any dishonest intent on the part of accused, the offence being complete if he accepted this money in respect of an official act.

There must be a clear connexion between the payment and the performance of the act. The words "as a motive or reward" appear to mean "on the understanding that the bribe is given in consideration of some official act or conduct"; but it need not be shown that if the bribe had not been given the act would not have been performed or would have been differently performed. Obviously, it will not often be possible to prove such an understanding by direct evidence of a clearly defined agreement, and it must be permissible to deduce the understanding from the circumstances (see *Choudhury's* case reported in A.I.R. 1917 (C) at page 850.)

In this case, accused on receiving the money on two occasions said in almost identical terms "Even if trouble arises, since the thief admits he is the person who gave you the groundnuts, you should not worry." The words "Even if trouble arises" shows that he had in view the possibility that it would not arise as far as he was concerned, and I have no doubt that was what he meant and what he was understood to mean. Taken in conjunction with the fact that he failed to report or prosecute a confessed thief, it is quite clear that it was not his intention at that moment either to report him or to prosecute him. In my view it is quite clear that the taking of these two sums of money was closely connected with the case which he was then investigating in his capacity of police constable, and the official act to which the money was connected was reporting and prosecuting a confessed thief. The facts that he was a Bandsman and not a general duties constable, and that he was not at the time of the offence on duty, are neither in my view relevant. He was without doubt a police constable. His duties are statutory, and include the apprehension of offenders. Those duties are always binding upon him till such time as he may cease to be a member of the

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force. Thus what he forbore to do, namely to arrest a confessed thief, was an official act. He received this money as a motive for refraining from doing what he refrained from doing, and I find him guilty.

*Accused convicted of offence under s.* 115(*a*).



## COMMISSIONER OF POLICE *v.* MICHAEL DAVID

[C.A. (Hurley, C.J., and F. C. Smith, S.P.J.)—January 18, 1963]
[Jos—Charge No. JD/120C/1962]

***Criminal procedure—search of premises—search without warrant—two respectable inhabitants of the neighbourhood not present—evidence of result of search, whether admissible—search not under part B of Ch. VI of Criminal Procedure Code—Criminal Procedure Code, s.*** 78(1); ***Ch. VI, ss.*** 74, 76, 77, 81, 85.

***Case stated by magistrate to High Court—question which arises in the hearing of the case—question limited by facts of case—Criminal Procedure Code, s.*** 260.

The accused's house was searched by two persons who were not police officers. They had no warrant, but made the search with the accused's permission. The search was not made in the presence of two respectable inhabitants of the neighbourhood as required by section 78(1) of the Criminal Procedure Code in respect of searches under part B of Chapter VI of the Code.

On those facts, the following question was referred for the opinion of the High Court under section 260 of the Criminal Procedure Code—"When a search of premises is conducted which does not comply with the provisions of section 78(1) of the Criminal Procedure Code is evidence of the result of the search admissible against the occupier of the premises?"

*Held*, (1) The search was not a search under part B of Chapter VI, and therefore section 78(1) did not apply to it and could create no legal consequences from the failure to carry out the search in the manner it prescribes.

(2) The only sort of question which may be referred and answered under section 260 of the Criminal Procedure Code is a question which arises in the case, and therefore the question for the Court's opinion was a question about a search not under part B.

(3) Accordingly, the answer to the question was "Yes".

CASE STATED

*Nadarajah, Crown Counsel*, for Commissioner of Police; *Ekong* for accused.

**Hurley, C.J.**, delivering the opinion of the Court: This is a reference by the Chief Magistrate, Jos, under section 260 of the Criminal Procedure Code. The reference is as follows:—

"1. The complaint contained in the First Information Report reads as follows:—

'Unlawful possession of A.T.M.N. properties:—Mr Craig of A.T.M.N. Barikin Ladi reported that at about 11.30 hrs. of date at A.T.M.N. Bukuru one Michael David was found in possession of one blue electric fan, a tin of red paint and one electric cooker'.

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"2. The facts proved on as follows:—

The accused was an employee of A.T.M.N. On 4th September, 1962 his house was searched by two A.T.M.N. security officers with the permission of the accused. The Security Officers did not have a warrant to search nor was the search made in the presence of two respectable inhabitants of the neighbourhood.

"3. It was submitted on behalf of the accused that as the search had not been carried out in accordance with the provision of Section 78(1) of the Criminal Procedure Code evidence of the search was not admissible.

"4. Section 78(1) of the Criminal Procedure Code reads as follows:—

Searches under Part B of this Chapter shall, unless the Court or Justice of the Peace owing to the nature of the case otherwise directs, be made in the presence of two respectable inhabitants of the neighbourhood to be summoned by the person to whom the search warrant is addressed.

"5. The following question is submitted for the opinion of the High Court: When a search of premises is conducted which does not comply with the provisions of Section 78(1) of the Criminal Procedure Code is evidence of the result of the search admissible against the occupier of the premises?"

Section 78 applies only to searches under part B of Chapter VI of the Code, and to searches where a search warrant has been issued as subsection (1) shows. Searches under part B are searches authorised under section 74, 76, 77, 81 or 85. Section 85 authorises a search by the direction of a justice of the peace and in his presence. Section 81 authorises a search of anybody in or about a place which is being searched who is reasonably suspected of concealing anything that is being searched for. Section 77 authorises a search for a person. Section 76 authorises a search by a police officer. Section 74 authorises a search for the purpose of an investigation, inquiry, trial or other proceeding under the Code. All these sections except section 85 provide for the search to be authorised by means of a warrant. There was no warrant in the present case, and the search was not made by the direction and in the presence of a justice of the peace under section 85. It was not a search of the accused's person and it was not a search for a person. It does not appear to have been a search by a police officer, for we are not told that the A.T.M.N. Security Officers mentioned in paragraph 2 of the reference were members of a police force. Nor does it appear to have been a search for the purpose of any proceedings under



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the Code. We think that the words "investigation, inquiry, trial or other proceeding under this Criminal Procedure Code" in section 74 must be taken as referring to proceedings already begun, not to proceedings merely intended or contemplated. This view is supported by section 75. That section authorises a police officer to apply for the issue of a search warrant under section 74 when he is making an investigation under the Code, and we have been shown no other provision for the issue of a search warrant on the application of a police officer. In this case, no proceeding under the Code seems to have begun before the search was made. No inquiry or trial has been shown to have been in progress, and the search does not appear to have been made for the purposes of an investigation under the Code, for the only investigation provided for in the Code is an investigation by a police officer under Chapter XII and the Security Officers who carried out the search were not, so far as has been shown, police officers. We conclude therefore that this search was not a search under part B of Chapter VI.

The question submitted for our opinion in paragraph 5 of the reference refers to searches generally, whether under part B or not. The question which arises on the facts stated in paragraph 2, however, is a question about a search not under part B.

The only sort of question which may be referred and answered under section 260 is a question which arises in the case, and accordingly the question to be answered here is a question about a search not under part B. Section 78 applies only to searches under part B. It did not apply to the search in this case, and it could create no legal consequences from the failure to carry out the search in the manner it prescribes.

The answer to the question submitted to us is Yes.

# COMMISSIONER OF POLICE *v.* BALA ALHAJI AND ANOR.

[C.A. (Smith, S.P.J., and McCarthy, Acting J.)—November 25, 1961]
[Jos—Appeal No. JD/59CA/1961]

*Criminal procedure—summary trial in magistrate's court—change of presiding magistrate—whether proceedings can be continued by new magistrate—Criminal Procedure Code, Chapter XVI; ss.* 158, 169; *s.* 184.

*Magistrates—magistrate continuing proceedings commenced by predecessor—summary trial—preliminary inquiry*—ibid.

*Words—"inquiry", Criminal Procedure Code, s.* 184.

Where proceedings for the summary trial of a case under Chapter XVI of the Criminal Procedure Code have been commenced in a magistrate's court presided over by a particular magistrate and another magistrate succeeds him as presiding magistrate in that court, the latter magistrate may deal with the case under the Chapter, but he must commence the proceedings *de novo*.

It is a fundamental principle that the constitution of a court must remain the same throughout a trial. A summary trial in a magistrate's court commences when an accused is brought before the court and the particulars of the offence are stated to the accused under section 156 of the Code. From that stage onwards the proceedings must continue before the same magistrate. If for any reason he does not continue the hearing then the particulars of the offence must be stated afresh to the accused, and, provided the case does not fall within section 157, such witnesses as may have given evidence before the former magistrate must be recalled to give evidence again before the new magistrate.

CASE STATED

*Nasir, Senior Crown Counsel*, for Commissioner of Police; *Ezekwe* for accused.

**Smith, S.P.J.,** delivering the opinion of the Court: This is a case stated by Mr A. R. H. Thomas, acting Chief Magistrate, under section 260 of the Criminal Procedure Code. He has submitted the following questions for the opinion of this Court:

1. Can this Court duly constituted by a magistrate other than Mr T. H. Williams, continue the hearing of this complaint?

2. Does section 184 of the Criminal Procedure Code apply only to preliminary inquiries or does it extend to all inquiries as defined in section 1 of the Code?





It appears that the two defendants were brought before Mr T. H. Williams, Chief Magistrate, on a First Information Report which complained that the defendants fraudulently altered the identification plate of lorry No. BY. 2275 to read LE. 8998 to prevent lawful seizure. Mr Williams heard the evidence of one witness for the prosecution. When the hearing was resumed in the magistrate's court, Mr A. R. H. Thomas was presiding as acting Chief Magistrate, Mr Williams having left Jos Magisterial District on transfer. Learned counsel for the defendants submitted to Mr Thomas that he was not empowered to continue the hearing. The prosecuting officer submitted that the case could be continued by Mr Thomas by virtue of section 184 of the Criminal Procedure Code. Mr Thomas did not decide the point but submitted the two questions quoted above by way of a case stated.

We are not told in the case stated whether the proceedings before Mr Williams were being conducted under Chapter XVI of the Criminal Procedure Code which is entitled "Summary Trials in Magistrates' Courts", or under Chapter XVII, "Preliminary Inquiry and Commitment for Trial to the High Court". We have assumed, however, that the proceedings were not a preliminary inquiry because the way in which Question 2 is framed indicates that Mr Thomas realized that he had power under section 184 to continue a preliminary inquiry commenced by another magistrate.

Both learned counsel who appeared before us argued the case stated on the basis that Mr Williams had commenced a summary trial. Learned counsel for the prosecution submitted that unless Mr Williams continued the hearing, it must be commenced *de novo* before another magistrate. Learned counsel for the defendants went further and submitted that the defendants were entitled to be discharged under section 159 of the Code, if Mr Williams did not continue the hearing.

It is a fundamental principle that the constitution of a court must remain the same throughout a trial. A summary trial in a magistrate's court commences when an accused is brought before the court and the particulars of the offence are stated to the accused under section 156 of the Code. From that stage onwards the proceedings must continue before the same magistrate. If for any reason he does not continue the hearing then the particulars of the offence must be stated afresh to the accused, and, provided the case does not fall within section 157, such witnesses as may have given evidence before the former magistrate must be recalled to give evidence again before the new magistrate. In other words the trial is to be commenced *de novo*

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We are unable to agree with the submission of learned counsel for the defendants that, if Mr Williams does not continue to hear the case, the defendants are entitled to be discharged under section 159, because that section only applies when the trial magistrate finds on the evidence before the court that no case has been made out against the accused.

As to the second question posed by the learned acting Chief Magistrate, we are of the view that section 184 read in the context of Chapter XVII which is entitled "Preliminary Inquiry and Commitment for Trial to the High Court", only empowers another magistrate to continue the preliminary inquiry of his predecessor.

We answer the questions put to us as follows:—

1. No, the new magistrate must commence the hearing *de novo*.

2. Section 184 of the Criminal Procedure Code applies only to preliminary inquiries.



## THE QUEEN *v.* BELLO

[F.S.C. (Ademola, C.J.F., Brett, F.J., and Taylor, F.J.) —November 23, 1962]

[Kaduna—Appeal No. F.S.C. 311/1962]

*Criminal procedure—trial in High Court—no preliminary inquiry—Judge giving leave to prefer charge—Criminal Procedure Code, s. 185(b).*

The appellant was committed for trial in the High Court after a preliminary inquiry. When the case was called on for hearing in the High Court, Crown Counsel submitted that the preliminary inquiry was a nullity and should be set aside, and applied for leave to prefer a charge without a preliminary inquiry. The Judge upheld the submission and set aside the preliminary inquiry, and continued "I give leave for a charge to be preferred without the holding of a preliminary inquiry. I order that the accused shall be charged with the charge preferred by the prosecution . . . and appearing hereunder." The charge was thereupon read and explained to the appellant, and he pleaded not guilty to it and was tried and convicted.

On appeal it was argued that the trial was a nullity because the provisions of section 185(*b*) of the Criminal Procedure Code had not been observed, in that preferring a charge is the same as framing it and framing a charge is the function of a magistrate, and therefore the prosecution had no power to prefer the charge and in ordering that the appellant should be charged on the charge preferred by the prosecution the Judge did something which he had no power to do.

*Held*, the procedure adopted was authorised by section 185 of the Criminal Procedure Code, for—

(1) On any interpretation of the expression "preferring" a charge, the effect of the reference to "the charge preferred by the prosecution" was not to vitiate the order made by the Judge and,

(2) The wording of section 185(*b*) is designed to cover the case where one Judge gives leave for a charge to be preferred and the case is tried before another Judge as well as that where the same Judge gives leave and tries the case, and therefore a Judge can give himself leave to prefer a charge.

Case referred to:

*R. v. Rothfield*, 26 Cr. App. R. 103, mentioned.

CRIMINAL APPEAL

*R. O. Gaji* for appellant;

*I. M. Lewis, Q.C., Attorney-General of Northern Nigeria* (with him *I. M. S. Donnell, Crown Counsel*) for the respondent.

**Brett, F.J.,** delivering the judgment of the Court, referred to the facts of the case and continued: So far as the merits are concerned there is no substance in the grounds of appeal argued before us.

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It is submitted, however, that the trial was a nullity in that the provisions of section 185 of the Criminal Procedure Code Law, 1960, were not observed. That section reads as follows:—

"No person shall be tried by the High Court unless—

(*a*) he has been committed for trial to the High Court in accordance with the provisions of chapter 17; or

(*b*) a charge is preferred against him without the holding of a preliminary inquiry by leave of a Judge of the High Court; or

(*c*) a charge of contempt is preferred against him in accordance with the provisions of section 314 or section 315."

In this case a preliminary inquiry had ostensibly been held and the magistrate had purported to commit the appellant for trial to the High Court, but when the case was called for hearing in the High Court Crown Counsel submitted that for reasons which are not now material the preliminary inquiry was a nullity and should be set aside; he coupled with this submission a verbal application for leave to prefer a charge without a preliminary inquiry. The Judge upheld the submission and set aside the preliminary inquiry. His ruling continues:—

"I give leave for a charge to be preferred without the holding of a preliminary inquiry. I order that the accused shall be charged with the charge preferred by the prosecution and attached to his application and appearing hereunder."

The charge was thereupon read and explained to the appellant and he pleaded not guilty to it.

It is not suggested that the appellant was in any way embarrassed in making his defence by the course that was followed, but the submission made on his behalf is that under the Criminal Procedure Code the prosecution has no power to prefer a charge, and that in ordering that the appellant should be charged on the charge preferred by the prosecution the Judge did something which he had no power to do. Preferring a charge, it is said, is the same as framing it, and that is the function of the magistrate, subject only to the power of the Director of Public Prosecutions under section 181 of the Criminal Procedure Code to amend or alter the charges on which an accused person has been committed for trial; a Judge cannot give himself leave to prefer a charge. We find no substance in this submission, and we consider that the procedure adopted was authorised by section 185 of the Criminal Procedure Code. We shall not attempt to define what is



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on any interpretation the effect of the reference to "the charge preferred by the prosecution" was not to vitiate the order made by the Judge. As for the submission that the Judge cannot give himself leave to prefer a charge it is enough to say that the wording of section 185 (*b*) is designed to cover the case where one Judge gives leave for a charge to be preferred and the case is tried before another Judge (as in *R. v. Rothfield* 26 Cr. App. R. 103) as well as that where the same Judge gives leave and tries the case.

*Appeal dismissed.*

# ALHAJI SALIHU NAKANDE *v.* BARCLAYS BANK D.C.O.

[C.A. (J. A. Smith, Ag. C.J., and Skinner, J.)—At Kaduna, March 3, 1962]

[Jos—Appeal No. JD/22A/1961]

*Execution—committal—judgment debtor summons—conditional order for committal of judgment debtor—Sheriffs and Civil Process Ordinance, Laws of Nigeria*, 1948, *Cap.* 205, *s.* 64(1).

*Judgment debtor summons—"means to pay" judgment debt—* ibid., *s.* 64(1) and (2).

The appellant became a judgment debtor in the magistrate's court in July, 1960, for £445 10*s* 7*d*. At the hearing of a judgment debtor summons before the Senior District Judge in February, 1961, it appeared that the appellant had paid only £10 towards the judgment debt, and that he earned £5 a month and owned a house which, by his own admission, he could have sold for £150 and which he occupied with his family. The Senior District Judge held that the house was "means" within section 64 of the Sheriffs and Civil Process Ordinance which the appellant could have sold and applied the proceeds in part payment of the judgment debt.

On appeal, it was argued that the house was not "means" within section 64 of the Ordinance because it was the dwelling house of the appellant and not a property from which he derived any income.

*Held*, (1) The expression "means to pay" in section 64 of the Sheriffs and Civil Process Ordinance is to be interpreted to include all assets of a judgment debtor which can be realized for money except the wearing apparel and bedding of the judgment debtor and his family and implements of his trade.

The appellant's admission that he could sell the house for £150 showed that he had means with which to pay part of the judgment debt.

The Senior District Judge ordered that unless the appellant paid £150 into court within one month, he should be committed to prison for six weeks.

It was argued on appeal that the conditional order for commitment was wrong because, when it was made, it was not known whether the appellant could find a purchaser who would pay him £150 for the house within that period.

*Held*, (2) The Senior District Judge exceeded his jurisdiction in making an order of commitment conditional upon the appellant's failure to pay £150 within one month.

"The learned Senior District Judge was anticipating a default in the future which had not arisen. If in fact the appellant failed to pay the £150 by the end of the period of one month, that would be a matter for further investigation upon a fresh judgment summons to ascertain why the appellant had not obeyed the order of the court and to decide whether or not he could have obeyed the order. If he could not, no order of commitment would have been made against him."





Cases referred to:

*Maclean v. Maclean*, [1951] 1 All E.R. 967, at p. 969, applied;

*The Queen v. The Judge of the Brompton County Court and Reeves*, (1887) 18 Q.B.D. 213, followed.

(Editorial Note. The judgment debtor was not in a position to invoke s. 53 of the Sheriffs and Civil Process Ordinance.)

CIVIL APPEAL FROM ORDER ON JUDGMENT SUMMONS

*Agbakoba* for appellant;

*Grant* for respondents.

**J. A. Smith, Ag. C.J.,** delivering the judgment of the Court: The respondents were the plaintiffs in the original action commenced in the Chief Magistrate's Court where they sued the appellant for debt. The appellant admitted the claim and judgment was entered in favour of the plaintiffs for £445 10*s* 7*d* on 28th July, 1960.

As from 30th September, 1960, magistrates of all grades ceased to have jurisdiction in civil matters when District Courts were created and jurisdiction in civil causes was given to District Judges by the District Courts Law, 1960.

On 16th February, 1961 the appellant appeared in the District Court at Jos to answer a judgment summons issued at the instance of the respondents. Up to that time the appellant had only paid £10 towards the judgment debt. He was examined as to his means and admitted that he earned £5 a month and was the legal and beneficial owner of a house on plot 16/7 Bauchi Road, Jos, which he himself occupied with his family and which he said he could sell for £150.

The learned Senior District Judge held that the house was "means" within section 64 of the Sheriffs and Civil Process Ordinance which the appellant could have sold and applied the proceeds in part payment of the judgment debt. And the learned Senior District Judge made the following order:

"I therefore direct unless he pay £150 into court within one month, he shall be committed to prison for six weeks."

The appellant has appealed against this order. The substance of the argument of learned counsel for the appellant was firstly, that the house in Bauchi Road was not "means" within section 64 of the Ordinance because it was the dwelling house of the appellant and his family and not a property from which he derived any income.

As Asquith, L.J., said in *Maclean v. Maclean* [1951] 1 All E.R. 967, at p.969, cited to us by learned counsel for the respondents:

"Any asset, I should have thought, which is realisable to-day for money would be 'means' . . . . unless there was something in the context to repel that meaning . . . ."

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J. A. Smith Acting C.J.

We would respectfully agree with this definition of the word "means" and apply it in the context of section 64 of the Sheriffs and Civil Process Ordinance. There is nothing in that section which limits the scope of the expression "means to pay" and we think it is to be interpreted to include all assets of a judgment debtor which can be realised for money except the wearing apparel and bedding of the judgment debtor and his family and implements of his trade, to the value of £5, which are protected by section 25. In the present instance the appellant's admission that he could sell his house for £150 showed that he had means with which to pay part of the judgment debt but had not taken any steps to do so.

The second submission made by learned counsel for the appellant was that the learned Senior District Judge erred in making an order of commitment conditional upon the failure of the appellant, within a month of making the order, to pay into court £150 when it was not known if he could find a purchaser who would pay him £150 for the house within that period.

At the conclusion of his investigation into the means of the appellant on 16th February, 1961, it may have been open to the learned Senior District Judge to make an immediate order of commitment because the appellant having means with which to pay part of the judgment debt had defaulted. But that was not the order he made. He gave the appellant a further opportunity and allowed him one month in which to pay £150. The question is: could the judge at the same time make an order of commitment contingent upon the failure of the appellant to pay £150 at the end of the month. We think not. The learned Senior District Judge was anticipating a default in the future which had not arisen. If in fact the appellant failed to pay the £150 by the end of the period of one month, that would be a matter for further investigation upon a fresh judgment summons to ascertain why the appellant had not obeyed the order of the court and to decide whether or not he could have obeyed the order. If he could not, no order of commitment would have been made against him. We therefore think that the learned Senior District Judge exceeded his jurisdiction in making an order in the terms we have quoted earlier in this judgment. In coming to this conclusion we have followed the decision of the Court of Appeal on a similar point in *The Queen v. The Judge of the Brompton County Court and Reeves* (1887) 18 Q.B.D. 213. That decision was based on section 5 of the Debtors Act, 1869, which is similar to section 64 of our Sheriffs and Civil Process Ordinance.



We set aside the order of commitment and order that the appellant do pay £150 into the District Court, Jos, within one calendar month from the date of delivery of this judgment.

*Appeal allowed in part.*

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J. A. Smith Acting C.J.

# CHRISTOPHER NNODI v. B. O. OKAFOR

[High Court (Reed, Ag. S.P.J.)—April, 1962]
[Jos—Suit No. JD/70/1961]

*Practice Third Party—joinder of defendant's insurance company—action for damages for negligent driving—joinder of defendant's insurers.*

The plaintiff in an action for damages for the negligence of the defendant's servant in the driving of the defendant's motor vehicle applied to join the insurance company as a defendant, on the ground that the defendant was insured with the company, and in order to obtain a declaration of liability against the company. At the time of the application, there was no dispute between the plaintiff and the company.

*Held:* The application must fail, because there was no dispute between the plaintiff and the company and none could arise unless and until the plaintiff obtained judgment against the defendant.

*Per Curiam:* It is possible to have an insurance company made a party in other circumstances, as where the issue is whether or not there is a contract of indemnity between the defendant and the company.

Cases referred to:
*Carpenter v. Ebblewhite*, [1939] 1 K.B. 347, dictum of Greer, L.J., at p. 357 applied;
*Harman v. Crilly*, [1943] K.B. 168, referred to.

APPLICATION IN CIVIL SUIT

*Cameron* for plaintiff-applicant;
*Grant* for defendant-respondent.

**Reed, J.:** The plaintiff has claimed damages against the defendant, as owner of a lorry, for the death of one Celestine Nnodi caused by the negligence of the defendant's servant while driving the lorry. The plaintiff now moves the court to have the Northern Assurance Company Limited joined as a defendant on the grounds that the defendant is insured with them; the plaintiff makes this application in order to obtain a declaration of liability against the insurance company.

There is, of course, no privity of contract between the plaintiff and the insurance company and, in this respect, the claim differs from a claim by a creditor against a guarantor on an agreement in which the creditor, debtor and guarantor are all parties.

The plaintiff's application must fail because there is not yet any dispute between the plaintiff and the insurance company. No dispute can arise between them unless and until the plaintiff obtains judgment against the defendant. In





support of this view I rely upon *Carpenter v. Ebblewhite and Others*, [1939] 1 K.B. 347. This was an action for damages for the negligence of the driver of a car. The insurance company had been joined as a defendant and the defendants applied for the plaintiff's claim against the insurers to be struck out. Greer L.J. said at page 357:—

"The plaintiffs on their part are saying as against the defendant insurance company that . . . if they do succeed against these other defendants, then the insurance company will be liable to them. It seems to me that the making of such a claim is contrary to anything that has ever been decided in regard to actions for declarations. It has never been determined that in an action by a plaintiff against a defendant there can be a claim by the plaintiff for a declaration of liability against a third person for the relief claimed in the action where no dispute has as yet arisen between the plaintiff and that person . . . It seems to me that no dispute can arise between the plaintiffs and the insurance company until after the disposal of the action by the plaintiffs against the defendant Ebblewhite in favour of the plaintiffs and the establishment of a right of indemnity by Ebblewhite against the insurance company."

In *Harman v. Crilly, Zurich General Accident and Liability Insurance Company, Limited, Third Parties*, [1943] K.B. 168, the court dissented from parts of the judgment in *Carpenter v. Ebblewhite* but it approved of the passage I have cited. Lord Greene M.R. said at pages 170-171:—

"In *Carpenter v. Ebblewhite*, the plaintiff joined the insurance company as defendants to the action, claiming against them a declaration of liability. That procedure, on the face of it, was obviously wrong, because it is not the practice of the court to grant declarations in the air in respect of controversies which have not yet arisen, and the judgments of Greer and MacKinnon L.JJ. were based on that ground." I would add that it is possible to have an insurance company made a party to the suit in different circumstances. Thus *Harman v. Crilly* makes it clear—at any rate when the trial is before a judge without a jury—that there is no objection to having the insurance company joined as a third party where the issue is whether or not there is a contract of indemnity between the defendant and the insurance company; it is quite proper that this issue should be tried in the same proceedings as the action in which the liability of the defendant will be determined. But that is quite a different matter from the application which is now before me. The plaintiff may, of course, acquire legal rights against the Northern Assurance

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Company Limited in due course; provided the requirements of section 10 of the Motor Vehicles (Third Party Insurance) Ordinance are complied with, and the plaintiff obtains judgment against the defendant, the company will be under a legal obligation to satisfy that judgment. The application is dismissed.

*Application dismissed.*



## GARBA BAUCHI *v.* BAUCHI NATIVE AUTHORITY

[C.A. (Reed, Ag. S.P.J., and Holden, J.)—April 21, 1962]
[Bauchi—Appeal No. JD/113CA/1961]

*Appeal—appeal against decision or order of Grade "B" native court—criminal complaint—Grade "B" court's refusal to proceed with case—whether appeal to Provincial Court lies—application to Provincial Court for transfer—Native Courts Law*, 1956, *s.* 62; *Criminal Procedure Code, s.* 150(1) *and* (3).

*Criminal Procedure—refusal to proceed on the part of court taking cognizance—complainant's remedy—whether appeal or application to appeal court for transfer*—ibid.

*Jurisdiction—Provincial Court—application to Provincial Court for transfer of criminal case on lower court's refusal to proceed—transfer to court with jurisdiction to hear and determine the case—Provincial Court's jurisdiction to hear and determine on transfer to itself—Criminal Procedure Code, s.* 150(3); *Native Courts Law*, 1956, *s.* 63(1).

Audu made a criminal complaint against Garba in an Alkali's court of Grade "B", saying that he had advanced £116-15*s*-0*d* to Garba to buy kola nuts and that Garba had made a false report of the loss of the money and had in fact swindled him out of it. Having heard witnesses and listened to Garba's explanation, the Alkali decided not to proceed with the criminal case, but to treat the matter as a civil claim by Audu against Garba for the sum advanced. Audu objected to this, and the Alkali, without coming to any further decision, allowed Audu to appeal to the Provincial Court. In the circumtances, this was an appeal against the decision not to proceed with the criminal complaint.

The Provincial Court, having heard the appeal, convicted Garba of an offence under section 309 of the Penal Code and sentenced him to one year's imprisonment and ordered him to pay £116-15*s*-0*d*. to Audu as compensation.

On appeal by Garba to the High Court,

*Held:* (1) In deciding not to proceed with Audu's complaint, the Alkali's court must be deemed to have refused to proceed with the criminal case by virtue of section 150(1) of the Criminal Procedure Code.

(2) Though section 62 of the Native Courts Law gives a general right of appeal to the Provincial Court to a person aggrieved by a decision or order of a Grade "B" native court, the legislature has prescribed, in section 150(3) of the Criminal Procedure Code, a specific remedy for a person aggrieved by an order made under section 150(1), and that specific remedy must be pursued to the exclusion of the general right of appeal.

(3) The remedy open to Audu as a person aggrieved by the Alkali's refusal to proceed was to apply to the Provincial Court as the appropriate appeal court for an order under section 150(3) directing the transfer of the case to another court with jurisdiction to hear and determine it.

(4) The Provincial Court had no jurisdiction to hear the matter as an appeal from the Alkali's court, and the proceedings in the Provincial Court were a nullity.

*Per Curiam*: (1) The court hearing an application under section 150(3) must, after considering the facts disclosed on affidavit, either dismiss the application or direct the transfer of the case to a court which has jurisdiction to hear and determine the cause or matter other than the court which has refused to proceed.

(2) The Provincial Court itself could not hear and determine the matter, because in so doing it would be assuming original jurisdiction and a Provincial Court has no jurisdiction except in the circumstances set out in section 63(1) of the Native Courts Law.

APPEAL FROM PROVINCIAL COURT

*Appellant* in person.
*Belgore, Crown Counsel* for respondent.

**Reed, Ag. S.P.J.,** delivering the judgment of the Court: This is an appeal against the decision of the Provincial Court, Bauchi, convicting the appellant of an offence under section 309 of the Penal Code, sentencing him to one year's imprisonment and ordering him to pay £116-15*s*-0*d* to the complainant as compensation under section 78 thereof. The Court also ordered that the house and farm of the appellant should be sold to satisfy the order for compensation. We allowed this appeal, setting aside the conviction, sentence and orders of the Provincial Court, on 16th April and said we would give our reasons on 24th April.

The matter originally came before the Junior Alkali's Court, Bauchi, as a criminal complaint by one Audu. Audu complained that the appellant had cheated him of £116-15*s*-0*d* being money advanced to the appellant by him to buy kola-nuts on the understanding that they would divide the profit when the kola-nuts were sold. Later the appellant said he had lost the money but Audu did not accept that explanation and complained that the appellant had "swindled" him of the money. The Junior Alkali heard witnesses and heard what the appellant had to say. The appellant's explanation was that he had been robbed of the money after, as we understand it, a drugged drink had been given to him by the driver of a lorry in which he had been travelling. It is quite clear from the record that the Junior Alkali, after hearing evidence and the explanation of the appellant, decided that he would not proceed with the criminal case but that he would treat the matter as a civil one, that is as a claim by Audu against the appellant for the £116-15*s*-0*d*. Audu objected to this and, as a result, the Junior Alkali allowed Audu to appeal but came to no other decisions. Audu's appeal to the Provincial Court resulted in the decision to which we have referred at the beginning of this judgment.





In these circumstances there can be no doubt that Audu's appeal from the decision of the Junior Alkali to the Provincial Court was an appeal against the decision of the Junior Alkali not to proceed with the criminal complaint which Audu had made. The Junior Alkali had taken cognizance of an offence "upon receiving a complaint of facts which constitute the offence" from Audu; we refer to section 143(*d*) of the Criminal Procedure Code. Section 150(1) gives powers to a court taking cognizance of an alleged offence to refuse to proceed with the case, if, in the circumstances there described, the court is of opinion that there is "no sufficient ground for proceeding". The Junior Alkali must be deemed to have refused to proceed with the criminal case by virtue of section 150(1). Section 150(3) reads:—

"A person aggrieved by a refusal of a court to proceed with a case may apply to the appropriate appeal court with an affidavit setting out the facts for an order directing the transfer of the case to another court with jurisdiction to hear and determine the cause or matter."

This subsection sets out Audu's remedy against the Junior Alkali's refusal to proceed. Audu was a "person aggrieved" by that refusal and his remedy was not to appeal but to apply to the Provincial Court for an order which that Court has jurisdiction to make by virtue of the subsection. The Bauchi Provincial Court is the Court to which the application should be made because it is "the appropriate appeal court" with reference to the Junior Alkali's Court, Bauchi. But that does not mean that the Provincial Court hears the matter as an appeal. The application described in the subsection is quite different from an appeal. The court hearing the application must, after considering the facts as disclosed in the affidavit (and, of course, calling for further affidavits of facts if necessary) either dismiss the application or "direct the transfer of the case to another court with jurisdiction to hear and determine the cause or matter." "Another court" means a court other than the court which has refused to proceed, in this case the Junior Alkali's Court, Bauchi. We would say, however, that we do not think a Provincial Court can itself hear and determine the matter because, if it did so, it would be assuming original jurisdiction and a Provincial Court has no original jurisdiction except in the circumstances set out in section 63(1) of the Native Courts Law. We are aware that section 62 of the Native Courts Law gives a general right of appeal to a person aggrieved by a "decision or order" of a Grade "B" Native Court (and the

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Junior Alkali's Court, Bauchi, is such a court) to the Provincial Court. Nevertheless the legislature has prescribed a specific remedy for a person aggrieved by an order made under section 150(1) of the Criminal Procedure Code and that specific remedy must be pursued to the exclusion of the general right of appeal.

For these reasons we are of opinion that the Provincial Court had no jurisdiction to hear the matter now before us as an appeal from the Junior Alkali's Court. Accordingly the proceedings in the Provincial Court were a nullity and we so declare. This was why we allowed the appeal on 16th April, setting aside the conviction, sentence and orders of the Provincial Court. The complainant, Audu, may still apply to the Provincial Court, Bauchi, for an order under section 150(3) of the Criminal Procedure Code if he so wishes. He may also, if he so wishes, commence civil proceedings against the appellant to recover £116-15*s*-0*d*.

*Appeal allowed.*



## LAMBA KUMBIN *v.* BAUCHI NATIVE AUTHORITY

[C.A. (Reed, Ag. S.P.J., and Holden, J.)—April 23, 1962]
[Bauchi Appeal No. JD/9CA/1962]

*Criminal law—homicide—whether capital—whether culpable—accused's knowledge of consequences of his act—whether death a probable consequence—whether a likely consequence—Penal Code*, *ss.* 19, 220(*b*), 221(*b*).

*——— ——— ——— death caused where hurt alone intended—* ibid, *ss.* 225, 240.

*Appeal—evidence adduced on appeal—Native Courts Law*, 1956, *s.* 70(2).

The appellant was convicted in a Grade "A" native court of culpable homicide punishable with death contrary to section 221(*b*) of the Penal Code. It appeared at the trial that the appellant struck the deceased a back-handed blow on the abdomen with a stick, causing a loop of bowel to protrude, and that this injury caused the death of the deceased. The stick was about five feet long and between one half and three quarters of an inch in diameter at one end, increasing to about one inch at the other end. There was no express evidence that the blow was severe.

On appeal, the High Court heard the evidence of a medical practitioner who had examined the deceased's body. This evidence showed that the blow had fallen on the site of an old, large umbilical hernia. The deceased's injury could have been caused by a comparatively trivial blow, and its seriousness was the result of the hernia. If the blow had not fallen on the hernia it might have caused a laceration but it would not have gone through the muscle. The same injury could not have been caused by a similar blow on a normal, healthy person. The doctor did not think that the hernia would have shown through native clothing.

There being no evidence that the appellant knew the deceased was not in a sound state of health,

*Held:* It was impossible to find that the appellant knew or had reason to know either that the blow he struck would probably cause death or that it was likely to cause it, and accordingly the conviction of culpable homicide punishable with death contrary to section 221(*b*) of the Penal Code could not stand and a conviction of culpable homicide not punishable with death (contrary to section 220(*b*)) could not be substituted.

A conviction of causing death when intending to cause hurt only, contrary to section 225 of the Penal Code, was substituted.

*Per Curiam*: (1) Where, in testing whether the consequence of a person's act is a reasonable or a likely consequence within the meaning of section 19 of the Penal Code, a court asks itself how a reasonable man would view that consequence, the court must take into consideration the background, education and worldly knowledge of the individual person. A person from a remote, backward part of the country might well differ in this respect from an educated person. After the court has given due consideration to the person's way of life it must apply the test to the average person in that way of life.

(2) ...ether death is a likely or a probable consequence of a person's act is a ...stion of degree. If a weapon is used the question will generally resolve i... f by a consideration of the weapon used, the part of the deceased's body wh... it was struck and the amount of force used. A thin stick is not as dang... as a thick stick; a stick is not a dangerous as a sword, knife or other ...al weapon; a blow struck on a limb is not as dangerous as a blow struck o... the head; a hard blow is more dangerous than a light one. All these ar... matters which the trial court must consider where the accused person's ...owledge" of the consequences of his act is relevant.

CRIMI... APPEAL FROM NATIVE COURT

*D...* for appellant;

*B...re, Crown Counsel*, for respondent.

**R... d, Ag. S.P.J.,** delivering the judgment of the Court: This is ... appeal against conviction by the Emir of Bauchi's Court ... culpable homicide punishable with death. There is no disp... e that the appellant struck the deceased a blow with a stick... using a loop of bowel to protrude from the body of the de... sed and that this injury caused the death of the decease... There was no suggestion that the appellant had intende... o cause death by the blow but the trial court founded the cor... ction of culpable homicide punishable with death upon s... ion 221(*b*) of the Penal Code which reads:—

"I... he doer of the act knew or had reason to know that death w... ld be the probable and not only a likely consequence of the a... or of any bodily injury which the act was intended to cause... the culpable homicide shall be punished with death.

Th... evidence in the trial court was not in dispute and establish... d that cattle wandered on to a farm belonging to the appellan... and the appellant drove them off with a stick. The deceased... told the appellant not to beat the cattle and the appellan... hen struck the deceased a blow with his stick. The evidenc... s that one blow only was struck and there is no evidenc... hat it was a severe blow; the appellant himself describe... it as a "back-handed" blow.

Th... conviction of culpable homicide punishable with death u... r section 221(*b*) could be upheld by this court only if we w... satisfied that, on the evidence, either, (1), the appellan... 'knew or had reason to know that death would be the pro... ble and not only a likely consequence" of the blow wh... h he struck, or, (2), the appellant intended to cause bodily in... ry by the blow which he struck and he "knew or had reason t... now that death would be the probable and not only a likely c... sequence" of that bodily injury which he intended. We do ... think that consideration of (2) is relevant in the appeal ... before us; we think that to establish (2) there





must be evidence that the appellant intended to cause a particular bodily injury and that this bodily injury was of such a nature that he must have known, or had reason to know, "that death would be the probable and not only a likely consequence" of it. We do not think that there was evidence of any intent on the part of the appellant to cause either death or a particular bodily injury. The matter for consideration in this appeal is (1). What, then, we must decide is whether, on the evidence, the appellant knew, or had reason to know, that the blow he struck was not only likely to cause death but probably would cause death.

The words "likely" and "probable" are defined in section 19 of the Penal Code which reads:—

"(1) An act is said to be 'likely' to have a certain consequence or to cause a certain effect if the occurrence of that consequence or effect would cause no surprise to a reasonable man.

"(2) An effect is said to be a probable consequence of an act if the occurrence of that consequence would be considered by a reasonable man to be the natural and normal effect of the act."

If the act is known to the accused person as "*likely*", within this definition, to cause death, he is guilty of culpable homicide *not* punishable with death; see Penal Code, section 220(*b*). If death is known to the accused person to be the *probable* result, he is guilty of culpable homicide punishable with death.

We think the distinction between "likely" and "probable" can be explained as follows. The act of a person is "likely" to cause death if death was something which he, as a reasonable man, knew might well happen. In applying the "reasonable man" test the court must take into consideration the background, education and wordly knowledge of the individual; a person from a remote, backward part of the country might well differ in this respect from an educated person. After the court has given due consideration to the person's way of life it must apply the test to the average person in that way of life and ask itself if such a person must have known that death was something which might well follow the act—that he could not have been surprised that death followed the act. If the answer is in the affirmative the consequence of death is "likely" and the person is guilty of culpable homicide.

In deciding whether the accused person knew that death was the "probable" result the court should apply the same "reasonable man" test. It should then ask itself whether such a person must have known that death was the most probable result of the act—whether the act was so extremely dangerous that in all probability death would follow.

The answers to these questions must always be on the facts of the particular case. Whether death is "likely" or "probable" is a question of degree. If a weapon is used the question will generally resolve itself by a consideration of the weapon used, the part of the deceased's body where it was struck and the amount of force used. A thin stick is not as dangerous as a thick stick; a stick is not as dangerous as a sword, knife or other lethal weapon; a blow struck on a limb is not as dangerous as a blow struck on the head; a hard blow is more dangerous than a light one. All these are matters which the trial court must consider where the accused person's "knowledge" of the consequences of his act is relevant.

In the circumstances of the case before us we considered that we should see the stick. It was produced and we place on record that it was not an unusually heavy stick; it was about five feet long and one half to three-quarters of an inch in diameter at one end, increasing to about one inch at the other. We noted from the record that the deceased had suffered from a hernia. We regarded this as very important and as the deceased's body had been examined by a qualified doctor we decided to exercise our power under section 70(2) of the Native Courts Law by calling him to give evidence. The doctor told the court:— "He (the deceased) had an abdominal wound into an old, large umbilical hernia . . . . It is definitely the case that the seriousness of the wound was the result of the previous hernia. A comparatively trivial blow could have caused the injury. A similar blow on a normal, healthy person could not have caused the same injury. If the blow had fallen two inches above or below the hernia it would not, in my opinion, have caused a serious injury; it might have caused a laceration but it would not have gone through the muscle. It was a large umbilical hernia; I do not think it would have shown through native clothing."

The blow was such that it would not have caused the death of a person in a sound state of health. There is no evidence that the appellant knew the deceased was not in a sound state of health or evidence upon which the court could infer such knowledge. In these circumstances it is quite impossible for





the court to find that the appellant knew, or had reason to know, that the blow he struck was not only likely to cause death but probably would cause it. The conviction of culpable homicide punishable with death cannot, therefore, stand. The next question is whether we should substitute a conviction of culpable homicide not punishable with death, finding that the appellant knew the blow was likely to cause death. In our view we could make no such finding having regard to the doctor's evidence that a "comparatively trivial" blow could have caused the injury—a blow which, if struck on a healthy person, might have caused a laceration but not a serious injury. Section 225, however, provides that "Whoever causes the death of any person by doing any act not amounting to culpable homicide but done with the intention of causing hurt or grievous hurt, shall be punished with imprisonment for a term which may extend to fourteen years or with fine or with both." Section 240 states that "Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt." We think the facts establish an offence under this section. Accordingly we allow the appeal and set aside the conviction of culpable homicide punishable with death and the sentence of death. We substitute a conviction of death caused when intention is to cause hurt only, under section 225 of the Penal Code, and sentence the appellant to five years' imprisonment with hard labour.

*Appeal allowed and conviction under s. 225 substituted.*

English rule against bigamy is, therefore, wholly inapplicable to a non-Christian Asiatic of whatever persuasion. It will, however, apply to Christians amongst whom monogamy is the rule and bigamy both a sin and a crime."

However after considering the authorities I interpret section 370 of the Criminal Code as follows: There must be a husband and wife living and one of them must "marry" so that this second "marriage" is "void by reason of its taking place during the life of such husband and wife". If the first marriage was polygamous the second marriage could not be void because it, the second marriage, took place during the life of the husband and wife. Therefore the first marriage must be a monogamous marriage "good and valid in law" as defined by section 34 of the Marriage Ordinance.

I have already said that section 494 of the Indian Penal Code defines an offence in effect identical with the offence defined by section 370 of the Criminal Code. This section 494 (which is, incidentally, identical with section 384 of the new Penal Code of the Northern Region) reads:—

"Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment. . . . ."

The requirements of this second marriage have been defined judicially in India in *Mt. Kalan v. Emperor*, A.I.R. 1938 Sind 127, as follows:—

"Clearly when the word 'marries' is used in s.494 I.P.C. it means marries by some form of marriage known to or recognized by the law. S.494, when it uses the word 'marries' does not of course refer to a valid marriage. A bigamous marriage cannot be a valid marriage, and apart from the bar of the first marriage, it may be that there may be some other legal impediment to the validity of the marriage of the man or woman, some legal impediment personal to the man or woman, such as consanguinity, yet if the second marriage be a form recognized by or known to the law, that would, we think, be sufficient to satisfy this particular provision of the section".

I follow this statement and interpret the word "marries" in section 370 of the Criminal Code in the same way. The accused went through a form of marriage by Moslem law and custom and that is a form of marriage known to and recognized by the law.





The next question is whether the form of marriage by Moslem law and custom was "void by reason of its taking place during the life of" the wife of the accused by his first marriage. I have already found that the accused was a Moslem when he went through this form of marriage, and in Moslem law he could marry four wives. To be void a marriage must be of no legal effect and can it be said that it was of no legal effect if Moslem law, his personal law, recognized it is a valid marriage? The answer is to be found in section 35 of the Marriage Ordinance which reads:—

"Any person who is married under this Ordinance,. . . shall be incapable, during the continuance of such marriage, of contracting a valid marriage under native law or custom."

Is an invalid marriage the same as a void marriage? Again there is Indian judicial authority. In *Mt. Allah Di and anor v. Emperor*, A.I.R. 1928 Lahore 844 (1), it was held that the word "void" in section 494 of the Indian Penal Code was synonymous with "invalid". I follow this decision and find that the form of marriage by Moslem law which the accused went through on 16th July, 1960, with Fatima was void because it was a marriage, within the meaning of section 370 of the Criminal Code, taking place during the life of his wife Mary Hudung Princewell. It follows that the accused is guilty of an offence under section 370 of the Criminal Code and I convict under that section.

(Having convicted the accused, who had no previous conviction, and after hearing Counsel for the accused in mitigation, Reed, J., sentenced the accused to one month's imprisonment with hard labour, saying:)

It is very difficult to know what punishment is appropriate. I have sympathy with the accused. I think he told me the truth but ignorance of the law is not, of course, an excuse. His wife had a child while they were separated.

One cannot compare sentences given in bigamy cases in the United Kingdom. There monogamy is the only form of marriage recognised by law and it is in the interest of the public to see that that law is enforced. Here polygamous marriages are not only recognised by law but the great majority of marriages are polygamous.

Another reason for severe punishment in the United Kingdom, when a man is guilty of bigamy, is that the woman has been deceived into cohabiting with a man in the belief that he is her husband. But Fatima was in no way deceived; she said it was no concern of hers if the accused had another wife and she did not enquire.

refused his consent; we accept the evidence on this point of the Resident's letter exhibited to the motion and marked Exhibit A. In relation to the other two rights of occupancy there is no evidence of any demand for the Minister's consent or of his refusal to consent and we are unable to agree with Counsel for the applicants that demand and refusal are to be presumed.

An order of mandamus lies to compel the performance of a statutory duty. It does not lie to compel the exercise of a discretionary power conferred by statute. For the applicants it is contended that section 11 of the Land and Native Rights Ordinance imposes a duty on the Minister to give his consent. It is submitted that, even if the words of the section are apparently permissive, nevertheless they are in fact mandatory and must be interpreted as imposing a duty and not as merely conferring a discretion. Mr Razaq, who appeared for the applicants, drew our attention to the decision of the Court of Appeal in *The Queen v. The Commissioners for Special Purposes of the Income Tax*, (1888) 21 Q.B.D. 313, where it was held that in the circumstances of that case the words "it shall be lawful" imported a duty and that mandamus lay to enforce it. He also relied on other authorities to show that apparently permissive words must sometimes be interpreted as mandatory. Counsel submitted that the words "it shall not be lawful" in section 11 should also be treated as mandatory. It was said that it could not have been the intention of the Legislature to confer such a wide discretionary power but that the purpose of the section is merely to keep the Governor, or such person as he delegates his power to, informed of dealings in land. It was also said that to interpret section 11 in any other way would work an injustice. For the respondent it was submitted by the learned Senior Crown Counsel that section 11 does no more than confer a discretionary power to grant or withhold consent.

Section 11 of the Land and Native Rights Ordinance in the 1948 edition of the Laws of Nigeria provides: "Except as may be otherwise provided by the regulations in relation to native occupiers, it shall not be lawful for any occupier to alienate his right of occupancy, or any part thereof by sale, mortgage, transfer of possession, sublease or bequest or otherwise howsoever without the consent of the Governor first had and obtained, and any such sale, mortgage, sublease, transfer or bequest, effected without the consent of the Governor, shall be null and void." We find that the plain and ordinary meaning of this section is to confer on the





Governor a discretionary power to grant or withhold his consent to the alienation by any means of rights of occupancy. We agree that cases arise where words apparently permissive really import a duty and that in such cases the courts may and will interpret them as mandatory. But we are unable to agree that the words of section 11 in so far they relate to the Governor's consent could possibly be interpreted as imposing a duty. It is quite clear from the wording of the section that an occupier who wishes to alienate his right of occupancy cannot demand the Governor's consent as of right. If the purpose of the section were only to keep the Governor informed of land transactions, it is exceedingly unlikely that mere failure to keep him informed would have been made to result in the transaction being null and void. We are not persuaded that the Legislature when it passed the Land and Native Rights Ordinance in 1916 did not intend to vest the widest discretionary powers in the Governor. If it is true that such powers are no longer appropriate, it is not for this court to depart from the plain and ordinary meaning of the words used by the Legislature. It is for the Legislature itself to supply the remedy. It would appear from the Land Tenure Law, 1962, that the Legislature has already given the matter its attention.

Since the order of mandamus does not lie to compel the exercise of a discretionary power conferred by statute, it will not lie to compel the Minister to give his consent under section 11 of the Land and Native Rights Ordinance. If the applicants have no other remedy, that is unfortunate for them but the absence of other remedies would not enable this court to grant an order of mandamus to compel the exercise of a discretionary power. We note however that the applicants themselves at one stage believed that they had a remedy by way of interpleader summons but for reasons which have not been explained to us withdrew their claim. Counsel for the applicants has asked us to infer from the Resident's letter, Exhibit A, that the Minister has invited this court to give him directions and that for this reason an order of mandamus may and should issue to compel him to give his consent. It may be that the letter should be read in this sense but, glad as we would be to give such assistance as lies in our power, we are unable to accept the view that the Minister's invitation would enable us to grant an order of mandamus to compel the exercise of a discretionary power.

We must add that it is a condition precedent to the issue of an order of mandamus that it must be established that the party against whom the order is sought has received some

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prior intimation of what the applicant requires him to do and that he has refused to do it. As we have already observed, this condition precedent has only been fulfilled in relation to the right of occupancy covered by certificate of occupancy No. 7038. Consequently for this additional reason no order of mandamus lies in relation to the other two rights of occupancy.

We are not to be taken as saying that the Minister should or should not give his consent. We only say that the order of mandamus does not lie to compel him to do so. It is not a remedy available to the applicants in this matter. Upon an application of this sort it is not appropriate for this court to give directions or advice or to say anything more.

We are indebted to Counsel for their full and learned arguments.

The application is dismissed. The applicants must pay the respondent's costs.

*Application dismissed.*



## F. A. ONITIRI *v.* COMMISSIONER OF POLICE

[C. A. (Hurley, C. J., and Skinner, J.)—August 1, 1962]
[Kaduna—Criminal Appeal No. Z/20CA/1962]

*Appeal—Criminal Appeal from magistrate's court—order for compensation at trial—order against complainant in police prosecution—order under s.* 166 *or s.* 371 *of the Criminal Procedure Code—complainant's right of appeal—Criminal Procedure Code, ss.* 166, 371, 379(1); *Constitution of Northern Nigeria, s.* 52(3)(*a*) *and* (4)(*a*).

*Criminal procedure—appeal from magistrate's court—appeal by complainant in police prosecution—appeal against order to pay compensation—ibid.*

*Constitutional law—right of appeal—criminal proceedings—appeal from magistrate's court—by complainant in police prosecution—Constitution of Northern Nigeria, s.* 52(3)(*a*) *and* (4)(*a*).

A private complainant in a police prosecution in a magistrate's court has no exercisable right of appeal against an order requiring him to pay compensation to the accused made under section 166 or section 371 of the Criminal Procedure Code.

The appellant made a complaint to the police against one Moukarim. The police arrested Moukarim and prosecuted him in a magistrate's court. Having found the complaint was groundless the magistrate discharged the accused and ordered the appellant to pay compensation to him, under section 166 of the Criminal Procedure Code on the ground that the appellant's accusation against the accused was frivolous and vexatious, and under section 371 of the Code on the ground that the appellant had caused the accused's arrest without sufficient ground.

*Held:* The appellant had no right of appeal, either under section 379(1) of the Criminal Procedure Code as it then was, because he was not charged with nor did he plead to any offence, or under section 52(3) (*a*) of the Constitution of Northern Nigeria, because he was not the accused person, by whom alone the right of appeal there conferred was exercisable having regard to the provisions of section 52(4) (*a*) and the absence of any Regional legislation for the exercise of the right by anybody other than the accused.

Case referred to:

*Maja v. Johnson*, 13 W.A.C.A. 194, distinguished.

(*Editorial Note.*—Section 379 (1) of the Criminal Procedure Code as set out in the judgment has been amended to read "Appeals from a magistrate's court to the High Court shall be in accordance with section 52 of the Constitution of Northern Nigeria".)

CRIMINAL APPEAL

*Alhaji R. O. Gaji* for the appellant;

*N. Henderson, Senior Crown Counsel*, for the respondent;

*Alhaji A. Razaq*, for the accused Moukarim was not called on.

**Skinner, J.,** delivering the judgment of the Court: The appellant, F. A. Onitiri, was the complainant in a prosecution brought in the name of the Commissioner of Police against one David Sami Moukarim (hereinafter referred to as "the accused") in the Magistrate's Court, Kaduna, the complainant's allegation being that the accused had mischievously trespassed upon and caused damage to his shop at Plot D, Prince Edward's Way, Kaduna. At the close of the prosecution case on 13th March, 1962, the magistrate found that the complaint was groundless and discharged the accused. The complainant was then asked to show cause why he should not be directed to pay compensation to the accused, firstly, in respect of a frivolous or vexatious accusation (section 166 of the Criminal Procedure Code) and secondly, for having groundlessly caused the accused's arrest (section 371 of the Criminal Procedure Code). Having heard the complainant's objections the magistrate directed that he should pay to the accused a total sum of £40 as compensation or, alternatively, serve a term of two months' imprisonment.

The complainant now appeals *inter alia* against that direction and has filed five grounds of appeal in his memorandum. We have not heard argument on any of these, however, since learned Senior Crown Counsel appearing for the respondent has, with leave, made a preliminary submission that no appeal lies to this Court from a direction for payment of compensation made by a magistrate under section 166 or section 371 of the Criminal Procedure Code. If that submission is well-founded it will be unnecessary to consider those grounds of appeal which seek to impugn the legality of the direction. We will therefore deal with it now and thereafter hear argument on the other matters raised by the appellant.

At the time this case was decided the right of appeal from a magistrate in a criminal case was governed by section 279 of the Criminal Procedure Code as originally framed. We note that this section was later repealed and replaced by section 7 of the Criminal Procedure Code (Amendment) Law, 1962, the repeal having come into operation on 30th April, 1962. Subsection (1) of the original section in force at the material time, provided as follows:—

"Any person aggrieved by a conviction or order by a magistrate's court in respect of any charge to which he pleaded not guilty or of which he did not admit the truth may appeal to the High Court from such conviction or order".





We do not think that the appellant comes within the category of a "person aggrieved" in the meaning of that expression as used in the subsection. He was not charged with nor did he plead to any offence. His counsel has however argued that if we took the view that no right of appeal is specifically conferred we ought nevertheless to infer that such a right exists by virtue of the provisions of section 35 of the High Court Law. This argument is not well founded and involves a misunderstanding of the effect of section 35 which is confined in its proper application to the exercise of our jurisdiction only as regards practice and procedure. We cannot by invoking this section confer upon the appellant a right of appeal where none exists. For the same reason the case of *Maja and ors v. Johnson*, 13 W.A.C.A. 194, which was cited by learned Counsel for the appellant affords no support to this argument. That case deals with the practice in bringing an appeal in circumstances where the West African Court of Appeals Rules, 1950, made no specific provision by which an appeal might be brought and we note from the judgment that the Appeal Court before invoking rule 42 by which recourse might be had to the practice for the time being in force in England firstly expressed themselves as satisfied that a right of appeal existed. That it seems to us is the vital distinction between *Johnson's* case and the matter now before us.

Learned counsel for the appellant also prayed in aid the provisions of section 52 of the Third Schedule to the Nigeria (Constitution) Order in Council 1960 and in particular section 52(3)(*a*) which says—

"An appeal shall lie from decisions of a subordinate court to the High Court of the Region with the leave of the High Court or, if it is provided by any law in force in the Region that an appeal shall lie from that subordinate court to another subordinate court, an appeal shall thereafter lie to the High Court with the leave of the High Court in the following cases—

"(*a*) decisions in any criminal proceedings from which no appeal lies as of right to the High Court."

At first sight this would appear to confer a right of appeal, with leave, in the instant case but this impression is dispelled by the following subsection (4)(*a*) which reads thus:—

"Any right of appeal from decisions of a subordinate court to the High Court of the Region conferred by this section—

(*a*) shall be exercisable in the case of civil proceedings at the instance of a party thereto or, with the leave of the High Court, at the instance of any other person having an interest in

the matter and in the case of criminal proceedings at the instance of the accused person or, subject to the provisions of section 48 of this Constitution, at the instance of such other persons or authorities as may be prescribed by any law in force in the Region."

The complainant was not the accused person and accordingly any right of appeal which he may have from the magistrate's direction for payment of compensation must be prescribed by a Regional Law. We have neither been shown nor have we been able to find the enactment in Regional legislation of any such right and we accordingly conclude that learned Senior Crown Counsel's submission is correct and that no right of appeal lies to this Court from that direction. We would only add that it seems to us significant that whereas section 250 of the Indian Code of Criminal Procedure, which is in many respects similar to section 166 of our Code, specifically confers a right of appeal on a complainant who has been ordered to pay compensation, neither the provisions of section 166 or 371 of the Criminal Procedure Code confer a corresponding right of appeal.

For these reasons we are of the opinion that no appeal lies from the direction to pay compensation and we dismiss this appeal in so far as it seeks to impugn that direction. We observe however that ground 1 of the appellant's memorandum purports to attack the magistrate's decision as a whole and we are prepared to hear argument thereon so far as it may relate to matters other than the payment of compensation. We will also hear the appellant's counsel in support of ground 5 which also relates to a different matter.

*Appeal from direction to pay compensation dismissed.*



## IRIS WINIFRED HORN *v.* ROBERT RICKARD

[High Court (Holden, J.)—18th October, 1962]
[Jos—Suit No. JD/3/1962]

*Evidence—affidavit—affidavit by counsel in the case—whether subject to objection—whether in breach of client's privilege of secrecy—whether involving counsel personally in the dispute.*

*————extraneous matter—legal argument or conclusion—averment of existence of state of affairs on which order sought would be grounded—Evidence Ordinance*, 1948 *Laws of Nigeria Cap.* 63, *s.* 86.

*Legal practitioners—counsel in the case giving evidence—generally undesirable—whether subject to objection—facts to be deposed to likely to be in dispute—counsel's duty to withdraw and brief other counsel.*

An affidavit sworn by counsel representing a party to the proceedings is unobjectionable in principle provided that it does not by reason of its subject matter offend against the rule that a client's communications to his counsel are privileged, or the requirement that counsel should not put himself in a position where he may be subjected to cross-examination or in any way enter personally into the dispute.

*Per Curiam:* The swearing of affidavits by members of the Bar is in the main an undesirable practice. An affidavit which is of any real value on facts liable to be disputed cannot, it would seem, avoid offending against one or both of the principles set out above. If counsel alone has the knowledge necessary to swear the affidavit, and the facts to which he is to swear are likely to be in dispute, he should for the purposes of the application withdraw from the case and brief other counsel.

*Obiter:* An averment in an affidavit in support of an application for security for costs, that unless security for costs is given the defendant will be seriously hindered from recovering any costs that may be awarded to him in the action and any award may be thus rendered nugatory, is a statement that exactly that state of affairs exists which would need to be proved to exist before the court would make the order prayed, and thus offends against section 86 of the Evidence Ordinance, which provides that an affidavit shall not contain extraneous matter by way of legal argument or conclusion.

APPLICATION IN CIVIL SUIT

The affidavit of the applicant's solicitor contained the following avertments:—

"1. I am a Legal Practitioner of the Federal Supreme Court of Nigeria and am associated with the firm of Messrs. Irving and Bonnar, Solicitors who are acting for the Defendant in this action, and I am fully authorised by the Defendant to swear this affidavit on his behalf.

"2. I was present in this Honourable Court on 17th August, 1962 when the Plaintiff's Solicitor said in open Court, 'the Plaintiff is in the United Kingdom and, there is very little prospect of her returning to this country' or words to that effect.

"3. I verily believe that unless security for costs is given the Defendant will be seriously hindered from recovering any costs that may be awarded to him at any stage in this action, and indeed any award may be thus rendered nugatory."

*M. M. Murray* for applicant;
*R. C. Rickett* for respondent;

**Holden, J.,** There is before me a motion on notice asking for an order under Order 14, rule 6, of the Supreme Court (Civil Procedure) Rules for the plaintiff to give security for costs. It is supported by an affidavit sworn by Mr Murray, of Counsel, who also appears for the defendant. Mr Rickett for plaintiff raises a preliminary objection on principle to an affidavit sworn by counsel. He made no submission as to what the result would be should I rule in his favour, but I presume it would be that the affidavit should be expunged from the record, leaving the application unsupported.

This is apparently a simple matter, but there is much more in it than meets the eye; so much more that the Courts have not over the centuries laid down any absolute rule. Each case must be considered on its own merits. I think there are two main matters of importance to weigh. First comes the question of privilege. Every client is entitled to feel safe when making disclosures to his solicitor or counsel, and there are cases establishing firmly that counsel cannot be called to give any evidence which would infringe the client's privilege of secrecy. Note also the privilege is the client's, and not counsel's. The second question is the importance of counsel remaining detached and impersonal in his attitude to the case, so that his judgment of it will not be clouded by personal feelings. For this reason it has generally been held that counsel engaged in a case should not put himself in a position where he may be subjected to cross-examination or in any way enter personally into the dispute, as distinct from representing and speaking for his client in his professional capacity. There would thus appear to be no objection on principle to the fact of counsel swearing an affidavit, providing it does not by reason of its subject matter offend against either of the above requirements.





Applying these tests to this particular case, I cannot see that Mr Murray's affidavit does offend. There is no question of his having revealed any privileged communication, and indeed if there were such a suggestion it would be for defendant, and not for Mr Rickett, to object. There is no risk of his being subjected to cross-examination, though he has offered to undergo it if required, for there is nothing to show that the substance of what he says is challenged. Indeed no attempt has been made, either by denial in Court or by counter-affidavit, to challenge the accuracy of the facts he has stated, so there seems no risk that he may be drawn into an unseemly position. To go further, the affidavit did not materially add to the Court's knowledge. The first paragraph states a fact already on the record, namely that Mr Murray appears for the defendant. The second paragraph states that plaintiff is out of this country and not likely to return. That can readily be inferred from the pleadings, for the statement of claim shows that she suffered such severe and extensive injuries as to make it obvious that she would require treatment in a country with better medical facilities than are yet available here. The third paragraph is a deduction from the second, and in fact offends against section 86 of the Evidence Ordinance. It is a statement by counsel that exactly that state of affairs exists which would need to be proved to exist before the Court would make the order prayed.

I rule that there is nothing in this particular case to make the swearing of this particular affidavit by Mr Murray abhorrent on principle. That does not mean that I would always support the swearing of affidavits by members of the Bar. I consider that to be in the main an undesirable practice. I cannot see that any affidavit which is of any real value on facts liable to be disputed can avoid offending against one or both of the principles set out above. There would be little harm in counsel swearing an affidavit setting out formal facts required to be established to support a purely formal *ex parte* application where there is no possibility of those facts being disputed, but even in such a case there would be little need for counsel himself to swear the affidavit as some member of his staff could easily depose to the same facts as a matter of information and belief (due heed being paid to section 87 and section 88 of the Evidence Ordinance). If on the other hand counsel finds himself in the position where he is the only person with the knowledge necessary to swear the affidavit, and where the facts to which he is to swear are likely to be in dispute, then he should for the purposes of that application withdraw from the case and brief other counsel.

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Mr Murray's affidavit dated 10th September, 1962, may remain on the file, but the Court will presumably not be influenced by paragraph three, which is in breach of section 86 of the Evidence Ordinance.

*Objection overruled.*



## BISICHI TIN COMPANY LIMITED *v.* COMMISSIONER OF POLICE

[C. A. (Hurley, C. J., and J. A. Smith, S.P.J.) —January 18, 1963]

[Jos—Criminal Appeal No. JD/100CA/1962]

*Evidence—document—public document—mining lease—proof of contents—by certified copy only—Evidence Ordinance, Laws of Nigeria*, 1948, *Cap.* 63, *ss.* 92, 93, 94(*e*), 95, 96(1)(*e*), (2)(*c*), 108(*a*)(*iii*)*; Minerals Ordinance, Laws of Nigeria*, 1958, *Cap.* 121, *s.*34*; ss.* 3(2), 99, 101.

*————lease—expiry—proof of expiry—by proof of lease.*

*————objection—inadmissible evidence—criminal case —no objection taken—evidence nevertheless irrelevant.*

In order to prove that mining had taken place on Crown land, the prosecution had to prove that a mining lease had expired. The lease was not produced, and no certified copy was tendered. Two prosecution witnesses said that it had expired on the relevant date; neither said that he had seen it, but one said that he had "seen the records". A third witness said the area was Crown land. No objection was taken to any of this evidence. On appeal,

*Held*, (1) To prove that the lease had expired, it was necessary to prove its term and the date of its commencement; it was necessary to prove the contents of the lease.

(2) The mining lease being a public document, its contents might be proved by secondary evidence but the secondary evidence must be a certified copy, and not oral evidence.

(3) This being a criminal case, the fact that the oral evidence was not objected to did not make it admissible.

*Obiter:* Even if the oral evidence had been admissible, it would not have proved the contents of the lease, for it was not the evidence of persons who had seen the lease, and it was not an account of the contents of the lease.

CRIMINAL APPEAL

*R. C. Rickett* for the appellants;

*K. Nadarajah, Crown Counsel*, for the respondent.

**Hurley, C.J.,** delivering the judgment of the Court: The appellant company were found liable by the magistrate grade 1, Jos, on the following charge:—

"That Usman Korbo, Haruna Bongore on the 4th day of December, 1961 at Maijuju area in the Jos Magisterial District unlawfully mined on the Crown land contrary to section 3(2) of the Minerals Ordinance and punishable under section 99 of the Minerals Ordinance 1958 and that you being the employer of the said Usman Korbo and Haruna Bongore are liable for the said offence by virtue of section 101 of the Minerals Ordinance 1958."

The information presented in the First Information Report was as follows:—

"That Felix Ibnamah and six others employed by Bisichi Tin Mining Company were convicted on 5–12–61 of mining on 4–12–61 on Mining Lease 403 which expired on 13th July, 1961. Since it does not appear that the offences were committed without the knowledge of the said Company, and that they had not taken all reasonable steps to prevent the commission of these offences, this company shall be held to be liable for these offences."

Thus the prosecution case was that the Company's employees had mined in the area comprised in a mining lease which had expired. To prove that the lease had expired it was necessary to prove the term for which the area was leased and the date of its commencement, that is to say, it was necessary to prove the contents of the lease. By section 92 of the Evidence Ordinance the contents of documents may be proved either by primary or by secondary evidence, and by section 95 documents must be proved by primary evidence except in the cases thereinafter in the Ordinance mentioned. By section 93 primary evidence means the document itself produced for the inspection of the court, and by section 96 secondary evidence includes certified copies given under the provisions of the Ordinance thereinafter contained and oral accounts of the contents of a document given by some person who has himself seen it. By section 96(1)(*e*) secondary evidence may be given of the existence, condition or contents of a document where the original is a public document within the meaning of section 108. By section 108(*a*)(*iii*) public documents include documents forming the acts or records of the acts of public officers, legislative judicial and executive, of Nigeria.

The lease alleged to have expired was not produced at the trial, nor was any certified copy tendered. Instead, two prosecution witnesses gave evidence in the course of which they said that Mining Lease 403 had expired by 4th December, 1961. One of these two witnesses said that he had "seen the records" and that the lease had been granted to the defendant company and had expired on 16th June, 1961. The other simply said that it had expired "on a certain date" in 1961. A third witness said the area was Crown land. No evidence was called for the defence. Learned Crown Counsel, arguing on behalf of the respondent, submits that this evidence was oral evidence of the contents of the lease, and that as such it was admissible under section 96(1)(*e*) of the Evidence Ordinance, the lease being a public document by virtue of section





108(*a*)(*iii*). By section 34 of the Minerals Ordinance, Cap. 121, mining leases are granted by the Federal Government, and consequently a mining lease is the act of a public officer and is therefore a public document. But by subsection (2)(*c*) of section 96 of the Evidence Ordinance the secondary evidence admissible in respect of the original documents mentioned in subsection (1)(*e*), that is, public documents, is a certified copy of the document but no other kind of secondary evidence. Therefore oral evidence under section 94(*e*) was inadmissible to prove the mining lease in question, and even if the evidence about the lease given by the prosecution witnesses was an account of its contents given by persons who had seen it, it did not prove those contents. There was thus no evidence to show that the lease had expired and the prosecution case was not proved. This appeal will therefore be allowed.

Counsel for the company at the trial did not object to the evidence about the lease given by the prosecution witnesses. In his submission at the end of the prosecution case he pointed out that the lease had not been tendered and observed that the only evidence about it was secondary evidence. The learned trial magistrate in his judgment said "The objection as to evidence of the document concerning the expiry of the lease was not taken by counsel at the appropriate time." Proof cannot be waived in a criminal case. Counsel's not having objected to the evidence did not make it admissible evidence to prove the contents of the lease. We would add that even if it had been admissible it would not have proved the contents of the lease. Secondary evidence of a document, if oral, must be evidence of its contents given by some person who has himself seen it: Evidence Ordinance, section 94(*e*). None of the witnesses said that he had seen the lease, and we cannot infer that the lease was among the "records" which one of them said he had seen; he could as well have been referring to an abstract of the lease, or to some departmental register, as to the lease itself. Nor did any of the witnesses testify to the contents of the lease, and their saying that the lease had expired, or that the area was Crown land, was not an account of the contents. It was an account of their inferences from its contents, and it was not for them to draw those inferences; it was for the magistrate to do so, if he had been given the facts which he was not given.

The appeal is allowed; fine, if paid, to be refunded.

*Appeal allowed.*

## AGOMA ACHAJI AND OTHERS *v.* COMMISSIONER OF POLICE

[C.A. (Hurley, C.J., and J.A. Smith, S.P.J.)—January 18, 1963]

[Jos—Criminal Appeal No. JD/78CA/1962]

*Appeal—criminal appeal—interlocutory appeal—appeal from decision allowing prosecutor to address in reply—Constitution of Northern Nigeria, s.* 52 (5).

*Criminal procedure—addresses—prosecutor's right of reply—accused giving evidence but calling no witnesses—Criminal Procedure Code, ss.* 191 (1) (*b*), 194(1), 228.

*Words and phrases—"witness"*, ibid.

Where an accused person in a trial in the High Court or a magistrate's court gives evidence on his own behalf but calls no witnesses the prosecutor has no right of reply.

An accused person who gives evidence on his own behalf is not a witness within the meaning of section 194(1) (*b*) of the Criminal Procedure Code, which provides—"If the accused or any of the accused calls any witnesses other than to character. . . . the prosecutor shall be entitled to reply.

A ruling by a magistrate that the prosecutor has a right of reply when the accused has given evidence other than evidence as to character is an "order" within the definition of "decision" in section 52(5) of the Constitution of Northern Nigeria, and is therefore subject to appeal to the High Court.

CRIMINAL APPEAL

*R.C. Rickett* for appellants;
*K. Nadarajah, Crown Counsel,* for respondent.

**J.A. Smith, S.P.J.,** delivering the judgment of the Court: The appellants were jointly tried in the court of the magistrate grade 1 for an offence of criminal trespass and each of them was acquitted. After the case for the prosecution had closed each of the appellants (then the accused) gave evidence on his own behalf but none of them called any witnesses nor put in any document or other evidence. Counsel for the appellants summed up their case; and then the prosecutor indicated that he wished to reply. Counsel for the appellants objected and the learned magistrate ruled: "In my view when an accused person gives evidence concerning the substance of the complaint and charge he is to be regarded as a witness. In this case the accused persons have given evidence and it is evidence other than to character. Accordingly I hold that





the prosecution has a right of reply." The appellants have appealed against this ruling on the ground that it was wrong in law.

Mr Rickett for the appellants submitted that the word "witness" in section 194(1) of the Criminal Procedure Code did not include an accused person giving evidence on his own behalf and consequently the prosecutor had no right of reply. The subsection reads:—

"(1) If the accused or any of the accused calls any witness other than to character or any document other than a document relating to character is put in evidence for the defence the prosecutor shall be entitled to reply." The word "witness" in this subsection has the same meaning as that word in the context "to call witnesses" in section 191(1)(*b*) of the Criminal Procedure Code and as Mr Nadarajah for the respondent pointed out, "witness" in this paragraph is to be distinguished from "evidence" in paragraph (*a*) of the same subsection. The subsection reads:—

"(1) After the reading of the examination of the accused, in accordance with the provisions of section 190 the accused shall be examined as provided in section 235 and he shall then be asked—

(*a*) whether he wishes to give evidence on his own behalf as provided in section 236; and

(*b*) whether he means to call witnesses other than witnesses of character."

It will be observed that in paragraph (*a*) an accused is to be asked if he wishes to give evidence on his own behalf and also in paragraph (*b*) to be asked if he means to call witnesses. Here there is a clear distinction between the accused and his witnesses and we hold that an accused person giving evidence on his own behalf is not a witness within the meaning of that word in section 194(1)(*b*) of the Criminal Procedure Code.

Both the sections we have referred to appear in Chapter XVIII entitled "Trials in the High Court." The High Court procedure is to be followed in trials and inquiries in magistrate's courts so far as may be appropriate except as otherwise provided in the Criminal Procedure Code. This is provided for in section 228. No procedure is laid down in Chapter XVI—"Summary Trials in Magistrates' Courts"—as to the right of address and reply, hence the application of the procedure in Chapter XVIII.

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It was at first submitted that there was no right of appeal in the circumstances of this case because there had been an acquittal. It was later conceded in the course of argument that the ruling of the learned magistrate was a "decision" within the meaning of that word in section 52(5) of the Constitution of Northern Nigeria. We hold that the ruling was an "order" within the definition of "decision" in section 52(5) of the Constitution and consequently there was a right of appeal.

In the result we find that the learned magistrate erred in holding that when an accused gives evidence on his own behalf the prosecutor has a right of reply. There is no such right in the provisions of the Criminal Procedure Code.



## AMADU TEA *v.* COMMISSIONER OF POLICE

[C.A. (Hurley, C.J., and Bate, J.)—January 18, 1963]
[Kano—Appeal No. K/45CA/1961]

*Criminal procedure—bail—surety—forfeiture of bond—bond not exhibited—whether forfeiture proved—recovery of penalty—imprisonment, when lawful—Criminal Procedure Code, s.354; s.304.*

The appellant was surety for the bail of an accused person in a magistrate's court. The accused did not attend to stand trial. The recognisance was forfeited, and the magistrate thereupon ordered the surety to pay a penalty of £100, or to be imprisoned for six months.

Section 354(2) of the Criminal Procedure Code provides that where a bond has been forfeited, and the penalty is not paid or cause shown why it should not be paid, the court may proceed to recover the penalty in the manner laid down in section 304 for the recovery of fines, which is by a warrant for the levy of the amount; and section 354(4) provides that if the penalty cannot be recovered in that manner, the person bound shall be liable to imprisonment by order of the court which issued the warrant under section 304. On appeal to the High Court,

*Held:* (1) The order for imprisonment was unlawful, because when imprisonment was ordered no attempt had been made to recover the penalty in the manner prescribed.

The bond was not exhibited before the magistrate's court when the magistrate found that it had been forfeited, and there was no evidence that it was then before the magistrate. It was not produced before the High Court, because it could not be found.

*Held:* (2) The order to pay the penalty of £100 must be set aside because there was no evidence in the magistrate's court on which to form an opinion that the appellant had broken any term of the bond.

*Obiter:* Even assuming the bond was before the magistrate, the order could not stand because the High Court were not in a position, without seeing the bond themselves, to say whether or not they agreed with the magistrate's finding that there was a breach of it.

Case referred to:

*McGarry*, 30 Cr.App.R. 187, followed.

APPEAL IN CRIMINAL MATTER

*E. Lewis Thomas* for the appellant;
*O. F. Corcoran, Crown Counsel*, for the respondent.

**Bate, J.,** delivering the judgment of the Court: We have allowed this appeal and will now give our reasons.

The appellant was a surety for an accused person who was granted bail by a Chief Magistrate. The accused did not attend to stand his trial. The appellant, after being called upon to show cause, was ordered to forfeit his recognisance and to pay £100 or be imprisoned for six months. He appeals

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against this order on two grounds. The first ground of appeal is that it was wrong to estreat the recognisance without calling upon the appellant to produce the accused and without asking the appellant to show cause why the recognisance should not be estreated. Counsel for the appellant frankly admitted at the outset that the record showed that the appellant had been called upon to show cause and abandoned the last part of his first ground. The second ground is that the breach of the recognisance has not been strictly proved.

The law relating to the forfeiture of a bond is contained in section 354 of the Criminal Procedure Code. The circumstances in which imprisonment may be ordered are set out in sub-section (4) which provides that "If the penalty is not paid and cannot be recovered in manner aforesaid, the person bound shall be liable by order of the court which issued the warrant under section 304 to imprisonment which may extend to six months." In the present case, when imprisonment was ordered, no attempt had been made to recover the penalty in the manner prescribed. Consequently the order for imprisonment was unlawful.

There remains however the order to pay a penalty of £100. Counsel for the appellant confined himself to the second ground of appeal and argued that strict proof is required before a surety may be penalised for breach of a recognisance and that no such proof had been given. He was assisted in his argument by the fact that the bond was not exhibited either in this court or in the court below and, although we adjourned the appeal for a day and a half to enable a search to be made in the registry of the Chief Magistrate's court, it was not found. The learned Crown Counsel contended that the absence of the bond was immaterial. He argued that the bond was part of the record before the magistrate and that it was therefore unnecessary that it should have been exhibited to him, and that it was sufficient for this court to know that the magistrate had found that there had been a breach of the recognisance.

We are unable to agree with Counsel for the respondent. It was held in *McGarry*, 30 Cr. App. R.187, that the recognisance must be before the court which is trying the issue whether it should be estreated even though the recognisance was taken in that court. In that case the recognisance was not before the court and the sentence which it imposed for breach of recognisance was set aside "because the Court had no material at all on which to form the opinion that he had broken any term of the recognisance which was not



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before the Court." In the present appeal there is no evidence that the recognisance was before the learned magistrate and we cannot assume that it was.

But even if it is assumed that the recognisance was before the learned magistrate, the fact that it is not before us must be fatal to the respondent's case. Without seeing the recognisance we are not in a position to say whether or not we agree with the learned magistrate's finding that there was a breach of it. We cannot make any assumption that we would take the same view as the learned magistrate.

The appeal is allowed and the order of the learned magistrate estreating the recognisance and imposing a penalty of £100 or a sentence of six months' imprisonment is set aside.

*Appeal Allowed.*

## DOCTOR MOHAMMED ASHARD *v.* COMMISSIONER OF POLICE

[C.A. (Hurley, C.J., and J.A. Smith, S.P.J.)—January 19, 1963]

[Jos—Criminal Appeal No. JD/1CA/1963]

*Criminal procedure—case diary—statement of witness—written statement to be included in case diary—inadmissible against maker on his trial—Criminal Procedure Code*, ss. 121(1) (*g*), 122(1); *s.* 126.

*Evidence—accused's statement—statement made by accused as witness during police investigation—statement in writing—whether admissible against accused*—ibid.

At the appellant's trial a statement was admitted as evidence against him which he had written not under caution but as a witness at the request of the police officer investigating the case. By section 121(1) (*g*) of the Criminal Procedure Code, a police officer conducting the investigation of a case must set forth in the case diary any statement of a witness if reduced to writing. By section 122(1) of the Code a case diary is not admissible as evidence against any accused person in any inquiry or trial. On appeal,

*Held:* It must be presumed that the statement was duly set forth in the case diary, and therefore, as an item in the case diary, it was not admissible in the trial as evidence against the appellant.

CRIMINAL APPEAL

*Ezekwe* for the appellant;
*K. Nadarajah, Crown Counsel*, for the respondent.

**Hurley, C.J.,** delivering the Court's reasons for dismissing the appeal the previous day: We dismissed this appeal yesterday. The following are our reasons:—

The appellant was convicted by the Acting Chief Magistrate, Jos, on a charge of negligent driving contrary to section 18(1) of the Road Traffic Ordinance, 1948. The first ground of appeal to be argued was that a statement written by the appellant without his having been cautioned was wrongly admitted in evidence. Since there was no evidence that the police officer at whose request the statement was written had decided to initiate proceedings against the appellant, there was nothing to support this ground of appeal. While arguing it, however, Counsel for the appellant made another submission which was heard though it was not the subject of a ground of appeal. It was that the statement was inadmissible in evidence by virtue of section 122(1) of the Criminal Procedure Code, which provides that save in so far as is expressly permitted in





the Code a case diary shall not be admissible as evidence against any accused person in any inquiry or trial. By section 121(1) (*g*) of the Code the statement of any witness, if reduced to writing, is one of the things which are required to be set forth in the case diary. The appellant wrote the statement as a witness and it is to be presumed that it was duly set forth in the case diary. The case diary being inadmissible as evidence against the appellant by virtue of section 122(1), it is our opinion that the several things and matters set forth in it are separately inadmissible. This seems to follow from the provisions of section 126. By that section a police officer may record a confession in the case diary and a confession duly recorded in compliance with the provisions of the section is admissible as evidence against the person who made it. It would not have been necessary to provide that a confession recorded in the case diary under section 126 should be admissible as evidence against the person who made it if section 122, in making the case diary inadmissible as evidence against an accused person, did not make each item included in the diary inadmissible separately from the diary. Thus the appellant's statement ought not to have been received in evidence. (The Court then dealt with the facts of the case, and concluded that there had been no failure of justice.)

***Appeal dismissed.***

# M. YUSUFU WAKILIN YAKI DA JAHILCHI AND ANOTHER *v.* ZARIA NATIVE AUTHORITY

[C.A. (Hurley, C.J., Abubakar Mahmud, Sh. Ct. J., and Ahmad, J.)—January 26, 1963]

[Kaduna—Appeal No. Z/16CA/1963]

*Criminal Procedure—compensation ordered to be paid by offender—enforcing payment of compensation—seizure and sale of offender's property—whether compensation payable under Penal Code or under Criminal Procedure Code— whether fine imposed—Penal Code, s.* 78*; Criminal Procedure Code, ss,* 365(1)(*b*), 367.

*——————confiscation—property used for commission of offence or regarding which offence committed—property produced before court or in its custody—means property brought to court for purposes of the trial and not for use as compensation—Criminal Procedure Code, s.* 357.

Having convicted each of the appellants of criminal breach of trust in respect of money entrusted to him by the native authority which employed him, the trial court ordered each appellant to pay the money he had misappropriated and sentenced him to a term of imprisonment for his offence. After sentence, the appellants having no money, the trial court had their houses searched by the police, sold what was found there, and paid the proceeds to the native authority. The court also credited to the native authority six months' arrears of salary due to the first appellant.

*Held,* (1) It was within the trial court's powers to order the appellants to make compensation to the native authority under section 78 of the Penal Code, but

(2) it was not within the trial court's powers to order the appellants to pay compensation under section 365(1) (*b*) of the Criminal Procedure Code, because the appellants had not been sentenced to pay fines, and therefore,

(3) it was not within the trial court's powers to enforce the payment of the compensation under section 367 of the Criminal Procedure Code as if it were a fine by seizure and sale of the appellants' property or by the attachment of any debts due to the first appellant, because the compensation was not payable by virtue of any order under the Criminal Procedure Code; and

(4) it was not within the trial court's powers to order the confiscation of the appellants' property under section 357(1) of the Criminal Procedure Code, because—

(*a*) the offences which the appellants were found to have committed had not been committed in regard to their property which was confiscated, and the property had not been used for the commission of the offences; and

(*b*) it did not appear that the property had been produced before the trial court or taken into its custody.





*Per Curiam:* Even if the property had been produced before the trial court or taken into its custody, it would not have had the character of property produced before the court or in its custody within the meaning of section 357(1), which refers to property brought to court for the purposes of an inquiry or trial, that is, as being the subject matter of the offence or relevant to prove or disprove it, and confers no right to seize property for the sole purpose of being used as a source of compensation in the case.

CRIMINAL APPEAL

Appellants in person;

*I. M. S. Donnell, Crown Counsel,* for the respondent.

**Hurley, C.J.,** delivering the judgment of the Court: The appellants were tried together in the court of the Chief Alkali of Zaria and convicted of offences against section 315 of the Penal Code. The appellants were officials of the Zaria Native Authority concerned with adult education, and the prosecution arose out of the encashment of false vouchers and cash order forms for payments in connection with adult education. The trial court summed up the case against each of the appellants separately. After summing up the case against the first appellant, the trial court said "Since the Native Authority entrusted the money to him, and he spent it dishonestly, therefore the Wakilin of adult education M. Yusufu has offended under section 315 of the Penal Code. He will be punished and then will pay this money £707-15*s*". Similarly, the trial court said of the second appellant "Therefore for these reasons he has been found guilty of the offence of spending Native Authority money £439-6*s* for 1961-62 on 26 vouchers so M. Bello has offended under section 315 of the Penal Code. He will be punished and then he will pay the money." The court then proceeded to sentence the first appellant to three years' imprisonment and continued "I . . . . have ordered M. Yusufu to pay the money £707-15*s*. He said he has no money. I . . . have asked Mijin Yawa and three Native Authority Policemen to search his house. The following things has been found in his room. . . Total £36-4*s* the man who sold has been paid £1-10*s* commission, balance £34-14*s*. The Court asked the Native Authority whether M. Yusufu has money with it? The D.O. said his salary for six months is there £22-10*s* a month total £147 added to the money got from selling his property totals to £181-14*s*. The court paid it to the Zaria Native Authority treasury Receipt No. . . . . remaining balance £526-1*s* he is entitled to £221 gratuity, but when the payment will be made is not known. Therefore they judged that the £526-10*s* is still

with him." In the same way, after sentencing the second appellant to two years' imprisonment the trial court set out particulars of a search of his house and sale of the property there found yielding a balance of £29-7*s* after commission which was paid into the Native Authority Treasury leaving a balance of £409-9*s* still due from him. The appellants complain against these confiscations of their property.

By section 78 of the Penal Code, any person who is convicted of an offence under the Code may be adjudged to make compensation to any person injured by his offence and such compensation may be either in addition to or in substitution for any other punishment. It was within the trial court's powers to order the appellants to make compensation; the question is whether it was within the court's powers to exact the compensation by the confiscation of the appellants' property. By section 367 of the Criminal Procedure Code—"Payment of any money, other than a fine payable by virtue of any order under this Criminal Procedure Code may be enforced as if it were a fine." This section must be read with a comma after the words "other than a fine"; it says that payment of any money payable by virtue of any order under the Criminal Procedure Code, other than a fine, may be enforced as if it were a fine. Payment of a fine may be enforced under section 304 by the seizure and sale of the offender's movable property or by the attachment of any debts due to him. Under section 367, payment of any money, not being a fine, which is payable by virtue of any order under the Criminal Procedure Code may be enforced in the same ways as those in which payment of a fine may be enforced under section 304. But section 367 does not authorise the enforcement of payment of money which is not payable by virtue of an order made under the Criminal Procedure Code, and therefore it does not authorise the enforcement of payment of money payable by virtue of an order made under section 78 of the Penal Code. The section of the Criminal Procedure Code itself which enables a court to make an order for compensation in a case like the present is section 365, which provides in subsection (1) (*b*) that where a criminal court imposes a fine it may, when passing judgment, order that in addition to a fine a convicted person shall pay a sum in compensation in whole or in part for the injury caused by the offence committed, where substantial compensation is in the opinion of the court recoverable by civil suit. This section applies only where the offender has been sentenced to pay a fine, and the appellants in this case were not sentenced to pay fines.





There remains section 357 of the Criminal Procedure Code, which provides—

"(1) When an inquiry or trial in any criminal case is concluded, the court may make such order as it thinks fit for the disposal by destruction, confiscation or delivery to any person appearing to be entitled to the possession thereof or otherwise of any movable property or document produced before it or in its custody or regarding which any offence appears to have been committed or which has been used for the commission of any offence.

"(2) When an order is made under this section in a case in which any appeal lies, such order shall not, except when the property is livestock or is subject to speedy and natural decay, be carried out until the period allowed for presenting such appeal has passed or, when such appeal is presented within such period, until such appeal has been disposed of.

"(3) Notwithstanding the provisions of subsection (2), the court may in any case make an order under the provisions of subsection (1) for the delivery of any property to any person appearing to be entitled to the possession thereof on his executing a bond with or without sureties to the satisfaction of the court engaging to restore such property to the court, if the order made under this section is modified or set aside by the appellate court."

We note that the trial court failed to observe the provisions of subsection (2) or subsection (3) of this section; it should have postponed the sale of the appellants' property until after their appeal had been disposed of or taken security for its restitution if the appeal succeeded. But that is by the way; in our opinion the section gave the trial court no power, in the circumstances of the case, to order the confiscation of the appellants' property at all. The offences which the appellants were found to have committed had not been committed in regard to their property which was confiscated, and that property had not been used for the commission of the offences. The first appellant's arrears of salary had not been produced before the trial court and were not in its custody. It does not appear that the appellants' property found in the searches of their houses was produced before the trial court or taken into its custody, and even if that had been done we do not think it would have given the appellants' property the character of property produced before the court or in its custody within the meaning of subsection (1) of section 357. In referring to property produced before the court or in its custody, the subsection refers to property brought to court

for the purposes of the inquiry or trial, that is, as being the subject-matter of the offence or relevant to prove or disprove it; it does not refer to property brought to the court for the sole purpose of being used as a source of compensation in the case, and it confers no right to seize property for that purpose.

We have been shown no other provision of the Criminal Procedure Code which could justify the confiscations which were effected in this case. In our opinion they were illegal and must be set aside. We will so order, and we will order further, as the trial court could have ordered, that the proceeds of sale of their properties be repaid to the respective appellants, amounting in the case of the first appellant to £36-4*s*-0*d* and in the case of the second appellant to £30-7*s*-0*d*, and that his arrears of salary amounting to £147 be repaid to the first appellant. This order will be without prejudice to any further civil claim which the appellants may have against any person or body arising out of these transactions. Equally, it has no effect on the Native Authority's claim to recover from the appellants any sums misappropriated by them.

The first appellant complains against his sentence and the confiscation of his property taken together, as being together oppressive. Our order for the repayment of the sums realised may not fully compensate him for the confiscation, and for that reason, and having regard to the arbitrary manner in which the trial court acted in carrying out the confiscation, we reduce the first appellant's sentence to two years.

The first appellant did not complain against his conviction and in regard to that there is nothing more to be said in this judgment. The second appellant did complain against his conviction. The conviction was founded on evidence given in the trial court of the proceedings of a committee of inquiry, on the appellant's replies and explanations when shown the relevant vouchers and cash order forms in court, and on his admissions to the court recorded at two places in the record of proceedings. The second appellant has now given evidence on oath and said that the record at these places is incorrect and that he did not make the admissions recorded. That evidence stands uncontradicted by other evidence. Having regard to that fact, and to the fact that in the conduct of the trial the complaint against the second appellant was not inquired into directly by taking the evidence of witnesses who could testify from their own observation to what had actually occurred, but by receiving evidence of what had transpired at the committee of inquiry, we think that the second appellant's





conviction cannot be safely supported. There is however it appears a considerable body of evidence which could be brought against the second appellant although the trial court did not hear it; and for that reason, while allowing the appeal and setting aside the conviction and sentence, we will order the appellant to be retried in the Magistrate's Court of the Kano Magisterial District.

*Orders for confiscation set aside.*

# EMMANUEL IBEZIAKO *v.* COMMISSIONER OF POLICE

[Federal Supreme Court (Ademola, C.J.F., Brett, Taylor and Bairamian, F.JJ.)—January 28, 1963]
[Lagos—Appeal No. F.S.C. 329/1962]

*Constitutional law—fundamental rights—presumption of innocence—summary trial in magistrate's court—charge framed after prosecution witnesses heard—whether presumption of innocence violated—Constitution of the Federation of Nigeria, s.* 21(4)*; Criminal Procedure Code, ss.* 158, 159, 160(1), 161(1).

*Criminal procedure—summary trial—framing charge after hearing prosecution witnesses—presumption of innocence not violated—desirability of framing charge as early as possible*—ibid.

For the purposes of a summary trial under Chapter XVI of the Criminal Procedure Code, the trial magistrate, acting in accordance with the provisions of that Chapter, took the evidence of some of the prosecution witnesses and then framed a charge against the accused. Section 160(1) of the Code required the magistrate to frame a charge if after taking the evidence of the prosecution witnesses or at any previous stage of the case he was of opinion that there was ground for presuming that the accused had committed an offence. The accused pleaded not guilty to the charge and after further evidence was convicted. He appealed on the ground that the procedure adopted for his trial contravened the provisions of section 21(4) of the Constitution of the Federation of Nigeria because the presumption of innocence there provided for was violated. In support of this, it was contended that the magistrate must have presumed the accused guilty when he framed the charge.

*Held:* The submission that the magistrate must have presumed the accused guilty was ill founded, and the provisions of section 21(4) had not been infringed.

*Per Curiam:* A magistrate conducting proceedings under Chapter XVI of the Criminal Procedure Code should frame a charge as early in the preliminary proceedings as possible. It is best that the charge be framed as soon as some evidence for the prosecution shows, directly, or circumstantially or inferentially, that there is a *prima facie* case of the commission of an offence.

Cases referred to:—

*Woolmington v. The Director of Public Prosecutions*, [1935] A.C. 462 at p. 481, mentioned;

*R. v. Carr-Briant*, [1943] 1 K.B. 607, mentioned;

*Scapetta v. Lowenfeld*, 27 L.T.R. 509, applied;

*Kano Native Authority v. Obiora*, 4 F.S.C. 226 at p. 230, followed;

*Bukar of Kaligari v. Bornu Native Authority*, 20 N.L.R. 159 at p. 162, approved;

Practice Note, [1962] 1 All E.R. 448, referred to.

(*Editorial Note.*—The provisions of s. 235 of the Criminal Procedure Code as set out in the judgment have been amended by Law No. 3 of 1963).





CRIMINAL APPEAL

*F. R. A. Williams, Q.C.* (with him *G. C. Nzegwu*) for the appellant;

*I. M. Lewis, Q.C., Attorney-General* (with him *I. M. S. Donnell, Crown Counsel*) for the respondent.

**Ademola, C.J.F.,** delivering the judgment of the Court: This appeal raises a question of very great importance for Northern Nigeria where the Criminal Procedure Code is in force. The appellant was convicted by the Acting Chief Magistrate of the Jos Magisterial District on a charge of offering or giving gratification to a public servant contrary to Section 118 of the Penal Code. He appealed to the High Court and failed. This appeal to this Court is a second appeal and the ground of appeal, as amended, reads:—

"The procedure adopted in the Court below (the Magistrate's Court) for the trial of the appellant contravened the provisions of Section 21(4) of the Constitution of the Federation because the presumption of innocence provided for under that sub-section was violated."

Sub-section 21(4) referred to provides that—

"Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty:

"Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving any particular facts."

That provision enshrines a principle which has always been observed in our Courts, and which is succinctly enunciated in *Woolmington v. The Director of Public Prosecutions* [1935] A.C. 462 at p. 481, where Lord Sankey, L.C., said as follows: "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception." The exceptions to which Lord Sankey was alluding were certain principles at Common Law, such as insanity, in which the burden of proof lies on the accused person. There are also a few statutes that create some presumptions which an accused person has the duty to rebut. These were referred to in the case of *R. v. Carr-Briant*, [1943] 1 K.B. 607, where the standard of proof required of an accused person, or proof upon the preponderance of evidence, was discussed.

During the argument before us, a number of cases were referred to on the meaning of the word "charged" in the sub-section. It was said it may mean "charged by the police" in accordance with police practice, or "charged in court" in the nature of formal accusation. It seems unnecessary to discuss these cases for, whether or not the sub-section can mean "charged by the police", there is no doubt that it is right to understand it in the present case as meaning "charged in court", having regard to the context; it is in court that an accused person is proved guilty, and it is there he would have, if the law so provided in regard to the offence charged, "the burden of proving particular facts." It is common ground that the appellant was not "charged" at the beginning of the proceedings in the magistrate's court. The nature of his present complaint will be better appreciated if the proceedings there are summarised.

The appellant appeared as the 2nd accused person, with a co-accused, and both had counsel. The First Information Report (which, as required by Section 118 of the Criminal Procedure Code, is sent by the police to the court) was explained to them, and they were cautioned; they chose to say nothing. The note is "For P. I.". They were remanded on bail, and it was on a later day that the note reads "for trial". Crown Counsel appeared for the prosecution, and addressed the court on the evidence to be adduced. The accused had their counsel. Five witnesses were called, examined and cross-examined, over several days. Then the magistrate framed two charges—one against each of the accused—which he read and explained to them, and each pleaded not guilty; copies of the charge were handed to counsel on either side. The form of the charge, in respect of the appellant, is:—

"I Jeffrey Richard Jones, Acting Chief Magistrate, Jos, charge you Emmanuel Ibeziako that you. . .and thereby committed an offence under Section 118 of the Penal Code Law, 1959."

The case was adjourned for some days. At first counsel for the defence said they wished to recall one witness, but at the resumed hearing he said they did not so wish. The prosecution called three more witnesses; the defence said they were not calling any evidence; and counsel addressed the court. Judgment was given on a later day convicting the two accused; they appealed, one of their grounds being similar to the one advanced by the appellant in his further appeal from the High Court, where the magistrate was upheld. Before us Chief Rotimi Williams argued for the appellant and Mr Ian Lewis, Attorney-General of the Northern Region, argued for the respondent.





There was no suggestion that any section of the Criminal Procedure Code had been contravened. It will be convenient to start with the provisions of the relevant sections of the Criminal Procedure Code.

The First Information Report was sent to the Court under Section 118 of the Procedure Code, with which we are not at present concerned. Section 158 and section 159 of the Code provide as follows:—

"158(1) When the magistrate decides not to convict the accused under section 157 or when an accused person states that he intends to show cause why he should not be convicted the magistrate shall proceed to hear the complainant, if any, and take all such evidence as may be produced in support of the prosecution.

"(2) The magistrate shall ascertain from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution and shall summon to give evidence before him such of them as he thinks necessary.

"(3) The accused shall be at liberty to cross-examine the witnesses for the prosecution and, if he does so, the prosecutor may re-examine them.

"159(1) If upon taking all the evidence referred to in section 158 and making such examination of the accused as the magistrate thinks necessary for the purpose of enabling him to explain any circumstances appearing in the evidence the magistrate finds that no case against the accused has been made out which if not rebutted would warrant his conviction the magistrate shall discharge him.

"(2) The magistrate may discharge the accused at any previous stage of the case, if for reasons to be recorded by him he considers the charge to be groundless.

"(3) A discharge under this section shall not be a bar to further proceedings against the accused in respect of the same matter".

They are to be read with sections 144 and 145 of the Code which are as follows:—

"144. When the accused person appears before a court taking cognizance of an offence, the court may require the police officer, if any, in charge of the investigation, or any police officer acting on his behalf, to state a summary of the case and, if the court shall think fit, to produce the case diary for its inspection; and upon the application of any such police

officer or of its own motion, the court may give such directions as to the matters to be proved and how they are to be proved, and what documents or other exhibits are to be produced as the court may think fit.

"145. When a court has exercised its powers under section 144 it shall inform the accused person that he is not required to say anything at that stage, but that if he wishes to inform the court of the substance of his defence he can do so in order that the court may give him such advice as it may think fit".

The learned magistrate clearly did not act under sections 144, 145 or 159; he heard some evidence—in fact most of the prosecution evidence—and formulated the charge before hearing some more prosecution witnesses and calling upon the accused person for his defence.

We refrain in this matter from expressing an opinion about sections 144, 145 and 159 as they were not acted upon, but in this connection, it is necessary to observe that section 235 of the Code gives the Court power, if it thinks it necessary, to put questions to the accused without previously warning him. The section provides:—

"235(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the court may at any stage of an inquiry or trial, without previously warning the accused, put such questions to him as the court considers necessary and in such case shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

"(2) The accused shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them; but the court may draw such inference from such refusal or answers as it thinks just.

"(3) The answers given by the accused may be taken into consideration in the inquiry or trial.

"(4) The sole purpose of such examination shall be to discover the line of defence and to make clear to the accused the particular points in the case for the prosecution which he has to meet in his defence and there shall be nothing in the nature of a general cross-examination for the purpose of establishing the guilt of the accused.

"(5) No oath shall be administered to the accused for the purposes of an examination under this section".





It is, however, with sections 160(1) and 161(1) of the Code we are mostly concerned. They read:—

"160(1) If when the evidence referred to in section 158 and the examination referred to in section 159 have been taken and made or at any previous stage of the case the magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, which such magistrate is competent to try and which in his opinion could be adequately punished by him, he shall frame a charge under his hand declaring with what offence the accused is charged and shall then proceed as hereinafter provided."

"161(1) If the magistrate is of opinion that the offence is one which having regard to section 160 he should try himself, the charge shall then be read and explained to the accused and he shall be asked whether he is guilty or has any defence to make."

The question raised before us by Chief Rotimi Williams is, at what stage should the magistrate charge the accused. According to section 160 of the Code, he argued, the magistrate may continue to take evidence against an accused person until such time as he thinks a case has been made out against him; at the stage he makes up his mind about the accused he charges him. The submission is that the presumption of innocence must be present when an accused person is charged and begins to stand his trial; but the procedure of taking prosecution evidence to a point at which, in the words of section 160(1), "the magistrate is of the opinion that there is ground for presuming that the accused has committed an offence", whereupon the magistrate shall frame a charge for the offence, means that, when the charge is framed, the presumption of innocence is already gone, and that this violates the provisions of the fundamental right entrenched in section 21(4) of the Constitution of the Federation.

Counsel further complained that it was unheard of in Nigeria for a magistrate to draft a charge and that it was wrong in the instant case for the magistrate to have drafted the charge, as he had known all about the case from the witnesses who gave evidence for the prosecution. We find ourselves unable to agree with this view. We do not think it is a sound objection to a procedure, that the Legislature of a Region has shown preference for a particular system of procedure, provided it is clear that such procedure or law does not administer, observe or enforce the observance of

any principle of law which is repugnant to natural justice, equity and good conscience. A procedure is not contrary to natural justice merely because it is foreign to English Law—see *Scapetta v. Lowenfeld* 27 L.T.R. 509; *Kano Native Authority v. Obiora* 4 F.S.C. 226; *Bukar of Kaligari v. Bornu Native Authority* 20 N.L.R. 159. In the last case, Bairamian, J. (as he then was), said:—". . . . It must be presumed that the court followed the right procedure. . . . .It differs from the English procedure but that is not enough for attacking it."

The procedure adopted in the present case as laid down in section 160 of the Procedure Code is not dissimilar with the "no case" decisions in English law, and these principles are laid down as a Practice Note by Parker, L. C. J., which is reported in [1962] 1 All E. R. 448. It is as follows:—

"Those of us who sit in the Divisional Court have the distinct impression that justices today are being persuaded all too often to uphold a submission of no case. In the result, this court has had on many occasions to send the case back to the justices for the hearing to be continued with inevitable delay and increased expenditure. Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations.

"A submission that there is no case to answer may properly be made and upheld: (*a*) when there has been no evidence to prove an essential element in the alleged offence; (*b*) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

"Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

We are satisfied that at the time the magistrate drafted the charge he was not weighing the evidence before him; this he did after hearing the whole case. Up to that stage all the learned magistrate was doing was making an enquiry, and this was so until the charge was framed by him. The procedure followed by the magistrate is not unlike that provided by





section 332 of the Criminal Procedure Ordinance (which was in force in the Northern Region before it was replaced there by the new Criminal Procedure Code, and is still in force in Lagos and other Regions). Under section 332 of the Criminal Procedure Ordinance a magistrate holding a preliminary enquiry may, in the course of it, turn it into a summary trial subject of course to certain conditions, whereupon he may, under section 304(2), "cause the charge to be reduced into writing, if this has not been already done," and go through the procedure for a summary trial. That does not mean that the magistrate has made up his mind to convict; it only means that he thinks it is a case suitable for summary trial and which need not be committed to the High Court. The evidence heard up to that point shows that there is a *prima facie* case: but it may well be that further cross-examination of witnesses originally called, or of those, if any, called after the summary trial begins, or the evidence for the accused, may raise a reasonable doubt, in which case he will be acquitted.

We have given anxious consideration to the objection to the magistrate being required to frame the charge in the Northern Region; we feel that this means no more than that the magistrate is formulating what seems to him to be the appropriate charge for the offence which *prima facie* appears to have been committed, and it does not mean that the magistrate has made up his mind that the accused person is guilty. During our research we have had occasion to refer to the power provided in the Criminal Procedure Ordinance for the trial court to alter or amend the charge before it which, when exercised, sometimes has the effect of redrafting the whole charge or information. The idea in the Northern Region is that the charge should be framed by the magistrate instead of being left in the hands of lay prosecutors to frame.

The learned Attorney-General, Northern Region, informed us that, on the Indian authorities, the magistrate should frame the charge as early in the preliminary proceedings as possible. With that we agree; it is best that the charge be framed as soon as some evidence for the prosecution shows, directly, or circumstantially or inferentially, that there is a *prima facie* case of the commission of an offence.

We are not, in this appeal, deciding on the constitutionality of section 159 of the Criminal Procedure Code or of other provisions which were not acted under by the learned magistrate; we may one day be called upon to do so when those provisions will receive our due consideration. It is enough in this appeal to say that the learned magistrate did not act under such provisions.

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The submission that the magistrate, under the procedure he followed in this case, must have presumed the accused guilty when he framed the charge, in our view is ill founded and we are satisfied that the provisions of section 21(4) of the Constitution have not been infringed.

The appeal will therefore be dismissed.

*Appeal dismissed.*



## ABDU DAN SARKIN NOMA *v.* ZARIA NATIVE AUTHORITY

[C.A. (Hurley, C.J., Abubakar Mahmud, Sh.Ct.J. and Ahmad, J.)—January 26, 1963]

[Kaduna—Appeal No. Z/28CA/1962]

*Appeal—criminal appeal—error or omission in judgment of trial court—whether failure of justice occasioned—test applicable—Criminal Procedure Code, s.* 382.

*Words and phrases—"failure of justice"*, ibid.

By section 382 of the Criminal Procedure Code, an appeal court is not to reverse or alter any finding of the court of trial on account of any error or omission in its judgment unless the appeal court thinks that a failure of justice has been occasioned by such error or omission.

Where the trial court in a case of culpable homicide omitted to notice part of the accused's evidence, and omitted to consider whether there was provocation reducing the offence to culpable homicide not punishable with death, the High Court, on appeal against the accused's conviction for culpable homicide punishable with death,

*Held:* that the test to be applied to determine whether a failure of justice had been occasioned should be "Might the trial court have acquitted after directing itself properly on evidence properly admitted at the hearing, and on a reasonable view of that evidence?", or, expressed more fully, "There is a failure of justice not only where the Court comes to the conclusion that the conviction was wrong, but also when it is of opinion that the error or omission in the court below may reasonably be considered to have brought about the conviction, and when, on the whole facts and in the absence of the error or omission, the trial court might fairly and reasonably have found the appellant not guilty."

Applying those tests to the circumstances of this case, the High Court allowed the appeal and substituted a conviction of culpable homicide not punishable with death.

Cases referred to:

*Stirland*, 30 Cr. App. R. 40 at p.47, considered;
*Cohen and Bateman*, 30 Cr. App. R. 197 at p. 207, applied;
*Lee Chun-Chuen v. The Queen*, [1962] 3 W.L.R. 1461 at p. 1466, considered.

The following further cases were cited in argument by the Attorney-General;
*Wann*, 7 Cr. App. R. 135;
*Raney*, 29 Cr. App. R. 14;
*R. v. Haddy*, [1944] K.B. 442;
*Whybrow*, 35 *Cr. App. R.* 141;
*Holmes v. Director of Public Prosecutions*, [1946] A. C. 588;
*Bullard v. Reg.*, [1957] A.C. 635;
*Mensah v. The King*, 11 W.A.C.A. 1;
*Edache v. The Queen*, 1962 N.N.L.R. 56;
*Stephen Oji v. The Queen*, 1961 N.R.N.L.R. 93;
*Musa Arandum v. Bauchi N.A.*, 1961 N.R.N.L.R. 50;
*Babalola John v. Zaria N.A.*, 1959 N.R.N.L.R. 43;
*Sudan v. Hamad*, 1954 L.R. (Sudan) 81;
*Sudan v. Hassan*, [1956] S.L.J.R. 40;

*The Queen v. Akpakpan*, 1 F.S.C. 1;
*R .v. Igiri*, 12 W.A.C.A. 377;
*Abodundu and ors. v. The Queen*, 4 F.S.C. 70;
*Bobaye v. Kano N.A.*, 1962 N.N.L.R. 59;
*Otti v. Inspector-General of Police*, 1956 N.R.N.L.R. 1.

CRIMINAL APPEAL FROM NATIVE COURT

The appellant was convicted in a grade "A" native court of the offence of capital homicide punishable with death contrary to section 221 (*b*) of the Penal Code. He quarrelled with the deceased, Ahmadu, on Ahmadu's farm one evening, struck him on the head with a hoe and mutilated his penis with a knife. There were no eye-witnesses, but the appellant confessed to the Sarkin Kaskiya and the Alkali of Ancau, and made a judicial confession at the trial.

In his defence at the trial, the appellant said that Ahmadu, who was his younger brother, had been associating with his, the appellant's, wife in a suspicious manner and had refused to stop in spite of warnings from the appellant and his father, and that on the day in question Ahmadu took a hoe and went to work on his farm and he, the appellant took a knife and went to his own farm nearby. The appellant's evidence continued—"Then I started the matter, I said to him Ahmadu; he answered, the warning which the master gave you, I notice that you did not leave it, he then said, you Abdu talk nonsense. Have you caught us. I said then, I do not want to catch you. I just want you to stop it. Then he said since he has not been caught, he will not stop. And about the play, he will not stop. I then said to him, you see a shameless boy. I abused him and he returned. I said I will complain to our father about him, that if I tell you something you will not hear what has been said to you. When I told him so, it pained me, and seeing that I am his senior brother, I slapped him and he retaliated, when he retaliated we started boxing one another with hands, then it went to the extent that he wanted to hit me with the hoe, the one which he was unearthing the groundnuts. When he intended to hit me with it, I took it away and at that time my eyes were closed because of that my illness, so I do not know when I beat him with it (hoe) and I do not know when I cut him with knife which I went with. After that I went to my cotton farm." The appellant was in fact apprehended in the stream where he had been washing himself, not on his cotton farm, and in cross-examination he agreed that after his arrest he had told the police that when the fight with Ahmadu began he had taken a hoe and struck Ahmadu three times and then he fell, and that he had cut Ahmadu's penis with the knife he had taken with him to the farm.





The trial court's summing up of the appellant's evidence was as follows: "We are satisfied that you committed this offence, for you stated with your own mouth, you said you committed this offence. You said Ahmadu took a hoe and went to unearth groundnuts, and you took a knife, went to cut seed, when you found him in his farm, you started the matter, that he was going your wife Ahmadu said he will not stop—you said to him, you see, a useless boy? when he refused, you slapped him and he returned, you said at that time you beat him with the hoe, three times on the head. You wounded him. You said you cut his penis with the knife. You ran to the bank of the stream, and people found you out."

*E. Tagbo* for appellant;
*I. M. Lewis, Q.C., Attorney-General* (with him *I. M. S. Donnell, Crown Counsel*) for the respondent.

**Hurley, C.J.,** delivering the judgment of the Court, set out the facts and the appellant's evidence, and the summing up of the trial court, substantially as above, and continued; We observe that in this summing up the trial court omitted to refer to the appellant's statement that Ahmadu had attempted or intended to hit him with the hoe before he himself took the hoe and struck Ahmadu. This was a misdirection, and it was equally a misdirection for the trial court not to have considered the defence of provocation, because the situation as described by the appellant included provocative incidents, of which the deceased's having attempted or intended to strike the appellant with the hoe was not the least. The trial court's failure to refer to the appellant's evidence about what Ahmadu had done with the hoe, and to direct itself on the defence of provocation, was an error or omission in its judgment, but by section 382 of the Criminal Procedure Code we are not to reverse the trial court's findings because of that unless we think that a failure of justice has been occasioned thereby. The question which we have now to consider, is, when is a failure of justice occasioned, or, by what test is a failure of justice recognised?

By section 4(1) of the Criminal Appeal Act, 1907, "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

"Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred".

Section 382 of the Criminal Procedure Code is as follows: "Subject to the provisions hereinbefore contained, no findings, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or review on account of any error, omission or irregularity in the complaint, summons, warrant, charge, public summons, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Criminal Procedure Code unless the appeal court or reviewing authority thinks that a failure of justice has been occasioned by such error, omission or irregularity."

The Court of Criminal Appeal dismisses an appeal if it thinks there has been no substantial miscarriage of justice; this Court is to dismiss an appeal unless it thinks there has been a failure of justice. The Court of Criminal Appeal has formulated a test which enables it to say whether there has been no miscarriage of justice. We in this Court have to consider a test which will enable us to say whether a failure of justice has been occasioned. The test applied in the Court of Criminal Appeal may be expressed in the words of the Lord Chancellor, Viscount Simon, in *Stirland* 30 Cr. App. R. at page 47, where he said "The provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occured in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict." That is to say, if a reasonable jury properly directed on evidence properly admitted at the trial would *without doubt* have convicted, no miscarriage of justice has occurred. Looking at that from the other side, is this Court to say that a failure of justice has been occasioned where there is *some doubt* whether the trial court would have convicted after directing itself properly on evidence properly admitted at the hearing, and on a reasonable view of that evidence? Or are we to say, instead, that a failure of justice has been occasioned where the trial court might have *acquitted* after directing itself properly on evidence properly admitted at the hearing, and on a reasonable view of that evidence?





*In Bateman*, 2 Cr. App. R. at page 207, Channel J., reading a judgment of the Court of Criminal Appeal which has often been quoted with approval, said: "Taking sect. 4 with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso . . . . A mistake of the judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words 'any other ground,' so that the appeal should be allowed according as there is or is not a 'miscarriage of justice.' There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, . . . . If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge, not being a wrong decision of a point of law." In this judgment, the Court of Criminal Appeal formulated a test for establishing the existence of a miscarriage of justice as well as the test for negativing a miscarriage, and the tests are complementary. In *Lee Chun-Chuen v. The Queen*, [1962] 3 W.L.R. at page 1466, the Judicial Committee, on appeal from the Supreme Court of Hong Kong, quoted that Court's formulation of the test for negativing a miscarriage in the following words "We should determine whether if properly directed the jury acting reasonably would certainly have come to the same conclusion" and later observed "The Supreme Court did not approach the matter by considering in terms whether the issue of provocation need have been left to the jury at all, but it is agreed that the test which they formulated and applied comes to the same thing. If there was some material on which a jury acting reasonably could have found manslaughter, it cannot be said with certainty that they would have found murder." That last sentence

embodies the two tests in compendious words, that is, the test for establishing the occurrence of a miscarriage of justice and the test for negativing it, and it shows again that they are complementary.

We think that for the purposes of an appeal in this Court, the test for establishing the occurrence of a failure of justice should be "Might the trial court have acquitted after directing itself properly on evidence properly admitted at the hearing, and on a reasonable view of that evidence?"; or, more fully and adapting the words of Channel, J., in *Bateman's* case "There is a failure of justice not only where the Court comes to the conclusion that the conviction was wrong, but also when it is of opinion that the error or omission in the court below may reasonably be considered to have brought about the conviction, and when, on the whole facts and in the absence of the error or omission, the trial court might fairly and reasonably have found the appellant not guilty."

In the case before us, the trial court omitted to notice the appellant's evidence about the circumstances in which he came to strike Ahmadu with Ahmadu's hoe, and it omitted to consider whether there was provocation reducing the offence to non-capital homicide under section 222(1) of the Penal Code, that is, whether Ahmadu gave the appellant provocation; whether the provocation was grave and sudden; whether it deprived the appellant of the power of self control; whether the appellant caused Ahmadu's death whilst deprived of the power of self control by the provocation; and (as bearing on the last two questions) whether the provocation was likely to cause an ordinary reasonable man of the appellant's sort to act as the appellant did and whether the appellant's actions bore a reasonable proportion to the provocation. The facts from which the trial court ought to have looked for the answers to those questions were these: The appellant accosted Ahmadu and demanded that he should keep away from the appellant's wife, as he had been warned to do and had failed to do. Ahmadu replied that he had not been caught and therefore he would not stop. The appellant abused Ahmadu, and Ahmadu retaliated. The appellant felt resentment at his younger brother's attitude and abuse and slapped him, and Ahmadu retaliated, and they exchanged blows with their fists. Then, according to the appellant, Ahmadu seemed to be going to hit him with the hoe, and he took the hoe from Ahmadu and hit him with it, and then, when Ahmadu was down, took the knife which he had taken with him to use on the farm—and which he had not used in the fight—and





mutilated him with it. Afterwards he went off to wash himself in the stream, where he allowed himself to be apprehended. The appellant also said that he did not know what he was doing when he struck Ahmadu with the hoe and when he mutilated him. That was untrue, but it might not have been entirely untrue, and it might suggest a loss of self control. Ahmadu had received three wounds on the head, one at each side and one at the back, and the bone was broken and the brain exposed. His penis had been cut but not severed.

It was for the trial court to decide how much of the appellant's story they believed—not lightly disbelieving it, so far as it was uncontradicted—and then to consider the question of provocation in the way which we have explained. Since it lay on the prosecution throughout to prove the absence of provocation—that is, to prove the absence of all or some of the elements required for a defence under section 222(1)—the trial court should have decided in favour of the appellant if they were in doubt whether the facts did or did not show provocation, within the subsection. The question for this Court is whether the trial court's omission to approach the case in that way may reasonably be considered to have brought about the conviction, and whether on the whole facts the trial court, if it had approached the case in the right way, might fairly and reasonably have found the appellant guilty of non-capital homicide under section 222(1). Considering the line taken in the dispute by Ahmadu, the appellant's younger brother, which the appellant might have thought meant that Ahmadu would not stop committing adultery with his wife until he was caught, considering that Ahmadu may have seemed to be going to use a weapon against the appellant, and that the appellant may have thought that Ahmadu's intentions in regard to the use of the weapon were serious, since he believed Ahmadu was his wife's adulterer, and considering the evidence which might have suggested an actual loss of self-control on the part of the appellant, we think that the trial court, on the whole of the facts as found by them and without disregarding the violence of the appellant's attack and the nature of Ahmadu's injuries, but bearing in mind where the onus of disproving provocation lay, might fairly and reasonably have found the appellant not guilty of capital homicide and guilty of non-capital homicide, and accordingly we consider that the trial court's omission to deal with the evidence and the question of provocation in the right way may reasonably be considered to have brought about the conviction of capital homicide. We think therefore

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that a failure of justice has been occasioned, and we allow the appeal, set aside the conviction and sentence, and substitute a conviction of culpable homicide not punishable with death contrary to section 222(1) of the Penal Code, and will now consider sentence.

*Appeal allowed, non-capital conviction substituted.*



## T. U. AKWULE AND TEN OTHERS *v.* THE QUEEN

[F.S.C. (Ademola, C.J.F., de Lestang, C.J. Lagos, Brett, F.J. and Bairamian, F.J.)—May 23, 1963]

[Lagos—Appeal No. F.S.C. 325/1962]

*Constitutional law—Federal Constitution—exclusive legislative list—banks and banking—whether Region has power to make criminal laws affecting bankers—"peace, order and good government of the Region"—Constitution of the Federation of Nigeria, s.* 64 *and Schedule, Part I; Constitution of Northern Nigeria, s.* 4.

*Criminal law—criminal breach of trust in capacity as banker—whether bank manager a banker—Penal Code, s.* 311, *s.* 315*; Banking Act, Laws of the Federation of Nigeria and Lagos*, 1958, *Cap.* 19, *s.* 3(1).

*Words and phrases—"banker"*—ibid.

The first appellant was convicted in the High Court of Northern Nigeria of criminal breach of trust in his capacity as a banker, contrary to sections 311 and 315 of the Penal Code and of falsifying accounts contrary to section 371. The ten other appellants were all convicted of aiding and abetting the first appellant's criminal breach of trust.

At all material times, the first appellant was the manager of a branch of the Bank of West Africa. He exceeded authority given to him by granting overdrafts to some of the other appellants of an unauthorised size and without making any report about them, even though he knew that their credit facilities had been withdrawn. Credit was extended to the remaining appellants without making due reports and without entries being made in the bank's books. Later, false returns of the clearing accounts were made to reconcile the branch's accounts with those of other banks and the first appellant also forged a page in a ledger. The other appellants all knew that they had no funds and that their accounts were not being debited with the amounts they withdrew.

The appellants contended that the inclusion of banks and banking in the exclusive legislative list in the Federal Constitution precluded the Legislature of Northern Nigeria from passing legislation affecting the liability of bankers and that the legislation was null and void. Alternatively, if the legislation were *intra vires* the Legislature of Northern Nigeria, they contended *inter alia* that the first appellant was not a banker within the meaning of section 315 of the Penal Code.

*Held:* (1) Section 315 of the Penal Code was not ***ultra vires*** and therefore null and void, since its true nature was that of legislation "for the peace, order and good government" of Northern Nigeria (which falls within the competence of the Regional legislature) and not of legislation in respect of banks and banking.

(2) The first appellant was not a banker within the meaning of section 315, since under the Banking Act, only a body corporate could operate a bank and therefore be a banker.

Cases referred to:

*Gallagher v. Lyon*, [1937] A.C. 863, observations of Lord Atkin adopted;
*Copland v. Davies*, (1872) L.R. 5 H.L. 358 applied.
*Cooray v. R.*, [1953] A.C. 407.

The following further cases were also cited in argument by the Attorney-General;

*Russell v. The Queen*, (1882) L.R. 7 App. Cas. 829;
*Bank of Toronto v. Lambe*, (1887) L.R. 12 App. Cas. 575;
*Tennant v. Union Bank of Canada*, [1894] A.C. 31;
*Union Colliery Company of British Colombia v. Bryden*, [1899] A.C. 580;
*The Deer Plow Company Limited v. Wharton*, [1915] A.C. 330;
*Great West Saddlery Company v. The King*, [1921] 2 A.C. 91;
*Attorney-General for Ontario v. Reciprocal Insurers and Others*, [1924] A.C. 328;
*Attorney-General for British Colombia v. Attorney-General for Canada*, [1937] A.C. 368;
*Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117;
*Ladore v. Bennett*, [1939] A.C. 468;
*Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503;
*Subrahmanyan Chettiar v. Muttuswami Goundan*, A.I.R. 1941 F.C. 47;
*Bank of Commerce of Khulna v. Nripendra Nath Datta* A.I.R. 1945 F.C. 7;
*Prafulla Kuma v. Bank of Commerce of Khulna*, A.I.R. 1947 P.C. 60;
*State of Bombay v. Balsara*, A.I.R. 1951 S.C. 318;
*In re Rupendra Pharashad Saigal, A.I.R.* 1958 Andhra Pradesh 63;
*Pillai v. Mudanayake*, [1953] A.C. 514;
*Fox v. State of Ohio*, (1847), 5 Howard 410; 12 L.Ed. 213;
*Huron Portland Cement Company v. Detroit* (1960) 362 U.S. 440; 4 L.Ed. 2nd 852;
*Barkus v. Illinois* (1959) 359 U.S. 121; 3 L.Ed. 2nd 684.

(Editorial Note.—S. 64 of the Constitution of the Federation of Nigeria, enacted in the Second Schedule to the Nigeria (Constitution) Order in Council, 1960, has been replaced by s. 69 of the Constitution of the Federation, Act No. 20 of 1963. Item 43 in Part I of the Schedule to the Constitution of the Federation of Nigeria, and s. 72 of that Constitution, which deal with banking, have been replaced respectively by item 44 in Part I of the Schedule to the Constitution of the Federation and s. 78 of that Constitution.

S. 4 of the Constitution of Northern Nigeria, enacted in the Third Schedule to the Nigeria (Constitution) Order in Council, 1960, has been replaced by s. 4 of the Constitution of Northern Nigeria, N.N. No. 33 of 1963).

CRIMINAL APPEAL

*J. A. Fiberesima* for the first appellant;

*Chief F. R. A. Williams, Q.C.*, (*F. A. Thanni* with him) for other appellants;

*I. M. Lewis, Q.C., Attorney-General, Northern Nigeria*, (*K. C. Nadarajah, Crown Counsel*, with him) for the respondent.





**Ademola, C.J.F.,** delivering the judgment of the Court: The first appellant was convicted in the High Court, Northern Region, holden at Kano, of an offence laid under section 315 of the Penal Code of the Northern Region relating to criminal breach of trust in his capacity as a banker; the sum involved being £100,089-8*s*-5*d*. He was also convicted of an offence under section 371 of the Penal Code of falsifying a clearing account relating to other banks in what is known as the Impersonal ledger and also with forgery of a current account ledger. The other ten appellants were convicted each on a count of aiding and abetting the first appellant in the commission of the offence of criminal breach of trust.

The first appellant, who admitted the facts presented at the trial (except those relating to forgery), was at the time material to the charge the Manager of the branch of the Bank of West Africa at Fagge in Kano. He had authority to grant overdrafts to customers of the Bank up to a sum of £200 which must be reported at once. Contrary to the authority given to him, the first appellant granted overdrafts to the other appellants, from time to time, far above the sum of £200 and without making a report, although it was clear that some of the appellants had been bad debtors of the Bank before the first appellant took over, and it was to his knowledge that their credit facilities had been withdrawn. The other appellants became customers of the Bank since the first appellant became the Manager. Although credit facilities for heavy amounts were given to these men without making due reports, entries of these amounts were not made in the Bank's books. Later, false returns of the clearing accounts were rendered by the first appellant in order to reconcile his accounts with other banks. Forgery of a page in the current accounts ledger was also proved against the first appellant, although he denied the facts. The other appellants, Nos. 2–11, aided and abetted the first appellant to commit criminal breach of trust knowing full well that they were without funds in the Bank and that their accounts were not being debited with the amounts they had been drawing out; in some cases paying cheques into their accounts in the Bank, to facilitate the rendering of the returns by the first appellant. These cheques to their own knowledge were worthless.

As the range of arguments in this appeal relates principally to the offence under section 315 of which the first appellant was convicted, it is necessary to set out sections 311, 312 and 315 of the Penal Code:

"311. Whoever, being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust.

"312. Whoever commits criminal breach of trust shall be punished with imprisonment for a term which may extend to seven years or with fine or with both."

"315. Whoever, being in any manner entrusted with property or with any dominion over property in his capacity as a public servant or in the way of his business as a banker, factor, broker, legal practitioner or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine."

The first count of the charge is as follows:—

"Titus Akwule between the 1st October, 1960 and 15th September, 1961 at Kano being entrusted with dominion over property to wit cash in your capacity as a banker to wit the Manager of the Bank of West Africa Limited, Fagge Ta Kudu committed criminal breach of trust of a sum of £100,089-8*s*-5*d*, and thereby committed an offence punishable under section 315 of the Penal Code."

The point will have to be decided whether the first appellant was a banker, within the meaning of section 315 of the Penal Code and, if so, whether the property in relation to which he was said to have committed a breach of trust was entrusted to him in that capacity. Before this point, however, the important issue as to the validity of section 315, under which the first appellant is charged, has to be considered, because counsel for the appellants have, in the first ground of appeal, attacked the constitutional validity of the section. If that submission was upheld, it would mean that the first appellant was tried on a charge which was wholly void, so that no question of subtituting a conviction under any other section could arise. The first ground of appeal is as follows:—

"The learned trial judge erred in law in convicting these appellants (Nos. 2–11) of the offence of abetting the first accused to commit criminal breach of trust when the said





offence and the alleged offence of the 1st accused are offences purporting to have been created by the legislature of the Northern Region which is not competent to create any of such offences."

The submission which was made to us is that, with reference to the division of legislative powers, banking is a subject in the Exclusive legislative list in our Constitution; that in accordance with section 63 of the Constitution of the Federation, only Parliament can legislate on matters in the Exclusive list, which list includes Banks and Banking; that section 315 of the Penal Code, in so far as it relates to bankers, is an encroachment on the legislative powers of Parliament by the Northern Region Legislature; that to the extent, therefore, that the section relates to bankers, it is unconstitutional and void. Counsel for the appellant have referred to item 44 of the Exclusive list, which empowers the Federal Parliament to legislate on "any matter that is incidental or supplementary (*a*) to any matter referred to elsewhere in this list" which under Part III of the Schedule includes "offences"; and they have argued that penal provisions on bankers are within the exclusive competence of the Federal Parliament. Their aim is to show that count 1, which is laid under section 315, is null and void, so that not only is the conviction on that count a nullity, but the court is also debarred from replacing it by a conviction under section 312, if it turns out that the first appellant was not a banker. This would also affect the conviction of all the other appellants on counts laid under sections 315 and 83.

For the Crown, a number of cases have been cited on the validity of legislation by a legislature with limited powers. It will be enough if reference is made to *Gallagher v. Lyon*, [1937] A.C. 863. The legislature of Northern Ireland had passed an Act on Milk and Milk Products, which was attacked as being *ultra vires* section 4 of the Government of Ireland Act, 1920, on the ground that it interfered with the trade in milk between farmers outside Northern Ireland and customers within it, contrary to the limitation not to legislate on "trade with any place out of the part of Ireland within their jurisdiction." Lord Atkin said at page 869—

"The short answer to this is that this Milk Act is not a law 'in respect of' trade; but is a law for the peace, order and good government of Northern Ireland 'in respect of' precautions taken to secure the health of the inhabitants of Northern Ireland by protecting them from the dangers of an unregulated

supply of milk. These questions affecting limitation on the legislative powers of subordinate parliaments or the distribution of powers between parliaments in a federal system are now familiar, and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian Parliaments. It is well established that you are to look at the 'true nature and character of the legislation': *Russell v. The Queen* (L.R. 7 App. Cas. 839) 'the pith and character of the legislation.' If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An act may have a perfectly lawful object, e.g., to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, e.g., a direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of the Act to see whether they are passed 'in respect of' the forbidden subject."

Adopting those views for our guidance, it is clear that the Legislature of Northern Nigeria has power 'to make laws for the peace, order and good government of the Region": section 4 of the Constitution of Northern Nigeria. There is no suggestion that in including bankers in section 315 of its Penal Code, that Legislature was using its power to legislate on an offence such as criminal breach of trust as a cloak for encroaching on the field of banks and banking. The offence is created and defined in section 311 and any person guilty of it may be punished under section 312. The true nature of sections 313, 314 and 315 is that certain categories of persons (including bankers in section 315) should be liable to heavier punishment. An example of this mode of penal legislation is found in the Criminal Code of the Federation and of the other Regions. Section 390 of that Code provides a general punishment for stealing and goes on to provide heavier punishments for graver cases of the offence. That is arranged in sub-sections. In the Penal Code of Northern Nigeria, sections 312 to 315 could have been made or arranged as sub-sections in a single section dealing with punishment.

We are of the opinion that section 315 of the Penal Code is constitutionally valid in so far as it includes bankers in the category of persons liable to heavier punishment for criminal breach of trust. We are of the view that this is not legislation in respect of banks and banking but merely an incidental





provision in penal legislation enacted for the peace and good government of Northern Nigeria. We therefore reject the submission of Counsel that this legislation is invalid in respect of bankers and that it is null and void.

We now come to the question whether the first appellant, at the material time, was a banker. The learned trial Judge took the view that he was. For the Crown, it was contended that the Judge was right in holding that a bank manager is a banker. On the other hand counsel for the appellants (and this includes Mr Fiberesima for the first appellant), argued that a bank manager is not a banker. Both sides have referred us to *Ratanlal and Thakore* on the Indian Law of Crimes, 19th Edition, at pp. 1029 and 1030, that law being the source of the Penal Code of the Northern Region.

For the meaning of banker, we turn to our own law. The Banking Act (Cap. 19) does not define banker as such, but bank is defined thus: "'bank' means any person who carries on banking business". "Banking business" is defined as "the business of receiving money on current account from the general public, of paying or collecting cheques drawn by or paid in by customers and of making advances to customers" (as amended by Act No. 19 of 1962). Section 3(1) of the Act enacts:

"No banking business shall be transacted in Nigeria except by a company which is in possession of a valid licence, which shall be granted by the Minister after consultation with the Central Bank, authorising it to carry on banking business in Nigeria"

From these provisions it is clear that a bank can operate in Nigeria only by a company or body corporate. The word "person" in the definition of "bank" above is, therefore, used primarily in the sense of corporation. In *Copland v. Davies*, (1872) L.R. 5 H.L. 358, there is a definition of "banker" at p. 375 of the report, where Lord Hatherley, L.C., said:

". . . . it is not disputed that he was a banker in the ordinary sense of the word, as receiving people's moneys and giving them receipts—receipts not as for transfers of property, or for anything of that kind, but receipts acknowledging the receipt of money, and issuing pass books and cheque books, and dealing with them in the ordinary way of a banker; . . . ."

The relationship between a banker and a customer is that of debtor and creditor in respect of the money deposited with the banker by the customer. This position becomes clearer

when a customer asks for his money. The bank undertakes to pay cheques of the customer drawn on his current account; thus the bank becomes a debtor for the amount, which must be paid on demand. If the amount is not paid, the customer can sue the bank. The action will lie against the bank, not the bank manager. It is, therefore, not possible to agree with the view that the first appellant in this case was a banker. If the bank defaults the first appellant, as Manager of the Bank, will not be sued. The Bank itself (B.W.A. in this case) will be sued. The cheques are drawn on the Bank of West Africa Limited and the customer's account is with the Bank of West Africa Limited. The first appellant is no more than an official of the Bank carrying out the Bank's instructions as to the method in which its business should be carried out. The word "banker" in section 315 of the Code does not, in our view, include a person who is a mere employee of the bank. We would add that even if an employee of a bank could for any purpose be regarded as a banker within the meaning of the section, the evidence in this case shows that the breach of trust was committed in relation to monies which were already the property of the Bank, i.e., monies entrusted to the first appellant as an employee, not in any other capacity.

Our attention has been called to the words "to wit cash" in Count 1 of the charge. It was argued that there was no evidence before the court that the first appellant converted any of the cash of the Bank of West Africa Limited to his use or disposed of it in any dishonest manner. It is true, as counsel said, that the first appellant "did not give cash to the co-accused" but it is correct to say that their cheques, in favour of various firms, on the Fagge branch which he (first accused) passed on to other banks at which the firms have money, placed the Bank of West Africa Limited in the position of a debtor to the other banks, a debt which the Bank of West Africa Limited may be called upon to pay in cash. We are unable to agree that this is not an offence within section 311 of the Penal Code. If we are mistaken in our view on this point, and it were necessary, we would apply the proviso to section 26(1) of the Federal Supreme Court Act, as we are of the view that the mistake, if it was one, did not occasion any miscarriage of justice.

It was further argued on behalf of the other appellants that all they did was to overdraw, and if the first appellant authorised these overdrafts contrary to his instructions, they could not be guilty of abetting any offence under section 311.





We think this argument devoid of any substance when one looks at the findings of the learned trial Judge—with which we have no reason to disagree—on the part played by these appellants in this gigantic fraud.

It remains for us to decide the point argued before us, whether, having regard to the opinion we have expressed that the first appellant was not a banker, and that the laying of the count under section 315 was a mistake, the convictions should not be replaced by convictions of criminal breach of trust, or the abetting thereof, punishable under section 312, or under sections 312 coupled with section 83 in the case of abetting.

Arguments have been put to us about the powers of the court to substitute another section for the one charged in such a case. We have given consideration to this, and we are satisfied that under section 218 of the Criminal Procedure Code, when read with section 27(2) of the Federal Supreme Court Act, 1960, we are not without power to substitute, in this case, section 312 of the Penal Code for the section 315 charged. An authority for this is the case of *R. v. Cooray*, [1953] A.C. 407.

We therefore discharge the conviction under section 315 of the Penal Code and substitute in the case of the first appellant on the first count a conviction under section 312.

On the question of sentence, it was pointed out that the sentence of seven years passed upon the first appellant is the maximum sentence which could have been passed on a conviction under section 312 of the Penal Code. It was urged, in the circumstances, that the sentence passed upon him on that count be reduced. After due consideration of the whole case, we are of the view that to reduce the sentence in any way would be minimising the gravity of the offence the first appellant has committed.

We therefore pass on the first appellant, on the substituted conviction under section 312, a sentence of seven years I.H.L., less the period he has served from the date of his conviction in the High Court, namely, 6th August, 1962, and the date of this judgment, namely the 23rd May, 1963, that is to say, seven years reckoned from the 6th August, 1962. His convictions and sentences on counts 2 and 3 of the charge remain unaffected.

In regard to the other appellants, convicted on a count of abetting the first appellant in his offence under sections 315 and 83 of the Penal Code, we discharge the convictions, and substitute in respect of each a conviction under sections 312 and 83 of the Code.

T. U. Akwule and Ten Others v. The Queen

Ademola, C.J.F.

The following sentences are passed:

| | | |
|---|---|---|
| 2nd appellant | ... | 5 years I.H.L. |
| 3rd-9th appellants | ... | 4 years I.H.L. each. |
| 10th and 11th appellants | ... | 2 years I.H.L. each. |

and in each case the sentence dates as from the date of conviction in the High Court, namely 6th August, 1962.

*Convictions discharged and conviction under s. 312 and s. 83 substituted.*



## I. A. OGWU *v.* LEVENTIS MOTORS LIMITED

[C.A. (Hurley, C.J. and J. A. Smith, S.P.J.)—January 19, 1963]

[Jos—Appeal No. JD/55A/1962]

*Hire-purchase—Hire-purchase of lorry—No warranty as to description, state, quality, fitness, roadworthiness or otherwise—Different lorry delivered to hirer—Unfit for carriage of goods—Fundamental breach of contract.*

*Damages—Remoteness of damage—Damages recoverable where fundamental breach of contract.*

The appellant contracted to buy a lorry, registration number BYA 648, from the respondents. In fact, the lorry delivered was not the one contracted for but an older lorry to which the number plate BYA 648 had been affixed. The springs proved defective and the lorry was returned to the respondents who repaired it. After a further journey the appellant complained to the respondents that the engine was not in order and shortly afterwards it broke down. The lorry was eventually returned to the respondents who refunded to the appellant the deposit he had paid. It was admitted that the lorry had been idle for 51 days.

The appellant claimed the sum of £393-9*s*-6*d* as damages in respect of general damages for (*a*) loss of earnings for 51 days at £5 per day, and special damages for (*b*) vehicle licence, (*c*) stage carriage licence, (*d*) driver's salary, (*e*) two mates' salaries, (*f*) one new top cylinder, (*g*) repairs, (*h*) petrol, and (*i*) total expenses incurred whilst trying to reach a settlement with the respondents. The respondents pleaded that they were exempted from liability by an exception clause in the hire-purchase agreement which expressly excluded any warranty, implied or otherwise, as to description, state, quality, fitness, roadworthiness or otherwise.

The senior district judge found that there had been a fundamental breach of the contract, from liability for which the exception clause did not protect the respondents. He awarded the appellant £40-5*s*-6*d* damages in respect of items (*f*) and (*g*) of the claim.

*Held:* (1) There had been a breach of a fundamental term of the contract and the exception clause did not protect the respondents from liability.

(2) (*a*) Since time would have been required for maintenance of the lorry the general damages would be allowed in respect of idleness for 45 days, and (*b*) special damages in respect of all the items claimed, except item (*h*), would be allowed on the basis that these flowed directly from the breach of contract.

Cases referred to:

*Andrews v. Hopkinson*, [1957] 1 Q.B. 229; [1956] 3 All E.R. 424;

*Victoria Laundry (Windsor), Limited v. Newman Industries, Limited*, [1949] 2 K.B. 528; [1949] 1 All E.R. 997, applied.

*Karsales (Harrow), Limited v. Wallis*, [1956] 2 All E.R. 866, followed.

CIVIL APPEAL

*R. C. Rickett* for the appellant;
*A. C. Grant* for the respondents.

**J. A. Smith, S.P.J.,** delivering the judgment of the Court: This is an appeal by the plaintiff from the judgment of the learned senior district judge against the amount of £40-5*s*-6*d* damages awarded to plaintiff arising from a misrepresentation by the defendants that a lorry delivered to plaintiff on a hire purchase agreement was one year old whereas it was four or five years old.

The plaintiff took delivery of the lorry on 3rd April under a hire purchase agreement. The number plate on the lorry was BYA 648 but it was discovered that the lorry delivered was not in fact the lorry registered as BYA 648 but an older lorry the number plates having been switched. The lorry was taken to a garage at Jos where it was loaded with 3 or 4 tons of salt and it sank to its wheels as the springs were defective. The lorry was returned to defendants who inspected it and repaired the springs. The lorry was then handed over again to plaintiff on 9th April and went to Yola with a load of salt returning to Jos on 15th April. On its return plaintiff complained to defendants that the engine of the lorry was not in order. The lorry again set out for Yola and broke down on the way. It was eventually returned to the defendants on 30th May and defendants refunded to the plaintiff the £400 he had paid as a deposit on the lorry. It was conceded by counsel for each party that the lorry had been idle for 51 days.

The amounts claimed as damages by plaintiff were set out in paragraph 11 of his particulars of claim which after abandoning an item of 10*s*-0*d*; a reduction of £6-2*s*-0*d* on the item of £28-8*s*-6*d* for hotel expenses; and a reduction in the period claimed for loss of earnings from 57 to 51 days, consist of:—

| | £ | s | d |
|---|---|---|---|
| Loss of earnings for 51 days at £5 a day from 3rd April ... ... ... ... ... | 255 | 0 | 0 |
| Vehicle licence (quarter) ... ... ... | 22 | 10 | 0 |
| Stage Carriage licence ... ... ... ... | 6 | 0 | 0 |
| Driver's salary (two months) ... ... ... | 20 | 0 | 0 |
| Two mates' salaries (two months) ... ... | 16 | 0 | 0 |
| One new top cylinder ... ... ... ... | 24 | 10 | 0 |
| Repairs ... ... ... ... ... ... | 15 | 15 | 6 |
| Petrol ... ... ... ... ... ... | 10 | 17 | 6 |
| Hotel Bill .. ... ... ... ... ... | 22 | 6 | 6 |





The amount of £40-5*s*-6*d* awarded by the learned senior district judge as damages included the item of £24-10*s*-0*d* for a new top cylinder and £15-15*s*-6*d* in respect of repairs to the lorry. The defendant company does not contest this amount. The plaintiff complains that the learned senior district judge was wrong in refusing to include in the award of damages the other items of the claim which we have set out above.

In assessing damages the learned senior district judge appears to have relied upon the case of *Andrews v. Hopkinson*, [1957] 1 Q.B. 229; [1956] 3 All E.R. 424, which he cited in his judgment.

In his judgment the learned senior district judge said:
"I find that the defendant is liable for damages arising directly out of this breach of warranty. Part of the damage has been repaired by the return to the plaintiff of the money he has paid. There remains however a part which has not. Clearly the repairs effected by defendant—and I hold that all arose from this breach—are recoverable . . . That I cannot include speculative profits or expenses that plaintiff would have incurred if the warranty had not been broken. Nor do I accept plaintiff's total expenses as a necessary expense."

In *Andrews v. Hopkinson* (*supra*), the plaintiff took delivery of a motor car and entered into a hire-purchase agreement acting upon words used by defendant's sales manager, which amounted to a warranty that the car was in good condition and reasonably safe for use on the highway. Eight days later, when driving the car, the plaintiff was in collision with a lorry, the accident being due to the failure of the drag-link joint of the steering mechanism of the car. In a claim for damages for breach of warranty, it was held that, although the *prima facie* measure of damages may in an ordinary case be the difference in value between the car as delivered and the car as warranted, nevertheless on the facts of that particular case the plaintiff's personal injuries were held to be loss directly and naturally resulting in the ordinary course of events from the breach of warranty and so recoverable as damages for breach.

The deposit which the plaintiff paid to defendants was refunded to him and in the learned senior district judge's view the only other loss arising from the breach of warranty was the cost of repairs.

Mr Ricket for the plaintiff submitted that the item of the claim for loss of earnings was an estimate of the measure of general damages which were recoverable and cited in support the case of *Victoria Laundry (Windsor), Limited v. Newman Industries, Limited*, [1949] 2.K.B. 528; [1949] 1 All E.R. 997 where it was held,

"that the defendants, an engineering company, with knowledge of the nature of the plaintiffs' business, having promised delivery by a particular date of a large and expensive plant, could not reasonably contend that they could not foresee that loss of business profit would be liable to result to the purchaser from a long delay in delivery; that although the defendants had no knowledge of the dyeing contracts which the plaintiffs had in prospect, it did not follow that the plaintiffs were precluded from recovering some general, and perhaps conjectural sum for loss of business in respect of contracts reasonably to be expected. . . "

This decision shows that a sum may be recovered as damages for loss of business.

But was the loss of business in the case now on appeal the direct and natural result of the breach of warranty? We must first see that what the breach of warranty was before we can say what loss directly and naturally resulted therefrom. The misrepresentation made to the plaintiff by the defendants' representative was that the lorry was lorry BYA 648 and one year old whereas it was not lorry BYA 648 but a lorry four or five years old, the number plates having been switched. That was a breach of an express warranty and the damages arising therefrom were the difference between the value of the lorry delivered to the plaintiff and the lorry warranted. The learned senior district judge dealt with that aspect of the damages. The loss of business and the expenses which the plaintiff incurred in respect of the lorry were generally the direct consequence of the vehicle being unfit for the purpose for which the plaintiff wanted it, namely for the carriage of goods from one town to another. Mr Rickett has submitted that the defendants were well aware that the plaintiff wanted to use the lorry for the carriage of goods. If that was so, then in addition to the express warranty there would have been an implied warranty by the defendants at common law that the lorry was in a reasonably good condition to be used for the carriage of goods. The learned senior district judge did not make any finding as to implied warranties. We think that it is proper for us to consider





this question in this appeal. There can be no doubt on the evidence that all parties were aware that the plaintiff wanted the lorry for the carriage of goods. It is settled law that in the absence of an express term in the agreement excluding any warranty of fitness it is the duty of the owner of a chattel which he lets out under a hire purchase agreement to ascertain that the chattel is reasonably fit for the purpose for which it is expressly hired or for which from its character he must be aware it is intended to be used. In the present case, the defendants by clause 3 of the hire purchase agreement (Exhibit 1) expressly excluded any warranty, implied or otherwise, as to description, state, quality, fitness, roadworthiness or otherwise. The learned senior district judge referring to the "exception clause" in the agreement (which we take to be clause 3), said in his judgment that he relied on the decision of Denning, L.J. in *Karsales (Harrow), Limited v. Wallis*, [1956] 2 All E.R. 866, that the exception clause of the hire purchase agreement, no matter how widely expressed, only availed the party when he was carrying out his contract in its essential respects.

The learned senior district judge held that "the plaintiff did not get what he had a right to think he was getting because he was misled, even though not deliberately, as to an essential part of the contract, by the defendant who ought to have known and whom for this very reason he (the plaintiff) relied on." The fact was, as admitted by the defendants' manager, that the lorry delivered to plaintiff was not BYA 648 but an older lorry, the number plates having been switched. Thus, although the plaintiff saw the actual vehicle which was delivered to him, it was nevertheless represented to him by defendants that he was getting lorry BYA 648. But in fact, the only part of the lorry which had been registered as BYA 648 which the plaintiff received was the number plate. This appears to us to put the present case on all fours with the case of *Karsales (Harrow), Limited v. Wallis*, and none of the exemptions from liability in clause 3 of the hire purchase agreement avail the defendants.

Arising out of the misrepresentation, the lorry delivered to the plaintiff by the defendants was not fit to be used for the carriage of goods. Its springs were defective, but these were repaired; the engine was not in proper working condition and it became necessary for the plaintiff to buy a new cylinder head; and finally, within a short time of delivery, the lorry broke down and had to be towed back to Jos. Thus there was

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J. A. Smith, S.P.J.

a breach of the implied warranty that the lorry was fit to be used for the carriage of goods. In addition to the damages awarded by the learned senior district judge, the plaintiff is entitled to damages for breach of the implied warranty of fitness.

As to the claim for loss of business, the estimated earnings of £5 a day appears to us to be a reasonable basis for calculating general damages for loss of business. The period for which it is claimed is 51 days. We do not think that the lorry would be earning every day, time being required periodically for maintenance. We therefore assess general damages at £225 based on the conjectural figure of £5 a day for 45 days.

The other items claimed are items of special damage. The condition of the lorry prevented the plaintiff from getting the benefit of licensing the vehicle; and the cost of the vehicle licence and the stage carriage licence were losses which flowed directly from the implied breach of warranty as to fitness. Likewise the salaries paid to the driver and two mates. We do not know on what journeys the petrol (or diesel) was purchased but assume it was for the journey to Yola and this is not recoverable. We think that as soon as the plaintiff discovered that he had not got the lorry which he thought he had, he was justified in coming to Jos to sort the matter out and his hotel expenses arose directly from defendants' breach of warranty and are recoverable. He could not, it appears, usefully have done anything else in the circumstances.

We allow the appeal and increase the award of special damages from £40-5*s*-6*d* to £127-12*s*-0*d*. (this includes the items of £22-10*s*-0*d*, £6-10*s*-0*d*, £20-0*s*-0*d*, £16-0*s*-0*d*, and £22-6*s*-6*d*.) In addition we award general damages for loss of business assessed at £225-0*s*-0*d*.

*Appeal allowed.*



## THE FEDERAL BOARD OF INLAND REVENUE *v.* AZIGBO BROTHERS LIMITED

[High Court (J.A. Smith, S.P.J.)—November 8, 1962]
[Jos—Civil Suit No. JD/53/1962]

*Revenue—Income Tax—Assessment in default of return of chargeable income—No valid objection to or appeal against assessment before it became final—Whether assessment should exclude consideration of capital allowances in previous years—Federal Board of Inland Revenue not making assessment "to the best of their judgment"—Income Tax Ordinance, Laws of the Federation of Nigeria and Lagos*, 1958, *Cap.* 85, *s.*55(3); *Companies Income Tax Act*, 1961, *s.*49(3).

The defendant company did not deliver to the plaintiffs the return of income required by the Income Tax Ordinance for 1960-61 and by the Companies Income Tax Act (which replaced the Ordinance in respect of the taxation of companies) for 1961-62. The plaintiffs duly raised assessments of £1,000 and £1,500 respectively for the two years, purporting to act under s.55(3) of the Ordinance and s.49(3) of the Act. These sections empower the Board to determine according to the best of its judgment the amount of the chargeable income of a person or company who has not delivered the prescribed return and to make an assessment accordingly.

The defendant company did not object to or appeal against the assessment but waited until the present action for non-payment of the tax had been commenced.

The Board's assessment was based on the Acting Senior Inspector of Taxes' experience of mining companies in Jos (the defendant company was a mining company in Jos) and his experience of the defendant company's tax file relating to previous years. It contended that no capital allowances could be granted as these had to be first claimed and no claims had been made in respect of the current year. The defendant company contended in this action for recovery of tax due that the assessments were arbitrary and were not made to the best of the Board's judgment within the meaning of the relevant sections.

*Held:* The Board's assessments were made "to the best of their judgment."

Cases referred to:

*Chairman of the Board of Inland Revenue v. Joseph Rezcallah and Sons, Limited*, 1961 N.R.N.L.R. 32; on appeal, F.S.C. 304/1961, January 4, 1962, (unreported), distinguished.

CIVIL SUIT

*A.L. Balogun* for the plaintiffs,
*R.C. Rickett* for the defendant company.

**J.A. Smith, S.P.J.:** The Federal Board of Inland Revenue claims from the defendant company the sum of £1,080 being income tax and penalties for the years of assessment 1960-61 and 1961-62.

It is admitted that the Board served the defendant company with notices in respect of each of the years in dispute, requiring them to make a return of income for each of these years which the defendant company failed to do. After the expiry of the period of the notices the Board raised assessments and served the defendant company with notices of assessment in each instance on or about 30th Noverber, 1961. No objection in writing was made by the defendant company to these assessments and demand notes for payment of the income tax assessed and penalties were served on the defendant company on or about 10th February, 1962. The sums demanded have not been paid.

As the requisite notices were served upon the defendant company for the 1960-61 assessment as provided by the Income Tax Ordinance and the 1961-62 assessment as provided by the Companies Income Tax Act, the assessments raised by the Board were made with jurisdiction.

The defendant company averred in paragraph 10 of their statement of defence that the assessments—

"are arbitrary assessments in that they ignore completely the information furnished to the plaintiffs by or on behalf of the defendants and it was in contravention of the method laid down in the Income Tax Ordinace that assessments should be 'to the best of his judgment.' "

The assessment for 1960-61 was made under section 55(3) of the Income Tax Ordinance; the assessment for 1961-62, under section 49 (3) of the Companies Income Tax Act which replaced the Ordinance as regards tax charged for the year of assessment commencing 1st April, 1961. The two subsections are similar. Section 49(3) of the Companies Income Tax Act reads:

"(3) Where a company has not delivered a return and the Board is of the opinion that such company is liable to pay tax, the Board may, according to the best of its judgment, determine the amount of the total profits of such company and make an assessment accordingly, but such assessment shall not affect any liability otherwise incurred by such company by any reason of its failure or neglect to deliver a return."

On behalf of the Board, Mr Odueyunigbo, the Acting Senior Inspector of Taxes, proposed the assessments which were approved by the Scrutineer Committee. (Exhibits F.B. 1 and 2.) The assessable income for 1960-61 was estimated at





£1,000 and for 1961-62 at £1,500. The income tax payable thereon as shown in each of the notices of assessment Exhibits F.B. 4 and 5 was respectively £400 and £600.

Mr Odueyunigbo said in evidence:

"In assessing the proposed chargeable income I am guided by my experience of mining companies in Jos and my experience in dealing with the taxpayer's file of the defendants in my office", and—

"I proposed the chargeable income on my general experience of mining companies. Capital allowances if not claimed cannot be carried on. They must be claimed before they are considered. Mining trade generally was better in 1961-62 than 1960-61."

He was cross-examined on the accounts of the defendant company for the years 1952-53 to 1959-60 (both years inclusive) from which it appeared that while profits had been earned in each year except two, various capital allowances and reliefs had been allowed so that no tax was payable in any year except 1953-54. The "adjusted profits" before deduction of allowances varied from year to year. In 1955-56 it was £6,066, in 1956-57 £2,888; in 1957-58 £2,634, in 1958-59 £1,874. In 1954-55 there was a loss of £3,091-11*s*-6*d*. In 1959-60 there was an estimated income of nil, but it is said the figures for that year have not yet been agreed.

Mr Odueyunigbo had no information from the defendant company as to their actual earnings in the years in dispute and Mr Gardner, their accountant who gave evidence for the defendant company, was unable to say what had been earned in the years in dispute as the accounts for those years are not ready.

It has been submitted by learned counsel for the defendant company that the Board should have had due regard to what happened in these previous years in estimating the assessable income. I would agree with learned counsel that these are factors to be considered but not the only factors. Mr Odueyunigbo said he was also guided by his experience of minings companies in Jos and general trading conditions in the mining industry in the years in dispute though he did not give evidence of any specific instances. In estimating the assessable income of the defendant company in the disputed years he ignored capital allowances. His view was that capital allowances had to be claimed and that view in this action must be deemed to be the view of the Board. On that view the assessments

were *bona fide* and reasonable and supported by the figures of "adjusted profit" before deduction of allowances in previous years.

The basis of the case for the defendant company was that having regard to capital allowances which had been permitted as deductions in ascertaining the assessable income of the defendant company, the Board by excluding consideration of capital allowances in estimating the assessable income of the years in dispute did not act according to its best judgment.

The question arises: Is it for this Court in these proceedings to decide whether this view of the Board in estimating the assessable income was right or wrong?

The assessments in dispute were raised by the Board in default of returns of income by the defendant company. It was open to the company on receiving the notices of assessment to apply by objection in writing to the Board under section 59(2) of the Income Tax Ordinance and section 53(1) of the Companies Income Tax Act to review and revise the assessments made; and failing agreement, to appeal against those assessments as provided in Part XII of the Income Tax Act. The defendant company did not in fact object in writing to the assessments. They waited until this action for the payment of income tax thereon had commenced and then in their statement of defence averred that the assessments were arbitrary. The amounts of the estimated assessable income became final and conclusive under section 63 of the Income Tax Ordinance and section 60 of the Companies Income Tax Act when no valid objection or appeal had been lodged within the prescribed time.

Whether or not capital allowances should have been deducted in estimating the assessable income was a matter which would have been considered by the Board on objection to the assessments and, failing agreement, on appeal to the appropriate tribunal and further appeal to the appropriate court. It is not for this Court in an action for the recovery of income tax to investigate this question, which should properly have been raised by the defendant company by objection and appeal. All that is required of this Court is to decide whether the view of the Board in ignoring capital allowances until they were claimed was *prima facie* reasonable. I conclude that it was.

The judgment of Reed J. in *The Chairman of the Board of Inland Revenue v. Joseph Rezcallah and Sons Limited* (1961 N.R.N.L.R. 32) and the judgment of the Federal Supreme





Court on appeal from that decision (F.S.C. 304/1961, decided on 4th January, 1962) have been cited to me. The *ratio decidendi* in that case was that the assessments were null and void because it had not been established that there had been any demand for a return of income from the defendants. That point does not arise in the present case. Reed J. also held on the facts of that case that the Chief Inspector of Taxes did not exercise his discretion "to the best of his judgment" in making the assessments.

The facts in the present case are different from those in *Rezcallah's* case. On the facts in the present case, I find that the assessments raised by the Board were according to its best judgment; and the amounts of those assessments are those upon which income tax is payable.

As the income tax was not paid by the defendant company within the prescribed time, additional tax became due; on the 1960-61 assessment an additional sum equal to five per cent of the tax payable became due under section 67(1) of the Income Tax Ordinance, making a total of £420; and on the 1961-62 assessment an additional sum equal to ten per cent of the amount of tax payable became due under section 62(1) of the Companies Income Tax Act, making a total of £660.

There is one other point to which I wish to refer. The defendant company in paragraph 11 of their statement of defence stated:

"11. The defendants further aver that the plaintiffs knew well that all income of the defendants earned by the said company known as Azigbo Brothers Limited was treated as director's fee and that one K. O. Azigbo has paid tax on the amount thereof under the Direct Taxation Ordinance."

Evidence was led as to the amounts paid out in directors' fees but there was no evidence that the directors had in fact paid tax thereon as averred in this paragraph of the statement of defence. There is therefore no need to consider this point further.

I enter judgment for the Board in the sum of £1,080 against the defendant company with costs.

Costs (including disbursements) assessed at £80.

*Judgment for plaintiff with costs.*

# LAW REPORTS

OF

# NORTHERN NIGERIA

# 1964

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## THE HIGH COURT
## OF
## NORTHERN NIGERIA
## 1964

Hon. Mr Justice Hurley, Chief Justice
Hon. Mr Justice J. A. Smith, Senior Puisne Judge*
Hon. Mr Justice Reed, Judge
Hon. Mr Justice Bate, Judge
Hon. Mr Justice Holden, Judge
Hon. Mr Justice J. P. Smith, Judge
Hon. Mr Justice Ahmad, Judge

*Hon. Mr Justice J. A. Smith proceeded on retirement on 22nd December, 1964, and was succeeded as Senior Puisne Judge by Hon. Mr Justice Reed on that date.

THE LAW REPORTING COMMITTEE
OF
NORTHERN NIGERIA
1964

Hon. The Chief Justice, *ex-officio*, Chairman

The Senior of the State Counsel in Jos, *ex-officio*

The Senior of the State Counsel in Kano, *ex-officio*

The Commissioner for Native Courts, *ex-officio*

The Dean of the Faculty of Law, Ahmadu Bello University, *ex-officio*

G. C. U. Agbakoba, Esquire, Barrister-at-Law

E. Noel Grey, Esquire, Barrister-at-Law

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Possession of poison for an illegal purposes—disproof of illegal purpose—accused not knowing of what he is in possession—Pharmacy Ordinance, Laws of Nigeria, 1948, ss. 59, 60.

Possession of poison or poisonous matter—whether possession retained during temporary bailment—Pharmacy Ordinance, Laws of Nigeria, 1948 Cap. 169, s. 59.

Joseph Olayioye *v.* Commissioner of Police
1964 N.N.L.R. 7 (C.A.).

Possession of Indian hemp—premises occupied by more than one person—which person has possession—Dangerous Drugs Ordinance, Laws of Nigeria, 1948, Cap. 50, s. 5(2).

The Queen *v.* Mary Anthony and Another
1964 N.N.L.R. 74 (Reed, Ag. S.P.J.).

Procuration of minor girl—meaning of "illicit intercourse with another person"—Penal Code, s. 275.

Aya Agee *v.* Zaria Native Authority

CRIMINAL PROCEDURE

Accused wishing to make unsworn statement not subject to cross-examination—examination by court under Criminal Procedure Code, s. 235—Constitution of Federation of Nigeria (1960), s. 21(9).

The Queen *v.* Mohammadu Yola
1964 N.N.L.R. 12 (Reed, J.).

Appeal—irregularity in trial proceedings—unsworn interpreters whose ability open to question—whether failure of justice—whether in fact any misinterpretation or failure to interpret.

Buraima Ajayi and another *v.* Zaria Native Authority
1964 N.N.L.R. 51 (C.A.).

Irregularity in trial proceedings—failure of justice—burden lies on appellant to establish failure of justice—Criminal Procedure Code, s. 382.

Buraima Ajayi and Another *v.* Zaria Native Authority (No. 2).
1964 N.N.L.R. 61 (F.S.C.).

Arrest—policeman's reasonable belief in commission of offence—resisting arrest—assaulting a policeman in the execution of his duty—Criminal Procedure Code, s. 26; Penal Code, s. 172, s. 267.

Felix Chukwuka *v.* Commissioner of Police
1964 N.N.L.R. 21 (C.A.).

Court taking cognizance of offence—complaint by person aggrieved by offence of injurious falsehood under chapter XXIII, Penal Code—falsehood concerning private individual—whether First Information Report complaint by person aggrieved—Penal Code, s. 393; Criminal Procedure Code, ss. 1, 141.

J. I. Adunkoko *v.* Ilorin Native Authority
1964 N.N.L.R. 84 (C.A.).

Cross-examination of witnesses by accused—counsel presumed to be aware of rights of accused—whether absence of record of invitation to exercise rights affects validity of trial—Criminal Procedure Code, s. 162(1) and (2).

Joseph Olayioye *v.* Commissioner of Police
1964 N.N.L.R. 7 (C.A.).

Cross-examination and calling of witnesses—duties of court—Criminal Procedure Code, s. 389, s. 391(3).

Umaru Cham *v.* Gombe Native Authority
1964 N.N.L.R. 88 (C.A.).



Evidence—interpretation—native court proceedings—unsworn interpreters—ability open to question—whether conduct of trial irregular—Criminal Procedure Code, s. 242.

Buraima Ajayi and Another *v.* Zaria Native Authority
1964 N.N.L.R. 51 (C.A.).

—— Interpretation native court proceedings—unsworn interpreter—whether conviction should be set aside—Criminal Procedure Code, s. 242 (and s. 386).

Buraima Ajayi and Another *v.* Zaria Native Authority (2)
1964 N.N.L.R. 61 (F.S.C.).

Examination of accused—whether mandatory or permissive—Criminal Procedure Code, ss. 191(1) and 235(1) and (4); s. 236.

The Queen *v.* Mohammadu Yola
1964 N.N.L.R. 12 (Reed, J.).

—— no discovery of line of defence or explanation of prosecution's case—no warning that need not give evidence—Criminal Procedure Code, s. 235, s. 236.

Na'iya Dansara *v.* Kano Native Authority
1964 N.N.L.R. 140 (C.A.).

Failure of justice—what amounts to failure of justice—justice not seen to be done—Criminal Procedure Code, s. 382.

Buraima Ajayi and another *v.* Zaria Native Authority (2)
1964 N.N.L.R. 61 (F.S.C.).

Fitness to plead—accused deaf and dumb—procedure to be followed—Criminal Procedure Code, s. 261, s. 320(1), s. 321(2), s. 322(2).

Zaria Native Authority *v.* Aishatu Yar Dauda Bakori
1964 N.N.L.R. 25 (C.A.).

Interpretation at trial alleged inadequate—whether failure of justice—whether reasonable person at trial must have supposed fair trial denied—ability of interpreter open to question—Criminal Procedure Code, s. 382.

Buraima Ajayi and Another *v.* Zaria Native Authority (2)
1964 N.N.L.R. 61 (F.S.C.).

Irregular proceedings—erroneously taking cognizance of offence—trial of offence by court erroneously taking cognizance—whether, and what part of, proceedings vitiated—whether trial and conviction vitiated—Criminal Procedure Code, ss. 1, 143, 379(*c*).

Adam Shiwa *v.* Bornu Native Authority
1964 N.N.L.R. 66 (C.A.).

—— erroneously taking cognizance of offence—absence of lawful complaint—Criminal Procedure Code, ss. 143, 152, 379(*c*).

Joseph I. Adunkoko *v.* Ilorin Native Authority
1964 N.N.L.R. 84 (C.A.).

—— illness of accused—whether accused fit to stand trial—justice not seen to be done—failure of justice—Criminal Procedure Code, s. 382.

Mairaleigh Daura *v.* Kano Native Authority
1964 N.N.L.R. 145 (C.A.).

Joint trial of two accused charged independently of distinct offences—whether prejudicial to co-accused—exercise of power under Criminal Procedure Code, s. 221(*a*).

Joseph Olayioye *v.* Commissioner of Police
1964 N.N.L.R. 7 (C.A.).

Jurisdiction—magistrate's Court—Federal offence—jurisdiction to try—offence against customs or excise laws—punishment of offence exceeding punishment determining magistrate's jurisdiction—Customs and Excise Management Act, 1958, s. 145, s. 161(1) and (2); Criminal Procedure (Northern Region) Act, 1960, s. 2, s. 3(1); Criminal Procedure Code, s. 4, s. 7(1) (*b*), s. 13, s. 380(*h*).

Board of Customs and Excise *v.* Alhaji Yusufu
1964 N.N.L.R. 38 (C.A.).

Jurisdiction—native court—offence under s. 115, Penal Code—public servant carrying out duties of police officer—native authority police officer—whether triable by native court below Grade A—Penal Code, s. 115(*i*) and (*ii*); Criminal Procedure Code, s. 12(2) and Appendix A.

Halilu Okoko *v.* Igala Native Authority
1964 N.N.L.R. 35 (C.A.).

Opportunity to state defence and call witnesses—duties of court—Criminal Procedure Code, s. 389.

Na'iya Dansara *v.* Kano Native Authority
1964 N.N.L.R. 140 (C.A.).

Power of appeal court to substitute conviction for another offence—whether power to be exercised merely to allow increase of sentence—Native Courts Law, 1956, s. 70 (1)(*iii*); Penal Code, s. 248 (1), s. 265.

Akussa Bassa *v.* Jos Native Authority
1964 N.N.L.R. 49 (C.A.).

Taking cognizance—offence under chapter XXIII, Penal Code—taking cognizance of offence on complaint of "person aggrieved"—private individual defamed—complaint by police officer—whether complaint by "person aggrieved"—Penal Code, ss. 391, 392; Criminal Procedure Code, s. 141.

Adam Shiwa *v.* Bornu Native Authority
1964 N.N.L.R. 66 (C.A.).

DAMAGES

Fatal accidents—apportionment of damages among members of immediate family—principles to guide court—nature of order—Fatal Accidents Law, 1956, s. 7(1).

B. O. Okafor *v.* C. Nnodi
1964 N.N.L.R. 132 (S.C.N.)

General damages—nature of general damages.

Kadiri Amao *v.* Amodu Onire
1964 N.N.L.R. 130 (C.A.)



EVIDENCE

Admissibility—secondary evidence of fact in issue—communication explaining absence of public officer—Evidence Ordinance, s. 34(3); Nigerian Railway Corporation Act, Laws of the Federation of Nigeria and Lagos, 1958, Cap. 139, s. 47; Criminal Procedure Code, s. 239.

The State *v.* Sunday Okeke
1964 N.N.L.R. 125 (Bate, J.)

—— tape recording of incriminating conversation—use as corroboration of other evidence.

G. Efobi and another *v.* Commissioner of Police
1964 N.N.L.R. 1 (C.A.)

Admission—criminal proceedings—admission against accused's interests—duty of accused's counsel.

Umaru Gwandu *v.* Gwandu Native Authority
1964 N.N.L.R. 58 (F.S.C.)

Burden of proof—proof of insanity in defence to criminal charge—Penal Code s. 51.

The Queen *v.* Yaro Biu
1964 N.N.L.R. 45 (Bate, J.)

Witnesses—oaths—circumstances in which required—Criminal Procedure Code, s. 229, s. 230, s. 391.

Madu Manama *v.* Bornu Native Authority
1964 N.N.L.R. 137 (S.C.N.)

GUARANTEE

Obligations of creditor—extent of obligation to disclose information affecting credit of debtor.

John Shidiak *v.* Bank of West Africa Limited
1964 N.N.L.R. 96 (J. A. Smith, S.P.J.)

ILLITERATES PROTECTION

"Illiterate person"—person literate in Arabic but not in English—document written in English—Illiterates Protection Ordinance, Laws of Nigeria, 1948, Cap. 88, s. 3.

———— "Writer"—document typed by one person leaving spaces—blank spaces filled in by another person on behalf of signatory—ibid., s. 7.

Baba Dan Kantoma *v.* Paterson Zochonis and Company Limited.
1964 N.N.L.R. 54 (F.S.C.)

Person not totally illiterate but only unable to read language in which document written—whether able to claim protection of Illiterates Protection Ordinance, Laws of Nigeria, 1948, cap. 88.

John Shidiak *v.* Bank of West Africa Limited
1964 N.N.L.R. 96 (J. A. Smith, S.P.J.)

JURISDICTION

Magistrate's court—Federal offence—offence against customs or excise laws—Customs and Excise Management Act, 1958, s. 145, s. 161(1) and (2); Criminal Procedure (Northern Region) Act, 1960, s. 2, s. 3(1); Criminal Procedure Code, s. 4, s. 7(1) (*b*), s. 13, s. 380 (h).

Customs and Excise *v.* Alhaji Yusufu
1964 N.N.L.R. 38 (C.A.)

Native Court—offence under s. 115, Penal Code.

Halili Okoko *v.* Igala Native Authority
1964 N.N.L.R. 35 (C.A.)

Whether guidance principle can cure defect—Criminal Procedure Code, ss. 288, 382, 386(4); Native Courts Law, 1956, s. 70(1) (*b*).

LEGAL PRACTITIONERS

Criminal proceedings—admission against accused's interests—duty of accused's counsel.

Umaru Gwandu *v.* Gwandu Native Authority
1964 N.N.L.R. 58 (F.S.C.)

NATIVE AUTHORITY

Action against—notice of intention to sue—native authority added as defendant—Supreme Court (Civil Procedure) Rules, O. IV, r. 5(1). Native Authority Law, 1954, s. 110(2).

Mkovor Jagera *v.* Ilyemen Ilo
1964 N.N.L.R. 43 (J. P. Smith, J.)

NATIVE COURT

Criminal Procedure—guidance principle—whether guidance principle can cure defect of jurisdiction—ibid., ss. 288, 382, 386(4); Native Courts Law, 1956, s. 70(1)(*b*).

Adam Shiwa *v.* Bornu Native Authority
1964 N.N.L.R. 66 (C.A.)

Jurisdiction—offence under s. 115 Penal Code.

Halilu Okoko *v.* Igala Native Authority
1964 N.N.L.R. 35 (C.A.)

Witness—oaths—discretion of court to invite witness to take oath—Criminal Procedure Code, s. 391(2).

Madu Manama *v.* Bornu Native Authority
1964 N.N.L.R. 137 (S.C.N.)

PRACTICE AND PROCEDURE

Civil proceedings—interlocutory decision—appeal from High Court to Supreme Court—application for leave to appeal—Supreme Court Act, 1960, s. 31(2)(*a*); Constitution of the Federation, 1963, s. 117.

J. P. Baldwin *v.* Nigerian Oil Mills Limited and Others
1964 N.N.L.R. 109 (Reed, J.).

Fatal accidents—duty of plaintiff to supply particulars—Fatal Accidents Law, s. 5.

B. O. Okafor *v.* C. Nnodi
1964 N.N.L.R. 132 (S.C.N.).

Garnishee order—affidavit supporting application—whether statement of exact amount of judgment debt necessary—Judgments (Enforcement) Rules, O. VIII, r. 3(1)(*a*); Sheriffs and Civil Process Ordinance, Laws of Nigeria, 1948, cap. 205, s. 92 (1) and First Schedule, Form 25.



Banque de l'Afrique Occidentale *v.* Habu and Others
1964 N.N.L.R. 30 (Holden, J.).

Parties—joinder—non-joinder—defendant added—new defendant a native authority—notice—Supreme Court (Civil, Proceedure) Rules, O. IV, r. 5(1); Native Authority Law, 1954, s. 110(2).

Mkovor Jagera *v.* Ilyemen Ilo
1964 N.N.L.R. 43 (J. P. Smith, J.).

TORT

Conversion—uncrossed cheque—collecting bank's liability where customer has no lawful title—common law liability.

Attorney-General for Northern Nigeria *v.* African Continental Bank Limited
1964 N.N.L.R. 111 (Bate, J.).

*Injuria sine damno*—whether general damages must be specifically justified and claimed.

Kadiri Amao *v.* Amodu Onire
1964 N.N.L.R. 130 (C.A.).

WORDS AND PHRASES

"Another person"—Penal Code, s. 275.

Aya Agee *v.* Zaria Native Authority
1964 N.N.L.R. 82 (C.A.).

"Disturbs the public peace"—'public place'—Penal Code s. 113.
Felix Chukwuka *v.* Commissioner of Police
1964 N.N.L.R. 21 (C.A.).

"Failure of justice"—Criminal Procedure Code, s. 382.
Umaru Cham *v.* Gombe Native Authority
1964 N.N.L.R. 88 (C.A.)

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Na'iya Dansara *v.* Kano Native Authority
1964 N.N.L.R. 140 (C.A.).

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Mairaleigh Daura *v.* Kano Native Authority
1964 N.N.L.R. 145 (C.A.).

"Person aggrieved"—Criminal Procedure Code, s. 141.
Adam Shiwa *v.* Bornu Native Authority
1964 N.N.L.R. 66 (C.A.).

"Public Service"—Evidence Ordinance, s. 34(3); Nigerian Railway Corporation Act, Laws of the Federation of Nigeria and Lagos, 1958, Cap. 139, s. 47; Criminal Procedure Code, s. 239.
The State *v.* Sunday Okeke
1964 N.N.L.R. 125 (Bate, J.).

"Special reasons"—Motor Vehicles (Third Party Insurance) Ordinance, s. 3.
Commissioner of Police *v.* N. A. Akinsoto
1964 N.N.L.R. 126 (C.A.).

"Wilful misconduct".
A. J. Karouni Limited *v.* Nigerian Railway Corporation
1964 N.N.L.R. 15 (Holden, J.).

## GABRIEL EFOBI AND EMMANUEL IBEZIAKO *v.* COMMISSIONER OF POLICE

[C.A. (Reed, Ag. S. P. J. and Holden, J.)—July 10, 1962]
[Jos—Appeal No. JD/11CA/1962]

*Evidence—admissibility—tape recording of incriminating conversation—use as corroboration of other evidence.*

*Constitutional law—unconstitutionality of provisions in Chapter XVI of Criminal Procedure Code—whether interference with presumption of innocence—reference of constitutional issue to Federal Supreme Court—Constitution of the Federation of Nigeria* (1960), *s.* 21(4), *s.* 108.

The appellants were convicted of offering a gratification to an Assistant Superintendent of Police to persuade him to show favour to them in respect of certain offences committed or likely to be committed by the first appellant contrary to the Road Traffic Regulations.

When approached by the appellants, the Assistant Superintendent of Police agreed to receive the first instalment of the gratification in his office. He had a tape recorder installed in his office before their visit and recorded the entire interview he had with them. The recording was rather indistinct but what could be heard of the interview supported the A.S.P.'s story.

On appeal, the appellants contended, *inter alia*, (1) that there was no evidence to support the conviction and (2) that the procedure whereby evidence heard before the trial starts can be taken into consideration after the charge and plea displaced the presumption of innocence of an accused person and thereby raised an issue of Constitutional interpretation which should be referred to the Federal Supreme Court.

*Held:* (1) The tape recording was admissible in evidence as corroboration of the A.S.P.'s account of the interview and there was sufficient evidence to support the conviction.

Observations on the procedure to be followed in preparing a tape recording for submission as evidence.

(2) The nature of the procedure did not involve any question of Constitutional interpretation, since on a proper view the procedure did not displace the presumption of innocence of an accused person.

Cases referred to:

*Harry Parker, Ltd v. Mason*, [1940] 2 K.B. 590, followed;

*R. v. Bracey*, The Times, February 25, 1959, considered;

*Olawoyin v. Commissioner of Police*, F.S.C. 327/1961, unreported; on referral back, 1962 N.N.L.R. 29, adopted.

(*Editorial Note.*—The procedure impugned by the appellants in their second contention mentioned in the headnote was the procedure prescribed by sections 158, 160(1) and 162 of the Criminal Procedure Code).

CRIMINAL APPEAL

*G. C. U. Agbakoba* for first appellant;

*S. P. Khambatta, Q.C., S.O. Morohundiya* with him, for the second appellant;

*N. Henderson, Crown Counsel,* for the respondent.

**Holden, J.,** delivering the judgment of the court: The two appellants are each convicted of offering a gratification in the form of £10 down and £10 a month to an Assistant Superintendent of Police, to persuade him to show favour to the first appellant and his servants in the matter of offences committed or to be committed by him or them under the Road Traffic Regulations. The story for the prosecution is that the first appellant, a transporter, approached the second appellant, an Inspector of Police, for assistance. He said he had seven lorries plying in Plateau Province whose drivers were often in trouble with the police. He wanted the second appellant to approach the first prosecution witness and persuade him in his capacity of Assistant Superintendent of Police in charge of motor traffic matters to "be lenient and overlook certain offences." He offered ten pounds down and the same amount every month as a reward, and tendered a list of numbers and descriptions of seven vehicles. The A.S.P. asked to see the first appellant after the second appellant had told him of the suggestion. The first appellant heard from the A.S.P. the proposal made by the second appellant, and said it was correct. The A.S.P. said he would think it over and they went out of his office. Later, several more approaches were made to him and he eventually agreed to receive the first instalment in his office one morning. During the preceding afternoon, a senior officer installed a tape recorder in the A.S.P.'s office. Next morning, the second appellant came in and handed over nine pounds in notes and a list of vehicle numbers and descriptions. The A.S.P. had switched the tape recorder on when he saw the second appellant coming in and the interview was recorded, though unfortunately rather indistinctly. As soon as the second appellant left the office, the fifth prosecution witness, who was waiting outside for him, brought him in again and in his presence the A.S.P. reported all that had transpired. The second appellant admitted all of it, except the question of the money, of which he said he knew nothing.

No evidence was given for or by either appellant before the trial court. Counsel there relied on four arguments. He first submitted that there was no evidence on which to convict. Secondly, he argued that the A.S.P. was an agent provocateur. Thirdly, he said the charge was bad for duplicity; and fourthly, he attacked the procedure, saying that it offended against section 21(4) of the Constitution.

The learned trial magistrate dealt at length with the evidence, in a very careful and thorough judgment. It is not necessary to quote him at length, but suffices to say that he believed the A.S.P. to be a truthful witness, well corroborated even though corroboration was not necessary, and one on whose testimony a conviction would well be founded.





The appeal now before us falls into two parts, the first attacking the convictions and the second attacking the procedure. In the first part the first and second grounds argued for the first appellant and the fourth ground argued for the second appellant amount to the general ground as to the evidence, and secondly allege an error in law in convicting when the evidence did not support the charge. The second and third grounds filed by the second appellant were abandoned. The third and fourth grounds for the first appellant and the first ground for the second appellant attacked the Criminal Procedure Code, alleging that it is in certain sections unconstitutional.

Mr Agbakoba for the first appellant adopted in advance the submissions made by Mr Khambatta, Q.C., for the second appellant, as regards the first part of the appeals. Mr Khambatta submitted that it was a case where the court had had to decide on one man's word against that of another and in such circumstances it was not safe to convict. He considered the evidence of the first prosecution witness, the A.S.P., not convincing and submitted that it left grave doubts, the benefit of which should have been given to the appellants. He pointed out that there was a direct conflict of evidence between the first and the fifth prosecution witness. The first said that when the fifth entered his office, the money (£9 in notes) was on the table. The fifth says that he saw the money in the first's hand when he entered. Furthermore, he submitted that no motive had been shown for the alleged attempt to bribe the A.S.P., as none of the vehicles on the list was involved at that time in any prosecution or proposed prosecution. He emphasised the gravamen of the case was that the attempt to bribe was aimed at one particular prosecution then pending before the Alkali's court. He conceded that the tape recording was admissible, though not very helpful.

In reply, Mr Henderson pointed out that the gravamen of the case was not as suggested, but was more in the nature of a general insurance against future prosecutions for any offences which might be committed. This, he said, is clearly set out in the charges and supported in the evidence. The trial started only three days after the offence, when memories were clear. The trial magistrate believed the first prosecution witness and said so in unequivocal terms. No corroboration of his evidence was in fact needed but there was ample. The tape recording was proved to be the genuine recording and on it the trial magistrate said he could hear a mention of ten pounds. The fifth prosecution witness took the second appellant back into the A.S.P.'s office at once, where the A.S.P. told the story. The second appellant confirmed nearly all of it, denying only the one point about the money. The fourth prosecution witness connected the first appellant directly with offences committed by one Efobi, matters which did not in any way concern the second appellant in his business of finance clerk. The vehicle referred to in Exhibit 3 is one of those on the list which the second appellant gave to the A.S.P. The driver of the offending motor bore the same name as the first appellant and was seen at his house. Altogether, he submitted, the evidence was overwhelming.

This is the first case in which this court has had to consider the admissibility in evidence of a recording made on a magnetic tape. It is not a ground of appeal but must be considered in the course of weighing the evidence on which the learned trial magistrate convicted. It so happened that the recording produced was of so low a technical quality that the learned trial magistrate could not place much reliance on it. He was, however, able to hear enough to say in his judgment as follows:

> "It is undoubtedly a recording, though a poor one, of the interview which witnesses have stated it to be, but I have to ask myself whether in view of its poor quality I can consider it to have any weight as evidence, and if so how much. I have decided that it is evidence of two matters only, since these two matters are not affected by the possibility of any doubt or reasonable explanation being contained in anything that was said but is unintelligible on the tape. Nor is their context in the flow of conversation of any import. They are as follows: First, it is evidence that a conversation of the general type stated by 1st P.W. took place, and second, that mention was made of £10, some money was counted, and that 2nd accused made a comment on the amount. Thus it is evidence against 2nd accused only and corroborates 1st P.W.'s evidence that he and 2nd accused held the sort of conversation 1 P.W. has stated, and that he and 2nd accused spoke of an amount of money—which there is evidence 2nd accused denied to 5th P.W., Mr Green, A.S.P. As to the time and place of this conversation the evidence of 5th P.W., Mr Green, A.S.P., and 1st P.W., Mr Faruk, A.S.P., coupled, as I have said, with the tape, and coupled also with the evidence of 2nd P.W., Mr Bradney, S.P., is conclusive. There is, perhaps, a further negative point, that nothing intelligible on the tape contradicts any of 1st P.W.'s evidence of the material conversation. I therefore have no hesitation in believing 1st P.W.'s evidence."

There is ample authority for admitting recordings in evidence. In *Harry Parker, Limited v. Mason*, [1949] 2 K.B. 590, a mechanical recording was admitted in evidence to confirm the evidence of one party as to what had transpired at a particular interview with the other. In *R. v. Bracey*, The Times, February 25th, 1959, an indistinct tape recording, of which a transcript could not be made, was played over to the court. In the commentary on this case, [1959] Crim. L.R. 231, it appears that husband and wife were quarrelling bitterly, both talking at once and thus making an adequate transcript impossible. The learned judge, it appears, would have preferred a transcript had one been available, but the recording made it clear that the husband was the aggressor, shouting at his wife and provoking her, whilst her voice on the recording remained quiet.

There is not authority that we can trace where a tape recording has been submitted as the sole evidence of a conversation. Always, those submitted have been used as corroboration of evidence given by a witness present at the conversation, and to such use we can see no objection. Properly made recordings of an interview are similar in





nature to a note made at the time and have the same advantage that they are not able to alter in the same way as a human memory can. If a witness gives his story of the interview and then says "Here is a tape recording made at the time. This is exactly what the interview sounded like," then clearly such a recording is admissible to confirm his evidence, providing the court is satisfied that the recording is genuine.

Tape recordings are very easy to alter. Given a reasonably long recording of a man's voice, it is possible with patience and technical skill to make a counterfeit recording composed of words uttered by him but so rearranged in a different order that he is made to appear to say something which he never said. For this reason, it is important that great care is taken to satisfy the court that the tape produced before it contains the original recording and has not been tampered with. A counsel of perfection would be to say that such a tape should be played back to the culprit as soon as possible after the recording has been made and before it has been removed from the machine. It should then be removed from the machine in his presence and sealed up before being handed to some senior officer for safe keeping. For the trial, a transcript is desirable, if practicable. If not practicable, then when the tape is played to the court, there should be a note in the record of the particular points heard which are of evidential importance.

In this case, there was in our opinion ample evidence on which to convict. The one item of conflict which has been brought to our notice is not serious and not the sort of conflict which would lead us to say that the trial court ought not to have believed the first prosecution witness. We consider that the learned trial magistrate was fully justified in convicting.

The second part of the appeals falls again into two parts; first, the appeals against conviction on the ground that the trial procedure was unconstitutional and secondly, a request under section 108 of the Constitution of the Federation that this court should refer the question to the Federal Supreme Court. On the first part, Mr Agbakoba has conceded that the procedure used by the learned trial magistrate complied with the Criminal Procedure Code. His attack is against the Criminal Procedure Code itself and not against the trial. As the procedure complied with the law, this ground of appeal must obviously fail if the law is not shown to be unconstitutional. Learned counsel's complaint against the Criminal Procedure Code is that evidence heard before a charge is framed, and thus heard before the trial starts, can be taken into consideration after the charge and plea. This is exactly the question referred to the Federal Supreme Court in paragraph 2(*b*) of the reference in *Olawoyin's* case F.S.C. 327/1961 (unreported). In that judgment, their Lordships said:—

> "The questions referred to us in this case do not involve any interpretation of the Constitution, but its application merely."

The matter was referred back to the High Court for decision and that decision is before us in 1962 N.N.L.R. 29. There, at page 34, Hurley C.J. said:

"The meaning of this ground of appeal seems to be that the appellants were presumed guilty before there was proof or evidence of their guilt, and that the prosecution were relieved of the onus of proving the appellants' guilt. It is said that that was so because the prosecution cannot operate or the onus fall until issue is joined and the trial begins, and because evidence before issue is not and cannot be evidence in the trial or upon the issue, and here issue was not joined until the appellants pleaded to the charge after the prosecution evidence had been heard. These seem to us to be purely matters of form, and in our view what we must look at is the question of substance which is, were the prosecution in any degree relieved of the onus of proving guilt because the prosecution evidence was heard before the appellants were charged and pleaded? Was the court any more likely to be persuaded of the appellants' guilt because the evidence preceded the charge? Did the course followed make it easier for the prosecution? We are totally unable to see any reason for supposing that it did, or that the presumption of innocence was displaced or the prosecution to any extent relieved of the onus of proving their case."

To sum up, the situation as regards the second part of the appeals before us is simple. The Federal Supreme Court has said that this very question does not involve any interpretation of the Constitution, and should not be referred but should be decided by the High Court. The application for a reference is therefore refused. There is a judgment of a court of concurrent jurisdiction on the same point. We find ourselves in full agreement with it and respectfully adopt both its sentiments and its wording. We therefore find that the procedure adopted in the trial against which this appeal is made was fully in accordance with the Constitution and in no way offends against it. As the trial was conceded to be in accordance with the law in force in Northern Nigeria, it was therefore a proper trial and the appeals against conviction must fail.

Both appeals are dismissed, and the conviction and sentences are confirmed.

*Appeals dismissed.*



## JOSEPH OLAYIOYE *v.* COMMISSIONER OF POLICE

[C. A. (J. A. Smith, S.P.J. and J. P. Smith, J)—January 25, 1963]
[Makurdi—Appeal No. MD/19CA/1962]

*Criminal law—possession of poison or poisonous matter—whether possession retained during temporary bailment—Pharmacy Ordinance, Laws of Nigeria*, 1948, *Cap.* 169, *s.* 59.

*Criminal Procedure—joint trial of two accused charged independently of distinct offences—whether prejudicial to co-accused—exercise of power under Criminal Procedure Code, s.* 221(*a*).

*Criminal procedure—cross-examination of witnesses by accused—counsel presumed to be aware of rights of accused—whether absence of record of invitation to exercise rights affects validity of trial—Criminal Procedure Code, s.* 162(1) *and* (2).

The appellant was convicted of possessing poison or poisonous matter with the intent that it should be used for an illegal purpose, contrary to the Pharmacy Ordinance, s. 59. He had entrusted the poisons to his friend Ndamadu Ali with a request that he keep them for three days. A police search of Ndamadu Ali's premises before the expiry of this time disclosed them. He was brought before the magistrate together with Ndamadu Ali on one First Information Report which named them both as found in possession of the drugs, and the proceedings continued against them jointly until a charge came to be framed. The magistrate then framed two separate charges, one against each accused, under the same section of the Ordinance and containing the same allegations.

The appellant claimed, *inter alia*, that he had not been in possession of the drugs, that it was contrary to the provisions of the Criminal Procedure Code, s.221 (*a*), to try him jointly with Ndamadu Ali when they were independently charged with distinct offences, and that the provisions of s.162(1) and (2) of the Criminal Procedure Code had been contravened in that, though legally represented, he had not been expressly asked whether he wished to cross-examine witnesses for the prosecution.

*Held* (1) Ndamadu Ali's custody of the poison was no more than a temporary bailment and the appellant retained constructive possession.

(2) Although it would have been better for the magistrate to frame a joint charge in this case, the framing of two separate charges did not prejudice either of the accused persons.

*Per curiam:* It is not a rule of law that there should be separate trials where the defence of one accused amounts to an attack on his co-accused but that would have been a matter which the magistrate would have taken into consideration had the appellant asked for a separate trial.

(3) As the appellant was legally represented, it was not necessary for the magistrate to ask him to state personally if he wished to cross-examine prosecution witnesses.

Case referred to:

*Bisiriyu Shoaga v. The King*, (1952) 14 W.A.C.A. 22, followed,

J. Olayioye v. C. of P.

J. A. Smith, S.P.J.

CRIMINAL APPEAL

*A. O. Mogboh* for the appellant;

*M. B. Belgore, Crown Counsel,* for the respondent.

**J. A. Smith, S.P.J.,** delivering the judgment of the Court: The appellant was convicted in the magistrate's court of an offence contrary to section 59 of the Pharmacy Ordinance. He was tried jointly with Ndamadu Ali, the latter being acquitted

The facts found by the learned magistrate were that the police searched the premises of Ndamadu Ali on 9th July 1962 and found there seventeen bottles of streptomycin wrapped in an envelope. At the material time the appellant was a trainee nurse at Makurdi hospital and Ndamadu Ali was a cook at the nurses' hostel. They were friends. Three days prior to the search by the police, the appellant came to Ndamadu Ali's house about 10 p.m. with this package which the police later found and the appellant requested Ndamadu Ali to keep it for him for two or three days. A neighbour, Mrs. Bright, was in Ndamadu Ali's house listening to the news on the radio when the appellant called; and she confirmed that the appellant brought an envelope containing something which he handed to Ndamadu Ali saying he (the appellant) would collect it in three days. The appellant's defence was a denial.

On this evidence the learned magistrate acquitted Ndamadu Ali and convicted the appellant.

There were several grounds of appeal. Learned counsel for the appellant first argued that the facts as found by the learned magistrate might support a finding that the appellant had transferred the poisons to Ndamadu Ali but did not support a finding that the appellant had possession of the poisons at the time the police discovered them in Ndamadu Ali's house.

Ndamadu Ali had the physical custody of the bottles of poison at the time the police searched his house. But this custody was no more than a temporary bailment at the request of the appellant for three days after which the appellant would assume full possession when he collected them from Ndamadu Ali. In that way the appellant retained control over the poisons and had constructive possession while they were in Ndamadu Ali's custody.

It was also argued on behalf of the appellant that the decision of the learned magistrate was unreasonable having regard to the evidence. But there was ample evidence upon which the learned magistrate could make the findings of fact to which we have already referred and we do not think it necessary to consider in detail the argument of learned counsel on this point.

Learned counsel also submitted on his last ground of appeal that the learned magistrate should have warned himself before accepting the evidence of Ndamadu Ali. The learned magistrate carefully considered the credibility of the evidence of Ndamadu Ali and decided he was truthful. It was not necessary for the magistrate to warn himself, as he would in practice when considering the evidence of an accomplice, since Ndamadu Ali was a co-accused and section 177(2) of the Evidence Ordinance applied.



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The two remaining grounds of appeal attacked the procedure at the trial as contained in the record of proceedings in the court below.

As to the first of these two grounds, it was submitted that the learned magistrate erred in law in trying together two accused persons charged independently with a distinct offence. The appellant and Ndamadu Ali were both named in the First Information Report dated 28th August, 1962, as being found in possession of the bottles of streptomycin. They were both brought before the magistrate on the same day when the prosecutor stated that he wished to proceed against both of them jointly for having unlawful possession of drugs. The complaint was read and explained and each of them made an explanation which was taken by the learned magistrate to be a denial of the complaint and then the case was adjourned to the following day. The next day the trial proceeded as a joint trial, the appellant being represented by counsel. When the learned magistrate reached the stage of framing a charge, instead of framing a joint charge against both, he framed two separate charges one against each accused the allegations in each of the charges being the same and contrary to the same section of the Pharmacy Ordinance. We would comment that while it would have been more correct to frame a joint charge the framing of two separate charges did not prejudice either the appellant or Ndamadu Ali. Learned counsel's objection on this ground of appeal was that there should have been separate trials because Ndamadu Ali (then first accused) was implicating the appellant. A joint trial on the complaint in this case was permissible under section 221(*a*) of the Criminal Procedure Code. It was open to the appellant or his counsel when he appeared before the magistrate to object to being tried jointly with Ndamadu Ali; and it would then have been for the magistrate at his discretion to decide whether or not there should be separate trials. It is not a rule of law that there should be separate trials where the defence of one accused amounts to an attack on his co-accused but that would have been a matter which the magistrate would have taken into consideration had the appellant asked for a separate trial. The appellant did not apply for a separate trial and it is now too late to complain.

The remaining ground of appeal was to the effect that the learned magistrate failed to comply with section 162(1) and (2) of the Criminal Procedure Code.

Section 162(1) and (2) read as follows:

"(1) If the accused pleads not guilty or makes no plea or refuses to plead, he shall be required to state whether he wishes to cross-examine or further cross-examine any, and if so which, of the witnesses for the prosecution whose evidence has been taken.

"(2) If the accused wishes to cross-examine or further cross-examine under the provisions of subsection (1) the witnesses named by him shall be recalled and after cross-examination and re-examination, if any, they shall be discharged."

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In the present instance the learned magistrate did not frame the charges until the last prosecution witness had given evidence. Each accused pleaded to the charges and the entries in the record of proceedings immediately following read:

"1st accused: I wish to make a sworn statement.
Shatola: 2nd accused will make a sworn statement."

These entries in the record of proceedings appear to have been made in answer to the question the magistrate is required to ask in section 191(1)(*a*) of the Criminal Procedure Code after the close of the case for the prosecution. Where, as in this case, the charge is framed after the last prosecution witness has given evidence the accused must first be given the opportunity of recalling prosecution witnesses for cross-examination or further cross-examination before the magistrate goes on to ask the questions set out in section 191(1). There is nothing on the record to show whether or not the provisions of section 162(1) were complied with in this case.

The operative words are "the accused shall be required to state whether he wishes to cross-examine. . . ." and the question arises what is the position when as in the present case accused is represented by counsel. By section 226 legal practitioners as therein defined have a right to practice in the magistrate's court. But Chapter XVI—Summary Trials in Magistrates Courts—makes no reference as to the rights of counsel when defending an accused in a summary trial in the magistrate's court. By section 389(1) native courts are to be guided in regard to practice and procedure by the provisions of the Code; and by section 390 legal practitioners are prohibited from appearing as counsel in native courts. It appears to us that as native courts are to be guided by Chapter XVI as to the procedure they are to follow when conducting a summary trial—which is what a trial in a native court is—it would be inappropriate to refer in Chapter XVI to counsel who have no right of audience in native courts. Nevertheless legal practitioners do have a right of audience in a magistrate's court and when appearing for an accused the conduct of his defence is in the hands of counsel who decides *inter alia* the extent to which it is necessary or advisable to examine or cross-examine witnesses or ask for their recall. We think the circumstances of the present case are similar to those in ***Bisiriyu Shoaga v. The King*** (1952) 14 W.A.C.A. 22, where the court dealt with the point of the recall and cross-examination of witnesses after an alteration in the charge made under section 165 of the Criminal Procedure Ordinance. It was there held:

> "Under section 165, it is clearly laid down that where an alteration or an addition has been made to the charge the accused person must be allowed to recall and cross-examine any witness who has already given evidence, if he so desires. That is a right which cannot be taken away from him, and of which he must be informed if he is not legally represented. But it must be assumed that Counsel is aware of the rights of the person whom he represents, and that if he so desired he could make application to recall and cross-examine any witness whom he thought fit. The fact that he has not done so does not in our view affect the propriety of the conviction, for there can be no doubt that had he made such an application, it would have been both recorded and allowed."



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While the words in section 165 of the Criminal Procedure Ordinance are "the accused shall be allowed to recall or resummon any witness" and are not identical with the words we have quoted from section 162(1) of our Criminal Procedure Code, the right to recall witnesses which is given to an accused is similar in each instance. And we consider that the dictum we have quoted above applies equally to the present case. As the appellant was represented by counsel, we do not consider that it was necessary for the learned magistrate to require the appellant personally to state if he wished to recall witnesses for cross-examination or further cross-examination. That is a matter which counsel would do on his behalf and had learned counsel for the appellant at the trial wished to recall witnesses for cross-examination or further cross-examination, there is no doubt that his request would have been granted; the witnesses recalled; and their evidence on cross-examination by counsel would have been recorded. We find that the magistrate's omission to make a note on the record as to compliance with section 162(1) of the Criminal Procedure Code, did not in the circumstances affect the validity of the conviction.

For the reasons given we dismiss this appeal.

*Appeal dismissed.*

## THE QUEEN *v.* MOHAMMADU YOLA

[High Court (Reed, J.)—March 27, 1963]
[Kano—Criminal Cause No. K/3C/1963]

*Criminal procedure—examination of accused—whether mandatory or permissive—Criminal Procedure Code, ss.* 191(1) *and* 235(1) *and* (4); *s.* 236.

——————— *accused wishing to make unsworn statement not subject to cross-examination—examination by court under Criminal Procedure Code, s.* 235—*Constitution of Federation of Nigeria* (1960), *s.* 21(9).

A trial court's power of examining an accused person under section 235 of the Criminal Procedure Code is permissive, not mandatory.

Where an accused person wishes to make an unsworn statement not subject to cross-examination instead of giving evidence in his own defence, the court will exercise its powers of questioning him under section 235 after warning him that he is not compelled to answer having regard to section 21 (9) of the Constitution of the Federation of Nigeria (1960).

CRIMINAL CAUSE

*K. Hassan, Crown Counsel*, for the prosecution;
The accused appeared in person.

**Reed, J.,** gave the following ruling: At the close of the case for the prosecution, the court did not exercise its power of examining the accused as provided by section 235 of the Criminal Procedure Code. I explained section 236 to the accused, who is not represented by counsel, and asked him if he wished to give evidence on his own behalf. He said he did and that he would like to give it on oath, but after he had entered the witness-box, and before he was sworn, he asked for an assurance that he would not be cross-examined by counsel for the prosecution and suggested that the court was bound to accept his evidence. I informed him that if he gave evidence, counsel for the prosecution had the right to cross-examine him. I also informed him that the court had a discretion to accept or reject his evidence given on oath. He thereupon declined to give evidence but said he would like to make a statement without being cross-examined upon it.

It is to be noted that section 191(1) (*a*) makes it necessary for the court to explain section 236 to an accused person before he elects to give evidence but such an explanation would not include a warning that he renders himself liable to cross-examination as would be the case under section 287(1)(*a*)(*ii*) of the Criminal Procedure Ordinance. Section 236(1)(*d*) of the Criminal Procedure Code does, however, refer to cross-examination and, of course, if the accused person gives evidence on his own behalf he becomes a witness and is liable to cross-examination by virtue of section 188(1) of the Evidence Ordinance.





The question is whether the accused can make an unsworn statement without subjecting himself to cross-examination on it. There is no provision for this in the Criminal Procedure Code and in this respect it differs from the Criminal Procedure Ordinance which makes express provision in section 287(1)(*a*)(*i*).

I have considered the position under the Indian Criminal Procedure Code. It was not until 1955, by an amendment to that Code, that an accused person had the right, under section 342A, to give evidence on his own behalf. The following comment appears in *Sohoni's Code of Criminal Procedure*, volume II, at page 1875—

> "Before this amendment, an accused person could not appear as a witness in his defence, although for the purpose of enabling him to explain circumstances appearing in the evidence against him the Court could put to him such questions as it considered necessary."

The court in India has power to examine the accused under section 342(1), a section which is almost the same as section 235(1) of our Criminal Procedure Code. The Indian courts have held that an examination of the accused after the witnesses for the prosecution have been examined and before he is called on for his defence, is mandatory and not merely permissive. But these Indian decisions were given at a time when an accused person had no right to give evidence and therefore had no other opportunity of stating his defence. Thus *Sohoni* (*supra*), at page 1837, comments on the section—

> "This section requires the accused to be examined for the purpose of enabling him 'to explain any circumstances appearing in evidence against him.' It is one of the most fundamental principles to be observed in a criminal trial that the accused should be called upon to explain the evidence against him and should be thus given an opportunity of stating his own case. The maxim *audi alteram partem* expresses an elementary rule of justice. *Emperor v. Karuma Shanker*, 1936 Oudh 16 at 18."

I have said that our section 235(1) is "almost the same" as the Indian section 342(1). There is one substantial difference. The Indian section 342(1) states that the court—

> "may, at any stage of any inquiry or trial. . .put such questions to him as the Court considers necessary, and shall. . .question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

Our section 235(1) is the same except that the words "in such case" appear immediately before the word "shall." These words "in such case" refer to the preceding words "put such questions to him as the court considers necessary" and therefore the court in Northern Nigeria is required to question the accused after the witnesses for the prosecution and before he is called on for his defence only if the court considers it necessary. The power is therefore, unlike the corresponding power in India, permissive and not mandatory. My view is that the court should question him at this stage only if it is necessary to assist him in a case of some complexity, so that he knows what the issues are and how he

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should meet them in his defence. I did not consider it necessary in the case before me, where the issues are perfectly clear issues of fact. I refer to subsection (4) of our section 235 in support of this view and would add that there is no similar provision in the Indian section 342.

Now that the accused has declined to give evidence on oath, but has indicated that he would like to state his defence without being cross-examined upon it, I think the proper course is for the court to exercise its power of questioning him under section 235, which can be done at "any stage of an inquiry or trial" so that he has an opportunity of stating his own case. I shall therefore question him with this object after warning him that he is not compelled to answer having regard to section 21(9) of the Federal Constitution.

*Ruling accordingly.*



## A. J. KAROUNI, LIMITED *v.* NIGERIAN RAILWAY CORPORATION

[High Court (Holden, J.)—April 25th, 1963]
[Kano—Civil Suit No. K/225/1961]

*Carriage by land—Railway Corporation Conditions of Carriage—whether goods "accepted and booked" by Corporation—whether goods lost as result of "wilful misconduct" of Corporation's servants or agents—Nigerian Railway Corporation Ordinance,* 1955, *s.* 69.

*——————owners' risk—when liability for loss arises.*

*Words and phrases—"wilful misconduct".*

The plaintiffs claimed damages for the loss of 260 bags of groundnuts delivered to the defendant Corporation for carriage from Kano to Apapa. The evidence established that the plaintiffs' employees loaded the bags on to a railway waggon belonging to the defendant Corporation. The waggon was thereupon sealed and left in an open siding. The plaintiffs sent copies of the credit note in respect of the bags to the defendant Corporation, who accepted one copy as a consignment note and another as a promise to pay the freight. In return, the authorised employee of the defendant Corporation issued a waybill in respect of the contents of the waggon.

The waggon was later reported to be standing empty in the siding but the defendant Corporation did not take any action to ascertain the whereabouts, of the bags and the loss was not investigated until the plaintiffs complained that the bags had not reached Apapa.

Section 69 of the Nigerian Railway Corporation Ordinance provided, *inter alia*, that the Corporation would not be liable for the loss of goods unless they were accepted and booked by a railway servant and, in the case of carriage at owner's risk (which was the case here), unless a complete consignment had been lost as the result of the wilful misconduct of the servants or agents of the Corporation.

*Held:* (1) Since the goods had been accepted and booked by an authorised railway servant, responsibility for their safekeeping fell on the defendant Corporation from that moment and not from the time of the departure of the train to Apapa.

(2) The defendant Corporation's failure to act when notified of the loss of the goods, amounted in the circumstances to wilful misconduct and the plaintiffs could therefore recover the value of the consignment lost.

CIVIL SUIT

*E. Noel Grey* for the plaintiffs;
*G. O. Olarenwaju* for the defendant Corporation.

**Holden, J.:** The plaintiffs claim the sum of £1,057, being the value of 260 bags (20 tons) of groundnuts delivered to the defendant Corporation on 6th December, 1960 for carriage from Kano to Apapa. The plaintiffs in fact proved the value at £1,047. There are seven strings to the defence, which I deal with in an order more logical than that in which they are pleaded.

Paragraph 5 of the statement of defence complains that the defendant Corporation has never been served with the writ, but only with a hearing notice. There is an affidavit on my file showing that the Lagos bailiff on 22nd February, 1962, served a "writ hearing notice" on Mr Duncan, Assistant Secretary. In the absence of proof to the contrary, I must hold that to be service, as no objection has been taken to the fact that Mr Duncan is not the Secretary within section 83 of the Nigerian Railway Corporation Ordinance. In the event Alhaji Razaq appeared for the defendant Corporation on 2nd March, 1962, and agreed to an order for pleadings, without then raising any objection about service or the lack of it, and apparently without taking the trouble to ask anybody for a copy of the writ. I see no merit in this defence.

The second defence (paragraph 7 of the statement of defence) is that the plaintiffs failed to give the notice required of their claim under section 75(2) of the Ordinance. This puts on the plaintiffs the onus of stating their claim within one month of the acceptance of the goods (paragraph (*a*)) or within a reasonable period, not exceeding two months thereafter (paragraph (*b*)). I held as a preliminary finding that this section means that the claim must be made within a total of three months at the most from the date of acceptance. The word "thereafter" in paragraph 2(*b*) in my view refers to "that period" in the same sentence, and not to "such acceptance" in paragraph 2(*a*). If the plaintiffs seek extra time under paragraph 2(*b*), they must satisfy me that it was not reasonably possible for them to give such notice within one month of the date of acceptance (here 6th December, 1960). I am so satisfied. There is evidence, which I believe, that the plaintiffs had no means of telling whether the waggon had reached Apapa safely and when towards the end of January, 1961, they had had no news of it, they acted quickly and efficiently. They could not in my view have acted before. Secondly, before extra time can be granted, it is open to the defendant Corporation to prove that they have been "prejudiced thereby". I am not quite sure what that means, but in any event the defendant Corporation has not pleaded or attempted to prove to me any prejudice. I hold the latest date in this case for giving effective notice of the claim was 6th March, 1961. Mr Olarenwaju for the defendant Corporation concedes that the notice was given by the plaintiffs' Lagos agents in the original of Exhibit 2 dated 12th February, 1961. It was therefore well within time. It does not specify any value, but that was given in Exhibit 3, dated 22nd March, 1961, received according to the date stamp on 27th March, 1961, in the office of the defendant Corporation. This is within five months from the date of acceptance, so this defence must fail too.

Paragraph 6 of the statement of defence contends that "Plaintiffs' notice of intention to commence this action dated 14th August, 1961 does not comply with section 82(2)" of the Ordinance. Mr Olarenwaju could not find anything to submit in support of this contention. (In fairness to him it must be made clear that he did not draw up the statement of defence nor prepare the case for hearing, but "inherited" it as a ready-made brief from Alhaji Razaq when taking over the latter's chambers). This defence too must fail.





Fourthly, paragraph 4 of the statement of defence pleads that the action was not commenced within the period of twelve months laid down in section 82(1) of the Ordinance. Mr Olarenwaju concedes there is no merit in this, as the writ was applied for over a fortnight before the end of the year.

Fifthly, the defendant Corporation denies that any groundnuts were ever loaded, and puts the plaintiffs to the strict proof of it.

Sixthly, the defendant Corporation pleads that if any groundnuts were in fact loaded, they never came into the custody of the Corporation or its servants. They say that the Waybill, Exhibit 5, was issued on the strength of the plaintiffs' allegation in Exhibit 4, and does not mean that they accepted responsibility for 260 bags of groundnuts, or any.

Seventh, the defendant Corporation says in paragraph 8 of the statement of defence that as the groundnuts, if any, were consigned at owners' risk, the plaintiffs must prove, and they have not pleaded it, that the loss was a result of the wilful misconduct of the servants or agents of the Corporation, as is required under section 69(1)(*b*) of the Ordinance.

Under these last two pleas, Mr Olarenwaju sought to put in evidence the Tariff which he said governed all contracts of carriage entered into by the Corporation at that time. This Tariff was not specifically pleaded but I ruled that as the Waybill, Exhibit 5, states "goods are carried subject to the rules and conditions of the Railway's published Tariffs," the contents of that document are clearly relevant. Mr Grey for the plaintiffs no longer objecting, the Tariff was produced.

As to the facts, I accept the evidence of the witnesses for the plaintiffs. They were vigorously attacked in cross-examination and they withstood it well. They told me the truth and I find the following facts proved:—

1. In response to a request by the plaintiffs, the defendant Corporation put waggon No. 3456 in a position where the plaintiffs could load it.
2. The waggon was, as is pleaded in paragraph 3 of the statement of defence, on a "common or open siding" in the Syrian Quarter of Kano, not on a siding on private or enclosed land.
3. The plaintiffs' men loaded 260 bags of groundnuts into it and sealed it with a seal provided for the purpose by the defendant Corporation.
4. The plaintiffs, in accordance with custom, made out the credit note, Exhibit 4, and sent it with copies to the defendant Corporation.
5. The defendant Corporation accepted one copy of Exhibit 4 as a Consignment Note and another as a promise to pay the freight according to custom.

6. The defendant Corporation's Night Booking Clerk, in accordance with custom, issued the Waybill, Exhibit 5, making it clear on the face thereof that he had no knowledge of the contents of the waggon but was accepting the representation of the plaintiffs made in Exhibit 4.
7. The waggon stayed there for some time before it was moved. During its stay there, it was checked each day by a servant of the defendant Corporation and reported by him to the Kano office as being there. At first it was reported as being loaded, but later the report was changed to show it as being empty. Its exact position at the time of the change in the report is not known.
8. After the waggon was found empty, the defendant Corporation's servants in Kano apparently did not notice that it should have been full. No investigation was made till the plaintiffs complained that the groundnuts had not reached Apapa.
9. This consignment of groundnuts never reached Apapa as such or to the credit of the plaintiffs' account.
10. The value of the consignment including freight was £1,047.

Mr Grey, for the plaintiffs, submitted that the Tariff is a bye-law made under section 57 of the Ordinance and as such is *ultra vires* that section. He submits it cannot be brought within any of the purposes set out in section 57 for which bye-laws can be made. I cannot accept this. The bye-laws are quite separate. The conditions of carriage in the Tariff are, in my view, conditions imposed under section 59 of the Ordinance "for the receiving, forwarding, conveying and delivering of goods" and as such are lawfully imposed under section 59, published in the Tariff under section 79, and admitted in evidence under section 80 by consent.

It is agreed that the groundnuts were consigned, if consigned at all, at owners' risk, so I shall not consider parts of the Ordinance and the Tariff not applying to that form of contract. The relevant parts of section 69 of the Ordinance may be summarised as follows:

> The Corporation shall not be liable for the loss of a consignment of goods carried or delivered for carriage by the Railway unless:—
>
> (*a*) the goods in respect of which compensation is claimed have been accepted and booked by a railway servant; and
>
> (*b*) in the case of goods consigned at owners' risk a complete consignment has been lost as a result of the wilful misconduct of the servants or agents of the Corporation:
>
> Provided that the Corporation shall not be exempt from any liability they might otherwise incur in the case of non-delivery of the whole of a consignment unless such non-delivery is due to accident to trains or to fire;
>
> Provided however that the Corporation shall not be liable in the said case of non-delivery upon proof by them that the same has not been caused by the negligence or misconduct of the Corporation or its servants.





This latter proviso seems to be in direct conflict with subsection (1)(*b*) of section 69 but as the defendant Corporation has not pleaded the proviso or attempted to lead any evidence in support of such a plea, I need not try to work out what that proviso means.

I can find no definition of the words "accepted and booked" in section 69(1)(*a*). Goods are dealt with in clause 2 of Chapter II of the Tariff (page 4), where paragraph A says there can be no liability in respect of goods carried or delivered for carriage unless those goods shall have been "consigned, booked, and paid for in conformity with the conditions herein." Paragraph 3 of Chapter XIII (page 75) of the Tariff states that every consignment tendered for carriage must be accompanied by a Consignment Note in the prescribed form giving the prescribed details. The forms are shown in specimen at pages 158–160, and bear little resemblance to Exhibit 4. However, we have the expert evidence of the first defence witness that one copy of Exhibit 4 is used as a Consignment Note and that the form also settles the question of the payment of freight charges. Paragraph 5A of Chapter XIII (page 76) of the Tariff states "for all goods booked the Corporation grants a receipt," etc. At the bottom of Exhibit 4 there is an entry, "Time booked by Booking Clerk," and initials representing a signature. I can only deduce that when the Corporation speaks of goods being "booked" it means they have been entered in the books kept for that purpose by the Corporation's servants. I cannot find anywhere in the Tariff the word "Waybill," or a specimen document in the form of Exhibit 5, but I think it is clearly the receipt referred to above. I am confirmed in this belief by the fact that it bears at the bottom the words "The consignee must surrender this Waybill when claiming delivery of the goods." This appears to fit in with paragraph 5B and 5C of Chapter XIII (page 76) of the Tariff on the subject of the delivery of goods.

Exhibit 5 is marked with a specific reservation and is obviously not evidence of the quantity of goods in the waggon. Also, at paragraph 4 of Chapter II (page 6) and at paragraph 16 of Chapter XIII (page 79) of the Tariff, it is made clear that the defendant Corporation does not accept any responsibility for the quantity or condition of goods loaded, unless they are loaded under the supervison of and tallied by members of their staff. This is a reasonable reservation to make but does not in my view prevent evidence from being led to show the Court just what was put into that waggon.

To sum up, we have a situation where, on the evening of 6th December, 1960, the plaintiffs had loaded 260 bags of groundnuts into this waggon and sealed it with the seal provided for the purpose by the Corporation. They submitted the required document (Exhibit 4) and got the receipt (Exhibit 5). The goods had thus been tendered for carriage and accepted (subject to the Corporation's reservations as to quantity and quality), booked and paid for (within the terms of the special arrangement). The question is whether the responsibility for the protection of those goods fell at that moment on the Corporation, as the plaintiffs submit, or not until they removed the waggon, as the defendant Corporation submits.

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Holden, J.

Paragraph 2A of Chapter II (page 4) of the Tariff says the Corporation shall not be liable for any loss to goods delivered for carriage unless those goods have been consigned, booked and paid for and the receipt issued. It seems that consignment and payment form the offer, and booking and issuing the receipt form the acceptance, of this contract. The natural corollary to the negative postulation of paragraph 2A above is that once those goods have been consigned, booked, and paid for, and the receipt has been issued, then responsibility for them must fall upon the Corporation; subject of course to disclaimers as to quantity and quality and to any defences open by law to the Corporation in the event of loss. The second defence witness tried to convince me that the plaintiffs were responsible and should have guarded that waggon day and night till such time as it suited the Corporation to come and take it away. I cannot accept this. The waggon was not on a siding in private enclosed land, but on a "common and open siding," to quote from the statement of defence. Nothing has been brought to my notice in the Ordinance or Tariff, or proved in evidence, which in my view relieved the defendant Corporation of their responsibility for those groundnuts once they had been properly consigned, booked and paid for and a receipt issued.

The sole remaining question is whether this whole consignment was lost as a result of the wilful misconduct of the servants or agents of the Corporation, in the words of section 69(1)(*b*) of the Ordinance. I think, and Mr Olarenwaju for the defendant Corporation concedes this, that "wilful misconduct" can cover acts of omission as well as acts of commission. That waggon stayed on an open siding for a number of days. The defendant Corporation cannot even say how long it was there. They made no enquiries about it till the end of January, when the plaintiffs complained that the groundnuts had not reached Apapa. All they did was to have a daily report from the waggon checker. This report told them several times that the waggon was there loaded, but nothing was done to bring it to a place of safety. When they were told by their checker that it was still there, but now empty, they still did nothing. That, in my view, is the measure of their negligence. They apparently did not care whether a valuable cargo was safe or had vanished. I consider their behaviour in leaving the waggon there on an open siding for so long unguarded was gross negligence. They knew it was there, so their act in leaving it there was wilful, and in the circumstances was most certainly misconduct.

The plaintiff Company is entitled to judmgent for the value of the groundnuts proved at £1,047 with costs.

*Judgment for the Plaintiffs.*



## FELIX CHUKWUKA *v.* COMMISSIONER OF POLICE

[C.A. (J.A. Smith, S.P.J. and Reed, J.)—May 28, 1963]
[Jos—Appeal No. JD/23CA/1963]

*Criminal procedure—arrest—policeman's reasonable belief in commission of offence—resisting arrest—assaulting a policeman in the execution of his duty—Criminal Procedure Code, s. 26; Penal Code, s. 172, s. 267.*

*Words and phrases—"disturbs the public peace"—"public place"—Penal Code s.* 113.

The appellant was charged with disturbing the public peace contrary to s. 113 of the Penal Code, resisting lawful arrest contrary to s. 172 and assaulting a policeman in the execution of his duty contrary to s. 267. At a dance in a hotel, he fell on a loudspeaker and interrupted the music, causing a crowd to gather round. A policeman intervened and invited the appellant to come to the police station; the appellant assaulted him and he arrested the appellant. The trial court found that the assault followed the arrest, but on the evidence, which was ambiguous on this point, the High Court neither supported that finding nor found that the assault preceded the arrest.

*Held,* (1) There was no evidence that the peace had been disturbed by the appellant's actions.

(2) The hotel was not a "public place" for the purposes of the Penal Code, s. 113, since the landlord could at any time require a person to leave his premises and the public could not insist on any right of entry.

(3) The policeman was not acting in the execution of his duty in inviting the appellant to the police station, or in arresting him before the assault if he was arrested then, because the appellant had committed no offence and the evidence for the prosecution did not disclose facts upon which it was reasonable to believe he had committed one.

*Per curiam:* The test as to what is reasonable belief that a suspect has committed an offence is objective. It is not what the policeman himself considered reasonable but whether the facts within the knowledge of the policeman at the time of arrest disclosed circumstances from which it could be reasonably inferred that the appellant had committed an offence.

Case referred to:

*Brannan v. Peek* [1948] 1 K.B. 68; [1947] 2 All E.R. 572, observations of Lord Goddard, L.C.J., applied.

CRIMINAL APPEAL

*C. A. Ikomi* for the appellant;
*I. M. S. Donnell,* Crown Counsel, for the respondent.

**J. A. Smith, S.P.J.,** delivering the judgment of the Court: The appellant was tried in the magistrate's court and convicted of disturbing the public peace, an offence punishable under section 113 of the Penal Code; of resisting lawful arrest, punishable under section 172; and of assaulting a policeman, one Rahimi Bello, in the execution of his duty, punishable under section 267 of the Penal Code.

The learned magistrate accepted the story given by the prosecution witnesses which he summarised as follows:

> ". . . . at about 8 p.m. there was a dance at the Hotel Horizontal. Accused was one of the guests. He was drunk. He was staggering. He fell on a loud speaker. The loud speaker stopped functioning. Music stopped. People started gathering round the accused who was lying on the loud speaker. Cpl. Bello after seeing the disturbed atmosphere approached the accused, introduced himself as a policeman and arrested him. Asked him to go to the police station. The accused offered resistance. He then pushed Cpl. Bello against the wall who sustained a head injury. Evidence of the 3 P.W. corroborates with the testimony of Cpl. Bello particularly for the disorderly behaviour of the accused, his falling on the loud speaker and the arrest of the accused. Subsequently the 3 P.W. says the accused resisted the arrest and pushed Bello against the wall. Bello sustained some sort of head injury."

Later in his judgment, the learned magistrate stated "I am satisfied that the accused on that occasion was drunk." As learned Crown Counsel for the respondent has pointed out, this was not proved. Rahimi Bello, the complainant, expressed the opinion that the appellant was drunk; while the third prosecution witness said he did not think the appellant was drunk. On that evidence alone there could not be a finding of fact as to drunkenness, as the evidence of each of the witnesses on this point had the effect of cancelling the evidence of the other.

Learned Crown Counsel did not seek to support the conviction under section 113 of the Penal Code, because the section makes it an offence "in a public place" to "disturb the public peace" and there was, he submitted, no evidence that the public peace was disturbed. The learned magistrate in his judgment referred to the disturbed atmosphere. There was no evidence of that. No one present at the dance other than the complainant, who was the second prosecution witness, and the third prosecution witness were called to give evidence. The evidence for the prosecution was to the effect that the appellant fell on the loud speaker. That might in the literal sense be called a "disturbance" but there was no evidence that it disturbed the public peace.

Mr Ikomi, who appeared for the appellant, submitted that the Horizontal Hotel was not a public place and cited in support the case of *Brannan v. Peek*, [1948] 1 K.B. 68; [1947] 2 All E.R. 572. In that case, the question was whether or not a public house was a place within the definition in section 1(4) of the Street Betting Act, 1906. In that subsection, "public place" was defined thus:

> "the word 'public place' shall include any public park, garden or seabeach and any unenclosed ground to which the public for the time being have unrestricted access and shall also include every enclosed place (not being a public park or garden) to which the public have a restricted right of access whether on payment or otherwise, if at or near every public entrance there is conspicuously exhibited by the owners or persons having control of the place a notice prohibiting betting therein."





In his judgment, Lord Goddard, L.C.J., said:

> "The justices may have been misled by the fact that in common parlance licensed premises are called a public house. There is no finding here that the premises were a common inn. If they were the case might require some further consideration because travellers have a right to be taken into an inn if there is room in the house. But a public house is only a place where a person holding a justices' licence is entitled to sell drink and it is no more a public place than a draper's shop. The public it may be are invited to enter, as they may be invited to enter any other place, but that does not give a right of access because the invitation may be withdrawn at any moment."

This decision is useful as a guide but is not binding upon us. A "public place" is not defined in our Penal Code. As to the Horizontal Hotel, the only evidence about it was that it had a "bar" and a dance was in progress. Persons who attended would do so at the general invitation of the landlord and upon the conditions he laid down. He could at any time require a person to leave his premises. Thus, as the public could not go there as of right, we hold that the hotel was not a public place.

We agree with the submissions of counsel both for the appellant and the respondent; and we hold that the offence under section 113 of the Penal Code was not proved.

Learned Crown Counsel did not seek to support the second conviction under section 173 of the Penal Code, because he submitted there was nothing to show that the second prosecution witness had made up his mind to arrest the appellant until after the assault had been committed. The sequence of events as submitted by learned Crown Counsel was: appellant fell on the loud speaker; then the policeman invited him to go to the police station; then the appellant assaulted the policeman and the policeman arrested the appellant.

Learned counsel for the appellant submitted that the arrest preceded the assault, but that the arrest was unlawful.

It would appear from the learned magistrate's summary which we have already quoted that he considered the sequence of events to be: the appellant fell on the loud speaker; the policeman introduced himself to the appellant; then arrested the appellant; then invited him to the police station; then appellant offered resistance by assaulting the policeman.

In his evidence-in-chief, the policeman, the second prosecution witness, did not say that he arrested the appellant, but merely said "I invited him to the police station". At the end of his cross-examination, he is recorded as saying "I arrested the accused he assaulted me". This sentence is ambiguous. It may mean "I arrested the accused *because* he assaulted me", in which case the arrest followed the assault.

F. Chukwuka v. C. of P. Smith, S.P.J.

Or it may mean "I arrested the accused *who then* assaulted me", in which case the arrest preceded the assault. So that on the evidence, the appellant should have been given the benefit of the doubt, as the ambiguity was not clarified and if the assault preceded the arrest then there was no offence proved under section 173.

Had an incident occurred in a public place which the policeman had reason to believe was likely to cause a breach of the peace, he could arrest the offender, provided it appeared that the commission of the offence of disturbing the public peace could not otherwise be prevented. Here, however, the incident occurred in a hotel, a private place; and it appears from the evidence that the policeman was of the opinion that the appellant was drunk and misbehaving. Assuming that the appellant was drunk and misbehaving, it was for the policeman to report the matter to the owner or manager of the hotel with the suggestion that the latter ask the appellant to leave the premises. Had the owner or manager of the hotel so requested the appellant to leave and he had refused, then the policeman might have arrested him on the ground that there was reasonable belief that the appellant had committed an offence contrary to section 402 of the Penal Code. This was not done and in the circumstances of this appeal we would agree that if the arrest preceded the assault such arrest would have been unlawful.

The question that arises on the conviction under section 267 of the Penal Code, is whether or not the policeman was acting in the execution of his duty in inviting the appellant to the police station or arresting him as the case may be, before he was assaulted. We think the answer to that question is in the negative because the hotel being a private place, no offence had in fact been committed nor did the evidence for the prosecution disclose facts upon which it was reasonable to believe that the appellant had committed an offence under sections 113 or 402 of the Penal Code. The test as to what is reasonable belief is objective. It is not what the policeman himself considered reasonable but whether the facts within the knowledge of the policeman at the time of arrest disclosed circumstances from which it could be reasonably inferred that the appellant had committed an offence.

We find that the conviction under section 267 cannot stand. It has been submitted that we could substitute a conviction for using criminal force. We have considered this and come to the conclusion that as the appellant has already served a sentence of six months' imprisonment on the conviction under section 267 of the Penal Code, this is not an appropriate case to substitute at this stage a conviction for a lesser offence for which we would consider a small fine an adequate punishment.

We allow the appeal; we quash all the convictions and set aside all sentences. Fines imposed on the first and second convictions are to be refunded if paid.

*Appeal allowed.*



## ZARIA NATIVE AUTHORITY *v.* AISHATU YAR DAUDA BAKORI

[C.A. (Hurley, C.J., Jibir Daura, Sh. Ct. J., and Bello, Ag. J.)—December 19, 1963]

[Kaduna—Matter No. Z/21M/1963]

*Criminal procedure—fitness to plead—accused deaf and dumb—procedure to be followed—Criminal Procedure Code, s.* 261, *s.* 320(1), *s.* 321(2), *s.* 322(2).

The accused was deaf and dumb. The trial court attempted to communicate with her through her father. In regard to some of the things he said to her, he told the trial court that she understood; in regard to other things, he said he could not make her understand. He did not make these statements as a witness.

A report from a Government Psychiatrist was put in evidence, from which it appeared that he had been unable to communicate with the accused; that deaf and dumb people were subject to impulsive actions and could be dangerous to others when annoyed; and that in the psychiatrist's opinion the accused was of sound mind but incapable of pleading in a court of law.

The trial court, purporting to act under s. 321(2) of the Criminal Procedure Code, found that the accused was of unsound mind and incapable of making her defence.

*Held:* (1) Evidence that an accused person belongs to a class of persons who are impulsive and dangerous when annoyed is not sufficient to support a finding that he is of unsound mind and consequently incapable of making his defence, for it is not evidence of the sort of unsoundness of mind which would disable him from defending himself in court or understanding the evidence or the proceedings or his legal rights in the proceedings.

(2) The trial court's decision could not be upheld as a decision under s. 261 of the Criminal Procedure Code to treat the accused, though not insane, as a person incapable of making her defence by reason of unsoundness of mind because she could not be made to understand the proceedings. That was an issue that would have had to be tried by taking evidence. The trial court should have ascertained by evidence whether communication was possible with the accused in court. There was no such evidence, because the psychiatrist's report was evidence only that he himself could not communicate with the accused, and the accused's father's evidence had not been taken.

*Per Curiam:* Observations made on the procedure to be followed by an interpreter in court.

(*Editorial Note.*—On Held (2) cf. *The Queen v. Ogor* (1961) 1 All N.L.R. 70 at p. 75).

REPORT BY INSPECTOR OF NATIVE COURTS

*A.R.H. Thomas, Senior State Counsel,* for the Native Authority;
*Alhaji R. O. Gaji* for the accused.

Zaria N.A. v. Aishatu yar Dauda Bakori

Hurley, C.J.

**Hurley, C.J.,** delivering the judgment of the Court: This case comes before us on a report by an Inspector of Native Courts under section 58 of the Native Courts Law. The accused is deaf and dumb. She was brought before the Court of the Emir of Zaria on 23rd January, 1963, on the complaint of the Native Authority Police that she had killed her three months old child on 27th November, 1962. The trial court heard one witness that day. After this witness had given his evidence, the court asked the accused's father Daudu to explain it to her. The record says that he did so, and in reply to the court he said that she understood and that she did not agree. The trial court asked "Has she any questions?" and Daudu replied "I cannot show her by way of gesture whether she has questions". The court adjourned the case, and it came on again on 15th February. On that day another witness was heard, and after his evidence was concluded the record states that Daudu explained it to the accused and informed the court that she said she understood it and that, on hearing the explanation, she said she did not know. He also told the court that she did not agree with the evidence. The court asked "Has she any questions?", and the record then reads "She was asked but Daudu failed to speak to her." The trial court then received in evidence a medical report dated 23rd January, 1963, as follows:—

> "*Psychiatric Report on Malama Aishetu Yar Dauda Baku: Prisoner awaiting trial in Zaria Native Authority Prison:*
>
> "She was admitted into the prison on the 1st November, 1962. Aged about 25 years. Marital Status—Unknown. Mental State—She is deaf and dumb. Unable to lip-read or communicate by sign language. She showed no sign of aggression or unco-operation to date, although people, with such afflictions are subject to impulsive actions and could be dangerous to others when annoyed by them.
>
> "In view of her physical handicaps (deafness and dumbness) her mental state could not be assessed. I am of the opinion that she is incapable of pleading in a court of law and from my observation of her and the reports given by the Prison wardress, she is of sound mind.
>
> "(*Sgd*) C. O. OSHODI,
> *Regional Psychiatrist,*
> *General Hospital, Zaria*"

Upon receiving this report, the trial court recorded their decision in these words:—

> "President and members of the court observed that Doctor has stated that he could not understand A'i Baku who is standing trial for killing her child for reason of being dumb and deaf and has again stated that at times such people become dangerous to people who provoke them. To that effect A'i is insane, President and members support doctor's report, to adjourn case as stated in C.P.C. 321(2).
>
> "And President to submit the report of case to His Excellency the Governor as requested by C.P.C. 322(2)."



Zaria N.A. v. Aishatu yar Dauda Bakori

Hurley, C.J.

Section 321(2) of the Criminal Procedure Code says—

> "If the medical officer shall report under section 320 that [the accused] person is of unsound mind and incapable of making his defence, the court shall if satisfied of the fact, find accordingly, and thereupon the inquiry or trial shall be adjourned."

From their reference to section 321(2), therefore, it appears that the trial court's decision meant that they were satisfied, and found, that the accused was of unsound mind and incapable of making her defence.

But the psychiatrist's opinion was that she was of sound mind. The trial court did not base its findings as to her sanity on the psychiatrist's opinion as to her soundness of mind, but on his observation that deaf and dumb people are subject to impulsive actions and can be dangerous to others when annoyed by them. Now the sort of unsoundness of mind which is in question where a court is inquiring whether an accused person is of unsound mind and incapable of making his defence, is unsoundness of mind in consequence of which the accused is incapable of making his defence. This appears from section 320(1) of the Criminal Procedure Code, which provides:

> "When a court holding a trial or an inquiry has reason to suspect that the accused is of unsound mind and consequently incapable of making his defence the court shall in the first instance investigate the fact of such unsoundness of mind."

What the trial court has to investigate is whether there is such unsoundness of mind as would disable the accused from defending himself in court. The evidence from which the trial court inferred unsoundness of mind in this case was evidence that the accused, as a deaf and dumb person, belonged to a class of persons who are impulsive and dangerous when annoyed. Unsoundness of mind which makes a person impulsive and dangerous is not the sort of unsoundness of mind which would disable him from defending himself in court; it would not prevent him from understanding the evidence or the proceedings or what he was entitled to do at any particular stage to defend himself. Therefore we do not think that the trial court's finding that the accused was of unsound mind, being, as it was, a finding that she was of unsound mind so that she could not defend herself, was supported by the evidence.

However, as learned Counsel for the accused has pointed out, section 261 of the Criminal Procedure Code provides:

> "If the accused though not insane cannot be made to understand the proceedings the court shall proceed to try the issue of his fitness to plead and if it is established that he is not fit to plead he shall be treated in like manner as a person incapable of making his defence by reason of unsoundness of mind as provided in chapter XXVI."

In the case before us, the accused apparently could not be made to understand the proceedings, in that she could not be made to understand her rights in the proceedings, namely, her right to have questions put on her behalf to the prosecution witnesses; and the trial court found

that she was incapable of making her defence, or in other words that she was not fit to plead, and treated her as a person incapable of making her defence by reason of unsoundness of mind as provided in chapter XXVI. If that decision had been based on a finding properly arrived at we would have had no reason to make any order on this review. But it appears to us that the finding was not properly arrived at.

Section 261 says that when the accused cannot be made to understand the proceedings the trial court must then proceed to try the issue of his fitness to plead. In order to try an issue, a court must take evidence. The trial court here did take the evidence of the psychiatrist's report. But they took no other evidence, and we do not think the report by itself was evidence that the accused was unfit to plead, or incapable of making her defence in court, any more than it was evidence of unsoundness of mind incapacitating her from making her defence. It was evidence only that the psychiatrist could not communicate with her; it was not evidence that no communication was possible with her at all. It was for the court to ascertain, by evidence, whether communication was possible with her in court sufficient to enable her to understand the proceedings and defend herself. The trial court ascertained that some communication was possible in court sufficient, perhaps, to enable her to understand the evidence, but not, apparently, sufficient to enable her to understand her right of having questions put to the witnesses. But the trial court did not ascertain that by evidence. Her father, Daudu, who told the trial court these things was not heard as a witness. He should have been called and heard as a witness, and if that had been done, and if, speaking as a witness, he had said that he had not been able to make the accused understand that she might have questions put to the witnesses, there would have been evidence on the issue of her fitness to plead under section 261 which would have been sufficient to support a finding that she was not fit to plead. Without such evidence, and on the evidence of the psychiatrist's report alone, the trial court's finding and decision cannot be supported.

We will therefore set aside the trial court's findings and their decision to report the case to the Governor under section 322(2) and order the issue of the accused's fitness to plead to be retried by the trial court. The trial court will retry that issue under section 261 of the Criminal Procedure Code, and will make its findings on the evidence of Daudu and on any other evidence it thinks necessary to take. The trial court may well think it advisable to test the accused's capacity to understand the proceedings by reopening them and hearing the complaint and the first witnesses again in a fresh attempt to make the accused understand. If that is done—and we ourselves think it would be advisable to do it—the trial court should note that it will not be sufficient to explain each witness's evidence to the accused after the witness has finished his evidence. Daudu or whoever else is explaining the evidence and the proceedings to the accused will be in the position of an interpreter, and an interpreter should interpret whatever is said immediately it is said, sentence by sentence; he should not wait till everything has been said and then state what he remembers of it or





what he thinks it was, but should interpret the whole and every part of it, piece by piece and sentence by sentence. It is in that way that the court should attempt to have the evidence explained to the accused, and the proceedings also—not only what the witnesses say, but also everything that the complainant and the court say—and so make sure either that the accused understands everything, or, if she does not understand everything, what it is that she cannot be made to understand.

If on retrying the issue of the accused's fitness to plead the trial court find that she is not fit to plead they will treat her as provided in chapter XXVI of the Criminal Procedure Code. If the trial court find that she is fit to plead, they will proceed with her trial on the complaint of killing her three months old child. In that case, the trial court will bear in mind the provisions of section 222(6) of the Penal Code and will hear evidence of the accused's behaviour and state of mind after the child's birth and before its death, and will be well advised to hear the evidence of a doctor about the effects which childbirth and lactation may have on a woman's mind and behaviour.

*Finding of unsoundness of mind and decision to report to the Governor set aside.*

*Order for retrial of issue of fitness to plead.*

# BANQUE DE L'AFRIQUE OCCIDENTALE *v.* HABU, ILIASU AND SAVAGE

## *In re* NORTHERN NIGERIA MARKETING BOARD (GARNISHEES)

[High Court (Holden, J.)—August 12, 1963]

[Kano—Civil Suit No. K/34/63]

*Practice and procedure—garnishee order—affidavit supporting application—whether statement of exact amount of judgment debt necessary—Judgments (Enforcement) Rules, O. VIII, r. 3(1)(a); Sheriffs and Civil Process Ordinance, Laws of Nigeria, 1948, cap. 205, s. 92(1) and First Schedule, Form 25.*

In garnishee proceedings, the affidavit in support of the application for the order need not adhere exactly to Form 25 of the First Schedule of the Sheriffs and Civil Process Ordinance and it does not therefore need to state the exact amount of the judgment debt.

Case referred to:

*De Pass v. Capital and Industries Corporation, Ltd., F. J. Vinall, Garnishee,* [1891] 1 Q.B. 216; affirmed, *sub nom. Vinall v. De Pass,* [1892] A.C. 90, followed.

*Salomon v. Salomon and Co., Limited.,* [1897] A.C. 22.

APPLICATION IN CIVIL SUIT

*E. Noel Grey* for the garnishees;
*John C.S. Hughes* for the judgment creditor.

**Holden, J.:** Before I can consider the merits of this garnishee summons and decide whether or not to make the order *nisi* already granted into an order absolute, there is a preliminary objection which I must go into. Mr Grey for the garnishees asks for the proceedings to be struck out on the ground that the affidavit supporting the application does not state the amount of the debt said to be due to the judgment debtor. This submission was originally made on 10th May, 1963, and was not dealt with in my short ruling of 14th May in which I said I would hear oral evidence. The submission has very properly been repeated after I have heard evidence and must be answered. Mr Grey's complaint is that the affidavit of Monsieur Beyaert, dated 20th April, 1963, in paragraph 3 states:

> "That the said Judgment is still wholly unsatisfied; further the garnishee is indebted or has a debt accruing due to the judgment debtor in the sum of £10,513 1*s* 0*d* at the least."

This, he argues, does not obey Order VIII, rule 3(1)(*a*) of the Judgments (Enforcement) Rules, which states that the affidavit must be in the form of Form 25 in the First Schedule of the Sheriffs and Civil Process Ordinance. Form 25, at the relevant point, reads:





> "3. That the garnishee.....of..... is indebted to the judgment debtor in the sum of £ : : d."

He submits that the form itself states its own requirements and is its own authority. Here, there has been no compliance with an essential requirement, and the original affidavit being wrong, the order *nisi* should not have been made and no order absolute should follow.

In reply, Mr Hughes for the judgment creditor refers to the 1956 Edition of the *Annual Practice*, p. 819, and to Form 25 set out in part B of Appendix B at p. 2569. This is identical with the Nigerian form except for the additional words "or thereabouts" after the space for the figures. He further refers to the decision in *De Pass v. The Capital and Industries Corporation, Ltd., F. J. Vinall, Garnishee,* [1891] 1 Q.B. 216, affirmed *sub nom. Vinall v. de Pass,* [1892] A.C. 90, as authority for the proposition that there can be an order in respect of an undefined sum notwithstanding the form of the affidavit. He concedes that there has been a ruling of Bate J. on the point, but says that he was unprepared at the time and could not quote this authority.

The first hurdle that Mr Hughes has to get over is the difference between the English form with its extra words "or thereabouts" and the Nigerian form. That, I think, is dealt with adequately by section 92 of the Sheriffs and Civil Process Ordinance, subsection (1) of which reads:

> "92. (1) Subject to the express provisions, if any, of the rules, the forms contained in the First Schedule may, in accordance with any instructions contained in the said forms and with such variations as the circumstances of the particular case may require, be used in the cases to which they apply and, when so used, shall be good and sufficient in law."

In my view the words "and with such variations as the circumstances of the particular case may require," are intended to show that the litigant is not to be form-bound but that so long as he uses a form based upon the form in the Schedule and gives the information required by the form, then his adaptation of the form can be accepted. Can that be said to include such a departure from the form as is here perpetrated? Is not the amount stated to be due from the garnishee to the judgment debtor an essential piece of information? There is nothing in the Ordinance or the Rules to answer that, so we are entitled to look to English authorities and there could be none more to the point than the case of *De Pass* quoted above. In the Court of Appeal, [1891] 1 Q.B. at page 218, Lord Esher M. R. said:

> "The simple answer to this is that no debt need be described in the affidavit, and that all the deponent is required to do is to swear to some debt."

On the next page, Lopes L. J. said:

> "Notwithstanding the form of this affidavit it appears by *Lucy v. Wood* that a garnishee order *nisi* will be made, although the amount of the debt sought to be attached is not stated;"

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and on page 220, Kay L. J. said:

> "The first objection taken on behalf of the garnishee is, that the affidavit in support of the application is only an affidavit of information and belief as to there being a debt due from the garnishee to the judgment debtor. I do not understand how anyone can be asked to swear to the existence of such a debt except in this way. The objection which has been dealt with in *Coren v. Barne* is untenable."

The form of affidavit referred to by Lopes L. J. above is in the same wording as that given in the English Rules of the Supreme Court now in force. In my view, *De Pass's* case is direct authority for holding that it is not necessary in the affidavit to adhere exactly to Form 25 of the First Schedule to the Sheriffs and Civil Process Ordinance and that it is not necessary to swear to an exact amount as being due from the garnishee to the judgment debtor. I have read the ruling of Bate J. dated 1st February, 1963, in earlier garnishee proceedings in this same suit. It does not appear to me to be a direct ruling on the point. All he says there is that he has doubts whether it is correct to contend that no exact sum need be stated. I think with all respect it is not going too far to say that had his attention been drawn to *De Pass's* case his doubts would have been resolved.

Much evidence has been heard by which Mr Hughes for the judgment creditor sought to show that there is (or rather was at the date of service of the order *nisi*) a debt due from the Marketing Board to Musa Iliasu. There is a conflict of evidence as to when money becomes payable by the Board to its licensed buying agents and as to when the property in the groundnuts bought by them passes from them to the Marketing Board. There is argument whether there was at the critical date anything due from the Marketing Board to that particular agent and there is argument as to who that agent is. It is not necessary for me to go into all these things, nor into the effect of the guarantee given by the Board to the agent's bank. There is a short answer to this matter, namely that the Marketing Board was not during the two seasons recently past dealing with the judgment debtor but with a limited liability company by the name of Musa Iliasu and Company, Limited. Mr Hughes has tried to show that the Board was in fact dealing with the judgment debtor in its own mind. There is not a shred of evidence to support this idea; in fact all the evidence is dead against it. It may well be that the judgment debtor formed this company specifically for the purpose of preventing his creditors in general, or the judgment creditor in particular, from getting their hands on the proceeds of his groundnut buying activities. It may well be that the whole transaction is designed to help him avoid paying his debts. That does not make it illegal.

I would refer to the leading case on the subject of the difference between a limited liability company and the persons who form it, namely *Salomon v. Salomon and Co., Ltd.*, [1897] A.C. 22. In his speech, at page 30, Lord Halsbury L. C. said:



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> "I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence—quite apart from the motives or conduct of the individual corporators."

And lower on that page:

> "But short of such proof [of a specific illegality in the process of incorporation] it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.
>
> "I will for the sake of argument assume the proposition that the Court of Appeal lays down—that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself; and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence."

And lower:

> "Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr Salomon."

Then, at page 53 in the speech of Lord Macnaghten, we find the following:

> "It has become the fashion to call companies of this class 'one man companies'. That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading: if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of creditors. If the shares are fully paid up, it cannot matter whether they are in the hands of one or many. If the shares are not fully paid, it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd."

And then, a last quotation from the speech of Lord Davey, at page 54:

> "But, after all, the intention of the Legislature must be collected from the language of its enactments; and I do not see my way to holding that if there are seven registered members the

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association is not a company formed in compliance with the provisions of the Act and capable of carrying on business with limited liability, either because the bulk of the shares are held by some only, or even one of the members, and the others are what is called 'dummies,' holding, it may be, only one share of 1*l.* each, or because there are less than seven persons who are beneficially entitled to the shares."

There is evidence that the judgment debtor in the season 1960-61 was a licensed buying agent and that the Board did business with him. He squared his account at the end of that season. Before the 1961-62 season opened, the company came into the picture. By Exhibit G9, the judgment debtor told the Board that "the business formerly carried on in the name of Musa Iliasu will be continued under the style of Musa Iliasu and Company Limited." The Board then and ever thereafter dealt with the company. Mr Hughes has made a point of the apparent impropriety of the appointment of the company as licensed buying agents. It is irrelevant. It does not matter if there was no agent that season or even during the season 1962-63. What does matter is that Musa Iliasu himself was not a licensed buying agent for either of those seasons and did no business in his own right. Thus at the date of service of the order *nisi* on the Marketing Board (23rd April, 1963), there was no money owing from the Marketing Board to Musa Iliasu so there is no debt which can be attached. The order *nisi* dated 23rd April, 1963, is discharged.

*Order discharged.*



## HALILU OKOKO *v.* IGALA NATIVE AUTHORITY

[C.A. (Reed, Ag. S.P.J., Smith J. and Jibir Daura, Sh. Ct. J.)—October 23, 1963]

[Lokoja—Appeal No. MD/5CA/1963]

*Criminal procedure—jurisdiction—native court—offence under s.* 115, *Penal Code—public servant carrying out duties of police officer—native authority police officer—whether triable by native court below Grade A—Penal Code, s.* 115(*i*) *and* (*ii*)*; Criminal Procedure Code, s.* 12(2) *and Appendix A.*

*Jurisdiction—native court—offence under s.* 115, *Penal Code*—ditto.

*Native court—jurisdiction*—ditto.

The appellant was a native authority police officer. He was convicted by a Grade B native court of the offence of taking, etc., a gratification being a public servant, contrary to s. 115 of the Penal Code. It was alleged that he committed the offence while carrying out his duties as a police officer.

By the effect of s. 12(2) of the Criminal Procedure Code, Appendix A to that Code shows what grades of native court may try particular offences under the Penal Code. Appendix A deals with offences under s. 115 of the Penal Code in two parts. The first part deals with offences under that section which are punishable with imprisonment for seven years or fine or both, and shows that such offences are triable by native courts of Grade C and upwards. The second part is confined to offences punishable with imprisonment for fourteen years or fine or both where the public servant is acting in a judicial capacity or carrying out the duties of a police officer, and shows that such offences are triable by native courts of Grade A and no others.

On behalf of the appellant it was argued that the Grade B court had no jurisdiction since the offence complained of was an offence committed by a public servant carrying out the duties of a police officer.

*Held:* The second part of Appendix A to the Criminal Procedure Code dealing with s. 115 of the Penal Code refers to an offence as defined by s. 115 for which the offender is liable to punishment as set out in s. 115(*ii*), and therefore applies only where the public servant is, in the words of s. 115(*ii*), a public servant in the service of the Government of the Northern Region or of the Federation acting in a judicial capacity or carrying out the duties of a police officer. Accordingly, the Grade B Court had jurisdiction.

(*Editorial Note.*—The exclusion of jurisdiction in respect of Government officials which is shown for native courts by column 7 of Appendix A was not in point, because the appellant was not a Government official).

CRIMINAL APPEAL

*J. M. N. Onyechi* for the appellant;
*M. B. Belgore, State Counsel*, for the respondents.

**Reed, Ag. S.P.J.,** delivering the judgment of the Court: The appellant, a native authority police officer, was tried in the Idah Criminal Court, a Grade B native court, for an offence under section 115 of the Penal Code. He was convicted and sentenced to six months'

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imprisonment. He appealed to the provincial court and his appeal was dismissed. He now appeals to this Court and his counsel submits that the trial court had no jurisdiction. Section 12(2) of the Schedule to the Criminal Procedure Code Law, 1960, states that—

> "Any offence under the Penal Code may be tried by any native court by which such offence is shown in the seventh column of Appendix A to be triable or by any native court with greater powers."

In Appendix A, section 115 is dealt with in two parts. In the second column, under the heading "Offence," it is stated—

> "If such public servant acting in judicial capacity or carrying out duties of police officer."

Column 5 sets out the punishment for the offence in such circumstances as "Imprisonment for fourteen years or fine or both." Column 6 states that the court with least powers by which such an offence is triable is the "High Court" and column 7 states that the native court with the least powers by which the offence is triable is a Grade A court, "excluding jurisdiction in respect of Government officials." Section 10 of the Penal Code defines a "public servant" to include a person appointed by a Native Authority. The appellant was alleged to have committed the offence while carrying out the duties of a police officer and therefore, on a literal interpretation of the relevant part of the Appendix, the trial court, a Grade B court, had no jurisdiction to try the appellant.

However, learned State Counsel has advanced an argument which has satisfied us that this is not so and that, in fact, the trial court had jurisdiction. Section 115 of the Penal Code first defines the offence of public servants taking gratification in respect of official acts and then sets out the punishment for such an offence in two parts. It states that an offender shall be punished—

> "(*i*) with imprisonment for a term which may extend to seven years or with fine or with both;
>
> (*ii*) if such public servant is a public servant in the service of the Government of the Northern Region or of the Government of the Federation acting in a judicial capacity or carrying out the duties of a police officer, with imprisonment for a term which may extend to fourteen years or with fine or with both."

Now section 115 is dealt with in the second column of the Appendix in two parts. The first part purports to define an offence which in the fifth column is stated to be punishable with "imprisonment for seven years or fine or both" and the second part purports to define an offence which is stated in the fifth column to be punishable with "imprisonment for fourteen years or fine or both." In our view there can be no doubt that the legislature intended that the offence defined in the first part of the second column should be the offence defined in section 115 of the Penal Code for which punishment is provided by subsection (*i*) thereof and that the offence defined in the second part of the second column should be the offence defined in section 115 of the Penal Code for



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which punishment is provided by subsection (*ii*) thereof. Otherwise the punishment in column 5 with reference to the second part would not be correct. It would mean, for example, that a public servant in the service of a Native Authority acting in a judicial capacity or carrying out the duties of a police officer was liable to fourteen years imprisonment whereas, by virtue of section 115 of the Penal Code, he is only liable to seven years.

At the beginning of the Appendix it is stated that—

> "The entries in the second and fifth columns of this Appendix, headed respectively 'Offences' and 'Punishment under the Penal Code,' are not intended as definitions of the offences and punishments described in the several corresponding sections of the Penal Code or even as abstracts of these sections, but merely as references to the subject of the section, the number of which is given in the first column."

We are of opinion that the second part of the second column in Appendix A to the Criminal Procedure Code dealing with section 115 of the Penal Code, namely—

> "If such public servant acting in judicial capacity or carrying out duties of police officer,"

should be interpreted to mean an offence as defined by section 115 of the Penal Code for which the offender is liable to punishment as set out in subsection (*ii*) thereof. In other words, the second part applies only where the public servant

> "is a public servant in the service of the Government of the Northern Region or of the Federation acting in a judicial capacity or carrying out the duties of a police officer."

In the appeal before us we must look, therefore, to the first part. The offence so defined may be tried by a native court with Grade C, or greater, powers. The trial court was a native court Grade B and it therefore had jurisdiction.

*Ruled accordingly.*

## BOARD OF CUSTOMS AND EXCISE *v.* ALHAJI YUSUFU

[C.A. (J. A. Smith, Ag. C.J., and Holden, J.)—September 23, 1963]

[Kano—Appeal No. K/30CA/1963]

*Criminal procedure—magistrate's court—jurisdiction—Federal offence—jurisdiction to try—offence against customs or excise laws—punishment of offence exceeding punishment determining magistrate's jurisdiction—Customs and Excise Management Act*, 1958, *s.* 145, *s.* 161(1) *and* (2)*; Criminal Procedure* (*Northern Region*) *Act*, 1960, *s.* 2, *s.* 3(1); *Criminal Procedure Code*, *s.* 4, *s.* 7(1) (*b*), *s.* 13, *s.* 380(*h*).

*Jurisdiction—magistrate's court—Federal offence—offence against customs or excise laws*—ibid.

*Revenue—customs and excise—magistrate's jurisdiction*—ibid.

*Statute—repugnancy—qualification in one of two conflicting sections—other section unqualified—Customs and Excise Management Act*, 1958, *s.* 161(1) *and* (2)*; Criminal Procedure* (*Northern Region*) *Act*, 1960, *s.* 3(1).

A magistrate of Northern Nigeria cannot try an offence under the customs or excise laws if the punishment to which the offender is liable is greater than the punishment by reference to which the magistrate's jurisdiction is limited under s. 13 (2) of the Criminal Procedure Code.

Upon a prosecution before a chief magistrate by the Board of Customs and Excise, the chief magistrate framed charges under s. 145 of the Customs and Excise Management Act, 1958, for offences each of which would in the circumstances of the case have been punishable by a fine of £2,379-5*s*. The effect of s. 161 of the Customs and Excise Management Act is to give a general power to courts of summary jurisdiction to try customs or excise offences and impose the punishments provided in the Act notwithstanding anything contained in any other Act. But s. 3(1) of the Criminal Procedure (Northern Region) Act, 1960, incorporates the provisions of s. 7 (1)(*b*) and s. 13 (2), proviso (*a*), of the Criminal Procedure Code and limits the exercise of a chief magistrate's jurisdiction over Federal offences to the trial of offences where the maximum punishment is imprisonment for ten years or a fine of £500. The chief magistrate referred to the High Court upon a case stated the question whether he had jurisdiction to try the offences.

*Held:* (1) Where there are two sections dealing with the same subject-matter, one section being unqualified and the other section containing a qualification, effect must be given to the section containing the qualification; and therefore,

(2) s. 3(1) of the Criminal Procedure (Northern Region) Act, which limits the exercise of a magistrate's jurisdiction when he tries Federal offences, prevails over s. 161 of the Customs and Excise Management Act in so far as they are inconsistent with each other.

The answer to the question raised upon the case stated was No.

(*Editorial Note.*—See *Moss v. Elphick* [1910] 1 K.B. 465 at p. 468.)

*J. D. Ogundere* for the Board of Customs and Excise;
*S. J. Ete* for the defendant.



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**J. A. Smith, Ag. C.J.,** delivering the judgment of the Court: This is a case stated by the learned chief magistrate pursuant to section 260 of the Criminal Procedure Code arising out of a prosecution by the Board of Customs and Excise for offences contrary to section 145(*a*) and (*b*) of the Customs and Excise Management Act, 1958.

The facts as set out by the learned chief magistrate are as follows:

> "It is proved that Alhaji Yusufu, a trader, had in his possession at Kano on or about 25th February, 1963, 255⅝ gross boxes of Palm Tree matches value £396-10*s*-0*d*, on which duty of £243 was chargeable and importation of which without a licence is prohibited. No licence for these matches had been obtained and no duty paid. It is proved that Alhaji Yusufu was aware of these requirements and that they had not been complied with.
>
> "The penalty is liability for a fine six times the value of the goods, i.e. £2,379-5*s*-0*d* on each count."

The learned chief magistrate framed two charges which he set out in his case stated, the one charging an offence of dealing with the quantity of Palm Tree matches valued at £396-10*s*-0*d*, chargeable with £243 duty which had not been paid, with intent to defraud the Federal Government and punishable under section 145(*a*) of the Customs and Excise Management Act; the other charging an offence of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of the same quantity of Palm Tree matches punishable under section 145(*b*) of the same Act.

The learned chief magistrate posed the following question for the opinion of this Court:

> "Does the Customs and Excise Management Act, 1958, at section 161, give a Magistrate's Court of the Northern Region jurisdiction per section 13(1) of Criminal Procedure Code, 1960, in a case such as this where maximum penalty is in excess of that stipulated in section 13(2), Criminal Procedure Code?"

Mr Ogundere, who appeared for the Board of Customs, submitted that section 161 of the Customs and Excise Management Act gave a magistrate's court jurisdiction to impose a fine of up to six times the value of the goods on conviction of an offence contrary to section 145 of the Act, although such a fine would exceed the maximum fine a magistrate could impose by virtue of the jurisdiction given to him in section 13 of the Criminal Procedure Code of Northern Nigeria.

Section 161 of the Customs and Excise Management Act provides:—

> "161. (1) Any offence under the customs or excise laws—
>
> (*a*) where it is punishable with imprisonment for a term of two years or more, with or without a fine, shall be punishable either on summary conviction or on conviction on indictment;
>
> (*b*) in any other case, shall be punishable on summary conviction.

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"(2) Where any court of summary jurisdiction hears and determines any prosecution for any offence under the customs or excise laws then, notwithstanding anything contained in any other Act, such court shall have jurisdiction to impose any fine or any sentence of imprisonment which may be imposed under the customs or excise laws on any person convicted of the offence.

"(3) . . ."

Subsection (3) does not concern us here. The effect of section 161 is to give a general power to courts of summary jurisdiction to try customs or excise offences and impose the punishments provided in the Act, notwithstanding anything contained in any other Act. The offences created by the Customs and Excise Management Act are Federal offences. And our courts in Northern Nigeria are given jurisdiction to try Federal offences by section 3 (1) of the Criminal Procedure (Northern Region) Act, 1960, which reads:

"3. (1) Subject to the provisions of this Act and of the Penal Code (Northern Region) Federal Provisions Act, 1960, the courts of the Northern Region shall in respect of Federal offences committed in the Northern Region have the like jurisdiction and powers, and shall follow the like practice and procedure, as they respectively have and follow in respect of offences other than Federal offences."

In section 2, a "Federal offence" is defined as "an offence contrary to the provisions of a Federal Act" and "Federal Act" means "an Act enacted by the Federal Legislature or taking effect as if it had been so enacted."

Four classes of magistrates' courts have been created by section 4 of our Criminal Procedure Code in Northern Nigeria. By section 7(1)(*b*) it provides:

"7. (1) Subject to the provisions of this Criminal Procedure Code—

(*a*) . . .

(*b*) no magistrate either as presiding officer or otherwise shall exercise any jurisdiction or powers in excess of those conferred upon him by his appointment."

Section 13 says:

"13. (1) Any offence under any law other than the Penal Code may be tried by any court given jurisdiction in that behalf in that law or by any court with greater powers.

"(2) When no court is mentioned such offence may be tried by the High Court or any court constituted under this Criminal Procedure Code:

"Provided that in trying any such offence—

(*a*) a Chief Magistrate shall not try an offence punishable with imprisonment for a term which may exceed ten years or with fine exceeding five hundred pounds;"



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The remaining paragraphs of this subsection deal with the extent of the powers of magistrates of the first, second and third grades and of native courts. And by subsection (3), the powers conferred in subsection (2) shall not be deemed to confer upon any court any jurisdiction in excess of that conferred upon the court by sections 15 to 25. These latter sections need not be considered here.

Section 7(1)(*b*) says categorically that in the exercise of his jurisdiction no magistrate shall exceed the powers given to him by his appointment. This subsection, read in conjunction with section 13(2), means that each grade of magistrate specified therein shall not try offences punishable with imprisonment or a fine which may exceed the maximum which a magistrate may impose according to the grade of his appointment. The consequence of a magistrate sitting as a court and trying a case beyond the limits of the jurisdiction he is to exercise by his appointment is that the proceedings are void (section 380(*h*)). Section 13(1), read side by side with these other subsections, does no more than permit a magistrate to try an offence "under any law" which gives a magistrate's court jurisdiction to try such an offence, provided that the magistrate presiding in that court does not exceed in the exercise of that jurisdiction the powers conferred upon him by his appointment.

By section 3(1) of the Criminal Procedure (Northern Region) Act, 1960, which we have quoted above, the magistrates' courts of Northern Nigeria are given the like jurisdiction and powers. Thus, under this Act the jurisdiction and powers to be exercised by magistrates when trying Federal offences are similar to those which under the Criminal Procedure Code they may exercise when trying Regional offences.

Mr Ogundere referred to section 64(4) of the Constitution of the Federation of Nigeria (1960), which provides that where a law enacted by the legislature of a Region is inconsistent with any law validly made by the Parliament of the Federation, the latter shall prevail to the extent of the inconsistency. The effect of section 3(1) of the Criminal Procedure (Northern Region) Act, 1960, is to incorporate within the Act the provisions of the Criminal Procedure Code as to jurisdiction and powers of magistrates in order to enable them to try cases involving Federal offences. Thus the problem that arises in this case stated is not a conflict between a Regional Law and a Federal Act but a conflict between two apparently inconsistent provisions of two Federal Acts.

We have observed that the jurisdiction given to courts of summary jurisdiction when trying cases involving offences under the customs or excise laws is, by section 161 of the Customs and Excise Management Act, 1958, to be exercised "notwithstanding anything contained in any other Act". But we also observe that the opening words of section 3(1) of the Criminal Procedure (Northern Region) Act, 1960, which is the later enactment, are "Subject to the provisions of this Act and of the Penal Code (Northern Region) Federal Provisions Act, 1960." These words are restrictive and grant the courts of Northern Nigeria jurisdiction and power to try Federal offences within the limits set out in those

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two Acts. There is a clear conflict between section 161 of the Customs and Excise Management Act and section 3(1) of the Criminal Procedure (Northern Region) Act. Section 161 of the Customs and Excise Management Act gives all courts of summary jurisdiction, irrespective of class or grade, the power when trying an offence under section 145 to impose a fine of six times the value of the goods, that is to say in the present instance a fine of £2,379 5*s* 0*d*. Section 3(1) of the Criminal Procedure (Northern Region) Act, 1960, which incorporates *inter alia* the sections of the Criminal Procedure Code which we have quoted above, limits the exercise of his jurisdiction by a chief magistrate to the trial of offences where the maximum punishment is imprisonment for ten years *or* a fine of £500. It gives magistrates of lower grades lesser power to imprison or fine.

We think that this conflict may be resolved by applying the principle that where there are two sections dealing with the same subject-matter, one section being unqualified and the other containing a qualification, effect must be given to the section containing the qualification. Its effect in this case stated is that section 3(1) of the Criminal Procedure (Northern Region) Act, 1960, which limits the exercise of a magistrate's jurisdiction and powers according to his grade to that conferred upon him by his appointment when he tries Federal offences (which include customs and excise offences), prevails over section 161 of the Customs and Excise Management Act, 1958, in so far as they are inconsistent with each other. This brings us to the conclusion that in the exercise of their jurisdiction to try Federal offences including offences against customs or excise laws, magistrates of Northern Nigeria are limited in the same way and to the same extent as they are when trying Regional offences.

Our answer to the question posed in the case stated is "No."

*Opinion negative.*



## MKOVOR JAGERA *v.* ILYEMEN ILO

[High Court (J. P. Smith, J.)—May 17, 1963]

[Makurdi—Civil Suit No. MD/3/1963]

*Practice and procedure—parties—joinder—nonjoinder—defendant added—new defendant a native authority—notice—Supreme Court (Civil Procedure) Rules*, O. *IV*, *r.* 5 (1); *Native Authority Law*, 1954, *s.* 110(2).

*Native Authority—action against—notice of intention to sue—native authority added as defendant*—ibid.

*Action—native authority, against*—ditto.

The defendant in this action for false imprisonment was the chief warder in a native authority prison, and came into the matter only because he was chief warder. He was represented by Crown Counsel, who applied to join the native authority as a defendant.

*Held:*(1) The native authority should be joined under O. IV, r. 5 (1), as a person having an interest in the subject-matter of the suit and likely to be affected by the result.

(2) The native authority could be joined by taking the notice provided for by r. 5 (1) as the notice called for by s. 110 (2) of the Native Authority Law, 1956.

APPLICATION IN CIVIL SUIT

*M. B. Belgore, Crown Counsel*, for applicant;
*L. C. Anoliefo* for respondent.

**J. P. Smith, J.:** This motion raises an interesting point. The claim is brought against Ilyemen Ilo—described as Chief Warder, Gboko Prison—and seeks damages for false imprisonment. Counsel for the defendant submits that Tiv Native Authority, the employer of the defendant, should be joined, as it is an interested party (Supreme Court (Civil Procedure) Rules, Order IV, rule 5(1) ). This rule gives the court discretion to "direct" that such person who is to be joined as having an interest, or for whatever other reason, shall be made a party. Counsel then submitted that as the party to be joined is a native authority, attention must be paid to section 110(2) of the Native Authority Law, which prescribes how a suit is to be instituted against a native authority. There is a conflict between these two provisions and it is submitted that the claim should be struck out as void.

Counsel for the plaintiff argues that the tort which bases this action was solely that of the defendant and that as he is being sued in his personal capacity, counsel has no wish or intention to join the native authority as a co-defendant.

I have no hesitation in finding that Tiv Native Authority is a person having an interest in the subject matter of this suit and is likely to be affected by the result. If not, why is Crown Counsel appearing for the defendant? There is an affidavit on file, sworn to by one Tila

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Usen, from paragraphs 5 and 6 of which it is absolutely plain that the defendant only came into the matter as he was Chief Warder. He was acting officially, or rather was not acting officially as he was off duty and so could not discharge the plaintiff.

I rule that Tiv Native Authority is an interested party and must be brought in under Order IV, rule 5(1). But how is that to be done in view of the apparent conflict between the rule and section 110 of the Native Authority Law? I think that this conflict is more apparent than real and disagree with learned Crown Counsel on this aspect. I direct that the notice provided for by rule 5(1) shall be taken to be the notice called for by section 110(2) of the Native Authority Law. It seems to me that in this way the intention of both enactments is carried out.

Service upon Crown Counsel may be taken as service upon the Native Authority concerned.

*Application granted.*



## THE QUEEN *v.* YARO BIU

[High Court (Bate, J.)—March 15, 1961]

[Kano—Criminal Case No. K/3C/1961]

*Criminal law—defence of insanity—elements of the defence—Penal Code, s.* 51.

*Evidence—burden of proof—proof of insanity in defence to criminal charge*—ibid.

The burden of proving insanity in defence to a criminal charge lies on the accused and can be discharged by tendering evidence suggesting that it was "most probable" that he was incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law.

Cases referred to:

*R. v. Yayiye*, 1957 N.R.N.L.R. 207, followed;
*R. v. Ashigifuwo*, (1948) 12 W.A.C.A. 390, followed;
*R. v. Echem*, (1952) 14 W.A.C.A. 158, followed;
*R. v. Carr-Briant*, [1943] K.B. 607, (1943) 29 Cr. App. R. 76, followed;
*Attorney-General for South Australia v. Brown*, [1960] A.C. 432, [1960] 1 All E.R. 734.

(*Editorial Note.*—This case applies to the Penal Code the common law rules relating to the proof of insanity which had previously been held to apply to the defence under s. 28 of the Criminal Code.)

CRIMINAL CAUSE

*M. Bello, Senior Crown Counsel*, for the prosecution;
*E. Noel Grey* for the defence.

**Bate, J.:** The accused is charged with culpable homicide punishable with death contrary to sections 220 and 221 of the Penal Code.

He pleaded "I did not kill him intentionally" and repeated this when examined in accordance with sections 191 and 235 of the Criminal Procedure Code at the close of the case for the prosecution.

The case for the prosecution is that the accused struck Birma Garkida with a matchet with the intention of killing him and that Birma died of his wounds.

The facts are scarcely disputed. I find that the accused and Birma were steward and gardener respectively in the service of the same employer. On the 23rd October last at about 8.30 a.m., the accused went into his employer's kitchen and told the cook that he had got two aspirins from his employer's wife and was going to his quarters to take them. He went to his quarters which were next door to Birma's. Birma and his wife were in their room. The accused said he was not well and asked Birma's wife to get him some hot water. She went off to boil some, leaving her husband and the accused in their respective rooms. As soon as she got to her kitchen she heard a cry and, on returning, found her husband on the ground and the accused cutting him with a matchet.

She lifted her husband in her arms but the accused cut him again on the neck and arm. The accused then threw the matchet away and left the compound on his cycle. He went to the native authority police station and told the Chief Inspector that he had had a fight with somebody and had left him in bad condition. The Chief Inspector described the accused as shaking all over when he came to the police station but able to speak clearly. The Chief Inspector had gone with the accused to the house where the accused was then employed and had found a matchet on the ground outside the accused's quarter. An ambulance was sent for but Birma died on his arrival at the hospital.

I must add that there is evidence that a fire broke out in the accused's quarter about the time of his attack on Birma. But neither the prosecution nor counsel for the defence has attempted to connect this fire with the offence charged and I shall regard this curious piece of evidence as irrelevant.

I have no doubt that the accused killed Birma as alleged by the prosecution. The evidence is overwhelming and the accused does not deny it. His defence is that he was insane at the time and, by reason of unsoundness of mind, was incapable of knowing that what he did was wrong. In this connection his counsel relies on section 51 of the Penal Code. The burden of proving insanity is on the defence but it is not as heavy as the burden which lies on the prosecution to prove their case. As was pointed out by this court in *R. v. Yayiye*, 1957 N.R.N.L.R. 207, the West African Court of Appeal held in *R v Ashigifuwo* (1948) 12 W.A.C.A. 390, that under the Criminal Code it was sufficient for the defence to prove facts such as make it "most probable" that the accused, by reason of mental disease or natural mental infirmity, was deprived of his capacity to understand what he was doing or control his actions; and in *R. v. Echem*, (1952) 14 W.A.C.A. 158, that the burden was no higher than that in civil proceedings. The same view was taken by the Court of Criminal Appeal in England in *R. v. Carr-Briant*, [1943] K.B. 607, [1943] 29 Cr. App. R. 76.

The evidence of insanity is contained in the statement made by the accused the day after he attacked Birma and in the medical evidence. The absence of motive may also be considered. Absence of motive by itself is not sufficient ground upon which to infer insanity but when, as in the present case, there is evidence of insanity rather than of sanity, the absence of evidence of motive may become relevant (*R. v. Ashigifuwo, supra*).

The accused's statement is obviously not that of a sane man in the lay sense. It suggests some unsoundness of mind. Three doctors gave evidence. The first, Dr Michaleski, had no opportunity to examine the accused and based his opinion solely on the statement. I am sure the doctor would be the first to wish me to bear this limitation in mind when considering his evidence. He expressed the view that the accused was suffering from maniacal persecutory psychosis when he made the statement. His opinion was that such a person would probably have known the nature of his act but would have done it under the compulsion





of an irresistible impulse and would not have known that what he was doing was wrong or appreciated the consequences of his acts. Dr Stoffel, a Government medical officer, who had been Assistant Medical Officer at a hospital for mental diseases in 1951 and 1952, had seen the accused once a week for the month before he gave evidence. He thought the accused sane when he saw him. He agreed, however, that the statement was the sort of thing a schizophrenic might write and could not exclude the possibility that the accused might have been suffering from schizophrenia at the time of the offence. He said that a schizophrenic of this type would know what he was doing but might not know that he was doing wrong. He said that maniacal persecutory psychosis was one aspect of schizophrenia. Finally, there is the evidence of Dr Paull, the Regional psychiatrist. He had examined the accused on the 15th February and had then concluded he was sane. Later, he had seen the accused's statement, had spoken with the wife of the accused's former employer and, on the day he gave evidence, had examined the accused again. He had found a marked change. In the light of the statement, what he had learned from the wife of the accused's former employer and of the change he had seen in the accused, the witness had concluded that the accused was a paranoid schizophrenic and had been one when he attacked Birma. Such a person would not know that what he was doing was wrong.

For the prosecution, it has been submitted that the accused disclosed in his statement a motive for the crime and that this and the fact that he reported to the police show that he knew that he was doing wrong. I do not accept this. Dr Paull, whose evidence I accept, said that the statement was the work of a paranoid schizophrenic who would not at the material time have known that he was doing wrong; the other two doctors were in substantial agreement. And Dr Paull also said that the fact that the accused went to the police was not inconsistent with his diagnosis.

Counsel for the prosecution also contended that the evidence showed nothing more than irresistible impulse which is no defence and from which insanity cannot be inferred. In this connection counsel relied on *Attorney-General for South Australia v. Brown*, [1960] A. C. 432, [1960] 1 All E. R. 734. But irresistible impulse was not raised as a defence in the present case. It was mentioned by two of the doctors but only as symptomatic of the mental disease from which they considered the accused to be suffering. They did not base their diagnosis on the ground that the accused acted under irresistible impulse. The important point is that Dr Paull and Dr Michaleski were of opinion that a person suffering from the mental unsoundness which they diagnosed in the accused would not at the material time have known that he was doing wrong. I do not think that the authority on which counsel for the prosecution relies materially assists the case for the prosecution.

I have come to the conclusion that it is "most probable" that the accused at the time when he killed Birma was, by reason of unsoundness of mind, incapable of knowing that what he was doing was wrong. The defence has therefore discharged the burden of proving the accused to be insane within the meaning of section 51 of the Penal Code.

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I find proved that the accused committed the act alleged in the charge but I find him not guilty of culpable homicide upon the ground that he was at the material time, by reason of unsoundness of mind, incapable of knowing that what he did was wrong. I order that he shall be kept in safe custody in the Government prison at Kaduna to await the order of the Governor.

*Order accordingly.*



## AKUSSA BASSA *v.* JOS NATIVE AUTHORITY

[C.A. (J. A. Smith, S.P.J., Reed, J., and Abubakar Mahmud, Sh. Ct. J.) —April 25, 1963]

[Jos—Appeal No. JD/69CA/1961]

*Criminal procedure—power of appeal court to substitute conviction for another offence—whether power to be exercised merely to allow increase of sentence—Native Courts Law,* 1956, *s.* 70 (1)(*b*)(*iii*)*; Penal Code, s.* 248 (1), *s.* 265.

*Appeal—criminal appeal from native court—principles for exercise of power of substituting conviction for another offence—ibid.*

The intention of s. 70 (1) (*b*) (*iii*) of the Native Courts Law, 1956, is to allow an appeal court to substitute a conviction for another offence where the original conviction is wrong and not to allow it to do so merely because it thinks that the offence deserves a more serious punishment.

CRIMINAL APPEAL FROM NATIVE COURT

The appellant was convicted by the Chief Alkali of Jos of an offence under s. 265 of the Penal Code and sentenced to three years' imprisonment. The facts found by the Chief Alkali were that the appellant and the complainant quarrelled over dowry which the complainant had failed to pay to the appellant when he married his daughter. In the course of the quarrel, the appellant struck the complainant with a spear.

The appellant appeared in person;
*K. Nadarajah, Crown Counsel,* for the respondent.

**Reed, J.,** delivering the judgment of the Court, referred to the facts as stated above, and continued: Mr Nadarajah, for the respondent, has properly drawn our attention to section 265 of the Penal Code. Under that section, "whoever assaults or uses criminal force to any person" is guilty of an offence. That offence is punishable with imprisonment for one year unless "grievous hurt" is caused, in which case the offence is punishable with imprisonment for three years. "Grievous hurt" is defined by section 241 and there was no evidence that the complainant sustained any of the seven kinds of hurt described in the definition. The appellant could not, therefore, be lawfully punished with more than one year's imprisonment in respect of his conviction under section 265.

Mr Nadarajah asks us to substitute a conviction under section 248(1) of the Penal Code and to confirm the sentence of 3 years' imprisonment. It is true that the inflicting of a spear wound is a very serious offence and may well deserve more than one year's imprisonment. It is true, too, that this court has wide powers under section 70(1)(*b*)(*iii*) of the Native Courts Law; it may:

"substitute any other decision . . . . which the court of first instance could have made but so that, by the decision so substituted, the appellant shall not be found guilty of any offence of which he was not accused before the court of first instance, unless the appellate court is satisfied that the defence of the appellant before the court of first instance would not have been substantially affected if he had been so accused."

We agree that the defence of the appellant in the Chief Alkali's Court would not have been substantially affected if he had been charged with an offence under section 248(1) of the Penal Code. Nevertheless, we do not think that this is a proper case to exercise our discretion and substitute a conviction under that section.

We think that the intention of this provision is to give the appeal court power to substitute a conviction where the conviction of the court below is wrong. We do not think it was intended to provide a way to increase the sentence—which would follow if we made the substitution in the case before us. The evidence supported a conviction under section 265 of the Penal Code. The appellant was, in the circumstances, liable to imprisonment for a term not exceeding one year. We think that the proper course for us to take is to alter the sentence to one of imprisonment for one year.

Accordingly the appeal against conviction is dismissed but the sentence passed by the court below is reduced from imprisonment for three years to a sentence of imprisonment for one year. The sentence is to run from the original date of conviction in the Chief Alkali's Court.

*Appeal against conviction dismissed; sentence reduced to one year's imprisonment.*



## BURAIMA AJAYI AND JULANDE JOS *v.* ZARIA NATIVE AUTHORITY

[C.A. (Hurley, C.J., and Skinner, J.)—February 3, 1962]
[Kaduna—Appeal No. Z/7CA/1961]

*Criminal procedure—evidence—interpretation—native court proceedings—unsworn interpreters—ability open to question—whether conduct of trial irregular—Criminal Procedure Code, s. 242.*

*——————appeal—irregularity in trial proceedings—unsworn interpreters whose ability open to question—whether failure of justice—whether in fact any misinterpretation or failure to interpret.*

The appellants were convicted in a native court. The proceedings in the trial court were in Hausa, which the appellants neither spoke nor understood. They were Yoruba speakers by birth and understood English, but not perfectly. The proceedings were interpreted by five different interpreters at successive stages. Two interpreted into English and one into Yoruba; it did not appear what language the others interpreted into. None of them were sworn. The trial record gave their names, but it did not appear how they came to be called on to interpret or who they were except that one was a schoolboy and another, who gave evidence in the High Court, was an Ibo who spoke English but not Yoruba.

On appeal to the High Court, the appellants complained of the interpretation at the trial and, in particular, alleged that parts of the proceedings including the evidence had not been interpreted correctly or at all and that the evidence-in-chief of the prosecution witnesses was not interpreted while each witness was testifying but when he had finished.

The High Court received evidence by affidavit and orally from the appellants and others which, together with the record of proceedings, disclosed the foregoing facts. The evidence included an affidavit from the trial Alkali which indicated that the evidence of the prosecution witnesses was interpreted while it was being given.

Observing that in at least two instances the ability of the interpreters to interpret satisfactorily might be questioned, the High Court nevertheless found that all the evidence was interpreted and that the whole of the proceedings were interpreted correctly, and that the appellants had not established that anything was added or omitted or falsified in interpretation.

*Held:* (1) The trial court ought to have been guided by s. 242 of the Criminal Procedure Code, and the conduct of the trial was irregular because of the use of a series of interpreters who were not bound by oath to interpret truly and whose ability to interpret satisfactorily might in at least two instances be questioned.

(2) The whole of the proceedings including the evidence having been interpreted correctly and without addition, omission or falsification, the irregularity in the conduct of the trial had not occasioned a failure of justice.

[*Editorial Note.*—Reversed on appeal to the Supreme Court, *infra*, p. 61.]

B. Ajayi & Julande Jos v. Zaria N.A. — Hurley, C.J.

CRIMINAL APPEAL FROM NATIVE COURT

Appellants in person;
*N. Henderson, Senior Crown Counsel*, for respondent.

**Hurley, C.J.,** delivering the judgment of the Court: The appellants were tried in the court of the Chief Alkali of Zaria and convicted of an offence under section 300 of the Penal Code. The case against them was that they hired a taxi to drive them from Jos to Kaduna and on the way attacked the driver and his companion and got possession of the taxi and drove off with it. The only complaint of any substance in their grounds of appeal is that the proceedings in the trial court were not properly interpreted.

The appellants are Yoruba speakers by birth, and they each speak and understand English, though not perfectly. The trial was conducted in the Hausa language, which the appellants neither speak nor understand. The record shows that five different interpreters were used in succession. It does not show that any of them occupied an official position in the court as interpreter or otherwise, and it seems probable that none did. Nor does it give any information about their tribal origins or their occupations or about anything else that might affect their fitness to act as interpreters, except that one of them was an Ibo who spoke English but not Yoruba and another was a schoolboy. None of them are shown by a certificate or otherwise to have been bound by oath to state the true interpretation of the evidence as required by section 242 of the Criminal Procedure Code, by which the trial court ought to have been guided. On the record, the conduct of the trial was irregular because of the use of a series of interpreters who were not bound by oath to interpret truly and whose ability to interpret satisfactorily may in at least two instances be questioned. But provided that the appellants did have the assistance of an interpreter or interpreters we cannot interfere on the ground that such assistance was given in an irregular way unless a failure of justice was occasioned. All the evidence was interpreted by the various interpreters in succession, and it is not suggested that they did not also interpret the proceedings other than evidence from the point where the prosecutor opened his case to the court. The appellants were unable to satisfy us that there was in fact any misinterpretation or any failure to interpret from that point onwards; they did not show us that anything was added or omitted or falsified in the process of interpretation. They did not establish that any failure of justice was occasioned because the proceedings were interpreted by the unsworn interpreters who appear on the record as having interpreted and whose qualifications or lack of them we have described.

But as far as the record shows those interpreters assisted only from the point where the prosecutor opened his case. It was before that point that the questions required by section 15A of the Native Courts Law were asked and the answers recorded. The appellants concede that the questions were interpreted, but say that their answers to the second question were misinterpreted. And they submit in effect that there was



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no interpreter at that stage, for they say that the prosecutor interpreted. If in fact the prosecutor interpreted, and if we took the view that interpretation by a prosecutor did not meet the requirements of section 25(5)(*e*) of the Federal Constitution, and that the expression "trial" in section 21(5)(*e*) includes proceedings before plea—questions which as will appear it is unnecessary for us to decide—the appeal might succeed, because section 21(5)(*e*) entitles every person who is charged with a criminal offence to have the assistance of an interpreter if he cannot understand the language used at the trial of the offence. And the appeal would certainly succeed if the appellants' answers to the second question put to them in accordance with section 15A were in fact misinterpreted.

In order to decide the questions raised by the appellants' allegations, which were allegations of illegality and fraud, we received evidence on affidavit and orally to add to the contents of the record and show what actually occurred during the proceedings. In addition to the affidavits of the Alkali who tried the case, the court scribe, and the interpreter concerned, we had oral evidence from the interpreter and from the appellants. The interpreter was one L. O. Ihekwereme, otherwise Baba or Barber, and he impressed us as a truthful witness who gave us an account of what occurred to the best of his recollection. As to the appellants' evidence, and their cross-examination of Mr Ihekwereme, the more they said the plainer it became that they were reckless of the truth. The evidence leaves us in no doubt that the appellants' allegations are untrue, and satisfies us that the proceedings were interpreted from the beginning and interpreted correctly.

Accordingly, there are no grounds for interfering with the decision of the trial court, and the appeals are dismissed.

*Appeals dismissed.*

## MALLAM BABA DAN KANTOMA *v.* PATERSON ZOCHONIS AND COMPANY LIMITED

[Federal Supreme Court (Ademola, C.J.F., Unsworth, F.J., and Taylor, F.J.)—April 28, 1962]

[Lagos—Appeal No. F.S.C. 131/1961]

*Illiterates protection—"illiterate person"—person literate in Arabic but not in English—document written in English—Illiterates Protection Ordinance, Laws of Nigeria*, 1948, *Cap.* 88, *s.* 3.

———————"*writer*"—*document typed by one person leaving spaces—blank spaces filled in by another person on behalf of signatory* —ibid., *s.* 7.

The appellant signed a guarantee indemnifying the respondent company in respect of a third person's indebtedness to the company. The guarantee was in English. The appellant was not literate in English but was able to read and write in Arabic.

The guarantee was typed out by a typist in the employ of the respondent company, with blank spaces for the appellant's name, the amount and the date. The company's manager filled in the blank spaces on behalf and in the name of the appellant.

*Held:* The appellant was not illiterate in the sense in which that word is to be construed in the Illiterates Protection Ordinance, and he did not come within the provisions of the Ordinance.

*Obiter:* The appellant company's manager was the writer of the guarantee within the meaning of the word "writer" in the Ordinance.

Case referred to:

*S.C.O.A., Zaria v. A. D. Okon*, 1960 N.R.N.L.R. 34, distinguished.

(*Editorial Note.*—This was an appeal from the decision of the High Court in *Paterson Zochonis and Company, Limited, v. M. Momo Gusau and M. Baba Dan Kantoma*, 1961 N.R.N.L.R.1. The High Court held that the appellant, then the 2nd defendant, was an illiterate person within the meaning of section 3 of the Illiterates Protection Ordinance, but that the requirements of the section had been satisfied by the writer of the guarantee, the company's manager, writing his name and address thereon as writer thereof, not at the time of its execution but afterwards, that is, on the day of the hearing. The question whether section 3 had been sufficiently complied with did not fall to be decided by the Federal Supreme Court, but, as appears in the headnote, that Court expressed the opinion that the manager was the writer.)

CIVIL APPEAL

The respondant company were plaintiffs in the High Court. The appellant was the 2nd defendant, and was sued as the 1st defendant's guarantor with the company under a guarantee written in English. The appellant was not literate in English, but was able to read and write in Arabic. He spoke and understood Hausa. The guarantee was typed out by a typist in the employ of the respondent company, with blank spaces for the appellant's name, the amount of the guarantee and the date. The blanks were filled in by the company's manager on behalf and in the name of the appellant. The guarantee was read and explained to the appellant in Hausa and he said he understood it and signed it, and in fact it correctly represented his instructions. The manager did not at the time write his name on the guarantee as the writer or his address but did so on the day of the hearing.



The grounds of appeal were as follows:—

"(1) The learned trial judge drew a wrong conclusion in holding that the plaintiff Company's manager, Mr Alevizopoulos, was to be regarded as the writer of the guarantee within the meaning of section 3 of the Illiterates Protection Ordinance when there was evidence before him to show that the guarantee was typed by a typist in the plaintiffs' office at Gusau.

"(2) The learned trial judge erred in law in holding that the fact that Mr Alevizopoulos, the plaintiff's manager, wrote his name and address on the guarantee as the writer thereof long after the appellant had signed the guarantee, was a sufficient compliance with the requirements of section 3 of the Illiterates Protection Ordinance to render the appellant liable upon the guarantee."

*J. C. S. Hughes* for the appellant;
*R. S. Horn* for the respondent company.

**Taylor, F.J.:** The plaintiffs sued the defendants in the High Court of the Kano Judicial Division for the sum of £512-10*s*-7*d* being the amount alleged to be due and owing by the 1st defendant to the plaintiffs on his produce account and guaranteed by the 2nd defendant as per contract of guarantee dated the 27th day of October, 1958. The 1st defendant admitted this claim at the hearing and judgment was accordingly entered against him. The case proceeded to proof against the 2nd defendant, who denied liability, and after evidence was heard, judgment was similarly entered against him in the same sum.

The 2nd defendant has appealed against this judgment and the grounds of appeal argued in his favour urge that:—

(1) The trial Judge erred in holding that the guarantee was written by the manager of the respondent company when the typist was the writer.

(2) The trial Judge erred in holding that section 3 of the Illiterates Protection Ordinance was complied with.

At the trial in the High Court and during the arguments before us, the point was argued as to whether the appellant was, in fact, an illiterate within the meaning of the Illiterates Protection Ordinance. It will, I think, be convenient to deal with this point at the outset, for if the appellant is not a person protected by this Ordinance then it serves little purpose dealing with the two grounds of appeal which are based on the provisions of section 3 of the said Ordinance. The learned trial Judge has this to say on this point:—

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"I conclude from the evidence that the 2nd defendant is not literate in English. The Illiterates Protection Ordinance does not supply any definition of the expression 'illiterate person' in section 3 but I take it to mean a person who is unable to read the document in question in the language in which it is written, subject to the proviso that the expression includes a person who, though not totally illiterate, is not sufficiently literate to read and understand the contents of the document. The proviso follows from the decision of the Federal Supreme Court in *S.C.O.A., Zaria v. A.D. Okon* [1960 N.R.N.L.R. 34]"

In this case on appeal before us, there was evidence on record to show that though the appellant could not read English, the language in which the guarantee was couched, yet he was able to read and write in Arabic. The word "illiterate" is defined in the Oxford Dictionary as meaning "Ignorant of letters or literature, without education, unable to read, i.e. totally illiterate; an illiterate, unlearned, or uneducated person, one unable to read". I have always understood the word "illiterate" to refer to a person totally illiterate in the sense that he is unable to read or write in any language. To hold that a person is illiterate or not literate because he is unable to read or write in a particular language, even if the document concerned was written in that language, is in my view to stretch the meaning of the word to an absurdity. A Frenchman enters into a contract with a Nigerian. The contract is written in English, which only the Nigerian can understand though interpreted to the Frenchman. By that interpretation the Frenchman would not be regarded as literate. In the case *S.C.O.A., Zaria, v. A.D. Okon,* 1960 N.R.N.L.R. 34, to which the learned trial Judge made reference, the guarantor could only write his name. There is nothing in the judgment to indicate that he was able to read or write in any language, and even as to his ability to sign his name this is what was said by this Court in the judgment delivered by Quashie-Idun, Ag. F.J. (as he then was):—

> "The waybills which were signed by the defendant and upon which the plaintiffs rely in support of the contention that the defendant is not illiterate, have been seen by this Court. It is clear to me that the signatures of the defendant on them are not those of a person who could be regarded as literate in the sense that he can read and understand the meaning of Exhibit A . . ."

When the case was heard in the High Court, this is what the learned Chief Justice said in his judgment:—

> "It seems to me that a man may be sufficiently literate to sign his name and read figures, but not sufficiently literate to understand the meaning and effect of a document such as a bond. The evidence of Mr Briggs is to the effect that the contents of this document were not explained to defendant in the plaintiffs' office. That, in my opinion, is important.

With the greatest respect, I agree with this view of the learned Chief Justice. The Illiterates Protection Ordinance refers to an "illiterate person" and "illiterate" is defined in the Concise Oxford



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Dictionary as "ignorant of letters, unlearned, unable to read." I think that "illiterate" in the Ordinance should be construed in its ordinary meaning as thus defined. In my view, on the evidence on record, the appellant was not illiterate in this sense and did not come within the purview of this Ordinance. Further, it must be borne in mind that there is no challenge to the following findings of fact by the trial Judge which read as follows:—

> "I am satisfied that the guarantee was read over and explained to the 2nd defendant and that he subsequently signed it; I am satisfied that the 2nd defendant said that he understood the guarantee and I reject his evidence that the plaintiffs' clerk misinformed him with regard to his liability. I am satisfied that the 2nd defendant raised no objection when the guarantee was read over to him and I conclude that the guarantee correctly represents his instructions."

These findings of fact further differentiate the facts of this case from those of *S.C. O.A. v. Okon* and further go to show that the applicant was not a person envisaged by the provisions of the Illiterates Protection Ordinance, for apart from being able to read and write in Arabic, he also understood the Hausa language, the medium of interpretation used by the plaintiff's 2nd witness. The Illiterates Protection Ordinance was designed to protect illiterates from being taken advantage of by being made to sign or acknowledge a writing or document which does not bear out their real intention. In the case on appeal before us the trial Judge has found as a fact, and it has not been challenged, that this document truly represents the intention of the appellant; that it was interpreted to him; that he understood it and agreed to it before appending his signature.

As for the contention that the typist was the writer of the guarantee and not the manager of the respondent company, there is no substance in this point and I need say no more than that the fact that the typist who typed the guarantee was working in the office of the respondent company of which the plaintiffs' 1st witness was the manager, coupled with the fact that on the evidence of the plaintiffs' 1st witness the latter made manuscript insertions on the document, brings him within the definition of a "writer" as contained in section 7 of the Ordinance.

For the reasons given by me in this judgment I would dismiss this appeal with costs assessed at 20 guineas.

**Ademola, C.J.F.:** I concur.
**Unsworth, F.J.:** I concur.

*Appeal dismissed.*

## UMARU GWANDU *v.* GWANDU NATIVE AUTHORITY

[Federal Supreme Court (Brett, F.J., Taylor, F.J., and Bairamian, F.J.)—November 2, 1962]

[Lagos—Appeal No. F.S.C. 161/1962]

*Appeal—evidence—procedure—criminal appeal—exhibit produced at trial—identification in appeal court—no admission by appellant of identity of exhibit—admission by appellant's counsel—no evidence from or for appellant—procedure and indentification unsatisfactory.*

*Evidence—admission—criminal proceedings—defence counsel's admission—whether acceptable in criminal proceedings.*

*Legal practitioners—criminal proceedings—admission against accused's interests—duty of accused's counsel.*

The High Court, hearing an appeal from a native court against a conviction of culpable homicide punishable with death contrary to section 221 of the Penal Code, required the production before it of the mortar which at the trial the appellant had admitted he threw at the deceased's head, thus killing her. A mortar was produced which the appellant did not admit was the mortar produced at the trial. A police constable gave evidence that he recognised it as the mortar produced at the trial. The appellant's counsel agreed that it was the mortar and did not examine the constable or ask that the appellant or any witnesses on his behalf should give evidence. On the basis that the mortar had been sufficiently identified, the High Court recorded a conviction of culpable homicide punishable with death contrary to section 221 (*b*) of the Penal Code.

On appeal to the Federal Supreme Court on the ground that an admission made by counsel cannot be accepted in a criminal case.

*Held:* (1) Counsel erred in accepting that the mortar produced in the High Court was the mortar used by the appellant and identified by him at the trial.

(2) The procedure adopted in the High Court and the identification of the mortar in that Court were unsatisfactory.

CRIMINAL APPEAL

*J. A. Cole* for the appellant;
*A. A. Isiaku* for the respondent.

**Bairamian, F.J.,** delivering the judgment of the Court: Umaru Gwandu was tried before the Emir of Gwandu's Court on the prosecutor's statement that he had killed a woman by the name of Rabi. There is no dispute that he threw a mortar at her head as she lay asleep during the night; she was found groaning, senseless, with blood coming out of her ears, nose and mouth. The appellant told one Yari that he had "used a mortar and killed her and that she did not even move." In fact she did not die until many hours later. He did not dispute the evidence given at the trial, and he agreed that he had killed Rabi. A mortar was brought to the court of trial; he agreed it was the one he had used. The judgment was—



"Umaru, this court sentence you to death as you did kill Rabi."

He appealed to the High Court, and counsel represented him at the hearing. There is this note by the Court:—

"Real question is whether this culpable homicide punishable with death or not punishable with death. Cannot decide without seeing mortar and considering size and weight. But mortar not exhibited to us. Therefore we order that hearing be adjourned to next sessions at Kano and call for mortar."

The notes at the adjourned hearing are important:—

"*Nzekwu:* Appellant says he does not recognise mortar.
"*Ardo:* Have policeman who can identify.

"Mamman Nassarawa, P.C. 51, Gwandu Native Authority Police says in answer to court: 'I was present when appellant was tried by Emir of Gwandu. A mortar was produced at trial. I have brought a mortar here from Gwandu. Chief of Gwandu Native Authority Police gave it to me to bring. I recognise it as mortar produced at trial.'

"*Nzekwu:* accepts mortar as one produced at trial."

The learned counsel who argued the appeal from the High Court before us has pointed to that passage in the notes and criticised it on two grounds: one is that that was taking evidence of a witness who was not sworn; the other is that the High Court accepted an admission made by counsel, which is not possible in criminal cases. He has pointed to passages in the judgment as showing that it proceeds on the basis that the mortar used by the appellant was sufficiently identified as the mortar brought by the policemen, and that it was a large and heavy mortar which when thrown or used as a weapon was capable of causing death; and he has argued that the High Court made a mistake in that respect which affected its decision that it was a case of culpable homicide punishable with death.

Those submissions were accepted by the learned counsel who appeared for the respondent at the hearing.

We have read the judgment under appeal with care and also the proceedings in the trial court. The trial court made no finding that it was a case under section 221 (*a*) or (*b*) of the Penal Code; and no light is thrown from the notes of the trial court on the size and weight of the mortar admitted by the appellant at his trial. It was the High Court that decided that the case fell under section 221(*b*), and recorded a conviction to that effect, stating that the Court did so by virtue of the powers conferred by Section 70(1)(*b*)(*iii*) of the Native Courts Law. Insofar as the judgment of the High Court is affected by the view that the mortar brought by the policeman was the mortar used, there are the criticisms of it which have been stated already.

It is clear that the High Court was taking evidence on the identity of the mortar. We are accustomed to all evidence being on oath or affirmation in the South, but the Northern Region has a procedure of its

own; it would be wiser to leave the point to some other occasion when the point is argued after preparation by counsel who have experience of the procedure in the North. Be it assumed, merely for the sake of argument, that the Court could have heard the policeman without asking him to be sworn. His counsel erred in accepting that it was the mortar used and identified at the trial by the appellant. He should have asked leave to examine the policeman; and on the rule of *audi alteram partem* if his client himself wished to give evidence on the identity of the mortar—which he was denying in the High Court—the Court might have had to consider whether it would not be right to hear him and let him call evidence about the mortar if he so wished. Counsel was not really happy about it; even after he said that he agreed it was the mortar, a little lower down the notes say that he submitted it was not the mortar which the appellant threw, and then again that it was the mortar produced at the trial.

The procedure in the High Court over the mortar was with respect unsatisfactory. Whether it was the mortar was not settled in a satisfactory manner. On the other hand, having regard to the nice distinction between a "likely" and a "probable" consequence of an act, on which the sentence is decided, whether it shall or shall not be one of death; and to the fact that the High Court noted that that could not be decided without seeing the mortar and considering its size and weight: we think that it would not be safe, in view of the unsatisfactory identification of the mortar, to allow the sentence of death to stand.

We therefore substitute a conviction of culpable homicide under sections 220 and 222, and sentence the appellant under section 224 of the Penal Code to imprisonment for life.

*Appeal allowed.*



## BURAIMA AJAYI AND JULANDE JOS *v.* ZARIA NATIVE AUTHORITY (2)

[Federal Supreme Court (Ademola, C.J.F., de Lestang, C.J. Lagos, Brett, F.J. and Bairamian, F.J.)—April 4, 1963]

[Lagos—Appeal No. F.S.C. 113/1962]

*Constitutional law—fundamental rights—criminal charge—interpreter to assist person charged—adequate interpretation required—interpretation required both to person charged and to court so far as necessary—Constitution of the Federation of Nigeria* (1960), *s.* 21(5)(*e*).

*Criminal procedure—evidence—interpretation—native court proceedings—unsworn interpreter—whether conviction should be set aside—Criminal Procedure Code, s.* 242 (*and s.* 386).

——————— *appeal—irregularity in trial proceedings—failure of justice—burden lies on appellant to establish failure of justice*—ibid., *s.* 382.

——————— ——————— ——————— *failure of justice—what amounts to failure of justice—justice not seen to be done*—ibid.

——————— ——————— ——————— *interpretation at trial alleged inadequate—whether failure of justice—whether reasonable person at trial must have supposed fair trial denied—ability of interpreter open to question*—ibid.

*Appeal—criminal appeal—failure of justice—burden lies on appellant to establish failure of justice*—ibid.

——————— ——————— *failure of justice—what amounts to failure of justice—justice not seen to be done*—ibid.

——————— ——————— *interpretation at trial alleged inadequate—whether failure of justice—whether reasonable person at trial must have supposed fair trial denied—ability of interpreter open to question*—ibid.

The appellants appealed to the Supreme Court against the High Court's refusal to interfere with their conviction in a native court on the ground that the interpretation in the native court had been unsatisfactory. The High Court received evidence on that question. The proceedings in the native court were in Hausa, which the appellants neither spoke nor understood. They were Yoruba speakers by birth and understood English, but not perfectly. The proceedings were interpreted by five different interpreters at succesive stages. Two interpreted into English and one into Yoruba; it did not appear what language the others interpreted into. None of them were sworn. The trial record gave their names, but it did not appear how they came to be called on to interpret or who they were except that one was a schoolboy and another was an Ibo who spoke English but not Yoruba. Only one gave evidence in the High Court. The High Court found that in at least two instances the ability of the interpreters to interpret satisfactorily might be questioned, but that in fact the whole of the proceedings had been interpreted correctly.

In the Supreme Court's view it did not appear to be disputed that the evidence-in-chief of the prosecution witnesses was not interpreted sentence by sentence and that all that the appellants received was a summary of so much of that evidence as the interpreter remembered or thought important.

*Held:* (1) Native courts are not bound by s. 242 of the Criminal Procedure Code, and the fact that the interpreters were not sworn was not in itself a ground for setting aside the conviction.

(2) It was essential to be satisfied that the appellants had a fair opportunity to defend themselves, and in particular that they were accorded in full the right conferred by s. 21(5)(*e*) of the Constitution of the Federation, which requires that there shall be adequate interpretation to the accused person of anything said in a language that he does not understand, and equally that there shall be adequate interpretation to the court of anything said by the accused person in a language that the court does not understand.

(3) For the purposes of s. 382 of the Criminal Procedure Code, the burden is on an appellant to show that any irregularity in the proceedings has led to a failure of justice.

(4) There is a failure of justice within the meaning of s. 382 of the Criminal Procedure Code if the proceedings at the trial fall short of the requirement not only that justice be done but that it may be seen to be done.

(5) In view of the difficulties facing an appellant who seeks to establish that the interpretation in the trial court was incorrect or incomplete, such an appellant discharges the burden of showing that a failure of justice has been occasioned if it is shown that a reasonable person who was present at the trial might have supposed that the interpretation was defective to such an extent as to deny the appellant a fair trial.

(6) On the High Court's finding that the ability of the interpreters to interpret satisfactorily might in at least two instances be questioned, the appellants had discharged the burden of showing that a failure of justice had been occasioned.

*Per Curiam:* An appeal court must make such allowance as is reasonable for the situation of an appellant who complains that the proceedings were not correctly interpreted. While he may be able, from a study of the record, to point to instances where what he himself said was wrongly or incompletely interpreted, it is almost impossible for him, in the absence of a contemporaneous record of the proceedings as interpreted to him, to establish conclusively that he did not receive the benefit of a full and accurate interpretation by reference to particular omissions or inaccuracies in the interpretation made to him.

*Quaere*, whether s. 382 of the Criminal Procedure Code can ever apply where one of the fundamental rights enshrined in the Constitution has been denied or withheld.

Cases referred to:

*Adan Haji Jama v. The King*, [1948] A.C. 225 (at p. 233), applied;

*Reg. v. East Kerrier Justices*, ex parte *Mundy*, [1952] 2 Q.B. 719 (at p. 724), applied.

CRIMINAL APPEAL

Appellants not present or represented;

*K. Nadarajah, Senior Crown Counsel*, for the respondent.

**Brett, F.J.,** delivering the judgment of the Court: The two appellants were convicted by the Chief Alkali of Zaria on a charge of voluntarily causing hurt in committing robbery, contrary to section 300 of the Penal Code of Northern Nigeria. Their appeal to the High Court was dismissed and they appealed to this Court.





The appellants were neither present nor represented in this Court, but had submitted arguments in writing. Mr Nadarajah, Senior Crown Counsel, appeared for the respondent and informed the Court that he felt unable to support the convictions in view of certain irregularities in the procedure adopted in the court of trial.

The most serious of these, and the only one which we need consider, relates to the interpretation of the evidence and other proceedings. The appellants are Yoruba speakers by upbringing and it is stated in the judgment of the High Court, before which they had argued their appeals in person, that they each speak and understand English, though not perfectly. The trial was conducted in Hausa, which they neither speak nor understand. The record of the proceedings in the trial court is supplemented as to the methods adopted for the interpretation of the proceedings both by oral evidence given when the appeal was heard in the High Court and by affidavits produced in the High Court. The appellants allege that the police officer in charge of the prosecution acted as interpreter into "pidgin" English when they were called on to plead and asked if they consented to trial in the chief alkali's court, but the High Court accepted the evidence that this part of the proceedings was interpreted into English by one L. O. Ihekwereme, who admittedly interpreted the opening address for the prosecution and the evidence of the first prosecution witness. A. M. Hassan interpreted the evidence of the remaining six witnesses for the prosecution into Yoruba, and the evidence of the appellants themselves was interpreted at first by Manzuman Zangon Katab, a schoolboy, and then by one Muhammadu Lawal. Finally, one M. C. Okoro interpreted the equivalent of the *allocutus* into English. The record does not show who these persons were or how they came to be called on to interpret.

If the trial had been conducted in the High Court or a magistrate's court it would have been necessary for these interpreters to be sworn as such, under section 242 of the Criminal Procedure Code, but this is not one of the sections by which a native court is bound, and although it is agreed that the interpreters were not sworn that is not in itself a ground on which it would be necessary to set aside the convictions. What is essential is that this Court should be satisfied that the appellants had a fair opportunity to defend themselves, and in particular that they were accorded in full the right conferred by section 21(5)(*e*) of the Constitution of the Federation, which provides that—

> "Every person who is charged with a criminal offence shall be entitled— . . . (*e*) to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence."

This requires that there shall be adequate interpretation to the accused person of anything said in a language which he does not understand, and equally that there shall be adequate interpretation to the court of anything said by the accused person in a language which the court does not understand.

We would draw attention here to the difficulty which faces an appellant who complains that the proceedings were not correctly interpreted. While he may be able, from a study of the record, to point to instances where what he himself said was wrongly or incompletely interpreted, it is almost impossible for him, in the absence of a contemporaneous record of the proceedings as interpreted to him, to establish conclusively that he did not receive the benefit of a full and accurate interpretation by reference to particular omissions or inaccuracies in the interpretation made to him. An appeal court must make such allowance as is reasonable for this situation.

Two specific complaints were made by the appellants. In the first place they complained that while their own evidence was interpreted to the court sentence by sentence the evidence-in-chief of the witnesses for the prosecution was not so interpreted to them, and that all they received was a summary of so much of the evidence as the interpreter remembered or thought important, and this does not appear to be disputed. Secondly, they both deny that they consented to trial in the chief alkali's court. They make the further general comment that the five persons used as interpreters were selected at random from among persons who happened to be available at the time, that none of them is an experienced interpreter, and that there must be serious doubt as to their ability to interpret satisfactorily.

The High Court rejected the allegation that the appellants did not consent to trial in the chief alkali's court. For the rest, while agreeing that the trial was irregular, the High Court held that the burden was on the appellants to show that the irregularity had led to a failure of justice and that they had failed to discharge that burden. The following extract from the judgment of the High Court shows its reasons for holding this view—

> "On the record, the conduct of the trial was irregular because of the use of a series of interpreters who were not bound by oath to interpret truly and whose ability to interpret satisfactorily may in at least two instances be questioned. But provided that the appellants did have the assistance of an interpreter or interpreters we cannot interfere on the ground that such assistance was given in an irregular way unless a failure of justice was occasioned. All the evidence was interpreted by the various interpreters in succession, and it is not suggested that they did not also interpret the proceedings other than evidence from the point where the prosecutor opened his case to the court. The appellants were unable to satisfy us that there was in fact any misinterpretation or any failure to interpret from that point onwards; they did not show us that anything was added or omitted or falsified in the process of interpretation. They did not establish that any failure of justice was occasioned because the proceedings were interpreted by the unsworn interpreters who appear on the record as having interpreted and whose qualifications or lack of them we have described."





In this passage the High Court was applying the test laid down in section 382 of the Criminal Procedure Code, which provides that—

> "Subject to the provisions hereinbefore contained, no findings, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal . . . on account of any error, omission or irregularity in the . . . proceedings before or during trial . . . unless the appeal court . . . thinks that a failure of justice has been occasioned by such error, omission or irregularity",

and we do not dissent from the view that for the purpose of that test the burden is on an appellant to show that the irregularity has led to a failure of justice. However, while the point has not been argued before us, we are of the opinion that there is a failure of justice within the meaning of the section if the proceedings at the trial fall short of the requirement "not only that justice be done, but that it may be seen to be done", as that maxim has been applied by the Judicial Committee in *Adan Haji Jama v. The King*, [1948] A.C. 225, and by the Queen's Bench Division in such cases as *Reg. v. East Kerrier Justices*, ex parte *Mundy*, [1942] 2 Q.B. 719. We have already referred to the difficulties facing an appellant who seeks to establish that the interpretation was in fact incorrect or incomplete, and, in view of those difficulties, we consider that if the burden rests on the appellants it will have been satisfied if it is shown that a reasonable person who was present at the trial might have supposed that the interpretation was defective to such an extent as to deny the appellants a fair trial. In our view the appellants satisfied that burden. Of the five persons who acted as interpreter at different stages of the trial only Ihekwereme gave evidence in the High Court, and on that Court's own finding that the ability of the interpreters to interpret satisfactorily "may in at least two instances be questioned" we are of the opinion that the correct decision would have been that the convictions should be set aside.

We reach this conclusion even on the assumption that the test laid down in section 382 of the Criminal Procedure Code is applicable, and it is unnecessary to consider whether that section can ever apply where one of the fundamental rights enshrined in the Constitution has been denied or withheld.

On this ground, and without considering the other matters of criticism to which Mr Nadarajah referred, we set aside the decision of the native court. Mr Nadarajah has invited us to order a retrial, in accordance with section 70(1)(*b*)(*ii*) of the Native Courts Law, 1956, and section 30 of the Federal Supreme Court Act, 1960, and this is a case in which in the ordinary way we might well take such a course. However, it has taken so long for the two successive appeals to be heard that the appellants have already served nearly two-and-a-half years out of the sentences of seven years' inprisonment imposed on them, and without laying down any rule for the exercise of our discretion in the matter we do not propose in this case to order a retrial. The judgment of the Court therefore is that the decision of the native court is set aside and the appellants are acquitted.

***Appeal allowed.***

## ADAM SHIWA *v.* BORNU NATIVE AUTHORITY

[C.A. (Hurley, C.J., J. A. Smith, S. P. J. and Haliru Binji, D.G.K.)—April 6, 1963]

[Maiduguri—Appeal No. JD/76CA/1962]

*Criminal procedure—taking cognizance—offence under chapter XXIII, Penal Code—taking cognizance of offence on complaint of "person aggrieved"—private individual defamed—complaint by police officer—whether complaint by "person aggrieved"—Penal Code, ss.* 391, 392; *Criminal Procedure Code, s.* 141.

*———————irregular proceedings—erroneously taking cognizance of offence—trial of offence by court erroneously taking cognizance—whether, and what part of, proceedings vitiated—whether trial and conviction vitiated—Criminal Procedure Code, ss.* 1, 143, 379(*c*).

*Native courts—criminal procedure—guidance principle—whether guidance principle can cure defect of jurisdiction*—ibid., *ss.* 288, 382, 386(4); *Native Courts Law*, 1956, *s.* 70(1)(*b*).

*Jurisdiction—whether guidance principle can cure defect*—ibid.

*Words and phrases—"person aggrieved"—Criminal Procedure Code, s.* 141.

The appellant was convicted of the offence of defamation in proceedings which were prosecuted on the complaint of a native authority police officer. The person defamed appeared as a witness for the prosecution. On appeal,

*Held:* (1) While the person defamed was a "person aggrieved" within the meaning of s. 141 of the Criminal Procedure Code, the police officer was not; and therefore the trial court was not empowered to take cognizance of the offence and did so erroneously.

(2) While the trial court might be assumed to have acted in good faith, s. 379 of the Criminal Procedure Code saved the trial court's proceedings only in so far as they consisted in taking cognizance of the offence and not in so far as they consisted in trying it or convicting for it.

(3) S. 379 of the Criminal Procedure Code cannot be interpreted so as to enable a court, by making a mistake, to give itself a jurisdiction it would not otherwise have had. The proceedings following the erroneous taking of cognizance of the offence were therefore a nullity.

(4) Although a native court is only guided by the provisions of s. 141 of the Criminal Procedure Code, the guidance principle cannot be used to confer on a native court a jurisdiction it would not otherwise have had.

(*Editorial Note.*—This case should be read in the light of *Joseph Idowu Adunkoko v. Ilorin Native Authority, infra*, p. 84. In that case a Bench of five Judges reached the same final decision as in the present case on similar facts but on the different ground that s. 379 of the Criminal Procedure Code did not apply to the situation at all.)

CRIMINAL APPEAL FROM NATIVE COURT

Appellant in person;
*M. Nuhu Usman, Crown Counsel*, for the respondent.





**Hurley, C.J.**, delivering the Court's reasons for judgment: We allowed this appeal earlier in the present sessions, and the following are our reasons:

The appellant was convicted in the Court of the Chief Alkali of Bornu of an offence of defamation as defined in section 391 of the Penal Code and made punishable by section 392. These sections are in chapter XXIII of the Penal Code. The proceedings were prosecuted on the complaint of a constable of the native authority police, and the person defamed was a witness for the prosecution. By section 141 of the Criminal Procedure Code, no court shall take cognizance of any offence falling under chapter XXIII of the Penal Code except upon a complaint made by some person aggrieved by such offence. By section 1 of the Criminal Procedure Code, "take cognizance" means take notice in an official capacity, and "complaint" means an allegation made to a court, with a view to its taking action under the Code, that some person has committed an offence. The effect of section 141 is therefore that no court can take official notice of an offence of defamation unless some person aggrieved thereby makes a complaint of the offence to the court. In the present case, the person defamed was a person aggrieved by the offence but he did not make the complaint to the court, and the police constable who did make the complaint was not a person aggrieved. Therefore the trial court was not empowered to take cognizance of the offence, that is, to take notice of it in an official capacity. And if it was not empowered to take notice of the offence, it was not empowered to try or to convict anybody for it.

We observe that section 379 of the Criminal Procedure Code provides:

> "If any court . . . not empowered by law . . . . . .
> "(*c*) to take cognizance of an offence under section 143,
> "erroneously in good faith does any such thing, the proceedings shall not be set aside merely on the ground that the court . . . was not so empowered."

Section 143 empowers all courts to take cognizance of offences in various circumstances, but subject to the provisions of chapter XIV which includes section 141 and also to the provisions of chapter XIII. By virtue of section 141, the trial court in this case was not empowered to take cognizance of the offence of defamation on the complaint of the police. It did take cognizance of the offence, and it did so erroneously and we may confidently assume it did so in good faith. Does section 379(*c*) mean that in the circumstances the whole of the trial proceedings are not to be set aside, or only that part of them which the trial court was expressly disempowered from taking, that is, the initial taking cognizance of the offence? Is the taking cognizance all that is saved by section 379(*c*), or are the whole proceedings saved?

We think that the proceedings saved by section 379(*c*) are no more than the taking cognizance of the offence, which the trial court was disempowered from doing by the effect of section 141. Taking cognizance of the offence was beyond the trial court's powers and therefore

unlawful, but by virtue of section 379(*c*) the taking cognizance is not to be set aside, because the trial court acted under an honest mistake. But that does not apply to the rest of the proceedings. Since it was beyond the trial court's powers to take cognizance of the offence, that is, to take notice of it in its official capacity as a court, it was beyond its powers to try the offence or to convict for it, and the trial and conviction are not saved by section 379(*c*). The section cannot be construed so as to enable a court, by making a mistake, to give itself a jurisdiction it would not otherwise have had. The trial was a nullity, and the conviction must be set aside.

We are aware that the trial court was merely to be guided by section 141. That being so, by section 386(4) of the Criminal Procedure Code we are to apply the principles contained in sections 288 and 382 of the Code, and the provisions of the Native Courts Law, 1956. It seems to us that the guidance principle cannot be used to confer on a native court a jurisdiction which it does not possess, or to confer on the trial court in this case a jurisdiction of which section 141 deprives all courts. On that view, there is sufficient ground, and more than sufficient ground, for interfering with the decision of the trial court under section 70(1)(*b*) of the Native Courts Law.

We wish to add that while the trial court was entitled to convict the appellant of speaking the defamatory words on the evidence of only one witness who said he heard him speak them, the court ought to have considered the evidence of this witness, Mallam Biu, more carefully than it seems to have done. This evidence contains certain contradictions which the trial court did not refer to in its judgment and seems not to have noticed, and which, if they had been noticed, might have raised some doubt in the mind of the trial court. The defamatory words were said to be heard by Mallam Muhammad Biu from the mouth of the appellant, Adam Shiwa. Then Mallam Muhammad Biu told Bukar, Zannah Umara's brother, about it. Then Bukar told his brother Zannah what he heard from Mallam Biu. Zannah later confirmed it from Mallam Biu.

Zannah Umara and Mallam Muhammad Biu gave evidence in the court. Zannah was the first prosecution witness and stated: "P.C. Adam said to Mallam Biu that I have spent about 90 something and he said 'No, it is about £1,090' while I was supervisor of works, Bornu, and they investigated the case." The second prosecution witness Mallam Muhammad Biu stated: "I went to the house of Zannah but I did not meet him at home, but there are some people waiting for him. I stood at the gate waiting. As I was standing, P.C. Adam Shiwa came... then Adam called me and we stopped at one side. He told me Zannah Umara has spent goods costing £1,090 while he was supervisor.... Then a certain boy came and stood by our side. The man said Zannah knew the tricks of Bornu Native Authority people. Then Adam Shiwa looked at me with serious eyes. Then I entered to Zannah Umara's house. Then I called Bukar, Zannah's brother... I told him that Adam Shiwa told me Zannah has spent about £1,090 of Native Authority funds... Then the next day his brother told him and Zannah Umara even asked me why."





The appellant cross-examined Mallam Muhammad Biu, saying: "Is there any person at the gate of Zannah Umara when I told you the thing?" Mallam Biu replied: "There are no people at the gate of Zannah and you told me in secrecy and nobody there."

By giving this answer, it appeared to us that Mallam Biu had contradicted himself. He told the trial court previously that he went to Zannah's house, did not meet him at home but found some people waiting for Zannah and he, too, stood at the gate waiting for him. He said at that time the appellant came and, calling him to one side, told him about the money. Also, calling somebody to one side denotes the presence of some other people on the spot.

The appellant again cross-examined Mallam Biu, saying: "Didn't the boy hear who came and stood near us?" Mallam Biu replied: "When the boy came you stopped talking and he did not hear." Again Mallam Biu, the single witness in the case, seems to contradict himself, because in his direct evidence it appears he told the trial court that that boy overheard them and he even commented on what they were conversing about by saying "Zannah knew the tricks of Bornu Native Authority people."

Had the trial court considered these irregularities in the evidence given by Mallam Biu, and that there was no evidence other than his, the trial court in our opinion might have come to a different decision and acquitted the appellant.

*Appeal allowed and conviction set aside.*

## THE QUEEN *v.* AHMED AROGUNGBADE

[High Court (Reed, J.)—May 15, 1963]

[Mubi—Criminal Cause No. JD/23C/1963]

*Criminal law—mens rea—possession of Indian hemp—Dangerous Drugs Ordinance, Laws of Nigeria*, 1948, *Cap.* 50, *s.* 5(2).

*————— —————possession of poison for an illegal purpose—disproof of illegal purpose—accused not knowing of what he is in possession—Pharmacy Ordinance, Laws of Nigeria*, 1948, *ss.* 59, 60.

In answer to charges of being in possession of Indian hemp contrary to s. 5(2) of the Dangerous Drugs Ordinance and being in possession of poison for an illegal purpose contrary to s. 59 of the Pharmacy Ordinance, the accused admitted possession of the containers in which these articles were found but pleaded ignorance of their contents.

*Held:* (1) The presumption that *mens rea* is required in criminal offences applies to the charge of possessing Indian hemp and it is therefore necessary for the prosecution to prove that the accused is knowingly in possession.

(2) The Pharmacy Ordinance puts the burden on the accused of proving that his possession of the poison is not for an illegal purpose. He therefore has a defence if he can establish that he did not know of what he was in possession.

The Court found that the prosecution had discharged the burden under s. 5(2) of the Dangerous Drugs Ordinance of proving that the accused was knowingly in possession of the Indian hemp, and that the accused had not discharged the burden under the Pharmacy Ordinance of showing that he did not know of what he was in possession.

Case referred to:

*Taylor's Central Garages (Exeter) Limited v. Roper*, [1951] W.N. 383, *dictum* of Devlin J. applied.

(*Editorial Note.*—The passage from para. 3 of Halsbury's Laws of England, 2nd ed., vol. 9 at pp. 11-12 quoted in the judgment has been replaced in the 3rd edition by para. 508 of vol. 10 at pp. 273-274.)

CRIMINAL CAUSE

*M. Nuhu Usman, Crown Counsel*, for the Crown;
*Accused* in person.

**Reed, J.:** The accused is charged (1) with being in possession of Indian hemp contrary to section 5(2) of the Dangerous Drugs Ordinance and (2) with being in possession of three bottles of acetylarsan, being a poison as defined by the Pharmacy Ordinance, for an illegal purpose, contrary to section 59 of the said Ordinance.

There is evidence, which the accused does not dispute, that a carton, exhibit B, containing five dozen wraps, exhibits B1 and B2, was found in the possession of the accused. There is evidence, not disputed





by the accused, that exhibit B2 contained Indian hemp. There is also evidence, which the accused does not dispute, that a cigarette tin, exhibit A, containing three bottles, exhibit A1, was found in the possession of the accused. There is also evidence, again not disputed by the accused, that the three glass bottles in exhibit A1 contain acetylarsan, which is an arsenical preparation included in Part III of the First Schedule and therefore a poison within the meaning of the Pharmacy Ordinance.

The defence is as follows: The accused alleges that one Nosiru gave him the carton containing the Indian hemp for safe keeping and that he had no idea of the contents of the carton. He alleges the cigarette tin containing the acetylarsan was left in the Federal Bar—of which the accused is the manager—by a customer of the bar and that he, the accused, took possession of it in order to return it to the owner when claimed. The accused denies all knowledge of the contents.

It is an offence under section 59 of the Pharmacy Ordinance only if the person found in possession of the poison is in possession for an illegal purpose. The onus of proving that the purpose is not illegal is upon the person in possession but clearly the accused has a defence to the charge if he can establish that he found exhibit A and contents in his bar and did not know what the contents were.

With regard to the first charge, the charge under section 5(2) of the Dangerous Drugs Ordinance, it is to be noted that the allegation is that the accused was "in unlawful possession" of Indian hemp. It is unnecessary to allege that the possession was "unlawful"; what the section says is that mere possession is unlawful, and therefore it is only necessary to allege possession and that, by reason of such possession, the accused has committed an offence under the sub-section. Learned Crown Counsel has submitted that since the accused admitted possession, the offence is proved and that it is no defence to say he was not knowingly in possession.

So far as I am aware this point has not been decided. I am unable to find a reported case. The general rule is that a person cannot be convicted of a crime unless the prosecution proves a wrongful intention or some other blameworthy condition of the mind—what is known as *mens rea*. In *Halsbury's Laws of England*, 2nd edition, volume 9, pages 11-12, it is stated:

> "In a limited class of offences, *mens rea* is not an essential element. This class consists, for the most part, of statutory offences of a minor and only *quasi*-criminal character and, in order to determine whether *mens rea* is an essential element of an offence, it is necessary to look at the object and terms of the statute which creates it."

An example is given of a statutory offence where it is unnecessary to prove *mens rea*. Where possession of unsound meat for the purpose of sale and intended for human food is shown, proof of knowledge on the part of the accused of the condition of the meat is unnecessary in prosecutions under the Food and Drugs (Adulteration) Act, 1928.

*Devlin J.* in *Taylor's Central Garages (Exeter), Limited v. Roper*, [1951] W.N. 383, said [as quoted in *Archbold*, 35th ed., para. 49]:

> "Where the statute . . . does not contain the word 'knowingly,' the first thing is to examine the statute to see whether the ordinary presumption that *mens rea* is required applies or not. If it is found that it does apply, I should have thought the natural result would be that the prosecution must discharge the burden of showing guilty knowledge. All the word 'knowingly' does is to say expressly what is normally implied, and if the presumption that the statute requires *mens rea* is not rebutted, I find it difficult to see how it can be said that the omission of the word 'knowingly' has, as a matter of construction, the effect of shifting the burden of proof from the prosecution to the defence."

It is true that the marginal note of section 5(2) of the Dangerous Drugs Ordinance refers to the "total prohibition of trade" in Indian hemp and no doubt just that is intended. Nevertheless it cannot possibly be said that the offence created is of a "minor and only *quasi*-criminal" character as would negative the ordinary presumption that *mens rea* is required. An offender is liable, under section 20, to a fine of one thousand pounds, or to imprisonment for ten years, or to both. In my view, there is no offence under section 5(2) of the Dangerous Drugs Ordinance unless the accused person is knowingly in possession of Indian hemp.

The accused, as I have already said, alleged that one Nosiru had brought the carton, exhibit B, containing the Indian hemp to him and that he had it for safe keeping and did not know what the contents of the carton were. He also alleged that the three bottles of acetylarsan, exhibit A1, inside the cigarette tin, exhibit A, were left in his bar by a customer and that he took possession until the owner claimed it, not knowing what the contents of the tin were.

The accused gave evidence on oath in his defence and called five witnesses. Four of these defence witnesses were called to show that the police had failed to arrest Nosiru when he was pointed out to them by somebody acting on behalf of the accused after the accused had been arrested. The fifth, Dan Ladi, said that a man had called him, the witness, to carry a load to the accused's room and he, the witness, put the load under the bed.

Now I do not consider that the police were under any obligation to arrest Nosiru at the instance of the accused. It may well be that the accused did get exhibit B and its contents from Nosiru. The issue is whether the accused knew what the carton contained when he got it. I have given this issue careful consideration and I am satisfied that the accused knew that exhibit B contained Indian hemp when he got it. The exhibit was found in his bedroom, under his bed, which is not the sort of place where something would normally be put for safe keeping. I believe, on the evidence, that the accused was reluctant to open the door of his bedroom when the police asked him to and this shows a





guilty mind. Next, there is the evidence of two of the policemen that the accused did not say he had got the exhibit from Nosiru until he was taken to the police station and made his statement. It is true that the third policeman——who was the one who took the accused's statement—said that the accused said he had got the exhibit from Nosiru when the exhibit was first found and the accused alleges this to be so. Nevertheless, I am inclined to believe the first two policemen and I do not believe the accused mentioned Nosiru until he made his statement at the police station.

So far as the possession of exhibit A1 is concerned it is for the accused to prove that his possession was not for an illegal purpose. I believe that the accused first said one Nosiru gave him the exhibit which was not true. I do not accept his explanation that the cigarette tin, exhibit A, and its contents were left in his bar by a customer and that he was waiting for the customer to call for it.

It follows that I find the accused guilty on the first charge and convict him under section 5(2) of the Dangerous Drugs Ordinance. I find him guilty on the second charge and convict him under section 59 of the Pharmacy Ordinance.

***Accused found guilty on both charges.***

## THE QUEEN *v.* MARY ANTHONY AND ANTHONY EKPEKPEKE

[High Court (Reed, Ag. S.P.J.)—September 7, 1963]
[Jos—Criminal Cause No. JD/38C/1963]

*Criminal law—possession of Indian hemp—premises occupied by more than one person—which person has possession—Dangerous Drugs Ordinance, Laws of Nigeria*, 1948, *Cap.* 50, *s.* 5(2).

In order to be in possession of any thing, a person must have dominion over that thing and know that he has such dominion. Where more than one person is in occupation of the premises on which the thing is found, it is a question of fact which of those persons, if any, are in possession of the thing.

Cases referred to:

*R. v. Boober and others*, (1850) 4 Cox, C.C. 272, headnote criticised;
*Ram Charan v. Emperor*, A.I.R. 1933 All. 437, observations of Niamatullah, J. adopted.

CRIMINAL CAUSE

*M. Nuhu Usman, Crown Counsel*, for the Crown;
The two accused appeared in person.

**Reed, Ag. S.P.J.,** The two accused persons are charged together with an offence contrary to section 5(2) of the Dangerous Drugs Ordinance, punishable under section 20 of that Ordinance. The case for the prosecution has closed and the Court has, under section 191(5) of the Criminal Procedure Code, the power to acquit at this stage if it considers that the evidence is not sufficient to justify the continuation of the trial.

The prosecution evidence is to the effect that the accused persons are husband and wife living together in two rooms, a bedroom and a parlour, at 74/9 Dodo Street, Jos. The police obtained a search warrant to search these premises and the warrant was executed on the 19th November, 1962, in the presence of the wife but not in the presence of the husband. Four small wraps of Indian hemp were found concealed behind a cupboard in the parlour and a few seeds of Indian hemp were found, wrapped in paper, in the bedroom. The issue is whether I could, on the evidence before me, find that either of the accused persons was in possession of Indian hemp. I called upon learned Crown Counsel to sum up his case and he submitted that the husband only had a case to answer. He relied upon *R. v. Boober and others*, (1850) 4 Cox, C.C. 272, in which the headnote reads:

> "If coining implements are found in a house occupied at the time by a man and his wife, the presumption is that they are in the possession of the husband alone, unless there are circumstances to show that the wife was acting separately and without her husband's sanction; they cannot both be convicted."





With respect, I think this headnote is misleading. The case reports the Judge's summing-up to the jury and the Judge made it clear that the issue of possession was one of fact for the jury. He said:

> "With regard to the man it appears that he occupies the room in which these things were found, and, *prima facie*, he would be presumed to be in possession of what the room contains, but this presumption may be rebutted. . . ."

Coining implements had been found in the house and there was evidence that the wife had tried to break a mould when the police came to the house. The judge directed the jury that this would not affect the case against the husband if the jury thought that "her object was to screen him from detection." He concluded: "Either of the prisoners may be convicted upon this evidence, but I do not think you can convict both."

I think the law relevant to this issue is well stated in *Ram Charan v. Emperor*, A.I.R. 1933 All. 437, and I adopt the statement. It is as follows:

> "It seems to me that the police and the Magistrate proceeded on the assumption that property found in a house occupied by several male and female members residing therein should be considered to be in possession of the head of the family. This is a wholly unwarranted assumption and can have no place in cases in which possession and criminal intent form the essential elements of an offence. It is equally unwarranted to assume that every one residing in the house should be deemed to be in possession of an article recovered from it. Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and can exercise it. A person cannot be said to be in possession of a thing unless it is shown by evidence that he had dominion over it and knew that he had it. The mere fact that a thing is found in a house occupied by a person in common with others or at a place in the house which is as much accessible to others as to him is no proof that he was in possession of it."

In the case before me the evidence is that the husband and wife occupied a parlour and a bedroom and it is to be presumed that both of them occupied both rooms. The two exhibits of Indian hemp are very small; together they would fit into a match-box. Both were concealed from view when the police found them and the court could not presume that either one or other of the accused persons knew that either of the exhibits was where the police found it. On the evidence before me I could not, therefore, find that either of the accused persons was in possession of Indian hemp.

I would add that when two or more persons occupy premises in which property is found it is always a question of fact whether one or more of those persons is in possession of that property. It might, for

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instance, be shown (as in *Boober's* case) that one was the sole occupant of the room in the premises in which the property was found; or it might be shown that the property was found in a box, cupboard or other receptacle belonging to one of the occupants; or the property might be so bulky, or so conspicuous, that none of the occupants could fail to know of its existence. In such circumstances a rebuttable presumption of possession might well arise, as in *Boober's* case.

For the reasons which I have given I acquit both the first and the second accused persons.

*Accused persons acquitted.*



## ALHAJI BUBA CHUKOL JIMETA *v.* ADAMAWA NATIVE AUTHORITY

[C.A. (Reed, Ag. S.P.J., Bate, J. and Jibir Daura, Sh. Ct. J.)—November 14, 1963]

[Yola—Appeal No. JD/48CA/1963]

*Criminal law—intentional insult with intent to provoke breach of peace—whether proof required that some person in fact provoked—Penal Code, s.* 399.

The appellant was convicted in a native court of giving intentional insult with intent to provoke a breach of the peace contrary to s. 399 of the Penal Code. On appeal, it was argued that proof of the offence against s. 399 required proof that some person had actually been provoked by the insult.

*Held:* The test to be applied under s. 399 of the Penal Code is not whether any particular person is in fact provoked but whether the insulting provocation would in ordinary circumstances cause a breach of the peace by angry words or deeds or the commission of any other offence.

CRIMINAL APPEAL FROM NATIVE COURT

*Alhaji R. O. Gaji* for the appellent;
*M. U. Ogbole, State Counsel*, for the respondent.

**Bate, J.,** delivering the judgment of the Court: The appellant appeals against his conviction by a chief alkali of offences contrary to sections 148 and 399 of the Penal Code. He abandoned all grounds of appeal except the general ground.

With regard to the conviction under section 148, it was argued that there was no evidence of any obstruction. With this we are unable to agree. There is evidence that P.C. Ibrahim told the appellant that he was a policeman, that the appellant was under arrest and that he must come to the charge office, and that thereafter the appellant drew a knife and drove off in a lorry. The appellant's acts amount to obstruction.

It was also argued that there was no evidence that the appellant knew that P.C. Ibrahim was a police officer. There is in fact evidence in the testimony of the second and third prosecution witnesses that P.C. Ibrahim expressly told the appellant that he was a police officer before the incident took place which gave rise to the prosecution of the appellant. But the chief alkali observed that the appellant did not give the constable a chance to prove his identity as a police officer by production of his identity card or otherwise and for this reason could not be heard to complain that he did not know that P.C. Ibrahim was a police officer. We agree with the chief alkali.

With regard to the conviction under section 399, counsel for the appellant took the point that the section requires proof that somebody has actually been provoked and that there is no evidence establishing this. This, it was said, is the proper construction to be put on the

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expression "and thereby gives provocation to any person". We think that the meaning of this expression is not as clear on the face of it as one might hope. But it appears from the notes in *Ratanlal and Thakore's Law of Crimes*, 20th edition, at pages 1338 and 1339, that the test to be applied is not whether any particular person is in fact provoked but whether the insulting provocation would in ordinary circumstances cause a breach of the peace by angry words or deeds or the commission of any other offence.

We accept this interpretation. The chief alkali properly found that the appellant had insulted P.C. Ibrahim. In our view, the insults were such as to provoke a breach of the peace and it is immaterial that the police constable happened to be sufficiently good tempered or phlegmatic as not to allow himself to be provoked.

The appeal is dismissed and the convictions and sentences affirmed.

In view of the evidence that the appellant drew a knife, we feel constrained to observe that the sentence in relation to the conviction under section 148 is very lenient.

*Appeal dismissed and convictions and sentences affirmed.*



## GARBA DOBA AND ANOTHER *v.* THE QUEEN

[S.C.N. (Ademola, C.J.N., Taylor, J.S.C. and Bairamian, J.S.C.)
November 21, 1963]
[Lagos—Appeal No. FSC 394/1963]

*Criminal law—attempt—attempting to obtain gratification—whether request* per se *constitutes attempt—Penal Code, s* 115.

The appellant and another, both police constables, were convicted of attempting to obtain a gratification from two men for forbearing to investigate a reported theft. On appeal, the appellant submitted that an attempt to commit this offence could only be constituted by some physical act involving a gratification actually in existence and going beyond a mere demand for such gratification.

*Held:* That asking for or demanding a reward is in itself an attempt to obtain it within the meaning of s. 115 of the Penal Code.

Case referred to:
*Baldeo Sahai*, I.L.R. 1879 2 All. 253, applied.

CRIMINAL APPEAL

The appellant appeared in person;
*M. Buba Ardo, Deputy Solicitor-General*, for the respondent.

**Ademola, C.J.N.,** delivering the judgment of the Court: The appellant and another were both convicted in the High Court at Jos of the offence of attempting to obtain a gratification, other than lawful remuneration, as a motive or reward for forbearing to investigate into the theft of corrugated iron sheeting and thereby committing an offence punishable under section 115(*b*)(*ii*) of the Penal Code. They were each sentenced to a term of eighteen months' imprisonment with hard labour. The second accused in the case has not appealed.

At the material time, the appellant and the second accused were police constables in the Nigeria Police Force. They both suspected two men of having stolen some corrugated iron sheets and during the investigations which followed they asked for a bribe, which was eventually settled at £3-0*s*-0*d*. The amount was to be collected on a subsequent day.

Meanwhile one of the men reported the incident and two C.I.D. officers were detailed to accompany him; he was given £3-0*s*-0*d* to hand over to the policemen. The evidence shows a confused state of affairs as to whether or not the £3-0*s*-0*d* was handed over to the policemen. The learned Judge, after making reference to the discrepancies in the evidence on this vital part of the story, arrived at a conclusion in the following words:

> "In view of the contradictions between the evidence of the second prosecution witness and the fourth prosecution witness and remembering that the second prosecution witness was an

accomplice, I am not satisfied that the £3-0*s*-0*d* was received by the accused persons. The question remains what offence has been committed?"

Earlier in his judgment, the learned Judge arrived at the following conclusions; he said:

> "I find that the second accused first suggested that a gratification might be paid by the second prosecution witness for stopping the investigations. I find that both the first and second accused participated in the negotiations with the second prosecution witness which followed, the first accused finally demanding £3-0*s*-0*d*,".

The learned Judge eventually found the men guilty of attempt.

The appellant, who argued the appeal himself, submitted earlier some arguments in writing, and before us he supplemented this orally. His argument may be put under two heads:

1. That as the two men suspected did not in fact steal the corrugated iron sheets or commit any offence in respect of them, it cannot be said that he (the appellant) and the second accused received a bribe. In other words, the men were committing no offence for which they might give bribes to stop investigation.

2. That there was not sufficient evidence to support the finding of an attempt to obtain a bribe.

Now section 115(*b*) of the Penal Code enacts as follows:—

> "Whoever being or expecting to be a public servant accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification whatever whether pecuniary or otherwise, other than lawful remuneration as a motive or reward—. . .
> (*b*) for showing or forbearing to show in the exercise of his official functions favour or disfavour to any person; . . . . . shall be punished. . . "

The appellant's argument before us on the first ground was that the corrugated iron sheets were not stolen and that therefore he and the co-accused could not be convicted for the offence charged.

This Court is not unfamiliar with this argument but the point does not arise for our consideration in this case. The evidence shows that the appellant and the co-accused suspected that the two men stole the corrugated iron sheets and they proceeded to make inquiries into the matter. It was during the investigations that the second accused said, in the words of the first witness for the prosecution, "that he was sorry for us and did not wish to waste our time; and for that reason we should consider what we should do for them so that they should not take us to the charge office". At that time the appellant was walking in front. He was later consulted about the amount and after the bargaining he (the appellant) fixed the amount at £3-0*s*-0*d*. It is clear, therefore, that the bargain was for the appellant and the co-accused to drop the investi gations they were making and obtain the amount of £3-0*s*-0*d* agreed





upon. In other words they would forbear to carry out their duty of investigating into the offence they suspected the men to have committed for a sum of £3-0*s*-0*d*. These are the facts accepted by the learned trial Judge, and we are in agreement with him that to obtain or attempt to obtain such gratification is covered by section 115 of the Penal Code.

In regard to his second ground of appeal, the appellant in effect argued that to constitute an attempt in law it was essential that the money to be given to him should be in existence, and that there should be a physical act on the part of the giver to hand it over to him, although it had not actually reached his hands. This ground of appeal also must fail. It has been held that asking for or demanding a reward in itself is an attempt to obtain it under a similar section of the Indian Penal Code. This is said to be so in *Ratanlal and Thakore, The Law of Crimes*, 19th edition, page 382, where the case *Baldeo Sahai*, I.L.R. 1879 2 All. 253 was referred to.

In that case, A made an overture to B that if he would give him money, he (A) had influence enough to see that an increased pension be given to B. The offer was rejected by B, whereupon A said that B would rue the rejection. It was held that this was an attempt to obtain a reward under section 161 of the Indian Penal Code which is a similar section to our section 115 of the Penal Code. With that view, this Court is in agreement.

Both grounds of appeal failed and the appeal is dismissed.

***Appeal dismissed.***

## AYA AGEE *v.* ZARIA NATIVE AUTHORITY

[C.A. (Hurley, C.J., Jibir Daura, Sh. Ct. J. and Bello, Ag. J.)—
December 18, 1963]
[Kaduna—Appeal No. Z/44CA/1962]

*Criminal law—procuration of minor girl—meaning of "illicit intercourse with another person"—Penal Code, s.* 275.
*Words and phrases—"another person"*—ibid.

To constitute the offence of procuring a minor girl under s. 275 of the Penal Code, it is necessary to show that the accused procured the girl for illicit intercourse with some person other than himself.

The accused was convicted of an offence under s. 275 of the Penal Code. The evidence showed that the girl lived with her brother and that the accused wished to marry her. The girl's brother told the accused that he would need to obtain the permission of her parents but told the girl that he was going to give her in marriage to someone else. The girl thereupon ran away to the accused and he hid her in a friend's house for five days. On appeal,

*Held,* that to constitute the offence under s. 275, it was necessary to show that the accused procured the girl for illicit intercourse with some person other than himself.

CRIMINAL APPEAL FROM NATIVE COURT

*Alhaji R. O. Gaji* for the appellant;

*A. R. H. Thomas, Senior State Counsel,* for the respondent.

**Hurley, C.J.,** delivering the judgment of the Court: The appellant was convicted of an offence against section 275 of the Penal Code, which pro..des as follows:—

> "Whoever, by any means whatsoever, induces any girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punished with imprisonment . . ."

The evidence showed that the girl lived with her brother at Zaria. The appellant proposed marriage to her and had been visiting her and her brother for two years with that in view. Her brother told the appellant that if he wanted to marry the girl he must get the consent of her parents, who were in their town; but according to the girl's evidence, her brother told her he was going to give her in marriage to someone else. She therefore ran away to the appellant and joined him at Kaduna. She told the appellant that she had come without her brother's knowledge, and he said he would hide her in his friend's place. He kept her at his friend's house for five days.

After the evidence had been heard, the appellant was charged as follows:—





> " . . . that on the 25th October, 1962, you induced a girl of sixteen and kept her in your friend's house for five days with the hope of seducing to illicit intercourse."

In reply to the charge, the appellant said, "I agree that I committed my offence." Convicting him, the trial court said, "You kept her in the room of your friend at Kaduna for five days with the hope of seducing her to illicit intercourse.'

Neither the evidence nor the charge nor the trial court's finding disclosed any offence under section 275. The offence created by section 275 is the offence of procuring a girl for intercourse with a third person—"with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person" The words "another person" do not refer merely to some person other than the girl, for if they did, they would be unnecessary and superfluous. To have any meaning of their own, these words must refer to some person other than the accused. The evidence did not show, and the charge did not allege, and the appellant did not admit, and the trial court did not find, that the appellant contemplated that the girl should have intercourse with a person other than himself. The proceedings do not disclose any offence against section 275, and the appeal is therefore allowed.

We would add that, so far as the evidence went, it failed to disclose an offence against section 275 for at least two other reasons, The first is that there was no evidence of the girl's age. The second is that the evidence, in our judgment, was not enough to show that the appellant had it in mind that the girl should or might have illicit intercourse with anybody. Illicit intercourse is intercourse other than between husband and wife. The evidence was that the appellant wanted to marry the girl, and there was no evidence to show that it was his object that he should have intercourse with her before that, or that anybody else should have intercourse with her.

*Appeal allowed; conviction and sentence set aside.*

## JOSEPH IDOWU ADUNKOKO *v.* ILORIN NATIVE AUTHORITY

[C.A. (Hurley, C.J., Abubakar Gummi, G.K., J. A. Smith, S.P.J., Haliru Binji, D.G.K. and Ahmad, J.)—April 7, 1964]

[Kaduna—Appeal No. Z/7CA/1963]

*Criminal procedure—court taking cognizance of offence—complaint by person aggrieved by offence of injurious falsehood under chapter XXIII, Penal Code—falsehood concerning private individual—whether First Information Report complaint by person aggrieved—Penal Code, s.* 393*; Criminal Procedure Code, ss.* 1, 141.

——————— *irregular proceedings—erroneously taking cognizance of offence—absence of lawful complaint—Criminal Procedure Code, ss.* 143, 152, 379(*c*).

The appellant was convicted in a provincial court of publishing a false statement intended to harm the reputation of the Emir. The proceedings were initiated by a First Information Report signed by a native authority police officer.

*Held:* (1) The First Information Report was not a complaint by a "person aggrieved" for the purposes of s. 141 of the Criminal Procedure Code and the court was therefore not empowered to take cognizance of the offence.

(2) S. 379 of the Criminal Procedure Code did not save the proceedings, since the words "not empowered by law" in that section cannot be taken as covering a case in which there is no complaint as required by law. The trial was therefore a nullity.

Cases referred to:

*Adam Shiwa v. Bornu Native Authority, supra,* p. 66, in part not followed; *Ramdin Lal v. Emperor*, A.I.R. 1937 Patna 176, followed.

(*Editorial Note.*—The Court in this case took note of its decision in *Adam Shiwa v. Bornu Native Authority*, supra, p. 66. It considered the application of s. 379 of the Criminal Procedure Code in cases in which the complaint is defective or absent, and found it unnecessary to follow so much of the decision in *Adam Shiwa's* case as is reported under Held (2) at p. 66.)

CRIMINAL APPEAL FROM PROVINCIAL COURT

*C. A. Adefarasin* for the appellant;

*A. R. H. Thomas, Senior State Counsel,* for the respondent.

**Hurley, C.J.,** delivering the judgment of the Court: This is an appeal from the Provincial Court, Ilorin, against a conviction and fine for an offence under section 393 of the Penal Code, by publishing a false statement intended to harm the reputation of the Emir of Ilorin. The case was tried, not on any complaint made by the Emir to a court, but on a First Information Report signed by a lance-corporal of the Ilorin Native Authority Police. The appeal has been argued on the ground



that, in those circumstances, the trial was a nullity in that the trial court had no jurisdiction to try the case. Learned Senior State Counsel appearing for the respondent does not support the conviction.

Section 393 of the Penal Code is contained in chapter XXIII of the Code. By section 141 of the Criminal Procedure Code, no court shall take cognizance of any offence falling under, *inter alia*, chapter XXIII of the Penal Code, except upon a complaint made by some person aggrieved by such offence. By section 2 of the Criminal Procedure Code, "complaint" means the allegation made orally or in writing to a court, with a view to its taking action under the Code, that some person has committed an offence, but except where the context otherwise requires it does not include a police report. In our view, for the purposes of section 141 of the Criminal Procedure Code, the person aggrieved by an offence under section 393 of the Penal Code is the person whose reputation is affected by the false statement made in contravention of that section, and in the context of section 141 a complaint does not include a police report. The First Information Report in this case was a police report, not a complaint. Since it was not a complaint, and was not a complaint made by the person aggrieved by the alleged offence under section 393, the trial court was prohibited by section 141 of the Criminal Procedure Code from taking cognizance of the offence.

By section 2 of the Criminal Procedure Code, "take cognizance" with its grammatical variations means take notice in an official capacity. By section 143, a court may take cognizance of an offence in any of the circumstances there stated, subject, however, to the provisions of chapters XIII and XIV of the Code, which latter chapter contains section 141. By section 152:

> "When a court taking cognizance of an offence is satisfied that there is sufficient ground for proceeding, it shall after causing process to issue for the attendance of the accused person, if he is not already in custody or on bail, proceed either to hold an inquiry into the offence or to try it provided that the court is competent so to do."

The case for the appellant is that section 141, by prohibiting the trial court from taking cognizance of the offence here except on the complaint of the person aggrieved, equally prohibited the court from trying it; by the effect of section 141, the court could not lawfully take cognizance of the offence on the First Information Report, and therefore it could not lawfully try it. We think that that is indeed the intention and effect of section 141. However, we have to consider the effect of section 379, which provides:

> "If any court or justice of the peace not empowered by law to do any of the following things, namely—
> (*a*) to issue a search warrant under section 74;
> (*b*) to direct, under section 120, the police to investigate an offence;
> (*c*) to take cognizance of an offence under section 143,
> erroneously in good faith does any such thing, the proceedings shall

not be set aside merely on the ground that the court or justice of the peace was not so empowered."

The appeal turns on the construction and application of section 379.

The section has already been considered by the High Court on two separate occasions and has been given a different construction on each and in consequence this Court of five Judges has been convened to resolve the question. The first occasion when the section came up for consideration was during the December, 1962, appeal sessions at Ilorin, when the present case came before the Court as an appeal against a conviction under section 392 of the Penal Code in the Chief Alkali's Court of Ilorin, the proceedings having been taken on the First Information Report already referred to. The point was not fully argued, learned counsel for the appellant having conceded that section 379 was against him. Taking the view that section 379 cured the whole of the proceedings in the lower court, this Court allowed the appeal on other grounds and ordered a retrial in the provincial court; and the present appeal is an appeal against the decision on the retrial. Subsquently, at the April 1963 appeal sessions at Maiduguri, in *Adam Shiwa v. Bornu Native Authority* [*supra*, p. 66], where the appellant had been convicted under section 392 of the Penal Code on the complaint of a native authority police constable who was not the person defamed, this Court held that section 379 cured the taking cognizance in the lower court but not the trial proceedings there.

Having heard the very helpful arguments of learned counsel for the appellant and learned Senior State Counsel in this appeal, and considered the authorities they have cited, we are of opinion that the appeal must be allowed, not on the ground upon which *Adam Shiwa's* appeal was decided, but for the more fundamental reason that section 379 does not apply at all. In so holding, we are persuaded by the reasoning in the Indian case of *Ramdin Lal v. Emperor*, A.I.R. 1937 Patna 176, decided under the Indian Code of Criminal Procedure. In that Code, section 529 corresponds to section 379 of our Code, and section 190 corresponds to section 143. By section 190(1) certain classes of magistrate

> " . . . may take cognizance of any offence—
>
> (*a*) upon receiving a complaint of facts which constitute such offence;
>
> (*b*) upon a report in writing of such facts made by any police-officer; . . . "

By section 529:

> "If any Magistrate not empowered by law to do any of the following things, namely: . . .
>
> (*e*) to take cognizance of an offence under section 190, sub-section (1), clause (*a*) or clause (*b*); . . . erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered."





In *Ramdin Lal's* case the petitioner had been convicted of an offence of giving false evidence in a judical proceeding contrary to section 193 of the Indian Penal Code (which is Section 158 of our Penal Code). By section 195(1)(*b*) of the Indian Code of Criminal Procedure (which is comparable to section 140(1)(*b*) in chapter XIV of the Criminal Procedure Code), no court shall take cognizance of any offence punishable under, *inter alia*, section 193 of the Indian Penal Code when such offence is alleged to have been committed in, or in relation to, any proceeding in any court, except on the complaint in writing of such court or of some other court to which such court is subordinate. Section 476 lays down the procedure for making such a complaint. Ramdin Lal was prosecuted and convicted on the written complaint of a magistrate who was not the magistrate who had entertained the proceedings in which the false evidence was said to have been given nor a magistrate to whom the latter magistrate was subordinate. On revision, the Patna High Court set aside the conviction and sentence, saying:

> " . . . the complaint was presented by a Court which was not the proper Court having jurisdiction to present it . . .
>
> "It has been suggested that S.529(*e*) may assist the prosecution. Under this clause, if a Magistrate not empowered by law to take cognizance of an offence under S.190, sub-s.(1), Cl.(*a*) or Cl.(*b*) erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered. S.190, sub-s.(1), Cl.(*a*) refers to cases in which there is a complaint and cannot, I think, cover cases under which it has to be held that there is no complaint as required by law before the Court and the words 'not be [*sic*] so empowered' refer to a want of power in the Magistrate rather than a defect in or absence of the complaint itself . . .
>
> "More than once the absence of a complaint under S.476 has been held to be fatal to the subsequent proceedings . . . For these reasons the rule must be made absolute and the conviction and sentence set aside . . . "

Likewise under the Criminal Procedure Code, in our opinion, section 143 refers to cases in which there is a lawful complaint or First Information Report, that is, such complaint or First Information Report as is required by law for the prosecution of the particular offence, and section 379(*c*) does not cover any case where there is no complaint or First Information Report as required by law. The complaint required by law was absent in the case before us, section 379(*c*) did not apply, and the trial was a nullity. The appeal is allowed, and the conviction and sentence are set aside.

*Appeal allowed; conviction and sentence set aside.*

## UMARU CHAM *v.* GOMBE NATIVE AUTHORITY

[C. A. (Haliru Binji, D.G.K., Reed, Ag. S.P.J. and Bate, J.)—September 28, 1963]

[Jos—Appeal No. JD/95CA/1962]

*Constitutional law—fundamental rights—criminal trial—accused's rights to examine prosecution witnesses and call own witnesses—conditions to be satisfied—Constitution of the Federation*, 1960, *s.* 21(5) (*d*).

*Criminal procedure—cross-examination and calling of witnesses—duties of court—Criminal Procedure Code, s.* 389, *s.* 391(3).

*Appeal—criminal appeal—failure of court to recognise accused's right to adduce evidence and cross-examine witnesses—whether failure of justice occasioned*—ibid., *s.* 382.

*Words and phrases—"failure of justice"*—ibid.

The appellant was convicted in a native court of culpable homicide punishable with death and sentenced to death. He claimed, *inter alia*, that the procedure in the trial court had infringed his rights under s. 21(5)(*d*) of the Federal Constitution by the court's failure to ask him if he wished to call evidence or cross-examine the prosecution witnesses. He further claimed that these failures resulted in the trial procedure being contrary to the requirements of s. 389 and s. 391(3) of the Criminal Procedure Code that the court call upon the appellant to inform it of witnesses he wishes to call in his defence and ask him if he wishes the court to put any question to a witness on his behalf.

*Held:* (1) A court's failure to tell an accused person specifically that he has the right to call witnesses and to ask him whether he wishes to do so, does not infringe his Constitutional rights, provided that the accused is duly allowed to state his defence and that the court in fact hears the evidence of available witnesses of which it knows or should know.

(2) Similarly, failure to tell an accused person that he may cross-examine witnesses for the prosecution and to ask him whether he wishes to do so, does not infringe his Constitutional rights, provided that he is given the opportunity of agreeing or disagreeing with their evidence.

(3) Although on the face of the record the requirements of s. 389 and s. 391(3) of the Criminal Procedure Code had not been satisfied, the procedure followed indicated that no failure of justice had been occasioned.

Cases referred to:

*Buraima Ajayi and another v. Zaria Native Authority*, (2), 1964 N.N.L.R. 61. followed;

*Kano Native Authority v. Raphael Obiora*, 1960 N.R.N.L.R. 42, applied;
*Ubi Yola v. Kano Native Authority*, 1961 N.N.L.R. 103.

CRIMINAL APPEAL FROM NATIVE COURT

*C. Ikomi* for the appellant;

*P. A. Barreto, Crown Counsel*, for the respondent.





**Reed, Ag. S.P.J.,** delivering the judgment of the Court: This is an appeal against the decision of the Court of the Emir of Gombe convicting the appellant of culpable homicide punishable with death and sentencing him to death. The record states that the court found the appellant guilty of "intentional murder" under section 220(*a*) of the Penal Code. Section 220 states that: "Whoever causes death—(*a*) by doing an act with the intention of causing death or such bodily injury as is likely to cause death;. . . commits the offence of culpable homicide." But culpable homicide so defined is punishable with death, under section 221(*a*), only if the intention of causing death is proved, and not if the intention proved is no more than the intention of causing such bodily injury as is likely to cause death. In the latter case the offence is not punishable with death. However, the point was not raised in the appeal and, in our view, the finding of "intentional murder" is a finding of intention to cause death. We note too that the appellant was "sentenced to death under section 221(*a*) of the Penal Code".

Five grounds of appeal were argued by counsel for the appellant. Ground 1 was the general ground. After we had adjourned to consider our judgment, we noted that there was no evidence that Fatu Dumbulwa, the woman alleged to have been killed, was dead. The evidence was to the effect that she had been removed from her village with very serious head injuries but that she was then still alive. There was a statement of the doctor that he had "examined Fatu's corpse" but there was no evidence of identification of this body. We considered that we should exercise the power conferred on us by section 70(2) of the Native Courts Law and we ordered evidence to be adduced on this issue. We heard four witnesses and satisfied ourselves that Fatu Dumbulwa in fact died and that the body examined by Dr Hussain on 24th July, 1962, was the body of Fatu Dumbulwa. Having regard to this evidence and the evidence in the record, it cannot be said that the finding was unreasonable or that it cannot be supported having regard to the evidence. The first witness, Asamu'u, saw the appellant hit the deceased twice on the head with a pestle and "the head broke". The appellant himself admitted that he had quarrelled with her and that he "took a pestle and beat her three times, then she fell down." There was evidence that the deceased was found in a pool of blood with "her head broken". There is some confusion about dates but there is evidence that she died within twenty-four hours of receiving these injuries and the doctor's evidence is that she died of a fracture of the skull.

The second ground of appeal complains that the court below erred in accepting evidence when the witnesses were neither sworn nor affirmed. But in fact, as we pointed out in court, the original Hausa record makes it clear that they were affirmed and we are satisfied that there was compliance with sections 229 to 231 of the Criminal Procedure Code.

We shall deal with the third and fourth grounds of appeal later. The fifth ground complains that the trial court did not consider the

defence of provocation. That is so. But we can find no evidence which could possibly support a defence of provocation as defined by section 222(1) of the Penal Code.

Grounds 3 and 4 can be considered together. Ground 3 complains that the trial court did not give the appellant the opportunity of cross-examining all the prosecution witnesses and Ground 4 complains that the trial court did not explain to the appellant his right to call witnesses for the defence. Counsel referred us to sections 391 and 389 of the Criminal Procedure Code and these sections must be considered with reference to section 382. In view, however, of an observation of the Federal Supreme Court in *Buraima Ajayi and another v. Zaria Native Authority* [1964 N.N.L.R. 61], that consideration might have to be given to the question whether section 382 "can ever apply where one of the fundamental rights enshrined in the Constitution has been denied or withheld" we think we should look first to the relevant provision in the Constitution of the Federation.

Section 21(5) states that:

> "Every person who is charged with a criminal offence shall be entitled. . .(*d*) to examine in person. . .the witnesses called by the prosecution before any court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to the witnesses called by the prosecution;. . ."

Although the judgment in *Kano Native Authority v. Raphael Obiora*, 1960 N.R.N.L.R. 42, a decision of the Federal Supreme Court, deals with an accused person's rights in these respects by natural justice, we note that there is a remarkable similarity between the requirements of the Constitution and the requirements of natural justice. The Court said, at page 47:

> "We agree that natural justice requires that an accused person must be given the opportunity to put forward his defence fully and freely, and to ask the court to hear any witnesses whose evidence might help him. . ."

The Court stated that they did not agree with the view that—

> "opportunity to call a witness is denied to the accused person when he has not been specifically told that he has a right to call witnesses or asked if he wishes to call witnesses".

Later, the Court said:

> "As a rule, where the record shows that the accused was duly allowed to state his defence, and that the native court in fact heard the evidence of any witnesses who might be able to assist the court in arriving at the truth, and of whose existence it knew or should have known, whether from information supplied by the accused or otherwise, there will be no grounds for holding that there has been a denial of natural justice."





In our view, we should apply the same principles in deciding whether the appellant has enjoyed his right under section 21(5)(*d*) of the Constitution "to obtain the attendance and carry out the examination of witnesses to testify on his behalf".

With regard to the cross-examination of prosecution witnesses, the Court in *Obiora's* case said, with reference to the procedure of the native court:

> "The witnesses for the prosecution will then be called and after each of them had been examined, the accused would be asked 'what objection he had to the witness' or in other words what parts of his evidence he challenged or what questions he wished to put to him."

The Court went on to point out that legal representation was not permitted in native courts and said that—

> "many accused persons may well find it easier to put forward their cases under the procedure followed. . .than if they were restricted to cross-examination in the strict sense."

Now what was done in the appeal before us? The appellant was not specifically told that he had the right to call witnesses or asked if he wished to call them. But after he had been charged with "the offence of intentional murder" of Fatu his wife by hitting her with a pestle at Ashaka, "which broke her brain substance and she died", he said, "It is so, I beat her with a pestle". He then made a statement at some length and in the course of it said, "I took a pestle and beat her three times, then she fell down". After the statement the record continues:

> "*Court to the accused:* Have you something to say before a decision is taken on your case?
>
> "*Accused:* None."

The accused had the opportunity to state then that he wished to call witnesses, if such were the case. He had the opportunity to ask for witnesses to be called and he did not do so. We think that the trial court heard the evidence of any witnesses who might be able to assist it in arriving at the truth, of whose existence it knew or should have known.

With regard to the cross-examination of prosecution witnesses, the procedure followed by the trial court was, in effect, the same as that followed by the trial court in *Obiora's* case. After each prosecution witness had given his evidence-in-chief, the court asked the appellant if he agreed with the evidence. That is really the same as asking what objection he had to the witness, or, as the Court said in *Obiora's* case, "in other words what parts of his evidence he challenged or what questions he wished to put to him". In every case save one the appellant said he agreed with the evidence and that was the end of the matter. In one case he said he did not agree and immediately the court said, "Have you questions to ask this witness?", and the accused's questions and the witness's answers to them follow.

For these reasons we are of opinion that the appellant was not denied his rights under section 21(5)(*d*) of the Constitution of the Federation.

Next, it is necessary for us to decide whether there has been non-compliance with either section 389 or section 391(3) of the Criminal Procedure Code. A native court is bound by both these sections by virtue of section 386(2). Both sections go further than the requirements of the Constitution to which we have referred. Section 389 requires the court to "call upon" an accused person "to inform the court of the names and whereabouts of any witnesses whom he intends to call in his defence. . ." Section 391(3) requires the court, after hearing the evidence of any witness, to "ask an accused person if there is any question which he wishes the court to put to the witness on his behalf. . . . . "

On the face of the record, neither of these requirements was complied with. Section 382 of the Criminal Procedure Code states that:

> "Subject to the provisions hereinbefore contained, no findings, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal. . .on account of any error, omission or irregularity in the. . .proceedings before or during trial. . .unless the appeal court. . .thinks that a failure of justice has in fact been occasioned by such error, omission or irregularity."

In *Ajayi's* case, *supra*, the Court said, with reference to section 382:

> "We do not dissent from the view that for the purpose of that test the burden is on an appellant to show that the irregularity has led to a failure of justice."

In *Ubi Yola v. Kano Native Authority*, 1961 N.N.L.R. 103, this Court said, with reference to section 382:

> "We note that the language of the section requires that there shall be no interference with the findings of the trial court unless a failure of justice has actually been occasioned. A mere possibility that a failure of justice might have been occasioned is not enough to justify interference."

In *Ajayi's* case, the Court said that there is a failure of justice within the meaning of section 382, if the proceedings at the trial fall short of the requirement "not only that justice be done, but that it may be seen to be done" and that an appellant discharged the burden of proof that the irregularity had led to a failure of justice if it was shown that a reasonable person who was present at the trial might have supposed that the irregularity was such that it denied the appellant a fair trial.

We so direct ourselves but, having regard to what we have already said in this judgment, we are quite satisfied that no failure of justice was occasioned by the failure of the trial court to call upon the appellant to inform the court of the names and whereabouts of his witnesses. Similarly, no failure of justice was occasioned by the failure of the trial





court, after hearing the evidence of each prosecution witness, to ask the accused specifically if there was any question which he wished the court to put to the witness on his behalf. We would add that counsel for the appellant has not suggested to us that the appellant had questions he wished to put to the prosecution witnesses or that he had witnesses he wished to call.

For these reasons we dismiss the appeal. For the reasons given at the beginning of this judgment, however, we substitute a conviction under section 221 of the Penal Code for the conviction under section 220 (*a*) of the Penal Code. The sentence is affirmed.

*Conviction under s.* 221 ***substituted; sentence affirmed.***

## UMARU CHAM *v.* GOMBE NATIVE AUTHORITY (2)

[S.C.N. (Brett, J.S.C, Taylor, J.S.C., and Bairamian, J.S.C.) ——March 6, 1964]

[Lagos—Appeal No. FSC 487/1963]

*Appeal—appeal to Supreme Court—criminal appeal—notice of appeal signed by counsel—notice required to be signed by appellant himself—whether requirement may be waived—where appellant has not himself indicated any wish to appeal—Federal Supreme Court Rules*, 1961, *O. I, r.* 5*; O. VIII, r.* 4*; O. IX.*

——— ——— *departure from rules—waiver of non-compliance with rules—criminal appeal—notice of appeal not signed by appellant himself—where appellant has not indicated any wish to appeal* —ibid.

U.C. was convicted on a charge of culpable homicide punishable with death. He appealed to the High Court, which dismissed his appeal. A notice of appeal to the Supreme Court was filed, signed by U.C.'s counsel and not by U.C. himself. No question as to U.C.'s sanity was involved.

The Supreme Court was asked to hold that it had power under O. I, r. 5, or O. IX of the Federal Supreme Court Rules, 1961, to waive the requirement of O. VIII, r. 4(1), that a notice of appeal in a criminal case shall be signed by the appellant himself.

So far as the information available to the Supreme Court went, U.C. had not at any time indicated that he wished to appeal from the decision of the High Court.

*Held:* without deciding that there are no circumstances in which the requirement of r. 4(1) of O. VIII may be waived, no such circumstances existed in this case.

CRIMINAL APPEAL:

*J. A. Cole* for the appellant;
*A. R. H. Thomas, Senior State Counsel*, for the respondent.

**Brett, J.S.C.,** delivering the judgment of the Court: Umaru Cham was tried in the Native Court of the Emir of Gombe on a charge of culpable homicide punishable with death. He was convicted on 15th November, 1962, and appealed to the High Court of Northern Nigeria, which gave judgment dismissing the appeal, on 28th September, 1963. He was represented in the High Court by Mr Clement Ikomi, who was present when the judgment of the High Court was read, and the record of the proceedings in the High Court shows that after the judgment had been read the following took place:—

> "Ikomi wishes to give notice of appeal. Undertakes to undertake giving notice. Appellant informed of rights of appeal."

A notice of appeal was later filed, signed by Mr Ikomi and not by Umaru Cham.





Order 8, rule 4 of the Federal Supreme Court Rules provides that except where a corporation wishes to appeal, or where a question as to the sanity of a convicted person is involved, a notice of appeal in a criminal matter shall be signed by the appellant personally. We were asked to hold that the Court had power to waive this requirement either under Order 1, rule 5, or under Order 9, but without deciding that there are no circumstances in which the requirement may be waived, we do not consider that any such circumstances exist in the present case. There are good reasons for insisting that a notice of appeal should be signed by the convicted person himself. He may believe that an appeal would be hopeless and be unwilling to suffer the suspense of waiting for it to be determined. In a non-capital case, he may fear that he would fare worse if a retrial was ordered, and in the case of an appeal against sentence, he may not wish to take the risk of having the sentence increased. He may recognise that he has done wrong and feel that he can best expiate his wrong-doing by undergoing the sentence passed on him In the present case, Umaru Cham has not only not signed a notice of appeal but, so far as the information available to this Court goes, he has not at any time, whether within the period prescribed for the lodging of an appeal or after it had elapsed (when it would in any event have been too late, since the period cannot be extended in a capital case), indicated that he wishes to appeal from the decision of the High Court.

In the circumstances, this Court had no alternative but to strike out the appeal as not being properly before it.

*Appeal struck out.*

## JOHN SHIDIAK *v.* BANK OF WEST AFRICA LIMITED

[High Court (J.A. Smith, S.P.J.)—July 25, 1963]

[Jos——Suit No. JD/88/1962]

*Guarantee——obligations of creditor——extent of obligation to disclose to surety information affecting credit of debtor.*

*Contract——misrepresentation——duty of contracting party where other party illiterate——effect of misrepresentation.*

*Illiterates——person not totally illiterate but only unable to read language in which document written——whether able to claim protection of Illiterates Protection Ordinance, Laws of Nigeria,* 1948, *cap.* 88.

M.B.'s account with the defendant bank was overdrawn. The bank manager asked him to provide security for this overdraft. M.B. wished to increase the overdraft by £800 and the plaintiff agreed to act as surety in respect of this amount. Before he acceded to the request for the additional advance, the bank manager insisted once more to M.B. that he give proper security for the entire overdraft, amounting to over £3,000.

A memorandum of guarantee was drawn up by the defendants which made the plaintiff surety for the sum of £3,500. The plaintiff and B.M. both signed this memorandum. The plaintiff, however, was unable to read English (the language in which the memorandum was written) and the bank manager did not explain the terms of the memorandum to him, though the plaintiff knew the nature of the document he was signing. At the time of the signature, the plaintiff still believed that his liability as surety was in respect of £800.

The plaintiff sought a declaration that the memorandum was void as between him and the defendants.

*Held:* (1) Since the plaintiff was not totally illiterate but was only unable to read English, he could not claim the protection of the Illiterates' Protection Ordinance.

(2) The defendants were under no obligation to volunteer information to the plaintiff about the state of M.B.'s account before he signed the memorandum of guarantee.

(3) Since the bank manager knew that the plaintiff was unable to read English, he had a duty on behalf of the defendants to explain to the plaintiff that the memorandum contained terms which were not those that the plaintiff expected to find there and which were more favourable to the defendants. The failure to explain this amounted to an implied misrepresentation, which vitiated the agreement as between the plaintiff and the defendants.



Cases referred to:

*S.C.O.A., Zaria v. A. D. Okon,* 1960 N.R.N.L.R. 35;

*Paterson Zochonis & Company, Ltd. v. Momo Gusau and Baba Dan Kantoma,* 1961 N.N.L.R. 1; on appeal, *Mallam Baba dan Kantoma v. Paterson, Zochonis & Co., Ltd.,* 1964 N.N.L.R. 64, applied;

*African Sales Company, Ltd. v. E. Ayo and another,* F.S.C. 374/1961 (unreported), applied;

*Davies v. London and Provincial Marine Insurance Company,* (1878) 8 Ch. 469;

*Hamilton v. Watson,* (1845) 12 Cl. & F. 109;

*London General Omnibus Company, Ltd. v. Holloway,* [1912] 2 K.B. 72, applied.

CIVIL SUIT FOR DECLARATION

*R. C. Rickett* for the plaintiff;

*A. C. Grant* for the defendant.

**J. A. Smith, S.P.J.:** The plaintiff's claim was for a declaration that the memorandum of guarantee dated 20th May, 1960, made by the plaintiff (Mr John Shidiak) and Mr Maroun Bichara in favour of the defendant bank, the Bank of West Africa, Ltd., is void as between the plaintiff and the defendant bank.

The defendant bank counterclaimed the sum of £3,500 from the plaintiff as surety on this guarantee; £2,072 12*s* 1*d* represented the debt due to the defendant bank by Mr Maroun Bichara as principal and £1,427-7*s*-11*d* due from Mr Maroun Bichara as surety of the indebtedness to the bank of Mr Joseph Michael Bichara. During the hearing, the counterclaim in respect of the sum of £1,427 7*s* 11*d* was withdrawn.

The document in question was Exhibit J.S. 20. It is a printed form of guarantee in which the names and addresses of the parties and the figures and words of the principal sum guaranteed are typewritten.

Clause 1 thereof reads:

"To the Bank of British West Africa Ltd.

1. We John Shidiak and Maroun Eichara,
20 Naraguta Street,
Post Office Box 236. Jos,

in consideration of your granting or continuing banking accommodation at our request to Maroun Bichara, 20 Naraguta Street, Jos (hereinafter called 'the Customer(s)') hereby jointly and severally guarantee payment to you on demand of all sums which now are or at any time or times hereafter may become due or owing or may be accruing or becoming due to you by the customers either alone or jointly with any person or persons on any account or in respect of any liability whatsoever and whether in the character of principal debtor guarantor or surety or otherwise howsoever together with interest on all such sums to the date of payment and all other usual banking charges and all costs and expenses.

"And we agree to pay to you interest at five per cent per annum on all sums due from us hereunder from the date of discontinuance of this Guarantee by us or any or either of us or demand by you until payment.

"Provided that the total amount recoverable from us hereunder is limited to the principal sum of (£3,500) THREE THOUSAND FIVE HUNDRED POUNDS with interest thereon as aforesaid."

This document was signed by the plaintiff and Mr Maroun Bichara and dated 20th May, 1960. In his particulars of claim, the plaintiff averred *inter alia* that:

> "3. The plaintiff did not read the said form of guarantee owing to his illiteracy nor was it translated to him.
>
> 4. Before signing the said guarantee the plaintiff was verbally assured by . . . Hugh Musgrove it was in respect of the sum of £800 only.
>
> 6. The plaintiff was induced to sign the said form of guarantee by the false representation that it was in respect of the sum of £800 only.
>
> 7. The plaintiff contends that the figures and words '(£3,500) Three thousand five hundred pounds' which now appear in the said form of guarantee were not present at the time of his signature and have been added afterwards.
>
> 8. Alternatively the plaintiff contends that the figures and words '(£3,500) Three thousand five hundred pounds' were not pointed out or read to him at the time of his signature.
>
> 9. The plaintiff implicitly relied on the said Hugh Musgrove's assurance that the form of guarantee was in respect of a sum of £800 only."

The gravamen of the plaintiff's averments was to the effect that Mr Musgrove, the manager of the Bank of West Africa, Ltd., Jos, falsely represented to the plaintiff that the document the plaintiff signed was a guarantee of Mr Maroun Bichara's account in the sum of £800; that at the time the plaintiff signed it the amount of the guarantee had not been entered and that later a sum of £3,500 was inserted; or alternatively that the figure of £3,500 in the document was not pointed out to the plaintiff, nor was the document translated or explained to him, the plaintiff being illiterate.

It will be convenient to consider at the outset the question whether or not the figure of £3,500 had been inserted in Exhibit J.S. 20 before the plaintiff signed that document. The plaintiff himself said he did not look at the document when he signed it and was consequently unable to say whether or not the figures and words of £3,500 had been typed in the document at that time. Mr Maroun Bichara, the second witness for the plaintiff, also said he signed the document without reading it and could not be sure if the amount had been filled in at that time. Mr Musgrove, the manager of the defendant bank at Jos, said the amount had been typed in words and figures before the parties signed it. He was cross-examined as to this and it was suggested to him that the names of the parties had been typed on the document at a different time from that on which the words and figures of £3,500 were typed in. Mr Musgrove said they were not typed in at different times. The presumption is that the document was complete when the parties signed it and the plaintiff has not produced proof to show the





contrary. I therefore find that the figures and words of £3,500 had been inserted in the document before it was signed by the parties. That disposes of paragraph seven of the particulars of claim.

The story of the £800 starts with Mr Maroun Bichara, who needed that amount to send his brother's wife home. In the month of May, 1960 he asked the bank for £800 to be transferred to Kano but did not explain why he wanted the £800. Mr Maroun Bichara's account with the defendant bank was at this time overdrawn to the extent of about £2,400. His evidence as to his interview with Mr Musgrove, the manager, was as follows:

> "In May, I asked the bank for £800 to transfer this sum to Kano. I asked Mr Musgrove, the manager. He would not let me have the money unless I cleared my overdraft. I then went to the plaintiff and asked him if he would guarantee me. This was in the second half of May and we went to the bank together. We saw Mr Musgrove. The plaintiff asked Mr Musgrove to give me the £800 and he (the plaintiff) would guarantee me. We went away. There was no document at that time",

and in cross-examination he said: "I asked the plaintiff to guarantee my personal account. It was the day I asked him to guarantee me for £800." Mr Maroun Bichara said that after the plaintiff and himself had seen Mr Musgrove, he (the witness) drew a cheque for £800 but a clerk of the defendant bank returned it to him unpaid. He said he went and informed the plaintiff who again accompanied him to the bank and they saw Mr Musgrove together. The latter agreed to an advance of £800, prepared a cheque which Mr Maroun Bichara signed, and the money was transferred to Kano. The cheque is in evidence as Exhibit J.S. 29 and is dated 20th May, 1960. As to the signing of the document, Exhibit J.S. 20, Mr Maroun Bichara said:

> "Exhibit J.S. 20 contains my signature. Only the manager and myself were present when I signed it. The plaintiff's signature was already on the document when I signed it. I was not present when the plaintiff signed. When I saw the plaintiff's signature on Exhibit J.S. 20, I signed it without looking. I cannot be sure if the amount had been filled in at the time I signed it. Mr Musgrove did not tell me the amount the document was for."

In cross-examination, Mr Maroun Bichara admitted that he had in 1959 jointly with the plaintiff approached the defendant bank for an overdraft to complete the building of a cinema in which the plaintiff and the witness were interested. No advance was made to them jointly for this purpose but the witness financed the building of the cinema from sales of textiles, which transaction he operated through his account with the defendant bank. He said that at first he repaid the advances at the end of each month and then (I quote):

> "It was after March, 1960, when my trade was going into financial difficulty, that I was first asked for security . . . I had no property except part of the Certificate of Occupancy of the

Ambassador's Cinema. I offered the Certificate of Occupancy as security when I asked for the additional £800 in May, 1960 . . . "

Later, he said:

> "I did not explain to Mr Shidiak why the mortgage had to be signed. But in order to obtain the facility I required of £800, we signed the mortgage. I signed the mortgage in the presence of Mr Shidiak in the manager's office. I did not explain to the manager why I required the £800—nor did Mr Shidiak explain . . . "

It is apparent from this evidence that Mr Bichara was well aware that he would not get an extra advance of £800 from the bank unless he provided security to cover the whole of his overdraft. The mortgage he referred to was not produced in evidence. It was executed on a different occasion from that on which the document Exhibit J.S. 20 was signed.

Mr Musgrove, the manager of the defendant bank at Jos, said that in November, 1959 he received a letter signed by the plaintiff and Mr Maroun Bichara (Exhibit J.S. 25) in which they asked for a loan of £7,680 to complete the cinema which they were constructing at Bukuru. Negotiations followed, as a result of which he said he agreed to grant Mr Maroun Bichara facilities on his account with the bank up to a limit of £3,500, upon the plaintiff and Mr Maroun Bichara agreeing to mortgage the cinema to the bank and depositing the "title deeds". Mr Musgrove said he received the "title deeds" about April, 1960. He also said that about April-May, he started to return cheques signed by Mr Maroun Bichara and about that time reviewed the bank's security. He called Mr Maroun Bichara to the office and told him the bank would insist upon "a guarantee signed by both gentlemen in favour of himself". The manager said he had the document Exhibit J.S. 20 prepared and gave it to Mr Maroun Bichara and he signed it. Mr Musgrove said he suggested Mr Bichara took it away and got the plaintiff to sign it. Mr Maroun Bichara declined, on the ground that at that time the plaintiff and he were not on speaking terms; but undertook to bring the plaintiff to the bank when they were friends. Mr Musgrove said that on 20th May, 1960, the plaintiff and Mr Maroun Bichara came to his office, that he brought out Exhibit J.S. 20 from his safe and asked the plaintiff to sign it. He said the plaintiff and Mr Maroun Bichara had a long talk in Arabic which he (Mr Musgrove) did not understand and then the plaintiff signed the guarantee. Mr Musgrove continued:

> "After the guarantee was signed, Mr John Shidiak (the plaintiff) asked if I would permit Mr Maroun Bichara . . . additional facilities of £800, to be repaid within one month. The purpose of this money was, I was told, to buy textiles. And on the same day a telegraphic transfer was made to Kano in favour of Pierre Shidiak for £800. When Mr John Shidiak asked for £800, I agreed to it and made out a cheque which Mr Maroun Bichara signed and the money was remitted."





The cheque for £800 signed by Mr Maroun Bichara was Exhibit J.S. 29. Mr Musgrove further said:

> "After the £800 transaction was completed, Mr John Shidiak asked me to inform him if the £800 had not been repaid by Mr Maroun Bichara within the period of one month."

On 20th June, 1960 Mr Musgrove wrote the following letter (Exhibit J.S. 1). to the plaintiff:

> "Dear Sir,
>
> *Maroun Bichara*
>
> We wish to inform you that the £800 granted to the above on 20th May at your personal request and which was due to be repaid today is still outstanding. We should be obliged therefore if you would kindly press Mr Maroun Bichara for the early liquidation of this temporary facility.
>
> Yours faithfully,
> *for:* Bank of West Africa Limited,
> H. W. MUSGROVE,
> *Manager.*"

He said he did not receive a reply to this letter and the bank pressed Mr Maroun Bichara for repayment of the whole sum owing and not the £800 in particular. On 2nd June, 1960, Mr Maroun Bichara guaranteed the overdraft of his brother Mr Joseph Bichara. Cross-examined as to the extent of Mr Maroun Bichara's overdraft on various dates, Mr Musgrove said on perusing the bank statement (Exhibit J.S. 27) of Mr Maroun Bichara's account that on the 20th May, 1960, the overdraft was £2,397-17*s*-10*d* at the start of business on that day and £3,200-5*s*-10*d* as at the close of business on that day; and on 2nd June, 1960 the overdraft was £3,098-6*s*-10*d*. Mr Musgrove in his evidence has laid stress upon the state of Mr Maroun Bichara's overdraft, in respect of which the bank wanted a guarantee. As to the extra £800, Mr Musgrove stated that the request for this additional sum was not made by the plaintiff until after the guarantee Exhibit J.S. 20 had been signed. He made no reference to any earlier requests by Mr Maroun Bichara for an advance of £800, implying thereby that the first time he was asked for this sum was after the signing of the guarantee. I accept that a request for security for the overdraft had been made by Mr Musgrove to Mr Maroun Bichara, as he has admitted, before the latter had asked for the extra £800. But I also believe that the request for the £800 had been made before the guarantee was signed. I have come to the conclusion that when the request for £800 was made, Mr Musgrove took the opportunity of insisting that proper security for the overdraft be given, before he acceded to the advance of £800; and that Mr Maroun Bichara was aware of this.

The plaintiff's story was that in 1960, Mr Maroun Bichara told him he needed £800 to send his brother's wife home and asked the plaintiff to speak to Mr Musgrove; that the plaintiff asked Mr Bichara when he would settle the amount and he replied in a month; that they

both went to the bank and the plaintiff asked Mr Musgrove to give Mr Bichara £800 and he (the plaintiff) would stand surety for one month and Mr Musgrove agreed. But later, Mr Bichara reported to the plaintiff that his (Bichara's) cheque for £800 had been returned unpaid. The plaintiff then went alone to see Mr Musgrove and asked why the £800 had not been given to Mr Bichara. Then, said the plaintiff, Mr Musgrove brought out a paper and told the plaintiff to sign it. This he did—he signed Exhibit J.S. 20—and said there was no other signature on the document at the time. He further said the document was not explained to him and he signed it without looking at it, assuming it was a guarantee for £800 and relying on the good faith of the bank manager.

The plaintiff said that he could read Arabic but he could not read English, though he could read figures. Evidence was led in support of this statement and I accept as a fact that the plaintiff could not read English but understood figures.

The next question of fact that requires consideration is what knowledge, if any, had the plaintiff of the existence of the overdraft owing from Mr Maroun Bichara to the bank in May, 1960, before any request was made for the £800. The plaintiff himself did not say anything about this in his evidence. Mr Maroun Bichara merely said in evidence that he asked the plaintiff to guarantee his personal account and that he needed £800, thereby implying that his account would be overdrawn £800 when this amount was paid and the guarantee was needed to cover that amount. Mr Musgrove, as representative of the defendant bank, did not enlighten the plaintiff as to the true position of Mr Maroun Bichara's overdraft. On that evidence, I find as a fact that the plaintiff was not aware of the money owing on the overdraft by Mr Bichara to the bank and that he promised to be surety to the extent of £800 only.

There is a conflict in the evidence as to whether or not Mr Maroun Bichara was present when the plaintiff signed the document Exhibit J.S. 20 and whether or not the plaintiff or Mr Maroun Bichara signed first. It is agreed that the plaintiff signed the document in the presence of Mr Musgrove. According to the plaintiff, he was alone with Mr Musgrove when he signed the document; Mr Musgrove did not explain the document to him; and the plaintiff himself did not read it before signing. According to Mr Musgrove, Mr Maroun Bichara was present when the plaintiff signed; that he (Mr Musgrove) did not explain the document to the plaintiff but Mr Bichara spoke to the plaintiff in Arabic, a language Mr Musgrove did not understand. Whichever of these stories is correct, the result on the issues in this case is the same. Both stories disclose that Mr Musgrove made no representations to the plaintiff before he signed but remained silent and that Mr Musgrove did not choose to enlighten the plaintiff as to the contents. What the plaintiff signed was not a guarantee for £800 as he supposed he was signing, but a guarantee to the extent of £3,500 as surety for money owing to the bank then or later by Mr Maroun Bichara as principal debtor or as surety. On 2nd June, Mr Maroun Bichara signed a guarantee as surety of the bank account of his brother, Mr Joseph





Michael Bichara. Thus, if Exhibit J.S. 20 was binding upon the plaintiff by signing, he in the result made himself liable as surety for the bank accounts of each of the brothers.

I find as facts that (1) the plaintiff did not read Exhibit J.S. 20 before signing it; and (2) that the contents of the document were not explained to him by Mr Musgrove before the plaintiff signed. As to whether or not the plaintiff knew the nature of the document he was signing as opposed to the contents thereof, I have come to the conclusion that he knew he was signing a guarantee as surety for a loan of money by the bank to Mr Maroun Bichara. The plaintiff was not a customer of the defendant bank.

I now come to consider the law in relation to the facts of this case.

The plaintiff averred in his particulars of claim that he was illiterate and it transpired that he did not read English. Learned counsel for the plaintiff cited *S.C.O.A., Zaria v. A. D. Okon*, 1960 N.R.N.L.R. 35, which went on appeal to the Federal Supreme Court, and learned counsel for the defendant bank cited *Paterson Zochonis & Company, Ltd. v. Momo Gusau and Baba Dan Kantoma*, 1961 N.N.L.R. 1 and the judgment on appeal to the Federal Supreme Court [1964 N.N.L.R. 54]. All these decisions dealt with the question of what persons were entitled to the protection of the Illiterates Protection Ordinance and were considered by the Federal Supreme Court in the later case of *African Sales Company Ltd. v. E. Ayo and another*, F.S.C. 374/1961 (unreported), decided on 5th March, 1963, where the Court followed its decision in *Paterson Zochonis & Company, Ltd. v. Momo Gusau and Baba Dan Kantoma*, holding that the word "illiterate" refers to "a person totally illiterate in the sense that he is unable to read or write in any language". Thus the fact that the plaintiff in the present case could not read English but was literate in Arabic did not entitle him to the protection of the Ordinance.

In order to succeed on paragraphs four and six of his particulars of claim, it was necessary for the plaintiff to prove that representations had been made to him by Mr Musgrove which induced the plaintiff to sign Exhibit J.S. 20 and that those representations were untrue. As I have said earlier in this judgment, there was no evidence that Mr Musgrove made any positive representations to the plaintiff. And now I come to the alternative averments which are to the effect that Mr Musgrove, as the representative of the defendant bank, did not disclose to the plaintiff the true position and intention of the contract of guarantee as between Mr Maroun Bichara and the bank. I am satisfied on the evidence that Mr Musgrove realised that the plaintiff believed that he was going to sign a guarantee for £800 only and that Mr Musgrove did not offer to the plaintiff any explanation as to the contents of the document Exhibit J.S. 20. It is accepted law that a contract of guarantee is not one in which there is a universal obligation to make a full disclosure of all the circumstances. But, in the words of Fry, J. in *Davies v. London and Provincial Marine Insurance Company*, (1878) 8 Ch. 469, at page 475:

"Very little said which ought not to have been said and very little not said which ought to have been said would be sufficient to prevent the contract being valid."

Now I think it is clear that had the plaintiff asked Mr Musgrove what was the state of Mr Maroun Bichara's account with the bank, Mr Musgrove was under a duty to give a true answer; and had the plaintiff asked him to explain the effect of the document he was under a duty to explain. But the plaintiff did neither of these things.

The principles upon which a banker-creditor is under a duty to the proposed surety to give information material in relation to the suretyship were explained by Lord Campbell in *Hamilton v. Watson*, (1845) 12 Cl. & F. 109, at page 119 and quoted by Vaughan Williams, L.J. in *London General Omnibus Company, Limited v. Holloway*, [1912] 2 K.B. 72, at pages 78-9, as follows:

> "Unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure: and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect: and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question and he must gain the information which he requires."

Commenting on this, Vaughan Williams, L.J. said, at page 79:

> "Lord Campbell, it is true, takes as his example of what might not be naturally expected an unusual contract between creditor and debtor whose debt the surety guarantees, but I take it this is only an example of the general proposition that a creditor must reveal to the surety every fact which under the circumstances the surety would expect not to exist, for the omission to mention that such a fact does exist is an implied representation that it does not. Such a concealment is frequently described as 'undue concealment'."

Kennedy, L.J., in his judgment in the same case, drew the distinction between intrinsic and extrinsic circumstances and continued, at page 87:

> "On the other hand, in the case of the suretyship or guarantee of a financial account, the previous pecuniary dealings between the creditor and the person whose future liability the surety is invited to secure constitute only extrinsic circumstances. They may be material circumstances, such as might affect the judgment of the person who is asked to be surety. But in the language of Sir Frederick Pollock . . ., 'the creditor is not bound to volunteer information as to the general credit of the debtor or anything else which is not part of the transaction itself to which the suretyship relates: and on this point there is no difference between law and equity.' "





It appears from these *dicta* that the defendant bank was under no obligation to volunteer the information that Mr Maroun Bichara's account was already overdrawn before the plaintiff agreed to be surety for the £800. But I think that the bank was under a duty to explain to the plaintiff, who could not read English, that the document the bank itself had prepared for the plaintiff to sign did not contain the terms and conditions which the plaintiff expected to find in it but different terms and conditions which were more favourable to the bank and based on a different agreement between the bank and Mr Maroun Bichara. The failure of Mr Musgrove on behalf of the bank to make any explanation when he handed the document to the plaintiff to sign amounted to an implied representation. It implied that the document prepared by the bank contained the terms and conditions of an agreement by the plaintiff to stand surety for a specific sum of £800 to be advanced to Mr Maroun Bichara, which he was to repay within one month, and if he did not pay, the bank were to notify the plaintiff. It is true that had the plaintiff been able to read English he could have found out for himself what the document contained before he signed it. But the plaintiff had no reason to suspect that the document would not contain the terms and conditions he had agreed and he was left in ignorance of what were the actual terms of the document. In the circumstances of this case, I hold that the plaintiff was not bound by the document he signed and I order that the contract be rescinded to the extent of excluding the plaintiff from the obligations of a surety as set out in the document Exhibit J.S. 20.

I enter judgment for the plaintiff on the claim and it follows from the rescission of the plaintiff's obligation on Exhibit J.S. 20 that there also be judgment for the plaintiff on the counterclaim.

Costs to the plaintiff assessed at eighty guineas inclusive of disbursements.

*Judgment for the plaintiff.*

## DOMINIC O. OKENYI *v.* IDOMA NATIVE AUTHORITY

[C.A. (Reed, Ag. S.P.J., J.P. Smith, J. and Abubakar Mahmud, Sh. Ct. J.)—December 13, 1963]

[Makurdi—Appeal No. MD/12CA/63]

*Criminal Law—attempt—attempt to cheat—no representation intended to deceive—no act directly connected with such representation—Penal Code, s.* 320.

The appellant was the Supervisor of Works employed by the Idoma Native Authority. He took the native authority's labourers and masons from their work and got them to work in his private building with native authority tools, intending to cheat the native authority by using the workmen to do work on his private building for which the native authority would pay. He was convicted of an attempt to cheat the native authority.

*Held*, allowing the appeal, that the appellant's act in getting the workmen to work on his private building was not sufficiently proximate to any act of deceiving the native authority into believing that the workmen had been employed on native authority work so that the native authority should pay them. The appellant could be guilty of cheating only if he made some representation, whether by words or conduct, to that effect, and he could be guilty of an attempt to cheat only if he committed an act directly connected with such representation.

CRIMINAL APPEAL FROM NATIVE COURT

*L. C. Anoliefo* for the appellant;

*M. B. Belgore, State Counsel*, for the respondent.

**J. P. Smith, J.,** delivering the judgment of the Court prepared by Reed, Ag. S.P.J.: The appellant was convicted in the Oturkpo Court of attempting to commit the offence of cheating and was sentenced to imprisonment for 9 months. He appealed to the Provincial Court. The Provincial Court confirmed the conviction but reduced the sentence to a fine of £25, in default 3 months' imprisonment. The appellant now appeals to this court against the conviction.

The appellant was, at the relevant time, the supervisor of Works employed by the Idoma Native Authority. The trial court found that he had taken—

> "the Idoma N.A. labourers and masons from their official point of work, with the N.A. working tools to work in the private building of the 1st accused (the appellant)."

We can find no fault with this finding of fact made by the trial court on the evidence before it. The trial court also found, as a fact, that the appellant intended to cheat the Idoma Native Authority by using the workmen to do work on his private building for which the Native Authority would pay. Again we see no reason to dissent. The question





for this court is whether the trial court was justified, upon these findings of fact, in coming to the conclusion that the appellant had, in law, attempted to cheat the Native Authority.

The offence of cheating is defined by section 320 of the Penal Code. This section reads, to fit the facts alleged in the case before us, as follows—

> "Whoever by deceiving any person—
> (*b*) intentionally induces the person so deceived to do . . . anything which he would not do . . . if he were not so deceived and which act . . . causes . . . damage . . . to that person in . . . property, is said to cheat."

This means, we think, that the appellant would have been guilty of an offence under section 320 if (1) he had deceived the Native Authority to believe that workmen had worked for the Native Authority when, in fact, they had worked for him, the appellant, on his private building and (2) the Native Authority, acting upon such deception and believing it to be true, had paid the wages of these workmen.

There are three steps in the commission of an offence. First, there is the intention to commit it. Secondly, there is preparation to commit it. Thirdly, there is an attempt to commit it. If the attempt is successful the offence is complete. Mere intention to commit an offence, not followed by any act, creates no offence. Nor is there an offence if there is nothing more than intention to commit it followed by an act, or acts, which are mere preparation to commit the offence; there is no offence until there is intention to commit the offence followed by an act which constitutes an attempt to commit the offence and which goes beyond mere preparation to commit it. An act which is only remotely connected with the commission of the full offence is preparation; it is an attempt only if it is immediately connected with it. (We would add that what we have said in this paragraph is the law *unless* the legislature has expressly provided to the contrary. For example, section 304 of the Penal Code provides that *preparation* to commit the offence of brigandage shall itself be an offence and thereby creates an exception to the general rule).

The essence of the offence of cheating under section 320 of the Penal Code is that the person charged "*deceived*" the person cheated. It follows, in the appeal before us, that the appellant can be convicted of attempting to cheat the Native Authority only if his act was immediately connected with deceiving the Native Authority. In our view it is not. The appellant's act in getting the workmen to work on his private building is not sufficiently proximate to the act of deceiving the Native Authority into believing that the workmen had been employed on Native Authority work so that the Native Authority should pay them. The appellant could be guilty of cheating, in our view, only if he made some representation, whether by words or conduct, to that effect; and he could be guilty of an attempt to cheat only if he committed an act directly connected with such a representation.

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Perhaps an example will make what we mean clear. Let us suppose that the workmen had worked for, say, two days on the appellant's private building and, at the end of the month, the Native Authority had paid them for working on those days in the belief that they had worked for the Native Authority. Could it be said that the appellant had deceived the Native Authority? In our view it could not unless the appellant had, in addition, made some representation, either by words or conduct to the Native Authority that the workmen had worked for the Native Authority for those two days. He might, for instance, have signed a certificate to that effect, or done something, such as authorising their payment on behalf of the Native Authority, from which such a representation could be inferred; and in such cases the appellant would be guilty of the offence of cheating. To put it in another way, it would not be enough, to have the appellant convicted for cheating, to prove that he had gained by using free labour, paid by the Native Authority, on his private building; it would have to be proved that he actually deceived the Native Authority into believing that the workmen had worked for the Native Authority and not for the appellant privately.

We must, therefore, with some reluctance, allow this appeal. We make it clear, however, that we think the appellant was guilty of gross misconduct. But we think that such misconduct should be the subject of departmental disciplinary action and not of a criminal prosecution. The appeal is allowed; the conviction and sentence are set aside and a verdict of acquittal is entered.

*Appeal allowed.*



## J. P. BALDWIN *v.* NIGERIAN OIL MILLS LIMITED AND OTHERS

[High Court (Reed, J.)——August 8, 1964]

[Kano——Civil Suit No. K/119/62]

*Appeal——civil proceedings——interlocutory decision——appeal from High Court to Supreme Court——application for leave to appeal——Supreme Court Act*, 1960, *s.* 31(2)(*a*); *Constitution of the Federation*, 1963, *s.* 117.

*Practice and Procedure*——ditto.

There is no right of appeal to the Supreme Court from an interlocutory decision of the High Court of Northern Nigeria in a civil proceeding.

Case referred to:

*Banque de L' Afrique Occidentale v. Sharifadi*, 1961 N.N.L.R. 105, followed.

APPLICATION FOR LEAVE TO APPEAL

*M. A. Agbamuche* for the applicant;
*K. E. Grey* for the respondent.

**Reed, J.:** The applicant wishes to appeal to the Supreme Court against a decision in the High Court in a civil case which, he concedes, is an interlocutory decision.

By section 31(2) of the Supreme Court Act, 1960, the period prescribed for giving notice of application for leave to appeal in a civil case against an interlocutory decision is fourteen days. The applicant did not give notice of application for leave to appeal within the prescribed period and he now applies for an extension of time within which to file his notice of application for leave to appeal.

I have come to the conclusion that I must strike out the application on the grounds that no appeal lies to the Supreme Court from an interlocutory decision of the High Court of the Northern Region in a civil case. In *Banque de L'Afrique Occidentale v. Sharifadi*, 1961 N.N.L.R. 105, Bate, J. pointed out that the jurisdiction of the Federal Supreme Court (as it then was) to hear appeals from the High Courts was conferred by section 110 of the Second Schedule to the Nigeria (Constitution) Order in Council, 1960. He continued:

> "No power is conferred directly to hear appeals against interlocutory decisions such as the decision against which the defendant now wishes to appeal. It is provided that the Federal Supreme Court may hear appeals in cases other than those specifically described in section 110 where jurisdiction is conferred by a law in force in the Region."

He went on to say that there was no law in force in the Region which enabled an appeal to be made against an interlocutory decision of the High Court.

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The jurisdiction of the Supreme Court to hear appeals from the High Court is now conferred by section 117 of the Constitution of the Federation. There is no difference of substance between section 110 of the Second Schedule to the Nigeria (Constitution) Order in Council, 1960, and section 117 of the Constitution of the Federation. I conclude, therefore, that there is still no appeal to the Supreme Court against an interlocutory decision of the High Court of the Northern Region in a civil case unless there is in force in the Region a law which enables such an appeal to be made. I have been unable to find any such law.

I note that section 6(*b*) of the Federal Supreme Court (Appeals) Ordinance provided a right of appeal, with leave, to the then Court of Appeal against interlocutory decisions of a High Court in civil suits. This Ordinance was, however, repealed by the Federal Supreme Court Ordinance, 1960, (now the Supreme Court Act, 1960) and it appears from section 4 of the Supreme Court (Miscellaneous Provisions) Act, 1961, that this right of appeal was inadvertently repealed. Accordingly, the Act reinstated such right to appeal against an interlocutory decision of the High Court of Lagos. A similar right has been conferred by the legislature of the Western Region in section 11 of the High Court (Amendment) Law, 1961, and by the legislature of the Eastern Region in the Federal Supreme Court (Miscellaneous Provision) Law, 1962. The legislature of the Northern Region has not done so.

I therefore order that the application for an extension of time within which to file notice of application for leave to appeal against an interlocutory order be, and is hereby struck out.

*Application struck out.*



## ATTORNEY-GENERAL OF NORTHERN NIGERIA *v.* AFRICAN CONTINENTAL BANK LIMITED

[High Court (Bate, J.)——April 18, 1964]

[Jos——Civil Suit No. JD/93/1962]

*Bills of exchange——cheques——crossed cheques——forgery by employee of bank's customer——negligence——duty of bank to make enquiries——Bills of Exchange Ordinance, Laws of Nigeria,* 1948, *cap.* 18, *s.* 82.

*Bankers and banking*——ditto.

*Tort——conversion——uncrossed cheque——collecting bank's liability where customer has no lawful title——common law liability.*

A clerk in a Government sub-treasury opened an account with the defendant bank in the name of P. N. Oku. His initial deposit was one of £6 cash and the account was opened by a ledger-keeper who had authority to open accounts for new customers without reference to the manager where the initial deposit was less than £30. He was not asked to give references and it was the routine practice of the bank not to make inquiries if large sums were later paid in. There was no evidence to show what inquiries, if any, the bank manager made about the depositor at the time he opened the account.

The clerk proceeded to forge eight Government payment vouchers in the name of P. N. Oku, purporting to be for work done on behalf of the Government. He also forged eight cheques drawn on the Government's account at the Bank of West Africa, Limited, Jos, made out either in favour of the defendant bank for the credit of "Oku", or to "A.C.B. A/c for Sundry Persons" with a bank certificate directing payment to the account of Oku. Seven of the cheques were clearly crossed and the eighth was found by the Court not to be crossed. All were paid by the clerk into the account in the name of Oku.

In an action by the Government for the recovery of the money payable on the cheques,

*Held:* (1) The defendant bank was negligent in failing to make proper enquiries about the clerk when he originally opened the account and when large sums of money were later paid into the account. This being so, the bank lost the protection of the Bills of Exchange Ordinance, s.82 (1).

(2) A banker is liable to the true owner for conversion if it collects an uncrossed cheque for its customer to which he has no lawful title.

Cases referred to:

*Commissioners of Taxation v. English, Scottish and Australian Bank, Limited,* [1920] A.C. 683, considered;

*E. B. Savory and Co. v. Lloyd's Bank, Limited,* [1932] 2 K.B. 122, affd. *sub nom. Lloyd's Bank, Limited v. E. B. Savory and Co.,* [1933] A.C. 201, considered;

*Baker v. Barclay's Bank, Limited,* [1955] 2 All E.R. 571, [1955], 1 W.L.R. 822, considered.

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Bate, J.

CIVIL SUIT

*P. A. Barreto, State Counsel,* for the plaintiff;
*G. C. U. Agbakoba* for the defendant.

**Bate, J.:** The plaintiff, the Government of Northern Nigeria, claims £9,702 13*s* 8*d* from the African Continental Bank.

The main facts are not in dispute and I find them to be as follows. Johnson Ogu, a clerk in the Government Sub-Treasury at Jos, forged eight Government payment vouchers purporting to relate to money due from the Government to P. N. Oku for work done for the Government. The earliest is dated in June, 1959 and the last in January, 1961. They appear on their face to have passed through the Ministry of Works, in some cases at Bauchi and in others at Yola. They purport to have been checked and passed and to be payable at Jos. There was also admitted in evidence eight cheques drawn on the Government account with the Bank of West Africa at Jos. Six of these are made out to the African Continental Bank for the account of P. N. Oku or to that effect and the amount on each cheque corresponds exactly with the amount on one of the forged payment vouchers. Of the other two, one is payable to "A.C.B. A/c for Sundry Persons" and does not correspond to the amount on any voucher; but the cheque has attached to it a document, referred to as a bank certificate, directing payment to the account of P. N. Oku of an amount appearing in one of the vouchers. These seven cheques are all crossed. The last cheque, exhibit 18, is made payable to the "Manager, A.C.B. Ltd. Jos" for an amount appearing on one of the vouchers and is accompanied by a bank certificate directing payment into P. N. Oku's account. There is a dispute whether or not this last cheque is crossed.

In May, 1959, Johnson Ogu opened an account with the African Continental Bank, Jos, in the name of Patrick Nwokoye Oku.

The Sub-Treasury, Jos, sent the eight cheques and their accompanying bank certificates to the African Continental Bank, Jos. The latter cleared the cheques with the Bank of West Africa and credited Oku's account accordingly.

Oku's account with the defendant bank shows that from the 12th May, 1959, when the account was opened, to the 23rd February, 1961, the only credit entries relate to the eight cheques and a cash deposit of £6 with which the account was opened. But over the same period there were a considerable number of drawings which left the account in credit to the extent of only a small sum.

The plaintiff's case is that the Government is entitled to recover from the defendant bank the sum of the amounts payable on the eight cheques, on the ground that the bank was negligent in not making inquiries or fuller inquiries when the account was opened in the name of P. N. Oku. It was also argued without objection, though the latter was not pleaded, that the bank was negligent on the ground that it failed to infer from the manner in which the account was operated



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and in particular from the absence of credit entries apart from those relating to the eight cheques, that Oku had no title to the cheques. The plaintiff does not allege bad faith but contends that the defendant bank is not entitled to the protection of section 82 of the Bills of Exchange Ordinance because it acted negligently.

The defendant denies negligence and claims protection under section 82. The defendant has not pleaded reliance on section 82 but raised this defence in argument without objection by the plaintiff. The latter in opening his case clearly anticipated that the defendant would rely on section 82. I shall therefore regard this defence as properly raised.

By his defence, the defendant raises other defences but these were not referred to at the trial and counsel for the defence confined himself to his contentions that the defendant bank had not acted negligently and was therefore entitled to the protection of section 82.

The only issue therefore is whether the defendant bank is excused from liability by section 82 of the Bills of Exchange Ordinance. Section 82(1) provides as follows:

> "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specifically to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

In the present case, there is no issue whether the defendant bank acted in good faith; the plaintiff does not allege bad faith. But the section only gives protection in relation to crossed cheques. Consequently, it is necessary to consider whether the eight cheques are crossed. Seven of them are clearly crossed and there is no doubt about this. But with regard to the other cheque, exhibit 18, there is a dispute. Mr Edwin Ogu, an Inspector of the defendant bank, expressed the view that it is crossed and said that it had been dealt with in the same way as the other cheques. Mr Finch, an Internal Auditor in the Inland Revenue Department and Sub-Treasurer at Jos at the material time, said on the other hand that it is not crossed. The question may be answered by looking at the cheque in the light of section 76 of the Bills of Exchange Ordinance which makes provision with regard to the crossing of cheques. Scrutiny of the cheque shows that it is not crossed generally within the meaning of section 76(1), because it does not bear across its face two parallel transverse lines or any of the words referred to in the subsection; there is only one transverse line and what appear to be some figures. Nor is the cheque crossed specifically within the meaning of section 76(2). I therefore conclude that this cheque is not a crossed cheque and so find. Consequently, the defendant bank is not entitled to the protection of section 82 in relation to this cheque.

Section 82 only applies where the customer has no title or a defective title. In the present case, it has not been argued that the customer had

a good title to the cheques. The evidence shows that Oku or Ogu was a customer of the defendant bank, that he procured the payments by the eight cheques for his account by fraud, and that his title to the cheques was defective. I so find.

Under the common law applicable in Northern Nigeria, if a banker collects a cheque for his customer and that customer has not rightful title to it, the banker is liable in conversion to the true owner. But he is protected in relation to crossed cheques by Section 82 of the Bills of Exchange Ordinance. In the present case, so far as concerns the seven crossed cheques and the defence under section 82, the only remaining issue is whether or not the defendant bank was negligent. This is a question of fact but guidance is to be found in some of the authorities cited in this case. I must refer first to the decision of the Judicial Committee of the Privy Council in *Commissioners of Taxation v. English, Scottish and Australian Bank Limited*, [1920] A.C. 683. There, approval was expressed of a statement of the law that the test of negligence in relation to section 82 is whether the transaction of paying in any given cheque, coupled with the circumstances antecedent and present, was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry.

Then, in *E. B. Savory and Company v. Lloyds Bank*, [1932] 2 K.B. 122, it was suggested by Scrutton, L.J., in the Court of Appeal that it was negligence on the part of the bankers to have failed to make sufficient inquiries in opening the accounts of the customers concerned. This view was approved on appeal to the House of Lords (*Lloyd's Bank, Limited v. E. B. Savory and Company*, [1933] A. C. 201), which also endorsed the view that a banker who had omitted some proper precaution could not be heard to say that he was nevertheless not negligent because the precaution, if it had been taken, might have been fruitless. Lord Wright, at page 231, said:

> "It is now recognized to be the usual practice of bankers not to open an account for a customer without obtaining a reference and without inquiry as to the customer's standing; a failure to do so at the opening of the account might well prevent the banker from establishing his defence under section 82 if a cheque were converted subsequently in the history of the account . . . ."

The decision in the *Savory* case was applied by Devlin, J. (as he then was) in *Baker v. Barclays Bank, Limited*, [1955] 2 All E.R. 571, [1965] 1 W.L.R. 822. Devlin, J. also said, [1955] 2 All E.R. at page 584, [1955] 1 W.L.R. at page 838:

> "I do not think that in this case I need go so far as to hold that every failure to make proper inquiries, whether or not they appear to be material, is fatal to a defence under s. 82. It is not necessary that I should hold that such carelessness is fatal even if the bank can show affirmatively that the failure was immaterial. In my judgment, however, if a bank manager fails to make inquiries which he should have made, there is, at the very least, a heavy burden on him to show that such inquiries could not have led





> to any action which could have protected the interests of the true owner;. . ."

Counsel for the plaintiff also referred me to a compendious statement of the law in *Halsbury's Laws of England*, 3rd edition, volume 2, at pages 180-181. There it is stated that negligence in relation to section 82 is:

> ". . .breach of a duty to the possible true owner, not the customer, created by the statute itself, the duty being not to disregard the interests of such true owner. The test of negligence is whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present was so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused him to make inquiry. The banker is bound to make inquiry when there is anything to raise suspicion that the cheque is being wrongfully dealt with in being paid into the customer's account, but the banker is not called upon to be abnormally suspicious. . ."
>
> "It is negligence not to make inquiries as to a customer upon opening an account and collecting a cheque for him. Unless the reference obtained in respect of a customer renders it superflous inquiry ought to be made concerning the character and circumstances of the customer."

I will now examine the evidence in the light of these decisions. The only witness who threw any direct light on what happened when Ogu opened an account with the defendant bank was Mr Ejechine. The latter is and at the material time was a clerk with the defendant bank. He said that he had authority to open accounts for new customers and where the first deposit was small he was not required to refer the matter to the manager. He admitted that he had met Ogu once before he came to open an account but said that when he came to open an account he had not recognised him. I accept this and the rest of his evidence. His evidence is that Ogu came to him at the bank and asked to open an account with a deposit of £6. He gave his name as Patrick Nwokoye Oku and said he was a general businessman. He gave an address in Jos. The witness had not asked for details but had taken specimen signatures from the customer and opened an account for him. In view of the smallness of the deposit he had not referred the matter to the manager, except in so far as he had sent the specimen signature card to him in accordance with routine practice. The manager had returned it the following day. It was, the witness said, the manager's duty to make inquiries when specimen signatures were sent to him. The manager at the time, who did not give evidence, was, the witness said, in the United Kingdom. The witness had handled the account and had seen nothing suspicious about it. Payments by the Government on Treasury payment vouchers were, he said, common.

Mr Edwin Ogu, now a bank inspector with the defendant bank but formerly manager of the Jos branch in succession to a Mr Kalu, gave evidence of the defendant bank's practice at Jos in his time in

opening accounts for new customers. He confirmed that ledger keepers were authorised to open new accounts without reference to the manager where the initial deposit was less than £30. New customers were not asked to give references and no inquiries were made if large sums were later paid in. Where, as in the present case, the new customer claimed to be self-employed, the practice was for the clerk to pass the specimen signature card to the manager who would make inquiries, such as whether the address was genuine, and might make further inquiries at the address. If the manager was satisfied, he returned the card to the ledger keeper. Mr Ogu had been introduced to Ogu by Mr Kalu before the latter had left. He had seen nothing suspicious about the customer or his account. I accept Mr Edwin Ogu's evidence except with regard to the cheque, exhibit 18.

There was, in my view, nothing in the cheques themselves or in the manner in which they were sent to the bank so out of the ordinary as to put the bank on inquiry. But, in order to ascertain whether there was negligence, it is necessary to look also at the antecedent circumstances. When Ogu came to open an account the bank did not ask him for a reference. The ledger clerk merely accepted at its face value the customer's statement of his name, address and occupation. He did not refer to the manager for his approval but contented himself with sending to the manager a specimen signature card. There is no evidence that the manager took any steps to test the truth of the customer's statements. I accept the clerk's evidence that the manager returned the card promptly but I am unable to agree with counsel for the defence that the proper inference to be drawn from this is that the manager must have made inquiries about the customer. The evidence is equivocal and it might equally mean that the manager made no inquiries at all or insufficient inquiries. I am also unable to draw the inference suggested by counsel for the defence that because Mr Edwin Ogu said that the practice in his time was for the manager to make inquiries on receiving a specimen signature card, Mr Kalu must have made inquiries or even that he probably did. Such an assumption would be unjustified. Nor am I able to agree that the sort of inquiries which Mr Edwin Ogu described would necessarily have been sufficient. Merely to inquire whether a customer lives at the address he has given does not go to the heart of the matter at all.

It is no defence for the banker to excuse his failure to make inquiries on the ground that they might have been fruitless. But in the present case, effective inquiries would have shown that the customer was a clerk in the Jos Sub-Treasury attempting to open an account in a false name. If the bank had with this knowledge allowed him to open an account, the arrival from the Sub-Treasury of large cheques purporting to be payments for contract work would have been a matter of grave and obvious suspicion. But the defendant bank asked for no references and made no effective inquiries whatever about the customer. This constitutes negligence and the defendant bank is not entitled to the protection of section 82 in relation to the seven crossed cheques.





Apart from this, the system in the defendant bank at Jos by which the ledger keeper was excused from referring to the manager before opening an account if the initial deposit was small and by which no inquiries were made if large sums were subsequently credited to the account, was in itself defective and amounted to negligence on the part of the defendant bank. It seems illogical that the criterion for deciding whether an application to open an account is to be referred to the manager should depend on the amount of the initial deposit.

The defence that the bank is not liable for the acts of the ledger keeper, Mr Ejechina, was not argued. There is in any event no substance in this line of defence.

I am unable to agree with the submission for the defence that the failure of the Attorney-General or his agent to give evidence is fatal to the plaintiff's claim.

There is no defence in relation to the uncrossed cheque.

I therefore find that the defendant bank is liable to the plaintiff for the amount for which the eight cheques were payable.

Judgment is entered for the plaintiff for £9,702-13*s*-8*d* with costs.

*Judgment for the plaintiff.*

## IGBOKE OROKE *v.* CHUKU EDE

[C. A. (Hurley, C.J., J.P. Smith, J. and Jibir Daura, Sh. Ct. J.)—January 10, 1964]

[Makurdi—Appeal No. MD/9A/1962]

*Appeal———civil appeal from native court——additional evidence——whether could by reasonable diligence have been adduced at trial——Native Courts Law*, 1956, *s.* 70A(2).

*———— ————retrial or rehearing—rehearing to be either entirely from the record or by hearing all witnesses from court below—ibid., s.* 70A(1) (*a*).

On an appeal in a land matter from a native court to a provincial court the unsuccessful plaintiff alleged that a vital witness in his favour, who had been in court during the trial, did not give evidence. The provincial court heard that witness and another of the plaintiff's witnesses and also admitted a plan which had been prepared for the use of the provincial court. On appeal to the High Court by one of the original defendants,

*Held:* (1) Additional evidence should only be admitted by an appeal court where it could not by reasonable diligence have been adduced at the trial.

(2) Even where additional evidence is correctly admitted, it is normally only relevant to show that the trial court might have reached a different decision if it had heard that evidence. In such a case, an appeal court should not reverse the decision of the trial court but should order a retrial.

(3) An appeal court's exercise of its powers to rehear a case should be either by a consideration of the record of the court below or by hearing all the evidence of each side. The power should not be exercised as it had been in this case, by hearing only some of the witnesses and relying for the remaining evidence on the record.

(*Editorial Note.—See* also *Atswaga v. Agena, infra, p.* 122).

CIVIL APPEAL FROM PROVINCIAL COURT

The parties appeared in person.

**Hurley, C.J.,** delivering the judgment of the Court: The appellant was on of two defendants in a land case tried in the Ijigbang Civil Court and the respondent was one of the plaintiffs. The parties are Ezzas, and the land in dispute is part of an area which the Ijigbang people gave to the Ezzas and shared out among their six clans. The respondent's case was that this had been done in the time of one Onuma, a district head who had subsequently been removed from office, and that the appellant and the other defendant had entered on the share which the respondent's clan had been given. The appellant's defence was that the land he was on had been given to him by Onuma's father and the other defendant's defence was that his own piece of land had been given to him by Onuma himself. Onuma was in court during





the trial but he did not give evidence. It lay on the respondent to call him, because as a plaintiff he had to discharge the burden of proof. After hearing the evidence that was called by both sides, the trial court gave judgment in favour of the appellant and the other defendant. The respondent appealed to the provincial court, which gave judgment in his favour. The appellant has appealed to this Court and the other defendant has not.

The provincial court heard the evidence of Onuma and of one of the respondent's witnesses at the trial, Nwale Iluma, and took into consideration a sketch plan which had been prepared for the provincial court by a neutral party with the knowledge and assistance of the appellant and the respondents. They did not hear any witness for the appellant or for his co-defendant, the other respondent in the provincial court. It appeared at the trial that the appellant had planted bananas and dug a latrine on the land and that the first respondent's house was near the latrine. The evidence at the trial was that the first respondent had put his house there after the trees had been planted and the latrine had been dug. Onuma's evidence in the provincial court was that the land had been given to the respondent's clan and not to the appellant's or his co-defendant's. In its judgment, the provincial court said,

> "The sketch showed that the position of the banana tree and the spot on which it is alleged the latrine stood is very close to the house of the appellant. On the receipt of this sketch coupled with the evidence adduced we are now in a position to say that the area in question belongs to the appellant (the present first respondent) and we order the respondent to remove the banana tree and close up the latrine. We allow the appeal and the above mentioned order shall be carried out forthwith."

We observe, with all respect to the provincial court, that as regards the relative positions of the latrine, the banana tree, and the first respondent's house the sketch showed no more than the evidence at the trial had shown, and otherwise it showed less, for it did not show whether the house or the latrine and the banana trees had been there first. As to the evidence adduced, Onuma's evidence had not been adduced at the trial, and it was adduced as additional evidence on the appeal. By section 70A(2) of the Native Courts Law, a court exercising appellate jurisdiction in civil matters under the provisions of that Law may hear additional evidence but only such additional evidence as it considers necessary for the just disposal of the case. Additional evidence should be admitted cautiously and used carefully if it is to be admitted and used for the just disposal of the case and we are not satisfied that Onuma's evidence was either rightly admitted or properly used by the provincial court for the purpose of the decision which it arrived at in the appeal.

Courts are established for the purpose of deciding the rights of disputing parties in order to terminate their disputes once and for all. Once a case has been decided, the dispute should not be reopened by trying the case again. It is the business of a trial court to decide disputes

by trying cases. It is not the business of an appeal court to reopen disputes by trying cases again; an appeal court's duty is to see whether trial courts have used correct procedure to arrive at the right decisions. An appeal court does not inquire into disputes, it inquires into the way in which disputes have been tried and decided. Since a dispute is to be decided by the trial court and not in the appeal court, each party must make the whole of his case in the trial court and call all his witnesses there; he should not be allowed to improve on his case in the appeal court if he has not made it in the trial court as well as he might have done. For this reason, an appeal court should not allow additional evidence to be adduced unless the evidence could not by the exercise of reasonable diligence have been obtained for use at the trial.

Onuma, as we have said, was in court during the trial; and the second respondent has told us so. The respondents in the provincial court told that court that Onuma was not allowed to give evidence at the trial. They did not explain to the provincial court who prevented him from giving evidence or by what means he was prevented. The provincial court should have required the respondents to explain what they meant by saying that Onuma was not allowed to give evidence and should have required them to prove what they said. They have told this Court two different things; one, that the trial court refused to call Onuma and the other, that he was unwilling himself to give evidence. The record does not show that the trial court was asked to hear Onuma's evidence, and we do not believe that the court refused to hear it. If he was unwilling to give evidence, he could have been compelled to do so by witness summons, but it does not appear that the respondents took any step to compel him. The respondents have not satisfied us that Onuma's evidence could not have been used at the trial, and we do not think that the provincial court could have properly been satisfied of that either on the information which the respondents gave it, or rather on the bare allegation which they made to the effect that Onuma was not allowed to give evidence. Onuma's evidence was available at the trial and ought not to have been heard by the provincial court.

Next, if additional evidence is properly adduced, as was not the case here, it must be used properly. Additional evidence is seldom of such a nature as to justify an appeal court in saying that the judgment of the trial court must be wrong and ought to be reversed. It cannot as a rule do more than show that the trial court might have come to a different decision if it had itself heard the additional evidence. In such a case, the appeal court should order a retrial but is not justified in reversing the trial judgment. In the present case, Onuma's evidence was not decisive, because there were other witnesses whose evidence would have been to a contrary effect and therefore the decision required was a decision as to which evidence was true, that is which witnesses were truthful, and that could only have been decided by hearing them all. By reversing the trial judgment in this case, the provincial court in effect decided the dispute on the evidence of Onuma and the other witness Nwale Iluma, without hearing the witnesses on the other side. If Onuma's evidence was to be heard for the decision of the dispute,





the evidence of all the other witnesses ought to have been heard also; the case ought to have been retried.

The appeal must be allowed because Onuma's evidence was improperly admitted and wrongly used by the provincial court. But even if Onuma's evidence had not been heard in the provincial court, the decision of that court could not be sustained. They heard another of the respondent's witnesses besides Onuma, and they heard none of the appellant's witnesses. They should have heard all the witnesses (except Onuma), or none. By section 70A(1) (*a*) of the Native Courts Law, the provincial court was empowered to rehear the case. A rehearing is not a retrial. A rehearing covers the original case but no more. The evidence is heard again but no other evidence. If additional or different evidence is heard, it is a retrial. For a rehearing, it is not necessary to hear the witnesses themselves; the rehearing may be a rehearing from the record of the trial proceedings. That is the usual way. If a rehearing is conducted by actually taking the evidence of the witnesses again, the witnesses to be heard should be the same witnesses who testified at the trial and no others and they should all be heard. It is not safe or proper to rehear a case by hearing some of the witnesses and taking the rest of the evidence from the record. It should all be taken from the record, or else all the witnesses should be heard. The reason is that a court which hears witnesses decides the truth both by what the witnesses say and also by the way they say it, while a court which reads evidence from a record can only decide the truth by what the witnesses say and not by the way they say it. A court which takes part of the evidence from witnesses and part from the record precludes itself from obtaining a balanced impression of the whole case and from arriving at a balanced judgment. The impressions of truth or falsehood it receives from the witnesses it hears are not balanced by any like impressions from the evidence it reads. The provincial court would not have been justified in interfering with the decision of the trial court after hearing Nwale Iluma's evidence alone, even without hearing Onuma's; it should have heard all the trial witnesses or none.

The appeal is allowed, the decision of the provincial court is set aside and the judgment of the trial court restored.

*Appeal allowed. Decision of provincial court set aside and judgment of trial court restored.*

## L. ATSWAGA *v.* GBAKON AGENA

[C. A. (Hurley, C.J., J. P. Smith, J. and Jibir Daura, Sh. Ct. J.)——January 10, 1964]

[Makurdi——Appeal No. MD/34A/1963]

*Appeal——civil appeal from native court——additional evidence———whether could by reasonable diligence have been adduced at trial——Native Courts Law*, 1956, *s.* 70A(2).

*———* *———rehearing* de novo*——circumstances in which may be ordered*, ibid., *s.* 70A(1)(*b*).

One Ama was given in marriage to the appellant by whom she became pregnant. She was then given in marriage to the respondent and subsequently gave birth to a child. In an action by the appellant claiming back Ama and her child from the respondent, the native court gave him the custody of the child but left Ama with the respondent. It did not hear the evidence of Ama, although she was present at the trial. On appeal the provincial court heard *inter alia* Ama's evidence and that of two other witnesses who had not given evidence at the trial. On further appeal,

*Held:* (1) Additional evidence should only be admitted by an appeal court where it could not by reasonable diligence have been adduced at the trial.

(2) A rehearing *de novo* should not be ordered without good reason and the fact that there is additional evidence to be heard is not such a good reason, except where it could not by reasonable diligence have been adduced at the trial. Justice may require, however, that where all the evidence (including some which was improperly admitted on appeal) has been heard in public without resulting in a sustainable decision, and where in the opinion of the court an essential issue turns on the credibility of the witnesses, there should be a retrial *de novo*.

*Per Curiam:* Observations made on the distinction between a rehearing under s. 70A (1)(*a*) and a rehearing *de novo* under s. 70A (1)(*b*) of the Native Courts Law, 1956.

*Quaere:* Whether a provincial court with its limited original jurisdiction, would have been competent to rehear a case *de novo* on its own order.

Case referred to:

*Igboke Oroke v. Chuku Ede*, supra, p. 118, followed.

CIVIL APPEAL FROM PROVINCIAL COURT

The parties appeared in person.

**Hurley, C.J.,** delivering the judgment of the Court: This case started in the Jecira Intermediate Court. The appellant was the plaintiff, the respondent was the first defendant, and the second defendant was a woman called Anye. Anye's husband died and his elder brother Ikyambe, who lived in Mgagbena, gave her and her daughter Ama in charge of their younger brother Tivkaa at Zaki Biam. There Ama was given in marriage to the appellant. Anye returned to Mgagbena and Ama either





went there with her or joined her there. The appellant's evidence in the trial was that Ama was then pregnant and this was not contradicted by other evidence or disputed in any other way; but Ama herself was not a witness at the trial. The appellant went to Mgagbena and brought Anye and Ama to the clan head, Jingali. Jingali gave Ama to the appellant and he took her back to Zaki-Biam but soon afterwards she returned to Anye and was given in marriage to the respondent and was subsequently delivered of a son. The appellant sued the respondent and Anye, claiming back Ama and the child and the Jecira Intermediate Court gave him the child but left Ama with the respondent. The appellant and the respondent both appealed to the provincial court, which gave both Ama and the child to the respondent. That is the decision against which the appellant now appeals.

The provincial court heard evidence from all the witnesses who gave evidence at the trial except Jingali and they also heard the evidence of Ama and two other additional witnesses. Ama's evidence was that she was not pregnant when she married the respondent and that she had had a miscarriage during her marriage to the appellant, before she went back from Zaki-Biam to Mgagbena. Tivkaa confirmed that there had been a miscarriage. The evidence of the two other additional witnesses went to show that Ama was pregnant when the appellant was bringing her back from Mgagbena after she first left him and that the child's birth was registered a few days after the registration of her marriage to the respondent.

By section 70A(1)(*a*) of the Native Courts Law, the provincial court was empowered to rehear the case in whole or in part. As we have explained in our judgment in *Igboke Oroke v. Chuku Ede*, [*supra* p. 118], to rehear a case means to hear the case that was heard in the trial court but no more. Section 70A(1)(*a*) in giving an appeal court power to rehear, does not give power to hear evidence that was not heard at the trial. That power is given by subsection (2) of section 70A, which gives power to hear additional evidence. But as we have also explained in the judgment to which we have referred, additional evidence should not be heard on an appeal unless it could not by the exercise of reasonable diligence have been obtained for use at the trial. Ama was present at the trial and her evidence could have been heard then and no reason was shown why the evidence of the other two additional witnesses could not also have been heard. The evidence of these three witnesses was not properly heard in the provincial court under subsection (2).

However, by subsection (1)(*b*) of the section, an appeal court may quash the trial proceedings and order the case to be reheard *de novo* before the trial court or before any other court of competent jurisdiction. To rehear a case *de novo* is plainly something different from rehearing it under subsection (1)(*a*). It means hearing the case afresh and from the beginning, as distinct from rehearing it as it stands after the trial. It is the same as a retrial and, as with a retrial, the court is not restricted to hearing the evidence of the witnesses who testified at the trial and may hear any witnesses. The proceedings of the provincial court

amounted to a rehearing *de novo*. But a rehearing *de novo* can only be had before a court of competent jurisdiction and after the trial proceedings have been quashed and an order for the rehearing made. Nor should a rehearing *de novo* be ordered as a matter of course or without good reason. It must first be shown that the trial proceedings or the trial judgment were in some sufficient way unsatisfactory. The fact that there is additional evidence to be heard is not a good reason for ordering a rehearing *de novo* or retrial except in the circumstances in which additional evidence can be adduced at the hearing of the appeal, that is, when the evidence could not have been obtained for use at the trial. That, as we have shown, was not the case here. And in fact the provincial court did not order a rehearing *de novo* or quash the trial proceedings. For these reasons alone, we think that the rehearing *de novo* in the provincial court was wrong and it is unnecessary for us to consider whether the provincial court, with its limited original jurisdiction, was a competent court to rehear a case *de novo* on its own order if that order had been made. The proceedings and judgment of the provincial court must be set aside.

We have considered whether we should restore the judgment of the trial court or order a retrial under section 70A(1)(*b*). As we have noticed, it was in effect undisputed at the trial that Ama was pregnant when she married the respondent and that the child was the appellant's. The provincial court said in its judgment:

> "As regards the claim over the child we have found that all the witnesses have not been truthful, but when one takes into consideration the evidence of the mother, who said that it was Gbakon Agena that conceived her and the evidence of Tivkaa and some answers by him to questions about the abortion coupled with the boy's resemblance of Gbakon, one would come to the conclusion that Gbakon conceived the mother of the child and we therefore come to the conclusion that the child should be handed over to Gbakon Agena."

We will not comment on this further than to say that it shows that the question to some extent turns on the credibility of the witnesses who testified in the provincial court, including the three additional witnesses. Since this evidence has now been heard in public without resulting in a sustainable decision, we think the interests of justice require that it should be heard again by a competent court and a decision given upon it. We will therefore order that the case be reheard *de novo* in the court of first instance. This means that the trial court will retry the case and may hear any witnesses that the parties produce or that the trial court itself thinks necessary to call.

***Judgment of provincial court set aside. Order for rehearing*** de novo ***by court of first instance.***



## THE STATE *v.* SUNDAY OKEKE

[High Court (Bate, J.)——February 26, 1964]

[Jos——Case No. JD/86C/63]

*Evidence——admissibility——secondary evidence of fact in issue——communication explaining absence of public officer——Evidence Ordinance, s.* 34(3)*; Nigerian Railway Corporation Act, Laws of the Federation of Nigeria and Lagos,* 1958, *Cap.* 139, *s.* 47*; Criminal Procedure Code, s.* 239.

*Words and phrases——"public service,"* ibid.

An employee of the Nigerian Railway Corporation is not "a person employed in the public service" for the purposes of s. 34(3) of the Evidence Ordinance.

CRIMINAL CAUSE

*P. A. Barreto, State Counsel,* for the prosecution;
*J. N. I. Ezekwe* for the defence.

**Bate J.:** The prosecution seeks to put in evidence the deposition of one Moller, an engineer in the Railway Corporation, on the ground that he has left the country and his presence cannot be obtained without considerable delay and expense. There is no evidence before the Court that he has left the country or that his presence cannot be obtained. But it is sought to put in evidence a letter purporting to emanate from the general manager, Nigerian Railway Corporation, that the engineer has left Nigeria. Reliance is placed on the Evidence Ordinance, section 34, and in particular on subsection (3), and on the Criminal Procedure Code, section 239. It is said that the engineer is or was in the public service.

I rule that the deposition is inadmissible. There is no evidence to prove that Moller has left the country or that his presence cannot be obtained without considerable delay, expense or inconvenience.

The general manager's letter does not afford proof under section 34(3) of the Evidence Ordinance. Assuming that Moller was in the employment of the Railway Corporation, he was not in the public service. The public service, as appears from the Nigeria (Constitution) Order in Council, 1960, consists of those persons whose appointment, disciplinary control and discharge are controlled by the Federal or Regional Public Service Commission. The Nigerian Railway Corporation Act, 1955, section 47, shows that the Corporation's employees rae not so controlled. It follows that the Corporation's employees are not in the public service.

*Ruling accordingly.*

## COMMISSIONER OF POLICE *v.* N. A. AKINSOTO

[C. A. (Hurley, C.J. and Holden, J.)—March 26, 1964]

[Kano—Appeal No. K/66CA/1963]

*Road traffic——driving while uninsured——disqualification——special reasons——whether evidence to support special reasons needed where facts undisputed——Motor Vehicles (Third Party Insurance) Ordinance, Laws of Nigeria*, 1948, *cap.* 139, *s.* 3.

*——————————what constitutes special reasons—reasonable belief that insured*——ibid.

*Words and phrases—"special reasons"*——ibid.

The respondent was convicted by a magistrate of driving while uninsured contrary to the provisions of the Motor Vehicles (Third Party Insurance) Ordinance, s. 3(1). After his conviction, the respondent made a statement in which he claimed, *inter alia*, that when he had bought the vehicle in respect of which the offence was committed, he had paid the seller for the unexpired term of the car insurance, that the insurance company wrote to him asking him to complete a form, which he did, and that he genuinely believed that he thereupon became insured. He also claimed that the insurance company had indemnified him in respect of the loss caused when the car was involved in an accident. He did not produce either the letter or the form in question but none of the facts he alleged were disputed by the prosecution. The magistrate held that the respondent's genuine belief that he was insured was a special reason why he should not disqualify the respondent from holding a driving licence. On the prosecutor's appeal,

*Held:* (1) Where facts alleged as constituting special reasons within the meaning of s. 3 of the Motor Vehicles (Third Party Insurance) Ordinance are not disputed, they need not be supported by evidence before they can be used as the basis of a court's decision not to disqualify.

(2) A mistaken belief with regard to any fact, however honest, cannot be regarded as a special reason unless it is based on reasonable grounds.

(3) Since the mischief aimed at by s. 3 of the Ordinance is the causing of injury to a third party without his being able to recover compensation from the person who caused his injury or his insurance company, the fact that an insurance company has voluntarily indemnified the person causing the injury against any claim made on him is a sufficient special reason for not disqualifying him.

Cases referred to:

*Jones v. English*, [1951] 2 All E.R. 853, observations of Lord Goddard C.J. considered;

*Knowler v. Rennison*, [1947] K.B. 488, *sub nom. Rennison v. Knowler*, [1947] 1 All E.R. 302, applied.

CRIMINAL APPEAL

*K. Hassan, State Counsel*, for the appellant;
The respondent appeared in person.





**Hurley, C.J.,** delivering the judgment of the Court: This is an appeal by the prosecutor against a decision not to disqualify the respondent from holding a driving licence for twelve months from the date of his conviction for a contravention of the Motor Vehicles (Third Party Insurance) Ordinance. The prosecution arose out of an accident involving a car owned by the respondent which took place on the 14th April, 1962. The car had become the respondent's property on the 18th January, 1962, by purchase from a Mr How. Mr How had insured the car up to the 19th June, 1962, and held a certificate of insurance. On the 28th December, 1961, he wrote to the insurance company telling them of the sale and that the car would become the respondent's property with effect from the 8th January, and concluding, "Please do not cancel the certificate of insurance; I shall pass this to you and he [the respondent] will communicate with you on the matter." The prosecution having adduced evidence of these facts, the defence offered no evidence and the respondent was convicted of an offence under section 3(1). Upon conviction and before sentence, the respondent said:

> "I have been a regular owner of cars since 1949 and have always insured my cars. The insurance company wrote a letter to me and asked me to fill a form which I did. I was under the impression that the transfer had been completed. When the accident occurred, I was indemnified by the insurance company. When I paid for the car, I also paid Mr How for the policy."

The respondent did not produce the letter from the insurance company which he mentioned, or the form. In reply, the prosecutor asked the court to impose disqualification. The learned trial magistrate said:

> "I am satisfied that the defendant genuinely believed that he was covered by the certificate of insurance issued in the name of the previous owner taking all the circumstances of the case into consideration and have therefore come to the conclusion that this is a special reason why I should not disqualify the defendant. . ."

The first ground of appeal is that the trial magistrate ought to have heard evidence on behalf of the respondent as to the facts constituting special reasons. In *Jones v. English*, [1951] 2 All E.R. 853, cited to us by learned State Counsel in support of this ground, the prosecutor appealed by way of case stated against an order of the justices that for special reasons the respondent should not be disqualified from holding or obtaining a licence for twelve months upon his conviction on a plea of guilty of having been in charge of a motor vehicle while under the influence of drink. After the plea in the trial court, the respondent's counsel made certain statements and urged certain circumstances as showing special reasons. No evidence was offered in support of counsel's statement but the facts were not disputed by the prosecution and were set out by the justices in the case stated. Lord Goddard, C.J. said, at page 854:

"In those circumstances I am sure the justices were under the impression—as I should have been if I had been one of them—that the prosecution were accepting the statements that were made by the respondent. But where, on a plea of Guilty or after evidence has been heard, a defendant has been convicted of an offence for which the penalty of disqualification is laid down by Act of Parliament and he seeks to rely on special reasons for the non-imposition of disqualification, he ought to give evidence, and the justice ought to hear evidence on the point and not merely to accept statements. This is highly desirable because the onus is on the defendant to show special reasons why he should not be disqualified."

The Lord Chief Justice was there stating what was desirable; he was not stating the law, and indeed his judgment, with which the other two members of the Court concurred, ends, ". . . but on the finding of the justices we cannot say that there was no evidence on which they could find special reasons." This case shows that it is not the law that there must be evidence of facts constituting special reasons in a case of this kind if the facts alleged as special reasons are not disputed. The facts so alleged were not disputed in this case and we cannot interfere with the magistrate's decision on the ground that they were not supported by evidence.

The next ground of appeal is that the learned trial magistrate erred in law in holding that the facts could amount to special reasons. The special reason found by the learned magistrate was that the respondent genuinely believed he was covered. Learned State Counsel has referred to the case of *Mowler v. Rennison*, [1947] K.B. 488, *sub nom. Rennison v. Knowler*, [1947] 1 All E.R. 302, where it was held that a mistaken belief with regard to any fact, however honest, could not be regarded as a special reason unless it was based on reasonable grounds. There, the respondent believed his policy covered third party risks while his motor cycle was being driven by someone other than himself, which in fact it did not do. He had not read the policy, however, so there was no reasonable ground for his belief. Here, the respondent stated the ground of his belief when he said, "the insurance company wrote a letter to me and asked me to fill in a form which I did." That must of course be taken in the light of the surrounding circumstances, which were that he had paid the former owner for his policy, that it was a policy paid up until the middle of June, and that the former owner had handed him the certificate of insurance relating to the policy, had asked the insurers not to cancel it and had asked him to communicate with the insurers. Following on all that, he had received a letter and a form from the insurers and had filled up the form, and so, he said, he believed he was covered. It seems to us that the reasonableness of that belief must have depended on what was in the letter and the form. The respondent did not say what was in them, nor did he produce them, and so he did not give the trial court enough facts to enable it to be said whether his belief was based on reasonable grounds. We agree, therefore, that the learned magistrate erred in law in holding that the facts could amount to the special reasons which he found.





However, we are not prepared to allow the appeal and impose the statutory disqualification, because in our view the facts disclosed other special reasons which would have been sufficient to entitle the learned magistrate to order that the respondent should not suffer the disqualification and which ought to have persuaded him so to order. The insurance company indemnified the respondent in respect of the accident. No doubt they did this as an act of grace; they did it not because they were legally bound to, but because, in the circumstances of the case, they were morally bound to do it or because it was good business to do it. But for whatever reason they did it, the consequence was that the respondent was in fact covered, and that was a consequence that resulted from the circumstances of the case; it was not, obviously, the consequence of a purely gratuitous act on the part of the company. So whatever the respondent believed, and whether he believed it with or without reasonable grounds, he was in effect covered and the mischief against which section 3 is aimed did not arise. That being so, we think the learned trial magistrate's order, though based on special reasons which were not proved, was in the circumstances the right order and one which had in fact special reasons to support it. We will therefore dismiss this appeal.

*Appeal dismissed.*

## KADIRI AMAO *v.* AMODU ONIRE

[C.A. (Hurley, C.J. and Ahmad, J.)——April 9, 1964]

[Ilorin——Appeal No. Z/3A/1964]

*Practice and procedure——tort*—injuria sine damno——*whether general damages must be specifically justified and claimed.*

*Damages——general damages——nature of general damages.*
*Tort*——injuria sine damno——*false imprisonment——damages.*

In an action for false imprisonment, the plaintiff did not give evidence of what amount he was claiming or what damage he had suffered in consequence of the act alleged. On appeal,

*Held:* That since an action for false imprisonment is an action for *injuria sine damno*, it is not necessary for the plaintiff to give evidence of damage to establish his cause of action, or to claim any specific amount of damages.

*Obiter:* It may be that in courts and jurisdictions where proceedings are conducted entirely by experienced professional lawyers, a technical error of this kind in respect of a claim in civil proceedings can be allowed to defeat litigants regardless of the merits of their claims; but that has never been the way in which the law has been applied in Northern Nigeria and if it were it would cause great and unnecessary hardship.

CIVIL APPEAL

*A. O. Omisore* for the appellant;
*D. A. Akintoye* for the respondent.

**Hurley, C.J.,** delivering the judgment of the Court: The appellant was the plaintiff in an action in the district court in which he claimed £250 general damages for false imprisonment. After the appellant had given his evidence, the learned district judge ruled that his claim failed because he had not said in evidence what he was claiming or that he suffered any damage. The district judge said:

> "The statement of claim as it stands on record is for £250. The witness did not once refer to this or any other sum he was claiming . . . . Counsel . . . just fell short of asking the witness as to what the witness was claiming or if he suffered any damage. . . he failed to substantiate the damage and in consequence also failed to claim for such damage as he set out in his statement and amended statement of claim."

In fact, there was no statement of claim, for pleadings were not ordered; there were particulars of claim annexed to the summons, and these were what the district judge referred to.

General damages are the kind of damages which the law presumes, when a contract is broken or a tort is committed, to flow from the wrong complained of and to be its natural or probable consequence.





The quantification of general damages in terms of money is a matter for the jury under proper direction from the judge, or where there is no jury by the judge acting as a jury. In many cases no precise measure can be indicated and general damages thus may often include compensation for damage which is incapable of exact allegation, proof or evaluation in money. Trespass to the person, whether by assault, battery or false imprisonment, is actionable without proof of actual damage; it is *injuria sine damno*. It was thus unnecessary for the appellant to give evidence of damage in order to establish his cause of action and still less was it necessary for him to quantify his damages by testifying to any particular amount of damages. As to the appellant's omission to state his claim in evidence, this, as the learned district judge said, was a technicality. We do not think that it was the kind of technicality that ought to be allowed to have any effect. The appellant's claim was on record and had been served on the respondent and his omission to state it in the witness box prejudiced nobody, while his having stated it would have added nothing of substance to the case. Though we have been shown no authority for it, it may be said that in courts and jurisdictions where proceedings are conducted entirely by experienced professional lawyers, this sort of thing can be allowed to defeat litigants regardless of the merits of their claims; but that has never been the way in which the law has been applied in our courts here and if it were it would cause great and unnecessary hardship.

For these reasons the appeal will be allowed and the case will be remitted to the district court for hearing.

*Appeal allowed.*

## B. O. OKAFOR *v.* CHRISTOPHER NNODI

[S.C.N. (Ademola, C.J.N., Taylor, J.S.C. and Bairamian, J.S.C.)—— December 9, 1963]

[Lagos——Appeal No. FSC 51/1963]

*Damages——fatal accidents——apportionment of damages among members of immediate family——principles to guide court——natur· of order——Fatal Accidents Law*, 1956, *s.* 7(1).

*Practice and procedure——fatal accidents——duty of plaintiff to supply particulars*——ibid., *s.* 5.

In an action under the Fatal Accidents Law, 1956, to recover damages for the death of a person, the plaintiff must give to the Court full particulars of the nature of the claim and of the person or persons for whom or on whose behalf the action is brought. The Court must decide the questions of which persons are entitled to share in the damages and what injury each of such persons suffered from the death of the deceased; and must apportion the damages between such persons on the basis of the injury each has suffered. The Court should make the order awarding damages in such a form as to ensure that they are used for the benefit of the persons entitled to share in them and that they are not treated as merely a contribution to the general resources of the family.

Case referred to:

*Emionayi Erinmwionghae v. Matina Chukwudebelu and others*, FSC 426/1961, 15th February, 1963, observations of Brett, F.J. approved.

CIVIL APPEAL

*K. Sofola* for the appellant;
*T. K. Cameron* for the respondent.

**Bairamian, J.S.C.,** delivering the judgment of the Court: This appeal was allowed at the hearing and an order made on the 11th November, 1963 at Kaduna; the Court said reasons would be given later and they will now be given.

The claim in the writ is for £20,000 as damages for the death of Celestine Nnodi "as per particulars attached." The particulars explain that:

> "The plaintiff's claim is as the person entitled under native law and custom to administer the estate of Celestine Nnodi, deceased, for £20,000 (Twenty thousand pounds) being damages for the death of the said Celestine Nnodi from injuries received by the said Celestine Nnodi while a passenger in the defendant's lorry No. BYA773, by the negligence of the defendant's servant and driver in charge of the said lorry known as Chukwuweike at Mile 9 on the Lafia–Jos road, on the 28th July, 1959."

The defendant could not be found, so an order was made to post the writ on the door of his house. This was done but he did not turn





up at the hearing on the 23rd May, 1962. Counsel proceeded to prove his case. He called Christopher Nnodi, who testified that being a full brother of the deceased and their father having died, he was the representative under their Ibo Native law and custom and represented the family in the suit. He spoke of five children, the eldest fifteen and the youngest five, who went to school and were under his care. He said that the deceased traded in fish, potatoes, English vegetables, bought gari and oil, and had a large store in Port Harcourt; and added that he could manage for the family with £20,000. The second witness, Anene Nwachukwu, spoke of the accident and added that he and the deceased traded together. The third witness, Cletus Ume, also spoke of the accident. Finally the motor licensing officer of Jos testified that at the time of the accident the lorry was registered in the defendant's name.

Thereupon, the trial Court found that he was the owner of the lorry, which was driven by his servant negligently, with the result that the deceased died in the accident the lorry had on the 28th July, 1959; that the plaintiff was entitled to sue under section 4 (1)(*b*) of the Fatal Accidents Law (N.N. No. 16 of 1956); but in view of section 7(1) of that Law, the learned Judge (Reed, J.) said that he would have an Ibo assessor to help him. On the following day, the trial Judge sat with an assessor, and called on the plaintiff to give full particulars of the persons on whose behalf the action was brought under section 5. The plaintiff then stated the names and ages of the children; that the deceased left a widow, who had not remarried; that their mother was still alive; that he had three brothers and a sister; that all the children were at school, and that he was responsible for them.

The learned Judge awarded £4,000, which the assessor advised should be paid to the plaintiff as the person responsible for the widow and children; he was to hold the money in trust and should keep a proper account, and when the children were independent their share should be paid to them.

The defendant's principal grounds of appeal are variations on the theme of there being no evidence on oath of what contributions the deceased had been making to each of the claimants and no basis for what was an excessive award.

Attention is drawn first to section 5 of the Law, which provides that.

> "5. In every action brought under the provisions of this Law the plaintiff shall give to the court full particulars of the person or persons for whom and on whose behalf such action is brought and of the nature of the claim in respect of which damages are sought to be recovered."

The particulars of claim state its nature but not the persons on whose behalf the action is brought. The trial Judge, after entering judgment, sought to remedy that omission before assessing the damages by asking the plaintiff to give particulars of who those persons were; and the

plaintiff gave the names of all who could be included in "the immediate family" as defined in section 2. That was rather late: it should have been done early so that the defendant might know who the virtual plaintiffs were and be able to prepare his defence, if he wished to defend, for the purposes of section 7. Of this it is enough to quote subsection (1):

> "7. (1) In an action brought under the provisions of this Law the assessment and apportionment of damages shall be made in accordance with the following principles—
>
> (*a*) where the deceased person was not a person subject to any system of native law and custom—
>
> (*i*) the court may give such damages as it may think proportioned to the injury resulting from a death to the persons respectively for whom and for whose benefit such action is brought; and
>
> (*ii*) any amount recovered under the provisions of sub-paragraph (1), after deducting the costs not recovered from the defendant, shall be apportioned amongst the persons entitled thereto in such shares as the court shall direct;
>
> (*b*) where the deceased person was a person subject to any particular system of native law and custom the principles of such system shall be applied by the court in—
>
> (*i*) the assessment of the total amount of damages;
>
> (*ii*) the decision as to which (if any) members of the immediate family of the deceased person are entitled to share in such damages; and
>
> (*iii*) the apportionment of the shares of such damages among the members of the immediate family so ascertained:
>
> Provided that no greater sum shall be awarded by a court in assessing damages under the provisions of paragraph (*b*) in relation to the death of a particular deceased person than could have been awarded by a court in assessing damages under the provisions of paragraph (*a*) in relation to the death of such person."

There is to be one award of damages according to section 4(3), but in any case under section 7(1) the amount must be apportioned among those entitled to share in the damages, and there must be a decision of who they are; and the apportionment must have regard to the injury resulting from a death to the persons respectively—we stress the word *respectively*—for whom and for whose benefit the action is brought.

In this case, in which the plaintiff's counsel called evidence to prove his claim, there was no statement of who those persons were and no evidence on oath of who those persons were, of what injury each one of them suffered from the death of the deceased to furnish a basis of assessment of damages and apportionment, and no apportionment among them. The complaints in that behalf were justified, and the appeal had to be allowed; on the other hand, as the three years allowed for suing by section 6(1) had passed, it was only fair to order a re-trial and that was ordered.





The Fatal Accidents Law, 1956, replaced the English Fatal Accidents Acts, 1846 and 1864 with an eye to adapting them to local conditions. They and the local Law may be compared to see how far English practice and decisions may be usefully applied. (The English Acts can be seen in *Halsbury's Statutes of England*, 2nd edition, page 4 onwards, and a form of claim is given in Lord Atkin's *Encyclopaedia of Forms and Precedents*, volume 12, page 57; and guidance will be found in *Halsbury's Laws of England*, 3rd edition, volume 28, at page 100.) It is hoped that counsel for the plaintiff will conduct his case with more assistance to the Court below next time.

On the question of what to do with the money awarded as damages in a fatal accident case, attention is drawn to what Brett, F.J., said in *Emionayi Erinmwionghae v. Matina Chukwudebelu and others* (FSC 426/1961; judgment delivered on the 15th February, 1963). He said as follows:

> "I would also express the hope that where damages are awarded under the Fatal Accidents Acts or under Nigerian legislation replacing those Acts, the courts will consider making such an order as will ensure that the damages recovered are used for the benefit of the dependants for whom they were awarded, and not treated merely as a contribution to the general resources of the family at large. It seems that in *Jirigho v. Anamali* (1958) W.R.N.L.R. 195, Duffus, J., made such an order, and even if there is no statutory rule in the matter, as there is in England under Order 16*b*, rule 12, of the Rules of the Supreme Court, and in Eastern Nigeria under section II of the *Fatal Accidents Law*, 1956, I cannot doubt that the High Court has power to make a suitable order. In the present case the affidavit of the brother of the deceased which was filed in support of the motion asking for leave for the widow to sue suggests that the 'immediate family of the deceased' apart from his dependants, suppose that they have some direct interest in the result of the action, which indicates the need for an order protecting the interest of the dependants on whose behalf the action was brought."

The Court would like these observations to be borne in mind in all such cases.

As to costs, as the defendant did not appear, he has no right to costs in the court below. He is entitled, however, to costs of appeal; but although it seems that the registrar of the Court below charged £50 for the notice of appeal being filed, that was a mistake for £7-10*s*-0*d*, for which the plaintiff cannot be asked to pay.

The following order is made; it incorporates the order made at the hearing:

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Bairamian, J.S.C.

The appeal is allowed; judgment and costs are set aside.

The case will be sent back for rehearing by another Judge. Leave should be granted to the plaintiff to file full particulars of his claim and/or statement of claim which should, for the purpose of service on the defendant, be posted on the notice board in the Court premises, with a copy posted on the door of, or thrown in to the house of, his last known address, 23 Lonsdale Street, Jos, as already supplied to the Court. This should be deemed a good and sufficient service for all processes of Court arising in this matter.

Costs of this appeal are assessed at thirty-nine guineas.

There will be no costs in favour of the defendant/appellant in the Court below.

The Registrar of the High Court at Jos shall refund to the appellant £42-10*s*-0*d*, the excess paid in respect of filing the notice of appeal.

*Appeal allowed; case remitted for rehearing by another Judge. Order for reimbursement of certain costs.*



## MADU MANAMA *v.* BORNU NATIVE AUTHORITY

[S. C. N. (Ademola, C. J. N., Taylor, J. S. C. and Bairamian, J. S. C.)——April 9, 1964]

[Lagos——Appeal No. F.S.C. 537/63]

*Evidence———witnesses———oaths———circumstances in which required——Criminal Procedure Code, s.* 229, *s.* 230, *s.* 391.

*Native Courts——witnesses——oaths——discretion of court to invite witness to take oath*——ibid., *s.* 391(2).

A native court is not obliged to invite a witness before it to take an oath. S. 391(2) of the Criminal Procedure Code gives it a discretion to issue such an invitation and this discretion is to be exercised judicially.

CRIMINAL APPEAL

*J. A. Cole* for the appellant;
*A. R. H. Thomas, Senior State Counsel,* for the respondent.

**Ademola, C.J.N.,** delivering the judgment of the Court: The appellant was convicted in the Shehu of Bornu's Court of the offence of culpable homicide punishable with death under section 221(*a*) of the Penal Code: he was sentenced to death. His appeal to the High Court of the Jos Judicial Division failed and he has now appealed to this Court.

On the facts, there is no merit in the appeal; the appellant was found guilty of murdering his wife, who he alleged had stolen his bag containing money and a gown. Counsel for the appellant did not seek to argue the appeal on the facts; he filed and argued only one additional ground of appeal which is as follows:

> "The trial of the appellant was a nullity on the basis that the witnesses for the prosecution neither took oath nor made affirmation before they gave their evidence."

The record of proceedings in the Shehu's Court clearly shows that none of the six witnesses (including the accused) who gave evidence before the court were at any time made to take an oath or made affirmation. It was submitted this is contrary to the spirit of the common law and against sections 229, 230 and 391 of the Criminal Procedure Code, none of which dispense with the taking of an oath.

With regard to the argument about the common law, it is enough to say that the Shehu of Bornu's Court is not bound by the common law of England and the arguments on this point need no further consideration by this Court. The Shehu of Bornu's Court is a Grade A Native Court and has power to try any offence under the Penal Code (*see* Section 12 of the Criminal Procedure Code and Appendix A).

Section 5(1) of the Criminal Procedure Code Law enacts that, "All offences under the Penal Code shall be investigated, inquired

into, tried and otherwise dealt with according to the provisions contained in the Criminal Procedure Code."

Counsel referred us to the provisions of sections 229, 230 and 391 of the Procedure Code and argued that as these provisions were not observed, and the witnesses before the Court were not sworn, the trial was a nullity.

Sections 229 and 230 of the Criminal Procedure Code are as follows:

> "229. (1) Every witness giving evidence in any inquiry or trial under this Criminal Procedure Code may be called upon to take an oath or make a solemn affirmation that he will speak the truth.
>
> "(2) The evidence of any person, who by reason of youth or ignorance or otherwise is in the opinion of the court unable to understand the nature of an oath, may be received without the taking of an oath or making of an affirmation if in the opinion of the court he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.
>
> "230. No witness, if he refuses to take an oath or make a solemn affirmation, shall be compelled to do so or asked his reason for so refusing but the court shall record in such a case the nature of the oath or affirmation proposed, and the fact of the refusal of the witness together with any reason which the witness may voluntarily give for his refusal."

It is clear that these two provisions of the Code relate to trials in the High Court and the magistrates courts and have no reference whatever to native courts. So, they are not applicable in this case.

Section 391, however, refers specifically to trials in the native courts. The relevant subsections are (1) and (2), and are as follows:

> "391. (1) In taking evidence in any criminal matter a native court may test the credibility of any witness by examination.
>
> "(2) Notwithstanding the provisions of this Criminal Procedure Code or of any other written law, a native court may in its discretion invite any witness to take an oath as to the truth of his evidence or any part thereof either before he gives such evidence or at any subsequent stage of the proceedings and if such witness refuses to take any such oath the court may draw such inference from such refusal as it thinks just."

Counsel for the appellant submitted that the correct interpretation to be applied to subsection (2) above is that it is obligatory on the part of the native court to administer the oath to witnesses before it, but that the oath need not necessarily be administered before the witness gives his evidence—it may be administered before or at any subsequent stage of the proceedings.





We are unable to agree with Mr Cole's view of the interpretation of section 391(2) of the Criminal Procedure Code. The section, in our view, gives a discretion to the native court to invite a witness, "either before he gives his evidence or at any subsequent stage of the proceedings," to take an oath as to the truth of what he was going to say or what he had said; again, a witness may be invited to take an oath as to a particular portion of his evidence only. It is not obligatory on the part of the court to do so; it is a matter of discretion for the court whether or not it will invite the witness to take an oath. It must be made clear, however, that the matter is not left to the whims of the court, but it is a discretion to be exercised in appropriate cases.

This ground of appeal must therefore fail and the appeal before us is hereby dismissed.

*Appeal dismissed.*

## NA'IYA DANSARA *v.* KANO NATIVE AUTHORITY

[C. A. (Hurley, C.J., Holden, J. and Jibir Daura, Sh. Ct. J.)——March 23, 1964]

[Kano——Appeal No. K/50CA/1962]

*Criminal procedure——examination of accused——no discovery of line of defence or explanation of prosecution's case——no warning that need not give evidence——Criminal Procedure Code, s.* 235, *s.* 236.

*——————————————opportunity to state defence and call witnesses——duties of court——*ibid., *s.* 389.

*Words and phrases——"failure of justice"——*ibid., *s.* 382.

The appellant was charged in a native court with culpable homicide punishable with death. The prosecution case was stated by reading out the report of a district head who had investigated the allegations made against the appellant and the court then asked the appellant whether he had any question or comment. He made a comment on the district head's report and then, at the court's request, made a second comment amplifying the first. He was not warned that he need not give evidence and that, if he did, the evidence might be used at the trial. When the appellant was charged, the court asked him whether or not he was guilty but did not ask him to state his defence or name his witnesses. His reply admitted doing some of the acts alleged but did not amount to a plea of guilty.

On appeal, the appellant contended, *inter alia*, (1) that the trial court had failed to be properly guided by s. 235 of the Criminal Procedure Code, in that it asked him to comment on the statement made by the prosecution and then to amplify his comment, when this procedure was not for the purpose of discovering his line of defence or explaining the prosecution's case against him, and that there had accordingly been a failure of justice within the meaning of s. 382 of the Code; (2) that he had a defence to the charge, namely, that he was exercising the right of private defence and (3) that the trial court did not call upon the appellant to state his defence and inform the court of the names of his witnesses, as required by s. 389 of the Code, and that there had again been a failure of justice.

*Held:* (1) By inviting an accused person to speak generally on the case after hearing only the statement of the prosecution's case, a court is not being properly guided by s. 235 of the Criminal Procedure Code, and if no warning is given to the accused under the terms of s. 236(1)(*b*), his statement may not be received in evidence under s. 236.

(2) A trial court must ask an accused person to state his defence and inform it of the names of his witnesses, as provided by s. 389 of the Criminal Procedure Code.

(3) In this case, although having regard to the evidence the failure to be properly guided by s. 235 and s. 236 did not lead to a failure of justice within the meaning of s. 382, the failure to observe the provisions of s. 389 led to the accused being prejudiced in his defence and accordingly to a failure of justice, because the appellant had a defence and did not admit the charge.

Case referred to:

*Bobaye v. Kano Native Authority*, 1962 N.N.L.R. 59, followed.



(*Editorial Note.*—At the time of the trial, s. 235 (1) of the Criminal Procedure Code provided that, "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the court may at any stage of an inquiry or trial, without previously warning the accused, put such questions to him as the court considers necessary. . . ." It was amended by the Criminal Procedure Code (Amendment) Law, 1963, s. 25, by the deletion of the words "at any stage of an inquiry or trial, without previously warning the accused" and the substitution therefor of the words "if the accused so agrees at any stage of an inquiry or trial, after explaining to the accused the effect of subsections (2) and (3)". Subsections (2) and (3) provide that the accused's refusal to answer questions shall not render him liable to punishment but the court may draw from the refusal or answers such inference as it thinks just, and that the answers of the accused may be taken into consideration at the inquiry or trial. Subsection (4) provides that the sole purpose of such examination shall be to discover the line of defence and to make clear to the accused the particular points in the prosecution's case which he has to meet and further provides that there be nothing in the nature of a general cross-examination for the purpose of establishing the guilt of the accused).

CRIMINAL APPEAL FROM NATIVE COURT

*E. Tagbo* for the appellant;
*K. Hassan, State Counsel*, for the respondent.

**Hurley, C.J.,** delivering the judgment of the Court: The appellant was convicted of the offence of culpable homicide punishable with death contrary to section 221 (*a*) of the Penal Code and sentenced to death by the Court of the Emir of Kano. There were ten grounds of appeal; three were abandoned, and of the remainder we need consider only the fifth, the second and seventh which were argued together, and the fourth.

The fifth ground of appeal is that the trial court did not observe the provisions of section 235 and section 236 of the Criminal Procedure Code. This ground refers to questions put to the appellant and his replies, after the facts of the prosecution case had been stated at the opening of the proceedings. The prosecution case was stated by reading a report from the district head of Ungogo setting out the results of his investigation of the case. This was not evidence and a great part of it was left unsupported by the evidence subsequently given. It said that the appellant and the deceased, Saad, were half brothers and that after their father's death they had quarrelled on two occasions, the appellant being the aggressor, and later the appellant had threatened to kill the deceased. On the 3rd August, 1962, at the gate of Yammata market, the appellant waylaid the deceased, hit him on the neck with an axe so that he fell down, cut his head off with a knife, and began to dig a grave for him. When people came, the appellant warned them that if anybody came near he would kill him as he had killed the deceased. He was apprehended by force. He confessed to the district head that he had killed the deceased, and said that he had done it because the deceased had promised to kill him. He was wounded in three places and said that the wounds had been inflicted by Ado and Mai Fada. Ado and Mai

Fada told the district head that they had wounded the appellant when he threatened them with a knife and tried to run away.

When this report had been read, the trial court asked the appellant whether he had any question or comment. The appellant replied:

> "When I returned from Rafi long ago Saad came to my house with an axe, Dan Inna said to him 'How do you come to a man's house with an axe?' From that time he said he would kill me and from that time I wait for him in that manner, till we came together and with me was the axe. I wounded him, when he saw the blood he fell on the ground and then I took the knife and beheaded him".

The court asked the appellant at what place and at what time and the appellant said, "On the side of the village road near Yammata market to the left side".

The trial court was to be guided by the provisions of the Criminal Procedure Code. The only question which the Code allowed to be put to the appellant at that stage was the question whether he had any cause to show why he should not be convicted. The trial court put a wider question than that, a question which invited the appellant to say more, and in fact elicited more from him; and then it cross-examined him on his reply. A trial court can examine an accused person under section 235 of the Code and it can hear evidence from him under section 236. But as it stood at the date of the trial, section 235, in subsection (1), empowered the trial court to examine the appellant only for the purpose of enabling him to explain any circumstances appearing against him in the evidence. No evidence had been given when the trial court examined the appellant after the reading of the district head's report, there were no circumstances appearing in the evidence for him to explain and no examination ought to have taken place. Furthermore, by subsection (4) of section 235, the examination of an accused person is to be for the sole purpose of discovering his line of defence and explaining the points in the prosecution case which he has to meet and there is to be nothing in the nature of a general cross-examination for the purpose of establishing his guilt. The tenor and effect of the questions put to the appellant after he had spoken in reply to the invitation to comment on the district head's report, is that they were not for the purpose of establishing his line of defence and were for the purpose of establishing guilt. These questions were not only not authorised by section 235, they were prohibited by it.

Besides examining an accused person at the proper stage of the proceedings and in the proper way, a trial court may allow him to give evidence and may cross-examine him on the evidence he gives. It may do this under section 236, but it may not do it without warning him under section 236(1)(*b*) that he is not bound to give evidence and that, if he does so, his evidence may be used at the trial. The trial court did not give this warning.

In inviting the appellant to speak generally on the case after the district head's report was read and then questioning him, the trial court failed to be guided by the Criminal Procedure Code. In consequence, statements of an evidential nature, whether as testimony or as admission, were made by the appellant which would not have been made had the trial court been guided by the Code. The question is whether this occasioned a failure of justice.





There were four prosecution witnesses. All saw the appellant standing with an axe and a knife in his hand beside the decapitated body of Saad. All said that the appellant threatened to kill anybody who approached as he had killed Saad. One said he was making a ditch with the axe. He was apprehended by force. That was the prosecution evidence. It was evidence on which the trial court could fairly and reasonably have come to the decision it made, and we do not think that it has been shown on this ground of appeal that a failure of justice has been occasioned.

The second and seventh grounds of appeal allege a malicious falsification of the record of the trial proceedings by the omission of the appellant's defence, which was that he had been exercising his right of private defence when the deceased and others waylaid him in order to kill him. The appellant has made two affidavits in which he deposes to his account of the occurrence and avers that it has been omitted from the trial record though he gave it in full when asked to comment on the district head's report. He avers also that he believes that this omission and other omissions of which he gives particulars were made because of the trial court's hostility to him, as betrayed by its attitude at all stages of the trial. The appellant has not submitted himself for cross-examination on his evidence attacking the record and the conduct of the trial and no other evidence in support of these grounds of appeal has been adduced. His allegations are allegations of the commission of a criminal offence, and we do not think that the evidence which he has furnished in support of them is such as calls for a reply. This ground of appeal fails.

The fourth ground of appeal is that the trial court did not call on the appellant to state his defence and inform the court of the names of his witnesses when it charged him, thereby failing to comply with section 389 of the Criminal Procedure Code. Having charged the appellant the trial court said, "Do you agree that you are guilty or not?" It did not ask him to state his defence or name his witnesses. In reply, according to the record, the appellant said that he agreed that he hit Saad with an axe and cut his head with a knife and separated the body and head. He did not say he was guilty. In one of his affidavits he says that when he was charged he told the court he was badly beaten and retaliated in a desperate condition with his hoe; he was told later that one of his attackers died afterwards but he did not know the cause of his death. As has been seen, we are unable to accept that as *prima facie* evidence that the record is false or that when he was charged the appellant said anything different from what the record shows. But the record shows that the appellant was not asked to state his defence or name witnesses, and that though he admitted killing and decapitating

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the deceased he did not plead guilty. According to his affidavits, the appellant had a defence. Since the record does not show the appellant was asked to state his defence, his failure to state it does not show he had none. That being so, and in the absence of a plea of guilty, there is not enough in the record to meet his averments that he had a defence.

In *Bobaye v. Kano Native Authority*, 1962 N.N.L.R. 59, the appellant was not called upon to state his defence when charged, and made no statement in his defence and gave no evidence; but he did not admit the charge and he called witnesses whose evidence showed that he had a defence. On appeal, this Court held that there had been a failure of justice in that the appellant had been prejudiced in his defence. We must hold the same here, for the same reasons; the appellant was not called on to state his defence and did not state it but he had a defence and he did not admit the charge. As to his witnesses, the appellant now says that he has none he can usefully call; but that does not affect the case before us, because the appeal must succeed on the ground that the trial court did not comply with section 389 of the Criminal Procedure Code by calling on the appellant to state his defence and there was a failure of justice because in consequence the appellant did not state his defence though he had one.

The appeal will be allowed. This is a clear case for a retrial, and we will order accordingly.

*Appeal allowed; retrial ordered.*



## MAIRALEIGH DAURA *v.* KANO NATIVE AUTHORITY

[C.A. (Hurley, C.J., Reed, J. and Abubakar Zaki, Sh. Ct. J.)—— July 18, 1964]

[Kano——Appeal No. K/11CA/64]

*Criminal procedure——irregular proceedings——illness of accused ——whether accused fit to stand trial——justice not seen to be done—— failure of justice——Criminal Procedure Code, s.* 382.

*Words and phrases——"failure of justice"*——ibid.

Where an accused person is manifestly unwell at his trial, to proceed with the trial and convey the impression that his illness is prejudicing him in his defence will amount to a failure of justice.

CRIMINAL APPEAL FROM NATIVE COURT

The appellant appeared in person;
*M. Sambo, State Counsel*, for the respondent.

**Hurley, C.J.,** delivering the judgment of the Court: This is an appeal against a conviction for theft. When he was caught the appellant was beaten up. He was tried and convicted the next day. He says that in consequence of the beating he was lying down and was not in his right senses while he was being tried. That is clearly untrue. The trial court would not, and could not, have tried him in that condition. The record shows that the appellant gave evidence. And finally, the injuries which have been described to us are by no means such as would oblige him to lie down in court, or would interfere with the proper balance of his mind. On the other hand, it is perfectly clear that at the time of his trial he had fairly serious injuries. He had a big swelling over one eye and it seems that the skin was broken also. His shins were broken and bleeding under the knee. With these injuries it was most unlikely that he was feeling well and he could not have seemed to be well. He was put on trial as a sick man, without apparently having received any treatment before the trial began. His condition may well have been a disadvantage to him during the trial and anybody present in court would have reasonably thought that it was a disadvantage to him. There was therefore at least an appearance of injustice in his trial. The Supreme Court has already held that there is a failure of justice not only when justice is not done but also when it is not seen to be done. We think there must have been such a failure of justice at the appellant's trial. For this reason we allow the appeal and set aside the conviction and sentence. There was a strong case against the appellant and for that reason we shall order a retrial in the Magistrate's Court of the Kano Magisterial District. The appellant will remain in custody pending his trial. If he is convicted, no doubt the magistrate will take into consideration when sentencing him, the time he has spent in prison.

*Appeal allowed. Case remitted to magistrate's court for retrial.*