

**THE OPEN UNIVERSITY OF TANZANIA
(OUT)**

CRIMINAL LAW COURSE UNIT I

CASE BOOK

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INTRODUCTION

Criminal Law is one of the most interesting subjects for students and practicing lawyers. Experience has taught many people that the understanding of the operation of criminal law, to a large extent requires the study of the working of the law on a case to case basis. This collection is intended to fulfill this need. For students it is also intended to be a companion to our manual: General Principles of Criminal Liability, but we hope that it may also prove useful to students who use other textbooks.

We have collected a total of about sixty eight cases touching on six main aspects: elements of an offence; exceptions to the general principle of actus reus and mens rea; the principle of causation; parties to crime; inchoate crimes and general defences.

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SECTION I

ELEMENTS OF A CRIME

You were introduced to the terms Actus Rens and Mens Rea in the student manual for unit one.

In the case of **Hawding V. Prince [1948], K.B 695** Lord Goddard, C.J. stated that the general rule applicable to criminal cases is **actus non facit reum mens sit rea**. He added that it is of the utmost importance for the protection of the liberty of the subject that courts should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

1. Actus Rens

Actus reus means the whole definition of crime with the exception of the mental element. It requires, generally, proof that the accused did an act prohibited by the law. However it is only after looking at the definition of a particular crime that one can determine the material circumstances required to constitute the actus reus.

K.V. Wiley (1950) 2 Den. 37

Wiley was convicted of receiving two cocks and five hens, well knowing from to have been stolen. The evidence was that Stranghan and Williamson, who were found guilty of stealing the property in question, were seen to be conducted into a stable by Wiley. Stranghan and Williamson were carrying a sack, and the stable belonged to Wiley. The Police entered the stable and found the parties bargaining with regard to the price of goods in question. There was no doubt that Wiley knew that the goods were stolen, but a case was reserved for the opinion of the court for Crown Cases Reserved, on the question whether Wiley had sufficient possession [if the actus reus of receiving stolen property was complete] of goods to be convicted of receiving.

The relevant parts of the Judgements of the court for crown cases Reserved are as follows:-

MARTIN, B.:

"... Upon the facts which are stated in this case I think the prisoner (accused) cannot be taken to have received the goods. The direction of the Judge can only be taken to refer to so much of the circumstances stated as relates to the taking into the stable, and the subsequent facts. And upon those facts it seems to me that strangan and Williamson had possession of the goods as vendors, and therefore adversely to Willey, and never intended to part with the goods until the bargain was concluded."

PARKE, B.:

"I think the conviction [of Willey] was wrong. We have only to consider the precise point submitted to us in the case reserved. The taking `as above' was said by the chairman to amount to receiving; that only incorporates so much of the transaction as relates to the taking of goods into the stable. We must not therefore speculate on the question whether the three prisoners (accused persons) were all participating in the wrongful act, or what would be the legal consequences to each of their so doing. Receiving must mean a taking into possession actual or constructive, which I do not think there was here. The prisoner took the thieves into the stable, but he never accepted the goods in any sense of the word accept upon a contingency, which, as it happened, did not arise. I think the possession of the receiver must be distinct from that of the thief; and that the mere receiving of a thief with stolen goods in his possession would not alone constitute a man a receiver.

Conviction quesned

Actus Rens by Omission. The word `offence' is defined as an act, attempt or omission punishable by law. Liability for omissions is not limited to crimes expressly defined by statute as omission offences. For example homicide require the accused to have `killed' but it may be committed by omission.

The Queen V. Instan [1893] 1 QB. 450

The accused lived with her aunt aged 73. The evidence was that the aunt was in good health until shortly before her death. She contracted gangrene of the leg which rendered her, in the last ten days of her life, quite unable to attend to herself or to procure assistance. No one but the accused had knowledge of the condition of her aunt. Accused continued to live in the house at the cost of the deceased, and took in the food supplied by the tradespeople; but she does not appear to have given any to the deceased, and she certainly did not give or procure any medical or nursing attendance for her, or give notice to any neighbour of her wants, although she had abundant opportunity to do so. The deceased died of exhaustion caused by the gangrene but substantially accelerated by neglect, want of food, of nursing and of medical attendance during several days previous of the death. Accused was convicted by the jury of manslaughter. The trial judge stated the case for consideration man by the court for crown cases Reserved].

LORD COLERIDGE C.J. `We are all of opinion that this conviction must be affirmed. It would not be correct to say that every moral obligation involves a legal duty but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement. There can be no question in this case that it was the clear duty of the prisoner to impart to the deceased so much as was necessary to sustain life of the food which she from time to time took in, and which was paid for by the deceased's own money for the purpose of the maintenance of herself and the prisoner. It was only through the instrumentality of the prisoner that the deceased could get food. There was therefore, a common law duty imposed upon the prisoner which she did not discharge.

Nor can there be any question that the failure of the prisoner to discharge her legal duty at least accelerated the death of the deceased. If it did not actually cause it there is no case directly in point, but it would be a slur upon and a discredit to the administration of justice in this country if there were any doubt as to the legal principle, or as to the present case being within it. The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her, that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty. It is unnecessary to say more than that upon the evidence this

conviction was most properly arrived at conviction affirmed.

NOTE: In Tanzania the case against the accused would have been considered under sections 206 and 195 of the Penal Code.

2. Mens Rea

Brend V. Wood (1946) 62 T.L.R. 462

A man was charged with having in his possession, with intent to deceive, a document so closely resembling a motor fuel coupon issued for the purpose of the Control of Motor Fuel Order, 1945, made under reg. 55 of the regulations of 1939, as to be calculated to deceive, contrary to regs. 55 and 82(1) of the regulations. The coupon, which the man did not know was forged, was given to him in a public house by a man whose name he did not know. He had no licence to accept or be in possession of such coupon. It was contended for the prosecution that on those facts an intent to deceive was proved or must be presumed. The magistrate found that the man had received the coupon in good faith inasmuch as, through absence at sea, he was unaware of the law with regard to fuel rationing.

Lord Goddard, C.J., The respondent was charged on an information which alleged that "with intent to deceive he had in his possession a document so closely resembling a motor fuel coupon issued for the purposes of the Control of Motor Fuel Order, 1945, as to be calculated to deceive."

We are now told that he was at the same time charged with the offence of having acquired a supply of petrol otherwise than against the surrender of a valid petrol coupon. In respect of that he was convicted. Why it was necessary, therefore, to charge him with this other offence, I do not know, though it may be that there was a good reason for it.

On this evidence the essence of the offence is that a man is in possession of what he is in possession of with intent to deceive. The magistrate, having heard the whole of the evidence, accepted the respondent's story and found that he had no intent to deceive, apparently because

the man satisfied him that he was entirely ignorant of these matters relating to coupons; that he received the coupon in good faith, believing it to be a valid coupon; and that he did not know that he was committing any offence in acquiring it in this way.

It is argued for the appellant that the magistrate was bound to find that the respondent had an intent to deceive, and for that reliance is placed on *Rex v. Greenberg (sup.)*, decided by the Court of Criminal Appeal.

It should first be observed that at English common law there must always be *mens rea* to constitute a crime; if a person can show that he acted without *mens rea*, that is a defence to a criminal prosecution. There are statutes and regulations in which Parliament has seen fit to create offences and make people responsible before criminal courts although there is an absence of *mens rea*; but it is certainly not the court's duty to be acute to find that *mens rea* is not a constituent part of a crime. It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

In *Rex v. Greenberg (sup.)* the defendant was convicted of being in possession of clothing coupons, and there was evidence before the court that they had been irregularly obtained. Asquith, J., having presumably been invited to rule on the construction of the order in question, said (28 Crim. App. Rep. at p. 163): "Once it is proved that there is an intent to deceive by means or in respect of a document, the mere possession of such a document shall be an offence; provided it is what I will, for short, call a deceptive document, people shall possess such documents at their peril, and the Crown shall not be required to prove that they are possessed with knowledge of their deceptive or colourable character, always a difficult matter - be it observed that the judge says, "deceptive or colourable character" - "provided that the Crown can establish an intent to deceive by means of or in respect of or in relation to such a document.

The Court of Criminal Appeal approved Asquith, J.'s construction of the order, and agreed generally with his ruling. Birkett, J., delivering the judgment of the court, said (28 Crim. App. Rep., at p. 164): "This court holds that that construction is the proper construction to be put

upon this particular regulation.... It is important to say upon that part of the case that the words 'with intent to deceive' are not to be construed in any narrow vein, as referring to the deceiving of any particular person. If in fact on all the evidence it can be gathered that there was an attempt to deceive anybody by means of the particular document, that is enough". In other words, they approved Asquith, J.'s ruling that, if the Crown can show that the coupons, or whatever the document may be, have been acquired in a manner not permitted by law, that is enough; but enough in the sense only, in my opinion, that it is enough to establish a prima facie case that the defendant had intent to deceive. It follows that if the Crown have given evidence (they must have given evidence in this case because the respondent was convicted on the first summons of acquiring petrol without surrendering a valid coupon, and they had proved that he had no valid coupon when he acquired the petrol) that the respondent had acquired the coupon in a manner not permitted by law, that establishes a prima facie case which the respondent must answer if he can. If, as is the case, he has satisfied the magistrate of his good faith in the matter, he negatives the intent to deceive. That is what the magistrate has held. I should be sorry to think that, in any case where the essence of the offence is an intent to deceive, if the man charged proves that he acted in good faith and was innocent of intent to deceive, the court would hold that he should nevertheless be convicted of intent to deceive.

In my opinion, once it was established that the respondent had no intent to deceive, there was an end of the case. The magistrate, being satisfied on that point, properly dismissed the information. The appeal is dismissed.

Humphreys, J., I agree with every word of the judgment of my lord. In my opinion it is plain from the language used by Birkett, J., that, when he said that the intent to deceive could be shown by giving evidence that the documents were irregular, what he meant was that that afforded a prima facie case which was sufficient, unless answered, to justify the tribunal of fact in convicting. It was not, and could not have been intended to be, a direction in law that the tribunal of fact must convict of an intent to deceive.

Singleton, J., I agree.

Appeal dismissed.

(a)Intention

Intention is the highest state of mens rea. Where a person is charged with an offence requiring specific intention such intention must be proved. A person is said to intend a particular consequence when he foresees what it may result and desires that it should do so.

Alfred Brazila V. R. (1968) HCD n. 304

Accused, a messenger employed by the Bukoba District Council, was in charge of prisoners held at a Primary Court. He let two prisoners out of their cells and ordered them to wash his clothes while he went for a walk. The prisoners escaped, and accused was charged under section 117(1) of the Penal Code which applies to "any person who aids a prisoner in escaping or attempting to escape from lawful custody..."

Held: "(T)he word 'aid' would import ... an element of positive assistance and/or an intention of helping the prisoners to escape. The evidence led only establishes that [accused] was extremely negligent and careless." Conviction quashed.

D.M. Patel V. R (1969) HCD n. 60

The appellant was convicted of contempt of court c/s 114 (1), Penal Code. The facts alleged against the appellant were that in the course of judicial proceedings, he showed disrespect to the court by speaking without its permission. It appears that the appellant told a witness in attendance at the court "Wewe shahidi kaa huku" ("You witness, come and sit over here"). Where the charge was read and explained to the appellant, he admitted that he had spoken without asking the permission of the court but said he did not know he had to do so. The appellant also admitted that he was wrong in not consulting his advocate, who was present, before communicating with his witness.

Held: It is clear from his judgment "that the learned magistrate did not direct his mind to the

question of **mens rea**. This appears to me to have been a misdirection. Section 114 (1) of the Penal Code makes it an offence if any person "(a) within the premises in which any judicial proceeding is being had . . . shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being had or taken". The emphasis in that subsection seems to lie on the intention of the accused in doing the act complained of. This emphasis may not be so clear in the Common Law offence of contempt of court which is defined in Archbold (at para 3471, 35th Edn). . . . But learned State Attorney has conceded that intentional disrespect is an essential ingredient of the statutory offence in Tanganyika and I think this is clearly shown if subsection (1) of s. 114 is read as a whole including subsection (1)(i), which makes it a crime if any person: "commits **any other act of** intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken" (underlining added).

There was no evidence in the present case of any intention on the part of the appellant to show disrespect and had the learned Resident Magistrate directed his mind to this aspect of the matter, I have no doubt he would not have come to the conclusion that the appellant was guilty of contempt of court as charged". Appeal allowed.

(b)Recklessness

A person is classified as reckless when he foresees that certain consequences are likely to result but he is indifferent as to whether they occur or not or does not desire them.

R. V. Evans [1962] 2 All E.R. 1086

The appellant was convicted of causing death by dangerous driving contrary to section 1(1) of the Road Traffic Act, 1960. On appeal the court gave a judgment whose relevant parts are the following:

FENTON ATKINSON, J., The appellant, who was a very experienced driver with a very long and good record behind him, was driving his Jaquar motor car along a straight open road. The road was only just over twenty feet wide, so that there clearly would not be room for three

vehicles abreast. Ahead of him was a motor car travelling at about forty miles per hour. He decided to overtake. In the act of overtaking, he increased his speed to some sixty miles an hour and was driving on his wrong side of the road when he crashed head - on into a motor car coming from the opposite direction and of whose approach he appears to have been totally unaware. The driver of the other car was killed. The reason why the appellant did not see the approaching vehicle appeared to be that there was a dip in the road ahead of him and, at the vital moment when he was deciding to overtake, and commencing to overtake, the approaching vehicle was hidden in that dip, but he knew that the dip was there and he was apparently taking a chance. So that the question here for the jury was, viewed objectively, did the course on which and the speed at which the appellant drove his car in the particular circumstances prevailing at the time involve danger to another road user, and, if the answer to that question was 'yes', then the proper verdict was one of guilty.

... Counsel has told us that, at the time of that interruption, he was in fact urging on the jury that, although the test of dangerous driving was purely objective, in applying the test there were varying degrees of negligence for them to consider. Arguments of that sort often no doubt are addressed to juries, and sometimes counsel go on to invite them to compare the degrees of negligence necessary for founding civil liability, due care and attention and so forth, and the learned Judge, in our view quite rightly, intervened to make it quite clear to the learned counsel and the jury that he did not himself agree with the manner in which it was then being put. But the main criticism arises on a passage in the summing up itself. I think that, for completeness, this should be read:

'Members of the jury, there is no legal definition of driving to the danger of the public, and there cannot be any legal definition. It has sometimes been said that a very good test is for the jury to make up their minds on the evidence what actually happened, and in their minds' eye to put themselves down at the scene of the accident and to ask themselves this question, 'Had we seen this should we have said without any doubt, that was a dangerous piece of driving?' If the answer to the question is 'Yes', then the man is guilty, and if the answer to the question is, 'Oh, no; or we cannot be sure about it, then he is not guilty'.

So far counsel makes no criticism whatever of that direction. The learned judge went on:

"You see, members of the jury, you are the public, and it is for you to set the standards. You, no doubt all of you, use the roads and no doubt a good many of you drive motor cars [so far no criticism] and you have got to make up your minds here whether or not what [the appellant] did was dangerous to the public, that it dangerous to other road users. If it was, then even although the dangerous driving was caused by slight negligence, the slightest negligence on his part, he is guilty of the offence of driving to the danger of the public. That is the law, members of the jury, and you must take the law from me".

The latter part of that passage in the view of this court is really the necessary corollary of the objective test, because it has been laid down again and again in the reported cases, amongst others by LORD GODDARD C.J., in **Hill v Baxter [1958] All E.R 193 at p. 195 [1958]** when he said:

The first thing to be remembered is that the statute contains an absolute prohibition against driving dangerously or ignoring halt signs. No question of mens rea enters into offence: It is no answer to a charge under those sections to say, 'I did not mean to drive dangerously' or 'I did not notice the Halt sign.

It is quite clear from the reported cases, if a man in fact adopts a manner of driving which the jury think was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best. It is highly relevant if it ever comes to sentence and equally relevant in the mind of any person who has to consider whether a prosecution is justified or not..

If the summing-up at the passage which I have read is open to any criticism, it may well be that the direction is there too favourable to the appellant.

Appeal dismissed.

(c)Negligence

A person is said to be negligent when he does not foresee the probability of the occurrence of that consequence or is not aware but he, as a reasonable man, ought to have foreseen them.

R. V. Daudi Magomu s/o Anderea Magombe (1941) 8 EACA 52

Sir Henry Webb C.J., We are not satisfied that the appellant was guilty of criminal negligence. He had been employed for some years as a medical orderly and had had occasion, in the course of his duties to give injections of N.A.B., which are properly given intravenously, and also injections of bismuth, which are given intramuscularly. Some months ago the use of N.A.B. was discontinued, but there was no evidence before the court that at any time the appellant was ever told that, as is the case, and intravenous injection of bismuth would, in the words of Dr. Snell, 'have a marked poisonous effect, liable to be fatal: indeed usually fatal'. Dr. Snell thinks that his instructions would or at all events, should have been to give bismuth intramuscularly, but the appellant says that he was told to give the injections in the buttock and in the arm (i.e., intravenously) alternatively. Crown counsel submits that, if the appellant was told to give these injections in the buttock, then any deviation from these instructions would amount to criminal negligence, because the appellant must be considered as having taken a risk as to the effect of a drug without having taken the precaution of ascertaining its nature and effects. In our opinion this is putting the standard too high. In **Chamberlain** (10 Cox C.C. 486) the accused was a quack doctor who had volunteered to treat the deceased: here the appellant was giving a treatment which it was his duty to give, and it was only in his method that he erred. It seems to us that a person like the appellant would be most unlikely to appreciate the danger of giving an intravenous injection of bismuth, or indeed, that there would be any danger, unless explicit instructions to that effect had been given to him. He might well think that an intramuscular injection would merely be more effective. For instance, when one is given a medicine 'to be taken after meals' it would be extremely unlikely to occur to one, we think, that if one inadvertently took it before a meal the result would be fatal. And if the medicine was of such a kind one would certainly expect the medical practitioner to do more than merely to put the conventional direction on the label. In saying this, we wish it to be clearly understood that we are far from suggesting that in fact the instructions given to the appellant were inadequate: all that concerns this court in the present case is the question whether or not it was proved that the

appellant had received such instructions as to the absolute necessity of injecting busmuth only into the muscle and not into a vein as could cause his deviation therefrom to amount to criminal negligence. Crown counsel admits that this evidence was wanting and therefore we are of the opinion that the conviction must be set aside and the appellant released from imprisonment on this charge".

R. V. John Jones (1874) 12 Cox 628

The accused was charged with manslaughter of a child. The mother of the deceased said that he was eight years old and that she went upstairs leaving the accused and the child downstairs. While the child was out of the room, he picked up a gun and held it pointed at the door. He did not examine the gun, and believed it to be unloaded. When the child came in, through the door, the gun went off and killed him.

LUSH, J., No doubt the prisoner did not intend to discharge the gun at the child. What he did was either an accident or negligence on his part. The charge is that he so carelessly handled the gun as to occasion the death of the deceased. If a person points a gun without examining whether it is loaded or not, and it happens to be loaded and death results, he is guilty of negligence and manslaughter. Can you come to any other conclusion than that the prisoner did either in joke or otherwise point the gun at the boy? [His Lordship read the evidence] If he held the gun pointed at the boy, and so held it until the child came out of the pantry, and it went off, what can that be but so improperly and carelessly handling the gun as to be negligence and therefore manslaughter?

Verdict, guilty with a recommendation to mercy. Sentence, two months' imprisonment.

R. V. Chepe Kalangali (1973) LRT. n. 77

MNZAVAS, J., The accused, Chepe s/o Kalangali, stands charged with manslaughter c/s 195 of the Penal Code.

It is the Republic's case that the accused on or about the 26/12/71 at Chosi village in the district

and Region of Mbeya, unlawfully killed one, Edward s/o Chepe, his son.

The accused pleaded not guilty to the charge.

The deceased who was, according to the evidence, between 1.5 and 2 years old, disappeared from his parents on the night of 26/12/71. A search was mounted and the deceased was found lying in a river already dead on 28/12/71.

It is the prosecution's argument that it was due to the accused's gross negligence that the deceased strayed from him to the river where he met his death.

The defence, on the other hand, argued that the deceased was with his mother when he strayed to the river where he was found dead.

In support of the Republic's case seven main prosecution witnesses gave evidence as to how the deceased disappeared and how his body was found in a river two days later.

Insyile Kapande, (P.W. 2) the wife of the accused and mother of the deceased chose to give evidence notwithstanding the fact that she is not a compellable witness. [The court considered at length the evidence of the witnesses and continued]

After summing up to the gentlemen assessors; they were both of the opinion that the child was in accused's custody when it disappeared and later to be found dead in the river. They were also of the opinion that the accused was grossly negligent in that he left the child unattended and as a result the child strayed to the river where he met his death. They, therefore, found the accused guilty of manslaughter as charged.

In this case the accused is charged with manslaughter. It is the Republic's case that the accused, by his negligence, unlawfully caused the death of his son, Edward Chepe.

Before I deal with the issue of negligence I will first try to answer the question - In whose custody was the deceased when he was found to be not in the house and later to be found dead

in a river?

The prosecution's argument is that the deceased was in the custody of the accused when he got lost. The accused however argued that the deceased was with his mother when he disappeared. With respect I tend to agree with the learned state attorney's argument that on the evidence the only reasonable conclusion is that Edward Chepe was with his father when he disappeared and later to be found lying in the river dead. In support of this conclusion, we have Insyile (P.W. 2), the accused's wife, who told the court that the accused took the child from her as she was going to Abibu's house to report that the accused had assaulted her. Her evidence is fully supported by Borahesabu (P.W. 5) Afyusisye (P.W. 6) and Maulid (P.W. 8) who gave evidence to the effect that they were sent by Abibu to go to accused's house and collect the child and that on arrival they saw the accused with the child.

All the three witnesses told the court that they asked the accused to surrender the child to them so that he could join his mother who was at Abibu's house but that the accused refused to surrender the child to them. This was on the night of 26/12/71. We also have the testimony of Abibu, accused's uncle; he told the court that next morning (27/12/71) he sent one, Jeremiah to go and call the accused. The accused came to Abibu's house and, on being interrogated as to the whereabouts of Edward, he replied that Edward was at home. Later when Abibu, Msunguru (P.W. 7) and other people went into the accused's house for the child the accused changed his story and told them that the child was with his mother. The child was, on the next day, found in the river already dead.

There is no reason to suspect, and the defence has suggested no reason, why the accused's wife should cook up such a serious story against her husband. Nor is there any reason why Msunguru (P.W. 7), a cell-leader, and a well respected person by the local gentry should have decided to come to the court and manufacture a story against the accused. And what is more the accused's own brother, Afyusisye (P.W. 6) supported the prosecution case. The accused on being cross-examined by the prosecution admitted that there was enmity between him and his brother.

The accused's defence that there was bad blood between him and his uncle Abibu and also with

Maulid may be true. But there is no reason why the other witnesses should tell lies against him. Indeed the accused's behaviour and contradictory answers on 27/12/71 regarding the whereabouts of the deceased showed that he was hiding something from the searching party.

On the evidence I am fully convinced that the deceased was in the hands of the accused when he disappeared from the house and later to be found dead in a river. The vital question, however, is whether on the evidence before this court, the accused can be convicted of manslaughter by negligence.

The rule as laid down in the famous case of **Rex v. Bateman** (19 CR. APP. R. 8) is that before a conviction for manslaughter by negligence can stand the following ingredients must be proved:

- (i)"It must be proved that the accused had a duty to take care".
- (ii)"Failure to discharge that duty has to be proved".
- (iii)"That death was due to that default".

And (iv)"The negligence must go beyond a mere matter of compensation and show such disregard for human life and safety of others as to amount to a crime against the state and conduct deserving of punishment".

On the evidence the only reasonable conclusion is that the deceased strayed from the custody of the accused to where it was found lying dead. The deceased was a child of tender age, who had just started walking. The accused as father of the deceased had a duty to take care that the deceased did not leave the house and wander about to his detriment.

The accused totally failed to discharge this duty and the child strayed to the river where he was found dead.

As to the question whether the death of the deceased was due to the accused's failure to take care we have the evidence of the doctor (P.W. 1). According to his evidence he performed post mortem examination on the deceased's body and that on inspection of the lungs he suspected pulmonary tuberculosis. To ascertain his clinical finding he sent specimens of the deceased's

lungs to the Central laboratory in Dar es Salaam for histopathology.

The report of the pathologist (exhibit B) is to the effect that the deceased was suffering from broncho-pneumonia. After this report the doctor came to the conclusion that the deceased died of broncho-pneumonia.

In support of the argument that the deceased's death was a result of the failure of the accused to take care the learned state attorney referred to the court sections 206 and 207 of the Penal Code.

With respect to the learned state attorney I am not in the least convinced that Sections 200 and 207 are relevant in this case. Both sections speak of the duty of every person having charge of another - (Section 206) and every person who is head of a family - (Section 207) to provide for that other person the necessities of life - Section 206) - And to provide the necessities of life for such child - (Section 207).

In this case there can be no doubt that the accused is covered by Section 207 in that he was the father and as such head of his family. Equally there can be no doubt that his deceased child was under the age of 14 years. He was estimated to be about 2 years old. But there is no evidence to suggest, leave alone to prove, that he failed to provide the necessities of life to the deceased and that such failure consequently affected the life or health of the deceased. These two sections are in my view inapplicable in this case.

Having commented on the learned state attorney's submission, I now come to the question as to whether the accused's negligence in failing to keep watch on the movements of the deceased contributed to the death of the deceased.

The doctor told the court that the deceased died from Broncho/pneumonia. That the deceased was suffering from chest ailment is evident from no lesser a person than the accused himself. He told the court that the deceased was suffering from a cough a few days before his disappearance and that he had taken him to a local dispensary for treatment but that he was still coughing when he disappeared.

We have the evidence of Abibu that on the night the accused took the child from its mother it

rained heavily. From the evidence the deceased must have strayed from the house that same night and no doubt must have been exposed to cold and, most probably to the heavy rain. The doctor, on being interrogated by the court, replied that exposure to cold of a child suffering from pneumonia may aggravate its condition.

On the evidence the deceased's health on the night he disappeared from the house was far from being sound, he had a cough a few days before his disappearance from the accused, and was still coughing when he disappeared. Post mortem examination showed that he died of bronchopneumonia. This would suggest that the deceased must have been suffering from pneumonia when he disappeared. His exposure to cold must have speeded his death. Under Section 203(d) of the Penal Code "A person is deemed to have caused the death of another person although his act is not the immediate or sole cause of death" - "If by any act or commission he hastens the death of a person suffering under any disease or injury which apart from such act or omission would have caused death".

In the present case the accused failed to take care of his child and as a result the child who was known to the accused to be suffering from a cough strayed away and was exposed to cold. The exposure hastened the deceased's death. The accused is therefore under Section 203(1) of the Penal Code deemed to have caused the death of his child, Edward Chepe.

As to the question whether the accused negligence went beyond a mere matter of compensation, I would say it did. As a father in charge of a sick child, and having refused to surrender the child to its mother, it was his duty to take care of the child in every respect. His omission to do so which led to the child being exposed to cold which no doubt hastened its death was such disregard for human life as to amount to a crime against the state.

If I do not refer to the learned defence counsel's submission in detail, it is not through lack of respect for the learned counsel, who has argued this case with clarity and restraint. I am satisfied however that the Republic has proved the charge against the accused beyond all reasonable doubt.

Like the unanimous opinion of the gentlemen assessors, I find the accused guilty as charged;

[After taking into account all the mitigating factors the accused was sentenced to 8 months imprisonment].

3. Voluntaryness

Mens rea involves those acts willed by the accused and my involuntary muscular movement will not contain mens rea. In Tanzania the aspect of voluntariness is provided for under section 10 of the Penal Code.

Anthony Mhikwa V. R. (1968) HCD n. 460

Accused was charged with contempt of court c/s 114, Penal Code, for showing disrespect to the court by laughing during the course of a trial in which he was involved. Accused said that a fly had entered his nose, which was the cause of the ensuing noise that he made. He was sentenced to 8 months imprisonment.

Held: (1) "It is to be presumed that an offence under s. 114 (1)(a) of the Penal Code requires **mens rea**. The offender must intend to show disrespect to the officer administering justice or to the proceeding, in which he is engaged." The record did not contain such a showing (2) The proper procedures for a court to follow in summarily dealing with contempt of court was set out by the Court of Appeal in Joseph Odhengo s/o Ogongo v. R. [(1954) 21 EACA 302, a case involving the equivalent section of the Kenya Penal Code]. These were not followed here. (3) The maximum sentence of imprisonment permitted under s. 114 (2) is one month. (A fine can also be imposed). Thus the court erred in passing a sentence of eight months imprisonment. (4) "(A) good principle to bear in mind when dealing with contempt of court cases is that trivial incidents ought not to be magnified into offences." Conviction quashed.

Bratty V. A.G for Northern Ireland [1963] AC 386

The accused killed a girl whom he was driving in his car by taking off her stocking and strangling her with it. The accused testified that a feeling of blackness came over him when he was with the girl and there was some evidence that he was suffering from psychomotor epilepsy

which could cause ignorance of the nature and quality of acts done. At the trial the defences of automatism and insanity were raised. The defence of insanity was rejected by the trial Judge. The Court of Criminal Appeal in Northern Ireland dismissed an appeal against conviction for murder. He appealed to the House of Lords.

LORD DENNING., My Lords, in *Woolmington V. Director of Prosecutions* Viscount Sankey L.C. said:

‘When dealing with a murder case the crown must prove (e) death as the result of a voluntary act of the accused and (b) malice of the accused.

The requirement that it should be voluntary act as essential, not only in a murder case, but also in every criminal case. No act is punishable if done involuntarily: and an involuntary act in this context - some people nowadays prefer to speak of it as ‘automatism’ - means an act which is done by muscles without any control by the mind such as spasm, a reflex action or a convulsion, or an act done by a person who is not conscious of what he is doing such as an act done whilst suffering from concussion or whilst sleepwalking. The point was well put by STEPHEN, J., in 1889:

‘... can anyone doubt that a man who though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing.’

See **R V. Tolson** (1989) 23 Q.B. 168 the term involuntary act is, however, capable of wider connotations: and to prevent confusion it is to be observed that in the criminal law an act is not to be regarded as an involuntary act simply because the doer does not remember it. When a man is charged with dangerous driving, it is no defence for him to say ‘I don’t know what happened. I cannot remember a thing’: See **Hill V. Baxter** [1958], QB 277. Loss of memory afterwards is never a defence in itself, so long as he was conscious at the time, see **Russell V. H.M. Advocate** 1946 JC 37; **R. V. Podola** [1960] 1 QB. 325. Nor is an act to be regarded as an

involuntary act, simply because the doer could not control his impulse to do it. When a man is charged with murder, and it appears that he knew what he was doing, but that he could not resist it, then his assertion 'I couldn't help myself' is no defence in itself: See **A.G. For South Australia V. Brown [1960] A.C. 432** though it may go towards a defence of diminished responsibility, in places where that defence is available, see **R. V. Burne [1960] 2 QB. 396** but it does not render his act involuntary so as to entitle him to an unqualified acquittal. Nor is an act to be regarded as involuntary act simply because it is unintentional or its consequences are unforeseen. When a man is charged with dangerous driving, it is no defence for him to say, however truly, 'I did not mean to drive dangerously'. There is said to be an absolute prohibition against that offence, whether he had a guilty mind or not (see **Hill V. Baxter [1958], QB. 277** at p. 282 per Lord Goddard C.J.) but even though it is absolutely prohibited, nevertheless he has a defence if he can show that it was involuntary act in the sense that he was unconscious at the time at the time and did not know what he was doing (see **H.M. Advocate V. Kitchie 1926 S.C. (J) 45**, **R. V. Minor (1955) 15 W.W.R (NS) 433** and **Cooper V. MC Kenna Ex parte Cooper [1960] Qd R 406**).

Another thing to be observed is that it is not every involuntary act which leads to a complete acquittal. Take first an involuntary act which proceeds from a state of drunkenness. If a drunken man is so drunk that he does not know what he is doing, he has a defence to any charge, such as murder or wounding with intent, in which a specific intent is essential, but he is still liable to be convicted of manslaughter or unlawful wounding for which no specific intent is necessary; see **Beard's Case [1920] A.C. 479**. Again, if the involuntary act proceeds from a disease of the mind, it gives rise to a defence of insanity, but not to a defence of automatism. Suppose a crime is committed by a man in a state of automatism or clouded consciousness due to a recurrent disease of the mind. Such an act is no doubt involuntary, but it does not give rise to an unqualified acquittal, for that would mean that he would be let at large to do again. The only proper verdict is one which ensures that the person who suffers from the disease is kept secure in hospital so as not to be a danger to himself or others. That is, a verdict of guilty but insane ...

In the present case the defence raised both automatism and insanity. And herein lies the

difficulty because of the burden of proof. If the accused says he did not know what he was doing, then, so far as the defence of automatism is concerned, the crown must prove that the act was a voluntary act; see **Woolmington's Case [1935] A.C. 462**. But so far as the defence of insanity is concerned, the defence must prove that the act was an involuntary act due to disease of the mind; see **M'Naghten's Case (1843) 10 CL & Fin 200**. This apparent incongruity was noticed by Sir Owen Dixon, Chief Justice of the High Court of Australia, in an address which is to be found in 31 **Australian Law Journal** 225 and it needs to be resolved. The defence here say: Even though we have not proved that the act was involuntary, yet the Crown have not proved that it was a voluntary act: and that point at least should have been put to the Jury.

My Lords, I think that the difficulty is to be resolved by remembering that, whilst the ultimate burden rests on the crown, of proving every element essential in the crime, nevertheless in order to prove that the act was a voluntary act, the Crown is entitled to rely on the presumption that every man has sufficient mental capacity to be responsible for his crimes: and that if the defence wish to displace that presumption they must give some evidence from which the contrary may reasonably be inferred...

All the doctors agreed that a defect of reason due to disease of the mind: and the judge accepted this view. No other cause was canvassed.

In those circumstances, I am clearly of the opinion that, if the act of the appellant was an involuntary act, as the defence suggested, the evidence attributed it solely to a disease of the mind and the only defence open was the defence of insanity. There was no evidence of automatism apart insanity. There was, therefore, no need for the judge to put it to the Jury. And when the jury rejected the defence of insanity, they rejected the only defence disclosed by the evidence.

Appeal Dismissed.

4.Intention and Motive

Motive is the intention with which an intentional act is done or the intention which an intentional consequence is brought about. It is the reason why a thing is done. In some cases it is possible for a person to commit a crime with a good motive but generally this does not affect liability unless expressly declared (see sect. 10 of the Penal Code and the Case of **R. V. Windle (1952) 2 QB. 826**). Admittedly a good motive may be taken into account in determining the sentence. See **Pili d/o Kafiti V R. 1969 HCD n. 152**. However the issue of motive in corruption case has given rise to conflicting opinions in East Africa.

Sewa Singh Mandia V R [1966] EA 315 LAW, J.A., - The appellant was convicted by the High Court of Kenya (DALTON, J.) of an offence against s. 3 (2) of the Prevention of Corruption Act (Cap. 65) and was sentenced to nine months' imprisonment. On August 30, 1966, we allowed his appeal, quashed the conviction and set aside the sentence, and we now give our reasons.

The particulars of the charge against the appellant were as follows:

"Sewa Singh Mandla on or about the 29th day of January, 1966, at Nairobi in the Nairobi Area corruptly gave this sum of Shs. 15/= to one Joseph Mugero as an inducement to the said Joseph Mugero, being a member of a public body namely a constable in the Kenya Police Force to forbear to take any further action in relation to a traffic offence or traffic offences alleged to have been committed by the driver of a Peugeot motor vehicle, a matter in which the said public body was concerned."

The facts of the case are not in dispute. The appellant, who at the material time was a magistrate at Nyeri, was, on January 29, 1966, a passenger in a motor vehicle driven by one Walia on Thika road near Nairobi, when the vehicle was stopped by constable Joseph Mugero, who was then on traffic duty. The constable inspected the vehicle and told the driver that he was committing various offences, in particular in that the licence had fallen off the windscreen on to the floor of the vehicle, and in that one tyre was allegedly defective. The constable wrote something on a piece of paper which he handed to me driver, and while so doing acted and spoke in a manner which amounted to soliciting a bribe. The driver said he had no money and

drove off, but stopped after a few yards and called the constable whereupon the appellant produced Shs. 15/-, which the constable took. The appellant asked the constable his name and made a note of his number. The constable then tore up the paper which he had previously handed to the driver and went away. Soon afterwards the appellant told the driver, and one Machuria who had been present throughout in the back of the vehicle, that he would accuse the constable when he got back to Nyeri. The appellant in fact returned to Nyeri on January 30, and on February 3, he instructed the court prosecutor, Inspector Tole, to send for constable Joseph forthwith. The constable arrived in Nyeri on the following day, and was taken to the appellant's chambers. Soon afterwards the appellant sent for Inspector Tole, and in the constable's presence told the Inspector what had happened on the previous Saturday. The constable refunded the Shs. 15/= to the appellant, who then admonished the constable and warned him never to accept bribes again. The constable then returned to Nairobi. Some ten days later, Assistant Commissioner of Police Benjamin Gethi, who was then the officer in charge of police in the Central Province, had occasion to visit the appellant in his chambers to discuss routine matters. In the course of conversation the appellant, voluntarily and without any prompting, informed Mr. Gethi of the events of January 29, and of the action subsequently taken by him in sending for the constable and reprimanding him in the presence of the court prosecutor. The appellant said that so far as he was concerned the matter was closed. Mr. Gethi reported the matter to his superiors in Nairobi, and in due course the proceedings giving rise to this appeal were instituted against the appellant and constable Joseph. In a statement to Senior Superintendent Bell on March 3, the appellant said that he gave the Shs. 15/= to the constable because "I had heard of these things and I wanted to know if it was real".

At the trial, after the close of the prosecution, counsel for the appellant, as he did in this appeal, asked the learned judge for directions as to whether, in the judge's view, it was necessary for the prosecution to prove a corrupt motive, which was, in his submission, an essential ingredient of the offence charged. Counsel for the Republic, relying on the case of *R. v. Smith* (1), submitted that the appellant's motive was immaterial, and that all the prosecution had to prove was that the appellant intentionally entered into what was in fact a corrupt transaction. The learned judge delivered a carefully considered ruling, adopting the reasoning in *Smith's* case (1). The appellant did not give evidence as to his motive, in view of the judge's indication of opinion that such evidence would be irrelevant to the charge. In his judgment convicting the appellant, the

learned judge made it clear that he did so because the appellant, whatever his motive, intended that the constable should enter into a corrupt bargain with him.

As the evidence as to the appellant's motive was in effect excluded this appeal must be decided on the basis that the appellant's motive, in paying Shs. 15/= to constable Joseph, was not a dishonest one but was directed to the detection and suppression of corruption rather than its encouragement. That this was so is in our opinion borne out by the appellant's conduct, in taking note of the constable's name and number, in announcing his intention to accuse the constable, and in voluntarily disclosing the full facts to Inspector Tole and Assistant Commissioner of Police Benjamin Gethi.

As counsel for the appellant said, in opening his argument on this appeal, the whole question turns on the interpretation of a single word in a penal statute, and that is the word "corruptly" as used in s. 3 of the Prevention of Corruption Act. The subsection relevant to this appeal reads as follows:

"Any person who shall by himself, or by or in conjunction with any other person, corruptly give, promise or offer any gift, loan, fee, reward, consideration or advantage whatever to any person, whether for the benefit of that person or of another person, as an inducement to, or reward for.... otherwise on account of, any member, officer or servant of any public body doing or forbearing to do, or having done or forborne to do anything in respect of any matter or transaction whatsoever, actual proposed or likely to take place, in which the said public bodu is concerned shall be guilty of a felony."

This subsection follows closely the wording of sub s. (2) of s. 1 of the Public Bodies Corrupt Practice subject of the courts ration in *R. v. Smith* (1). the charge which was..... The effect of that judgment is that the word "corruptly", in the context of s. 1 aforesaid, means a deliberate offering of cash or something similar with the intention that it should operate on the mind of the person to whom it is offered to make him enter into a bargain. The motive of the offeror is immaterial. Counsel for the Republic argued that in the great majority of cases motive and intention are the same, and for this reason the words have been used as interchangeable in

many of the English and East African cases. The exceptional situation arose in England in *Smith's* case (1), and has now arisen here in the present case, when the motive was pure but the intention corrupt. He therefore asked us to accept *Smith's* case (1), and argued that this would not involve departing from previous decisions of this court. Alternatively, he submitted that the word "corruptly" adds nothing to s. 3 of the Prevention of Corruption Act, and that it should not be interpreted as meaning "dishonestly", but as meaning intentionally doing something prohibited by statute. Counsel for the appellant on the other hand submitted that there is no real distinction between intention and motive, motive being the real or dominant intention, and he invited us to hold that *R. v. Smith* (1) was wrongly decided. We are not prepared to go so far. It was decided on its own peculiar facts and should not be looked at for general principles. The facts in *Smith's* case (1) are easily distinguishable from those in the present case. For one thing, the offeree in *Smith's* case (1) was an honest man who Smith thought would accept the bribe, and thus prove his thesis that town councillors as a whole were corrupt. In the instant case, the offeree (the police constable) had shown himself to be already corrupt, and the payment made by the appellant was not made with the intention that it should operate on the mind of the constable to induce him to be corrupt. This being so, the appellant's state of mind, which in our view includes motive and intention, seems to us to be an essential and material factor in determining whether, in making the payment, he was acting corruptly or not. This has always been the approach adopted by the courts in East Africa, and in our opinion it is the correct approach, in cases in the nature of the one now under consideration. For instance, in *Habib Kara Vesta and Others v. R.* (2), it was held that a genuine police spy is not an accomplice, and therefore does not require corroboration, if his motive is the capture of offenders and not the perpetration of offences. In *R. v. Jetha* (3), in which the appellant was charged with official corruption, NIHILL, C.J., said "the essence of the offence is the motive which animates the giver". In *R. v. Hasham Jiwa* (4), a "trap" case, the decision in *Habib Kara Vesta's* case (2) was approved and followed. In *A.-G. v. Shamba Ali Kajembe* (5), a court presided over by SIR KENNETH O'CONNOR, P., held, in a case involving official corruption on the part of the receiver of a bribe, that "corruptly" means that the corrupt purpose or motive must be in the mind of the person charged. The trend of judicial opinion in the courts in India would appear to be to the same effect, see for instance *Emperor v. Rama Nana Hagavne* (6). In that case the accused had been charged with corruptly using false evidence as true, contrary to s. 196 of the Indian Penal Code. In the course of his judgment, MACLEOD, C.J., said, 321:

"The mere user of false evidence is not sufficient, the user must be corrupt We must give to the word 'corruptly' its ordinary dictionary meaning 'Concept' is an adjective of very general application. It refers to anything which had been changed so as to become purid, vitiated, tainted."

Similarly there is an English case, which does not appear to have been considered by the court in *R. v. Smith* (1). This is the case of *Bradford Election Petition* (No. 2) (7), in which the meaning of the word "corruptly" was considered when used in relation to "treating" as an election offence under the Corrupt Practices Prevention Act (17 and said, in the course of his judgment 728:

"Now what is the meaning of that word 'corruptly'? It is difficult to tell; but I am satisfied that it means a thing done with an evil mind or an evil intention; and except there be an evil mind or an evil intention accompanying the act it is not corruptly done."

The appellant's conduct in reporting the matter to two police officers may be an indication that he had no "evil mind" or "evil intention"; see for instance *R. v. Car* (8) in which GODDARD, C.J., said 166:

"Of course, if a person takes a bribe and goes straight off to someone in authority and says 'here is the bribe he has given me', that may show he was not acting corruptly."

It follows that we are of the opinion that the first ground of appeal, that

"The learned judge misdirected himself and the assessors with regard to the meaning of the word 'corruptly' in s. 3(2) of the Prevention of Corruption Act in relation to the charge against the appellant."

I must succeed, in the circumstances of this case. We consider that the motive prompting the

giving of a bribe is a relevant consideration in deciding whether or not the bribe was given corruptly.

For these reasons we allowed the appeal.

Appeal allowed.

Selau Dean V R [1966] EA 272

SIR JOHN AINLEY, C.J., - In this case the appellant was convicted of corruption contrary to s. 3(2) of the Prevention of Corruption Act, and of two offences of giving false information to a person employed in the public service contrary to s. 129 (a) of the Penal Code.

The story is somewhat complex. It is clear that one Mrs. Pantall ran some risk of prosecution at the hands of the immigration authorities, and that the appellant was anxious to prevent her prosecution. In his efforts to assist this lady the appellant interviewed, and quarreled with an immigration officer named de Rungary. Another immigration officer named Kushi Mohamed Chaudhery, who was in charge of investigations into immigration matters and who normally prosecuted in immigration cases, was drawn into this discussion, but did not so far as we can see do much or indeed anything to incur the appellant's enmity.

Be that as it may, on May 11, 1965, that is the day following the interview the appellant informed Mr. Bell, a Senior Superintendent of Police, that Chaudhery had said that for #50 he would refrain from prosecuting Mrs. Pantall. Mr. Bell thought it advisable to lay a police trap, and a trap was laid.

On that day the appellant spoke to Chaudhery over the telephone and by various devices the conversation was recorded upon a tape recorder.

On the following day, that is on May 12, the appellant provided himself with five Shs. 100/- notes. The police fitted him with a miniature microphone and transmitter. Receiving apparatus was installed in a police car, together with a tape recorder. The appellant then met Chaudhery, and had a long conversation with him, which, by means of the devices referred to was, partially

at any rate, recorded on the tape. All this resulted in two spools of tape which could be "played" on a machine, so that the sounds and speech recorded could be heard.

It was also arranged that a police party should, so far as was possible, keep an eye upon the appellant and Chaudhery and it was understood that when Chaudhery accepted the money the appellant would make a signal, whereupon Chaudhery would be arrested. Such a signal was not observed or at any rate understood by the police, but there came a time when after a lengthy conversation in a coffee house the appellant and Chaudhery walked along Gill Street, Nairobi, and entered Gill House. They were for a few moments out of sight of the police watchers, but when the police arrived the two were facing each other, and Chaudhery was in possession of the appellant's notes. Senior Superintendent Bell, who came to the scene, assumed not unnaturally that the trap had caught the expected quarry, and the appellant asserted to the police that he had handed the notes to Chaudhery as they waled together from the coffee-house to Gill House. Yet Chaudhery asserted then and asserted at the trial that the money had been thrust into his pocket by the appellant when the two of them were alone in the entrance to Gill House, after prolonged and unsuccessful efforts had been made by the appellant to persuade him to accept it as a bribe. If Chaudhery told the truth then undoubtedly the appellant was guilty of the three offences of which he was convicted.

We respectfully agree with the reasoning and the decision in *R. v. Smith* (1), and we have no doubt that if Chaudhery told the truth then the appellant corruptly offered Chaudhery the money in question although he did not intend Chaudhery to aid him in return for the money, but hoped that Chaudhery would be arrested, and charged with taking a bribe before he could take any action.

Now the conversation between the appellant and Chaudhery was in Punjabi, and painstaking efforts were made to obtain an accurate English transcript of the tape recording. It is clear that these efforts were to some extent successful, and the transcript made was accepted by both sides as being accurate so far as it went. The record of the conversation though it is defective in that what Chaudhery said has very frequently been lost, does tend to support Chaudhery's story. Mainly because of this, we think, it was the appellant who was prosecuted, while Chaudhery, the original suspect, became an important witness for the prosecution.

The very great importance of the tape recording can now be understood. At the trial the two spools were tendered in evidence and on the authority of *R. v. Maqsd Ali*; *R. v. Ashiq Hussain* (2), they were in our opinion correctly admitted.

It appears that the entire record contained on the spools was not played-over in the lower court, though parts were played for the purposes of indentifying the spools and tapes. The appellant was represented by very experienced counsel and clearly both sides thought that to play over the whole record in court would be a waste of time. That was common sense, but we shall refer to this matter again.

However as we have said the English transcript was accepted by both sides, and became an important exhibit, each side seeking to make what capital they could from the admittedly disjointed and imperfect record.

At the end of the hearing, a very patient and proper hearing be it said, the learned magistrate reserved judgment. The hearing ended on October 21, 1965. The magistrate delivered judgment on December 3, 1965, and as we have said convicted upon all three counts. The judgment was clear and well reasoned and we find no significant misdirections therein, but between the conclusion of the hearing and the delivery of the judgment matters occurred of which complaint is very properly made. Shortly before the learned magistrate wrote and delivered his judgment, the date rather strangely is uncertain, the magistrate had the record played over in the privacy of his chambers, there being present Senior Superintendent Bell to whom we have referred, Chief Inspector Phillips, who gave evidence in the case as the electronics expert, and one Hardial Singh Sidhu an executive officer of this court, who is fluent in Punjabi and English.

Neither the appellant, nor any representative of the appellant, was present.

We have read affidavits from the three persons mentioned and we say at once that we are convinced that the learned magistrate acted in perfect good faith. Senior Superintendent Bell was we think present because he had been told by a superior officer to make arrangements for

the playing of the record. Chief Inspector Phillips was quite obviously present because he was the expert able to play the record. We do not suppose that either of these officers discussed the case with the learned magistrate on this occasion. The part played by Hardial Singh we will consider in a moment, and it was an honest part, but it is scarcely necessary to point out that this gathering in the magistrate's chambers which was obviously in connection with the appellant's case would very seriously disturb any thinking member of the public who learned of it, while the appellant would beyond doubt and quite reasonably form the view that very unfair tactics had been used. The appearance of justice was not given here. This court should not be faced with a situation where it is asked to try the court below, as it were, and indeed in some cases of this kind this court may refuse to do so, saying simply that so grave an appearance of injustice has been given that it would be wrong and unnecessary for the purposes of an appeal to embark on a lengthy inquiry into the exact details of the matter.

In this case however we have been given without objection from the appellant, a fairly clear picture of what happened by the affidavits filed.

The learned magistrate's main concern was we think to satisfy himself beyond all doubt that the English transcript was correct. He reasoned that there could be nothing wrong in making a check with the aid of Hardial Singh. We must disagree. It can of course be said that if, as indeed happened here, the interpreter confirms the accuracy of an English transcript no harm has been done, but it is clearly wrong, we think, to adopt a procedure which may lead to an amendment in private of a transcript on the basis of which both the prosecution and the defence have argued their case.

We would say also, though here we may appear hypercritical, that if the tape recording has not been played in court it is probably wrong for the magistrate to play it to himself in the privacy of his chambers. We do not think that a magistrate or judge should hear in chambers what he has not heard in court, and in certain cases much may be gathered from the tone of the recorded voices of the speakers.

We do not however decide this case on that ground. This affair went beyond a mere checking of the transcript. A very important part of the conversation between the appellant and

Chaudhery took place immediately before the pair arrived at Gill House, and after they had arrived there. It will be remembered that the appellant's story was that the notes were in Chaudhery's possession before the arrival at Gill House, and that Chaudhery's story was that they were thrust on him after arrival at Gill House. The transcript of the conversation almost immediately before the police came on the scene reads:

Chaudhery: I am far above these things. I have never done such a thing.

Never do that and to my knowledge I know nobody ... By God I don't do such things. Not even-not even, not these things. These Europeans ... (Then apparently a mingling of voices, and then-)

Appellant: No, I think ... before your coming she was telling me not like this-this you don't.

You keep it.

Chaudhery: Not at all.

Appellant: No you keep it. You keep it. By God don't be silly, don't be silly.

Now it scarcely needs pointing out that those passages support Chaudhery's version of affairs, and so the learned magistrate held. According to the affidavits before us the magistrate was, very rightly, interested in those passages and again very rightly he was interested in the two Punjabi words which were rendered in English as "Keep it". Those words deserved inquiry for the very obvious reason that if the Punjabi words could apply only to something already in the possession of the person addressed, then perhaps the appellant's story rather than Chaudhery's story was supported by their use.

Learned state counsel has said with some reason that there is after all not a vast deal in the point, and that there was very much in the transcript and in other recorded evidence which could be thought greatly to outweigh anything that could be made of the matter.

But counsel for the appellant has said in effect that be the matter small or great there was some matter there, and it was matter in which the learned magistrate was interested.

The learned magistrate in the privacy of his chambers received from Hardial Singh the assurance that though a correct and literal translation of the Punjabi words as "keep it" yet these words could be used appropriately when offering another person something, and could therefore bear the meaning "take it".

Now Hardial Singh may very well have been right about this. His Punjabi is no doubt perfect, and his English good. That is no doubt why the magistrate asked him about the meaning of those words, and as we think relied on what he said.

In the judgment, which is a very good judgment, we find this immediately after the learned magistrate has quoted the passages which we have set out- "In both the parts of the dialogue which have been reproduced above, the expression 'Keep it' must be construed as 'take it' and I understand that 'keep' is a literal translation of the Punjabi expression which is used in both senses, viz., 'hold on to something one has already got' and 'take it'".

It is perfectly clear that the learned magistrate, albeit in good faith, took the opinion of someone whom he regarded as an expert upon a matter which had some bearing on the case. That opinion was adverse to the case of the appellant. That opinion was accepted by the magistrate and was clearly enough placed by him, when he came to write his judgment, upon the Republic's side of the scales.

That opinion was given to the magistrate in the absence of the appellant and in the absence of the appellant's advocate. The appellant had no opportunity to contravert that opinion. He was unaware that such an opinion had been given.

Now both counsel have in effect asked us to regard what took place in the magistrate's chambers as (to quote the words of s. 382 of the Criminal Procedure Code) - "proceedings ... during the trial" and have referred to the numerous cases in which High Courts, Supreme Courts, Courts of Appeal and the Judicial Committee of Her Majesty's Privy Council have sought to interpret this

section, once described by a former Chief Justice of Kenya as "overworked".

We venture to doubt whether s. 382 of the Criminal Procedure Code has anything to do with the present case. If magistrates, judges, assessors, or jurymen, having heard the evidence led during a trial, go off before writing their judgments, giving their opinions, or returning their verdicts, and glean in the absence of the accused information, and opinions, relevant to the case, there arise perhaps no questions of irregularity in the administration of the Criminal Procedure Code, or in the administration of any other law. These magistrates, judges or assessors have decided to arrive at their conclusions by methods unknown to any written law. No court of appeal can allow a conviction had by such methods to stand, or so we think.

However if we are wrong here, and must decide this case upon the basis that we are dealing with a case to which the section is relevant, we are strongly of the opinion that the error was fundamental, and deprived the appellant not only of the semblance, but of the substance of a fair trial.

We are perfectly satisfied that these convictions must be quashed and the sentences set aside, and we so order. It is within our powers order a re-trial but we have decided not to exercise those powers.

It is true that there is an impressive body of evidence against the appellant to which no exception can be taken. Yet the appellant was first arrested in June last year. The events said to incriminate him occurred in May last year. Upon both sides witnesses of dubious veracity were called. We do not think that ten months after the events in question, and after, if we may so express it, every witness has had an ample rehearsal, justice can now with certainty be done.

We have not indeed been asked to order a re-trial, and we decide not to do so.

The appeal is allowed. The convictions are quashed. The sentences are set aside. The appellant has surrendered to his bail. His sureties are discharged from their bonds. The appellant goes free.

Appeal allowed. Conviction quashed and sentence set aside.

SECTION II

EXEPTIONS TO THE GENERAL PRINCIPLE OF ACTUS REUS AND MENS REA

1. Strict Liability

The general criminal law principle is that proof of the existence of a guilty intent is an essential ingredient of a crime. However there are offences known as offences of strict liability or absolute prohibition where no mens rea need be proved. This means that the accused is held guilty on the strength of the actus reus alone.

R. V. Prince [1874-80] All E. Rep. 881. The accused was charged and convicted under s. 55 of the Offences against Persons Act 1861. It was proved that the accused did take the girl out of the possession and against the will of her father, and that she was under 16. The girl, Annie Phillips, though proved by her father to be yet 14, looked very much older than 16, and the Jury found upon reasonable evidence that before the accused took her away she had told him that she was 18, and that the accused believed that statement and that such belief was reasonable.

BLACKBORN, J., - ... No question arises as to what constitutes a taking out of the possession of her father ... nor how far an honest though mistaken belief... The question, therefore, is reduced to this, whether the words in 24 and 25 Vict. C. 100, s. 55, that whosoever shall take 'any unmarried girl, being under the age of sixteen, out of the possession of her father', are to be read as if they were 'being under the age of sixteen, and he knowing she was under that age. No such words are contained in the statute, nor is there the word 'maliciously', 'knowingly' or any other word used that can be said to involve a similar meaning.

BRAMWELL, B.J., - The question in this case depends on the construction of the statute under which the prisoner is indicted... The question is: has the prisoner taken an unmarried girl under the age of sixteen out of the possession of and against the will of the father? In fact, he has, but, it is said, not within the meaning of the statute, and that that must be read as though the

word 'knowingly', or some equivalent word, was in; and the reason given is that as a rule the mens rea is necessary to make any act a crime or offence, and that if the facts necessary to constitute an offence are not known to the alleged offender, there can be no mens rea.

... It is impossible to suppose that, to bring the case within the statute, a person taking a girl out of her father's possession against his will is guilty of no offence unless he, the taker, knows she is under sixteen; that he would not be guilty if the Jury were of opinion he knew neither one way nor the other. Let it be, then, that the question is whether he is guilty where he knows (as he thinks) that she is over sixteen. This introduces the necessity for reading the statute with some strange words introduced, as thus: 'Whosoever shall take any unmarried girl, being under the age of sixteen, and not believing her to be over the age of sixteen, out of the possession', etc. Those words are not there, and the question is whether we are bound to construe the statute as though they were, on account of the rule that the mens rea is necessary to make an act a crime. I am of opinion that we are not, nor as though the word 'knowingly' was there, and for the following reason. The act forbidden is wrong in itself, if without lawful cause; I do not say illegal, but wrong. I have not lost sight of this, that though the statute probably principally aims at seduction for carnal purposes, the taking may be by a female with a good motive. Nevertheless, though there may be such cases, which are not immoral in one sense, I say that the act forbidden is wrong.

... But what the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a girl, can be said to be in another's possession, and in that other's care or charge. No argument is necessary to prove this; it is enough to state the case. The legislature has enacted that if anyone does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope of the doctrine of mens rea. If the taker believed he had the father's consent, though wrongly, he would have no mens rea; so if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing an act forbidden by the statute - an act which, if he knew she was in possession and in care or charge of anyone, he would know was a crime or not, according as she was under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention, if done without lawful cause...

The same principle applies in other cases. A man held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer. Why? because the act was wrong in itself. So also in the case of a Durglos, could a person charged claim acquittal on the ground that he believed it was past part six when he entered ...?

... It seems to me impossible, where a person takes a girl out of her father's possession, not knowing whether she is or is not under sixteen, to say that he is not guilty; and equally impossible when he believes, but erroneously, that she is old enough for him to do a wrong act with safety, I think the conviction should be affirmed.

All the sixteen judges, except BRET, J., concurred, though not for identical reasons in affirming the conviction.

Conviction affirmed.

Hamad Abdallah V R [1964] E.A. 270

The owner and holder of a licence for a public service vehicle was convicted of failing to comply with a special condition of his road service licence contrary to s. 23(3) and s. 26 of the Transport Licensing Ordinance. On appeal against conviction it was not disputed that he was not on the vehicle when the offence was committed or that he was a party to it or even knew of it. It was submitted that no offence had been committed by the appellant, as s. 26(1) did not impose absolute liability upon him.

BIRON, J., The appellant, the owner of a public service vehicle, was convicted of failing to comply with a special condition of his road service licence contrary to ss. 23(3) and 26 of the Transport Licensing Ordinance, and he was fined Shs. 500/= or imprisonment for four months in default. He is now appealing.

The charge, as indicated, was laid under ss. 23(3) and 26 of the Transport Licensing Ordinance (Cap. 373, Supp. 56 Revised Laws. They respectively read:

"23.-(3) The licensing authority may attach to a road service licence such conditions as it may think fit with regard to the matters to which it is required to have regard under this Ordinance and, in particular, for securing that:

(a) the fares shall not be unreasonable;

(b) where desirable in the public interest, the fares shall be so fixed as to prevent wasteful competition with alternative forms of transport, if any, along the routes or any part thereof, or in proximity thereto;

(c) copies of the time table and fare table shall be carried and be available for inspection in vehicles used on the service;

(d) passengers shall not be taken up or shall not be set down except at specified points,

and generally for securing the safety and convenience of the public".

"26.-(1) Subject to the provisions of this section, any person who fails to comply with any condition of a licence held by him shall be guilty of an offence against this Ordinance and shall be liable in the case of a first offence to a fine not exceeding one thousand shillings and in the case of a second or any subsequent conviction to a fine not exceeding two thousand shillings."

Subsection (2) of this section is not relevant.

[The judge went on to deal with several grounds of appeal and then continued:] ... there was sufficient evidence on which the court could find, as it did, that there was a failure to comply with the special condition as charged.

The fifth and last ground of appeal is that:

"The said section i.e., 26 (1) of the Transport Ordinance does not create any absolute

offence and the learned magistrate should have held that unless the appellant had allowed expressly the commission of the offence on the, evidence before him no offence was disclosed."

It is abundantly clear from the evidence that the appellant, the owner of the vehicle and licence-holder, was not on the vehicle at the time the offence was committed, nor is there anything to suggest that he was party to such offence or even knew of it. It is, therefore, submitted by learned counsel for the appellant that no offence has been committed by the appellant, as the section does not impose an absolute liability. In this again, as on the facts, the appellant is supported by learned state attorney, who does not support the conviction either on the facts or in law.

The point of law raised is far from easy, and, as observed by learned state attorney, there is no authority to the point. He submitted that it would be of great help both to the Bar and to the public to get a ruling on this point.

The question as to whether a specific statutory enactment imposes an absolute liability is far from easy to determine in any particular case. The authorities are not all consistent, nor even always reconcilable. The latest leading case in point, which is of particular importance and relevance to this country, as it is a Privy Council case, is that of *Lim Chin Aik v. R.* (1). In that case the appellant was convicted of entering Singapore after having been declared a prohibited immigrant. It was established in evidence that the appellant was not in fact aware that he had been declared a prohibited immigrant. The Privy Council, reversing the decisions of the lower courts, held that the enactment under which the appellant was convicted did not create an absolute liability, and, quoting the relevant part of the headnote:

"the presumption that mens rea was an essential ingredient of the offence had not been ousted either by the terms of the Singapore Immigration Ordinance, or by its subject-matter."

Their Lordships in the judgment delivered by LORD EVERSLED reviewed the relevant authorities, noting the lack of uniformity, remarking:

"As was observed by WRIGHT, J., at the beginning of his judgment in (*Sherras v. De Rutzen* (2) to which their Lordships will presently make further reference, the difficulty of the problem is enhanced by the fact that many of the cases are not easy to reconcile. Thus it has been held that a licensee of a public house commits an offence under the licensing legislation of serving alcoholic liquor to a drunken man even though he was unaware of the customer's condition (*Cundy v. Le Cocq* (3)); but that a licensee does not commit the offence under the same legislation of serving drinks to a police constable on duty if he reasonably supposed that the constable was in fact off duty (see *Sherras v. De Rutzen* (2)); and in the latest case above cited, the Court of Criminal Appeal held that the terms of s. 1(1) of the Prevention of Crime Act, 1953, viz:

"Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence ..."

must be read as if the word 'knowingly' were written before the word 'has'".

Their Lordships quoted from the judgment of WRIGHT, J., in *Sherras v. De Rutzen* (2) that:

"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered ..."

The wording of the Ordinance in this instant case is equivocal and in itself capable of being construed as either or not imposing strict liability, though it is very relevant to note that under s. 26 (1) only the licence-holder can be proceeded against, not the driver nor the conductor of the vehicle, who may well be responsible for the offence committed, unless he is also the owner and licence-holder. No assistance can therefore be derived from the wording of the enactment itself. The point at issue therefore falls to be decided under the other head laid down by WRIGHT, J.,

in *Sherras v. De Rutzen* (2), that is, the subject-matter with which the statutory enactment deals, and this again must be determined by the application of general principles. Their Lordships did, however, formulate certain general principles, which to my mind can be applied to this instant case. They stated ([1963] 1 All E.R. at p. 228):

"Where the subject-matter of the statute is the regulation for the public welfare of a particular activity-statutes regulating the sale of food and drink are to be found among the earliest examples - it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of mens rea. Thus sellers of meat may be made responsible for seeing that the meat is fit for human consumption and it is no answer for them to say that they were not aware that it was polluted. If that were a satisfactory answer, then as KENNEDY, L.J., pointed out in *Hobbs v. Winchester Corpn.* (4), the distribution of bad meat (and its far-reaching consequences) would not be effectively prevented. So a publican may be made responsible for observing the condition of his customers: *Cundy v. Le Cocq* (3)".

To my mind, the example of sellers of food for public consumption is particularly apt to this case. Just as in the case of the sellers of food, if they were not subjected to strict liability they could always escape punishment by pleading ignorance and the public would in consequence suffer; likewise in the case of owners of public transport, if they were not subjected to strict liability for the observance of the special conditions attached to the licence, they could escape punishment by pleading ignorance of the breach, and the plea may well be, and often is, true. As already noted, the employee driver or conductor cannot be prosecuted. It would therefore be impossible to enforce the observance of the time-tables laid down, and it is not difficult to envisage how the public would be inconvenienced and suffer in consequence of the failing to observe time-tables. It may well be argued, as was indeed argued in this instant case, that it would be most unfair to penalise the owner for offences committed by his employees for which

he was neither responsible nor had connived at. Here again the answer is to be found in the judgment of the Privy Council, continuing from the passage above quoted.

"But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

The proprietors of public service vehicles can in a very large measure ensure that special conditions in general, and time-table in particular, are observed by their employees, in the manner recommended by their Lordships.

I therefore hold, and so rule, that the liability created by the section under which the appellant was convicted is an absolute liability, and it is no defence that the appellant was not a party to or even aware of, the breach of the special condition.

With regard to sentence, in view of the appellant's record, which the learned magistrate described as bad, the appellant having admitted to seven previous convictions for identical offences, the sentence cannot be regarded as excessive.

The appeal is accordingly dismissed in its entirety.

Appeal dismissed.

Maulidi V. R. [1970] H.C.D. n. 346

Biron, J.

The appellant was convicted of failure to prepare and maintain records of oral contracts in respect of his employees, failure to insure in respect of liability to his employees and failure to pay minimum wages. Evidence established that the appellant who owned a bar paid his barmaids Shs. 60/= per month whereas the minimum wage was Shs. 170/= per month. The appellant pleaded ignorance as to requirement of having employees insured or contracts made out for them. The plea was rejected on the ground that ignorance of law does not excuse.

Held: (1) "Apart from the finding on the facts that the appellant did know the law, I am inclined to the view that these statutory offences are absolute, and no mens rea is required, even so it is pointed that there is no such presumption that everybody is presumed to know the law. In fact, I very much doubt if such presumption would hold good of even those who administer the law. The principle is that ignorance of the law does not afford a defence which, as the magistrate will appreciate, is not the same as presuming that everyone knows the law." (2) There is no merit in the appeal (3) Appeal dismissed.

Joseph Hawksworth and Another V R [1970] HCD n. 271

Georges, C.J.

The appellants are Englishmen. On 3rd March, 1970 they crossed the Songwe River, from Malawi to Tanzania walked to Kyela and reported there to the police station. There they were arrested and charged with unlawfully entering into Tanganyika contrary to section 23(1)(i) of the Immigration Act, Cap. 534. The particulars alleged that they had entered into Tanganyika by way of Songwe River which is not an official port of entry. Section 25(1)(e) of the Immigration Act vested in the Minister power to make regulations prescribing the place or places where entry into Tanganyika may be made. The Minister exercised this power by Government Notice 32 of 1969 published on 14th February, but to become effective on 1st March. In those Regulations - "The Immigration (Prescribed Places of Entry) Regulations 1969" - Songwe River is not listed as a place of entry. The record states that the charges were read over to the appellants and explained to them. The first appellant is recorded as saying:- "I realise my mistake now. I entered unlawfully into Tanzania. I was misled by customs officials in Malawi to come this way". The second appellant is recorded as saying:- "I admit this

offence, I did not follow the official port of entry into Tanzania". This was entered as a plea of guilty. The record continues:- "Facts are as charged and as admitted by accused". The accused were convicted and fined Shs. 3,000/= each.

Held: (1) "This Court has said on more than one occasion that it is not proper to record the facts merely as charged. The prosecution should state the circumstances of the case as fully as possible. If the appellants had walked into the police station at Kyela in order to report their presence and to ask for some sort of immigration status the prosecution should have so stated. This would have been as relevant in considering punishment as would have been the fact that they had been found wondering in some completely different area without having made any efforts whatsoever to contact the authorities. If the facts are not going in any way to amplify the particulars set out in the statement of offence then there can be very little point in laying down a procedure which prescribes that they should be stated and admitted by the accused." (2) The appellants advanced as a mitigating circumstance the fact that they had been misled by an official at the customs post on the Malawi side of the border. On this basis Mr. Moisey submitted that the trial magistrate should not have entered a plea of guilty since mens rea was an essential prerequisite for the commission of this offence. He quoted in support the case of **Lim Chin Aik -v- Queen** [1963] 1 All E.R. 223. In that case the Privy Council was asked to interpret certain sections of the Immigration Ordinance of Singapore. Section 6(2) provided:- "It shall not be lawful for any person other than a citizen of Singapore to enter from the Federation or having entered Singapore from the Federation to remain in Singapore after (b) such person has been prohibited by order made under section 35 of this Ordinance from entering Singapore". Sub-section (3) of this same section provided: "Any person who contravenes the provisions of sub-section... 2 of this section shall be guilty of an offence against this Ordinance". Under section 9 of the Ordinance the Minister had made an order prohibiting the appellant from entering or re-entering Singapore. This order would have come into force as soon as it was made. It had been received at the Immigration Department but there was no evidence that it had been served on the appellant or had otherwise been brought to his notice prior to his arrest on this charge. The appellant argued that he ought not to have been convicted since he did not know of the order and had not intended to break the law. The issue was clearly whether or not an intention to break the law - mens rea - was a necessary ingredient for the commission of the offence. The Privy Council held that it was. They accepted as a correct

formulation of the law a dictum of Wright, J. in **Sherras -v- De Tutzen** [1895] 1 QB. at p. 921:-

"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered..." They agreed that where the subject matter of the statute was the regulation for the public welfare of a particular activity, for example, the sale of food and drink, strict liability was often intended irrespective of guilty knowledge. They went on to state further, that it was always pertinent to enquire whether or not putting the defendant under strict liability would assist in the enforcement of the regulations. If there was nothing which an accused person could do in order to promote observance of the regulations, then there would be no point in imposing strict liability as the effect could only be to find a luckless victim. Their Lordships then held that there was nothing which the appellant could have done in this case. Indeed if the test of strict liability were applied a person who had been in Singapore lawfully would commit an offence under the Ordinance immediately on an order being made against him under section 9, prohibiting the entry of person into the colony even though his intention was to leave as soon as he possibly could. The result would be that his mere passive conduct in remaining, which would be the mere continuance quite unchanged of his previous behaviour, hitherto perfectly lawful, would become criminal. Their Lordships felt that this could not have been intended and accordingly they allowed the appeal and quashed the conviction. Their Lordships did note, however, if the courts of Singapore had been of the view that unrestricted immigration was a social evil which it was the object of the Ordinance to control most rigorously their Lordships would hesitate to disagree since that was a matter peculiarly within the cognisance of the local courts. Mr. Moisey pointed out that this case had been cited with approval by Biron, J. in **Hamed Abdallah -v- R** [1964] EA 270. That was a case dealing with a breach by the holder of a public service vehicle licence of a condition of his licence. The learned judge quoted the case in order to support the view that strict liability could be contemplated because there was much that the licence holder could do in the organization of his business to ensure compliance with the law. On the facts, with respect, I agree entirely with the decision in the case of **Lim Chin Aik** but I do not think it strictly applicable on its facts with the case under consideration. There a prohibitory order was made which was not published and was not in any way brought to the attention of the person whom it affected. The relevant regulations made no provisions for publication or notification. The person affected could not

have complied with the law until the notice had been brought to his attention. In these circumstances it is difficult to conceive that the Legislature could have intended that an offence be committed. In this case, however, the regulations prescribing ports of entry were published. They were available if proper enquiries were made and this fact seems to me of vital importance in arriving at a decision as to whether or not the Legislature could have intended a breach of the regulations to be an offence even though there was no mens rea. I would also hold that at the present time the regulation of entry into Tanzania through proper ports is a subject which the Legislature did intend to control rigorously. I would think that the Legislature is well aware that law enforcement officers do have a discretion which they can exercise in a proper case as to whether or not they should prosecute. I would also think that the Legislature is also well aware that Courts can impose nominal punishments in cases in which the element of blameworthiness on the part of an accused person is minimal. These discretions are a vital part of the entire process of law enforcement. In a field like immigration regulation where the stigma of criminal conduct, as the term is generally understood, would not apply to any breach, the Legislature could very well intend to impose strict liability knowing that the factors which I have already mentioned will be taken into consideration so that there would be no undue harshness in the application of the law. In this type of case also it would be extremely difficulty to prove in most instances that the person charged did intend to break the regulation. The defence that one was misled by authorities on the other side of the border or by one's travel agents or by an Embassy or High Commission abroad would either be impossible to refute or else expensive if legally admissible evidence had to be led. Accordingly I would hold that mens rea was not a necessary ingredient of the offence in this case and that on the facts admitted by the appellants the charge was proved. (3) "I think that the sentences imposed in this case were excessive. I am well aware that the security of this country along its southern border is a matter of concern. On the other hand, it seems highly unlikely that "infiltrators of European origin", to use the magistrate's words, could be effective instruments of subversion in the area. It would, indeed, be far too simple matter to spot such person and there would be little point in sending them across this way when they could be introduced unobtrusively through the regular points of entry at the regular times. The likelihood is that the appellants were that they said they were, persons travelling on a world tour to broaden their experience and working from time to time to get money for their expenses. It is not denied that immediately on entering Tanzania they reported to the nearest police station at Kyela. As I have already pointed out, although the Immigration

Ordinance became effective on 14th April, 1964 no regulations prescribing ports of entry were made until March, 1969. Up to that date it would appear that it would not have been an offence to have entered Tanganyika across the Songwe River. It is possible that word of the Regulations had not yet reached the Malawi side of the Border as a result of which there had been a number of instances of illegal entries beginning sometime in December last year. It is hoped that the publicity attendant on these cases will make the position clear so that there is no recurrence of these instances. A fine of Shs. 500/= would adequately meet the justice of the case. Accordingly I quash the sentence imposed on each of the appellants and order that they each pay a fine of Shs. 500/="

2. Vicarious Liability

In the law of tort a master is held liable for all acts of his servant performed in the course of the servant's employment. In general criminal law does not regard the master as having any criminal liability for the acts of his servant unless he has authorized him. There are, however some exceptions and in Tanzania the position is covered under section 54 of the Interpretation of Laws and General Clauses Act, 1972 CAP. 1). The law covers offences committed by agents and employees.

Alimohamed Osman V R [1952] 1 TLR 391

The appellant in this case was found guilty of permitting a motor lorry to be used on a road while the tyres were not maintained in such a condition as to be free from defect which might in any way cause danger to persons on or in the vehicle or to other persons using the road. As the result of a tyre burst a turnboy fell off the lorry and was injured.

ABERNETHY, J., The appellant in this case was convicted of an offence contrary to Section 29(j) of the Traffic Rules, and was sentenced to pay a fine of Shs. 250/=.

The evidence for the Prosecution showed that the appellant is the owner of a motor lorry which was hired to the Public Works Department for a period of three months to work some distance from Songea on the Songea Tunduru road. On the day the contract of hire terminated and the

lorry was on its way to Songea a tyre burst, and as a result a turnboy fell off the lorry and was injured. Inspection of the tyre which burst and the tyre of the right hand front wheel of the lorry showed that they were so worn that the canvas next to the inner tube showed almost round the whole circumference. These facts were admitted by the appellant who stated that he had supplied his driver with two spare tyres and told the driver to report if anything was required or went wrong. He added that full responsibility for the vehicle was given to the driver.

The appellant now appeals against the judgment of the trial Magistrate on a number of grounds.

I have no hesitation in rejecting three of these grounds of appeal. Under the third ground the appellant submits that "The Trial Magistrate failed to give consideration to the evidence, which was undisputed, that the motor vehicle in question was at the time of the alleged offence hired to the Public Works Department of Tanganyika Government." It makes no difference whatsoever that the lorry was hired to the Public Works Department. If I hire a taxi, the tyres of which are not maintained in good order, I am in no way responsible for that defect. The responsibility for the vehicle being on the road with tyres that are not maintained in a proper state remains with the driver or the owner.

Under the fourth ground of appeal the appellant submits that "The Trial Magistrate failed to give consideration to the evidence that two spare tyres in good condition were provided by the accused for use with the vehicle in question." But it is clear from the judgment that the Magistrate did consider the fact that the lorry was provided with two spare tyres in good condition.

Under the fifth ground of appeal the appellant submits that "There was no evidence upon which the Magistrate could find that the alleged defective tyre could have caused damage to the surface of the road or danger to persons on or in the vehicle or to other persons using the road, as is necessary to support a conviction on an offence against Rule 29(j) of the said Traffic Rules." The trial Magistrate himself examined the tyre which burst and the right hand front wheel tyre and found them to be in the state already mentioned and I am quite unable to find that he came to the wrong conclusion in holding that tyres worn down to the canvas, and particularly in the case of tyres on heavy lorries, are not maintained in such condition as to be

free from any defect which might cause danger to persons on or in the vehicle or to other persons using the roadway. In a case of tyres so worn the possibility of a puncture or blowout which may cause the car to swerve or overturn is obviously very greatly multiplied.

The appellant's strongest ground of appeal, and the one argued at greatest length by learned Counsel for the appellant, is his second ground of appeal which reads as follows: "The Trial Magistrate erred in finding that the accused caused or permitted the motor vehicle in question to be used on a highway contrary to Section 29 of the said Rules." Now, can it be said that the appellant caused or permitted the vehicle to be used on a road while its tyres were not properly maintained? If the word "caused" is interpreted in its ordinary way there is no evidence to show that the appellant caused it to be used in that state. But the question as to whether or not he *permitted* it to be used on the road with tyres which were not properly maintained is a more difficult one. "Permit" in its ordinary sense means to allow. When a person is in a position to stop something being done and does not do so, he must be held to allow it to be done. Appellant was clearly in a position to stop the vehicle from being used with defective tyres, and if the word permit is given its ordinary meaning, then in my opinion the appellant cannot evade his responsibility simply by leaving it to the driver to change the tyres or not as the driver thinks fit. I can find no East African cases which are of any assistance in this matter. Learned Counsel for the appellant has, however, quoted two English cases: *Evans vs. Dell* (1937 A.E. 1 All E.R. page 349) and *Newall vs. Cross* (1936 2 All E.R. page 203). In the case of *Evans vs. Dell* it was said by Swift, J. that he could not see how anybody could be charged with permitting an offence to be done unless he had some knowledge that the offence was done or was about to be done. With all due respect I am unable to agree with this opinion. If this is a correct statement of the law then it would just be too easy for the owners of motor vehicles to escape their responsibilities. In my opinion the decision in the case of *Sidcup Estates vs. Sydney* (1936 24 Traffic Cases, 164) in which it was held that a master charged with "permitting" cannot escape conviction by proving that his servant in breaking the law disobeyed his orders comes more nearly to what is law in this territory. In the case of *Newall vs. Cross* the Court quoted with approval the judgment of Avory, J. in *Goldsmith vs. Deacin* in which Avory, J. said "In my opinion, if a person hires out a vehicle in circumstances in which he ought to know that it probably will be, or may be used as a stage carriage . . . then he is within the meaning of the statute permitting it to be used as a stage carriage", which is much in accordance with the

opinions of the learned Judges in the case of *Churchill vs. Norris* (1938 158 L.T. 255) in which case the owner of a vehicle who took a risk that his driver might break the law was found to have permitted a breach. Keeping these two decisions in mind, I am unable to hold, in the circumstances of this case, that the appellant did not take a risk that his driver would not comply with the requirements of the Traffic Laws. From the time the vehicle was hired by the Public Works Department until the time the tyre burst, resulting in this case, the owner took no steps whatsoever to see that the driver was maintaining the lorry in good condition.

Conditions in Tanganyika are quite different from those in the United Kingdom. Distances are greater, road surfaces are infinitely worse, and facilities for repairs being carried out on vehicles are nothing like so great. There are undoubtedly many good African drivers and mechanics, but the great majority of African drivers in Tanganyika have very little, or no mechanical knowledge, nor have they the sense of responsibility, or the training or intelligence to do the right thing in an emergency or when anything goes wrong, so that unless a vehicle is a new one and being driven only on tarmac roads, there is more than a little risk that it may develop some defect, and that the African driver will be unable to carry out the necessary repairs, or will fail to halt the vehicle until it is in a proper state to continue its journey. One cannot expect the same of the generally poorly paid and little trained African that one does of the drivers employed by any English transporting company.

In brief, it is my opinion that only when the circumstances clearly show that the vehicle is in such a new condition, doing such a journey in control of a competent driver that the owner could have no reason whatsoever to suspect that it could develop any defect, can a vehicle owner in Tanganyika who entrusts his vehicle to an African say he has not permitted his driver to drive or use the vehicle if it is found that the driver is using or driving the vehicle in a condition not allowed by the Traffic Laws.

I agree with learned Counsel for the appellant that the wording of the Magistrate's judgment does not agree with the wording of the charge or the Rules, but the appellant was not prejudiced thereby and this defect is not, in my opinion, sufficient grounds for setting aside the conviction.

Although I dismiss the appeal against conviction, taking into consideration the whole

circumstances of the case, I consider the penalty imposed is excessive, and I reduce it to a fine of Shs. 50/= or distress.

Lewis & Hodgkiss Ltd V. The Queen [1954] 27 K.L.R. 168

An officer of the Traffic Police stopped a lorry belonging to and driven by a servant of the accused company. The lorry was found to have no number plates and to be a new one consigned from Nairobi to the company's branch in Mombasa, and in the act of being driven to the railway goods yard. The driver could produce no insurance certificate. The vehicle carried no licence and carried no identification plates. The company had an insurance policy but it was valid only so long as the lorry carried the number plates. The company had in its possession a number of "trade plates" and their drivers were warned on engagement to use the trade plates. The magistrate convicted on all three counts. The company appealed.

JUDGEMENT.- The appellants who are dealers in motor vehicles had a general identification mark issued to them under section 12 (4), Cap. 232; they have 15 trade plates bearing the identification mark. One of their lorries, unlicensed and uninsured, was driven to the railway station at Nairobi for the purpose of entrainment. The driver of the lorry was acting in the course of his duties as a servant of the appellants. There were no trade plates bearing the identification mark issued to the appellants on the lorry. "Trade plates", however, had been issued to all drivers in the employment of the appellants, and on engagement they were warned under pain of instant dismissal that they were on no account to take out unlicensed vehicles on the road without putting on the trade plates allocated to them. There were plenty of trade plates available, one for each of the nine regular drivers and six spares.

The question is whether on these facts the appellants were properly convicted of offences *contra* section 4 (1), Cap. 233, and section 3 of Cap. 232. At the time of the alleged offences the new Traffic Ordinance had not been brought into force.

In his judgment the learned magistrate referred to a number of cases which were cited to him in court and others which were not. But, with respect, neither he nor the advocate who appeared for the appellants at the trial seemed to appreciate that the liability of a master for the act of his

servant involving a statutory offence is governed by the terms of the statute creating the offence. There are (1) statutes which make the act of the servant the act of the master whether the latter knew of it and even if he had forbidden it; (2) statutes which make the master liable for the act of his servant unless he can show that he took all reasonable steps to prevent it; (3) statutes which make the master liable for the act of his servant only if it is affirmatively proved that the act of the servant is in fact the act of the master who has inspired it in some way, by counselling it or causing it or permitting it to be done. In *Radford v. Williams*, (1910) 110 L.T. 195, for instance, to which the magistrate referred, it was held that once a person has been proved to have been drunk on licensed premises, the onus of proof is on the licensee to show that he and his servants had taken all reasonable steps to prevent it. It was so held because the Act under which the accused was charged specifically provided that in the circumstances mentioned the onus of proof of having taken reasonable precautions lay on him and his servants. The case falls within (2) and it certainly has no application to the offence created by section 3 of Cap. 232 which falls within (1). Section 3 enacts that the owner and driver of any vehicle which is driven upon any road . . . without a licence ... shall be severally liable." The lorry was driven upon a road by a servant of the appellants in the course of his employment and within the scope of his authority, and the appellants were, therefore, liable to be convicted, even if they had forbidden the act to be done. It is unnecessary to cite various English authorities in support of (1). Had a trade plate been affixed to the lorry no offence would have been committed *contra* section 3 (section 12 (4), Cap. 232). As there was no trade plate the appellants were properly convicted. The word "permitted to be used" in the "particulars" are words of surplusage.

I now come to the conviction *contra* section 4 (1) of Cap. 233. In his judgment the Magistrate said that the carrying of trade plates would have made "it lawfully possible to *dispense* with the licensing and third party insurance" of the lorry. I have dealt with the former (licensing). In regard to the latter (third party insurance) there appears to be a misapprehension. With or without trade plates a motor vehicle may not be taken on the road unless there is in force in relation to the user of the vehicle a policy of insurance or such a security in respect of third party risks as complies with the requirements of Cap. 233. But for the purpose of this appeal it has been assumed by Crown Counsel that the lorry was covered by a policy which complied with the requirements of Cap. 233 while it is being used on a road with trade plates attached, and I was invited by him to hold that even assuming such a policy as I have referred to existed at the

relevant time, the appellants were properly convicted of a contravention of section 4 (1), Cap. 233, as they permitted the lorry to be on the road without trade plates.

Let me deal then with the case on the basis suggested by Crown Counsel that, although the appellants' policy of insurance, which has been assumed to exist, was not called for and not put in evidence, the appellants can be held to have contravened section 4 (1) of Cap. 233 on proof *simpliciter* that a lorry of theirs was permitted by them to be on the road without trade plates. In (3) *supra*, that is to say statutes which make the master liable if the act of the servant is in fact the act of the master, within which section 4 (1) of Cap. 233 falls, it is *prima facie* a defence that, so far from countenancing or permitting the act of the servant, the master had expressly forbidden it to be done. On the other hand, even if a master has paid lip service to the law by forbidding an act to be done, he would nevertheless be liable, if for instance he had knowledge, actual or constructive, of the doing of the act and did nothing to prevent it, or if he connived at it, or, as it was put in one case, was "wilfully blind" to it, or if he knew it was being done or "was likely to be done" and adopted an attitude of supine indifference.

In all the cases I have examined it was held that the question was one of inference which entirely depended upon the facts of the case. It was in this way that the decisions in *McLeod v. Buchanan*, (1940) 2 AER 179, *Goldsmith v. Deakin*, (1930) 50 TLR 73, and *Evans v. Dell*, (1937) 1 AER 349, to mention a few-were reached.

Now the magistrate found as a fact that "Mr. Blackeman" (a servant of the appellants whose knowledge he has for the purpose of his decision imputed to the appellants) "had reason to suspect that African drivers . . . might be likely to take unlicensed (and as he added later, uninsured) vehicles on the road without trade plates". "If he did not have this suspicion before him", he added. "it is remarkable that he issued such a severe warning to his drivers on engagement". This was one of the reasons he convicted the appellants under section 4 (1). Cap. 233. I am unable to see from the record that it was ever suggested, in cross-examination of Mr. Blackeman or otherwise, that he entertained any suspicion that his African drivers would not obey his instructions, there was no evidence at all that he entertained any suspicious, and I cannot approve of a finding adverse to Mr. Blackeman and the appellants which is based only upon the former's insistence, and very proper insistence, that the law should be respected.

But the learned magistrate also found the appellants guilty under section 4 (1), Cap. 233, because in his view it was not sufficient for the appellants to have issued through Mr. Blackeman what he regarded as "a very severe warning". They should, he thought, have imposed a check on every vehicle leaving the premises of the appellants to see that they did not go out without trade plates, and, as they failed to do this, he concluded that they had not taken reasonable precautions and were therefore liable to be convicted. It would appear that the magistrate was applying the test derived from statutes falling within (2) *supra*.

But each case must depend upon its own facts. In *Evans v. Dell (supra)* the appellant who had no knowledge of, and did not deliberately shut his eyes to, what was being done by his servant, was successful in his appeal, although a vehicle was used on a road for a purpose for which a special licence was required and for which no licence had been obtained. In the present case the master had provided the means whereby on Crown Counsel's assumption the lorry could have been taken on the road for the purpose for which it was taken on the road without violating the provisions of section 4 (1), Cap. 233, and the offence was committed because the servant had not done what, on pain of instant dismissal, he had been ordered to do, viz. to affix trade plates-not an onerous task-before driving an uninsured vehicle on the road. On these facts I would have had great difficulty in holding that the appellants had "permitted" the act of the servant. But as the magistrate gave his reasons for taking the view he did, it is necessary to examine them. Those reasons were applied, wrongly as I think, to section 3 of Cap. 232 and section 4 (1) of Cap. 233, but I propose to examine them in relation to the latter only. In his judgment, the magistrate cited the case of *Adelaide Corporation v. Australasian Performing Right Assoc. Ltd*, (1928) 40 CLR 481, in which it was held that "indifference or omission is permission within the plain meaning of the word where the party charged (*inter alia*) knows or has reason to suspect that the particular act is to be or is likely to be done". He then found that Mr. Blackeman had reason to suspect that African drivers "might be likely" to take vehicles on the road without trade plates and following that finding, in the next paragraph, he found that a check should have been made of each vehicle. It is clear that the magistrate found that constructive permission had been given (for the reason that no check was made of each vehicle) because he found that Mr. Blackeman had reason to suspect that African drivers would be likely to disregard his instructions; and as the latter finding is, in my opinion, for the reasons I have given, erroneous,

it vitiates the former finding which was the main foundation of the conviction *contra* section 4 (1) of Cap. 233.

The appellants were also convicted of an offence *contra* section 26 of the Traffic Ordinance (Cap. 232). This section requires a licensing officer to whom an application has been made for the licensing as a taxicab, motor omnibus or other public service vehicle to issue, where such licence is granted, an identification plate which should be fixed to the back identification mark plate of the vehicle. No application was made for the licensing of the lorry in question in this case as a public service vehicle, and no identification plate was therefore issued. It was not being used for carrying passengers for hire and reward. The Crown does not support the conviction on the ground that the appellants were charged under the wrong section and it is set aside; also the sentence.

For the reasons I have given the conviction and sentence *contra* section 4 (1), Cap. 233, are also set aside. The conviction *contra* section 3 of Cap. 232 and the sentence passed thereunder are maintained.

3. Corporate Liability

A corporation is a legal person but has no physical existence. Section 3 of the Interpretation of laws and General Clauses Act, 1972 defines a person as including any body of persons whether corporate or incorporate. Being a legal person a corporation cannot act or form an intention except through its members. A corporation is not criminally liable for the acts of its members or employees who are not controlling officers, unless the particular offence falls in the category of offences where vicarious liability is applicable. In addition only acts of responsible officers like the managers or members of the Board of Directors which will be considered as acts of the corporation itself. And, further, a corporation cannot commit a crime for which it cannot be sentenced - see **H.L. Bottom (Engineering) Co. Ltd V Graham 1957 QBD 159, Smithfield and Leonard's Carrying Co. Ltd V. Asiatic Petroleum Co. Ltd (1915) AC 705.**

Smithfield Butchery Ltd V R (1949) 23 (2) KLR 81

JUDGEMENT.- The appellant in this case is a limited company known as the Smithfield Butchery. This company was charged before a Special Magistrate in Nairobi and convicted of an offence against section 131 (a) of the Public Health Ordinance and of two offences against by-laws 151 and 236 (2) of the Nairobi Municipality (General) By-laws, 1948. As regards the convictions on the second and third count it has been argued on behalf of the appellant that these are bad in law because on the date of the alleged offences the above-cited by-laws were not validly in force since there had been no proper publication of them in the Government Gazette.

It is convenient that we should consider and dispose of this point first.

The Municipal Council of Nairobi derives its power to make by-laws from the Local Government (Municipalities) Ordinance, 1928, Section 69 of that Ordinance sets out the matter respecting which it is within the power of the Council to make by-laws, and to alter and revoke them and sections 71 and 72 prescribe the procedure by which a by-law can be validly made. A by-law to be enforceable therefore must first be *intra vires* section 69 and secondly must have been enacted and approved by authority in the way prescribed by sections 71 and 72. It is not alleged in the present case that by-laws 151 and 236 are *ultra vires* section 69 nor was there any evidence before the Magistrate that the provisions of section 71 of the Ordinance were not complied with in respect of them. These provisions include the requirement of publication in some newspaper circulating in the Municipality and exhibition in some conspicuous place at or near the public entrance of the municipal offices seven days prior to the meeting of the Council held for the purpose of making or amending a by-law and the section provides for the lodging of objections in due course. This proviso is important because once objection has been lodged and not withdrawn only the Governor in Council can approve the enactment of the by-law objected to, By Government Notification 598 of 1940 the Governor by virtue of powers given him by section 13 of the Interpretation and General Clauses Ordinance as it then stood delegated to the Commissioner for Local Government the power to approve by-laws to which no objection had been lodged. It is in one respect only that it is alleged that the requirements of sections 71 and 72 have not been complied with, namely publication in the Gazette after approval by the Governor or his delegate, as required by section 72 (4). This sub-section reads as follows:-

"Upon approval by the Governor or the Governor in Council, as the case may be, of any by-law or amendment (with or without alteration thereof) such by-law or amendment shall be published in the Gazette and thereafter shall have the full force of law within the municipality".

The Nairobi Municipality (General) By-laws, 1948, were approved by the Commissioner for Local Government, on 13th October, 1948, acting under the power delegated to him by the Governor, but if the appellant company could establish that they were not thereafter published in the Gazette it would be entitled to succeed in this appeal so far as the convictions on the second and third count are concerned since the by-laws of which by-laws 151 and 236 form a part would not have the force of law.

We have already indicated during the hearing of this appeal that after listening to the argument we have come to the conclusion that there was publication in the Gazette technically sufficient to satisfy the Ordinance and we now give our reasons for that decision. It is a custom in this Colony to publish with an issue of the Official Gazette Supplement containing Government Notices and by section 2 of the Interpretation and General Clauses Ordinance, 1948, the term "Gazette" means "the Official Gazette of the Colony and includes any Supplement or any Gazette Extraordinary". In the Official Gazette of November 16th, 1948, there appears in the contents index on the front page an intimation that the contents include Supplement 55 containing the Nairobi Municipality (General) By-laws, 1948. So far all is plain sailing, but Mr. Salter relies for his argument that there has been no publication on two common features. The heading in the contents column "Supplement No. 55" is as traced with the following footnote "Supplement No. 55 was issued as a Special Supplement on 16th November, 1948", and below the words "G.N. No. 1083-Nairobi Municipality (General) By-laws, 1948" appear the following words in brackets "(A limited edition of these by-laws was published on 16th November, 1948, on behalf of the Nairobi Municipal Council)". Mr. Salter has argued that the only reasonable inference to draw from these somewhat cryptic references is that in fact no Supplement 55 to the Official Gazette of 16th November, 1948, was published as a Supplement to that issue, and some colour is lent to this argument by the fact that in the 1948 Volume of Proclamations, Rules and Regulations enacted in that year Supplement 55 is not reproduced. Nevertheless, we have before us what on the face of it purports to be an Official Gazette Supplement dated 16th November, 1948, bearing the Regulations, and the statement that it is published under the

authority of His Excellency the Governor of the Colony and Protectorate of Kenya. This publication contains the Nairobi Municipality (General) By-laws, 1948. We have no evidence as to how many copies of this Supplement were published and made available to the public but following the maxim "*Omnia prae sumuntur rite esse acta*", we cannot, without evidence, assume that this publication is not what it purports to be. We do not know the reason why this Supplement was not reproduced in the 1948 Vol. of Subsidiary Legislation, but its omission does not invalidate it. If this publication was in fact a restricted one it is indeed regrettable since by-laws which affect the day-to-day activities of the citizens of Nairobi should, one would have thought, receive the widest publicity, but with that we are not concerned. If this publication was in fact a Supplement to the Official Gazette of 16th November, 1948, as we must find it was, there was, in the light of the definition section in the Interpretation Ordinance, publication in the Gazette as required by section 72 (4) of the Local Government (Municipalities) Ordinance, 1928.

Turning to the merits of the case it has been urged stoutly on behalf of the appellant company that the Magistrate could not convict unless satisfied that the breach of the by-laws was committed by some responsible agent of the company. The responsibility of a company for criminal acts is not without difficulty. A company is in law a separate entity from its directors and agents, and it cannot in fact commit a criminal offence apart from some act of the latter, but as was held in the case of *Rex v. I.C.R. Haulage, Ltd.* (1944), Vol. 1 AER 691, to which Mr. Salter referred us, there may be circumstances in a case from which it may be inferred that the criminal acts of the agent are the acts of the company. Again in *Director of Public Prosecutions v. Kent & Sussex Contractors, Ltd.* (1944), 1 AER 119 which was a case where an officer of a limited company had rendered a false return for the purposes of the Motor Fuel Rationing Order, it was held that the knowledge and intention of a company's servants could be imputed to the body corporate. We agree with Mr. Salter that wrongful acts and omissions by the subordinate staff of a company would not in ordinary circumstances be sufficient to fix criminal responsibility on a company and if we thought that the Magistrate had accepted the evidence of Mr. Berkwell, the director of the company, and of Mr. Gaynor, the European assistant, that the deposit in their shop of the fowls and meat carcasses was entirely without their consent and permit, this appeal would be entitled to succeed. We do not, however, read the Magistrate's findings of fact in that sense. He says he is not convinced by the defence story, which was the

story told by the two Europeans that Karioki, the African purveyor, chimped the fowls and carcasses in the shop for some purpose of his own, aided and abetted possibly by two minor employees of the company. This was the story which the Magistrate rejected and in our opinion there was sufficient evidence of a circumstantial nature led by the prosecution from which he could draw an adverse inference. The fowls and carcasses which were the subject of the charges were brought to the company's premises in one of their vans, some of the carcasses when found by the inspector were on the shop counter and some of steelyards and the chickens were in a basket under the counter. It is clear that this consignment of poultry and meat was brought into the shop by the aid of some of the company's African servants and at a time when Mr. Gaynor, the European assistant, was on the premises. We think that on these facts a reasonable inference did arise that the transaction was within the knowledge of at least one responsible agent of the company, an inference which could only have been removed had the Magistrate accepted the evidence of Mr. Bakewell and Mr. Gaynor, which clearly he did not. As an Appeal Court, which has not had the opportunity of seeing and studying the demeanour of the witnesses we cannot say that the Magistrate erred in coming to the conclusion that he did. With regard to the ground of appeal that the Magistrate erred in holding that the carcasses were deposited in the shop for the purpose of sale or for the preparation for sale. We can only say that we consider that any other inference would have been unreasonable. For what other purpose would meat be taken to and received in a butchery? One other matter must be referred to. On the first count the company was charged with being found in possession at 11.30 a.m. on 12th February with five carcasses of calves which were in unwholesome state and unfit for human food. It is not in dispute that these were the same carcasses which were in the shop in the early evening of the day before and which had been "frozen" by the order of the sanitary inspector. Their "unwholesomeness" was not, however, established until they were seen by a meat inspector on the following day. It has been urged that this count is bad in law because the possession at 11.30 a.m. on 12th February was a possession forced on the firm by the "freezing" order of the sanitary inspector. If this "unwholesomeness" of the carcasses had been occasioned by putrefaction this would indeed be the case but it was not so. The unwholesomeness of the carcasses was due to their immaturity and they were therefore just as unwholesome on the night before. Even if, therefore, the charge is wrongly framed and this is by no means certain, the appellant firm cannot possibly have been prejudiced, and the curative provisions of section 381 of the Criminal Procedure Code would apply. We are of the opinion therefore that there are no

grounds on which this court could say that the convictions on any of the three counts are bad.

The appellant firm has also appealed against sentence which in the aggregate amounts to a fine of £ 75. Taking into account that this firm has one previous conviction for a like offence, we are unable to regard this as in any way excessive.

The appeal is dismissed.

SECTION III

THE PRINCIPLE OF CAUSATION

A person is said to cause something to happen if that thing would not have occurred at the time and in the manner in which it did occur if he had not done what he did. Where the definition of a crime includes a certain result it must be shown that the perpetrator of the crime caused that particular result. There are about seven circumstances in which the principle of causation can be examined: Where there is no physical participation e.g. in abetment or incitement; where participation is indirect; where there are subsisting and supervening causes; where the victim's own conduct has effected the result; where the negligence of the victim contributes to the particular consequence and where participation of the accused is sugarfluous.

Thambo Meli V R [1954] 1 All ER 373.

The four accused persons preconceived a plot to kill the deceased person and then to take an accidental death. The deceased man was brought to a hut struck over the head with an instrument and then, believing him to be dead, they rolled him over a Cliff and dressed the scene to make it look like an accident. The deceased died from exposure. They were convicted of murder and they appealed.

LORD REID, ... Obviously they believed at the time that the accused was dead, but it appears from the medical evidence that the injuries which he received in the hut were not sufficient to cause the death and that the final cause of his death was exposure when he was left at the foot of

the Cliff.

The point of law which was raised in this case can be simply stated. It is said that two acts were necessary and were separable: first, the attack in the hut; and secondly, the placing of the body outside afterwards. It is said that, while the first act was accompanied by mens rea, it was not the cause of death; but the second act, while it was the cause of death, was not accompanied by mens rea; and on that ground it is said that the accused are not guilty of any crime except perhaps culpable homicide.

It appears to their Lordships impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as part of their plan; and it is much too refined a ground of judgement to say that, because they were under misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law. Their Lordships do not think that this is a matter which is susceptible of elaboration. There appears to be no case either in South Africa or England, or far that matter, elsewhere, which resembles the present. Their Lordships can find no difference relevant to the present case between the law of South Africa and the law of England, and they are of opinion that by both laws there could be no separation such as that for which the accused contend, so as to reduce crime from murder to a lesser crime, merely because the accused were under some misapprehension for a time during the completion of their criminal plot.

Their Lordship must, therefore, humbly advice Her Majesty that this appeal should be dismissed.

R V. Pagett (1983) 76 Cr. App. R. 279

Armed with a shotgun, Pagett took a girl named Gail who was six months pregnant by him, from the home of her mother and stepfather by force, wounding the stepfather, and violently assaulting her mother. When the matter was reported the police pursued him. At a certain place the police called the accused to come out. He eventually did so holding the girl in front of him as a shield. He approached two police officers and fired the shotgun. The officers fired back

instinctively and the girl was struck by three bullets and died. Paget was convicted of inter alia, manslaughter. He appealed on the ground that the judge had misdirected the jury that, on these facts, he had caused the death of the girl.

ROBERT GOFF, L.J. - ... Now the whole subject of causation in law has been the subject of a well-known and most distinguished treatise by Professors Hart and Honore, **Causation in the law** ... But, for present purposes, the passage which is of most immediate relevance is to be found in chapter XII, in which the learned authors consider the circumstances in which the intervention of a third person, not acting in concert with the accused, may have the effect of relieving the accused of criminal liability. The criterion which they suggest should be applied in such circumstances is whether the intervention is voluntary, i.e. whether it is free, deliberate and informed'. We resist the temptation of expressing the judicial opinion whether we find ourselves in complete agreement with that definition, though we certainly consider it to be broadly correct and supported by authority. Among the examples which the authors give of non-voluntary conduct, which is not effective to relieve the accused of responsibility, are two which are germane to the present case, viz a reasonable act performed for the purpose of self-preservation, and an act done in performance of a legal duty.

There can, we consider, be no doubt that a reasonable act performed for the purpose of self-preservation, being of course itself an act caused by accused's own act, does not operate as a **novus actus interveniens**. If authority is needed for this almost self-evident proposition, it is to be found in such cases as **Pitts (1842) C & M 284**, and **Curley (1909) 2 Cr. App. R. 96**. In both these cases, the act performed for the purpose of self-preservation consisted of an act by the victim in attempting to escape from violence of the accused, which in fact resulted in the victim's death. In each case it was held as a matter of law that, if the victim acted in a reasonable attempt to escape the violence of the accused, the death of the victim was caused by the act of the accused. Now one form of self-preservation is self-defence; for present purposes, we can see no distinction in principle between an attempt to escape the consequences of the accused's act, and a response which takes the form of self-defence. Furthermore, in our judgement, if a reasonable act of self-defence against the act of the accused causes the death of a third party, we can see no reason in principle why the act of self-defence, being an involuntary

act caused by the act of the accused, should relieve the accused from criminal responsibility for the death of the third party. Of course, it does not necessarily follow that the accused will be guilty of murder, or even manslaughter, of the third party; though in the majority of cases he is likely to be guilty at best of manslaughter. Whether he is guilty of murder or manslaughter will depend upon the question whether all the ingredients of the relevant offence have been proved; in particular, on a charge of murder, it will be necessary that the accused had the necessary intent...

No English authority was cited to us, now we think to the learned judge, in support of the proposition that an act done in the execution of a legal duty, again of course being an act itself caused by the act of the accused, does not operate as a *novus actus interveniens* ... Even so, we agree with the learned judge that the proposition is sound in law, because as a matter of principle such an act cannot be regarded as a voluntary act independent of the wrongful act of the accused. A parallel may be drawn with the so called 'rescue' cases in the law of negligence, where a wrongdoer may be held liable in negligence to a third party who suffers injury in going to the rescue of a person who has been put in danger by the defendant's negligent act. Where, for example, a police officer in the execution of his duty acts to prevent a crime, or to apprehend a person suspected of a crime, the case is surely **a fortiori**. Of course, it is inherent in the requirement that the police officer, or other person must be acting in the execution of his duty that his act should be reasonable in all the circumstances: see section 3 of the Criminal Law Act 1967. Further, once again we are only considering the issue of causation. If intervention by a third party in the execution of a legal duty, caused by the act of the accused, results in the death of the victim, the question whether the accused is guilty of murder or manslaughter of the victim must depend on whether the necessary ingredients of the relevant offence have been proved against the accused, including in particular, in the case of murder, whether the accused had the necessary intent.

The principles which we have stated are principles of law. This is plain from, for example, the case of **Pitts (1840) C & M 284**, to which we have already referred. It follows that where, in any particular case, there is an issue concerned with what we have for convenience called **novus actus interveniens**, it will be appropriate for the judge to direct the jury in accordance with

these principles. It does not however follow that it is accurate to state broadly that causation is a question of law. On the contrary, generally speaking causation is a question of fact for the jury. Thus in, for example, **Towers (1874) 12 Cox CC 530** the accused struck a woman; she sweamed loudly, and a child whom she was then nursing turned black in the face, and from that day until it died suffered from contrulsions. The question whether the death of the child was caused by the act of the accused was left by the judge to the jury to decide as a question of fact. But that does not mean that there are no principles of law relating to causation, so that no directions on law are ever to be given to a jury so the question of causation. On the contrary, we have already pointed out one familiar direction which is given on causation, which is that the accused's act - need not be the sole, or even the main, cause of the victim's death for his act to be held to have caused the death.

Appeal dismissed.

R V. Blane [1975] 3 All ER 446

The appellant was convicted of manslaughter on the ground of diminished responsibility. He had inflicted four serious stab wounds on the deceased, one of which pierced a lung. The deceased, a Jehova's Witness, refused to have a blood transfusion because it was contrary to her religious beliefs, and acknowledged this refusal in writing, despite the surgeon's advice that without the transfusion she would die. The Crown conceded at the trial that had she had the blood transfusion she would not have died. Blane appealed on the ground (inter alia) that Mocatta, J., following **Holland (1841) 2 Mood & R 351**, in effect directed the jury to find causation proved.

LAWTON, L.J., - ... In Holland [(1841) 2 Mood & R 351] the defendant, in the course of a violent assault, had injured one of his victim's fingers. A surgeon had advised amputation because of danger to life through complications developing. The advice was rejected. A fortnight later the victim died of lockjaw! `... the real question is', said Maule, J. [2 Mood & R at 352], `whether in the end the wound inflicted by the prisoner was the cause of death?' That distinguished judge left the jury to decide that question as did the judge in this case. They had to decide it as juries always do, by poding their experience of life and using their common

sense. They would not have been handicapped by a lack of training in dialectics or moral theology.

Maule, J's direction to the jury reflected the common law's answer to the problem. He who inflicted an injury which resulted in death could not excuse himself by pleading that his victim could have avoided death by taking greater care of himself. See Hale [Pleas of the Crown (1800), pp. 427, 428]. The common law in Sir Mathew Hale's time probably was in line with contemporary concepts of ethics. A man who did a wrongful act was deemed morally responsible for the natural and probable consequences of that act. Counsel for the appellant asked us to remember that since Sir Mathew Hale's day the rigour of the law relating to homicide has been eased in favour of the accused. It has been - but this has come about through the development of the concept of intent, not by reason of a different view of causation. Well known practitioner's textbooks, such as Halsbury's laws [3rd edn, Vol. 10, p. 706] and Ruossell on crime [12th edn (1964) Vol. 1, p. 30] continue to reflect the common law approach. Textbooks intended for students or as studies in jurisprudence have queried the common law rule. See Hart and Honore, **Causation in the Law** [1959, pp. 320, 321] and Smith and Hogan [**Criminal Law** (3rd edn, 1973) p. 214].

The physical cause of death in this case was the bleeding into the pleural cavity arising from the penetration of the lung. This had not been brought about by any decision made by the deceased girl but by the stab wound.

Counsel for the appellant tried to overcome this line of reasoning by submitting that the jury should have been directed that if they thought the girl's decision not to have a blood transfusion was an unreasonable one, then the chain of causation would have been broken. At once the question arises - reasonable by whose standards? Those of Jehovah's witnesses? Humanists? Roman Catholics? Protestants of Anglo Saxon descent? The man on the elapham omnibus? But he might well be an admirer of Eleazar who suffered death rather than eat the flesh of swine [see 2 Maccabees, ch. 6 vv 18-31] or Sir Thomas more who, unlike nearly all his contemporaries, was unwilling to accept Henry VIII as Head of the church in England. Those brought up in the Hebraic and Christian traditions would probably be reluctant to accept that these martyrs caused their own deaths.

As was pointed out to counsel for the appellant in the course of argument, two cases, each raising the same issue of reasonableness because of religious beliefs, could produce different verdicts depending on where the cases were tried. A jury drawn from Preston, sometimes said to be the most catholic town in England, might have different views about martyrdom to one drawn from the inner suburbs of London. Counsel for the appellant accepted that this might be so; it was, he said, inherent in trial by jury. It is not inherent in the common law as expounded by Sir Mathew Hale and Maule, J. It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgement means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death

Appeal dismissed.

SECTION IV

PPARTIES TO CRIME

The person who commits a crime is not necessarily the only one who is liable to be convicted of the crime thereby committed. When two or more persons have participated in a crime there arises a question as to how much should each one be liable for the particular crime. The way the extent of participation is classified in Britain is different from that of Tanzania. In Britain parties to crime we: Principal in the first degree, principal in the second degree or aider and obetor; an accessory before the fact and an accessory after the fact. The Tanzania Penal Code recognizes only two main parties to an offence i.e. the principal offenders (under section 22 of the code) and accesseries after the fact (under section 287) - see **Kamau V R. (1965) EA 501 (CA)**.

Where an offence is committed by joint offenders their liability is determined under section 23

of the Penal Code. The most important aspect is the existence of common intention which does not necessarily mean that there should be previous agreement.

R V. Tabulayenka s/o Kiry and Others 10 EACA 51

SIR JOSEPH SHERIDAN, C.J. - The four accused in this appeal were found guilty of murder and sentenced to death. The facts of the case are not unusual in East Africa. A suspected thief, one Mikairi, was discovered sitting near the door of a hut at night, the alarm was sounded and several persons came rushing to the spot and at once proceeded to belabour the unfortunate Mikairi with fists, feet and such weapons they could lay their hands on. The result was death from multiple injuries.

There is evidence which the learned trial Judge accepted that all four accused took part in beating the deceased in one form or another and in presence of each other. The learned Judge held that Section 22 of the Penal Code had no application to the facts of the case and that the case was governed by Section 200 (e). Section 22 provides:-

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecutions such purpose an offence is committed of such a nature that its commi..... was a probable consequence of the prosecution of such purpose, ... each them is deemed to have committed the offence."

Section 200 (e) provides:-

"A person is deemed to have caused the death of although his act is not the immediate or sole cause of following cases:- ... (e) if his act or omission death unless it had been accompanied by an act or omission of the person killed or of other persons."

The passage of the judgment relevant to the question under consideration reads:-

"I do not agree with the prosecution that Section 22 of the Penal Code applies to the facts of this case. The words 'When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another' must be strictly construed. To bring this case within the section there should be evidence from which it could be inferred that at some time during that night these four accused had formed the intention to assault Mikairi in conjunction with one another. The evidence here is all the other way. The four of them each answered the alarm and went to the scene independently, each one taking up the assault on Mikairi as he arrived."

Section 200 (e) of the Penal Code is in my opinion the proper provision applicable to this case. Leaving out words which do not apply in the instant case, it reads: "A person is deemed to have caused the death of another although his act is not the sole cause of death if his act would not have caused death unless it had been accompanied by the act of other persons." That is, if a number of persons assault another, and the general result of the assault is death, it is not necessary to inquire into the effect of each particular injury caused by each of the assailants. That is the case here. Mikairi died as the result of kicks and blows with a rungu and a hammer. It is naturally impossible to say what injuries were caused by the kicks and what by the other instruments and whether the injuries inflicted by any one of the four accused were sufficient in themselves to cause death apart from the injuries inflicted by the others. But the legal result of Section 200 (e) is that each one of these four accused is guilty of having caused the death of Mikairi. I have no doubt that each of these accused knew that his acts would probably cause grievous harm to Mikairi. There are no circumstances of justification or excuse. I find Tabulayenka, Garandi, Rajabu and Nalyongo guilty of under of Mikairi, contrary to Section 194 of the Penal Code."

With respect we do not agree that Section 22 does not apply to the facts of this case. In our opinion it, rather than Section 200 (e), is applicable here. The fact that the four accused answered the alarm and went to the scene independently, each one taking up the assault as he arrived, does not rule out a common intention. Each as he arrived showed by his actions that his intention was at least to beat the thief, and when they were all assembled the beating in some form or other continued until Mikairi died. In these circumstances they were all so identified

with the fatal assault on Mikairi that they may be said to have formed a common intention to prosecute an unlawful purpose in conjunction with one another, the unlawful purpose being to beat the so called thief, there being no suggestion that the violence used was necessary to effect his arrest. To constitute such a common intention it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their actions and the omission of any of them to dissociate himself from the attack on Mikairi.

The question then arises whether the common intention was merely to beat the deceased or whether it was something more, namely to cause his death or to do him grievous harm, or did each one of them beat or associate themselves with assault with the knowledge that the beating would probably cause death or harm. The learned Judge said he had no doubt that each of the accused his acts would probably cause grievous harm. This would appear to be is not necessary in our opinion to go as far as that. If the cumulative beating carried out by the different accused was such as would pro- death or grievous harm and all the accused had associated themselves the evidence shows they did, each accused is responsible for done in furtherance of their common purpose.

The present case we consider to be a typical example of persons acting in pursuance of a common intention and the evidence of more than one witness confirms this. Take for instance the evidence of Kayendeke where she says: "Rajabu had a hammer. I know it. This is it (Ex. 1). Garandi came with a *rungu*, this is it (Ex. 2). It is Garandi's. Garandi beat the deceased twice with the *rungu*. The others were kicking him with their feet, those who had no sticks, they were kicking all over his body. Rajabu beat him with the hammer on the sides. They beat him to death". And the evidence of Yayiro is of a similar nature; he said: "Rajabu and Garandi came. Rajabu had a hammer, Garandi a *rungu*. These are they (Exs 1, 2). They began beating Mikairi, the others were also beating with hands, fisting and slapping". One can readily picture the unmerciful manner in which the deceased was set upon and done to death and one is not surprised that the medical witness found injuries which he described as follows: "I did a P.M. I found bruising at back of neck, and very extensive deep bruising on front and back of chest. There was a fracture of three ribs on left and five on right, all front ribs. I found five on right

and four on left broken at back. The breast bone was also fractured in the middle. The fractured ribs on right had made tears in liver and lung."

The facts of this case bear an remarkable resemblance to the facts in *Rex v. Mikaeri and others* EACA 84, the headnote of which reads:-

"Appellants and others set upon the deceased, whom they believed to be a thief or a person addicted to thieving, with the common intention of giving him an unmerciful beating and beat him with sticks so that he died soon afterwards. The trial Judge found that those concerned in the beating were actuated by a common intent to cause grievous harm.

Held: That the appellants were each guilty of murder."

The following passage is taken from the judgment:-

"The evidence supports the view that a person was caught who was regarded whether rightly or wrongly as a thief and that a number of persons set upon him with the common intention of giving him an unmerciful beating, which they did, with the result that the victim died soon after. The medical evidence was that the body bore testimony to the beating having been such that the doctor had never seen a worse beating. It seems to us and the learned Judge and assessors so found, that any person identified as having taken part in the beating must be regarded as linked by a common intention within the meaning of the section quoted making him responsible for the death and so responsible for the crime of murder. All five accused are shown to have played some part in the terrible beating with its terrible consequences. It is but reasonable to hold that those who took part in the beating must be taken to have had the knowledge that grievous harm at least was a probable consequence. We cannot say in these circumstances that the findings of fact or law of the learned Judge were wrong. As to whether there should be any discrimination made between the accused as to the respective degrees of responsibility or as to whether the capital sentences should be commuted, that is a matter for consideration in another quarter. The appeals are dismissed."

And the following passage from the judgment of this Court in *Rex v. Okute and another*, EACA 78 at p. 80, is particularly apt on the question of common intention: "Where several persons together beat another, then, though each may have a different reason, and though some may join in the beating later than others, it is plain that all have what the law calls a 'common intention', which does not necessarily connote any previous concerted agreement between them".

The appeals are dismissed.

Wanjiro d/o Wameiro V R (1955) EACA 521

Two boys stumbled upon an armed gang, which included the two appellants, in the bush. The male members of the gang promptly surrounded and killed them. The female members of the gang took no part in the killing which they did not witness. The entire gang was convicted of murder. The issue was whether the whole gang had common intention in the murder of the two boys.

WORLEY, V.P., - These two appellants were tried by the Supreme Court of Kenya sitting in Emergency Assize at Nairobi jointly with ten men on an information containing three counts. The first count charged all the accused with murder; the second count charged one of the men with unlawful control of a firearm and the third count charged the remaining eleven accused with consorting with the unlawfully armed man contrary to regulation 8c (1) of the Emergency Regulations, 1952. All the accused persons were convicted on these counts and their appeals have been summarily dismissed excepting only the appeals of these two women against their convictions for murder. These two appellants being under the statutory age were sentenced on both counts to be detained during the Governor's pleasure, so that the success of their appeals from their convictions for murder will have no practical effect. However, we thought it right to set down these two appeals for hearing since their conviction involves an important question as to the application of section 23 of the Penal Code of Kenya to persons who consort with or form part of a **Mau Mau** terrorist gang.

The facts so far as material are that the gang in question consisted of about fourteen or sixteen persons including four women of whom the appellants were two. The other two women turned Queen's evidence and were called as Crown witnesses at the trial. The gang was armed with one precision rifle and a number of home-made guns. On the morning of 20th April, 1955, the gang was lying up in a hideout in the Kiambu District when two boys, who were out shooting birds with an airgun, stumbled upon them in the bush. The male members of the gang promptly surrounded and killed the boys. The four women took no part in the actual capture and killing of the boys; they were in fact told by the men to move away and did so. They did not, it appears, witness the actual killing though they were near enough to hear the screams of the murdered children. After the killing the gang split up into groups, the two appellants remaining with one of the groups. In fact, the first-named appellant when captured was carrying the airgun which the boys had had while the other appellant was carrying a **simi** slung from her shoulder.

So far as the two appellants were concerned, the main issue, as the learned trial Judge states, was whether this evidence by itself was sufficient to render them guilty of the murder by the application of the doctrine of common intention or common purpose as prescribed in section 23, which reads:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

The learned trial Judge thought that proof that all the twelve accused were members of a gang of terrorists and were present when the two boys were killed was by itself sufficient, having regard to section 23, to render them all guilty of murder. His reasons for so holding appear in the following passage of the judgment:

"The Court of Appeal for Eastern Africa has held in *Wanjiru w/o Thairu v. Reg. Cr. A.* 141/1955, that the mere existence of an armed gang of **Mau Mau** terrorists is at the present day in Kenya prejudicial to public safety and the maintenance of

public order and it is indeed common knowledge that it is the purpose of gangs of terrorists to kill, rob, steal and burn. There can be no doubt that murder is a probable consequence of the prosecution of acts of terrorism by gangs of terrorists. It is therefore clear that when a murder is committed by a gang of terrorists all the members of the gang present at the killing are guilty of murder unless they have dissociated themselves from it. I am satisfied that there was no such dissociation here.... As regards the female accused, I am prepared to accept the evidence that the four women in the gang did not take part in the actual killing but were a short distance away hiding while it was taking place. Nevertheless, I consider that for the reasons already given they are just as guilty of the murder as the rest by virtue of section 23."

In the appeal referred to by the learned Judge the appellant, a woman, had been convicted of consorting with armed persons contrary to regulation 8c (1) of the Emergency Regulations, and the point which this Court had to consider was whether the facts accepted in the trial court disclosed circumstances raising a reasonable presumption that the appellant intended to act or had recently acted with the armed persons in question in a manner prejudicial to public safety or the maintenance of public order. In that case the facts were that the woman had for many months been an active member of the gang which had habitually engaged in terrorist activities and that she assisted the gang by associating with its members and by cooking for them. We accepted the contention of Crown counsel that the mere existence of an armed gang of **Mau Mau** terrorists is at the present day in Kenya prejudicial to public safety and the maintenance of public order, and that any person consorting with and actively assisting the gang in its activities is acting in a manner contravening the regulation. In other words, we accepted the proposition that anybody who voluntarily associates with and assists an armed gang can be taken, for the purposes of the presumption, to share with the other members of the gang a general common intention to commit unlawful acts.

We do not wish to appear to resile in the least from that proposition, but in the present case, the learned Judge has taken the matter a step further and has, in effect, held that not only can every person consorting with a gang be held to participate in the general unlawful purpose but also he can be deemed to have committed any offence which is committed in the prosecution of such

general unlawful purpose without proof of any common intent to commit a specific unlawful act provided that the offence committed was a probable consequence of the prosecution of the general purpose, and provided further that he is present when the offence is committed and does not dissociate himself from it.

In so far as the men in the gang were concerned, the learned Judge did not have to apply this proposition, because he found that they were all actual participants in the crime and accordingly were guilty as principals under section 22 of the Penal Code. He did, however, apply it in the cases of these two female appellants, and the question which has caused us anxiety is whether he was correct in law in so doing.

"Common intention" generally implies a pre-arranged plan, but this does not rule out the possibility of a common intention developing in the course of events though to the actual act. The complainant can also be forgiven if she left the Court bewildered, for as far as she is concerned the accused Haruna had attempted to rape her and she had testified to specific overt acts. In if the learned judges in these cases were following and applying the rationale in the **Mulira case** it is not clear why they did not convict the accused persons of assault with intent to commit a felony contrary to Section 243(a) of the Penal Code and make some attempt to distinguish between attempted rape and the offence under Section 24).

It is for these reasons that despite the extreme veneration with which I regard the decisions of the learned judges in these cases, I have been unable to arrive at similar decisions.

Reverting to the before me, I will simply apply the test laid down in Section 380 and determine whether the facts admitted by the accused disclose the following elements:

(a) Whether the accused intended to rape the complainant.

(b) Whether he has started putting his intention into execution by some overt act adapted to fulfilment.

(c) Whether the Overt acts had been established.

With regard to intention, the accused himself admitted as much in the words quoted at the beginning of this judgment. He certainly began to put his intention into execution when he got hold of the complainant and started stripping her clothes. These are overt acts. In the face of all these facts admissions, I do not know what the reaction of both the accused and the complainant would be if I were to follow the decision in the **Haruna case** and tell the accused:

Although you admitted attempting to rape the complainant but stopped only when people appeared and in fact you had started stripping off her clothes, I find you not guilty because you had not attempted to rape her as you still had your shorts or trouser on.

I must confess I do not have sufficient courage to say so to the accused.

In the result I find that the acts established and admitted by the accused in the lower court constitute in law and in fact the offence of attempted rape with which he was charged. He was therefore properly convicted.

With regard to sentence, I do not find it so lenient as to warrant interference by this Court, although I think it was on the lighter side.

For all the foregoing reasons I will make no revisional orders.

Omari V R (1971) HCD n. 362

Kwikima, Ag. J.

The appellant was convicted of attempted rape c/s 132 of the Penal Code. The evidence was to the effect that he grabbed the complainant, threw her down, tore her underpants and laid on her. The complainant stated however, that he did not unbutton his trousers in preparation of penetrating her private parts. The issue then was whether or not the appellant's acts amounted to attempted rape.

Held: (1) "[The] Resident Magistrate who tried this case overlooked the only issue, which was whether the appellant's act amounted to an attempt to rape the complainant. From the proven facts it is quite clear that appellant's act did not constitute an attempt to rape the complainant. The case of **R. v. Haruna Ibrahim** 1967 HCD 76 is an authority on this issue. The brief report of that case reads:- "Accused was convicted of attempted rape (c/s 132). The evidence was that he had dragged the complainant to a ditch, placed his hand over her mouth and pulled down her underclothes while lying on her when he was observed by a passerby and fled. There was no evidence that at the time he fled, (he was) undressed. The acts of the accused did not constitute attempted rape, since he had not yet undressed. Rather, the acts constituted mere preparation for that crime.

The acts however did constitute the crime of indecent assault (s. 135(1) P.C.). A conviction for indecent assault was substituted under section 185 of Criminal Procedure Code). "In the present case the appellant did not undress." (2) Following the **Haruna Ibrahim** case (supra) the appellant's conviction is hereby quashed and in substitution therefor he is convicted of indecently assaulting the complainant.

(b)Impossible Attempts

In some situations it is not possible to commit the attempted crime. In such cases the accused is actually labouring under a mistake of same kind. However, under section 380 of the penal code an accused person attempting to commit an impossible crime can still be punished. Two important types of attempts may be distinguished: (i) attempting a non-existent crime and (ii) attempting a factually impossible crime. It is beyond dispute that a person who commits or attempts to commit what is not a crime in law cannot be convicted of attempting to commit a crime.

The law and practice of attempting a factually impossible crime in Tanzania is the same as that of Britain. Strict construction of section 380 of the Penal Code shows that all factually impossible crimes are punishable.

Edward s/o Michael V R (1948) 1 TLR 308

WILSON, J. - An interesting point is raised in this Appeal. The Appellant was charged before the resident magistrate of Mwanza under section 5(1) and 17 of the Diamond Industry Ordinance (CAP. 103, T.T. Laws) with attempting to sell diamonds. He admitted that he had attempted to sell ten objects which he believed to be diamonds to Mr. Aziz Faucy of Messrs. Alibhar Lalji and Sons, Ltd, merchants of Mwanza. The objects turned out not to be diamonds but only pieces of glass. The accused nevertheless pleaded guilty to the charge and the learned magistrate after considering the law, accepted the plea as valid and convicted him and sentenced him to three (3) years' imprisonment with hand labour. He has now appealed to this court; but only against the alleged severity of that sentence, not against the conviction.

The case has, however, been put down for argument as to whether a plea of guilty was rightly entered in view of the fact that the "diamonds" which the appellant had admittedly attempted to sell were not diamonds at all. It would be entirely competent for this court to set aside the conviction, if the facts admitted by the accused at the trial were held not to constitute an offence against the law, notwithstanding the accused's plea of guilty.

Section 5(1) of the Ordinance States that "no person other than an authorized diamond miner or a cenced diamond dealer shall sell any diamond" and section 2 defines a diamond as "any rough and uncut diamond". Section 5(5) makes it an offence to contravene section 5(1) above and section 17 states that "any person who attempts to commit ... an offence ... against this Ordinance shall himself be guilty of an offence ... and shall be liable to the same punishment as for the offence attempted."

I think it is clear from the above that it is no offence under the Diamond Industry Protection Ordinance to sell a piece of glass as a diamond. No doubt the seller would not if he knew it was glass, lay himself open to a charge of obtaining money by false pretences, but that is another matter. It might seem then, at first sight that, as section 17 only makes it an offence to attempt to commit what is an offence against the Ordinance, it is offence under that section to attempt to sell a piece of glass as a diamond. The matter, however, is not as easy as that.

It has been held in England (**Rex v. Brown**, 63 J.P. 790) that of a woman, believing she was taking a noxious thing within the meaning of the offences against the Person Act, 1861, did, with intent to procure her abortion, take a thing in fact harmless, she is guilty of an attempt to commit an offence against section 58 of the statute, which makes it an offence to take any noxious thing to cause an abortion.

It would appear that in England the law on the subject is that 'everyone who, believing that a certain state of facts exists, does or omits an act the doing or omitting of which would, if that state of fact existed, be an attempt to commit an offence, attempt to commit that offence, although its commission in the manner proposed was by reason of the non-existence of the state of facts at the time of the act or omission impossible, (Archibold: 30th edition at p. 1443). That statement of the law is in accordance with the decisions in **Rex V. Brown**, 24 QBD 357 and **Rex V. Ring**, 17 Cox C.C. 491, which overruled the well known case of **Rex V Collins**, 9 Cox C.C. 497 in which it had been held that it was no offence to attempt to pick a pocket which turned out to be empty.

The Law in Tanganyika is the same as the law in England on this point. In section 380 of the penal code the word 'attempt' in its criminal legal sense is defined and it is stated, *inter alia*, that 'it is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence'. The circumstances not known to the offender in this case which made the commission of the offence impossible were that "the diamonds" he had bought from somebody else and was trying to sell at a profit to Mr. Fancy were really bits of glass. Although the present offence is not one under the penal code I see no reason to think that the word 'attempts' in section 17 of the relevant Ordinance has any other meaning than that stated in section 380 of the Penal Code, 1945.

The principle involved, then, seems to be that in deciding whether a certain action constitutes an attempt to commit an offence against that law one must look to the doer's intention and to what he thinks he is doing when he begins to carry it out. Just as in **Rex V. Brown** (ubi supra) it was held to be an offence for a woman to take a quite harmless drug because she believed she was taking a noxious one in furtherance of her intention to cause her own abortion, so in the present

case the appellant must be held to have committed an offence because he intended, without licence or authority, to sell diamonds and believed that the objects he was trying to sell to Mr. Fancy were in fact diamonds. It is hardly necessary to say that it is not the intention in itself which constitutes the offence; there must of course in addition to some overt act manifesting the intention. But where there is clear intention to commit an offence and an overt act putting that intention into execution and belief that what is being done is something which is an offence, then that overt act undoubtedly constitutes an attempt to commit that offence, although for reasons outside the doer's knowledge (in this case the fact that his "diamonds" were not really diamonds) the offence attempted cannot actually be committed.

I find therefore that in this case the appellant was rightly convicted by the learned magistrate of attempting to sell diamonds, though the 'diamonds' he tried to sell were only worthless pieces of glass... The appeal is dismissed.

NOTE: The courts in Britain tried to change this somewhat 'unjust' position.

It was argued that a person committing or attempting to commit an impossible crime is labouring under one of the following mistakes: (i) Where the accused is making a mistake about the criminal law; (ii) Where the accused, because he is making a mistake of fact, believes his objective to be criminal when it is not; and (iii) Where the accused's objective, if it could be obtained, would be a crime and, because he is making a mistake of fact, he believes it is possible when it is not. The last category (iii) is sub-divided into two smaller categories: (a) Where the accused has used inadequate means to achieve his objective and (b) includes all other cases where it is in fact impossible to attain the accused's criminal objective. According to **Haughton V. Smith [1975] AC 476** cases in categories (i), (ii) and (iii)(b) are not offences and only cases in category (iii)(a) constitute indictable attempts at common law.

For the purpose of making the law certain the British Parliament Passed the Criminal Attempts Act of 1981 which was interpreted in the following case:

R V. Shivpuri [1986] 2 All ER 334.

The appellant was arrested by customs officials while in possession of a suit case. He admitted that he knew that it contained prohibited drugs. Analysis showed that the material in the suitcase was not a prohibited drug but vegetable matter akin to snuff. The appellant was convicted under the Criminal Attempts Act 1981, s. 1(1), of attempting to commit the offence of knowingly concerned in dealing with and harbouring prohibited drugs contrary to s. 170(1)(b) of the Customs and Excise Management Act 1979. He appealed on the ground that because the substance was not a prohibited drug he had not done an act which was 'more than merely preparatory to the commission of the offence' as required by the 1981 Act.

LORD BRIDGE. - ... Applying this language (of the Criminal Attempts Act 1981) to the facts of the case, the first question to be asked is whether the appellant intended to commit the offences of being knowingly concerned in dealing with and harbouring drugs of class A or class B with intent to evade the prohibition on their importation. Translated into more homely language the question may be rephrased, without in any way altering its legal significance, in the following terms: did the appellant intend to receive and store (harbour) and in due course pass on to third parties (deal with) packages of heroin or cannabis which he knew had been smuggled into England from India? The answer is plainly Yes, he did. Next, did he, in relation to each offence, do an act which was more than merely preparatory to the commission of the offence? The act relied on in relation to harbouring was the receipt and retention of the packages found in the lining of the suitcase. The act relied on in relation to dealing was the meeting at Southall station with the intended recipient of one of the packages. In each case the act was clearly more than preparatory to the commission of the intended offence; it was not and could not be more than merely preparatory to the commission of the actual offence, because the facts were such that the commission of the actual offence was impossible. Here then is the nub of the matter. Does the 'act which is more than merely preparatory to the commission of the offence' in s. 1(1) of the 1981 Act (the *actus reus* of the statutory offence of attempt) require any more than an act which is more than merely preparatory to the commission of the offence which the defendant intended to commit? Section 1(2) must surely indicate a negative answer; if it were otherwise, whenever the facts were such that the commission of the actual offence was impossible, it would be impossible to prove an act more than merely preparatory to the commission of that offence and sub-ss (1) and (2) would contradict each other.

This very simple, perhaps over-simple, analysis leads me to the provisional conclusion that the appellant was rightly convicted of the two offences of attempt with which he was charged. But can this conclusion stand with *Anderton v Ryan*? The appellant in that case was charged with an attempt to handle stolen goods. She bought a video recorder believing it to be stolen. On the facts as they were to be assumed it was not stolen. By a majority the House decided that she was entitled to be acquitted. I have re-examined the case with care. If I could extract from the speech of Lord Roskill or from my own speech a clear and coherent principle distinguishing those cases of attempting the impossible which amount to offences under the statute from those which do not, I should have to consider carefully on which side of the line the instant case fell. But I have to confess that I can find on such principle.

Running through Lord Roskill's speech and my own in *Anderton v. Ryan* is the concept of 'objectively innocent' acts which, in my speech certainly, are contrasted with 'guilty acts'. A few citations will make this clear. Lord Roskill said ([1985] 2 All ER 355 at 364, [1985] AC 560 at 580):

'My Lords, it has been strenuously and ably argued for the respondent that these provisions involved that a defendant is liable to conviction for an attempt even where his actions are innocent but he erroneously believes facts which, if true, would make those actions criminal, and further, that he is liable to such a conviction whether or not in the event his intended course of action is completed.'

He proceeded to reject the argument. I referred to the appellant's purchase of the video recorder and said ([1985] 2 All ER 355 at 366, [1985] AC 560 at 582): 'Objectively considered, therefore, her purchase of the recorder was a perfectly proper commercial transaction'.

A further passage from my speech stated ([1985] 2 All ER 355 at 366, [1985] AC 560 at 582-583):

'The question may be stated in abstract terms as follows. Does s 1 of the 1981 Act

create a new offence of attempt where a person embarks on and completes a course of conduct, which is objectively innocent, solely on the ground that the person mistakenly believes facts which, if true, would make that course of conduct a complete crime? If the question must be answered affirmatively it requires convictions in a number of surprising cases: the classic case, put by Bramwell B. in *R v. Collins* (1864) 9 Cox CC 497 at 498, of the man who takes away his own umbrella from a stand, believing it not to be his own and with intent to steal it; the case of the man who has consensual intercourse with a girl over 16 believing her to be under that age; the case of the art dealer who sells a picture which he represents to be and which is in fact a genuine Picasso, but which the dealer mistakenly believes to be a fake. The common feature of all these cases, including that under appeal, is that the mind alone is guilty, the act is innocent.`

I then contrasted the case of the man who attempts to pick the empty pocket, saying ([1875] 2 All ER 355 at 367, [1985] AC 560 at 583):

`Putting the hand in the pocket is the guilty act, the intent to steal is the guilty mind, the offence is appropriately dealt with as an attempt, and the impossibility of committing the full offence for want of anything in the pocket to steal is declared by [sub-s(2)] to be no obstacle to conviction'.

If we fell into error, it is clear that our concern was to avoid convictions in situations which most people, as a matter of common sense, would not regard as involving criminality. In this connection it is to be regretted that we did not take due note of para 2.97 of the Law Commission Report, *Criminal Law: Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement* (1980)(Law Com no 102) which preceded the enactment of the 1981 Act, which reads:

`If it is right in principle that an attempt should be chargeable even though the crime which it is sought to commit could not possibly be committed, we do not think that we should be deterred by the consideration that such a change in our law

would also cover some extreme and exceptional cases in which a prosecution would be theoretically possible. An example would be where a person is offered goods at such a low price that he believes that they are stolen, when in fact they are not; if he actually purchases them, upon the principles which we have discussed he would be liable for an attempt to handle stolen goods. Another case which has been much debated is that raised in argument by Bramwell B in *Reg v. Collins*. If A takes his own umbrella, mistaking it for one belonging to B and intending to steal B's umbrella, is he guilty of attempted theft? Again, on the principles which we have discussed he would in theory be guilty, but in neither case would it be realistic to suppose that a complaint would be made or that a prosecution would ensue.'

The prosecution in *Anderton v Ryan* itself falsified the Commission's prognosis in one of the 'extreme and exceptional cases'. It nevertheless probably holds good for other such cases, particularly that of the young man having sexual intercourse with a girl over 16, mistakenly believing her to be under that age, by which both Lord Roskill and I were much troubled.

However that may be, the distinction between acts which are 'objectively innocent' and those which are not is an essential element in the reasoning in *Anderton v Ryan* and the decision, unless it can be supported on some other ground, must stand or fall by the validity of this distinction. I am satisfied on further consideration that the concept of 'objective innocence' is incapable of sensible application in relation to the law of criminal attempts. The reason for this is that any attempt to commit an offence which involves 'an act which is more than merely preparatory to the commission of the offence' but which for any reason fails, so that in the event no offence is committed, must *ex hypothesi*, from the point of view of the criminal law, be 'objectively innocent'. What turns what would otherwise, from the point of view of the criminal law, be an innocent act into a crime is the intent of the actor to commit an offence. I say 'from the point of view of the criminal law' because the law of tort must surely here be quite irrelevant. A puts his hand into B's pocket. Whether or not there is anything in the pocket capable of being stolen, if A intends to steal his act is a criminal attempt; if he does not so intend his act is innocent. A plunges a knife into a bolster in a bed. To avoid the complication of an offence of criminal damage, assume it to be A's holster. If A believes the bolster to be his

enemy B and intends to kill him, his act is an attempt to murder B; if he knows the bolster is only a bolster, his act is innocent. These considerations lead me to the conclusion that the distinction sought to be drawn in *Anderton v Ryan* between innocent and guilty acts considered 'objectively' and independently of the state of mind of the actor cannot be sensibly maintained.

Another conceivable ground of distinction which was to some extent canvassed in argument, both in *Anderton v Ryan* and in the instant case, though no trace of it appears in the speeches in *Anderton v Ryan*, is a distinction which would make guilt or innocence of the crime of attempt in a case of mistaken belief dependent on what, for want of a better phrase, I will call the defendant's dominant intention. According to the theory necessary to sustain this distinction, the appellant's dominant intention in *Anderton v Ryan* was to buy a cheap video recorder; her belief that it was stolen was merely incidental. Likewise in the hypothetical case of attempted unlawful sexual intercourse, the young man's dominant intention was to have intercourse with the particular girl; his mistaken belief that she was under 16 was merely incidental. By contrast, in the instant case the appellant's dominant intention was to receive and distribute illegally imported heroin or cannabis.

While I see the superficial attraction of this suggested ground of distinction, I also see formidable practical difficulties in its application. By what test is a jury to be told that a defendant's dominant intention is to be recognised and distinguished from his incidental but mistaken belief? But there is perhaps a more formidable theoretical difficulty. If this ground of distinction is relied on to support the acquittal of the appellant in *Anderton v. Ryan*, it can only do so on the basis that her mistaken belief that the video recorder was stolen played no significant part in her decision to buy it and therefore she may be acquitted of the intent to handle stolen goods. But this line of reasoning runs into head-on collision with s 1(3) of the 1981 Act. The theory produces a situation where, apart from the subsection, her intention would not be regarded as having amounted to any intent to commit an offence. Section 1(3)(b) then requires one to ask whether, if the video recorder had in fact been stolen, her intention would have been regarded as an intent to handle stolen goods. The answer must clearly be Yes, it would. If she had bought the video recorder knowing it to be stolen, when in fact it was, it would have availed her nothing to say that her dominant intention was to buy a video recorder because it was cheap and that her knowledge that it was stolen was merely incidental. This

seems to me fatal to the dominant intention theory.

I am thus led to the conclusion that there is no valid ground on which *Anderton v. Ryan* can be distinguished. I have made clear my own conviction, which as a party to the decision (and craving the indulgence of my noble and learned friends who agreed in it) I am the readier to express, that the decision was wrong. What then is to be done? If the case is indistinguishable, the application of the strict doctrine of precedent would require that the present appeal be allowed. Is it permissible to depart from precedent under the 1966 *Practice Note* ([1966] 3 All ER 77) notwithstanding the especial need for certainty in the criminal law? The following considerations lead me to answer that question affirmatively. Firstly, I am undeterred by the consideration that the decision in *Anderton v. Ryan* was so recent. The 1966 Practice Statement is an effective abandonment of our pretention to infallibility. If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better. Secondly, I cannot see how, in the very nature of the case, anyone could have acted in reliance on the law as propounded in *Anderton v. Ryan* in the belief that he was acting innocently and now find that, after all, he is to be held to have committed a criminal offence. Thirdly, to hold the House bound to follow *Anderton v. Ryan* because it cannot be distinguished and to allow the appeal in this case would, it seems to me, be tantamount to a declaration that the 1981 Act left the law of criminal attempts unchanged following the decision in *Haughton v. Smith* [1975] AC 476. Finally, if, contrary to my present view, there is a valid ground on which it would be proper to distinguish cases similar to that considered in *Anderton v. Ryan*, my present opinion on that point would not foreclose the option of making such a distinction in some future case.

I cannot conclude this opinion without disclosing that I have had the advantage, since the conclusion of the argument in this appeal, of reading an article by Professor Glanville Williams entitled 'The Lords and Impossible Attempts, or Quis Custodiet Ipsos Custodes?' [1986] CLJ 33. The language in which he criticises the decision in *Anderton v. Ryan* is not conspicuous for its moderation, but it would be foolish, on that account, not to recognise the force of the criticism and churlish not to acknowledge the assistance I have derived from it.

I would answer the certified question in the affirmative and dismiss the appeal.

Conspiracy

Conspiracy is an agreement between two or more persons to do an unlawful act or a lawful act by unlawful means. In Tanzania the term conspiracy is defined under section 384 of the penal code. To found a conviction for conspiracy the prosecution must prove not only an agreement amounting to conspiracy between the conspirators to carry out an unlawful purpose but also an intention in the mind of an individual conspirator to carry out that unlawful purpose. As it is rare to get direct evidence of an agreement to do an unlawful act courts have the practice of drawing inferences from available evidence.

R V. Whitchurch (1890) 2 QBD 420

Believing herself to be pregnant, Whitechurch agreed with others that they should use instruments and administer things to her with a view to procuring her miscarriage. Instruments were used and things were administered, but there was no evidence that Whitchurch was pregnant, a fact which would, if proved, have meant that she could be convicted of a crime under the first part of s. 58. Whitchurch was nonetheless convicted of conspiracy, and her conviction was affirmed by the Court of Crown cases reserved.

HAWKINS, J. - ... The prisoner is not charged with using instruments, or administering drugs to herself, for the purposes of procuring abortion, but with conspiring with others to procure abortion. It is clear that she could not lawfully call in other persons to do that which when done by them is a crime punishable with penal servitude. What she did was a conspiracy to commit a criminal act. Conviction affirmed.

Mavuta V R. [1973] EA 89

The appellant was convicted of conspiracy to defraud a bank on evidence which was upheld on appeal. For the appellant it was contended that it had not been proved that the bank was a person, and that the appellant as a first offender should not have been sentenced to the maximum of 3 years' imprisonment.

SIMPSON, J. - The appellant was convicted of conspiracy to defraud contrary to s. 317 of the Penal Code and was sentenced to three years' imprisonment.

The particulars of the charge read as follows:

"Jacob Mbutu Mavuta: Between 20 December, 1971 and 30 December, 1971 at Nairobi conspired together with other persons unknown to defraud Standard Bank, Kenyatta Avenue, of K.Shs. 230,103/= by false representations and other false and fraudulent devices."

According to the evidence accepted by the magistrate it was discovered by the Standard Bank, Kenyatta Avenue, that the proceeds of a sterling bill deposited by a customer amounting in local currency to Shs. 230,103/= had not been credited to that customer's account. Investigations revealed that the bill was missing as well as the ledger card and statement of account of the appellant, another customer, and a number of journal sheets. With some difficulty the account of the appellant was reconstructed. It was then found that the proceeds of the bill were credited to the appellant's account and that within two weeks the whole of the sum of Shs. 230,103/= and the sum of Shs. 8/85 which had been lying in the appellant's account before the proceeds of the bill were credited to it had been withdrawn by means of five cheques which also were missing. Investigations further revealed that the missing documents must have been extracted after the last withdrawal on 30 December 1971. [The judge considered the evidence and continued.]

The magistrate concluded that three of the five cheques viz. cheques for Shs. 92,000/=, Shs. 75,800/= and Shs. 52,200/= were definitely presented and cashed by the appellant. We have expressed certain reservations as to his findings with regard to the cheque for Shs. 75,800/=. As far as the other two cheques are concerned however we cannot see how he could properly come to any other conclusion.

Mr. R.K. Shah for the appellant submitted that for the purposes of a conviction under s. 317 of the Penal Code the prosecution had to prove that "Standard Bank, Kenyatta Avenue" was a person and had failed to do so.

"Person" is defined in the Interpretation and General Provisions Act (Cap. 2) as including "any company or association or body of persons corporate or unincorporate".

Mr. Dowling said he was the accountant for Standard Bank Limited, Kenyatta Avenue, a statement which was not disputed. It is difficult to see what other proof is required that the Standard Bank is a corporate body of persons. We think moreover it was a matter of which the court could properly take judicial notice.

There is no merit in this ground of appeal.

Mr. Shah also submitted that the appellant being a first offender should not have been given the maximum sentence. In principle we agree that the maximum sentence should not normally be imposed upon a first offender but in this case the maximum sentence of three years' imprisonment is, having regard to the amount involved and the prevalence of such conspiracies and frauds which are undermining the whole structure of banking in this country, manifestly inadequate.

The appeals against conviction and sentence are dismissed.

Ongodia and Erima v. Uganda [1967] EA 137.

BENNETT, J. - This is an appeal under s. 90 of the appeal Forces Act, Cap. 295, against the findings of a General Court-Martial.

At the Court-Martial four charges were brought against the two appellants and they were convicted on the first two charges, which read:

First charge: Both accused jointly

Conspiracy contrary to s. 375 (6) of the Penal Code and s. 77 (1) of the Armed Forces Act 1964 in that they

at Entebbe on February 24, 1966, conspired together and with other persons unknown to effect

an unlawful purpose, namely to set up a road block near Baitabibiri and arrest the then Prime Minister, Dr. A.M. Obote.

Second charge: Both accused jointly

Offences relating to security contrary to s. 16 (g) of the Armed Forces Act 1964 in that they at Entebbe on February 24, 1966, improperly occasioned false alarm by saying to Second Lieutenant Sam Anguram and Lieutenant Guweddeko "We are at war, war has broken out" or similar words.

At the material time each appellant held the rank of Captain in the Uganda Army. The evidence upon which the prosecution relied to establish the guilt of the two appellants may be summarised thus: On February 24 the two appellants arrived at the Officers' Mess at Entebbe in the first appellant's car at about 2 p.m. The only officers in the Mess at the time of their arrival were Second Lieutenant Anguram and Lieutenant Guweddeko, a pilot in the Uganda Air Force. On arriving at the Mess the first appellant, Ongodia; said to Anguram and Guweddeko that war had broken out, that Army Headquarters at Mbuya had been surrounded, and that they had managed to escape, or words to that effect. Ongodia then asked Anguram if he had confidence in his platoon and on receiving an affirmative reply, he asked Anguram to take his platoon to Baitabibiri on the Kampala/Entebbe road and set up a road block with the object of arresting the then Prime Minister, Dr. Obote. Ongodia said that other troops were advancing from Kampala, and that they would be arriving at any moment.

The only persons present during this conversation apart from the two appellants were Anguram and Guweddeko. Both these witnesses testified that the second appellant, Erima, was silent throughout the conversation, but Guweddeko said that Erima was looking at Ongodia and that he nodded his head from time to time while Ongodia was speaking. Anguram made no mention of the fact that Erima had nodded.

After the conversation with Anguram and Guweddeko the two appellants lunched in the Mess, and then drove back to Kampala. It appeared that on the morning of February 24 the appellants had been present at a meeting at Makindye Lodge between the then President, Sir Edward

Mutesa, and Brigadier Opolot. It also emerged in evidence that on that morning Brigadier Opolot had been relieved of his command of the Uganda Army, that Colonel Amin had been appointed in his stead, and that troops who were presumably loyal to Colonel Amin had taken over the Army Headquarters at Mbuya without a shot being fired.

The two appellants gave evidence in which they admitted that they had gone to Entebbe on February 24 to look for Ongodia's wife, she having gone to Entebbe earlier that day to escape from an ugly situation at Mbuya. They testified that having failed to find Ongodia's wife, they went to the Officers' Mess where they found Anguram and Guweddeko. They denied that Ongodia had said Mess "We are at war", or "War has broken out", or words to that effect. They also denied that Ongodia had asked Anguram to take his platoon and set up a road block on the Kampala/Entebbe road. They admitted that there was a conversation between Ongodia and the two Lieutenants in the Mess, but said that it was confined to informing the two Lieutenants that life in Kampala was normal, that Brigadier Opolot was to be transferred to the Ministry of Defence as Adviser to the Prime Minister, and that Colonel Amin was to be Commander of the Army in his stead.

An attack was made on the credibility of Anguram and Guweddeko, the two principal prosecution witnesses at the trial. It is plain that the Court-Martial could not have convicted the two appellants had they not accepted the evidence of Anguram and Guweddeko as being substantially true. We do not consider that the finding of the Court-Martial as to the credibility of these two witnesses is open to attack in this court. Indeed, counsel for the first appellant conceded that s. 90 of the Armed Forces Act conferred a right of appeal on a point of law only.

The conviction on the first charge has been attacked on the ground that it is said that there was no evidence to prove a conspiracy between the two appellants, or between either of the appellants and other persons unknown.

It is contended that since Erima took no part in the conversation in the Mess but merely nodded his head, there was insufficient evidence to prove that the appellants were acting in concert or that there was any agreement between them and that since a man cannot be convicted of conspiring with himself, both appellants were entitled to an acquittal on the conspiracy charge.

It is also contended that there was no evidence of any conspiracy between either of the appellants and third parties, so that the prosecution having failed to prove a conspiracy between the two appellants, the appellants were entitled to an acquittal on the first charge.

The learned Judge Advocate gave a very full direction in his summing up as to the law relating to conspiracy which had not been attacked on the hearing of this appeal. It is, however, contended that he misdirected the Court-Martial when he said in his summing up:

"I think that is all I need say about the evidence of the two principal witnesses called by the prosecution. You will appreciate that the whole basis of this case rests in effect on what was said or not said, by Ongodia in the Mess at Entebbe. It is for you to make up your minds as to whether or not Anguram and Guweddeko have told you the truth. If you come to the conclusion that they were telling the truth, notwithstanding anything put to them in cross-examination, then you will be justified in coming to the conclusion in your findings that the accused Ongodia at least is guilty on both charges, whatever doubts you may entertain in respect of Erima. If, on the other hand, you come to the conclusion that Anguram and Guweddeko have not told you the truth (and the prosecution, as I say, rests almost entirely on these two witnesses) you have no alternative but to acquit both the accused of the offences charged. Equally, if there is any reasonable doubt as to where the truth lies in relation to the evidence given by these two witnesses, then you must acquit the accused."

It is contended that there were discrepancies between the evidence of Guweddeko and Anguram which were not referred to by the Judge Advocate, and that he was, in effect, inviting the court to ignore the evidence other than the evidence of these two witnesses. As far as we can see the only material discrepancy between the evidence of Anguram and Guweddeko concerns the nodding attributed to Erima by Guweddeko. Anguram did not mention in his evidence that Erima had nodded while Ongodia was speaking to Anguram. We do not regard the failure of one witness to deal in his evidence with a fact testified to by another as a true discrepancy. Moreover, we do not consider that the passage complained of in the summing up contains an invitation to the court to ignore the evidence other than that of Anguram and Guweddeko. In

our judgment, the only misdirection in the passage complained of is the learned Judge Advocate's observation that the court would be justified in convicting Ongodia on both charges if it believed the evidence of Anguram and Guweddeko. For reasons which we will state hereafter, we consider that the court should have been directed that it would be justified in convicting Ongodia on the first charge only, and that there was no sufficient evidence against either of the appellants to support a conviction on the second charge.

In our judgment, there was sufficient evidence to justify an inference that Ongodia had conspired with a person or persons unknown to arrange for a road block to be placed on the Kampala/Entebbe road with the object of arresting the Prime Minister. Both Anguram and Guweddeko testified that Ongodia had said to Anguram that reinforcements were on the way. How could Ongodia have known about reinforcements unless he was a party to some scheme to send them to Entebbe? Plainly, Ongodia must have been collaborating with those who were to send reinforcements. Ongodia's words seem to us to contain an implied invitation to Anguram to join a conspiracy which was already in existence and an implied promise that if he assisted by setting up a road block, he would be joined by other forces which were on the way.

It is true that there was a discrepancy between the evidence of Anguram and Guweddeko as to where the reinforcements were to come from. Guweddeko testified that Ongodia had said that other men would be arriving from Kampala whereas Anguram testified in cross-examination that Ongodia had said that reinforcements were coming, but that he did not know where they were coming from. However, we do not regard the discrepancy as being sufficiently material to justify the rejection of the evidence of these two witnesses, since both were agreed that Ongodia did mention the impending arrival of reinforcements.

In our judgment, there was sufficient evidence to justify a finding that the first appellant had conspired with others to waylay and arrest the Prime Minister on the Kampala/Entebbe road despite the absence of any direct evidence of an agreement. As was said in the judgment of the Court of Appeal in *R. v. Gokaldas Kanji Karia and Another* (1949) 16 EACA 116.

"Certainly there was no direct evidence of an agreement but how rarely is conspiracy proved by such evidence. As Mr. Southworth pertinently observed conspirators do not normally meet

together and execute a deed setting out the details of their common unlawful purpose. It is a common-place to say that an agreement to conspire may be deduced from any acts which raise the presumption of a common plan."

There was no evidence that the arrest of the Prime Minister would have been lawful had it taken place. It was not suggested by the appellants' counsel either at the Court-Martial or before us that there would have been any justification in law for the arrest. In these circumstances we consider that there was sufficient evidence to support the conviction of the first appellant on the first charge.

As regards the second appellant, however grave may be the suspicion that he was acting in concert with Ongodia, we do not consider that there was evidence from which it could properly be inferred that he was a party to the conspiracy. Throughout the conversation in the Mess, Erima remained silent. There was no evidence to indicate that he assented to what was being said by Ongodia apart from the evidence of Guweddeko that he nodded his head from time to time. Unfortunately it does not emerge from Guweddeko's evidence at what junctures Erima nodded his head. He may well have nodded his head when Ongodia said that Army Headquarters had been surrounded and that war had broken out, while remaining motionless when Ongodia asked Anguram to send his platoon to set up a road block on the Entebbe road. In our judgment the fact that Erima may have nodded his head from time to time while Ongodia was speaking is altogether too equivocal to amount to proof that he agreed to everything that Ongodia was saying. In our judgment there was insufficient evidence to support the conviction of the second appellant on the first charge.

We now turn to the second charge.

We agree with counsel for the appellants' contention that the words "improperly occasions false alarms" in s. 16 (g) of the Armed Forces Act are not to be construed as if they read "improperly utters words calculated to occasion false alarms". We consider that the word "occasions" must be construed according to its ordinary meaning, which is "to cause or to be the occasion of". We consider that in order to succeed on a charge under s. 16 (g) it is incumbent on the

prosecution to prove among other matters, that an alarm was in fact occasioned and that at least one man of reasonable firmness was alarmed. In the instant case there was no evidence that anyone was alarmed by the words "we are at war", "War has broken out", alleged to have been uttered by Ongodia in the Officers' Mess.

Both Anguram and Guweddeko said that when they heard Ongodia's account of events in Kampala they were surprised. They did not say they were alarmed. Moreover, their subsequent conduct did not suggest that they were alarmed. All they did was to attempt, unsuccessfully, to telephone Army Headquarters. They did not attempt to warn the Prime Minister of the danger that he was in, or make any report to the police at Entebbe. They did not alert their platoons. They remained in the Mess and it was only in the evening when Captain Ebitu visited the Mess that Anguram reported the incident to him.

In our judgment the evidence does not establish that an alarm, false or otherwise, was occasioned. It may well be that the evidence was sufficient to prove an attempt on the part of the first appellant to occasion a false alarm. Such an attempt would be an offence against s. 16 (g) and s. 54 (6) of the Armed Forces Act. However, the first appellant was not charged with attempt, and our powers on appeal are circumscribed by s. 92 (4) of the Act. That subsection does not enable this court to substitute a conviction for "attempt" unless the attempt has been charged as alternative to the substantive offence, or unless the case falls within s. 56 of the Act. There was no such alternative charge in the instant case, nor does s. 56 apply. For these reasons we consider the convictions of the two appellants on the second charge cannot be allowed to stand.

As regards the first charge, we dismiss the appeal of the first appellant, and direct that a finding of not guilty be recorded in respect of the second appellant. We direct that a finding of not guilty be recorded in respect of both appellants on the second charge.

Since the second appellant has been acquitted on both charges, the sentence of three years' imprisonment imposed on him and dismissal from the Army with disgrace, will cease to have force and effect, having regard to s. 92 (2) of the Armed Forces Act. Under sub-s. (3) of s. 92 of the Act we refer the proceedings in respect of the first appellant, who was sentenced to four

years' imprisonment and dismissal with disgrace, to the Defence Council for such action as it may deem necessary.

R V. Golkaldas Kanji Karia & Another 16 EACA 116.

The appellants were convicted in the High Court of Tanganyika jointly of conspiracy to export diamonds from Tanganyika contrary to section 385 of the Penal Code and section 9(1) of the Diamonds Industry Protection Ordinance and individually of being in possession of diamonds contrary to section 3(1) of the Ordinance. In all, appellant No. 1 was sentenced to eight years' imprisonment with hard labour, and appellant No. 2 ten years' imprisonment with hard labour together with a fine of Shs. 20,000/=.

SIR BARCCAY NIHILL, C.J. - ... It has been contended however that even allowing for this evidence of possession by each appellant in Mwanza the evidence falls far short of supporting a charge against the appellants of conspiracy to export diamonds from Tanganyika. That the essence of conspiracy is the agreement to conspire and that this evidence was not forthcoming. Certainly there was no direct evidence of an agreement but how rarely is conspiracy proved by such evidence. As Mr. Southworth pertinently observed conspirators do not normally meet together and execute a deed setting out the details of their common unlawful purpose. It is a common place to say that an agreement to conspire may be deduced from any acts which raise the presumption of a common plan. As was said by Coleridge, J., to the jury in the case of *R. v. Murphy* (1837) 8 Car. & P. 297 (cited by Harrison on Conspiracy at p. 71):-

"If you find that these two persons procured by their acts the same object, often by the same means, one performing one part of the act and the other another part of the same action as to complete it with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object."

Or the evidence of the de Souza, Prabhudas Shavji and Bhagwanji, taken together and linked with the evidence of Shantilal Raghavji (P.W. 9) about whom the learned Judge observed in his judgment "I can say with absolute confidence that he is a truthful and accurate witness", we

consider that the trial Judge was fully justified in his inference that on 2nd June at Mwanza the two appellants were busy together in pursuance of a plan to export diamonds from Tanganyika with the least possible risk to themselves. Enough has now been said to indicate that in our view there is evidence to sustain the conviction of both appellants on each count and that we are unable to discover that the learned Judge has drawn any improper inference from the evidence which he accepted. There remain, however, one or two matters on which a word must be said.

It has been submitted that because of the joinder of the conspiracy charge with charges of unlawful possession the learned Judge, careful as he may have been, was not able to free his mind from certain statements made by one or other of the appellants which although they may have been evidence against themselves were not evidence against their co-operator. On this point we think it very necessary to say this that from our perusal of the judgment it is evident to us that the learned Judge took great pains to make this separation and we agree with Mr. Southworth that he took a view most favourable to the appellants in holding that the conspiracy was complete when the first appellant crossed the frontier between Tanganyika and Uganda so that he disregarded any statement made in Nairobi which implicated the second appellant. Under section 10 of the Indian Evidence Act an act or declaration of a co-conspirator even after the termination of the conspiracy is a relevant fact for the purpose of showing that such person was a party to it.

The fact therefore that the learned Judge in an abundance of caution followed the more narrow English rule can hardly be used for the purpose of attacking his judgment.

It has also been urged that the learned Judge went seriously wrong in admitting the evidence of pleas taken by Mr. Concell a Resident Magistrate at Nairobi when the first appellant was before him on counts charging him with unlawful importation of diamonds into Kenya and attempting to export diamonds unlawfully from Kenya. On this matter there was some confusion. Mr. Connell who was called for the Crown deposed that he was satisfied that the first appellant understood the charges and that he pleaded guilty to the first count and not guilty to the second count. Nevertheless a little later after his Counsel had seen him the first appellant withdrew his plea of guilty to importing diamonds unlawfully and pleaded guilty only to the attempt to export. In view of the first appellant's defence at his trial in Tanganyika the matter became of

first importance because if he had obtained the diamonds in Uganda or Kenya he would have committed no offence in either of those territories neither could he have been charged successfully with exporting them from Tanganyika. The defence had an explanation of the first appellant's apparent admission that he had imported the diamonds into Kenya which Mr. Morgan who represented the first appellant both at the proceedings before the Nairobi Magistrate and at his trial in Tanganyika wished himself to give in evidence. Unusual as this course would have been the learned Judge was after argument prepared to allow Mr. Morgan to go into the witness box. Mr. Morgan however decided not to take advantage of the Court's indulgence. At the beginning of the hearing of this appeal Mr. Morgan applied to us for leave to produce additional evidence in the form of an affidavit sworn by his junior, Mr. Akram, who appeared with him in the proceedings in Nairobi. We refused this application because the defence had ample notice that Mr. Connell was being called at the trial and could have called Mr. Akram had they so wished or, as it turned out, Mr. Morgan could have given evidence on the point himself. We have however accepted Mr. Morgan's assurance that he advised the first appellant on the instructions he received to plead not guilty to the first count and guilty to the second count, which is what according to Mr. Connell's evidence the first appellant ultimately did. We think the learned trial Judge would have been wiser to have left out of account altogether the first appellant's first answer to the charge of importing diamonds into Kenya seeing that he so soon retracted it. The learned Judge in his judgment has stated that he regards the admission as inconsistent with the appellant's story that he first took possession of the diamonds in Eldoret, which of course it is. If we thought that the learned Judge had placed so much significance on the admission that it might have just turned the scales against the first appellant in his mind the matter would be a serious one but reading the judgment as a whole it is evident that this was not so, for he makes no mention of the point when addressing his mind to the evidence of de Souza and the other Mwanza witnesses whose evidence he accepted.

Complaint has also been made at the failure to call one Harjivan Sunderji who gave evidence before the committing Magistrate and whom the prosecution did not call at the trial. In the lower Court he had deposed to the first appellant's offer to give one of his sons a free lift to Kampala on condition that he looked after somebody's valuables. The suggestion is that he was not called because the Crown feared he would break down in cross-examination. We cannot regard this as a serious point in appeal. No obligation rests upon the prosecution to call every

witness whose name appears on the back of the information although it is the duty of the Crown to see that every such witness attends the trial so that any not called by the prosecution are available to the defence and this was done in this case. We are aware that modern practice in this matter has not always been uniform but the Privy Council in *Adel Muhammed el Dabbah v. Attorney General for Palestine*, 60 TLR 456 approved the old rule referred to in the judgment of Alderson, B., in *R. v. Woodhead* (1847) 2 C. & K. 520 that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment:-

"You ought therefore to have them in Court, but they are to be called by the party who wants their evidence."

The Judicial Committee however went on to enunciate a proviso to this rule that it is within the discretion of counsel for the prosecution, if they find no sufficient reason to the contrary to tender such witnesses for cross-examination by the defence, a practice which we believe was until fairly recent times commonly followed in East Africa. The Privy Council decision in the Palestine case can be taken as authority for the view that this is a matter in the discretion of the prosecution and not one that can be claimed by the defence as one of right. Mr. Morgan cited to us the case of *R. v. Harris* (1927) 2 LRKB 587 in which Hewart, C.J., made an interlocutory remark to the effect that "in criminal cases the prosecution is bound to call all the material witnesses before the Court even though they give inconsistent accounts, in order that the whole of the facts may be before the jury". Their Lordships of the Privy Council in the case cited *supra* however observed that in their view Lord Hewart could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are.

To sum up we are unable to find any material on which we could hold that the learned trial Judge went wrong either on fact or law so as to make it incumbent on this Court to disturb his finding. It follows that the appellants' appeals against their conviction must be dismissed.

The appellants also appeal against their sentences on the grounds that they are harsh and excessive and this aspect of the appeals has given us much anxious concern. The sentences imposed are very heavy; indeed in the case of the second appellant, who has no previous

criminal record of any kind, the learned Judge has imposed the maximum term of imprisonment he could impose on either count. In a judgment given very recently by this Court in another appeal against a conviction of the unlawful possession of diamonds in Tanganyika a substantial reduction was made to a sentence of six years' imprisonment (*R. v. Hopley*, Criminal Appeal No. 229 of 1948) but for reasons which are not available to the appellants in this case. This is not a trap case and there was no employment of an agent *provocateur*. It is evident that the learned trial Judge addressed his mind most carefully to the question of sentence and took into account all that was said both in mitigation and for the prosecution. He was fully justified, from the number and value of the diamonds involved, in drawing the inference that the second appellant was the leader in the conspiracy and that he must have been buying diamonds on a very large scale. Mr. Southworth in supporting the sentence has emphasized the importance of the diamonds industry to the economy of the territory and to the demoralization caused to the Africans by the presence of receivers who are prepared to buy from them stones which they have unlawfully obtained. We are well aware of all these factors as well as the reasons why the legislature has deemed it right to give judges the power to impose very heavy penalties for breaches of the Diamond Industry Protection Ordinance. Nevertheless we are not altogether assured that there is not some danger of a sense of proportion being lost by those responsible for the just administration of the law in such cases as this when faced by clamant demands for condign punishment. Maximum sentences, especially when they are so severe as they are in the Diamond Industry Protection Ordinance, are not usually applied to a first offence, although in a particular case we grant that there may be circumstances which justify a Judge departing from normal practice. As has been said before by this Court we are reluctant to interfere with the discretion of a trial Judge on the matter of sentence and would never do so solely on the ground that had we been the Judge in first instance our sentence might have been a little less or a little more. Nevertheless we conceive it our duty to intervene when, as in the present case, we feel, after a review of all the circumstances, that the sentences imposed are in fact excessive.

The second appellant has been fined Sh. 20,000/= as well as receiving imprisonment for ten years. We are not very certain that in the circumstances of this case the learned Judge was justified in imposing a heavy financial penalty as well as a long term of imprisonment. The diamonds have been forfeited to the Crown and no profit can have been made by the second appellant from his unlawful transactions. He is a man in late middle age and it is obvious that

his business activities in Tanganyika must have been ruined with scant prospect of rehabilitation. The fine, if recoverable, will impose hardship not on the second appellant but on his innocent dependants. We have decided therefore to reduce his sentence on the third count to one of eight years' imprisonment with hard labour and to quash the sentence of fine in addition. This sentence will run concurrently with the sentence of two years' imprisonment imposed on the first count.

In the case of the first appellant the learned Judge has found that he was acting only as the agent of the second appellant. In his case we reduce his sentence on the second count to one of six years' imprisonment with hard labour to run concurrently with the sentence of two years' imprisonment imposed on the first count.

The appeals against convictions are dismissed.

Stanely Musinga & Four Others V. R 18 EACA 211.

The first three appellants were convicted of possessing minerals, to wit, 2,237 lb. of wolfram contrary to section 70 (1) of the Mining Ordinance of Uganda. The fourth appellant was convicted of possessing 3 lb. of wolfram. The fifth appellant was convicted of possessing 4 lb. of wolfram. The second, third and fourth appellants were convicted of conspiring to effect an unlawful purpose, to wit, to possess and sell the same 2,237 lb. of wolfram contrary to section 375 (6) of the Uganda Penal Code.

On the count of conspiracy it was contended that ie. charge alleging a conspiracy to effect two or more unlawful objects is bad for duplicity, and further that the conviction was bad because the prosecution failed to prove both objects specified in the particulars.

JUDGEMENT., - ... It remains for us to deal with the appeals of the second, third and fourth appellants against their convictions for conspiracy. The grounds of these appeals are that the charge is bad in law and that it was unsupported by any or any sufficient evidence. The appellants were charged that they conspired together to effect an unlawful purpose, to wit, to possess and sell 2,237 lb. of wolfram otherwise than as permitted by the provisions of section

70 (1) of the Mining Ordinance, 1949, and were convicted of the offence as charged.

The second ground of appeal, namely, the insufficiency of the evidence, was only seriously argued by Mr. Wilkinson on behalf of the fourth appellant. In his case it was proved that he showed the 3 lb. sample of the wolfram to Mr. Bjordal saying that it was a sample of about 2,500 lb. which he had been asked by some person to sell to clear a debt owing to him (the fourth appellant) and others: that he took part in a discussion between Bjordal, the third appellant and others over the purchase of the wolfram and accompanied Bjordal and the third appellant to first appellant's house, where Bjordal took samples from the two sacks opened by third appellant. Mr. Wilkinson has contended that there is here no evidence that this appellant was a party to the conspiracy but merely evidence that he was assisting other persons in their attempt to sell. The inference to be drawn from these proved and admitted facts is however primarily a matter for the Court of trial and it is impossible for us, sitting as an Appellate Court, to say that the learned Magistrate was not

ustified in holding the appellant guilty of conspiracy on this evidence. We agree with the opinion expressed by the Court of first appeal that there was very clear evidence that all these three appellants were acting in concert in an attempt to dispose of the wolfram in exhibit E.

On the first ground, it was contended that a charge alleging a conspiracy to effect two or more unlawful objects is bad for duplicity. No authority was cited for this proposition nor do we think that any authority could be found. We were referred to cases where two or more conspiracies had been laid in one count, or where different accused persons, having been charged jointly with taking part in one conspiracy, were found guilty of two or more different conspiracies. Those cases are not in point here, and we see no reason in law why, if the conspirators have in mind the commission of more than one unlawful act to give effect to the conspiracy, these acts should not all be set out in the particulars of the charge. A conspiracy to kidnap a person and sell him into slavery is one conspiracy: it would, we consider, be wrong in such a case to lay two charges of conspiracy and it might well be impossible to bring home the charge to all the conspirators without proving both purposes and it is only proper to give them notice of these purposes.

It is, however, further contended that the conviction on this count was bad because the

prosecution failed to prove both objects specified in the particulars. This argument is unded upon the judgment of the Judges of the High Court who held that it was not proved that the three appellants, before the wolfram came into the hands of the second appellant, put their heads together and agreed to obtain possession of the wolfram and then sell it. With great respect, we should not have been disposed to interfere with the finding of the trial Magistrate on this point. The unlawful possession of the wolfram was a continuing offence and an essential factor in the agreement. A person who joins a conspiracy is responsible in law for all the acts of his fellow-conspirators done in furtherance of the conspiracy, whether done before, during or after his participation. In our view, therefore, the continuing unlawful possession of the wolfram, even if it originated with the second appellant, attached itself in law to the other conspirators.

But, further, we agree with the opinion of the Court of first appeal that even though the Crown failed to prove one of the heads of the agreement, this was not fatal to the conviction, the Crown having proved an agreement to do an unlawful act, namely, to sell the wolfram contrary to the provisions of section 70, which was clearly specified in the charge. We can see nothing wrong in the conclusion of the learned Judges of the High Court that even if the Crown alleged that the conspiracy had a wider scope than they were able to prove, they did prove an illegal conspiracy and proved that it was a conspiracy to commit one of the offences specified in the charge.

Counsel for the appellants have referred us to expressions of opinion by this Court and by Courts in England deprecating the joinder of a charge of conspiracy with charges of specific offences based on the same evidence. It is admitted that there is no illegality in such a joinder, but we agree that it ought not to be done in cases where it is likely to prejudice the conduct of the defence. No objection was raised to the joinder of this charge at the trial and we do not think that it was improper in the circumstances of this case. Indeed, it would seem to have been the only course open to the Crown to bring home the guilt of some of the persons concerned in this series of illegal transactions.

In the result therefore the appeal of the fifth appellant is allowed and the appeals of the other four appellants are dismissed.

SECTION VI

GENERAL DEFENCES

General defences refer to incidents in which the accused accepts to have committed the actus reus of a particular offence but he is asserting the existence of an excuse for doing what would otherwise be a crime. There are a number of defences known in criminal law but only a few will be surveyed here.

1. Insanity

The defence of insanity is based on the promise that there is absence of mens rea because of insanity. Section 13 of the penal code provides for absolute non-responsibility if it is reasonably proved that at the time the accused committed the act or omission in question he is incapable of understanding what he was doing or of knowing that he ought not to do the act or make the omission.

R V. Daniel M'naghten (1843) 10 C & F 200.

The accused had been charged for the murder of one, Edward Drummond, secretary to the Prime Minister by smooting him in the back, as he was walking up Whitewell on 20th January 1843. The accused pleaded not guilty. After evidence had been given of the shooting of Mr. Edward and of his death in consequence thereof, witnesses were called on the part of the accused, to prove that, at the time of committing the act, he was ot in a sound state of mind. Some of the medical witnesses who gave evidence had previously examined the accused; others had never seen him until he appeared in court and they formed their opinions on hearing evidence given by other witnesses. The accused was acquitted on the ground of insanity. The verdict was made the subject of debate in the House of Londs. In consequence debates took place in the House of Londs and it was decided to take the opinion of the judges as to the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort.

TINDAL CJ. The first question proposed by your Lordships is this: `What is the law

respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?'

In answer to which question, assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land.

Your Lordships are pleased to inquire of us, secondly, 'What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?' And, thirdly, 'In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?' And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely of ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with

which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your Lordships have proposed to us is this: 'If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?' To which question the answer must of course depend on the nature of the delusion: but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The question lastly proposed by your Lordships is: 'Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?' In answer thereto, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury

to decide, and the questions are not mere questions upon a matter of science, in which such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

NOTE: The effect of insanity on understanding must be high - see section 13 of the Penal Code of Tanzania. In the case of **R V. Tomson s/o Msumali 1969 HCD n. 26** the accused, who was subject to epileptic fits slept in the same house as his father so that he could be taken care of if a fit come on. On the night in question he was found by his mother and others outside the house, standing by the dead body of his father with a heavy stick alongside. He told his mother that he had killed a thief. While under observation in hospital after the killing he suffered three epileptic fits, remaining in a confused state for about two hours after each one. Medical evidence was given that the accused could not at the time of the killing have been able to appreciate the nature of his act. After examining the evidence and the circumstances of the killing the court stated that the accused, by reason of the disease affecting his mind, was unable to understand what he was doing and that he ought not to have done the act.

From the foregoing it is evident that the term "insane" has a particular legal meaning and it must not be thought that the word is used in the medical sense. The purpose of classifying an accused as "insane" in the legal sense is two fold: (i) if the person has no mens rea because he is suffering from a disease of the mind, it is right that he should be treated differently from an ordinary criminal; (ii) a person may have mens rea and yet, due to disease of the mind, be utterly unaware that what he is doing is wrong in the legal sense.

R V. Windle [1952] 2 All E.R. 1

LORD GODDARD C.J. - The appellant was convicted before Devlin J at Birmingham Assizes of the murder of his wife. He is a man of little resolution and weak character who was married to a woman 18 years older than himself. His married life was very unhappy. His wife, in the opinion of the doctors, though they never saw her, must have been certifiable, and was always talking about committing suicide. The appellant became obsessed with this and discussed it with his workmates until they were tired of hearing him, and on one occasion, just

before this crime was committed, one of them said 'Give her a dozen aspirins'. On the day of the crime the appellant seems to have given the woman 100 aspirin tablets, which was a fatal dose. Later, he told the police that he supposed he would be hanged for it.

The defence at the trial was that he was insane and that the jury should return a special verdict to that effect, but Devlin J ruled that there was no issue of insanity to be left to the jury. There was some evidence that the prisoner suffered from some defect of reason or disease of the mind. The doctor called for the defence said it was a form of communicated insanity known as *folie a deux* which arises when a person is in constant attendance on a person of unsound mind. [His lordship quoted the M'Naghten rules].

The argument in this appeal really has been concerned with what is meant by the word 'wrong'. The evidence that was given on the issue of insanity was that of the doctor called by the appellant and that of the prison doctor who was called by the prosecution. Both doctors expressed without hesitation the view that when the appellant was administering this poison to his wife he knew he was doing an act which the law forbade. I need not put it higher than that. It may well be that in the misery in which he had been living with this nagging and tiresome wife who constantly expressed the desire to commit suicide, he thought she was better out of the world than in it. He may have thought it was a kindly act to put her out of her sufferings or imagined sufferings, but the law does not permit such an act as that. There was some exceedingly vague evidence that the appellant was suffering from a defect of his reason owing to his communicated insanity, and, if the only question in the case had been whether the appellant was suffering from a disease of the mind, that question must have been left to the jury because there was some evidence of it, but that was not the question. The question, as I endeavoured to point out in giving judgment in *Rivett* [(1950) 34 Cr App Rep 87], in all these cases is one of responsibility. A man may be suffering from a defect of reason, but, if he knows that what he is doing is wrong - and by 'wrong' is meant contrary to law - he is responsible. Counsel for the appellant suggested that the word 'wrong' as it is used in the M'Naghten rules did not mean contrary to law, but had some qualified meaning - morally wrong - and that, if a person was in a state of mind through a defect of reason that he thought that what he was doing, although he knew it was wrong in law, was really beneficial, or kind, or praiseworthy, that would excuse him.

Courts of law, however, can only distinguish between that which is in accordance with the law and that which is contrary to law. There are many acts which, we all know, to use an expression to be found in some of the old cases, are contrary to the law of God and man. In the Decalogue are the commandments: 'Thou shall not kill' and 'Thou shall not steal'. Such acts are contrary to the law of man and they are contrary to the law of God. In regard to the Seventh Commandment: 'Thou shall not commit adultery', it will be found that, so far as the criminal law is concerned, though that act is contrary to the law of God, it is not contrary to the law of man.

The test must be whether an act is contrary to law. In *Rivett* I referred to the Trial of Lunatics Act 1883, s 2 (1) of which provides:

'Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict ...'

I emphasise again that the test is responsibility 'according to law' Devlin J was right to withdraw the case from jury. This appeal fails.

Appeal dismissed.

2.Intoxication

Intoxication is, generally, not a defence in criminal cases except as provided in section 14 of the Penal Code. Ordinarily alcohol impairs a person's perceptions and judgement. That is the reason why the accused is said to lack mens rea of the crime charged. In **Attorney General for Northern Ireland V. Gallagher [1961] AC 349**. Lord Denning stated three important things:

(i) that drink may impair a man's power of perception so that he may not be able to foresee or measure the consequences of his actions as he would if he were sober. (ii) that drink may impair a man's power to judge between right and wrong so that he may do a thing when drunk which he would not dream of doing while sober; (iii) that drink may impair a man's power of self-control so that he may more readily give way to provocation than if he were sober.

Kahekeya Buzoya & Anor V. Republic (1976) LRT n. 16

LAW AG. P., MUSTAFA & MUSOKE J.J.A. - The two appellants, Kahekeya Buzoya and Kashana Buzoya, are brothers. They were charged in the High Court of Tanzania at Bukoba with the murder of a man referred to in the indictment as Bubagila, but named in the course of the evidence as Robagila or Rubalila or Rubagira. In the hope of avoiding further confusion, we shall refer to him in this judgment as "the deceased". The appellants were convicted by the learned trial judge (Katiti Ag. J.) of murder as charged and sentenced to death. They now appeal to this court from those convictions.

The facts of the case are far from clear, but so far as they can be ascertained appear to be as follows. On 6th July, 1973, the appellants took their millet crop to the market and sold it. They spent part of the proceeds on pombe. They left the market in the company of Protazi (PW. 1) and had more to drink at Protazi's house. When Protazi's pombe was finished, the appellants and other guests left. Protazi saw the appellants leave, and escorted his other guests in the same direction. While Protazi was so engaged, the appellants surreptitiously returned to his house. At the house were the deceased, a man of about 60, asleep on a mat. The deceased was Protazi's elder brother. Also present were Protazi's wife Martha, and his mother Ntimawose, who must be a very old woman. According to Martha, she went to the cowshed where the second appellant Kashana emoraced her and attempted to assault her sexually. He pushed her to the ground and tried to remove her clothes. She shouted for help. At this stage the first appellant Kahekeya arrived with a heavy coffee pounding stick belonging to Protazi and struck Martha on the head with it. She became unconscious, but before losing her senses she saw the old deceased man come in answer to her cries and she saw Kahekeya hit him on the head with the pounding stick. While all this was going on, Protazi who was not far off, heard the noise coming from his house and hurried back. Also attracted to the scene by the noise was one

Midande, a neighbour. Protazi and Midande found the deceased lying dead in the middle of the cowshed, and his wife and mother also lying in the cowshed suffering from injuries and bleeding. Protazi went off to report, and according to Midande both appellants, who had been shouting and behaving like wild men, went off to their home nearby, changed their clothes and then returned to Protazi's house where they spent the night sleeping next to the dead body. Next morning both were arrested, and both were found to have been injured. No witness could account for those injuries. A post-mortem examination revealed that the deceased had died from 3 head injuries, indicating heavy blows, with associated fractured skull and brain damage.

At the trial both appellants made unsworn statements to the same effect. They described how they had drunk heavily at the market, and later at Protazi's house; under the influence of all this drink they fell asleep outside Protazi's house, and woke up because there was a lot of noise and because they were being beaten. To us they repeated much the same story; they claim to have no recollection of events at Protazi's house. This borne out to some extent by Midande, who described the appellants as being drunk, "staggering like really drunk people." After a careful direction by the learned judge on the fact and the law, the first assessor advised that the first appellant Kahekeya was guilty of murder, but that the second appellant, who had not struck any blows, was not guilty. In effect, this assessor did not think that the appellants shared any common intention. The second assessor advised that the appellants were drunk. He advised convicting the first appellant of manslaughter, which indicates that he was not satisfied that the first appellant could have formed the specific intention to kill or do grievous bodily harm. He also advised that the second appellant should be acquitted.

The learned judge, in a long and carefully-reasoned judgment, convicted both appellants of murder. He found that when they came back to Protazi's house, it was after forming a common intention to prosecute an unlawful purpose - presumably rape, although he does not say so in terms - and "that they must have intended the consequences arising therefrom", so that each was liable for the acts of the other in the prosecution of the unlawful purpose. The learned judge rightly appreciated that the substantial defence in the case of both accused was intoxication and he correctly directed himself that the burden was on the prosecution to show that the appellants had the capacity to form the necessary intent, a burden which never shifts. He found that the prosecution had discharged that burden. If he is right in this, then his judgment cannot be

impugned.

The law on the subject of intoxication in murder cases is in our view correctly stated in **Malungu s/o Kieti v. R.** (1959) EA 797. The burden of proving that an accused person is capable of forming the intent necessary to constitute the offence of murder always remains on the prosecution. It is not discharged, if the probability emerges from the evidence that the accused was incapable of forming that intent. No onus of proving this lies on the defence. With these principles in mind, we have with great respect to the learned judge come to a different view from his on this difficult question of intoxication and capacity to form a specific intention.

We are influenced by a number of considerations. The appellants have consistently maintained that they were so drunk as to have no recollection of events at Protazi's house. If this may be true, they are unlikely to have had the capacity to form a specific intention, let alone a common intention. That it may be true is supported by several pieces of evidence. Firstly there is Midandi's evidence as to their extreme state of intoxication. Then there is the fact that, after the fatal assault, instead of fleeing from the scene of the crime, they remained there raising the alarm. Thirdly, they stayed all night by the body of the deceased, which in our experience is never done by persons who are aware of their guilt. All these matters, in our view, point to extreme mental confusion due to intoxication, and are inconsistent with the appellants having had the capacity to form the specific intention of causing death or grievous bodily harm, and **a fortiori** of forming a common intention to prosecute an unlawful purpose. We do not think that, on the evidence, the reasonable possibility that the second appellant independently formed the intention indecently to assault, or to rape, Martha can be excluded, and that when she resisted and shouted, the first appellant, independently of any common and pre-concerted intention, picked up the pounding stick and indiscriminately, in his drunken state, laid about him and struck all and sundry. In the result, we agree with the opinion of the second assessor. We allow the appeals of both appellants, quash the convictions of murder and set aside the sentences of death passed on them. In the case of the first appellant Kahekeya, who struck the fatal blows, we substitute a conviction for manslaughter, contrary to section 195 of the Penal Code, and impose a sentence of 6 years imprisonment. His appeal succeeds to this extent. The appeal of the second appellant Kashana succeeds entirely, and we order that he be released from custody unless otherwise lawfully detained.

NOTE: Although the law in Tanzania distinguishes between voluntary and involuntary intoxication yet a view has been expressed in the courts of Britain (**R V. Lipman (1970) QB 152**) that for the purpose of criminal liability there is no reason to distinguish between the effects of voluntary and involuntary intoxication. The case of **R V. Stanislaus (1969) HCD n. 32** shows that the courts of Tanzania hold the same view. In this case the accused and the deceased had gone for a drinking spree at the house of one, Mshamba. Sometimes later the deceased left the place. The accused after some minutes followed her (deceased). When he came up to her he had his hands folded across his chest but then, all of a sudden he drew a knife and stabbed her. She died later of stab wounds. The court found that the accused was intoxicated and was found guilty of a lesser offence of manslaughter.

DPP V Majewski [1976] 2 All ER 142 (HL).

The appellant was convicted on three counts of assault occasioning actual bodily harm and on three counts of assault on a police constable in the execution of his duty. It was undisputed that the offences were committed in the Bull public house in Basildon and during a fierce struggle Majewski shouted at the police: 'You pigs, I'll kill you all, you pigs, you bastards! He had consumed large quantities of drugs and alcohol shortly before the offences. He was a drug addict, and admitted that he had previously 'gone paranoid' but said that this was the first time he had 'completely blanked out'. He claimed not to have known what he was doing. The medical evidence suggested that such a state, called 'pathological intoxication', was possible but unlikely: it was quite possible for an intoxicated person to know what he was doing at the time and to suffer an 'amnesic patch' later. Judge Petre directed the jury to 'ignore the subject of drink and drugs as being in any way a defence' to assaults. He appealed to the House of Lords. It was dismissed.

LORD ELWYN-JONES LC ... If a man consciously and deliberately takes alcohol and drugs not on medical prescription, but in order to escape from reality, to go 'on a trip', to become hallucinated, whatever the description may be, and thereby disables himself from taking the care he might otherwise take and as a result by his subsequent actions causes injury to another - does our criminal law enable him to say that because he did not know what he was doing he lacked

both intention and recklessness and accordingly is entitled to an acquittal?

Originally the common law would not and did not recognise self-induced intoxication as an excuse. Lawton L.J [(1975) 3 All ER 296 at 305,306/] spoke of the 'merciful relaxation' to that rule which was introduced by the judges during the 19th century, and he added:

'Although there was much reforming zeal and activity in the 19th century Parliament never once considered whether self-induced intoxication should be a defence generally to a criminal charge. It would have been a strange result if the merciful relaxation of a strict rule of law had ended, without any Parliamentary intervention, by whittling it away to such an extent that the more drunk a man became, provided he stopped short of making himself insane, the better chance he had of an acquittal ... The common law rule still applied but there were exceptions to it which Lord Birkenhead LC [*Director of Public Prosecutions v Beard*] tried to define by reference to specific intent.'

There are, however, decisions of eminent judges in a number of Commonwealth cases in Australia and New Zealand (but generally not in Canada nor in the United States), as well as impressive academic comment in this country, to which we have been referred, supporting the view that it is illogical and inconsistent with legal principle to treat a person who of his own choice and volition has taken drugs and drink, even though he thereby creates a state in which he is not conscious of what he is doing, any differently from a person suffering from the various medical conditions like epilepsy or diabetic coma and who is regarded by the law as free from fault. However, our courts have for a very long time regarded in quite another light the state of self-induced intoxication. The authority which for the last half century has been relied on in this context has been the speech of Lord Birkenhead LC in *Director of Public Prosecutions v Beard* [[1920] AC at 494, [1920] All ER Rep at 25]:

'Under the law of England as it prevailed until early in the nineteenth century voluntary drunkenness was never an excuse for criminal misconduct; and indeed the classic authorities broadly assert that voluntary drunkenness must be considered rather an aggravation than a defence. This view was in terms based upon the

principle that a man who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man.'

Lord Birkenhead LC made an historical survey of the way the common law from the 16th century on dealt with the effect of self-induced intoxication on criminal responsibility. This indicates how, from 1819 on, the judges began to mitigate the severity of the attitude of the common law in such cases as murder and serious violent crime when the penalties of death or transportation applied or where there was likely to be sympathy for the accused, as in attempted suicide. Lord Birkenhead LC

[[1920] AC at 499, 500, [1920] All ER Rep at 27, 28] concluded that (except in cases where insanity was pleaded) the decisions he cited:

'establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved.... In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm... he cannot be convicted of murder. But nevertheless unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter: per Stephen J in *Doherty's* case [(1887) 16 Cox CC 306 at 307]. [He concluded the passage:] the law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter.'

From this it seemed clear - and this is the interpretation which the judges have placed on the decision during the ensuing half-century - that it is only in the limited class of cases requiring proof of specific intent that drunkenness can exculpate. Otherwise in no case can it exempt

completely from criminal liability....

[His Lordship discussed *A-G for Northern Ireland v Gallagher* (p. 142, below) and *Bratty v A-G for Northern Ireland* (p. 12, above)].

The seal of approval is clearly set on the passage of the *Beard* decision. In no case has the general principle of English law as described by Lord Denning in *Gallagher's* case and exposed again in *Bratty's* case [[1963] AC 386, [1961] 3 All ER 523] been overruled in this House and the question now to be determined is whether it should be.

I do not for my part regard that general principle as either unethical or contrary to the principles of natural justice. If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases: see *Venna* [[1975] 3 All ER 788 at 793] per James LJ. The drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim. Together they add up to criminal recklessness. On this I adopt the conclusion of *Stroud* [[1920] 36 LQR at 273] that:

'It would be contrary to all principle and authority to suppose that drunkenness (and what is true of drunkenness is equally true of intoxication by drugs) can be a defence for crime in general on the ground that "a person cannot be convicted of a crime unless the mens was rea". By allowing himself to get drunk and thereby putting himself in such a condition as to be no longer amenable to the law's commands, a man shows such regardlessness as amounts to mens rea for the purpose of all ordinary crimes.'

This approach is in line with the American Model Code [section 2.08(2)]:

'When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.'

Acceptance generally of intoxication as a defence (as distinct from the exceptional cases where some additional mental element above that of ordinary mens rea has to be proved) would in my view undermine the criminal law and I do not think that it is enough to say, as did counsel for the appellant, that we can rely on the good sense of the jury or of magistrates to ensure that the guilty are convicted. It may well be that Parliament will at some future time consider, as I think it should, the recommendation in the Butler Committee Report on Mentally Abnormal Offenders [(1975) Cmnd 6244] that a new offence of 'dangerous intoxication' should be created. But in the meantime it would be irresponsible to abandon the common law rule, as 'mercifully relaxed', which the courts have followed for a century and a half ...

The final question that arises is whether s. 8 of the Criminal Justice Act 1967 has had the result of abrogating or qualifying the common law rule. That section emanated from the consideration the Law Commission gave to the decision of the House in *Director of Public Prosecutions v Smith* [[1961] AC 290, [1960] 3 All ER 161]. Its purpose and effect was to alter the law of evidence about the presumption of intention to produce the reasonable and probable consequences of one's acts. It was not intended to change the common law rule. In referring to 'all the evidence' it meant all the *relevant* evidence. But if there is a substantive rule of law that in crimes of basic intent, the factor of intoxication is irrelevant (and such I hold to be the substantive law), evidence with regard to it is quite irrelevant. Section 8 does not abrogate the substantive rule and it cannot properly be said that the continued application of that rule contravenes the section. For these reasons, my conclusion is that the certified question should be answered Yes, that there was no misdirection in this case and that the appeal should be dismissed.

My noble and learned friends and I think it may be helpful if we give the following indication of the general lines on which in our view the jury should be directed as to the effect on the criminal responsibility of the accused of drink or drugs or both, whenever death or physical injury to another person results from something done by the accused for which there is no legal

justification and the offence with which the accused is charged is manslaughter or assault at common law or the statutory offence of unlawful wounding under s. 20, or of assault occasioning actual bodily harm under s. 47 of the Offences against the Person Act 1861.

In the case of these offences it is no excuse in law that, because of drink or drugs which the accused himself had taken knowingly and willingly, he had deprived himself of the ability to exercise self-control, to realise the possible consequences of what he was doing or even to be conscious that he was doing it. As in the instant case, the jury may be properly instructed that they 'can ignore the subject of drink or drugs as being in any way a defence to' charges of this character.

R V. Retief (1941) 8 EACA 71

SIR NORMAN WHITLEY C.J. - The otherwise very careful summing up to the jury by the learned trial judge contained a grave misdirection and, since it clearly goes to the root of the case, Mr. Archer for the appellant has contended with great force that it is impossible to allow the conviction for murder to stand. ...

The third [defence] was that the appellant, whilst not being so drunk as to be insane at the time, was yet too intoxicated as to be incapable of forming the intent necessary to be established in order to constitute malice aforethought so as to make his offence murder. It was on this point that the jury were not properly directed. The learned judge read the following passage from Archbold:

'Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime charged must be taken into consideration with the other facts proved in order to determine whether or not he had such intent. But evidence of drunkenness falling short of this, and merely establishing that the mind of the accused was affected by drink, so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.'

He also read section 14(4) of the Penal Code¹ which in effect codifies the English law as stated above. There the matter was left. ...

In the present case the jury were not told what the intention was in the absence of which the appellant would not be guilty of the offence charged nor what their finding should be if they decided that such intention had not been proved. Neither the passage from Archbold nor section 14(4) indicate that if a person by reason of intoxication is incapable of forming the intent necessary to constitute the offence of murder the verdict should be one of manslaughter and nowhere in the summing up were they given that essential direction. At the close the jury were told that three alternatives were open to them as follows:

'If you find that this man in drink got into a violent passion and stabbed this unfortunate Indian, then there is only one verdict and that is guilty of murder.
If you find evidence to support plea of insanity then you can bring in a verdict of guilty but insane, but as I say, the burden of proving insanity is on the defence.
If you find he was given grave and sudden provocation and while labouring under that grave and sudden provocation he stabbed one of his assailants, then he would be guilty of manslaughter'.

As regards the first we consider the direction misleading in that it fails to state that if they found him incapable through intoxication of forming an intent to kill or cause grievous bodily harm their verdict should be manslaughter and indeed rather suggests that in the opinion of the judge, the jury had no option but to return a verdict of murder if they found that the act was committed whilst the appellant was inflamed by drink. ...

That being so, we as an appellate court are placed in the difficult position of deciding what the jury would have found if they had been properly directed on this point. It is well established that where misdirection as to the law is established by the appellant, as it has been here, the conviction must be quashed unless the prosecution can show that on a right direction the jury

¹.Identical with Penal Code, Tanganyika, s. 14(4), *supra* p. 404.

would or must inevitably have come to the same conclusion.

Mr. Spurling for the Crown whilst unable to dispute the gravity of the misdirection has argued that the jury must have come to the same conclusion and after a careful consideration of the law and the evidence we feel no doubt that he is right. It would of course have been the duty of the jury to base their finding reasonably on the proved facts. The uncontradicted evidence of the prosecution witnesses established the following. The appellant having tried to break into Mrs. Fernandes' room chased her downstairs into the billiard saloon brandishing a knife and shouting 'I will kill her.' He had before going upstairs had some conversation with the deceased Indian at the billiard table. One Indian took Mrs. Fernandes to a place of safety and the appellant then caught hold of two Indians who broke away from him before he stabbed the deceased who was standing by the billiard table. The wound entered the chest and was 3.5 inches deep penetrating the heart. He then picked up a quarrel with an Indian working outside a garage abusing him for not fighting for his country. The Indian abused him in return and appellant then threatened him with a knife until Colonel Martin intervened. Colonel Martin admonished him and told him to put the knife in its sheath which he did. The Colonel found him quite amenable but very shortly afterwards found the quarrel had been resumed. The Indian had now armed himself with a piece of iron and appellant was dodging for an opening with his naked knife. He said he had again been insulted by the Indian and was not going to stand it. The Indian was slightly wounded in the arm. The Colonel took the knife from the appellant without resistance and says that he appeared to understand what was said to him and gave sensible answers. The Colonel kept the knife and saw blood on it right up to the hilt. When the appellant got back to camp he told his comrades that an Indian had invited him to a house; that on coming down he had to defend himself against Indians in a very threatening attitude; that he had stabbed one of them to the heart and that on his way back another Indian had hit him with a knobkerry and that he had stabbed that Indian in the arm and that a Colonel had taken his knife away. The Crown contention is that in the face of that mass of uncontradicted evidence it would be impossible for a jury to find that the appellant, however drunk he may have been, was incapable of forming an intent to cause death or grievous harm. All that the defence can rely upon to suggest the contrary is the evidence that the appellant is very easily influenced by drink and that he appears to have been very drunk at the time; and his own statement that the last thing he remembers is having a double whisky at the Carlton Bar and that he knows nothing of the stabbing and the

events leading up to and following it.

Upon consideration of the English case law upon which our section 14 is based we are satisfied that the jury in this case, if they had been rightly directed on that law, must on the facts before them have rejected the defence of incapacity to form the necessary intent and must have returned the verdict which they have done namely murder. The authorities are exhaustively reviewed by Lord Birkenhead in his judgment in the House of Lords in the case of *R. v. Beard*, 14 Cr. App. R. 184. On the particular question of applying this defence to a case of stabbing he quotes, without dissenting from it, the direction of Baron Alderson in *R. v. Meakins*, 7 C. & P. 297 that 'if a man use a stick you would not infer a malicious intent so strongly against him if drunk when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, would produce grievous bodily harm, drunkenness can have no effect in the consideration of the malicious intent of the party', and observed that the learned Baron's view was that drunkenness might affect the jury's view of the intent, but that the use of a deadly weapon in that case showed the malicious intent so clearly that the drunkenness of the accused could not alter it. From Lord Birkenhead's judgment and the cases referred to therein it would seem that the classes of cases in which it might properly be held that drunkenness had produced an incapacity to form the intent required would be such as (1) cases of killing by the intemperate use of a stick, as envisaged by Baron Alderson in the *Meakins'* case, under such circumstances as to reduce the offence to manslaughter (2) similar cases where the charge is wounding with intent to cause grievous bodily harm and (3) cases in which the drunkenness might take away from the act all criminal intent as on a charge of breaking into a store with intent to steal where the evidence might show that the prisoner blundered into the store by a drunken mistake and under such circumstances as to indicate inability to form any definite purpose and especially to form the purpose of committing larceny. If so he should be acquitted; but if on the other hand, although under the influence of liquor, he was not so intoxicated as to be unable to form such purpose and knew what he was about, his partial intoxication would not so excuse him. (See *Russell on Crime*, 9th ed., Vo. 1, p. 40). We are aware that courts have experienced difficulty in applying section 14 so that it may be useful if we state what, on our reading of *Beard's* case, which is codified in the section, is the proper direction on law to be given to a jury or assessors in a case such as the present one where drunkenness is put forward as a defence. Leaving aside any question of self

defence or provocation which must of course be dealt with separately if raised, they should be told

(1) That as a general proposition drunkenness is no excuse for crime.

(2) That insanity whether produced by drunkenness or otherwise is a defence to the crime charged. The law takes no note of the cause of insanity and, if actual insanity in fact supervenes as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. It is immaterial whether the insanity so induced was permanent or temporary and if a man's intoxication were such as to induce insanity so that he did not know the nature of his act or that his act was wrongful, his act would be excusable on the ground of insanity and the verdict should be as laid down in section 159 of the Criminal Procedure Code 'guilty of the act charged but insane when he did the act.' ...

(3) That if insanity is not established killing by a drunken man is either murder or mansalughter.

(4) That in order to make such killing murder the prosecution must establish an intent to cause death or grievous harm. If on the evidence and all the circumstances such intent is proved the offence is murder. If it be found that by reason of intoxication the accused was incapable of forming such intent the offence is mansalughter. The nature of the weapon used may, as we have indicated above, be a circumstances proper to be taken into account when considering this difficult question of capacity to form the intent to cause death or grievous bodily harm without which the offence would not be a murder.

The jury's strong recommendation to mercy is of course a matter for the consideration of His Excellency the Governor. The appeal is dismissed. ..."

R. V. Stanislaus Saroni Maresi (1969) HCD n. 32.

Platt, J.

The accused was charged with murder. He was alleged to have murdered Atifa, wife of

Abdulla, by stabbing her a number of times. The deceased, accompanied by her friends, had visited the house of Mshamba where there was a pombe party. While they were drinking pombe outside the house the accused also visited Mshamba. He appears to have been in a strange mood in that according to these women he simply drank some pombe, looked around and left. Shortly afterwards the women left the party. It was still light as they walked home. On the way, the accused was seen approaching. At this stage the deceased was about 12 paces away in front of the others approaching a crossroad. She was about to take the path leading to her house when the accused came up to her with his hands folded across his chest, hidden by his clothing, when all of a sudden he drew a knife and stabbed her. The deceased fell down and the other women raised the alarm and ran away to get help. When the alarm had been raised, Mustafa, the deceased's son, went to the scene and met the accused who was then in his Shamba. When the accused saw him he said that he had killed Mustafa's mother and he would kill Mustafa too. A quarrel ensued during which they threw stones at each other. Mustafa then left the accused, and having seen his mother's dead body lying on the road, fainted. Later on, the accused was arrested, whereupon he gave an unsworn statement to the effect that he did not know what had happened.

Held: (1) "I find that it was the accused who killed the deceased and with this conclusion the assessors were also in clear agreement".

(2) "I pass on then to what is really the crux of the case namely whether the accused killed the deceased with malice aforethought. The prosecution failed to establish any motive for the accused's actions. I should perhaps say that this was not so much due to lack of investigation as due to the misfortune that certain evidence could not be tendered due to the absence from this country of a vital witness.... As the evidence stands no motive was put forward, and while that is not fatal to the prosecution, in the circumstances of this case, it did leave open the accused's state of mind. He said in his defence that he did not know what had happened. This was taken up by the defence as being at least possibly indicative of drunkenness It was the prosecution's case that the manner in which the accused acted, showed that he was quite able to understand what he was doing, and that he must be presumed at least to have intended to cause the deceased grievous harm. In summing up to the assessors, both arguments were explained and the evidence upon which they depended. It was observed that the burden of

proof lay upon the prosecution to prove beyond reasonable doubt that the accused was clearly in a position to form the intention and did form the intention to cause at least grievous harm. If there was a doubt that the prosecution had failed to discharge the burden of proof then the accused must be given the benefit of the doubt and the result would be that he was guilty of manslaughter and not murder. The assessors took a short while to consider their verdict and when the Court resumed they both expressed the clear opinion that the accused could not have been in control of his senses and that he was guilty of manslaughter. I have given careful consideration to the evidence in the light of the opinions of the assessors and on the whole I agree with them. It is clear that the accused had been drinking and that he was not in a normal frame of mind when he visited Mshamba. While his actions do not readily suggest that of an intoxicated person, nevertheless, as the witnesses for the prosecution were not prepared to state that the accused was not drunk, I can only conclude that there must be some doubt as to his state of mind. The absence of motive seems to me to aggravate that doubt. Accordingly I hold that the prosecution failed to prove beyond reasonable doubt that the accused had formed the intention to cause grievous harm. It follows then that I acquit the accused person.

3. Defence of Person and Property

Section 18 of the penal code provides that a person is not criminally liable for an act done in the exercise of the right of self-defence or defence of another or defence of property. Section 18 A(1) gives an absolute exemption for criminal liability where a person defends himself or another and where he defends his property or any property in his lawful possession, custody or his care or the property of any other person against any unlawful act of force or violence.

Manzi Mengi V R [1964] EA 289

SIR TREVOR GOULD, V.-P.: This appeal was brought from the conviction of the appellant in the Supreme Court of Kenya of the crime of manslaughter. He had been indicted for murder. At the conclusion of the hearing we allowed the appeal, and quashed the conviction and sentence; we now give our reasons.

It was never in dispute that the appellant killed the deceased with a panga, with which he inflicted fourteen wounds. Six wounds were on the head and neck and the skull was fractured; there was a severe wound on each hand, two on the back, and further wounds on the right and left thighs and on each knee. The appellant's defence was that he acted in self defence to save his life and the finding of the learned judge was that he did act in self defence but used excessive force. Nevertheless he acted under provocation which reduced the offence to manslaughter.

The trouble between the appellant and the deceased arose over land. The appellant had permitted one Nzau, a brother of the deceased to cultivate his shamba while he was absent from the district. On his return he wanted the land back and settled the matter amicably with Nzau by paying him Shs. 10/=. The learned judge accepted in its entirety the version of the appellant of the events of the day in question, and the three assessors, who placed the blame wholly on the deceased, obviously did also. The learned judge's findings of fact are contained in the following passage from his judgment:

"I am satisfied there had been a dispute about the accused's shamba of which he had regained the right to possession amicably by paying Shs. 10/= to Nzau. I am also satisfied on the day in question the accused went to his shamba where he found cattle being tended by two children who informed him the deceased had told them to bring the cattle there. The accused also found the fence destroyed. He drove away the cattle and went to fetch a panga to repair the fence. On his return he found the cattle back again in his shamba. The children told him they had brought the cattle back on the deceased's instructions. The accused drove out the cattle again from his shamba and started to repair the fence. When he was doing so the deceased abused him by calling him 'Kino'. I am able to say from my own knowledge that it is a foul and filthy abuse to address to a male Africa. The abuse was therefore capable of and did constitute provocation. The accused however behaved with restraint and told the deceased that being a Christian, he would not abuse. The deceased who was armed with a bow and arrows said he was going to kill the accused. The deceased's threat as well as the fact of his being armed with a bow and arrows also constituted provocation.

The deceased then told the accused to go away from the shamba otherwise he would kill him. The accused replied, rightly in my opinion, that it was his own shamba. Again the deceased's demand that the accused should leave the shamba coupled with the threat to kill him if he did not comply, also in my opinion constituted provocation. It was aggravated in association with the recent statements of the children that it was the deceased who had instructed them to bring the cattle to the accused's shamba. Having paid Shs. 10/= the accused had regained the right to re-occupy his own shamba.

The deceased then fired an arrow at the accused but missed. In my view from that moment onwards, if not earlier when the deceased had threatened to kill him, the accused became entitled to defend himself and I believe him when he says he was afraid of the deceased, that he was crying. In court the accused did not strike me as a person who would embellish his case. This is reinforced by his attitude. As the record shows the accused refused to say anything at all in the first instance.

Accused told the deceased not to kill him. The deceased replied 'I am going to kill you'. Again, in my view this also constituted provocation. The deceased then crossed the fence and entered the shamba which provided still further provocation. Up to this moment the accused had not reacted violently. There is however neither any evidence to suppose nor reason to think the accused was not smarting under the provocation being offered to him persistently. In my view the accused must have been feeling terribly provoked.

The deceased then struck the accused twice with his bow. The accused protected himself with the panga. The cut on the bow supports the accused's story. No one came to his help.

The deceased tried to stab him in the chest with his arrows. I believe the accused's statement that when he saw the deceased was going to kill him he raised the

panga and cut the deceased with it. I am left in no doubt that the accused acted in self defence when first he began striking the deceased. I accept the accused's story that he cut the deceased because he was afraid if the deceased caught hold of him he would kill him. I consider the conclusion inescapable that there was a moment of time during the struggle when the accused was acting in self defence".

I would tabulate the salient facts so found, as follows:

- (a) the deceased acted offensively in his instruction to the children connection with the cattle;
- (b) the appellant got his panga for an innocent purpose-to repair the fence;
- (c) the deceased abused the appellant who did not retaliate;
- (d) the deceased threatened to kill the appellant;
- (e) the deceased again threatened to kill the appellant if he did not leave his own shamba and the appellant refused;
- (f) the deceased shot an arrow at the appellant but it missed;
- (g) the deceased again threatened to kill and advanced into the shamba;
- (h) the deceased struck at the appellant twice with his bow and the appellant protected himself with the panga;
- (i) the deceased tried to stab the appellant in the chest with the arrows;
- (j) the appellant then cut the deceased with the panga in order to avoid being killed himself.

In a later passage the learned judge again summarized the matter thus:

"I take into account that in this case there was a series of acts of provocation offered to the accused, that the deceased threatened to kill him if he did not leave and go away from his own shamba, probably the most precious possession in the life of a citizen of Kenya which is no less a castle to an African than a home is to an Englishman, that there was a murderous attempt to kill the accused when an arrow was fired at him by the deceased who thereafter trespassed on to the accused's shamba and came at him with his bow and struck the accused twice with it and the accused defended himself with the panga, that the deceased tried to stab him in the chest with his arrows each one of which is a lethal weapon as exhibited in court, and, as already stated, I believe the accused when he says he cut the deceased because he was afraid that if the deceased caught hold of him he would kill him, and, above all, the accused did not fetch the panga to enter into a combat with the deceased but he had done so for the purpose of repairing the fence."

There is one further relevant finding in relation to the medical evidence. The learned judge was unable on the evidence to make a finding as to which blow was struck first; all of the wounds were not necessarily fatal. The learned judge went on to say that he was left in no doubt that the appellant stood in danger of his life and that, if he had not made use of the panga, the deceased would probably have killed him.

On all of these findings we find it difficult to conceive a clearer case of killing in self defence, subject only to consideration of the learned judge's finding that excessive force was used. On that question the learned judge did not go into detail but stated that the assessors' view that the appellant acted in self defence was right up to a point but, "I do not think the accused should be acquitted because of the degree of force used by him."

The law to be applied in relation to self defence is the common law of England (see s. 17 of the Penal Code, Cap. 63 of the Laws of Kenya). Dealing with a similar provision in the law of

Tanganyika, this court said in *Selemani v. Republic* (1) ([1963] E.A., at p. 446):

"Under English law there is a broad distinction made where questions of self defence arise. If a person against whom a forcible and violent felony is being attempted repels force by force and in so doing kills the attacker the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious. It would appear that in such a case there is no duty in law to retreat, though no doubt questions of opportunity of avoidance of disengagement would be relevant to the question of reasonable necessity for the killing. In other cases of self defence where no violent felony is attempted a person is entitled to use reasonable force against an assault, and if he is reasonably in apprehension of serious injury, provided he does all that he is able in the circumstances, by retreat or otherwise break off the fight or avoid the assault, he may use such force, including deadly force, as is reasonable in the circumstances. In either case if the force used is excessive, but if the other elements of self defence are present there may be a conviction of manslaughter: *R. v. Biggin* (2), *R. v. Howe* (3), *Rohi v. R.* (4) (in relation to defence of property)."

The instant case falls into the first of those two categories; there is no doubt that a forcible and violent felony was attempted against the appellant. It was a felony of no minor character but one which, as the learned judge found, was an attempt on his life. Leaving aside the arrow which was actually shot at the appellant there was an attempt to stab him with arrows each one of which, as the learned judge said "is a lethal weapon". Up to that stage, on the findings of the learned judge and assessors the conduct of the appellant was not blameworthy in any particular. The crime which the deceased was attempting was one punishable by death and, as the matter presents us, if over there was a case in which the victim of an attack was justified in using violence, including lethal violence, this is such a case. If we are right in this, it is hard to say how violence which does result in death can be described as excessive in the ordinary sense of that word.

As we have mentioned, the learned judge did not go into detail in finding the violence to be excessive but it seems plain that he had in mind the number of blows struck; he may have been of opinion that the retaliation by the appellant continued after the need for it was past. The concept is expressed in *RUSSELL ON CRIME* (11th Edn.), Vo. 1, p. 496, thus:

"It has been observed that as homicide committed in the prevention of forcible and atrocious crimes is justifiable only upon the plea of necessity, it cannot be justified unless the necessity continues up to the time when the party is killed. Thus, though the person upon whom a felonious attack is first made is not obliged to retreat, but may pursue the felon till he finds himself out of danger; yet if the felon is killed after he has been properly secured, and when the apprehension of danger has ceased, such killing will be murder; though perhaps, if the blood were still hot from the contest or pursuit, it has been suggested that it might be held to be only manslaughter on account of the high provocation."

With respect to the learned judge we find no similarity between the circumstances referred to in that paragraph and the present case. There was no evidence upon which it could have been held that there came a moment in the affray, before any fatal blow had been delivered, when the appellant could have taken thought and realised that all danger to him was past. The learned judge indicated as much in his judgment, when he said:

"But notwithstanding all this, on the evidence I am unable to make a finding which blow was inflicted first. They were not all necessarily fatal. I am left in no doubt that the accused stood in danger of his life and if he had not made use of the panga, the deceased would probably have killed him. It is for this and the further reason which I state later that I cannot regard Dr. Gekonyo's opinion as being decisive that although he could not say in what order the wounds were inflicted, in his opinion after the head wounds the other wounds could not have been caused by a person who thought he stood in danger of his life.

The same applied in regard to the hand wounds. But it may be that the lesser wounds, few though they were, were inflicted first and the others followed during the

struggle in quick succession possibly with the speed of lightning. There is no evidence to enable me to say how long the whole incident took. The further reason is that I am inclined to think Dr. Gekonyo spoke about a sane, rational man in possession of his normal senses and not of a person who had been put in the position of the accused who was suffering from provocation and also feared he would lose his life, a person who was fighting for his life."

This, in view of the earlier finding that the appellant acted in self defence, amounts to a finding that the learned judge was unable to say that the appellant was not "fighting for his life" throughout the incident. The onus is upon the prosecution to show that the appellant was not acting in self defence (*Chan Kau v. R.* (5), *R. v. Lobell* (6)), and it was therefore upon the prosecution to show that there was a time before a fatal blow was struck that the appellant should have realised he was out of danger and desisted. We emphasise that it must have been before such a blow was struck, for, on our view that the appellant was entitled to use lethal force, what he did after he had used it could not

Selemani s/o USS. V. R. [1963] EA 442.

SIR TREVOR GOULD, Ag. P., - The appellant was convicted on June 21, 1963, in the High Court of Tanganyika at Dar es Salaam of murdering Salim Selemani in the Southern Region on the night of February 14/15, 1963.

Mohamed Salim gave evidence that on the night when the appellant was arrested he was called by his brother who complained that his house had been broken into. The witness saw a box which had been forced open and some clothing was missing. At that moment he heard cries of "Thief, Thief" outside. Going outside he saw that one Subini had run into a thicket to try to get the suspected thief out. A man whom he recognised as the appellant ran out and was pursued by Yusufu Ali, the deceased, and the witness. He heard Yusufu Ali cry that he had been stabbed with a knife; then he heard the deceased (presumably he heard him cry out though the record does not so state) who was not carrying any weapon. The appellant then entered another thicket and was arrested. Yusufu Ali said that there were many people present surrounding the first-mentioned thicket; he described his chase of the appellant, who, he said, stopped and stabbed

him with a knife. As he fell down the deceased jumped over him and caught hold of the appellant who stabbed him on the left of the stomach. Yusufu also said that the deceased was unarmed.

The deceased, according to medical evidence, died from a stab wound in the region of the lower left ribs, three of which were cut through. A knife, stained with human blood, was found in the vicinity but there was no evidence that it belonged to the appellant. Neither was there any evidence that he had any connection with the theft from the house of Mohamed Salim's brother. There was other evidence confirmatory of the fact that the deceased was stabbed by the appellant, but that was hardly put in issue by the appellant.

The appellant made an unsworn statement in the High Court in which he claimed to have heard the alarm and joined the people surrounding the thicket. He continued:

"I got into the thicket in order to get the thief. But the thief was not there. I left the thicket in the other direction and the people who saw me thought I was the thief. Many people came and beat me. They wanted to slaughter me but fortunately I took the knife from them. As there were many people, I pulled out the knife and stabbed one of them. At that time, those people were complaining and I ran away. When I got into another thicket and they still pursued me. They did not see me because it was night. About 6 a.m. they saw me hiding myself somewhere. Many people came and they arrested me. Fortunately, it was morning - if it had been night they would have killed me. Then they sent me to someone's homestead - I don't know his name. So they put some clothes on me which they alleged I had stolen, and they produced a knife which they said was the one I had used for stabbing. All this time I was being beaten, and I was saved when the policeman came from Newala".

Yusufu and Mohamed Salim denied that the appellant was beaten and their evidence was accepted by the learned judge. The appellant did have a cut on his head which was unexplained by the prosecution witnesses except by the suggestion that it could have been sustained while running through the thicket.

Before we proceed to the merits of the appeal there are certain points in mention to the record

and the trial which require to be noticed. The first touches the recording of the plea on arraignment. It appears in the record thus:

"Information is read over and explained to the accused in his own language and he is required to plead thereto.

Plea.

Entered as a plea of 'Not Guilty' to the Charge."

A possible implication of this record appeared to be that the appellant had not pleaded at all, though, as the trial proceeded as on a plea of not guilty, that seemed in the highest degree unlikely. We accordingly obtained a report from the trial judge under r. 42 (4) of the rules of this court which was to the effect that the appellant's words on being asked to plead being discursive (and possibly prejudicial) he had had in mind the observations of this court in *Wachira s/o Wambogo v. R.* (1) (1954), 21 EACA 396, and, when he was satisfied that the words of the appellant amounted to a plea of not guilty he entered that plea simply.

The case referred to is one in which words uttered by the prisoner in pleading, which had been recorded as a plea of not guilty, had been referred to by the trial judge. The following passage appears in the judgment, at p. 397:

"With deference we think that this reference to the words used by the prisoner when called on to plead was certainly improper. Technically, these remarks were not made before a properly constituted court for the plea is taken prior to the empanelling of the jury or, as in the instant case, the selection of the assessors. Indeed we think that if the court decides to enter a plea of not guilty the better course is merely to record the plea in those words and not to record the prisoner's actual words. This practice seems to be what is contemplated by s. 274 of the Criminal Procedure Code. And see *Byarufu s/o Gafa v. R.* (1950), 17 EACA 125 at p. 126. It is only when a plea of 'guilty' is entered that there is any obligation to record as nearly as possible the words used by the accused when admitting the truth of the charge."

This authority amply justifies the learned judge's approach and the difficulty which arose in this case is largely due to the use of a set form leaving spaces to be filled in by the judge. It would have been better, we think, if the words "Not guilty" had been inserted after the word "Plea".

The next matter for comment is that the record indicates that the Director of Public Prosecution during the course of the trial asked:

"... if the defence will concede that accused stabbed another person besides deceased."

The advocate for the defence is recorded as agreeing. Apart from the fact that the ambiguous words used might be construed as meaning that the admission went to the stabbing of the deceased as well as another we find this an unusual procedure and one which, though it caused no injustice in the present case, ought not to be adopted. We assume that reliance was placed on s. 58 of the Indian Evidence Act which is as follows:

"58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

"Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions".

In the commentary on this section in SARKAR ON EVIDENCE (10th Edn.), pp. 534-6 there are many cases quoted and there are indications of a difference of opinion between writers as to whether the section applies to criminal as well as civil cases. The question has not been argued before us and we need go no further than say that if, in the absence of any distinction drawn on the section itself, it properly applies to criminal proceedings, it is desirable that the proviso be applied strictly so as to ensure that all relevant facts are strictly proved by evidence in the usual way. In the present case the evidence called did include the stabbing of Yusufu, which was part of the *res gestae*, and we quite fail to see what useful purpose was served in asking for an admission, which, if it had stood alone must have confused, rather than assisted, the court.

There is a further matter relating to the evidence. The doctor who operated on the deceased and performed the post-mortem examination gave evidence that the body "was identified by two persons in the presence of askari". A report prepared at the time was read and indicates that the two persons were Abdalla Selemani and Hassani Kayonjo, and the askari "A.3056 P.C. Adams". Neither Abdalla Selemani nor Hassani Kayonjo, was called as a witness and the prosecution would have failed altogether to prove the death of the victim of the stabbing were it not for the evidence of Damas s/o Johannes, a police constable who took the unconscious victim from the scene of the crime and later went to the hospital and "Identified the body as that of the person I had brought in". Two exhibits identified by P.C. Damas show his number as A. 3056, which sufficiently identifies him with the "P.C. Adams" mentioned in the post-mortem report. No point on this was raised at the trial and the learned judge was justified in accepting the evidence of P.C. Damas as sufficient to link the medical evidence with the person named in the charge as having been murdered. Nevertheless, we cannot, without explanation, regard the prosecution's approach to the question of identification as satisfactory.

We come now to the questions which arise on the merits of the appeal. The assessors gave their opinions as follows:

"1st Assessor: We have heard the evidence of the doctor that the accused was taken into the presence of the deceased when he was in his senses. My opinion is that the accused did not intend to kill. When the accused found that so many persons were pursuing him, he found that he had better defend himself by using that weapon.

"2nd Assessor: I am of the opinion that the accused killed intentionally. There was no reason to use such a weapon, a knife, which he knows is a fatal weapon. As far as the doctor's evidence is concerned, he says that the wound was caused with a knife, and I agree."

We find difficulty in knowing what the assessors meant by those opinions. The first might possibly have intended to say that the appellant was not guilty and the second that he was.

Either might have intended to indicate that excessive force was used in self-defence which would result in a verdict of manslaughter. The learned judge had not put specific questions to the assessors and therefore presumably had asked each assessor to state his opinion as to the case generally as required by s. 283 (1) of the Criminal Procedure Code. We think it desirable, as a matter of practice, that in addition to any other answers which may be given, each assessor should state specifically whether he considers the accused person to be guilty or not guilty on each count on which he is required to state his opinion.

In his judgment the learned judge said that the basis of the defence amounted to an assertion that the appellant killed in self-defence and continued:

"Self-defence may excuse killing where the accused reasonably believes his life is in imminent danger where he is unable to escape and where he uses no more force than is reasonably necessary in the circumstances. Where the other conditions are satisfied but the degree of force used is excessive, the offence may be reduced to the lesser one of manslaughter.

"Applying those principles to the present case in relation to the facts found, it may be said in the accused's favour that he did at first attempt to run away. It may also reasonably be supposed that he was in a state of fear. It is common knowledge, sufficiently, I think, to be within the judicial knowledge of the court, that villagers in Tanganyika who apprehend a suspected thief by night do not infrequently beat him severely. I do not think, however, that it can properly be said that the accused was in imminent danger when he used the knife. He was at that time only being pursued by three persons, two of whom, those he struck, were certainly unarmed. The witnesses said that so far as they were aware, no one had beaten the accused and certainly there is no evidence before the court of any manifest intention other than to apprehend the accused. I hold, therefore, that the accused was not acting in self-defence, so as to excuse or reduce his offence."

The first part of that passage contains a direction on the question of self-defence in rather

general terms. By s. 18 of the Penal Code of Tanganyika, subject to any other express provisions of the Code or any other law criminal responsibility for the use of force in the defence of person or property "shall be determined according to the principles of English law". Under English law there is a broad distinction made where questions of self-defence arise. If a person against whom a forcible and violent felony is being attempted repels force by force and in so doing kills the attacker the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious. It would appear that in such a case there is no duty in law to retreat, though no doubt questions of opportunity of avoidance or disengagement would be relevant to the question of reasonable necessity for the killing. In other cases of self-defence where no violent felony is attempted, a person is entitled to use reasonable force against an assault, and if he is reasonably in apprehension of serious injury, provided he does all that he is able in the circumstances, by retreat or otherwise to break off the fight or avoid the assault, he may use such force, including deadly force, as is reasonable in the circumstances. In either case if the force used is excessive, but if the other elements of self defence are present there may be a conviction of manslaughter: *R. v. Biggin* (2), 14 Cr. App. R. 87; *R. v. Howe* (3) (1958), 32 Australian Law Journal Reports 212, quoted in CURRENT LAW YEARBOOK, 1958, No. 761; *Marawa s/o Robi v. R.* (4), [1959] EA 660 (C.A.) (in relation to defence of property). It is probable that the learned judge in giving his direction had in mind the type of self-defence secondly referred to above, but on his findings of fact no question of self-defence of any kind can arise.

As we read the passage from the judgment quoted above the extent of the learned judge's findings in favour of the appellant was that he was in a state of fear and might anticipate a severe beating if caught. He found that it could not properly be said that he was in imminent danger when he used the knife, that neither of his immediate pursuers was armed, that there was evidence that he had not been beaten and no evidence of any manifest intention other than to apprehend him. These findings we consider fully support the learned judge's decision that the appellant was not acting in self-defence. There is evidence that a felony had in fact been committed and under s. 32 (1) of the Criminal Procedure Code any private person may arrest any person whom he reasonably suspects of having committed a felony. Though there was no finding on this point in the court below, the flight of the appellant on the alarm being raised

provided abundant cause for such reasonable suspicion. The appellant was aware of the intention to arrest him as he said in his unsworn statement in court that people thought he was the thief. The pursuers were performing a lawful act in endeavouring to arrest the appellant and no question of provocation can arise (Penal Code, s. 202). It could be otherwise if the arrest were unlawful. It would be opening a very wide door indeed to hold that by reason of a known tendency of villagers to beat suspected thieves such a person might justifiably or excusably stab and kill a pursuer. Such a proposition has already been rejected by this court in *R. v. Berezeri Kayongo* (5) (1943), 10 EACA 116, the first two paragraphs of the headnote being as follows:

"(1) When a person has without legal excuse or justification violently assaulted another person, his apprehensions, as to what is likely to happen to him on his being arrested cannot be accepted in a Criminal Court as a justification for killing or violently assaulting those who are engaged in the duty of lawfully arresting him.

"(2) Upon the facts before the judge the appellant should have been convicted of murder."

In the present case on the learned judge's findings of fact the appellant stabbed the deceased prior to his arrest and the appellant had not up to that stage been beaten - it is therefore not a case in which the deceased had forfeited the status of a person effecting a lawful arrest. There was no right in the appellant to use any force at all and therefore no question of excessive force, or of manslaughter on any such basis, arises.

For these reasons we consider that the conviction should be sustained and the appeal is accordingly dismissed.

Appeal dismissed.

Marwa s/o Robi V. R. [1959] EACA 660.

JUDGEMENTS: - The appellant was convicted of murder by the Supreme Court of Kenya on May 12, 1959, and was sentenced to death. He has appealed to this court on two grounds: first,

that the learned trial judge misdirected himself as to the law applicable to cases of homicide in defence of property; and, secondly, that the learned judge erred in finding that there was no sufficient provocation to reduce the offence to manslaughter.

The facts are that all about 1 p.m. on November 15, 1958, the deceased left the boma of one Chacha s/o Ngoso and went towards the boma of the appellant, who was his father-in-law. The deceased told Chacha that he was going to claim his cattle from his father-in-law. The appellant's boma was about a quarter of a mile distant from that of Chacha. Shortly after the deceased left, Chacha heard a shout from the direction of the appellant's boma, and, on going in that direction, met the deceased who was suffering from a spear wound through his right upper arm into his chest. The deceased walked with Chacha for some distance towards the latter's boma, then collapsed, lost consciousness and died. On post-mortem examination the deceased was found to have an incised wound six inches long through the skin and muscle of the right arm and a stab wound into the right side of the chest about seven inches long going between the ribs and entering the middle and lower lobes of the right lung. The cause of death was haemorrhage from the wounds in the right arm and right chest. The two wounds appeared to have been caused by a single blow of a long shafted weapon such as a spear. When charged with the murder of the deceased the appellant said in answer to the charge: 'I wish to say that I speared my son-in-law Gati s/o Mahanga to death.' At the trial the appellant made an unsworn statement in the course of which he said:

'The deceased came and said he was going to take the cattle by force from me. ... The deceased would not obey what the elders told him and he came to my boma and started to take the cattle by force and that is when I killed him.'

It is clear that the appellant speared the deceased, causing the wounds from which he died, and the learned judge so found. It is clear also that the spearing occurred as a result of a dispute between the appellant and the deceased over cattle, when the deceased had gone to the appellant's boma to get cattle which the deceased claimed. There was a conflict of evidence as to whether the cattle in question were part of the bride-price for the appellant's daughter which the deceased was reclaiming, or whether they were cattle (or possibly a cow) given to the appellant by the deceased to look after. The learned judge made no specific finding on the

point, and it was conceded by counsel for the Crown that, in view of the conflict of evidence and the absence of a finding, it must be assumed in favour of the appellant that the deceased had gone to reclaim cattle which were part of the bride-price, that is to say, cattle to which the deceased, so far as the evidence went, had no legitimate claim. Again, there is little evidence, and no specific finding, as to whether or not the deceased actually attempted to drive away cattle from the appellant's boma as alleged by the appellant. The learned judge does, however, appear to accept appellant's statement when he says:

'The accused says in his uncautioned [this should read "unsworn"] statement that Gati "came to my boma and started to take the cattle by force and that is when I killed him". There is no suggestion that Gati used force against the person of the accused. ...'

At any rate, as again was conceded by counsel for the Crown, for the purposes of the appeal it must be assumed in the appellant's favour that the deceased did actually attempt to drive away the cattle. There is, however, no reason to differ from the learned judge's finding that no force was used against the person of the appellant, though the deceased had carried a stick when he went towards the appellant's boma.

In these circumstances the question arose whether the appellant had killed the deceased in defence of his property and, if so, whether the killing was excused, or, at least, reduced from murder to manslaughter.

The learned judge correctly referred to section 18 of the Penal Code, which provides that criminal responsibility for the use of force in defence of person or property shall be determined according to the principles of English common law, and proceeded:

'Whilst not attempting to set out a comprehensive statement of the law, the broad outline of the English common law is that it is a good defence that the battery was committed by the prisoner in defence of his possession, force may be opposed by force, but only such force is justified as is necessary for the defence of the property, that is, it must not be excessive. See Archbold, 33rd ed., page

998. ... The assessors were unanimous in their opinion that Gati did not receive his injuries under circumstances which establish the defence of defence of his property and I agree with their opinion and so find.'

Mr. Malik for the appellant contended that this passage amounted to a misdirection in that the passage in Archbold on which the learned judge relied was one referring to common assault and not to homicide; that the deceased was a trespasser; and that the relevant law is that at page 944 of Archbold (33rd ed.), where it states:

'What we have now said relates to felonies by force. In the case of forcible misdemeanours, such as trespass in taking goods, although the owner may justify beating the trespasser, in order to make him desist, yet, if he kills him, it will be manslaughter.'

Counsel for the Crown conceded that the learned judge had referred to the chapter of Archbold which deals with assault instead of to the chapter dealing with homicide, but he contended that this error did not in fact mislead either the judge or the assessors as to the law applicable; that the appellant had made use of a deadly weapon, namely a spear; that in the circumstances the use of such a weapon was unwarranted and the resulting death amounted to murder; and he referred to a sentence in Archbold, 33rd ed., page 944 following that relied on by Mr. Malik, which reads:

'Or, if instead of beating him, he attacks him, [*i.e.*, the trespasser] with a deadly weapon, it would perhaps be murder. ...'

The authorities on this branch of the law appear to be of considerable antiquity. In *Russell on Crime*, 11th ed., at page 490, the learned author says:

'In considering the law of this matter as it is set out by older authorities such as Hale, Foster, Blackstone and East, it should be remembered that the views of these authors rested upon the legal principles governing homicide as they existed at the period in which they were writing. For example, it is not certain that at the

present day the courts would agree that it is necessarily at least manslaughter if a householder in ejecting a trespasser happened to kill him, nor on the other hand that a killing would be justifiable if the trespasser had resisted and assaulted the householder when the latter justly laid hands upon him in order to turn him out. It would seem more probable that the courts would now hold that only such force can be justified as is reasonable under modern conditions, but that if without exceeding such reasonable bounds, the householder should unintentionally bring about the death of the invader, then the case should be treated as homicide by misadventure'.

There is no necessity in this case to consider the cases which relate to the degree of force which may be used to resist forcible felonies. Although, as I have said, it must be assumed in the appellant's favour that the deceased had no legitimate claim to the cattle, yet it is clear on the evidence that the deceased believed he had a claim of right to cattle. The dispute was not a new one and the deceased did not act in a stealthy manner. He went openly to the appellant's boma to exercise a right to which he obviously believed he was entitled. In these circumstances he would not be guilty of any criminal offence: Penal Code, section 9. Nevertheless his act amounted to a serious trespass, and we think the appellant was entitled to take reasonable steps to preserve his property. The cases relating to the steps which may be taken to prevent trespass, so far as they are available to us, indicate that only so much force as is reasonably necessary in order to turn a trespasser out will be justified. Roscoe's *Criminal Evidence*, 16th ed., at page 782, citing Foster 291, says:

`A finding a trespasser on his land, in the first transport of his passion beateth him and unluckily happeneth to kill; this hath been holden to be manslaughter. (Hale P.C., 473 is cited but there the trespasser does mischief), But it must be understood that he beat him not with a mischievous intention, but merely to chastise ... and to deter him ...; for if he had knocked his brains out with a bill or hedgestake, or had given him an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, whereof he had died, it had been murder.'

This passage, it is true, relates to the extent to which trespass may amount to provocation, but it does give an indication of the degree of force which may be regarded as reasonable. At page 796 of Roscoe (*supra*) under the heading of "Defence of Person or Property" it is stated:

'Deadly weapons must not be used to prevent trespass. Capt. Moir discharged a gun at a person who persisted in trespassing on his land, and the man died. He had gone home for pistols on seeing the trespasser, and angry words passed. He was found guilty of murder and executed. Moir (1828) cited in Price (1835) 7 C & P. 178'.

Upon such authority as we have been able to find we think it must be a question of fact in each case whether the degree of force used in defence of property which caused death was, in the particular circumstances of the case, justifiable, or, if not justifiable, whether it was such as to amount only to manslaughter, or was so excessive as to constitute the offence of murder.

In the instant case the learned trial judge stresses that the appellant was 'well aware of the existence of a peaceful method of settling the dispute.' Mr. Malik criticised this approach and submitted that the learned judge should have taken 'the objective view that there was a definite trespass.' We think, however, that all the circumstances must be taken into account, including this aspect of the matter. As we see it, this was no case of an attempt to commit a forcible crime. It was the culmination of a civil dispute between a father-in-law and son-in-law. There is no suggestion that any violence was used or threatened to the person of the appellant, or that he believed himself to be in any danger. No doubt in driving off the cattle the deceased was committing a trespass, but the means adopted by the appellant to resist the taking of the cattle seems to us to have been utterly out of proportion to the tort which was being committed. The appellant was no doubt entitled to use reasonable force to prevent the taking of the cattle, and if, in good faith, he had used more force than was reasonable and had thereby killed the appellant, no doubt the offence would only have amounted to manslaughter. The force actually used, however, was a thrust with a spear through the chest which was clearly calculated to kill. We can see no distinction between such use of a lethal weapon like a spear, and the use of a firearm. The weapon and its method of use leave no doubt that the intent was to kill, and not merely to prevent the removal of the cattle. There can be no justification in law for deliberate homicide in

these circumstances, and we have no doubt that, subject to the question of provocation, the offence is murder. Although the learned judge referred to the passage in Archbold relating to assaults and an extent to which the use of force in the defence of property is a defence to a charge of assault, and not to the chapter on homicide, we think that he did, in fact, apply correct principles and that his decision must have been the same had he had regard to the relevant law as stated in the chapter on homicide.

As regards the question of provocation, Mr. Malik submitted that the deceased's acts amounted to sufficient provocation to reduce the killing to manslaughter. Counsel for the Crown drew our attention to the case of *Yusufu s/o Lesso v. R.* (1952) 19 EACA 249, in which it was held that the definition of provocation in the Tanganyika Penal Code (which is similar to the Kenya Penal Code) is

'confined to wrongful acts done to the person and does not extend to wrongful acts done to property'.

That decision, which differed from an earlier decision of this court in *R. v. Murume s/o Nayboba* (1945) 12 EACA 80, must no doubt be considered in relation to the facts of that case, and we should not be prepared to accept the proposition that no act of trespass to property could ever amount to 'a wrongful act or insult ... done to ... a person' *cf.*, the passage from Roscoe's *Criminal Evidence*, page 782 which is cited above. We think that each case must be judged on its own facts. In the instant case, however, it is sufficient to say that we are satisfied that the learned judge has dealt adequately with the question of provocation, and we see no reason to differ from his conclusion.

We are accordingly of opinion that the appeal must be dismissed."

Appeal dismissed

R V. Mohamed s/o Ndowe & Others (1970) HCD n. 211

Pandu Ag. J.

The three accused who were watchmen were charged with murder. On the date in question an unknown number of thieves including the deceased came to steal corrugated iron sheets from a house which the accused were guarding. The deceased himself broke into the house through the window. The first accused person, Mohamed Mdowe, tried to throw at the deceased a club which the thieves had come with. Then the deceased came at him with a billhook which he had at that time, and the first accused struck the billhook with a club but the club was broken. The second and third accused helped the first accused, and they tried to strike the billhook with clubs but these were also broken. It was then that the thief fell down, and the accused persons held the billhook and struck the deceased with it. The accused heard a bullet shot which was fired by the other thieves who had come with the deceased, and they, the accused, ran off into the bush.

Held: (1) "The law is that the accused could defend themselves and their employer's property. All this happened when the accused were on duty and the deceased and his fellow-thieves went to steal. Before this they had already stolen nine times and locked the watchman inside so that they could steal safely. This shows clearly that the place was dangerous, and therefore the employer had to employ several watchmen to guard his property. I must say that a person is not allowed to kill a thief to retrieve his stolen property. He can arrest him and take him before the court. But if the thief uses force so that the property which he has stolen should not be recovered, and in doing so he uses a weapon in a manner which could cause grievous harm to or kill, the owner, the owner or the person who guards the property can defend to the extent of even killing the thief, because he will be defending his life and his property, and I am of the same opinion as all the assessors that none of the accused used more force than was necessary in law, and they were doing so in defence of their lives and their employer's property." (2) "I therefore find that all the accused persons have committed no offence, and I accordingly discharge them all."

NOTE: The defences of person and property have a limitation i.e. the use of force should be reasonable. A person is held criminally liable for any offence resulting from the excessive force used in exercising these rights. In addition in certain conditions the use of these rights extends to causing death - see sections 18A and 18C of the Penal Code. However where a person causes death as a result of excessive force used in defence he shall be guilty of manslaughter - see section 18B of the Penal Code.

Saidi s/o Abdallah v. R. (1967) HCD n. 266.

Georges, C.J.

Complainant slapped the second accused, who is his niece and an adult, hard enough that she fell down. Thereupon the niece picked up a large pestle (apparently the nearest thing at hand which might serve as a weapon) and started hitting the complainant with it. The first accused immediately joined the fray on the side of the niece. The damage to complainant was superficial, mainly a few lacerations and abrasions. Accused were convicted of assault and sentenced to eight months each.

Held: (1) Even though this quarrel was initiated by the complainant, accused were not justified in retaliating as they did. The convictions were upheld. (2) However, the sentences were patently too severe. A fine and compensation would have met the justice of the case, and probably fostered reconciliation. As both accused had already spent two months in jail, sentence was reduced so as to result in their immediate release.

4. Mistake of Fact, Law and Bonafide Claim of Right

A person who does or omits to do an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist (section 11 of the Penal Code). The rationale of this law is the absence of mens rea.

R V. Sultani Maginga (1969) HCD n. 33

Georges, C.J.

The deceased and a woman were lying in a rice field at night after having sexual intercourse. The accused, on his way to guard his shamba against the incursions of wild pigs, saw a movement in the grass and shone his torch in that direction, but the batteries were weak and he could see little. He called out, asking whether it was an animal or people. There was no reply. The couple then ran off in different directions. The accused threw his spear at one of the

shadows, hitting and fatally wounding the deceased. The accused was charged with murder.

Held: (1) The evidence supported the view that the accused did not know that he was throwing a spear at a man, and the charge of murder could not be sustained.

(2) Manslaughter could not be proved as the evidence did not show the requisite degree of recklessness. Although it was common knowledge in Rufiji that many couples go off into the bush at night and in the day for lovemaking, and the accused must have known this, he was absolved from recklessness because he called out, asking whether the object was human or not. Since he got no reply, he may well have thought it was a pig.

(3) Accused not guilty of any offence. The killing was an accident.

R V. Selemani s/o Hassani (1969) HCD 250.

Mustafa, J.,

The accused went out at night to chase away wild pigs which were destroying crops on his shamba. Believing that the pigs had run away into the shamba of the deceased, his neighbour and relative, he went over to the deceased's house where he woke up the deceased's wife who told him she did not know where her husband was. He then went into the shamba alone and when he found the pigs he fired his shot gun. Later he heard a voice saying "you have already shot your brother in law". The deceased had in fact been in the shamba and was found to have died from a gunshot wound. The accused was charged with manslaughter.

Held: (1) "There is evidence that it was a dark night. The accused himself said that the deceased also was in the habit of hunting pigs at night, as did all the other farmers in that area. When he arrived at the house of the deceased that night and did not find him, it would perhaps be reasonable to expect that the deceased could have gone into his shamba to hunt pigs. According to the accused's own account he went into the deceased's shamba, which was full of maize, he saw some pigs, and at the same time he saw a black shadow. Despite the fact that it was dark, and despite the fact that he did not find the deceased in his own house, and despite the fact that the accused knew the deceased could very well be chasing pigs away in his own

shamba, and despite the fact that the accused himself had whistled and called for the deceased three times from the deceased's house before he entered the deceased's shamba, the accused opened fire immediately without ascertaining whether the shadow could be the deceased or somebody else. In my view what the accused did was recklessness of an extreme kind. He was reckless in discharging a gun at night when visibility was very poor, in a shamba where the deceased could very well have been. ... I therefore am of the view that the degree of negligence was so high that what the accused did amounted to the offence of manslaughter." (2) Sentence. "This is a sad case. It is clear accused and deceased were great friends. Deceased before he died had said accused should not get into trouble because what accused did was through bad luck. Accused had been grossly negligent in discharging a gun and killing deceased. However accused has been in custody for 5 months now and the death of deceased, his brother in law, must have been a sad blow to him. I bind accused over to be of good behaviour for 12 months."

NOTE: Except where knowledge of the law by the offender is expressly declared to be an element of the offence and where a person commits an offence in the exercise of bona fide claim of right and without intention to defraud ignorance of law is no defence to a criminal charge.

R V. Karonga wa Kithengi & 53 Others (1913) 5 EALR 50

HAMILTON C.J. - The facts of this case are somewhat peculiar. In August of this year there was much sickness and death in the Kikuyu country owing to plague, cerebrospinal meningitis and pneumonia. As a consequence the Kikuyu, who are much given to the practice of witch-doctoring, not unnaturally suspected that their ills were due to the powers for evil of the witch doctors, and in the location of Chief Gathecha two men, Gunga and Katche, were denounced as being the cause of sixteen deaths. The Kiama, or Native Council of Elders was called together to try the men and on the first day of sitting Gathecha presided. He, however, was called away on other business and his place as president taken by Kinanjui. The council found the men guilty, and on the second day sent Kinanjui to Gathecha for his advice as to what they should do with them. Gathecha sent back a message to the effect that they could burn them if they liked. Directly this message was received the men were in fact burnt in a hut in the presence of the Kiama and with their direct approval.

The actual lighting of the hut was done by a relative of the men who were to be burnt, who, with his hands tied behind his back and a torch thrust into them, was compelled with blows and threats to apply it to the hut.

This device was apparently adopted with the object of preventing the relatives of the dead men laying any complaint or claim for compensation at a future date.

While this proceeding was going on another relative of the men in the hut was kept tied within the centre of the assembly with a cloak over his head so that he could not see what was going on. Both these men, Kamau and Warui, were originally committed for trial together with the members of the Kiama on a charge of murder.

I, however, directed that they should be tendered a conditional pardon and they have been called as witnesses in the case together with the chief, Gathecha.

The evidence of Kamau and Warui might naturally be suspect owing to the fact that Kamau carried out the Kiama's orders and that both he and Warui would be hostile to the accused. But the accused made no attempt to deny the facts with the exception of Kinanji who was said to have placed the torch in Kamau's hands when they were tied behind his back; this he denies, saying that Kamau was not bound and that he took the torch by the general order of the Kiama. On this point I believe Kamau, who graphically described the whole proceeding, and I have no reason whatever to believe that the main facts are otherwise than as stated.

The Kiama acted according to native custom in trying and burning men accused of causing deaths by magic, and do not consider that they have done anything but a meritorious act. But the action of Gathecha, which is not in issue here except in so far as it relates to the reliability of the evidence, is subject to different considerations from those affecting the rest of the Kiama.

Mr. Isaac, the D.C., has been given evidence to the effect that since the beginning of this year it has been the practice for the Kiama to sit to the station for the hearing of all serious matters, and Gathecha, when pressed by the court, refused to say why in this instance he summoned the

Kiama for the location instead of the station.

Now, it is in evidence that Gathecha had been expressly told the Kiama had not powers of life and death, but there is no evidence that these instructions had been given to the individual members of the Kiama; and from the evidence throughout it is clear that Gathecha had great weight with the Kiama and that they looked to him for advice, would not act without it, would not have acted contrary to it. That Gathecha knew he was acting contrary to orders is fairly obvious from the evidence of Mr. Isaac and his own evidence in cross-examination. He, the prime-mover in the whole matter, acted contrary to explicit instructions and advised the Kiama to do what he knew to be wrong, and then, in order to cover his tracks, made a false and misleading report of the facts to the District Commissioner. It is fairly obvious, too, from his cross-examination, that he endeavoured in his evidence, as far as he could, to exculpate himself and place the full culpability for the decision as far as he could on the Kiama.

I will now deal *seriatim* with the arguments that have been put forward by Mr. Figgis for the defence.

In the first place, it has been argued that the Kiama, who could by their own law and custom act as they did, were, in fact, merely exercising powers which were inherent, and which had never been taken from them by treaty. This contention cannot, I think, be upheld; the Crown, whether by treaty, grant, usage or otherwise, has assumed and does in fact exercise within the Protectorate the right to legislate for the inhabitants of the Protectorate. In the exercise of that right the Government has passed the Courts Ordinance of 1907, establishing courts within varying jurisdictions subordinate to the High Court. In that Ordinance, section 10, it is provided that the Governor may recognise the jurisdiction of native councils or grant them jurisdiction and that jurisdiction so granted shall be exercised in accordance with rules framed by him. The Native Tribunal Rules, 1913, passed for the purpose, provide that such councils only as have been recognised by the Governor shall exercise jurisdiction and that that jurisdiction shall be exercised in accordance with the rules.

The criminal jurisdiction of the councils recognised is limited to six months' imprisonment and does not extend to powers of life or death. I am, therefore, of the opinion that the council who

are accused in this case acted in excess of their jurisdiction in sentencing the men to be burnt. In the next place, it was argued that the council were in fact in the position of jurymen finding on the facts, and that the sentence of death was Gathecha's and his alone.

While allowing that the procedure of native councils is somewhat indefinite, this argument is not borne out by the evidence on the record, which is to the effect that the Kiama actually passed the sentence and had it carried out in their presence. They may, it is true, have acted on Gathecha's advice, but I am satisfied that the action was their own.

I now have to consider whether this action is covered by exception 3 of section 300 of the Indian Penal Code, that is to say, whether the council sitting as a judicial body acted in good faith in what they did. The evidence on this point is that they relied entirely on Gathecha, their chief's, advice, and that there was no talk of burning until Gathecha's message was received. This, in conjunction with the fact that there is no evidence as to their being instructed that, as a recognised council by the Governor, they were no longer exercising their customary jurisdiction, but only such jurisdiction as the Governor's rules allowed them to exercise, leads me to believe that they did act in good faith, and I agree with the Assessors in the opinion that they were misled by Gathecha.

I, therefore, find the accused guilty of the offence of abetment of culpable homicide, not amounting to murder, and as they instigated the burning and were present at the commission of the offence they are guilty of the principal offence under section 304 of the Indian Penal Code.

I sentence them each to one day's imprisonment, and to pay a fine of Rs. 50, and direct that out of the total fine the customary compensation to be assessed by the District Commissioner be paid to the relatives of the men who are burnt.

Accused Convicted.

Leonsoni alias Leonsion s/o Matheo v. R. [1961] EACA 364

SIR ALISTAIR FORBES, V.P. - The appellant was, on January 17, 1961, convicted by the

High Court of Tanganyika of the murder of one Socrates Eustace, and was sentenced to death. He appealed to this court against such conviction and sentence. We were satisfied that there was no merit in the appeal which we accordingly dismissed. Crown counsel, however, drew our attention to a passage in the judgment of the learned trial judge which, he contended, was a misdirection and invited us to comment on it.

The passage in question relates to an alleged fist blow which, the appellant stated, the deceased struck him on the head or face after he (the appellant) had caught hold of the deceased's arm. The learned judge considered that the sustaining of this injury should be accepted in the appellant's favour. The learned judge continued:

‘It can further be assumed in his favour that, although it was probably inflicted as a lawful reaction of the deceased to being taken hold of, accused himself did not believe it to be (see *R. v. Jehoshaphat Ruyambi Mwaniki* (1942) 9 EACA 40).

Crown counsel argued that if the act of the deceased in striking the appellant was lawful, it was immaterial what the appellant believed; that under section 202 of the Penal Code, which defines the "provocation" which will, under section 202 of the Penal Code, reduce a killing from murder to manslaughter, a lawful act can never be provocation; that the test whether an act is lawful or not is objective and not subjective, a subjective test being applicable only when it appears that the act relied on as provocative if wrongful and is of such a nature as to be likely when done by an ordinary person to deprive him of the power of self-control.

The passage in *R. v. Jehoshaphat Ruyambi Mwaniki* ... on which the learned judge based the observation complained of, reads as follows:

‘What then is the position? The accused is struck by the deceased accidentally or otherwise, is provoked thereby and retaliates. But can it be said that he was provoked by a wrongful act on the part of the deceased? It may have been, for to use a panga in a negligent manner thereby causing harm may be a wrongful act and indeed a wrongful act to constitute provocation need not be more than a tortious one. The kernel of the case is whether the accused honestly and

reasonably but mistakenly may have believed that he was the victim of a wrongful act on the part of the deceased, and as to that it will suffice if there be a reasonable doubt on the point. We think there is such a doubt and accordingly we substitute a finding of manslaughter for murder and sentence the accused to three years' hard labour.'

Crown counsel argued that since there was doubt whether the provocative act of the deceased was wrongful or not, that was sufficient for the decision of the case; that therefore the reference to the belief of the accused was unnecessary and should be treated as *obiter*; and he asked the court to disapprove the passage cited in so far as it relates to the relevance of the belief of an accused. ...

The material words of section 202 of the Penal Code, for the purposes of the point under consideration, are:

'The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult A lawful act is not provocation to any person for an assault. ...'

With section 202 must be read section 11 of the Penal Code²

Crown counsel did not advert to section 11 but, no doubt, would have argued that the application of section 11 is excluded by the words of section 202 set out above. However, we do not think this is the case. In our view the last sentence of section 11 refers, for example, to the class of statutory offences where the language used excludes any requirement of *mens rea*, so that the question whether the accused may have committed the deed intentionally, recklessly, negligently, or by mistake, is irrelevant so far as his liability to conviction is concerned. But this is not the case where murder and manslaughter are concerned.

It must be borne in mind that section 11 relates to mistakes of fact, as is, indeed, stated by the

².Identical with Penal Code, Tanganyika, s. 11, *supra*, p. 419.

marginal note to the section. The intention of the section would appear to be to apply the common law rules as to mistake summarised in *Russell on Crime* (11th ed.) at page 79 as follows:

'Mistakes can be admitted as a defence provided (1) that the state of things believed would, if true, have justified the act done; (2) that the mistake must be reasonable; (3) that the mistake relates to fact and not to law.'

We think that it is confusion between mistake of fact and mistake of law which may have given rise to difficulty in the application of section 202. It appears to us that an accused acting under a reasonable mistake of fact, where that mistake if true would lead to the application of section 201 of the Penal Code, is entitled to rely on that mistake. But the accused cannot rely on a mistake of law.

If this principle is applied, it will be seen that the decision in *R. v. Jehoshaphat Ruyambi Mwaniki* ... was sound, since the mistake in question was whether the act of the deceased which provoked the accused into retaliation was accidental or intentional. This was a question of fact, and since the accused could reasonably have believed that he was the victim of an assault by the deceased, he was entitled to have the case considered on that basis.

In the instant case there was no question of mistake of fact. The mistake, if any, on the part of the appellant would have been as to the justification for the blow, which is a matter of law. The appellant was under no mistake as to the facts and if on those facts the blow was lawful (as to which the learned judge made no definite findings) then the blow could not be any excuse for the assault.

We think, therefore, that the passage from the judgment in the instant case, which is set out above, is a misdirection, arising from a failure to distinguish between a mistake of fact and a mistake of law. The misdirection, in the event, was not material, since the learned judge held, in our view rightly, that even if the blow could be regarded as provocation, it could not excuse the method of retaliation employed by the appellant."

Appeal dismissed

Salum Ibrahim v. R. [1971] HCD n. 481

Onyiuke, J.

The appellant and complainant were married for about 8 years but were later divorced. It was agreed that the household goods all of which had been bought by the appellant should be divided between them. Sometime afterwards the appellant visited the complainant who, he learned had been having an affair with another man, and demanded all his property from her. He assaulted the complainant and removed a number of articles from the house. He was charged and convicted of robbery with violence c/s 285 and 286 of the Penal Code.

Held: (1) "It is doubtful whether the assault on the complainant was used to facilitate the stealing. It looks like an assault simpliciter and an expression of the appellant's resentment at the complainant's conduct." (2) "[The appellant's] defence was a claim of right to those things which he removed.... A claim of right may be unfounded in law, but if it was honestly held and was not manifestly unreasonable, it can be a good defence to a charge of stealing. The appellant might have thought he was entitled to demand his things back from the complainant in the circumstances." (3) Appeal allowed.

Mohamed Hassan v. R. [1969] HCD 71

Biron, J.

The appellant was convicted of burglary and stealing c/s 294 (1) and 265, Penal Code and was sentenced to imprisonment for two years and six months respectively, to run concurrently, and to the statutory twenty four strokes corporal punishment. The appellant had previously been employed as a house servant by the complainant. He admitted that he had taken the clothes from the complainant's room by opening the window and "pole-fishing" then out. He justified this by declaring that the complainant had dismissed him from his employment owing him three month's wages, and, as the complainant had failed to pay the wages due to him, despite repeated requests, he decided to take his clothes.

Held: "If the appellant's story is true, it would constitute a defence to the charge, as the appellant may well have thought he was acting under a claim of right. Although it was never put to the complainant that he owed the appellant any wages, it must be borne in mind that the appellant is but a youth... That could well account for his failure to put his case to the complainant in cross-examination, and likewise for his taking the complainant's clothes, if in fact the complainant was owing him wages which he refused to pay. The learned magistrate in his judgment has not directed his mind to this aspect of the case as to whether the appellant was acting under a claim of right. Had he done so, he might well have thought that there was a reasonable doubt whether he was in fact so acting. In all the circumstances of the case, I consider it would be most unsafe to uphold the conviction. It is not irrelevant, I think, to note, though this would not be known to the magistrate, that this was the appellant's first appearance in court, and a good record is an asset which can be used to weight the scales in an accused's favour, particularly so in a case of this nature. The appeal is accordingly allowed, the conviction is quashed, and the sentence imposed thereon is set aside."

5. Provocation

Provocation is one of the defences available to an accused person. To plead the defence successfully four conditions must be satisfied: (i) the provocative act pleaded must be a wrongful act or insult; (ii) the provocative act or insult must be of such a gravity as would deprive a reasonable man of his power of self control; (iii) the retaliation must be done in the heat of passion; and (iv) the means of retaliation adopted must be proportional to the degree of provocation - see sections 201 and 202 of the Penal Code.

R. v. Johali Ismail [1974] LRT n. 23

MFALILA AG. J. - Musa bin Bakari hereinafter referred to as the deceased was stabbed to death by Johali Ismail hereinafter referred to as the accused on or about 28th June, 1971. A lot of people witnessed this deed because it was committed while the dispute between the accused and the deceased was being heard by the village elders in the presence of a lot of other villagers. The elders who were hearing this dispute were the cell leader Mohamed Dadi (P.W. 8), and a Member of the Village Conciliatory Board, Mkanachipali Saidi (P.W. 2). Hamisi Nowa (P.W.

3) who is the accused's in-law was among the many people in the village who were present at this hearing. I will have occasion to refer to Nowa's evidence subsequently in this judgment. Explaining the background to this incident the cell leader Mohamed Dadi (P.W. 8) stated that earlier the accused had brought the deceased before them and explained that he had arrested the deceased in adultery with his wife. He said that he had found the deceased on a path standing and talking to his wife. The deceased had started to run away but he had chased and caught him and brought him before the elders. The cell leader then started questioning the deceased to answer these allegations. The deceased denied these allegations, but explained that he had been running because the accused had requested him to assist in chasing a thief. At this juncture, the cell leader said, the accused got up and stabbed the deceased. He pulled out his knife and ran away. A chase proved fruitless and the accused did not appear in the village again. A similar account was given by other eye-witnesses namely Mkanachipali Saidi and Hamisi Nowa. The accused was not traced until six months later when he was arrested in Newala District on 17/1/72 by Special Constable Saidi Dadi (P.W. 6). He was taken back to Nanyamba Police Station and subsequently to Mtwara where he was charged with the murder of the deceased and subsequently committed to this Court for trial on the information for murder contrary to Section 196 of the Penal Code.

To return to the events following immediately after the stabbing of the deceased, a report was made at the local Police Station at Nanyamba which prompted P.C. Joseph Makuli (P.W. 7) to proceed to the scene of the killing at Yuwi village. He collected the dead body and took it to hospital where on the following day it was identified before him by Bakari Nihapuka (P.W. 4) and following this identification Dr. Mhalu (P.W. 1) carried out a post-mortem examination. Dr. Mhalu stated that following his examination he found a penetrating wound through the midline of the upper chest and that it went deep into the right half of the heart. He also found that the pericardial sac was full of half clotted blood. He therefore arrived at the conclusion that the deceased's death was caused by heart failure itself due to compression of the heart by blood in the pericardial sac. I directed the assessors to accept Dr. Mhalu's findings with regard to both the death and its cause.

The accused elected to give an unsworn statement and in this statement he did not dispute the prosecution allegation that he killed the deceased. But he disputed the prosecution allegation

that this killing amounts to murder. He said that on 26/6/71 as he was sleeping with his wife Rukia Salim (P.W. 5) he saw a Muslim cap in the pocket of her undergarment. He questioned her about this, but she remained silent. He therefore decided to go and report to his father-in-law and handed him the cap in question on the understanding that the matter would be discussed the following morning. But Rukia stormed to her father and demanded the cap back, the father relented and handed back the cap. She went back with it to their bed-room, and on seeing it the accused said he could not tolerate it so he snatched it from her. But she became so angry that she picked up a panga and proceeded to assault him with it. He snatched it away from her, and went out of the house. He spent the night at the house of a friend, one Salum Ali. Next morning he went back to his in-laws who started hearing "the cap in the underpant incident". But Rukia consistently refused to answer her parents' queries over this cap. She explained in her evidence that she decided to remain silent because she was afraid of being beaten. However nothing was forthcoming from her, it was therefore decided that the matter be postponed till evening or the next day. They were in a hurry to go for work in the farm. Later that afternoon after work on the farm, the accused was sent to cut poles in the forest. He proceeded there and as he was looking for and cutting these poles, he saw the deceased and his wife. He raised an alarm, the deceased started running away, but he was trapped, fell down and arrested. The deceased then apologised and asked to be spared. He agreed to spare the deceased and took him to the village where he intended to make his complaint before the Village Chairman. The Chairman was away at the time, so he saw other Village Officials namely the member of the Village Conciliatory Board. He then started explaining to the elders how he had found the deceased committing adultery with his wife, and how he had chased and caught him. The elders then asked the deceased to answer these allegations. The deceased denied these allegations. At this stage accused said he became so angry that he jumped and stabbed him. He however does not know on which part of the body he stabbed him. They tried to arrest him but in vain.

At this stage I will pause and remark that the accused's story regarding "the cap in the underpart incident" is supported not only by the evidence of his father-in-law Hamisi Nowa (P.W. 3) but that of his wife Rukia (P.W. 5). Hamisi Nowa stated that during the morning of the day in question he and his elder brother, Rukia's father, had listened to a complaint by the accused against his wife stating that he had found a cap in the pocket of her underpant. He asked them to question his wife on this matter. Rukia herself stated in her evidence that the accused found a

cap in the pocket of her underpant before she had had time to dispose of it. She admitted that the cap belonged to the deceased who had given it to her. It is however not clear why. She also admitted that the deceased was her lover, she had finally given in to his persistent requests for her love, and after a lot of pressure from the learned defence counsel, she admitted having sexual intercourse with the deceased twice. However on the day in question she had gone to the well to draw water when on her way back, she saw the deceased who walked with her for some distance. He was telling her or rather asking her to leave her husband so that she could live with him. When they neared her home, the accused appeared and apprehended the deceased.

The defence to this killing is provocation, the accused stating that he was provoked by the deceased when he denied before the elders that he had found him with his wife. This denial so enraged him that he jumped on the deceased and stabbed him. Learned defence counsel put a lot of emphasis on the background to this incident, from the discovery of the cap in the underpant to the finding of the deceased with the accused's wife and his apprehension. He said that taking into account all these factors, the deceased's denial before the elders constituted the climax of a series of provocative acts. He stabbed the deceased while in this state. The accused had taken the deceased to the elders on the understanding that he would admit his misdeeds. He said that these factors are sufficient to reduce this offence to manslaughter.

Mr. Ismail for the Republic contended, and I think with some justification, that if the accused was not provoked into violence by a major incident such as finding his wife with the deceased, he could not possibly have been provoked into such vicious violence by a relatively minor act of a denial. However, while Mr. Ismail's argument is sound if the denial is taken in isolation, I think that in fairness to the accused and the defence case as a whole, the entire series of incidents leading to the attack must be considered and the "last straw" doctrine applied.

Provocation is a statutory defence. It is provided under Sections 201 and 202 of the Penal Code. Section 201 which creates the defence to the charge of murder provides:-

S. 201 - a person who unlawfully kills
another under circumstances which, but for the provisions of this Section would
constitute murder, does the act which causes death in the heat of

passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only."

S. 202 defines provocation as follows:-

"The term 'provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation or in relation of Master and servant, to deprive him of power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

The third paragraph to this section provides that:

"A lawful act is not provocation to any person for an assault."

The application of these Sections has been a subject of discussion in numerous cases both by this Court and the Court of Appeal. The most relevant consideration of these Sections appears in the case of *Sukusamaiundo s/o Mwamakosi v. R.*: [1958] EA 776 in which the alleged provocative act had some "history" as in this case. In that case, the deceased who knew that the appellant was after his wife, found, on return from a hunting trip, the appellant sitting outside his house. He asked the appellant what he wanted at his house. The appellant made no reply, thereupon the deceased proceeded to attack him viciously. In the ensuing struggle, the appellant stabbed the deceased with the sheath knife he had been carrying.

The Court of Appeal found that the deceased had been guilty of provocation of no small degree

and continued at page 778:

"While we agree that all the circumstances bearing upon the relationship between the parties are relevant matters for consideration, we do not find anything in the history of the case as sufficient to render the sudden attack by the deceased upon the appellant a lawful act, so as to bring it within the third paragraph of S. 202 of the Tanganyika Penal Code which reads:

`A lawful act is not provocation to any person for an assault.'"

The present case is the reverse of this. The provocative act pleaded by the accused is the deceased's denial before the elders that he had any adulterous association with the accused's wife. The question therefore is whether, on a proper construction of SS. 201 and 202 of the Penal Code, the deceased's denial was a wrongful act or insult. If it was, whether it was of such gravity as would deprive a reasonable man of his self-control and make him commit the type of assault committed by the accused, in other words whether the means of retaliation adopted by the accused was proportionate to the degree of provocation committed and whether this was done before the accused's passion had had time to cool.

Both gentlemen assessors had no difficulty in answering all those questions in the negative. I have nothing but respectful agreement with their opinions. For even if the accused had fond the deceased committing adultery with his wife, a version which was totally rejected by both assessors, his passion had clearly cooled off after walking one kilometre to the elders, and in fact his decision to have the matter settled by the elders, and his taking the deceased there, precluded him from indulging in any violence on the deceased. He had decided that the dispute shall be settled by established authority. Indeed that this was so is confirmed by the evidence of the elders that although certainly the accused was angry, he was calm when presenting his case to them. In these circumstances there was nothing wrongful or insulting in the deceased's disputing the allegations against him and putting the accused to proof. In the end the elders would have found out the truth and taken appropriate action. I would therefore say that even taking into account the history of the incident, starting from the time the accused found a cap in the pocket of his wife's underpant, through to the time he saw her talking to the

deceased, and making allowance for the "last straw" doctrine of cumulative provocation, the deceased's denial before the elders did not amount to sudden provocation within the meaning of S. 202 of the Penal Code as to make the defence of provocation available to the accused.

In the result, and with genuine respect to the gentlemen assessors, I am in complete agreement with their views that the accused's sudden fatal attack on the deceased was unjustified and unprovoked. The deceased's killing amounted to murder. Accordingly I find the accused guilty of the offence he stood charged on the information and convict him.

Kalume Wa Tuku v. R. [1954] EACA 201

The deceased woman had for many years lived with the appellant as his wife, but they had never married. On entering his hut one night, appellant found deceased in bed with a man. He attacked her with an axe and killed her.

SIR NEWNHAM WORLEY, SIR ENOCH JENKINS AND BRIGGS J, JA. - The appellant was convicted by the Supreme Court of Kenya at Mombasa of the murder of one Nyevea. We extended the time for appealing, as the memorandum had been filed too late in consequence of a mistake which was in no way the appellant's fault. We then allowed his appeal and substituted a conviction of manslaughter for that of murder. The sentence of death was accordingly set aside and a sentence of two years' imprisonment with hard labour was substituted. We now give our reasons for allowing the appeal.

The deceased woman had for many years been living with the appellant as his wife, although they were never lawfully married. On the night of the 2nd August, 1953, the appellant was away from home and returned early in the morning of the 3rd. On entering his hut he found the deceased in bed with a man named Abdulkadir. He attacked Abdulkadir with a *panga*, intending to kill him, and believed that he had done so, and thereafter attacked and killed the deceased with an axe. Abdulkadir recovered and gave evidence at the trial. The appellant admits freely these facts and states only that he acted as he did in uncontrollable anger at the woman's unfaithfulness. The learned trial Judge rightly considered that he was bound by the

decision of this Court in *Rex v. Ali s/o Lugulula*, (1938) 5 EACA 113, where it was held that the defence of provocation could not be relied upon in the case of a woman not regularly married, although found in the act of what would have been adultery, had there been a marriage. Counsel for the Crown cited also the decision of this Court in *Rex v. Wanusu s/o Mwanjia*, 6 EACA 76, to point the contrast between the law applicable where the parties are lawfully married and where they are not. It is clear from the judgment of the learned trial Judge that he regarded this distinction as a wholly artificial and unreasonable one, and that he would undoubtedly have found the appellant guilty only of manslaughter had the law permitted him to do so. On the authorities as they stood at the date of the judgment, there is no doubt that the learned trial Judge's decision was perfectly correct. Since that date, however, this Court has reviewed the authorities on provocation of the kind in question in the case of *Chacha s/o Wamburu v. Reg.*, 20 EACA 339. The decision in that case seems to us to show quite clearly that the distinction based on lawful marriage does not apply in this country. The mere fact that the parties were not married need not, in our view, prevent the seducer or the woman from committing a "wrongful act or insult" within the meaning of section 204 of the Penal Code and there is no reason why it should not be found, as the learned trial Judge clearly did find, that the provocation was sufficient in fact.

On the authorities as they now stand the defence of provocation was clearly open to the accused and we entirely agree with the learned trial Judge that he should have the advantage of it.

Mpagama s/o Chalo v. R. [1970] HCD n. 70

Hamlyn, J.

The accused is charged with the offence of murder, contrary to Section 196 of the Penal Code. The accused at the material time, was married to one Violet and had been her husband for some time. In about July, 1968 there had been a quarrel between the accused and the deceased and as a result the woman had returned to her father. The accused visited the father of the girl and asked him to re-pay the dowry of a number of cattle and goats which the accused had paid to him at the time of the marriage. The old man (who was alleged as a witness for the prosecution) informed the accused that he had not the cattle to pay to the accused. He told the court that he privately thought that perhaps his daughter would re-marry and that from the bride-price which

he obtained from the next husband he would be able to repay the accused the debt which he owed to him. The deceased daughter obtained a divorce from the local Primary Court and continued to live with her parents. On the day of the homicide, the accused met Violet some place in the bush, and she was with her new "boy-friend". He chased the man, who escaped, and thereafter chased Violet and stabbed her, killing her. The main question before the court is whether there was provocation such as to reduce the offence from murder to manslaughter.

Held: "Almost all the facts not being in dispute, a decision in this matter falls directly within the scope of Gogo law-all the parties (the accused, the deceased wife and the assessors) being of that tribe. The matter for decision is a very simple one and this I put directly to the assessors in my summing up. Where a divorce has been established by an act of a competent court and the woman returns to her parents, but the parents do not re-pay the bride-price, does any matrimonial relationship still obtain between the former spouses pending re-payment of the dowry? If such relationship still exists, to what extent will it enable the husband to control the acts of his former wife? The assessors asked for time to consider this problem and this was accorded to them. When the court re-convened, they gave their opinions and these are on the record. In brief, the local opinion of the questions put to them is this. Until re-payment of the dowry, the woman still owes duties to the former husband, though she may be living with her parents, she cannot form associations with other men, and it seems, is still in some way bound to the husband, despite the divorce decrees having been promulgated by the court. The assessors went further and advised that, if the husband finds the woman to be in association with another man, this would be a cause of provocation and would suffice to reduce the act which would otherwise be murder to mere manslaughter. It appears from the opinions of the two Gogo assessors that it would not be necessary for the husband to catch the former wife in sexual intercourse with another man, but the mere fact of her being in his company during the period prior to re-payment of the dowry, would suffice to reduce the offence to the lesser form of homicide.... I find..., in conformity with the opinion of the two assessors, that the sudden finding of the woman Violet in company with this man (and for the purpose of this Judgment it is unnecessary for me to find that they were having sexual intercourse when they were discovered) sufficed to provoke the accused that, in his fury, he knifed the woman. Such act in the community to which the accused belongs constitutes manslaughter and not murder with which he is charged and find him guilty of manslaughter."

R v. Danson s/o Simbacungile [1967] HCD n. 71

Otto, J.

Accused killed his mother-in-law during an argument, after spending some time drinking in a pombe shop.

Held: (1) The evidence showed sufficient provocation to vitiate the malice aforethought required for a conviction of murder, in view of the accused's evident intoxication: "... one must consider that because of the liquor that he had consumed he was more easily provoked, and under these circumstances one must **not** apply the test of the ordinary man." (2) "One must consider the effect of liquor in coming to a conclusion as to whether or not the accused person was able to form the necessary intent." Accused was convicted of manslaughter.

R. v. Mhamudu s/o Kibwana [1968] HCD n. 186

Hamlyn, J.

Accused's only possible defence to a murder charge was that shortly before the killing he heard deceased say to someone else that he (deceased) had signed a paper authorising the police to beat accused.

Held: "As a general rule ... spoken words alone cannot be the basis for provocation ... but variations of (the rule) may arise by virtue of the application of section 200 of the Penal Code in special instance among particular communities. Where spoken words are accepted in customary view as constituting provocation, the words must be of so devastating a character, of such overbearing force, as to shatter the self-control of a normal person of that community." Accused was convicted of murder and sentenced to suffer death by hanging.

6.Necessity

R. v. Abbasi Mohammed Comorian [1969] HCD ZANZ, n. 113

Kimicha, Ag. C.J.

The accused pleaded guilty to driving without a proper licence. His uncle had gone to Dar es Salaam to receive medical treatment. The accused received a message that his uncle had arrived at the Zanzibar Airport, and that he was very sick and needed to be collected. Thereupon the accused took his uncle's automobile to the airport to pick up his uncle and bring him to town, during which journey he was stopped by the police and found to be without a proper driving licence. The accused is a Post Office van driver. He holds a Government licence, which is issued free of charge to Government drivers, and which authorises him only to drive Government vehicles. The accused was fined Shs. 100/=.

Held: (1) On revision, the High Court has the power to consider the merits of a case, notwithstanding the fact that the accused pleaded guilty and the case came initially to the High Court for revision on the question of sentence only.

(2) The accused was faced with an emergency situation and it is hardly surprising that he drove to the airport without thinking about licensing technicalities. He was a competent driver; indeed, he made his living as a driver, so it cannot be argued that he was endangering the public safety. The High Court "did not think that any reasonable man placed in the situation of the accused of being required to meet a very sick man in a hurry would have behaved in a more reasonable manner than that pursued by the accused." Conviction quashed.

7. Judicial Privilege

Saidi Bakari Kionywaki v. R. [1967] HCD n. 443

Biron, J.

Accused was convicted of wrongful confinement. [P.C. s. 253]. He was a divisional executive officer in charge of self-help scheme. In his capacity as a justice of the peace, he issued a warrant for the arrest of complainant on a charge of obstructing the project contrary to Penal

Code section 89C (1) after the complainant had refused to participate in the project. Accused accompanied a special constable who arrested and handcuffed the complainant. He and the constable fled when the complainant's uncle threatened them with a spear, but the handcuffs were not removed for some twenty hours.

Held: (1) The substantive element of an offence under Penal Code section 89C (1) is dissuading others from participating in a self-help scheme, and the mere refusal to take part does not constitute an offence under that section. Therefore the arrest of complainant was unlawful. (2) Section 60(1) of the Magistrates' Courts Act provides that "No ... justice shall be liable to be sued in any court for any act done or ordered to be done by him in the exercise of his functions ... as a justice, whether or not such act is within the limits of his or the court's jurisdiction, if ... he believed in good faith that he had jurisdiction to do such act or make such order." Although this section applies specifically to immunity from civil process or liability, a fortiori such a person is immune from criminal liability for such an act. (3) 'Judicial functions' (functions of a justice) are defined as all acts emanating from, and appropriate to, the duties of the office of a judge, and includes the issuing of a warrant of arrest. [Citing *Calder v. Halket*, 18 Eng. Rep. 293; *Ratanlal and Thekore*, *The Law of Crimes*, 14th Edn., p. 148]. (4) The trial court erred in failing to consider whether accused believed in good faith that he was acting within his jurisdiction.

The Court stated, **obiter:** (1) Section 16 of the Penal Code, which provides that "(A) Judicial officer is not criminally responsible for anything done ... by him in the exercise of his judicial functions, although the act done is in excess of his judicial authority"

Mzee s/o Selemani v. R. [1968] HCD n. 364

Georges C.J.

Accused, a Divisional Executive Officer, was convicted of wrongful confinement [P.C. s. 253] and abuse of office [P.C. s. 96]. Complainant went to accused's house to seek a permit to hold an ngoma. When accused replied that no such permits were available, complainant apologised for bothering him. At this point accused rebuked complainant for interrupting a "bwana mkubwa" and ordered a clerk to arrest complainant. No warrant for the arrest was issued.

Complainant was charged with an offence contrary to section 124 of the Penal Code and was released on bail after being detained for short period. This charge against complainant was later dropped. Accused argued that because he was an ex officio justice of the peace, he was immune from prosecution as a judicial officer under section 16 of the Penal Code and section 60 of the Magistrates' Courts Act.

Held: (1) The immunity of Judicial officers extends only to those actions taken by the officer in the performance of a judicial function. [Citing Saidi Bakari Kionywaki v. R., Crim. App. 714-D-67, High Court Digest, Vol. I, case No. 443]. (2) Although the issuance of a warrant of an arrest has been held to be a judicial function [Citing Saidi Bakari Kionywaki v. R., supra], the arrest of a person without warrant for an offence allegedly committed within the officer's view does not constitute a judicial function. In the first case, the officer is to make an impartial evaluation of the grounds justifying the warrant; in the second case he is exercising a function similar to that of countless police officers. Therefore, there was no immunity and the conviction for wrongful confinement was proper. (3) Penal Code section 124 provides for the disobedience of a lawful order, and since no order has been made by accused which could be disobeyed, the arrest of complainant was unlawful. (4) Penal Code section 96 provides that any officer "who ... does or directs to be done, in abuse of the authority of his office, any arbitrary acts prejudicial to the rights of another, is guilty of misdemeanor." Accused knew that the arrest was wrongful, and the arrest was arbitrary and prejudicial to complainant. Sentence on first count reduced from nine months to three months; appeal otherwise dismissed.

Oddo Fungareza Meets v. R. [1969] HCD n. 252

Georges C.J.

Appellant was convicted of wrongful confinement c/s 253, Penal Code. The complainant, one Ahmed Mohamed, had been arrested and placed in the Primary Court lock-up for 3 days on the appellant's instructions, which were based on his suspicions that Ahmed was trading without a licence. The appellant was District Executive Officer and claimed to have acted according to s. 47 of the Magistrates Courts Act, Cap. 537, in his capacity as an ex-officio Justice of the Peace in the absence of the District Magistrate, who was away at the time. No charge was ever brought against Ahmed who was released on appellant's further instructions.

Held: (1) "The Magistrates' Court Act ... section 47 provides:- "A Justice of the Peace may arrest or may order any person to arrest any person who in his view commits a cognisable offence." The power is exercisable whether or not there is a magistrate in the District. ... The expression "cognizable offence" is defined in the Criminal Procedure Code Cap. 20 as "an offence for which a police officer may, in accordance with the first schedule hereto or under any law for the time being in force, arrest without a warrant." The offence of trading without a licence as not specifically listed in the first schedule. It falls, however, under the general classification in Division X Part B which deals with "Offences under Laws other than the Penal Code." This provides that where the offence is punishable with imprisonment for less than a year or with a fine only a policeman may not arrest the offender without a warrant. The penalty provided for trading without a licence c/s 3 of the TRades Licencing Ordinance Cap. 208 is "a fine not exceeding five hundred shillings" and "a further fine of twenty shillings for each day or part of "a day subsequent to conviction during which the contravention continues." The offence which Ahmed may have committed was not a cognizable offence and the appellant would not have had the power to arrest him without a warrant - even if it could be established that he had committed the offence." (2) "The appellant appears to be justifying the arrest not under section 47 but under section 50(b). This authorises a Justice of the Peace to - "remand in custody any person arrested with or without a warrant for a reasonable time not exceeding 7 days." It may well be that this section cannot in any event cover the facts of this case since the cause of the unlawful confinement was the appellant's order to the messenger to arrest without a warrant a person who had not committed any offence for which arrest without a warrant was permissible. Even if it could apply it is not available to the appellant in the circumstances of this case. There is a proviso to section 30(b) which reads as follows:- "A justice shall not remand any person in custody unless a case file is, or shall have been, opened for the matter and a charge is, or shall have been, drawn up and signed by a magistrate, justice or police officer. The power to remand cannot be exercised unless the conditions laid down in this proviso are fulfilled. In this case no case file was opened, nor was any charge signed either by the appellant, or a magistrate or a police officer. The fact that the court documents were under lock and key and unavailable, cannot be regarded as an excuse for non-compliance with this proviso. ... Any blank sheet of paper could be used to set out the particulars of the offence as required under the proviso and this could be signed by the appropriate officer.... The appellant's failure to obey the rules laid

down in the Ordinance as a pre-condition to his exercise of this power to remand, makes his use of that power unlawful." (3) "I have also considered whether or not the appellant can claim immunity by reason of section 16 of the Penal Code, which provides:- "Except as expressly provided by this Code, a judicial officer is not criminally responsible for anything done or omitted to be done by him in the exercise of his judicial functions. ..." In some circumstances a justice of the peace does act as a judicial officer. In others his functions are executive rather than judicial. In this case involving the arrest of an alleged offender without a warrant, his functions are executive rather than judicial and accordingly the immunity provided by section 16 does not avail. Accordingly the appeal against conviction is dismissed."

8.Compulsion and Coercion

Josia s/o Sonko v. R. [1972] HCD n. 60

Mustafa, J.A.

The appellant was convicted of murder, but as he was found to be under 18 years of age, was sentenced to be detained at the President's pleasure. There was plenty of evidence to sustain the conviction and the appeal was devoid of merit.

In the course of his defence, the appellant's counsel invoked the provisions of section 17 of the Penal Code which read -

"A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time it is being done or committed the person is compelled to do or omit to do the act by threats on the part of the offender or offenders instantly to kill him or to do him grievous bodily harm if he refuses; but threats to future injury do not excuse any offence."

The appellant had at one stage alleged that he and the deceased had gone fishing in a canoe. At the river bank they had met one Yeronimo. While in the middle of the river they came across a hippo, and both the appellant and the deceased became frightened and fell into the river. The

appellant had managed to swim ashore, but the deceased was without sufficient strength to do so. The appellant went and told Yeronimo of the incident and the appellant alleged that Yeronimo thereupon decided that the deceased should be killed and his property taken over. The appellant led Yeronimo to where the deceased was, and Yeronimo was alleged to have told the appellant that if he, the appellant, did not kill the deceased, Yeronimo would kill the appellant. Yeronimo then handed a panga to the appellant, and the appellant then cut the deceased several times with the panga after which Yeronimo and the appellant went to the deceased's house and shared out the property of the deceased.

The trial judge found that the alleged threat by Yeronimo to kill the appellant was not present all the time, and that once the panga was handed to the appellant by Yeronimo, the threat had ceased to exist, as the appellant was then in a position to withstand Yeronimo's attempt to put his alleged threat into effect. The appellant had therefore killed the deceased after the threat had ceased to exist, and therefore could not invoke the provisions of section 17 of the Penal Code in his defence.

However, the trial judge also said -

"It (that is section 17) is only available to an offender who is jointly charged with another or others"

The trial judge held that as the appellant was not jointly charged with another person, that was another ground why section 17 could not be invoked by him. With respect, we are satisfied that the trial judge was in error in so holding. The "two or more offenders" referred to in section 17 need not be jointly charged with an accused person, they could be abettors of the offence and indeed could be persons who had absconded and could not be traced or had died. The word "offenders" is not synonymous with "co-accused". However, this misdirection had not in any way prejudiced the appellant or occasioned any injustice as the trial judge had rightly found that the alleged threat by Yeronimo to kill the appellant had ceased to exist before the appellant cut and killed the deceased.

We accordingly dismiss the appeal.

9.Immaturity

R. v. Owen [1830] 4C. and P. 236

Owen was charged for stealing coals. The accused was ten years of age, and it was proved that, on 28 January, she was standing by a large heap of coals belonging to Messrs Harford and Bros., and that she put a basket upon her head. This basket was found to contain a few knobs of coal, which, in answer to a question put to her by the witness for the prosecution, she said she had taken from this heap. When the judge was about to call upon the accused to defend herself, Carrington, the **amicus curiae** suggested that she was entitled to an acquittal because of immaturity.

LITTLEDALE, J., (in summing up). In this case there are two questions: First, did the prisoner take these coals? and secondly, if she did, had she at the time a guilty knowledge that she was doing wrong? The prisoner, as we have heard, is only ten years of age; and, unless you are satisfied by the evidence that, in committing the offence, she knew that she was doing wrong, you ought to acquit her. Whenever a person committing a felony is under fourteen years of age, the presumption of law is that he or she has not sufficient capacity to know that it is wrong; and such person ought not to be convicted, unless there be evidence to satisfy the Jury that the party, at the time of the offence, had a guilty knowledge that he or she was doing wrong.

Verdict, not guilty.

