

**LAW REPORTS**  
**OF**  
**EASTERN NIGERIA**  
**1966-67**

**VOLUME X**  
*January 1966-26th May 1967*

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# **LAW REPORTS**



**LAW REPORTS**  
**OF**  
**EASTERN NIGERIA**

**VOLUME X**

CONTAINING  
SELECTED JUDGMENTS DECIDED FROM 1ST JANUARY  
1966-26TH MAY, 1967

BY THE  
HIGH COURTS OF FORMER EASTERN NIGERIA

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### JUDGES OF THE HIGH COURT OF EASTERN NIGERIA

<i>Chief Justice</i>	...	...	...	...	THE HON. SIR LOUIS MBANFO.
<i>Judges</i>	...	...	...	...	THE HON. MR JUSTICE SAVAGE.
					THE HON. MR JUSTICE KAIWE.
					THE HON. MR JUSTICE PHIL-EBOSIE.
					THE HON. MR JUSTICE EGBUNA.
					THE HON. MR JUSTICE BALONWU.
					THE HON. MR JUSTICE ALLAGOA.
					THE HON. MR JUSTICE NKEMENA.
					THE HON. MR JUSTICE KASSIM.
					THE HON. MR JUSTICE ANIAGOLU.
					THE HON. MR JUSTICE OPUTA.
					THE HON. MR JUSTICE KALU ANYA.



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Calabar High Court, 21st February, 1966—C/60C/65

ANIAGOLU, AG. J.

THE STATE

v.

BONIFACE ENWEREM

*Criminal Law—attempt averred in the charge but evidence discloses full offence—conviction for attempt valid—section 170 of the Criminal Procedure Law.*

The accused was charged with attempt to have carnal knowledge of a girl of four and a half years. The story of the girl and the evidence of the doctor who examined her proved that there was penetration which broke the girl's hymen and that she was through the intercourse infected with gonorrhoea. The accused was not charged with the full offence of rape nor was the charge of attempted rape amended.

*Held.*—Pursuant to section 170 of the Criminal Procedure Law, a person charged with an attempt to commit an offence may still be convicted and punished of the attempt even though the evidence establishes the commission of the full offence.

*Oguchi*, State Counsel for the State.  
Accused in person.

**Aniagolu, Ag. J.:** The case, in which the accused person, one Boniface Enwerem, is charged on one count of the information with having attempted to have unlawful carnal knowledge of the prosecutrix, one Lawrenca Odoemenam, arose in the village of Mbarakom, in Creek town, within the Calabar Judicial Division, and is alleged by the prosecution to have taken place on 23rd December, 1964.

The case put forward by the prosecution in a nutshell was that on 23rd December, 1964 the accused, Boniface Enwerem (hereinafter called the accused) invited the prosecutrix and one Cecilia, a little girl of about four and a half years of age, to his house. He gave them "akara" balls (a Nigerian food produced by frying ground moistened beans in very hot oil producing thereby round little balls of beans), and garri to eat. While in the house of the accused, the accused placed the prosecutrix on a bed in his parlour and there carnally knew her. After the sexual connection the prosecutrix returned to their house with the said Cecilia. Later the mother of the prosecutrix, one Helen Odoemenam, noticed some discharge on the lap of the prosecutrix. She was alarmed and questioned the little girl who narrated to her how the accused had earlier placed her on his bed and had her carnally known. Helen promptly went to the house of the accused, a house which was only about 100 yards away, and questioned the accused on whether it was true that he had sexual connection with the prosecutrix (P.W. 1). The accused agreed but begged Helen not to put him in disgrace by revealing the incident. Helen's husband, one Matthias Odoemenam, (P.W. 4) was away to Aba. Unable to handle the matter in the absence of her husband Helen told the accused that the matter would be dealt with on her husband's return. Her husband, Matthias, returned about 5 a.m. the

The State  
v.  
Boniface  
Enwereem  
Anigolu,  
Ag. J.

next morning, and was immediately told of what happened. About an hour later, at about 6 a.m. Matthias went to the house of the accused and questioned him on whether, and why, he committed the sexual offence on the prosecutrix. The accused admitted that he had the sexual connection with the prosecutrix but begged Matthias not to take him to court or let people hear about it. The accused offered him the sum of £4 together with three tablets of M & B which he asked the Odoemenam family to accept and to treat the prosecutrix with. Matthias refused to compound the felony or to accept the £4 but received the M & B tablets with the intention of handing them to the police. Matthias left the house and went to one Evaristus Njoku, (P.W. 5) another Ibo man who acted, and was regarded as, the head of the Ibo elements in Mbarakom, and reported the incident to him. Evaristus was once a timber contractor and the accused was his sawyer then. Later that day the accused went over to the house of Evaristus and there met Matthias and Evaristus. Evaristus then asked the accused if he had carnal knowledge of the prosecutrix. The accused admitted but begged Evaristus to intervene in the matter by asking Matthias to accept the £4 he offered and to refrain from reporting the matter to the authorities. Evaristus did not accede to his pleas but asked Matthias to report the matter to the police whereupon Matthias reported the matter to the police who took the matter and later sent both the accused and the prosecutrix to a medical officer one Dr Effiong Akpan Okon (P.W. 2), who medically examined both of them, on 8th January, 1965. The Doctor found that the girl's hymen was broken and that there was some purulent discharge from her vulva orifice a specimen of which was scientifically examined in the laboratory, the result of which examination revealed that the girl was infected with gonorrhoea. The result of the Doctor's examination of the accused revealed that the male organ of the accused was filthy with rash and that copious pus was exuding from his urethra orifice. A scientific laboratory test of the said discharge revealed that the accused was also suffering from gonorrhoea.

The story put forward by the accused by way of defence was that he did not know the prosecutrix carnally and that the case for the prosecution was a concoction heaped upon him by Helen, the mother of the prosecutrix who, having got the wind that he gave a sum of £6 10s which he earned and saved from working at the Calaro Estate, Calabar, to his father-in-law who also lived at Mbarakom sought ways and means of blackmailing him into giving her and her family part of the said money. Consequently, she, actively aided by her husband Matthias and Evaristus, fabricated a false story that he had had sexual intercourse with her daughter, the prosecutrix, all with a view to getting him pay them all or part of the said £6 10s—a money making racket which his father-in-law had in the meantime joined because, as it later transpired, he had made use of the money and was eager to have him put away (possibly into a prison yard) to a place from where he would not have the opportunity of making a demand for the return of the money. Unwilling as the prosecutrix was in supporting a false charge against the accused, the prosecutrix stated, so the defence continued, that the accused did her nothing but her mother, Helen, eager not to lose her golden opportunity of making money from the accused, beat up the prosecutrix into saying that the accused had sexual intercourse with her.

Before dealing with the case presented by the prosecution and the defence on the issue of the sexual intercourse I shall first deal with the age of the prosecutrix. Dr Okon has testified that she was four and a half years

of age on the 8th day of January, 1964 when he examined her. The charge against the accused has described the age of the prosecutrix as four and a half years. Section 209 of the Criminal Procedure Law enacts that:—

“Where in a charge for an offence, it is alleged that the person by or in respect of whom the offence was committed was a child or young person or was under or above any specified age, and he appears to the Court to have been at the date of the commission of the alleged offence a child or young person, or to have been under or above the specified age, as the case may be, he shall for the purposes of this law be presumed at the date to have been a child or young person or to have been under or above that age, as the case may be, unless the contrary is proved.”

I have watched the prosecutrix in Court and from my observation of her I am satisfied that she is a girl of tender years and that her age given by the Doctor as four and a half years is in agreement with my observation of her. I accept the evidence as to her age, namely, that she was on the 8th of January, 1964 of the age of four and a half years. Indeed the statement Exhibit 3, which the accused says was forged by the police puts the age of the girl at about five years. I shall, however, deal with the weight to be attached to that statement in due course.

I now turn to the facts about the carnal knowledge of the prosecutrix which has been put in issue. Dr Okon (P.W. 2) has given clear evidence which shows that some one had carnally known the prosecutrix. Her hymen was ruptured. There were bruises on and around her vulva orifice. There was some purulent discharge from her vulva a discharge which disclosed gonococcal infection. She had not had this discharge before otherwise her mother would not have been alarmed when she saw the smear on her laps. There was therefore no doubt that some one had sexually tampered with the prosecutrix. The prosecutrix says it was the accused. The accused says it was not him. To resolve this difference I am thrown back to the statement (Exhibit 3) tendered by the prosecution. The accused says that this statement so far as he is concerned is a forgery. P.W. 6, James Ogbolu, who took the statement from the accused does not live at Mbarakom. Nothing whatever has been alleged against him personally by the accused. There appears to be no reason whatsoever why he should forge a statement and pin it unto the accused. The contents of the statement follow a logical sequence including how the prosecutrix and the other children came to the house of the accused and how the accused gave them garri and “akara” balls to eat. Nothing that has transpired in Court or from the evidence of the accused has led me to the conclusion that the statement was forged.

“The only questions to be considered in deciding whether a confession is or is not admissible are:

- (1) Was any promise of favour, or any menace or undue terror made use of, to induce the prisoner to confess?
- (2) If so, was the prisoner induced by such promise or menace, etc., to make the confession sought to be given in evidence?  
If the answer to both these questions be in the affirmative, the confession will be inadmissible.”

(35th Edition Archbold Criminal Pleading Evidence and Practice paragraph 1115.)

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Again the confession in the statement tallies with the evidence given by P.W. 3 Helen Odoemenam and P.W. 4 Matthias Odoemenam, that the accused admitted having had sexual intercourse with the prosecutrix. These two witnesses are the mother and father of the prosecutrix. One might argue that their evidence must be looked upon with circumspection in view of their relationship with the prosecutrix. If so, what of the evidence of Evaristus Njoku (P.W. 5)? He bears no relationship to the parties other than the fact that they are all Ibos. Indeed, if he were to have a jaundiced approach to the issue at all he would be more favourably disposed towards the accused who was his erstwhile sawyer when he was a timber contractor. No suggestion has been made by the accused that his parting from Evaristus after he ceased to be a timber contractor was anything but cordial. The accused's contention that the evidence of Evaristus was motivated by greed to get at his £6 10s and that he, Helen and Matthias, and indeed his father-in-law, joined in a cobweb of conspiracy against him in order to snatch his said £6 10s, appears to me far-fetched and unreasonable. The simple truth is that the accused made the statement, Exhibit 3, freely and voluntarily. The accused may have hoped, without anyone putting the hope into him, that he may in the end be let off, or he may have wanted, out of remorse of conscience, to make a clean breast of the whole thing; the one thing which I have found is that he made the statement without any promise of favour, menace or terror, and was induced by no one into making the statement. Also, it is clear, and I so find, that the statement was not forged.

Helen (P.W. 3), Matthias (P.W. 4) and Evaristus (P.W. 5) all have testified that the accused confessed to having had carnal knowledge of the prosecutrix. I accept their evidence as true. Could the accused person have confessed to having had carnal knowledge of the prosecutrix without in fact having known her carnally, and without there being any inducement, promise of favour, or undue terror from anyone as I have found? I think not. The accused confessed to the deed because he in fact committed the act. I find, therefore, that on or about 23rd day of December, 1964 the accused person carnally knew Lawrenca Odoemenam and in the process infected her with venereal disease, namely, gonorrhoea. The information charges the accused person with having attempted to have carnal knowledge of the prosecutrix. On the evidence of the doctor, I hold that the proper finding of fact is, and should be, that the accused had carnal knowledge of the girl as the act had gone beyond an attempt and as the crime had been completed. There was penetration resulting in the rupture of the hymen even though the penetration is not of such a depth as would have wholly let in the accused's male organ into the vagina of the prosecutrix. Even though charged with attempt but the finding is that the full offence has been committed, the accused is not thereby entitled to an acquittal, for, *section 170 of the criminal Procedure Law* provides that:—

“Where a person is charged with an attempt to commit an offence but the evidence establishes the commission of the full offence the accused person shall not be entitled to an acquittal but he may be convicted of the attempt and punished accordingly.”

In the light of all the foregoing I accept the evidence of Lawrenca Odoemenam, whose story has been amply corroborated, that accused had carnal knowledge of her on or about 23rd December, 1964 in the circumstances

described by her. The act is unlawful, the consent or no consent of the girl being immaterial. Were her consent material, the tenderness of her age makes it impossible for her to form the intent necessary for a consent.

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Ag., J.

I find the accused, Boniface Enwerem, guilty as charged.

*Finding.*—Guilty.

*Allocutus.*—This is a conspiracy. I did not know the prosecutrix carnally. I have nothing more to say.

*Court.*—It was said in *R. v. Harling* (1938) 1 All E.R. 307 at 308-309 that:

“It is not necessary to say that the crime of rape must always be regarded as a serious crime. When the offence is committed by a strong, healthy man on a child of thirteen years in spite of that child’s resistance, it becomes not only a bad offence but a horrible offence . . .”

If the offence when committed on a girl of thirteen years is horrible, it is indeed abominable when committed, as in this case, on a girl of four and a half years. In this case the crime must be visited with severe punishment.

*Sentence.*—Twelve years I.H.L.

*Order as to Exhibits.*

Exhibit 4 (M and B tablets) to be destroyed. The accused is reminded of his right to appeal to the Supreme Court within thirty days if he so desires.

*Accused convicted.*

Enugu High Court, 23rd February, 1966—E/41/60

MBANEFO, C.J.

EASTERN NIGERIA DEVELOPMENT  
CORPORATION

*Plaintiff/Applicant*

v.

DR L. O. UWAECHIA

*Defendant/Respondent*

*Practice and Procedure—relistment of suit struck out after withdrawal—  
High Court Rules Order 47 and Order 41 rule 6.*

The plaintiff/applicant sued the defendant/respondent in the High Court. The parties agreed to settle the matter out of court on condition that the defendant refunded the summons fees which he did. Whereupon the plaintiff's counsel withdrew the case and the Court struck it out. This was on the 30th of December, 1960.

Five years later—on the 7th of December, 1965—the plaintiff filed an application to relist the suit deposing in the accompanying affidavit that the negotiation failed and explaining the delay in bringing the application to the Court. At the hearing of the motion the defendant/respondent opposed the application arguing that since the case was actually withdrawn there was nothing to relist, and that relistment of the suit after such a lapse of time was prejudicial to a defence of limitation open to him in a fresh action.

Power to withdraw a suit before the hearing date is contained in the High Court Rules Order 47 but these rules do not provide the order the Court must make in the circumstances. Rule 6 of Order 41 which deals with another subject, however, provides that a suit struck out may be relisted.

*Held:*

1. An order striking out a suit (whenever made) contemplates that the suit may be replaced in the cause list by leave of the Court.
2. Order 41 rule 6 prescribes no time limit within which application for relisting should be made, but the granting of leave is in the discretion of the Court and this should be exercised judiciously. In doing so, the Judge should take into consideration all the circumstances including such questions as the extent of the delay in making the application, the reasons therefore, the nature of the claim and the effect of granting leave upon the rights of the other party.
3. In this case, the defendant (who filed no affidavit) has not stated how his position has been affected or altered by the delay in applying to relist or that he has in any way been led to believe that the matter was at an end and would never be reopened.

Case relied upon:—

*Ikomi v. Agbeyegbe* 12 W.A.C.A. 379.

*Obi-Okoye* for the plaintiff.

*P. O. Balonwu* for the defendant.

**Mbanefo, C.J.:** This is an application by the plaintiff Corporation to relist this case which was struck out on the 30th December, 1960. The application was filed on the 7th December, 1965, five years after the case was struck out.

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Counsel for the defendant has opposed the application on the ground that there is nothing to relist. He says that the case was struck out on the application of the plaintiff/Corporation to withdraw it. He referred to Order XLVII of the High Court Rules dealing with discontinuance or withdrawal of suits and pointed out that it does not provide for striking out a case and said that the order striking out the case must be read as an order dismissing the case. Rule 1 of Order XLVII provides that if, after the date fixed for hearing, the plaintiff wishes to withdraw any suit such withdrawal may be allowed on such terms as to costs and as to subsequent suit and otherwise as to the Court may seem just. When counsel for the plaintiff/Corporation applied to withdraw the case, he said it was pursuant to an agreement with the defendant to settle the matter out of court. The Court made an order simply striking out the case. Order XLI rule 6 provides that "any cause struck out may, by leave of the Court, be replaced on the cause list on such terms as to the Court may seem fit". Order XLI deals with non-attendance of parties and rule 2 provides that if the plaintiff fails to appear the Court shall, unless it sees good reason to the contrary, strike out the case. When the Judge, in making the order on the plaintiff/Corporations application to withdraw, decided to strike out the case, he must be deemed to have in mind the effect of Order 41, rule 6. That rule interprets the effect of an Order striking out a case. The Order of the Court has not been appealed against and all the Court has to do here is to interpret its effect. It cannot have any other effect than the one set out in Order 41 rule 6, namely that any suit struck out, may with the leave of court, be replaced on the list. That is what the application before the Court seeks to do.

Order 41 rule 6 prescribes no time limit within which application for relisting should be made, but the granting of leave is in the discretion of the Court and this should be exercised judicially. In doing so, the Judge should take into consideration all the circumstances including such questions as the extent of the delay in making the application, the reasons therefor, the nature of the claim and the effect of granting leave upon the rights of the other party. (*Ikomi v. Agbeyegbe* 12 W.A.C.A. 379 at page 280.)

The applicants in their affidavit said they had been trying to negotiate, that the negotiation became protracted owing to the transfer of the defendant from Enugu to Port Harcourt and from Eastern Nigeria to Lagos. There is no counter-affidavit and the facts alleged by the applicants have not been countered. In the course of argument defendant's counsel mentioned that if the application is granted the defendant will be deprived of the opportunity of setting up a plea of limitation of action which would be open to him in a subsequent action. That may be so, but I have no evidence before me on which I can say definitely that the plea, if made, would necessarily succeed. The defendant has not stated how his position has been affected or altered by the delay in applying to relist or that he has in any way been led to believe that the matter was at an end and would never be re-opened. The order striking out the case contemplates that the case may be restored on the list with leave of court.

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It is also stated that as a condition for agreeing to withdraw the case the applicants were paid the cost of summons. The Court probably had that in mind when it made no order as to costs after striking out the case. Considering all the circumstances of the case it seems that reason and justice require that the application should be granted. I order that the case be relisted on the condition that the plaintiffs restore to the defendants the cost of summons which he had paid as a condition for withdrawing the case from court. No order as to costs.

*Suit relisted*

*Editorial note.*—*Quare* whether striking out is an appropriate order when a case is withdrawn under Order 47 of the High Court Rules.

Calabar High Court, 9th March, 1966—MISC/6/64

ANIAGOLU, J.

THE STATE

v.

PROVINCIAL SECRETARY, UYO PROVINCE

EX PARTE: 1. ASIBONG UDO IBIT

2. EDET UDO IBIT

3. OKOKON UDO IBIT

*Certiorari*—applicant after obtaining leave, defaulted in applying for final order and in putting the plaintiff on notice—plaintiff moved court to strike out the *certiorari* proceedings but exhibited no affidavit—whether he could move and whether he could be heard on facts—High Court Rules Order 35 Rules 9 and 23.

The applicants by motion *ex parte* applied to the High Court for an order of *certiorari* to issue for the purpose of removing into the High Court, for the purpose of their being quashed, the decisions of the Provincial Secretary, Uyo Province, and the Assistant Divisional Officer in a land case between Edem Udo Ekong and Asibong Udo Ibit, one of the applicants. The land case had been heard and determined at first instance in the Native Court of Northern Uruan holden at Mbiaya on the 17th day of April, 1952. The High Court on the 31st day of May, 1965, granted the application giving leave to the applicants to apply for an order of *certiorari* within seven days, such application to be made on notice to the plaintiff in the Native Court case namely Edem Udo Ekong. The applicants failed to comply with the said order of the High Court. Subsequently, Edem Udo Ekong filed a motion on notice praying the High Court to dismiss or strike out the application for an order of *certiorari* on the grounds set out in the motion paper. No affidavit was filed in support of the motion.

Counsel for the applicant informed the Court that he did not file an affidavit and was going to rely entirely on law. He then proceeded to narrate the facts upon which he based his application. Objection was raised that the motion was not supported by affidavit and that the applicant was bound to file an affidavit in support of his motion. Furthermore, that the applicant (Edem Udo Ekong) had no *locus standi* in the *certiorari* proceedings, the application being by motion *ex parte* and notice not having been served on him.

*Held:*

1. A mover of motion on notice who has not filed an affidavit cannot be heard in respect of the facts on which he relies except by leave of the Court.
2. The applicant, not having been served with notice of the *certiorari* proceedings, has no *locus standi* in the matter, accordingly his motion will be dismissed.

Case referred to:—

*Re Thom* (1918) 18 S.R.N.S.W. 70.

*Oku* for the applicants.

*Udofia* for the respondents.

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Aniagolu, J.

**Aniagolu, J.:** An application by motion *ex parte* was made by the three applicants Asibong Udo Ibit, Edet Udo Ibit and Okokon Udo Ibit seeking for order *nisi* for an order of *certiorari* to issue for the purpose of removing into the High Court, with a view to their being quashed, the decisions of the Provincial Secretary, Uyo Province, and the Assistant District Officer, in a land case Suit No. 96/51-52 between Edem Udo Ekong and Asibong Udo Ibit, heard and determined, at first instance in the Native Court of Northern Uruan holden at Mbiaya on the 17th day of April, 1952.

It would appear that on the 31st day of May, 1965, the High Court heard and granted the application giving leave to the applicants to apply for an order of *certiorari* within seven days, such application to be made on notice to the plaintiff in the Suit 96/51-52 aforementioned namely, one Edem Udo Ekong, for himself and on behalf of his people, they being members of the House of Obong Udo Eka Okon a people who would be affected by the outcome of the application for an order of *certiorari*. The applicants Asibong Udo Ibit and his people failed to comply with the said order of the Court, having failed either to file the application for the order of *certiorari* or to serve a notice as ordered upon Edem Udo Ekong.

Subsequently, Edem Udo Ekong, who, it would be remembered, is no party to the motion *ex parte* for leave to apply for the order of *certiorari* and who has not been put on notice, filed the present motion on notice praying the Court:

“for an order to dismiss or strike out the application by the applicants for an order of *certiorari* or for any other order that the Court may deem fit to make in the premises.”

The grounds for the application were set out in the motion paper as follows:—

“AND FURTHER take notice that the grounds upon which this application is made are as follows:—

1. That the applicants have not complied with the provisions of Order XXI, rule 2.
2. That the applicants have failed to comply with the order made by this Honourable Court on 31st May, 1965, to file the motion and serve on the parties concerned.
3. That the application is an abuse of the process of the Court.”

No affidavit was filed in support of the motion. Counsel for the applicant, Mr Oku, has told the Court that he did not file an affidavit in support of the motion because he was going to rely entirely on law and that he considered the filing of an affidavit, in the circumstances, as unnecessary. Having said this Mr Oku proceeded to narrate the facts upon which he based his application, namely, that an order was made by court on 31st May, 1965, that Asibong Udo Ibit and his people should file within seven days and serve on his client, the application for order of *certiorari*; that they failed to comply with the order: that his clients hands were tied in the use of the land in dispute in spite of the fact that they were adjudged to be the owners of the land; that Asibong Udo Ibit and his people filed the application for leave to apply for an order of *certiorari* simply in order to obstruct the members of the House of Obong Udo Eka Okon from the legitimate use of the land, they (the Asibong group) being still in possession of the land.

Two objections were raised to the present application, namely:—

- (i) That the motion is not supported by affidavit and that the applicant was bound to file an affidavit in support of his motion.
- (ii) That the applicant has no *locus standi* so far in the *certiorari* proceedings, the application for leave being by motion *ex parte* upon which he cannot be heard, and notice, as ordered by court, not having been served on him, the time for service of the said notice having expired.

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In respect of the first objection Order 35 of the Eastern Nigeria High Court Rules deals with interlocutory applications.

Rule 2 of the said order provides that:

“Unless the Court shall otherwise order, no motion shall be entertained until the party moving has filed a motion paper, or made verbal application to the Registrar, distinctly stating the terms of the order sought.”  
Rule 4 provides that:

“There shall be filed with the motion paper all affidavits on which the person moving intends to rely.”  
Rule 20 stipulates that:

“Along with the notice of motion there shall be served a copy of any affidavit on which the party moving intends to rely at the hearing of such motion.”

Mr Oku, as I have said, has stated that he did not file an affidavit because he did not want to rely on any affidavit and that he was relying on law. Before having recourse to the law he, however, proceeded to depose to facts which he considered necessary that the Court should hear and know about before determining the law on which he relied. The question is: Can Mr Oku, as of right, be heard on those facts without deposing them on an affidavit?

Rule 23 of the High Court Rules seems to answer the question in the negative. The rule provides that:—

“Oral evidence shall not be heard in support of any motion unless by leave of the Court. Where the party moving is illiterate, the Court may direct evidence to be taken by the Registrar, or other fit officer of court, and the minutes of such evidence may be used as an affidavit.”

I do not see how the mover of a motion on notice can be heard in respect of the facts on which he relies if under rule 23 he cannot adduce oral evidence in support of the motion except by leave of the Court, and if, according to Mr Oku, affidavit evidence is unnecessary where, as in this case, he would ultimately rely on the law. I use the word “ultimately” because there would hardly be a case in which some facts, however, scanty, would not be relied on in support of the arguments on law in a motion on notice. Affidavit is not a pleading. In the Australian case of *Re Thom* (1918) 18 S.R.N.S.W. 70 cited at page 516 of volume 22 of the *English and Empire Digest* an affidavit is said to be a statement of facts for the information of the judicial tribunal. How else would the Court be informed of the facts of the motion, where oral evidence is not allowed to be led except by affidavit verified as to those facts?

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The facts must be proved to exist and the onus of proving the existence of those facts lies on the applicant in this case. This accords with the provisions of section 134 (1) of the Evidence Law which provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Mr Oku had promised that he would at the end of his argument provide the Court with authorities which support his view that he can, without leave of court, file a motion without an accompanying affidavit, and proceed to rely on facts, however scanty, which he would simply narrate to court from the Bar, when his main reliance would be on the law. At the end of his address he neither cited an authority nor made any further allusion to the said promise. Basically, the principle that the opposite party should be acquainted with the facts on which one is relying (but not the evidence by which one intends to prove the facts) would have little meaning if one were permitted to subject the opposing party to the shock treatment of springing on him a surprise in open court by alleging facts which the opposing party had neither the opportunity, by way of counter-affidavit to rebut, nor the chance in court (except the Court specifically so orders) to challenge by way of cross-examination.

I am of the view, therefore, that a motion filed, as in this case, must be accompanied by affidavit verifying the facts on which the mover is to rely.

We now deal with the “locus” of the applicant in this matter. The motion on which Asibong Udo Ibit and his people applied for leave of the Court to apply for order *nisi* for certiorari was made *ex parte*. Order XXXV rule 9 of the High Court Rules specifically makes provisions regarding the position of parties to such proceedings as regards their being heard during the hearing of the proceedings. It provides that:—

“Any party moving in Court *ex parte* may support his motion by argument addressed to the Court on the facts put in evidence; and no party to the suit or proceeding, although present, other than the party moving, shall be entitled to be heard.”

Rule 11 empowers the party affected by the order made under rule 9 to cause the order to be served on him and within seven days of the said service, to apply to court by motion to vary or discharge the order. The Court may, on such application being made, vary or discharge the order, or refuse the application, as the case may be. The applicant in the instant application has neither applied for, nor was served with the order *nisi* for certiorari made on the 31st day of May, 1965. The order made by the Court that he be placed on notice by Asibong Udo Ibit and his people was not complied with. The effect of this would have been that the certiorari proceedings would have lapsed without the present applicant knowing anything about it. From no where, as it were, the applicant in the present motion, has jumped into a matter which has not been made to concern him. There is, of course, nothing preventing him from bringing a substantive action in court if he feels that he has in any way been wronged by anyone. He has not done so.

For the foregoing reasons it is my view that the applicant in the instant motion has no *locus standi* in the *certiorari* proceedings and that the objection to that effect raised by Mr Udofia is well founded. The motion is, accordingly dismissed.

Udofia says that the respondents put in four appearances. Asks for thirty guineas costs. Oku says that it was only on two occasions that respondents' counsel appeared. Offers three guineas costs.

I award the respondent the sum of seven guineas costs.

*Motion dismissed.*

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Onitsha High Court, 4th April, 1966—O/19/57

KAINE, J.

AJANA ENWELUM AND OTHERS *Judgment-Creditors*

*v.*

NNAGBO EKWESIE AND OTHERS *Judgment-Debtors*

*Execution—application for committal—original order not attached.*

The judgment-creditors brought an application to the Court for committal of the judgment-debtors for disobedience of an order of injunction for trespass to land made against them. The respondents who were served with the motion were before, as required by the rules, served with Form 49 to which was attached a copy of the minutes of the judgment instead of the formal order of the Court.

*Held.*—Failure to serve on the judgment-debtor the original formal order drawn up and signed by the Judge, is fatal to the application.

*Anyaegbunam and Ajagu* for the applicants.

*Mogbo* for the respondents.

**Kaine, Ag. C.J.:** The plaintiffs/judgment-creditors in Suit No. O/19/57 have applied to this Court that forty-two people mentioned in the Schedule be committed to prison for disobeying the order of this Court made on the 13th day of April, 1960, enjoining and restraining the Abube people as such from further trespass on Agu Okpu Ani Land situate at Nando and/or for having neglected to obey the said order.

I have to start by saying that the affidavits of service before me show that only two of the forty-two persons sought to be committed to prison were personally served with Form 49 together with a copy of the motion and affidavit namely Onwesi Ogua and Ekwuo Esodo; that forty others were purported to have been served through their leader whose name was not given. I am of opinion that the latter is no good service on the forty men.

Mr Mogbo the learned counsel for the respondents also pointed out that the order served on the respondents was just a copy of the minutes of a portion of the judgment and not a formal order drawn up and signed by a Judge. He then refers to the case of *Chief Ekem Ebo and Another v. Okpata and Another* E/3/1957 decided by Sir John Ainley, Chief Justice on the 6th day of June, 1959 where he held that what should be served on the persons sought to be committed is a formal order and not a copy of the minutes of the judgment which embodies the injunction. I have to say that I agree with him. I am also of opinion that this is fatal to the application for committal.

*Motion is dismissed.*

Calabar High Court, 2nd May, 1966—C/38C/65

ANIAGOLU, J.

NNAMA LINES LIMITED

*Plaintiff*

v.

1. ELDER DEMPSTER AGENCIES LIMITED }
2. GEORGE DIKE }

*Defendants*

*Practice and Procedure—preliminary issue—when it ought to be discouraged by the Court.*

The first defendant had challenged the right of the plaintiff to bring this action against it on the ground that the plaintiff was a stranger to the contract between the first and second defendants. Although the Statement of Claim averred that the first defendant sold a "marine craft" to the second defendant, the defence filed by the first defendant denied this and said that what was sold was a "scrap" under a written agreement that the scrap should not be resold to be used for trade or hire. It went further to aver that when the second defendant was turning the scrap into a ship letters were written to him by the first defendant pointing out that his act was in breach of the arrangement between them. None of these agreements and letters was before the Court yet. The right of the plaintiff to maintain the action against the first defendant depended on the evidence to be resolved at the hearing.

*Held.*—Although it is always useful, and indeed necessary, that preliminary points which raise serious points of law, and which if decided in favour of the party objecting, would dispense with any further trial, should be decided at the earliest stage, an order for the trial of such preliminary issue should be made only in respect of matters on which no further light would be thrown at the trial, and should not be made in respect of matters which by reason of the obscurity either of the facts or the law should be decided at the trial.

Cases referred to:—

*Windsor Refrigerator Company Limited and Another v. Branch Nominees Limited and Others* (1961) 1 All E.R. 277.

*Summer v. William Henderson and Sons Limited* (1963) 2 All E.R. 712 and 713.

*David v. Abdul Cader* (1963) 1 W.L.R. 834.

*Western Steamship Company Limited v. Amaral Sutherland and Company Limited* (1914) 3 K.B. 55.

*M. Isaacs and Sons Limited and Others v. Cook* (1925) 2 K.B. 391.

*Iredu* for the plaintiff.

*Okon (D. Douglas with him)* for the first defendant.

*Nyon* for the second defendant.

**Aniagolu, J.:** The preliminary point raised in this case challenges the right of the plaintiff to bring this action against the first defendant on the ground that the plaintiff company is a stranger to the contract between the first and second defendants.

Nams  
Lines Ltd.  
o.  
Elder  
Dempester  
Agencies  
Ltd.  
and Other  
Anigolu, J.

Paragraph 2 of the Statement of Claim avers that the first defendant sold a "marine craft known as *M.V. Esenne*" to the second defendants. Paragraph 2 of the Statement of Defence answers this paragraph and denies that what was sold to the second defendant was not a "marine craft" but a "scrap". The said paragraph 2 of the Statement of Defence goes further to aver that it was specifically agreed in writing between the first and second defendants that the "scrap" was "not to be used for trade or hire" but was to be used for scrap purposes only. The said agreement between the first and second defendants is not before the Court. The first defendant has stated in the Statement of Defence that the sale of the "scrap" as a ship to the plaintiff was in breach of the agreement. In paragraph 7 of the defence, the first defendant has alleged that even when the second defendant was turning the "scrap" into a ship by equipping it with an engine letters were sent to the second defendant pointing out that his act was in breach of the agreement between them.

The Court has not seen these letters as no evidence has yet been heard. Then there is the question whether the thing sold was sold as a "ship" or "a scrap". The pleadings have completely disagreed on this point.

Although it is always useful, and indeed necessary, that preliminary points which raise serious points of law, and which if decided in favour of the party objecting, would dispense with any further trial, or at any rate with the trial of some substantial issue in the action should be decided at the earliest stage, an order for the trial of such preliminary issues should be made only in respect of matters on which no further light would be thrown at the trial, and should not be made in respect of matters which by reason of the obscurity either of the facts or the law should be decided at the trial. As a general rule the Courts have leaned against the procedure of trying cases by way of preliminary objections. Among other reasons, it usually transpires that as the matter develops, a lot of assumptions which have neither been agreed upon the pleadings, nor cleared up by evidence, are made in judgment, the Court usually finding itself held a prisoner within the limited circle that it has built around itself by taking the snappy procedure of deciding a case by way of preliminary objection which in the long run does not in fact shorten the trial but lengthens it.

Such was the position that Cross, J., found himself in *Windsor Refrigerator Company Limited and Another v. Branch Nominees Limited and Others* (1961), 1 All E.R. 277. Lord Evershed, M.R. delivering his judgment on appeal in that case said at the end of his judgment:

"I repeat what I said at the beginning, that the course which this matter has taken emphasizes as clearly as any case in my experience the extreme unwisdom—save in very exceptional cases—of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasizes the teaching) that the short cut so attempted inevitably turns out to be the longest way round."

Harman, L. J., in concurring with the said judgment of Lord Evershed said:

"The number of conditions which my Lord has found it necessary to use to fence in the expression of this Court's opinion shows at once the undesirability of this kind of procedure. It is highly undesirable that the Court should be constrained to tie itself into many knots, and in the end merely say: 'Well, if this was thus, then that was so'."

These views of Lord Evershed and Harman, L.J., were re-echoed with emphasis by Sellers, L.J., in *Summer v. William Henderson and Sons Limited* (1963) 2 All E.R. 712 and 713. Delivering the judgment of the Court of Appeal he said as follows:

"In our view the procedure by this special case was wrong; no judgment should have been given under it and it cannot properly be further pursued. We therefore, on this ground only, set aside the judgment given, so that the parties are free to argue the legal position on establishing facts, and we proceed no further with this appeal."

The warning by the Court of Appeal in the hereinbefore quoted cases has been reiterated by the Privy Council in *David v. Abdul Cader* (1963) 1 W.L.R. 834—a case from Ceylon in which the chairman of a local authority, namely, an urban council, was alleged to have wrongfully and maliciously refused to issue a cinema licence to the appellant who was the proprietor of the cinema. Delivering the judgment of the Court, Viscount Radcliffe at p. 840 disapproved the procedure adopted by the District Court of trying by way of preliminary objection the issues whether the plaint disclosed a cause of action against the respondent and, if not, whether the appellant could maintain the action. He said:—

"Useful as the argument of preliminary issues can be when their determination can safely be foreseen as conclusive of the whole action in which they arise, experience shows that very great care is needed in the selection of the proper occasion for allowing such procedure. Otherwise the hoped-for shortening of proceedings and saving of costs may prove in the end to have only the contrary effect to that which is intended. This, unfortunately, is one of such cases."

Reading the snappy judgment of the Court of Appeal allowing the appeal in *Western Steamship Company Limited v. Amaral Sutherland and Company Limited* (1941) 3 K.B. 55 at 56 one can see how sometimes the Appeal Court can get infuriated when in an inappropriate case a case is disposed of by way of trial of preliminary issues when much of the facts are in contention.

In the instant case I think it would be much better if the facts were laid before the Court so that no facts which should properly be proved by evidence would be assumed. I know that I could proceed with the decision on the preliminary objection raised in this case with the satisfaction, as was done by Roche, J., in *M. Isaacs and Sons Limited and Others v. Cook* (1925) 2 K.B. 319 that the Supreme Court could remedy whatever mistakes that I might make, it would, however, be an unnecessary imposition of expenses on the parties for me to take a course which would take them to the Supreme Court only for the Court to send the case back for evidence, which, quite easily and inexpensively, could have been heard now, to be heard. No doubt litigation is an expensive business, yet efforts should always be made to limit those expenses to the minimum. Having carefully gone through all the authorities cited by both counsel and many more, I have come to the considered view that the better course to follow is to hear evidence in this case and to give judgment on the facts and the law. Accordingly, I order that the case should proceed in the normal way, and that the decision of the legal issues raised in the preliminary objection should be given in the judgment at the conclusion of trial.

*Hearing to proceed.*

Nnana  
Lines Ltd.  
v.  
Elder  
 Dempster  
Agencies  
Ltd.  
and Others  
Anisoglu, J.

Onitsha High Court, 26th May, 1966—O/94/64

KAINE, AG. C.J.

FRANCIS UBA

*Plaintiff*

*v.*

THE ONITSHA URBAN COUNTY  
COUNCIL

*Defendant*

*Local Government Law—Edict No. 14 of 1966—effect of it on suits pending against councils.*

An action grounded on tort was commenced against Onitsha Urban County Council in 1964. In 1966 while the suit was still pending, an Edict was passed as No. 14 of 1966 which stated as follows:—

“1. This Edict may be cited as the Local Government Councils (Dissolution) Edict No. 2, 1966.”

“2. We hereby dissolve the Local Government Councils whose names appear in the Schedule to this Edict and we order that the Administrative Officer in charge of the Division in which the area of authority of each of the dissolved councils shall be the Sole Administrator in and over the area of authority of the dissolved Council.”  
Onitsha Urban County Council was included in the Schedule. When the case came up for hearing the defence counsel objected to the hearing on the ground that as the council had been dissolved it must be considered dead and the action in tort died with it.

*Held.*—The Edict did not abrogate the Council as the instrument creating it was not repealed. It was only the constitution of its membership—to wit—the council of the councillors, that was dissolved and replaced by a Sole Administrator who would now alone constitute the Council.

*Umezimwa* for the plaintiff.

*Obianyo* for the defendant.

**Kaine, Ag. C.J.:** When this case came up for hearing to continue Mr Obianyo the learned counsel for the defendant said that the action should be struck out because by Edict No. 14 published in the *Eastern Nigeria Gazette* No. 18 Vol. 15 of the 4th March, 1966 the Onitsha Urban County Council was dissolved; that there is no saving clause about actions pending against the Council; that only the geographical area formerly administered by the Onitsha Urban County Council that is now administered by the Sole Administrator: that since the plaintiff's action is grounded on tort, the action died with the death of the tortfeasor. Mr Umezimwa the learned counsel for the plaintiff said that although the Council was dissolved the instrument creating the Onitsha Urban County Council was not revoked; that the Council still exists but the councillors have gone.

I am inclined to think that this Edict was not happily worded. It gives the impression where it talks about the area of authority of the Council being administered by the Sole Administrator that the Council has ceased to exist and that all that is left is the bare geographical area to be looked after

by the Sole Administrator. I am inclined to agree with Mr Umuezinwa that if the Edict intended that the institution of the Onitsha Urban County Council is dead, then it would have gone further to revoke the instrument establishing the Council.

The instrument which was published in the Eastern Region Legal Notice No. 74 of 1954 says that the Onitsha Urban District Council later known as the Onitsha Urban County Council shall be established on the 1st day of June, 1954. It then gives the area of authority and it goes further to say about the constitution of the Council that the Council shall consist of a council of thirty-eight councillors thirty of whom shall be elected, seven of whom shall be nominated and one of whom shall be appointed. I am inclined to think that it is this Council of thirty-eight members that is dissolved and not the institution which was established by the instrument.

If for example the tenure of office of the members of the Council is three years, the Council shall be dissolved at the end of three years which means that the councillors cease to be members of the Council but this dissolution does not affect the Common Seal of the Council which is provided for by paragraph 2 of the Instrument establishing the Council and which the officers of the Council continue to use during the interregnum until a fresh election is held and new councillors appointed.

I am of opinion that the Edict does not sack the officers of the Council; that it merely replaces the Council of thirty-eight members with the Sole Administrator; that the Sole Administrator would therefore continue to use the Common Seal of the Council in all its legal documents until the Instrument is revoked.

Also section 6 of the Local Government Law provides that a council established under the Law is a body corporate having perpetual succession and a Common Seal and I am of opinion that it is the Instrument which establishes the Council under the Local Government Law section 5 and until the Instrument is revoked the corporate body of the Council having a perpetual succession and a Common Seal shall exist even though what I may describe as the convention of councillors may be dissolved.

*I therefore overrule the objection.*

Francis  
Uba  
v.  
Onitsha  
Urban  
County  
Council

Kaine,  
Ag. C.J.

Enugu High Court, 26th May, 1966—E/7C/65

OPUTA, J.

THE STATE

v.

JONAS AGU AND ANOTHER

*Criminal Law and Procedure—fifteen counts in one information—charging accused with making or privy to making—validity of the information.*

Two accused persons were arraigned on an information containing fifteen counts covering a series of facts and omissions, within a period of four months, connected together and forming the same transaction. The charges are under sections 438 (b), 438 (c), and 390 (5) of the Criminal Code.

The defence counsel raised objection to as many as fifteen counts included in one information, relying on section 157 of the Criminal Procedure Law: and also to the charges under sections 438 (b) and 438 (c) averring that each accused person “makes or is privy to making” and “omits or is privy to omitting” on the ground that making and privy to making are two distinct offences as such the charges are bad for duplicity relying on section 156 of the Criminal Procedure Law.

*Held:*

1. In circumstances, such as in this case, which can fit into the wordings of section 158 of the Criminal Procedure Law, more counts than three can be joined and tried together in the same information. It is for the prosecution to decide whether it is expedient to do so.
2. By operation of section 7 of the Criminal Code a person who makes a false document or who omits any material particular therein is in exactly the same position as a man who is privy to the making of the false document or is privy to omitting any material particular therein as principal offenders. The count which charges a person with “making or privy to the making” of a false document as well as a count charging him with “omitting or privy to omitting” of a material particular in the charge, does not create separate or distinct offences within the meaning of section 156 of the Criminal Procedure Law.

Cases relied on:—

*Dau v. Kano Native Authority Police* 12 W.A.C.A. 14 at 15.

*Regina v. McDonald* (1965) 3 W.L.R. 1138 at 1144.

*R. v. Arthur Shaw and Another* 28 Cr. App. R. 138.

*Oyudo* Senior State counsel for the State.

*Enechi Onyia* for first accused.

*Nnaemeka-Agu* for second accused.

**Oputa, J.:** The accused persons in this case were on the 9th May, 1966, arraigned before this Court on an information containing fifteen counts dealing with offences contrary to sections 438 (b), 438 (c) and 390 (5) of the Criminal Code.

They were on that day represented by Mr Enechi Onyia for the first accused and Mr Nnaemeka-Agu for the second accused. The counts of the information were read over and explained to the accused to the satisfaction of the Court and each accused pleaded not guilty to all the counts of the information charged against him. The case was then adjourned for hearing to 23rd, 24th, 25th and 26th May, respectively.

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Agu and  
Another  
Oputa, J.

On the 23rd May, Mr Oyudo, Senior State Counsel now appearing for the State, asked for a short adjournment to the 25th May, 1966. This was granted. On the 25th May, 1966, Mr Oyudo for the State, filed an amended information containing fifteen counts and again charging the accused persons with offences contrary to sections 438 (b), 438 (c) and 390 (5) of the Criminal Code. Second accused was now charged on all the fifteen counts. Before hearing proceeded or rather before pleas were taken on the amended information, Mr Enechi Onyia for the first accused submitted as a preliminary point that the counts dealing with fraudulent false accounting were all bad for duplicity and that these therefore offend section 151 (1) of the Criminal Procedure Law.

Mr Agu for the second accused associated himself with this objection against the counts dealing with fraudulent false accounting and referred Court to section 463 (a) of the Criminal Procedure Law and submitted that the use of the forms contained in the schedule is subject to "express provision of the rules". He did not, however, refer this Court to any rules which expressly prohibited the prosecution from using the form prescribed in charging offences against section 438 (b) or (c).

Mr Agu also referred to section 156 Criminal Procedure Law which states that for each offence with which a person is accused, there shall be a separate charge and submits that the expressions—"makes, or is privy to making" in section 438 (b) and "omits or is privy to omitting" in section 438 (c)—all import distinct offences. He draws an analogy from the Road Traffic Act—section 18 (1) and referred Court to English decisions based on the interpretation of the English Road Traffic Act, 1930 which are in *pari materia* with our section 18 (1). He referred to the cases of *R. v. Wilmut* 24 Cr. App. R. page 63. *R. v. Disney* 24 Cr. App. R. page 49; *R. v. Molloy* 1921 K.B. 364. He further argued that under section 152 (4) an accused person is entitled to know the manner in which the offence alleged against him was alleged to have been committed and that the prosecution ought, knowing the facts, to make up its mind whether the accused person "made" or was only "privy to making" the false documents. Mr Agu again submitted that the whole information offends section 157 of the Criminal Procedure Law as it charges the accused in this case with more than three counts. He referred to the case of *Dau v. Kano Native Authority Police* 12 W.A.C.A. page 14 and page 15.

Mr Oyude for the State replied. He dealt with the second objection first. He submitted that section 157 covered only cases where the offences charged were committed within the period of twelve months from the first to the last of such offences. This was not the case here where the first offence was committed in December, 1962 and the last in March, 1963, only four months—not twelve months as required. He also submitted that

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section 158 C.P.L. which is a later provision gave the prosecution the right to charge any number of offences. He also relied on the case of *Dau v. Kano N. A. Police* 12 W.A.C.A. page 14 and page 15 Brett and Maclean, page 92 article 307. He further submitted that section 339 C.P.L. referred to by Mr Agu for second accused did not offer any assistance in the definition of the word charge and he referred to the case *R. v. Nji Achie and Others* 12 W.A.C.A. page 209.

Replying on the point of duplicity, he submitted that the offences created by section 438 (b) and 538 (c) were "making or being privy to making a false document", and "omitting or being privy to omitting, etc.", and refers on the precedent which had been in common use both here and in England, see *Archbold*, 34th Edition, page 783, Article 2074. He submitted that whatever the views were the accused cannot be embarrassed in view of section 7 of the Criminal Code.

I have given careful consideration to the arguments of both counsel for the accused persons and the reply of the Senior State Counsel. I shall deal first with the objection alleging duplicity. Section 156 C.P.L. states "for every distinct offence with which any person is charged there shall be a separate charge". Charge as defined by section 2 (1) of the Criminal Procedure Law means "the statement of offence or statement of offences with which an accused person is charged in a summary trial before the Court". A trial on information like the instant case is not a summary trial. But section 339 of the C.P.L. states that the provisions of sections 151-180 C.P.L. shall apply *mutatis mutandis* to counts of an information. This being so, the provisions of section 156 C.P.L. will make it mandatory that every count of an information shall charge the accused with not more than one distinct offence. In normal circumstances there can hardly be an argument that making a document and being privy to its being made are not quite the same thing. There is therefore on the surface some force in the point raised by learned counsel for both persons. Even if it is admitted that making a document and being privy to its being made express quite different concepts, the next hurdle for the defence counsel to clear is to satisfy the Court that these concepts—making—or being privy to the making of a document in fact create not only two offences but also two *distinct offences*. I do not think the legislature used the word *distinct* in section 156 in vain. Let us examine this matter from another angle. At common law a distinction is drawn in the case of a felony between:

- (a) Principal in the first degree.
- (b) Principals in the second degree.
- (c) Accessories before the fact.
- (d) Accessories after the fact.

There is or rather, there ought to be no doubt that a person who makes a false document other things being equal is a principal in the first degree. A person who is only privy to the making of the false document may be an accessory before or after the fact as the case may be. Under the Common Law Rule, this *distinction* between principal and accessories was of considerable importance both to procedure and punishment. Legislation has drastically altered this aspect of the Law.

In our Law section 7 has almost abolished the distinction between principals and accessories. They are all regarded as principal offenders and "may be charged with actual committing it". The result will then be that a man who makes a false document or who omits any material particular is in exactly the same position as a man who is privy to making a false document or is privy to omitting any material particular and could be charged with making or omitting. It therefore follows that the words "privy to making" in section 438 (b) and "privy to omitting" in section 438 (c) are from the operation of section 7 C.C. superfluous and redundant. They import and create the same offences as making a false document or omitting a material particular . . . I therefore hold that these words do not create distinct offences or as it was expressed by the Senior State Counsel—the offences created by section 438 (b) is "makes or is privy to making" . . . etc., and by section 438 (c) "omits or is privy to omitting . . . etc". Looking at the same point from yet another angle, it is true section 156 C.P.L. requires that for every distinct offence with which a person is charged, there shall be a separate charge but that section is silent on what happens if there is no separate charge. We are then forced back to judicial observations and decisions on what happens or what should happen if the provisions of section 156 are not complied with.

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In this case even if it is for the purpose of argument conceded that the charges as laid in counts 1, 4, 6, 8, 10 and 12 join two distinct offences (and I do not so hold) for the defence to succeed on an objection to the counts as bad for duplicity the defence must base that objection on the ground that the defence is likely in fact to be prejudiced by such counts. It is a matter for the discretion of the trial Judge whether the defence is likely to be in fact prejudiced or embarrassed. I will refer and rely on the dictum of Isaacs—Lord Chief Justice, in the case of *James Andrew Thompson* 9 Cr. App. R. page 252 at page 258. In this case there was a preliminary inquiry by the Magistrate. The accused were present at that inquiry. They knew exactly what was being alleged against them for the evidence and deposition of the various deponents. I have read these depositions and I am satisfied that the accused persons are not likely to be embarrassed or prejudiced by the counts now being objected to. Consensus of judicial opinion is that the Court will not interfere with a judgment on the ground of duplicity unless there is in fact a substantial miscarriage of justice and there will be a miscarriage of justice where the accused person is embarrassed or prejudiced in his defence. The cases of:—

- (1) *Rex v. Nelson Asiegbu* 3 W.A.C.A. page 142.
- (2) *Rex v. Peter Kalie* 3 W.A.C.A. page 197, both dealing with offences against section 438 (as in this case) refer.

Thirdly, Form 18 in the Third Schedule to the Criminal Procedure Law, Cap. 31 page 807 Vol. II Laws of Eastern Nigeria, gives a specimen form of a charge for offence against section 438 (b) and (c) of the Criminal Code. The prosecution in this case used this form. Section 436 (1) of the Criminal Procedure Law empowers the prosecution to use the forms appearing in the Schedule in cases in which they apply and when so used "shall be good and sufficient in law. I am" satisfied that in this case the counts objected to modelled as they were on Form 18 of the Third Schedule are sufficient and good in law. Fourthly there exists statutory justification for the counts as

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they are. Section 154 (5) (a) allows the prosecution to charge in appropriate cases "the doing or omission to do any one of any different acts in the alternative" when the written law constituting the offence states the offence to be such doing or omission referred to above. This point is well brought out by Bairamain S.P.F. as he then was in the case of *Ibrahim Ogenyi and Others v. I.G. of Police*, 1957 N.R.N.L.R. page 111 page 140 at page 141.

The objection to the counts on the ground of duplicity on any of the four reasons namely:—

- (1) That no distinct offences were charged.
- (2) That the counts as they are, are not likely to in fact embarrass or prejudice the defences of the accused.
- (3) That the form of charge used followed closely the precedent in Form 18 of the Third Schedule and should be deemed sufficient and good in law.
- (4) That section 154 (5) (a) gave the prosecution the *right to charge* acts or omission in the alternative, since the offences created were in the alternative or on the combination of all four is therefore bound to fail.

I therefore overrule the objection of learned counsel for the accused persons on the ground of duplicity and hold that the counts are properly laid and trial can continue on them. I have not considered the cases cited under the Road Traffic Act of 1930 because in my view they are not of any assistance in arriving at a decision of the objection. The next objection taken by learned counsel for second accused was as to the number of counts in the information. This objection has hardly any substance. There is no doubt that the fraudulent false accounting was done with a view to facilitating the stealing or to concealing it and thus preventing easy detection. All the fifteen counts therefore deal with a series of acts and omissions which are so connected together to form the same transaction. These can be safely charged and tried together as is provided for by section 158 of the Criminal Procedure Law. Also in the case of *Dau v. Kano Native Authority Police*, 12 W.A.C.A. page 14 and page 15, the West African Court of Appeal held that given circumstances which can fit into the wordings of section 158 of the C.P.L. more counts than three or more charges than three can be joined and tried together. I am satisfied that section 157 C.P.L. is not applicable to this case—and that the proper section ought to be section 158 C.P.L. and that the fifteen counts can be joined and tried jointly.

The prosecution may well have the right to join offences in one trial but whether it is expedient so to do is another matter and in that case all the Court can do is to offer advice and suggestions which the prosecution may take if it likes. I am supported in this view by the observation *per curiam* of Nield, J. in the case of *Regina v. McDonald* (1965) 3 W.L.R. page 1138 at page 1144 B-C, to the effect that "It is plain that the Court cannot direct the prosecution as to the course to be adopted . . . On the other hand of course sometimes an expression of judicial opinion will affect the prosecution with the conduct of their case".

In this particular case as well as other cases that are likely to be long and protracted, I will like to commend to the prosecution the observations made by Cassels, J. in the case of *R. v. Arthur Shaw and James Bowhill Agard*

(1940/42) 28 Cr. App. R. page 138, to the effect that those responsible for the prosecution in a long and complicated case ought to consider the possibility of driving it into parts as such involved cases "throw an unmerited strain upon a Jury and even upon the Court". Division into parts would reduce the issues before the Court and thus render easier the duties of the Court. If conviction is obtained, the accused person may avail himself of the provisions of section 249 (1) of the C.P.L. admit the other charges pending and ask that they be taken into consideration in passing sentence. If the prosecution on any of the parts fails, then the prosecution is not prejudiced with regard to the remaining charges. In the final result, I rule that the fifteen counts of information are proper before the Court but the prosecution is advised to consider taking some of the counts as a test case.

*Objection overruled.*

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Oputa, J.

Port Harcourt High Court, 28th May, 1966—P/13/1965

NKEMENA, J.

KALU K. OGBA

*Plaintiff*

*v.*

C. I. NWAPA

*Defendant*

*Land Law—agreement to assign State land—written consent of Governor—State Lands Law Cap. 122—Laws of Eastern Nigeria, 1963, s. 6 (b) (iii)—receipt for part-payment of agreed sum for assignment—whether contents of the receipt, sufficient to constitute it a memorandum of agreement—Statute of Frauds, 1677, s. 4.*

*Legal Practitioners—whether act done by solicitor acting under a general retainer binds his client.*

The defendant and the widow of his deceased brother jointly administered the estate of his deceased brother. A firm of solicitors of whom the plaintiff's witness was a partner acted for the defendant and his deceased brother's widow for the administration of the estate. One of the deceased's personal representatives the widow, died while the estate was being administered.

The defendant the sole surviving personal representative allowed the firm of solicitors to continue to act for the estates of the deceased and his deceased widow.

In the course of the administration of these estates, the defendant approached one of the solicitors to arrange for the sale of a property, which formed part of the estate of his deceased brother and which was also State land. The solicitor later contacted the plaintiff, who agreed to purchase the property for the sum of £500. The plaintiff issued a cheque for £300 in the solicitor's name in the presence of the defendant on 1st August, 1964. The defendant did not raise any objection throughout the transaction.

It was further agreed that the plaintiff should pay arrears of rent due on the property which amounted to £45, and that the plaintiff should pay the balance of the purchase money of £200 on production of the head lease of the property on 3rd August, 1964, by the defendant.

The defendant did not produce the head lease of the property on the said date nor on any other day as was agreed. Instead, on 5th August, 1964, the defendant assigned the lease of the property to one John Anyachie without informing the plaintiff or his solicitor.

The plaintiff then brought an action in the High Court against the defendant claiming damages for breach of contract by the defendant to assign the said property for the sum of £500 to him.

*Held:*

1. In any purported assignment of any State land, the previous consent in writing of the Governor or any officer to whom the Governor may have delegated his power to give such consent, must be obtained, otherwise neither party to the assignment can sue for specific performance of the assignment.

2. It is a material term of the agreement to assign the property in question, that the plaintiff should pay the balance of the purchase price on a certain date—3rd August, 1964, on production by the defendant of his title deeds on the same date. That being the case, the receipt issued to the plaintiff for part-payment of the purchase money does not satisfy the requirements of section 4 Statute of Frauds 1677 as a sufficient memorandum of agreement between the parties as it did not contain the material term.
3. A solicitor acting under a general retainer has implied authority in special circumstances to bind his client. As between client and opponent, the former is bound by every act of his solicitor done in the ordinary course of practice. The defendant is, therefore, bound by the receipt for part-payment of the agreed sum issued by his solicitor to the plaintiff.

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Cases referred to:—

*John Chediak v. David Coker* 14 W.A.C.A. 506.  
*Solomon Nassar v. Oladipo Moses* (1940) L.L.R. 170.  
*Ayo Solanke v. Abraham Abed and Another Part II* (1962) All N.L.R. 230.  
*Hawkins v. Price* (1957) 1 All E.R. 689.  
*Burgees v. Cox* (1951) 2 All E.R. 1212.  
*Nwanodi* for the plaintiff.  
*P. M. Mbanefo* for the defendant.

**Nkemená, J.:** The plaintiff's claim against the defendant is for the sum of £3,000 being special and general damages for breach of a contract made between the parties on 1st August, 1964, whereby the defendant promised to assign to the plaintiff for the sum of £500 the defendant's property known as No. 15 I. B. Johnson Street, Port Harcourt.

It would appear from the pleadings that the parties met in the office of Mr Allagoa, solicitor, on 1st August, 1964, and concluded an agreement to assign the said plot owned by the defendant to the plaintiff. Mr Allagoa who was present during this negotiation purported to act as solicitor for the defendant. The parties agreed to assign the plot for £500 and agreed further that the plaintiff should pay arrears of rents due on the plot which amounted to £45.

On that day the plaintiff issued a cheque for £300 as part-payment for which Mr Allagoa subsequently issued the receipt Exhibit 1. The defendant did not produce the head lease of the plot on that day nor any other day for the plaintiff's inspection.

On 5th August, 1964, the defendant assigned the lease of this land to a Mr John Anyaehie without informing the plaintiff or Mr Allagoa, the solicitor.

The plaintiff contends that the defendant agreed to produce the head lease on 3rd August, 1964, and on its production the balance of the purchase price would be paid the defendant. He pleaded that the defendant failed to produce the head lease on 3rd August, 1964, as agreed nor on any other day.

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The defendant on the other hand contended that it was agreed that the balance must be paid on 3rd August, 1964, as he was very much pressed for money. He said that the plaintiff did not make the production of the head lease a condition precedent before payment as anyone could go to the Lands Office to verify his title to the land. Furthermore, he made it clear that he would not be bound by his obligation if on 3rd August, 1964, the balance was not paid. The defendant further contended that he never consulted Mr Allgoa as a solicitor on this transaction, and that he issued the receipt Exhibit I without authority.

Four issues will have to be resolved:—

- (1) Did Mr Allgoa act as the defendant's solicitor in this transaction? If so had he any authority to issue Exhibit 1 for and on behalf of the defendant?
- (2) Did the parties enter into any contract?
- (3) What is the effect of an agreement to assign a State land where the consent of the appropriate Minister has not been obtained?
- (4) If there was a contract is it caught by section 4 of the Statute of Frauds?

I shall deal with these issues separately.

1. Mr A. C. Nwapa, the brother of the defendant owned No. 15 I. B. Johnson Street, Port Harcourt. When he died that plot of land formed part of the estate jointly administered by Dr (Mrs) Nwapa (wife of Mr A. C. Nwapa) and the defendant. The solicitors of the estate are Messrs Allgoa and Allgoa, of whom Mr Allgoa, the plaintiff's witness is a partner. The estate was still being administered when Dr (Mrs) Nwapa died.

The defendant still allowed Messrs Allgoa and Allgoa to continue to act as solicitors of the estates of Mr and Dr (Mrs) Nwapa.

It was in the course of the administration of these estates that the defendant approached Mr Allgoa with a request to find a buyer for 15 I. B. Johnson Street, Port Harcourt. Mr Allgoa contacted the plaintiff who eventually agreed to buy it. The cheque for £300 was issued in Mr Allgoa's chambers, in the name of Mr Allgoa and in the presence of the defendant. The defendant was present and acquiesced to all these. Furthermore, the cheque was handed over by the plaintiff to Mr Allgoa in the presence of the defendant without any objection raised by the defendant.

I am satisfied that by the conduct of the defendant, and in view of the fact that Mr Allgoa acted and continues to act as the solicitor of the estate of which 15 I. B. Johnson Street is part of, it is established beyond question that Mr Allgoa acted for the defendant as his solicitor during the present transaction.

It is immaterial, in the present circumstances, whether any fees were agreed between the defendant and Mr Allgoa before he commenced to act for him. They had been brought together over the years in the course of the administration of estates of both Mr A. C. Nwapa and Dr (Mrs) Nwapa. What would be more natural in the circumstances than for Mr Allgoa to send the usual bill to the defendant at the end of the transaction, or to deduct his legal expenses from the purchase price and pay over the balance to the defendant.

A solicitor acting under a general retainer has implied authority, except in special circumstances, to bind his client. As between client and opponent, the former is bound by every act of his solicitor, done in the ordinary course of practice.

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It is abundantly clear that the defendant is bound by Exhibit 1 issued by his solicitor, Mr Allgoa, in the ordinary course of practice.

2. It is clear from the evidence that the parties agreed on 1st August, 1964 that 15 I. B. Johnson Street should be assigned by the defendant to the plaintiff for £500. It was later further agreed that the plaintiff should pay the arrears of rent which amounted to £45. Exhibit 1 bears this out.

I am satisfied that there was a contract between the parties. Its enforceability is a matter for further consideration.

3. By the lease, Exhibit 5, the lessee covenanted "not to assign or otherwise part with the possession of the land hereby demised or any part thereof without the previous consent in writing of the Governor or any officer to whom the power may be delegated". This provision is to be implied in every lease of State lands pursuant to section 6 (b) (iii) of the State Lands Law (Cap. 122) in Vol. VII of the Laws of Eastern Nigeria.

It follows from the above that in any purported assignment where the necessary consent has not been obtained neither party can sue for specific performance. *John Chediak v. David Coker* 14 W.A.C.A. 506. *Solomon Nassar v. Oladipo Moses* 1960 L.L.R. 170.

But where a lessee assigns and allows another party to take possession without the necessary statutory consent to the transfer of possession he cannot as against this other party rely on his own wrongful act and contend that the agreement is unenforceable because he himself has failed to get the necessary consent. *Ayo Solanke v. Abraham Abed and Another* Part II 1962 All N.L.R. 230

In the case under trial we are not concerned with specific performance. For if it were an action for a specific performance neither party can compel the Minister to consent to the assignment. Since it was the defendant's duty to obtain the necessary consent, and he made no effort to obtain the consent the plaintiff ought, in ordinary circumstances, to be compensated by way of damages, if the contract is an enforceable one. (See *Solomon Nassar v. Oladipo Moses* referred to above.)

4. By section 4 of the Statute of Frauds 1677:

"No action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest or concerning them, unless either the agreement or some note or memorandum thereof shall be in writing and signed by the party to be charged there-with or some other person by him lawfully authorized."

As I pointed out above, Exhibit 1 was issued under the authority of the defendant, and can be regarded for all purposes as a document made by the defendant.

The transaction relates to an interest in land. It is such a transaction that should comply with section 4 of the Statute of Frauds to render it enforceable.

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The agreement itself is not required to be in writing but a note or memorandum of it is sufficient, provided that it contains all the material terms of the contract. The note or memorandum must contain the following:

- (a) Names of adequate identification of the parties.
- (b) Description of the subject matter.
- (c) Nature of the consideration.
- (d) Every material term of the contract.

Exhibit 1 contains the names of the parties, the description of the subject matter and the consideration for the assignment of 15 I. B. Johnson Street, Port Harcourt.

The question is whether it contains all material terms of the contract. If the document relied on by a plaintiff contains all the material terms, it need not have been deliberately prepared as a memorandum. The Courts have accepted as sufficient a telegram, a recital in a will, and even a letter written by the defendant with the object of repudiating his liabilities.

The circumstances of each case need be examined to discover if any individual term has been deemed material by the parties and, if so, it must be in the note of memorandum. If it is absent the agreement will be unenforceable.

In the famous case of *Hawkins v. Price* (1947) 1 All E.R. 689—

The plaintiff orally agreed in January, 1946, to buy from the defendant a freehold bungalow and land. He paid a deposit of £100, and the defendant as vendor, signed a deposit receipt which contained the names of the parties and a description of the property. The plaintiff asked for specific performance of the contract; and evidence was given and accepted by the Court that the oral agreement had included a provision for vacant possession by March 31, 1946, though the deposit receipt made no reference to it.

The plaintiff argued that this particular term was exclusively for his benefit, that he could waive it, and that the receipt would then be a sufficient memorandum. But Evershed, J. as he then was, gave judgment for the defendant. He held that the arrangement as to vacant possession was a material part of the contract and that it had been designed for the convenience of both parties. It could thus not be waived by the plaintiff, and the memorandum was insufficient.

A portion, if the term omitted is for the defendant's benefit, the plaintiff cannot concede to it and then seek to treat the memorandum as sufficient—*Burgess v. Cox* (1951) 2 All E.R. 1212.

Paragraph 2 of the plaintiff's Statement of Claim reads:

"In the course of the negotiations which led to the argument referred to in paragraph 1 above the defendant told the plaintiff that his title deeds to the said property were at Oguta and that he would deliver them to the plaintiff on 3rd August, 1964. In consequence of this promise, the defendant demanded, and the plaintiff agreed to pay the defendant, an advance of £300 pending the defendant's production of the said title deeds when the legal formalities would be completed."

It would seem from this that it was a material term of the contract that final payment of the agreed price would be on 3rd August, 1964 when the defendant would produce the title deeds.

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From the evidence I am satisfied that the defendant lied when he said that there was no mention of the production of the title on 3rd August, 1964. The plaintiff is unlikely to pay the purchase price without proper investigation of the defendant's title. The defendant admitted in paragraph 2 of the statement of defence that the balance would be paid on 3rd August, 1964, but went on to say that it was because the plaintiff was unable to pay for the whole amount on 1st August, 1964.

Both parties agreed that £300 was paid on 1st August, 1964 and that the balance would be paid on 3rd August, 1964. As I pointed out above I am satisfied that the reason why balance of the contract price was left unpaid was to enable the defendant travel to Oguta and bring the title deeds. The contract was not intended to be validly concluded until the title deeds were produced and the balance paid on 3rd August, 1964.

It would seem that it was a material term in this transaction that the plaintiff would pay the balance of the purchase price on a certain date—3rd August, 1964—on the production by the defendant of his title deeds on that same day. That being the case it must be included in Exhibit 1, otherwise the agreement would be unenforceable pursuant to section 4 of the Statute of Frauds.

I would point out that the confusion in this case arose out of a misunderstanding whether the plaintiff should have paid the balance of the agreed price on 3rd August, 1964, without the production of the head lease, or whether the defendant should have produced the head lease before payment was made to him. This confusion should have been clarified in the note Exhibit 1.

I am satisfied that the purported agreement to assign 15 I. B. Johnson Street, Port Harcourt, entered into by the parties on 1st August, 1964, is unenforceable, however morally reprehensible the action of the defendant might have been. That being the case I need not consider any claim for damages except to mention that the £300 has since been refunded to the plaintiff.

Each party to bear his own costs.

*Agreement to assign declared unenforceable.*

Enugu High Court, 30th May, 1966—E/53C/65

OPUTA, J.

THE STATE

v.

THEOPHILUS IKEWETA

*Criminal Procedure—charges of “manslaughter” and “reckless acts”—particulars required to be stated.*

The accused was charged with “manslaughter” and with “reckless acts” contrary to sections 325 and 343 (1) (e) of the Criminal Code respectively. The particulars of the first count stated that the accused “on the 14th day of April, 1965, at Ogbete, Enugu, unlawfully killed Fabian Nebo”. The particulars of the second count stated that the accused “in a manner so negligent as to endanger human life did give medical treatment to Fabian Nebo”.

Consistent with these charges as laid, the prosecution led evidence simply to establish that the accused who in his statement stated that he was a painter administered an injection to a child at the instance of the child’s father and that the child developed shock almost immediately after the injection and died shortly afterwards of what a medical witness described as hyper-sensitivity reaction consistent with the presence of a foreign protein body such as serum. There was thus no evidence of what the accused injected, or that he did not take necessary precautions before and after the injection, or that he was not qualified to give the injection, or that it was what he injected that resulted in death of the child, or that the accused exhibited such negligence or lack of skill to render his act criminal.

Sections 151 to 154 of the Criminal Procedure Law prescribed the form and particulars needed in a charge. If these were followed not only that the accused would know for certain what case to meet but also the prosecutor would know what he has to prove.

The Court acquitted the accused and—

*Held.*—To ensure success in a charge of manslaughter by negligence or in a charge of causing death by negligent or reckless acts, the prosecution ought to know with some measure of certainty the particular criminal negligence intended to be relied upon then aver that particular negligence with precision in the particulars of the offence, and prove same at the trial.

Cases relied on:—

*Regina v. Tatimu* 20 N.L.R. 60.

*R. v. Akerele* 7 W.A.C.A. 56.

*Queen v. Ishola Badejo Oshimi* 1955–56 W.R.N.L.R. 11 at 52.

*R. v. Percy Bateman* 19 Cr. App. R. 9 at 13.

*R. v. Crick* 1 F and F 520, 175 E.R. 835.

*R. v. Ezeocha* 12 W.A.C.A. 56.

*Amasiani* for the State.

*Onyeama* for the accused.

**Oputa, J.:** The accused is charged on the first count of the information with the offence of manslaughter and on the second count with an offence contrary to section 343 (1) (e) of the Criminal Code. The statement of offence in this count is headed "Reckless Acts". It is to be noted that the particulars of the offence in count one merely averred "Theophilus Ikweta on the 14th day of April, 1965, at Ogbete, Enugu, unlawfully killed Fabian Nebo". The particulars of the second count alleged that the accused "in a manner so negligent as to endanger human life did give medical treatment to Fabian Nebo". Sections 151 (1), (2), (3) and section 154 (4) of the Criminal Procedure Law all impose a duty on the prosecution to give the accused sufficient notice of the matter with which he is charged and "the charge shall also contain such particulars of the manner in which the offence was committed as will be sufficient for that purpose". In this information the particulars in count one did not allege how the unlawful killing took place and count two did not specify what type of medical treatment was given. These two counts are to my mind wholly defective and fall far short of the required particulars in these types of cases. But the defence counsel raised no objection and did not ask for further particulars. If the prosecution intends to charge manslaughter by negligence as is the case in count one of this information, it owes the accused a duty to disclose with certainty and precision and without inconsistency the particular form of negligence on which the prosecution intends to rely. In cases like the instant case dealing with injections, it is incumbent on the prosecution to state the particular negligence relied on viz:—

- (a) was it that the needle was dirty
- (b) did the substance injected contain any dirt or other contaminations
- (c) was there an overdose of the substance alleged injected
- (d) was there absence of a sensitivity test as is necessary in the case of injection of a prophylactic tetanus anti-toxin and allied serum (as in this case). Kingdom, C.J. in the case of *Rex v. Samuel Abengowe* (1936-37) 3 W.A.C.A. page 85 and page 86 emphasized the need for these particulars.

But as I said earlier, no one raised an objection and the trial proceeded without them. It is now left to be seen whether from the evidence led, it is possible to gather what the prosecution case is. Briefly summarized, the prosecution alleges that Victor Nebo (1st P.W.) took his son Fabian Nebo aged 5½ to the accused on the 14th April, 1965, for treatment. This child had an injury on one of the soles of his feet (the father (1st P.W.) does not remember whether it was right or left). He got quite ill and 1st P.W. took him to the accused and requested the accused to administer an injection to him (the child). Accused had earlier, on the 13th April, collected 1s 6d from 1st P.W. to be used to buy the substance to be injected. In the presence of 1st P.W. accused gave Fabian Nebo an injection on the buttocks. 1st P.W. paid accused 1s for his services and left with his son. 1st P.W. alleged that as he was going away the accused gave him "the empty bottle in a paper packet and asked me to throw this away on the road". This the 1st P.W. did. On their way home he noticed that his son was sweating profusely and complained of scratching sensation all over his body. He, 1st P.W., had to carry the child as he could no longer walk. He then observed the child was foaming from the mouth. On reaching home his co-tenants advised him to rush the

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child to the hospital. This he did. He saw the 2nd P.W. who got the history of what happened to the child from him and administered an antidote to anaphylactic shock condition in the form of adrenalin. This according to medical evidence is used in all such shock cases irrespective of the cause of the anaphylactic shock. In spite of this the child died almost immediately. The doctor did not perform any *post mortem* examination and there was no attempt to extract the substance injected and send same for analysis. The doctor (2nd P.W.), however, was of the opinion that death in this case was due "to hyper sensitivity reaction consistent with the presence of foreign protein body such as serum from a different type of animal besides man. This is the condition known as anaphylactic shock. This shock can be caused by different types of serum and the doctor was unable to say that in this case the serum was a prophylactic tetanus anti-toxin serum as is likely to be contained in Exhibit 1 and Exhibit 2. The doctor also gave evidence of the medical procedure where a patient comes to the hospital with a condition that necessitates the administration of this prophylactic tetanus anti-toxin serum. A sensitivity test is normally conducted to watch the reaction of the patient before the full dose is administered. The doctor agreed it is risky to administer the full dose without this test.

When the child died the doctor (2nd P.W.) telephoned the Police and reported. As a result of his report, 3rd P.W., Levinus Anyanwu was detailed to investigate. During his investigation he obtained a statement from 1st P.W. that night of the 14th April, 1965. On the strength of this statement 3rd P.W. prepared a search warrant tendered as Exhibit 3. Exhibit 3 was not executed until 8.30 hours, i.e., 8.30 a.m. on the 15th April, 1965, and as should be expected the usual entry "nothing incriminating found" was made. On the evening of the 15th April, 1965, 1st P.W. brought to the station a paper packet tendered as Exhibit 2 and identified by 3rd P.W. This packet was alleged to have contained the bottle which the accused gave to 1st P.W. to throw away on his way home. 3rd P.W. was quite sure that 1st P.W. never mentioned any bottle to him. It is a little intriguing how this bottle exhibit found its way into this case. It was not produced to the Police during investigations. It was not produced by the Police during the preliminary inquiry. I shall deal more with this aspect of the case later. Accused was then arrested on the 15th April, 1965, on a charge of murder. In this case it is quite obvious that if the accused committed any offence at all it was not murder. The prosecution acting rightly under the provisions of section 340 (2) (b) (1) of the Criminal Procedure Law filed an information for manslaughter on which the accused was tried.

The accused made a statement Exhibit 4 pleading alibi. In that statement he said "I returned from my home town Udi yesterday 14th April, 1965 about 11 a.m. and I was in my house till early morning of date 15th April, 1965". He did not say when he left for Udi. He also denied in Exhibit 4 administering any injection to Fabian Nebo the deceased and alleged he had many enemies in Udi. Accused in addition to Exhibit 4 gave evidence on oath in his own defence. He denied knowing the 1st P.W. ever before this case. He denied administering any injection to the child of 1st P.W. now deceased. He reiterated his alibi. He could not have been the culprit because he was in fact not in Enugu on the 14th April, 1965. He testified that when he was off duty on 14th April, 1965 he travelled to Udi by 3 p.m. and did not return by 8 p.m.

On the issue whether he knew 1st P.W. before, accused in cross-examination admitted that he saw the 1st P.W. driving away from the Enugu Motor Park some day in 1962. One wonders how this could have happened if he did not know 1st P.W. before. Accused had no quarrels whatever with the 1st P.W. since 1962, and 1st P.W. was not one of his enemies in Udi. This is a summary of the defence. Before recording my findings of fact on the evidence led I will like to dispose of the issue of alibi raised by the accused. It is significant that this alibi was set up at the earliest opportunity on 15th April, 1965. This seems to satisfy the first requirement as indicated by the Lord Chief Justice in the case of *R. v. Patrick Moran* (1909) 3 C.A.R. page 25. But that should not be all that was required of the accused. An accused who relies on the defence of alibi will endeavour to get his witnesses to court to prove this alibi. If he wants the police to investigate his alibi he has to provide tangible information relating to the place he was at the material time, the persons with whom he was and their correct addresses and any information which will be of assistance to the police. In this case I do not think anyone would expect the police, merely on the assertion that the accused "returned from Udi by 8 p.m." to go on a wild goose chase to Udi in an effort to prove or disprove this vague alibi. The case of *Patrick Moran* 3 C.A.R. page 25 at page 26 refers. In the case of *Cecil John Rabbitt* (1931-32) 23 C.A.R. page 112 the view was expressed by the Lord Chief Justice Hewart that the defence of alibi should be carefully treated by the Judge, i.e., and that detailed evidence of an alibi and other evidence must be carefully dealt with in the charge to the jury. In this case I hold the view that if the question of alibi is to be considered and resolved in the favour of the accused there ought to be before this Court sufficient evidence from whatever source either from the accused or from the prosecution witnesses on which to act. I see no such evidence here in this case I therefore, hold that the defence of alibi has failed. I reject it accordingly.

Now coming closer to the facts, on a careful review of the evidence I am satisfied:

1. That the accused and 1st P.W. know each other long before this case. I accept the testimony of 1st P.W. on this point and find as a fact—that 1st P.W. and accused knew as far back as 1961.
2. That in 1961 accused treated 1st P.W. successfully by administering an injection into his skin.
3. I accept the evidence of 1st P.W. that the accused administered an injection into the buttocks of his son Fabian Nebo on 14th April, 1965.
4. The substance injected was on the evidence of 1st P.W. bought by the accused. 1st P.W. did not know what substance was bought. There is evidence that before the actual injection the accused showed 1st P.W. the substance he was injecting.

This leads naturally to the empty bottle and packet Exhibits 1 and 2. The bottle is labelled "prophylactic tetanus anti-toxin serum". The 1st P.W. testified that accused gave him this bottle to throw away. He did not tell 3rd P.W. the investigating constable anything about the bottle. He did not produce the bottle to 3rd P.W. on 15th April, 1965. No reason was ascribed to the rather curious behaviour of the accused. It is not suggested

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that the accused asked him 1st P.W. to buy another bottle of the same type as Exhibit 1. Was the accused incapable of throwing Exhibits 1 and 2 away? These questions and doubts have not been resolved by the evidence. I disbelieve the 1st P.W. that the accused gave him Exhibits 1 and 2 to throw away. One gathers the impression that this portion of the testimony of 1st P.W. was hastily concocted without such thought. In view of the failure of medical evidence to throw any light on what was injected into the buttocks of the deceased and in view of my rejection of the story of the 1st P.W. relating to Exhibits 1 and 2, I hold that the prosecution has failed to prove what was in fact injected into the deceased by the accused.

5. I am satisfied that the deceased died immediately after leaving the house of the accused. This piece of circumstantial evidence induces a strong temptation to jump at the conclusion that it was the act of the accused that killed the deceased. It may well be, or may be it was not. But before this Court will act on mere circumstantial evidence of this nature it ought to be satisfied that the inference it is drawing is the only possible inference. The case of *Adebiyi Majekodumi v. Queen* 14 W.A.C.A. page 64 at page 67 refers. In this case I am not so satisfied and I refuse to draw this inference especially in view of the doctor's evidence to the effect "I cannot state emphatically that the serum that caused the shock in this case is that from prophylactic tetanus anti-toxin like is likely to be contained in Exhibit 1 and Exhibit 2. Then the question may arise if it is not this injection that killed the deceased what did? The answer cannot be anything other than conjecture. In any event it is not for the accused to suggest let alone prove an alternative cause of death. The case of *Frank Onyenankeya v. State* (1964) N.M.L.N. page 34 and page 35 refers.

The duty remains throughout on the prosecution to prove that it was the act of the accused and no other, that caused the death of the deceased. It is most likely in this case that it was the injection administered by the accused that killed the deceased. I am prepared to go as far as that. But as was held in the case of *Rex v. Bama of Geji* 3 W.A.C.A. page 80 mere likelihood is not sufficient to establish a crime. There should be absolute certainty as to the cause of death and a direct nexus established between that and the act or acts of the accused. It is not sufficient if the effect of the evidence is only that the act of the accused could have caused death. *Rex v. William Oledima* 6 W.A.C.A. page 202 refers. And where there is no sufficient evidence to show that death was either caused or accelerated by an *unlawful* act of the accused no conviction for manslaughter can be entertained. The case of *Rex v. Samuel Abengowe* 3 W.A.C.A. page 85, itself a case of an injection by an unqualified person refers.

In his address to this Court learned counsel for the accused quite rightly submitted that to succeed in this case the prosecution ought to prove:—

1. That the accused did certain things on the deceased.
2. That the deceased died as a direct result of what was done to him or on him by the accused.

3. That the accused was either incompetent or criminally negligent in doing whatever he did. I have held earlier that I have no difficulty in finding as a fact that the accused administered an injection to the buttocks of the deceased. With regard to the second requirement although I may and I do personally feel strongly that it was the injection that killed the deceased yet my feeling no matter how strong cannot replace evidence or upset all the well known rules relating to certainty of proof that it is the act of accused that caused the death of the deceased. As regards this point I am in serious doubt and I shall give the benefit of that doubt to the accused. In view of my incapacity to hold that the accused killed the deceased the third point made in the address, i.e., the criminal negligence of the accused normally ought not to arise.

But as I said earlier in this judgment that the particulars did not contain, as they should in a case of manslaughter by negligence—the particular form of negligence relied on, I wish to express some views on the third point raised in the address of defence counsel. The particulars were well drafted with meticulous care and precision serve a dual purpose. They satisfy the provisions of section 151 subsections (1), (2), (3) and section 154 (4) of the Criminal Procedure Law and help the defence to know exactly what is being alleged against it and to know what case to meet in Court. They also help the prosecution to plan its attack and having known precisely what is being alleged to check up whether enough evidence has been led to prove each allegation. They help the prosecution to attack effectively and they help the defence evolve an effective defensive stratagem. In this case it looked as if the prosecution had no precise idea beforehand what it was expected to prove. There was therefore no evidence whatsoever on the following points:

- (a) There was no evidence that the needle used by the accused was dirty—if that were the form of negligence being alleged, nor was there evidence that the needle was not sterilized.
- (b) There was no evidence that the accused gave an overdose of whatever he gave.
- (c) There was no evidence to show what the accused in fact injected.
- (d) There was no evidence that the accused did not conduct a sensitivity test in this case.
- (e) No attempt was made to explain what A.T.S. used by 1st P.W. (who did not know what it meant) meant. The doctor was not asked to explain it and the Court is not supposed to take judicial notice of abbreviations.
- (f) There was no evidence that accused showed any negligence or lack of skill in his manner of administering the injection. On the contrary, the evidence of 1st P.W. on this point was that the accused treated him and he found him so good in administering an injection that he had to take his son to the accused a second time when the occasion arose.

There was even no evidence that the accused was not a doctor or one not qualified to administer injections.

In his evidence the accused said he was a painter. This in my view does not relieve the prosecution of the burden of proving any essential

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element in their case. Even if the prosecution succeeded in proving that the accused killed the deceased the matter would not have ended there. In cases of death arising from a breach of a duty imposed by section 304 C. C. it has been held in *Regina v. Tatimu* 20 L.N.R. page 60 that it is not enough to prove an accident and death arising therefrom. The prosecution should go further and prove criminal negligence as cause of the accident. In cases like the instant case the duty is imposed by section 303 C. C. Breach of the duty imposed by section 303 does not amount to manslaughter automatically. This argument was rejected by the West African Court of Appeal in the case of *R. v. Akerele* 7 W.A.C.A. page 56. A man is, however, by the operation of section 303 responsible for any consequence resulting from his lack of requisite skill or want of care in the discharge of the duty imposed on him by section 303 of the Criminal Code but the prosecution will go further (in cases where death results from a breach of a duty under section 303) and show that the homicide was culpable and not excusable as required by section 306. The homicide would be culpable if it were attended by criminal negligence irrespective of the fact whether or not the accused was a professional medical practitioner or the ordinary common quack. In the case of the *Queen v. Ishola Badejo Oshimi* (1955/56) W.R.N.L.R. page 11 page 52 Irwin, J. held that it was immaterial that the accused is not a qualified medical practitioner the onus is still on the prosecution to establish that the accused was guilty of criminal negligence. And in the case of *R. v. Percy Bateman* 19 C.A.R. page 9 at page 13 Lord Hewart, Lord Chief Justice held that a doctor is not criminally responsible for a patient's death unless his negligence or incompetence passed beyond a mere matter of compensation and showed such disregard for life and safety as to amount to a crime against the State.

From these two cases it is apparent that it is not enough to show that the accused as in this case was not a doctor. Pollock C. B. in his charge to the jury in the case of *Reg. v. Crick* 1 F. and F. page 520, 175 E.R. page 835 said "It is no crime for any one to administer medicine but it is a crime to administer it so rashly and carelessly as to produce death". Where, however, a person takes upon himself the responsibility of attending to a patient when he is not qualified for the purpose and uses a dangerous drug *he is bound to bring skill to its use*: if his education or employment makes the use of dangerous drugs amount to want of skill and the patient dies the person administering the drug is guilty of such criminal negligence as to amount to manslaughter—*Rev v. Ezeocha* 12 W.A.C.A. page 56 refers.

I have reviewed all these cases to show that in cases of this nature the prosecution ought to know with some measure of certainty the particular criminal negligence they intend to rely on, then state that with precision in the particulars of offence and prove same at the trial. When that is done then it can press for a verdict of guilty. That has not been done in this case and this Court has no alternative but to find the accused not guilty on both counts of the information.

Accordingly I find the accused not guilty on counts 1 and 2. He is acquitted and discharged on both counts.

*Accused acquitted.*

Aba High Court, 1st June, 1966—A/27A/65

BALONWU, J.

UFOMBA IGWE

*Appellant*

v.

COMMISSIONER OF POLICE

*Respondent*

*Criminal Procedure—s. 22 (2) of the Constitution of Nigeria, 1963—failure to adjourn a case for the accused to procure the services of counsel—when it amounts to unfair trial.*

The accused was on 5th November, 1965 charged on two counts under sections 411 (1) and 390 of the Criminal Code, and arraigned in court on 16th November, when a counsel appeared for him. Hearing was fixed for the next day 17th November. On that day the accused appeared in person and made no mention of briefing any counsel. The charge was amended after which the accused elected summary trial, and pleaded not guilty. He did not ask for an adjournment and said nothing whatsoever about any counsel. In fact he did not brief any counsel. The trial proceeded and he was convicted. He appealed against the conviction and it was contended on his behalf that the trial was unfair as he was not given an opportunity by way of adjournment to obtain services of a counsel.

*Held:*

1. Both at common law and under our constitution, an accused person is entitled to the services of a counsel, and where he had briefed counsel to conduct his defence it is the duty of that counsel to appear on the hearing day or to make alternate arrangement for the defence of the accused.
2. Where the hearing date was fixed to the knowledge of the accused counsel but he failed to appear or make alternate arrangement, the Court shall not be obliged to grant an adjournment to enable the accused bring the counsel unless there be other circumstances to warrant the exercise of court's discretion in favour of an adjournment.
3. Where the absence of counsel is due to the failure by the accused to instruct him in time, or the failure by the counsel himself to do his duty, it will not amount to an unfair trial for the Court to refuse an adjournment and proceed to and conclude the hearing of the case.
4. Where the absence of counsel is not due to any fault of the accused, an application for an adjournment ought to be granted so as to provide the accused with sufficient time to arrange for counsel to conduct his defence.
5. In the instant case, as the accused did not brief any counsel, and the hearing was fixed in his presence and he had not made any application on that behalf, the trial did not offend any principle and therefore cannot be said to be unfair.

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Cases referred to:—

*Mary Kingston* 32 Cr. App. R. 183.  
*Dixon Gokpa v. I.G. of Police* (1961) 1 All N.L.R. 423.  
*Benjamin Shemfe v. Comm. of Police* 1962 N.M.L.R. 87 at 91.  
*Yusufu Gitta v. R.* 1959 E.A. 211.

*G. E. Okorie* for the appellant.

*F. O. Offiah* for the respondent.

**Balonwu, J.:** This is an appeal from the judgment of the learned trial Magistrate (Mr H. O. Nwazota), of the Aba Magisterial District, delivered at Aba on the 17th day of November, 1964. The accused was tried on three counts before the learned Magistrate to wit—

- (1) Breaking and entering the dwelling house of Hyacinth Ogbu by night-time, with intent to commit felony therein, to wit, stealing—s.411 (1) of the Criminal Code;
- (2) Stealing one Hercules bicycle No. 6209FY, valued £12 and one Raleigh bicycle No. DN. 80894 valued £27 10s, total value £39 10s property of Hyacinth Ogbu—s.390; and
- (3) Stealing three pairs of shorts valued £1 10s and four shirts valued £1 1s, total value £3 2s, property of Romanus Nsofor—s.390.

The prosecution story, which was accepted by the learned Magistrate, was this. At about 3 a.m. on 2nd November, 1964, the Hercules and Raleigh bicycles mentioned above, the properties of the complainant Hyacinth Ogbu (P.W. 1), and the three pairs of shorts and four shirts, properties of one Romanus Nsofor, all of which were kept and locked up in the complainant's store, were stolen therefrom. Later, after the complainant (P.W. 1) had made a report to the police constables Clement Izugboekwe (P.W. 5) and Richard Nwandu searched the accused's premises and recovered, in the presence of both the accused and the complainant, the seat and the lock of the complainant's Raleigh bicycle, Exhibit "A", part of the subject-matter of count 2, and one pair of shorts and one shirt, Romanus Nsofor's property, Exhibit "B", part of the subject-matter of count three. The accused was at the material time in exclusive possession of the premises from which the above properties were recovered.

In regard to the pair of shorts and the shirt, Exhibit "B", the accused in his statement, Exhibit "D", said that he bought them for his 'brother' Onwubualili, at the time the latter was living with him, from a trader in Aba market. And as regards the bicycle seat and lock, Exhibit "A", he said that they were found some distance away from his premises, but were later brought thereto by the complainant. Constable Izugboekwe (P.W. 5) requested the accused to take him to the trader who sold the clothes, Exhibit "B", to him, but the accused would not do so.

As a result, the learned trial Magistrate acquitted and discharged the accused on count one, there being no evidence that the accused broke and entered the complainant's dwelling house by night with intent to steal therein; and, with regard to counts two and three, he found that the accused, although not guilty of stealing as charged therein, had been proved to have received

the bicycle seat and lock, Exhibit "A", and the pair of shorts and shirt, Exhibit "B", knowing the same to have been stolen. Thereupon, in accordance with the provisions of sections 173 of the Criminal Procedure Law, he convicted the accused of receiving stolen property under section 427 of the Criminal Code. It is from this judgment that the accused has appealed to this Court.

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The grounds of appeal in all were filed on behalf of the accused, but only one was argued, namely, "that the trial contravened the provisions of section 22 (2) of the Constitution of the Federal Republic of Nigeria, 1963 in that the appellant was not given a fair trial". Section 22 (2) of the Constitution provides as follows:—

"Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing within a reasonable time by a court."

On the point of the fairness of the hearing, the facts were that the accused was charged on the 5th November, 1964, and brought before the Court on the 16th November, eleven days after he had been informed of the charge against him. Although the accused had not in fact briefed any counsel to appear for him in the case, he managed to persuade Mr C. E. Okorie to get Mr S. M. Ojukwu to appear for him on the 16th November, when after the two counts of the charge had been read and explained to him, he elected summary trial and pleaded not guilty thereto. Thereupon, the case was adjourned to the following day.

On the 17th November, the accused appeared in person without counsel, for he had not briefed any. The prosecution with leave withdrew the former charge, and framed a new charge consisting of three counts to which the accused pleaded not guilty. Again, the accused elected a summary trial. There is no substantial difference between the former charge and the new charge, except that the articles alleged stolen in count two of the former charge were found to belong to two different persons, and it was considered better only to include in one count articles which belonged to one person. Hence count two of the former charge was split up into counts two and three in the new charge. Thereafter, the case proceeded to trial and judgment on the same day.

It has been forcefully argued on behalf of the appellant that the above facts show that the appellant was not given a fair hearing. And the English case of *Mary Kingston* (32 C.A.R. 193) and the Nigerian case of *Dixon Gokpa v. I.G. of Police* (1961) 1 All N.L.R. Part 2, 423 were cited in support. In his reply, contending to the contrary, learned Senior State Counsel drew the attention of the Court to the case of *Benjamin Shemfe v. Commissioner of Police* (1962) N.N.L.R. 87 at 91.

In *Mary Kingston's* case, the appellant was deprived of the assistance of her counsel through counsel's own default, by his failing to appear to defend her or by not seeing to it that another counsel appeared to conduct the defence. The trial was with a jury. The Court of Criminal Appeal held that in those circumstances, the Assistant Recorder was perfectly justified in continuing with the trial of the appellant, although she was unrepresented. The Court of Criminal Appeal, however, went on to consider the Recorder's refusal to accept the suggestion of counsel for the

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prosecution, that counsel present in court might be asked to hold the brief, and held that that tantamounted to depriving the appellant of the right she had of being defended by counsel. The Court of Criminal Appeal continued—

“She had put herself, or her family had put her, in the position of a person who was entitled to the service of counsel. Money had been paid for that purpose by them, and she was entitled by the law of this country to the services of counsel. The result of the whole matter is that, having briefed counsel, she has in fact been tried as an unrepresented person, there being other members of the Bar present, any of whom would have defended her if he had been asked, but of course could not come forward and offer to do so.”

In the *Dixon Gokpa* case (*supra*) the facts were shortly as follows—

The appellant was charged on various counts of stealing and forgery, and was first brought before the Magistrate at Ogoni, Rivers Province, on 27th September, 1960. No plea was taken on that date, and the case was adjourned to 25th October, 1960, at the prosecution's request. The case was not called on 25th October. On 28th November the case came on for hearing, but neither the appellant nor his counsel was present. The Magistrate ordered a bench warrant to issue against the appellant, and adjourned the case to the next day. On the next day, the appellant was brought into court but his counsel failed to appear. The appellant informed the Court that he had counsel, and asked for an adjournment to enable his counsel to appear. There was no other counsel in court, and appellant's counsel resided in Port Harcourt, some twenty-three miles away. The Magistrate, nevertheless, adjourned the case to later in the day, and at 2.30 p.m. began to hear it. The appellant took no active part in the proceedings. He did not cross-examine the prosecution witnesses and refused to give evidence in his own defence. The Magistrate found him guilty and sentenced him to two years hard labour.

On appeal to the High Court of Eastern Nigeria presided over by Sir Louis Mbanefo, C.J., His Lordship said—

“After a study of the record one is left with the impression that adequate consideration was not given to appellant's application for adjournment on the 29th November bearing in mind that the appellant was brought to court on a Bench Warrant and the session was being held at a place where it could not be easy for him to obtain the services of counsel . . . In the circumstances, I am of the opinion that that amounted to denying the appellant the opportunity of a fair trial by depriving him of the right he had of being defended by counsel. It might be emphasized that I have taken this view because there is not reliable evidence that the appellant or his counsel knew that the case was coming up on the 28th November, the date on which a Bench Warrant was issued for appellant's apprehension or that the appellant had adequate opportunity of getting in touch with his counsel after he had been brought to court.”

As a result, the learned Chief Justice allowed the appeal, set aside the judgment of the Magistrate and ordered the case to be retried before another Magistrate.

In *Benjamin Shemfe's* case (*supra*) the following notes appear:—

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

In the course of his judgment on appeal to the High Court of Northern Nigeria, Hurley, C.J., said—

"No doubt the appellant was unable to conduct his defence with the same skill as counsel, but that could be said of any defendant, and therefore to say that the appellant's trial was unfair because it went on without his counsel would be to say that wherever an accused person is entitled to the assistance of counsel his trial should never proceed in the absence of his counsel. That is not what the law says, and that is not what the law means by 'unfair'."

The last case I will refer to is the East African case of *Yusufu Gitta v. R.* (1959) E.A. 211, decided in the High Court of Uganda, and referred to by Hurley, C.J., in his judgment in *Benjamin Shemfe's* case (*supra*), in which the following facts were noted—

"The accused in a Magistrate's Court appeared on the hearing day, having been on bail for over three weeks, and produced a letter from an advocate who wrote that he had been instructed by the accused and was requesting an adjournment because he was engaged in another court that day. The prosecution was ready to proceed, and the Magistrate refused the adjournment. On appeal to the High Court, it appeared from the affidavit made by the advocate that he had only just been instructed by the appellant when he wrote the letter requesting an adjournment. In the view of the High Court, the substantial cause of the appellant's not being represented by an advocate was his failure to instruct an advocate till the eve of the trial. A contributory cause was the advocate's failure to do his duty to his client as that duty is explained in the passage from *Mary Kingston's* case which we have cited. The appeal was dismissed."

The cumulative effect of the decisions in the cases quoted above seems to me to be illustrated by the following propositions:—

1. Where an accused person has briefed counsel to conduct his defence, he is both at common law and under our constitution entitled to the services of counsel, whose duty it is to appear on the hearing day to defend him or to see that there is another counsel in court to conduct his defence.
2. Where the hearing date was fixed to the knowledge of accused's counsel, who fails either to appear or to make an alternative arrangement for the conduct of the accused's defence, there is no obligation on the Court as such to grant an application for an adjournment to enable an accused person to bring his counsel. Each case must depend on its own circumstances.

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*Mary Kingston's case (supra)*

3. Where the cause of the accused not being represented by counsel was partly his failure to instruct counsel till the eve of the trial, and partly counsel's failure to do his duty to his client as stated in 1 above, to refuse accused's application for an adjournment, and consequently to proceed to hear and conclude the case, is not an "unfair" trial.

*Benjamin Shemfe's case (supra)*

*Yusufu Giitta's case (supra)*

4. Where the failure of accused's counsel to appear on the hearing day, or to provide another counsel to conduct the defence on the said day, is not due to his own fault, an accused's application for adjournment must receive adequate consideration by the Court, so as to provide him with sufficient time to arrange for counsel to conduct his defence.

*Dixon Gokpa's case (supra)*

The case in hand does not come within any of the above four categories. In the first place, the accused has not briefed any counsel, and so the question whether or not counsel was guilty of dereliction of duty does not arise. Secondly, the hearing date was fixed in the presence of the accused, who appeared on the said date. Finally, the accused did not ask for adjournment. Even if he made such an application, there is nothing on the record to show that it was brought to the notice of the Court. It seems to me that there was nothing unfair in the trial of the accused. Accordingly I dismiss his appeal, and affirm the judgment of the learned trial Magistrate.

*Appeal dismissed.*

Calabar High Court, 13th June, 1966—C/7/65

ANIAGOLU, J.

F. O. TOTTY

*Plaintiff-Applicant*

v.

EFFONG EKPENYONG UDOFIA AND  
ANOTHER*Defendants-Respondents*

*Practice and procedure—application to amend the name of the defendants after judgment—whether court has power to do so.*

The plaintiff sued two defendants the first of whom was described as "Effong Ekpenyong Udofia" claiming damages arising from negligent driving. Judgment was entered against the defendants in default of appearance for the sum of £817 8s with twenty-five guineas costs. Plaintiff took out a writ of execution. When the sheriff went to levy the execution the person identified to him as the first defendant objected, maintaining that he was not Effong Ekpenyong Udofia but Effiong Enyang Udofia as such that he was not the judgment debtor. The sheriff returned the writ unexecuted. The plaintiff then brought a motion on notice to Effiong Enyang Udofia which was duly served on this man, praying the Court to amend the title and judgment in the case so as to describe the first defendant as Effiong Enyang Udofia. At the hearing of the motion, no appearance was made by the first defendant but the Court had to consider whether it had jurisdiction to amend. Order 34 of the High Court Rules deals with amendments before judgment. The High Court Rules contain no provision for amendment after judgment. Order 20 Rule 11 of the Supreme Court Rules in England provide for amendment after judgment.

*Held:*

1. The High Court has power as the High Court of Justice has in England to make amendment after judgment as provided by Order 20 Rule 11 of English Supreme Court Rules as on the 30th of September, 1960.
2. The amendment sought in this case is within the provision of that rule and therefore is allowed.

Cases relied on:—

*Thynne (Marchioness of Bath) v. Thynne (Marquess of Bath)* (1955)  
3 All E.R. 129.

*Pearlman (Veneers) S.A. (Pty) Limited v. Bartels* (1954) 3 All E.R. 659  
*Re Army and Naval Hotel* 31 Ch. D. 644.

*Effang* for the applicant.  
Respondents absent.

**Aniagolu, J.:** The motion in this case seeks the order of this Court to:  
"amend the second Christian name of the first defendant and the judgment in the above suit to describe the first defendant as Effiong Enyong Udofia".

It would appear that the plaintiff sued the defendants in negligence, arising out of negligent driving of the first defendant's motor vehicle, by the second defendant, who was the servant of the first defendant, in the

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course of his employment resulting in a collision with the plaintiff's car which collision caused damage to the plaintiff's car to the extent that it was written off. Judgment was entered against the defendants in default of appearance for the sum of £817 8s and twenty-five guineas costs.

The first defendant's name was given on the claim as EFFONG EKPENYONG UDOFIA. The said judgment was entered against the first defendant in that name. The plaintiff took out a writ of execution against the first defendant. When the sheriff went to levy execution against the first defendant he objected maintaining that his name was not EFFONG EKPENYONG UDOFIA but Effiong Enyong Udofia. Since the judgment was obtained against Effiong Ekpenyong Udofia, the sheriff felt himself not entitled to execute against Effiong Enyong Udofia, and returned the writ of execution. The plaintiffs are now applying to have the writ and the judgment amended by substituting the proper name of the first defendant, namely, Effiong Enyong Udofia for the wrong name Effong Ekpenyong Udofia wherever it appears.

Even after having been served with this motion, the last defendant has not appeared and has not filed any counter-affidavit. There appears to be a certain amount of laxity on the part of the plaintiff in setting down the first defendant's name, for, even now that leave is being sought to insert his proper name when one would expect maximum accuracy, paragraph 4 of the plaintiff's affidavit in support of this motion has given the first defendant's first name as "Effion" instead of "Effiong" as set out on the motion paper. Moreover the motion has neglected to ask for leave to change the first defendant's first name which is set out in the writ as "Effong" instead of "Effiong".

However, there appears to be no doubt who were sued in this case and the person whose car, No. EY 259, hit the plaintiff's car.

Issue arose on whether this Court possesses the jurisdiction to make the order sought. Section 11 of the High Court Law, *Cap.* 61—Laws of Eastern Nigeria, in addition to any other jurisdiction under the High Court Law, or any other written law, conferred on the High Court of Eastern Nigeria all the jurisdiction, powers and authorities which were on 30th September, 1960, vested in the High Court of Justice in England. The Eastern Nigeria High Court Rules has no provision for amendment of judgment. Order 34 of the Rules deals with amendments before judgment.

In England, however, the High Court possesses the power, under Order 20 Rule 11 of the Rules of the Supreme Court, to amend clerical mistakes or errors arising from accidental slips or omissions, in the judgment or orders of the Court. This power is strictly limited to the correction of those mistakes, accidental slips or omissions, and has been held not to extend to varying the judgments or orders of the Court so as to make its meaning plain. *Thynne Bath. Marchioness v. Thynne Bath. Marquess* (1955) page 272: (1955) 3 All E.R. 129.

In the instant case it could be argued that when the Court gave judgment in default, it gave judgment against the person whose name was described by the plaintiff as Effiong Ekpenyong Udofia and that the Court had made no

mistake whatever because it was Effong Ekpenyong Udofia who was sued in the writ. At page 52 of Vol. 1 of 1966 Annual Practice the learned authors have the following passage:—

“It behoves the plaintiff to see that the defendant is described in the writ by his proper name. If a defendant is misnamed either, e.g., by being described as “John” when his real Christian name is “William” or as “Smith” when his real name is “Smythe”, it is submitted that he could have a judgment against him for default of appearance set aside for irregularity.”

That may well be so. Under the High Court Rules any judgment in default may be set aside for good cause shown by the applicant. In that case it is the defendant who is applying to have the judgment obtained in default of his appearance, set aside. In this case it is not the defendant that is applying; it is the plaintiff who is applying to amend.

Judgment in this case was entered against the owner of car No. EY 259 which hit the plaintiff's car when it was negligently manoeuvred by the second defendant, a servant of the owner of the car whom the owner at the material time authorized, in the course of his employment to drive the car. The present application does not seek to vary these facts or to vary the findings of the Court in favour of these facts. It seeks to correctly describe the owner of that car as Effiong Enyong Udofia.

In *Pearlman Veneers S.A. (Pty), Ltd. v. Bartels* (1954) 3 All E.R. 659 the plaintiffs entered into two contracts in writing with the defendant, who described himself in all the documents as Bernhard Bartels and who carried on business in Germany. Having broken the contracts the defendant was sued in England in the name of Bernhard Bartels. Judgment for damages and costs was recovered against him. The plaintiffs applied in German Courts to enforce the judgment against him. He contended that the judgment was invalid and unenforceable because his true name was Josef Bartels, the Bernhard Bartels being only the name in which he carried on business. The plaintiffs, in order to overcome this technical point, applied to the English Courts to amend the writ, and all subsequent proceedings and judgment, by substituting Josef Bartels trading “as Bernhard Bartels” for Bernhard Bartels”. The amendment was made. The defendant appealed contending that the Court had no jurisdiction to amend a judgment after it had been entered. The Court of Appeal held that the High Court had jurisdiction to amend the title of the action where the substantive judgment was in no way being altered.

Denning, L.J., in his judgment said:—

“when the substantive judgment is not being altered, but only the title of the action, it is to my mind quite plain that this Court has ample jurisdiction to correct any misnomer or misdescription at any time whether before or after judgment.”

In the case of *Re Army and Naval Hotel* 31 Ch.D. 644 error in the name of a company in a winding-up order was corrected.

The next point is whether the correction must be made by the Judge who gave the judgment the title of which is sought to be corrected, or whether

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any other Judge sitting at that Court can order the correction to be made. The words of Order 20, Rule 11 of the Rules of the Supreme Court of England are as follows:—

“Clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court on motion or summons without an appeal.”

The words used in the rule are “by the Court”. The jurisdiction is vested in the Court and not in the person of the particular Judge. Judgment was entered in this case, in favour of the plaintiffs by another Judge who has since left this Judicial Division. In *Thynne Bath, Marchioness v. Thynne Bath, Marquess (supra)* the Court of Appeal held that Lord Merriman had the jurisdiction to make the necessary correction sought, namely, the substitution for the particulars of the marriage ceremony which had been pleaded and proved in the proceedings those of an earlier marriage ceremony between the same parties to which no reference had been made, even though the petition was originally heard, and decree *nisi* granted by Dale, J.

Having regard to the foregoing, I am of the view that this Court has jurisdiction to make the order prayed for. As no rights of third parties have intervened in this matter; as there appears nothing inequitable in the making of the order; and as the first defendant would in no way be further prejudiced than he would have been if in the first instance judgment had been entered against him in his correct name since the Court intended in fact to enter judgment against him, I grant the application. I therefore, hereby, order that the title of the writ of summons, that of the judgment, and all other documents in respect of this case be amended for the first defendant's name to read:—

EFFIONG ENYONG UDOFIA instead of Effong Ekpenyong Udofia.

*I make no order as to costs.*

Onitsha High Court, 15th June, 1966—O/43M/65

KALU ANYA, J.

ONWUCHEKWA OKOLI

*Applicant*

v.

VINCENT NWAFOR

*Respondent*

*Execution—stay—Magistrate refused stay—further application to the High Court shall specifically ask for review—High Court rules O. 56. r. 20 (6) and O. 35 r. 2.*

The applicant against whom a judgment was obtained in the Magistrate's Court by the respondent unsuccessfully brought an application to the Magistrate for a stay of execution pursuant to section 54 (3) of the Magistrate's Court Law. The applicant then moved the High Court praying "for an order to stay execution of the judgment and costs and for such further order or orders as the Court may deem fit".

On behalf of the respondent, a preliminary objection was taken that the application was improper as it was not an application for a review of the Magistrate's Order. The applicant's counsel replied that at least he was covered by the inclusion in the prayer of the words "and for such further order or orders . . ." since it was on record that a stay had been refused by the Magistrate.

*Held.*—The applicant should have asked for a review of the Order of the Magistrate, and not "for a stay of execution"; and the words "and for such further order or orders as the Court may deem fit" do not embrace an application for a review. The application is therefore not properly before the Court.

*Anyaduba* for the applicant.

*Anah* for the respondent.

**Anyia, J.:** This is a motion on notice by learned counsel for the defendant/applicant, Mr Anyaduba, for an order of this Court to stay the execution of the judgment of the Magistrate, Awka, in suit No. MAW/119/62 between the parties. The terms of the motion are in the usual form and read:—

"TAKE NOTICE that this Honourable Court will be moved on the 31st day of January, 1966, at the hour of 9 o'clock in the forenoon or so soon thereafter when the counsel can be heard on behalf of the defendant/appellant praying this Honourable Court for an order to stay execution of the judgment and costs obtained against him in the above-named suit and for such further order or orders as this Honourable Court may deem fit."

Mr Anah, learned counsel for the respondent took the preliminary point that the application is improper in that it is for a stay of execution instead of for a review of the order of the Magistrate dismissing an application for a stay of execution in the first instance before the Magistrate.

In reply, Mr Anyaduba submitted that his motion is for a review of the order of the Magistrate or in the alternative for stay of execution and that the application is properly brought in this Court.

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 J.

On 6th June, 1966 in *British India General Insurance Company Limited v. Patrick Emeral* O/29M/66, I ruled that an application for a stay of the judgment of the Magistrate must in the first instance be brought in the Magistrate's Court. In that case no application was made at all to the Magistrate for an order to stay the execution.

The present application is different from the earlier one referred to above. The point of difference is, in the main, that the present applicant had already applied to the Magistrate for an order to stay the execution and had his application dismissed for reasons recorded by the Magistrate, Awka. The point taken by Mr Anah requires a full consideration.

Mr Anyaduba referred me to my earlier ruling and expressed the fear I might find it difficult to overrule myself. He referred me to Order 56 rule 20 (6) which he said was not brought to my notice and submitted that if my attention was directed to the rule quoted my ruling might have been different. I have considered my earlier ruling and the relevant rules of court quoted very carefully. Section 54 (3) of the Magistrates' Courts Law warns:—

"An appeal under this section shall not operate as a stay of execution but the Magistrate or the High Court may order a stay of execution either unconditionally or upon the performance of such conditions as may be imposed by rules of court made under the provisions of the High Court Law or of this Law."

The section of the Magistrates' Courts Law reproduced clearly empowers the Magistrate or the High Court to order a stay of execution in the discretion of the Court, but Order 56 rule 20 (3) of the Rules of the High Court reads:—

"An application for stay of execution under section 54 (3) of the Magistrates' Courts Law may be made at any time after the lodgement of the notice of appeal and *shall* in the first instance be made to the Magistrate's Court:

Provided that where execution has been ordered by the Court the application shall not be made to the Magistrate's Court but to the Court."

This rule 20 (3) of Order 56 of the Rules of the High Court enjoins upon an applicant for a stay of execution to bring his application first in the Magistrate's Court and not in the High Court except where the High Court has ordered an execution, e.g., in a case where the High Court has ordered a sale of the immovable property of the applicant for the purpose of satisfying a Magistrate's Court judgment debt, because it does not lie in the power of the Magistrate to interfere with the order of the High Court.

To explain "shall in the first instance" as appears in rule (3) of Order 56 of the Rules of the High Court, the following provisions appear in sub-rule (6) of rule 20 of the same order:—

"Any party dissatisfied with an order made by the Magistrate's Court, may apply to the High Court by motion (original or interlocutory, as the case may require) with notice to the other party for a *review* of the order, and the High Court may thereupon make such order as may seem fit."

I think sub-rule (6) means what it states. An application for a stay of execution of the judgment of the Magistrate must be made to the Magistrate's Court in the first instance in any event except where an order for execution

had been made by the High Court. But the power of review, a kind of appeal, is conferred upon the High Court by this rule.

It would appear that an order of the Magistrate made upon an application for a stay of execution is not appealable in the ordinary way but rule 20 (6) of Order 56 of the rules of the High Court provides an alternative way of taking the matter to the High Court thereby giving the applicant the opportunity of being heard a second time.

My view is that review is a kind of appeal. Review in the legal sense means revision. The High Court can only review or revise an order that is in existence and before it, made by a lower tribunal. It cannot review or revise an order it is called upon to make. The High Court may, upon review of an order of refusal of stay of execution order a stay. In support of my view that a review is some form of appeal I shall reproduce hereunder in part section 28 of the Native Court's Ordinance, *Cap.* 142, Vol. IV of the Laws of Nigeria, 1948:—

"28. (1) Every Resident and District Officer shall at all time have access to Native Courts both of first instance and of appeal in his province or division, as the case may be, and may of his own motion or in his absolute discretion on the application of any person concerned—

(a) review any proceedings (save and except a sentence of death) of such Native Court; whether civil or criminal and may make such order or pass such sentence therein as the Native Court could itself have made or passed:"

Surely any person concerned who wished to avail himself of the right of review provided by the section above-reproduced would in his application set out the order made or sentence passed and the grounds for attacking the order or sentence. It would be an appeal masquerading under the guise of a review.

In the instant application, the point to decide in order to rule on the propriety or otherwise of the motion before me is whether or not the application is for a review of the order of the Magistrate, Awka, dismissing the motion for stay of execution, or for a stay to be ordered in the first instance. It appears to me that the motion is a fresh application for stay of execution and not for a review of the order of the Magistrate, Awka. The terms of the order sought as in this application are always distinctly stated on the motion paper in compliance with rule 2 of Order 35 of the High Court Rules which reads thus:—

"Unless the Court shall otherwise order, no motion shall be entertained until the party moving has filed a motion paper, or made verbal application to the Registrar, distinctly stating the terms of the order sought."

The words "and for such further order or orders as this Honourable Court may deem fit" on the motion paper do not appear to me to embrace an application for a review of the order of the Magistrate. They merely contemplate such other orders as to the costs of the motion, security or other conditions which may appear just in the circumstances of the motion. For the reasons I have given, I strike out the motion with four guineas costs to the respondent.

*Motion struck out.*

O. Okoli  
vs.  
V. Nwafor  
Kalu Anya,  
J.

Calabar High Court, 15th June, 1966—C/15A/65

ANIAGOLU, J.

BOARD OF CUSTOMS AND EXCISE

*Appellant*

v.

ADIAHA S. UDO

*Respondent*

*Criminal Law—charge under Customs Act—statutory ingredients not averred—prohibited property found in matrimonial home—whether possession was in the wife or not.*

The respondent—a house wife—was charged in two counts with her husband under sections 145 (a) and 145 (b) of the Customs and Excise Management Act, 1958. The charges read as follows:—

*Count 1.*—"That you Adiaha Sampson Udo (*f*) and Sampson Akpan Udo (*m*) on 25th October, 1963, in your store, at Usung Inyang, Eket in Uyo Magisterial District, with intent to evade the duty payable to the Federal Government were concerned in harbouring the following goods:— . . . being goods chargeable with the import duty of Customs which has not been paid and you thereby committed an offence contrary to section 145 (a) of Customs and Excise Management Act, No. 55 of 1958".

*Count 2.*—"That you Adiaha Sampson Udo (*f*) and Sampson Akpan Udo (*m*) at the same date and place, were knowingly concerned in a fraudulent act evasion of a prohibition when the following prohibitions were found in your store:— . . . which prohibition was at the time in force by virtue of section 2 of the Import Prohibition Order, Legal Notice No. 81 of 1959 and you thereby committed an offence contrary to section 145 (b) of Customs and Excise Management Act, No. 55 of 1958".

As could be seen above, the words "knowingly and with intent to defraud the Government" which are the words used by the Act, are not contained in count 1. Also, as could be seen above, the second count is full of errors, bad arrangement of words, and with a number of meaningless words inserted. But no objection was taken by the defence at the trial.

According to the evidence, the goods in question were found in the store of the home of the couple. Second accused was absent at the time of the search but his wife the first accused admitted that the goods belonged to her husband the second accused. There being no admissible evidence against the second accused he was acquitted. As for the first accused the Magistrate held that the goods were not in her possession and also acquitted her.

The Board of Customs appealed to the High Court against the acquittal of the wife—first accused. The High Court considered the correctness of the charges and also the position of the respondent in relation to the possession of the goods.

*Held:*

1. Omission in the charge of the intent required by the statute is fatal to the charge. As such first count was bad and the respondent could not have been convicted on it whatever the evidence was.
2. Where goods are found in a house occupied by a man and his wife, the presumption is that they are in the possession of the husband alone. In this case this presumption was not displaced by the evidence and so the respondent could not have been convicted in the second count.

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## Cases relied on:—

*R. v. Boober* 14 J.P. 355.  
*Moses Okoro v. Police* 14 W.A.C.A. 370.  
*R. v. Yakubu* 10 W.A.C.A. 267.  
*R. v. McVitie* (1960) 2 All E.R. 498.  
*Gbadamosi v. The Queen* 4 F.S.C. 181.

*Ibidapo-Obe* for the appellant.  
*Ukot* for the respondent.

**Anigolu, J.:** Section 145 (a) of the Customs and Excise Management Act, No. 55 of 1958, on which the defendants are charged with the first count of the charge reads in part as follows:—

“Without prejudice to any other provision of this ordinance, if any person—

“(a) Knowingly and with intent to defraud the Government of any duty payable thereon, or to evade any prohibition with respect thereto, acquires possession of, or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or Government warehouse, or which are chargeable with a duty which has not been paid, or with respect to the importation, exportation or carriage coastwise of which any prohibition is for the time in force; . . .”

The charge as laid against the defendants reads thus:

“*Count 1.*—That you Adiaha Sampson Udo (f) and Sampson Akpan Udo (m) on 25th October, 1963, in your store, at Usung Inyang, Eket in Uyo Magisterial District, with intent to evade the duty payable to the Federal Government were concerned in harbouring the following goods:—

18 Quart bottles Gordon's Dry Gin.  
 8 Quart bottles White Horse Whisky.  
 1 Little Bottle Sants Riya Wine.

being goods chargeable with the import duty of customs which has not been paid and you thereby committed an offence contrary to section 145 (a) of Customs and Excise Management Act, No. 55 of 1958,”

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The words: "knowingly and with intent to defraud the Government", it would be seen, are not contained in the charge. Even if it is argued that the words "with intent to evade the duty payable to the Federal "Government" which are contained in the charge are equivalent to the words of the Statute namely "with intent to defraud the Government", the word "knowingly", has been completely omitted in the charge. Stretching the imagination a little, one might say that if a person "with intent to evade the duty payable to the Federal Government", as set out in the charge, was concerned in harbouring goods, there is contained, implicitly in the charge, the averment that he "knowingly" intended to defraud the Government.

Section 157 (1) of the Customs and Excise Management Act, 1958, unlike section 222 of the old Customs Ordinance, enacts that the procedure applicable in criminal matters in the place in Nigeria where the proceedings are brought is to be applied to the prosecution in that place for the enforcement of fines and imprisonment prescribed for Custom offences.

The Criminal Procedure Law of Eastern Nigeria, and indeed the general law of all places where you have the Rule of Law, requires the prosecution to set out all the ingredients of the offence in the charge in order to acquaint an accused person with the things which he has to meet. The salient words of section 145 (a) (*supra*) are "knowingly" and "intent to defraud". How far the words "intent to evade" take the place of "intent to defraud" is a matter for debate. What is clear is that the Legislature well knowing that the phrase "intent to evade" exists chose to use the phrase "intent to defraud". The provisions of the Customs and Excise Management Act are heavily weighted against a defendant charged under it. With all the advantage on their side I do not think that it is too much to ask that prosecutors under the Act should at least endeavour to frame their charge, correctly in the words set out by the Statute, leaving the defendants the task of carrying their unhappy burden, in respect of the *onus* of proof, under the Statute. The Federal Supreme Court, as the Supreme Court was then called, reiterated the importance of accurately framing charges and informations in *Ghadamosi v. the Queen* 4 F.S.C. I do know that it is not every defect in a charge that would result in the discharge of an accused person. The word "knowingly" was omitted in the charge in *R. v. McVitie* (1960) 2 All E.R. 498 and the omission was held not to be fatal. In that case, however, the accused admitted the guilty knowledge. It was held in these circumstances that the charge was not bad but only defective or imperfect.

In the instant case the respondent never admitted having anything to do with the goods in question.

The Courts have recognized generally that the omission in the charge of the intent required by Statute is fatal to the charge. Thus where "intent to defraud" required by Statute was omitted in the charge it was held to be fatally defective. *R. v. Yakubu* 10 W.A.C.A. 267.

Where indeed a charge fails to contain an essential ingredient of an offence such a charge is non-existent. This view was taken in *Moses Okoro v. Police* 14 W.A.C.A. 370.

In the instant case, learned State counsel, Mr Onafalujo, has conceded, and I think rightly so, that count 1 of the charge does not disclose an offence under section (145) (a) of the Customs and Excise Management Act, 1958

against the respondent. Accordingly the discharge of the respondent under that count by the Magistrate who went on the facts, would, in any event, have been made on the law. The appeal of the Board of Customs and Excise in so far as it relates to count 1 of the charge, therefore fails.

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I now turn to count 2. This is what the appellants are charged with in that section:—

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“Count 2.—That you Adiaha Sampson Udo (*f*) and Sampson Akpan Udo (*m*) at the same date and place, were knowingly concerned in a fraudulent act evasion of a prohibition when the following prohibitions were found in your store:—

30 Quart bottles sterling schnapps  
26 Quart bottles Pedro Doecq Brandy  
13 Quart bottles Terry Brandy  
5 pint bottles Terry Brandy

which prohibition was at the time in force by virtue of section 2 of the Import Prohibition Order, Legal Notice No. 81 of 1959 and you thereby committed an offence contrary to section 145 (*b*) of Customs and Excise Management Act, No. 55 of 1958.”

Subsection (*b*) of section 145 of the Act, under which count 2 above purports to be charged, reads as follows:—

“Without prejudice to any other provision of this Ordinance if any person—

(*b*) is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any such prohibition as aforesaid or of any provision of this Ordinance applicable to those goods, he shall be liable to a fine of six times the value of the goods . . . etc . . .”

There are a number of grammatical errors, bad arrangement of words, meaningless words inserted, and generally inelegance in the drafting of the charge. For example, the phrase “when the following prohibitions were found in your store”, has really no meaning. I have no doubt that what the prosecution meant to say was “when the following provisions were found in your store”. I have always wondered why some prosecutors of Custom cases cannot at least take the trouble of framing their charges accurately when literally the entire Customs and Excise Management Act, like its predecessor, the Customs Ordinance, places so much onus on the defendant in relation to the proof of matters in issue, that all that the prosecutor need do is to produce a proper charge with proper averments leaving it to the defendant to dislodge the presumptions which the law holds against him, and in favour of the prosecution.

In the instant case, however, with all the errors that it contains, it appears quite clear what count 2 is charging the accused persons with. The defendants were defended by counsel who had every right to object to the charge if he so desired or if he felt in any way that his client was misled by the charge. Both at the close of the case for the prosecution when he made a submission of no case to answer and at his final address at the close of the defence case, defence counsel, Mr Umana, made no mention whatever

to the nature of the charges. He was wholly concerned with the facts of the case. It is a little surprising that so many defects as existed in both counts of the charge should have escaped the attention of defence counsel, as one must suppose that they escaped his attention. Perhaps, it is more convenient to say that he noticed them but thought them of little consequence, having placed great reliance on the facts.

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The second accused is the husband of the first accused. He was absent when the Customs Officers made their search. The first accused, however, was present. The second accused was acquitted and discharged by the Magistrate. No complaint appears to be made by the Board against the acquittal of the second defendant by the Magistrate. The ground of appeal filed relates only to a passage in the Magistrate's judgment which deals with the first defendant only. In her extra-judicial statement (Exhibit "A"), made to the Customs Preventive Officer, one Anthony Ufomba, the first defendant referring to the goods in dispute said—"Those things were discovered in a small house owned by my husband". Further on in the statement she again said: "The things caught belong to my husband". The learned trial Magistrate did not hold this statement against the first defendant, as I think he was rightly entitled not to. The Magistrate's reasoning appears a little difficult to understand in terms of the words he used but I think that what he was trying to convey is clear. The Magistrate said:

"Even if the confessional statement by the first defendant is believed it was not a true confessional statement because in it, it is said that her husband owned it and her husband has been discharged and there is nothing to say that she herself must own the articles and no other person."

The first defendant's statement was not a confession. She in no way implicated herself in the statement or confessed to committing the offence with which she was charged. It is therefore wrong to call the statement a confessional statement. What has happened is that she made a statement in which she implicated her husband. That is not a confessional statement. The statement, is of course, not evidence against her absent husband. The net result is that the first accused made a statement in which she absolved herself of all connection with the goods; stated that they belonged to her husband (a statement which was no evidence against her husband); and retracted the statement in her evidence before the Court. Citing the case of *R. v. Boober* 14 J.P. 355 in support, the learned Authors of Archbold Criminal Pleading Evidence and Practice 35th Edition, at paragraph 3123 has the following passage:—

"If coinage implements are found in a house occupied at the time by a man and his wife, the presumption is that they are in the possession of the husband alone, and the wife should not be convicted unless there are circumstances to show that she was acting separately and without her husband's sanction . . . The fact of a wife attempting to break up coining implements at the time of her husband's apprehension, if done with the object of screening him, is not evidence of a guilty possession."

The first defendant in this case has said in her extra-judicial statement that the goods in dispute were her husband's. But even if the goods had been found in the shop which she occupied with her husband and not at the backyard, the possession on the authority of *Boober (supra)* would be that of her husband, the second defendant. I see no substance in this appeal filed against the discharge of the woman, the first defendant. As no appeal was lodged against the acquittal of the husband, the second defendant, I say nothing further on the matter.

The appeal is dismissed and the order of the learned Magistrate is affirmed.

*Appeal dismissed.*

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<ol style="list-style-type: none"> <li>1. EKE AWA</li> <li>2. EFFIONG NDARAKE</li> <li>3. ESSIEN AKPAN</li> </ol>	}	<i>Appellants</i>
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v.

COMMISSIONER OF POLICE	<i>Respondent</i>
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*Criminal Procedure—summary trial—application by prosecution to withdraw charge and to proceed by way of preliminary investigation—Criminal Procedure Law s. 284—application granted—accused persons discharged not on merit.*

*Appeal—appeal against order of discharge—whether appeal is proper—High Court Rules, Order 55, Rule 9, High Court Law s. 32 and Constitution of Eastern Nigeria Law, 1963 s. 53 (f) considered.*

The accused persons were charged under section 390 (9) of the Criminal Code with stealing £650 belonging to one Okon Edet. In the course of summary trial of the accused, the prosecution applied under section 284 of the Criminal Procedure Law to withdraw the charge and proceed by way of preliminary investigation after the complainant, Okon Edet, had concluded his evidence and had been cross-examined by counsel for the three accused persons. This was opposed by the learned counsel for the defence on the ground that under section 284 of the Criminal Procedure Law the prosecution could not withdraw the charge because the accused persons were arraigned on a charge and not brought before the Court on a complaint. He argued that even if the prosecution could withdraw the charge under the section the consequential order to be made by the Magistrate would be that of acquittal. On being overruled by the Magistrate the defence counsel appealed. He filed only one ground of appeal that—

“The learned Magistrate was wrong in merely discharging the accused, but ought also to have acquitted them.”

The learned State counsel took objection on the ground that the ground of appeal filed was not a ground of appeal permissible under Order 55, Rule 9 of the High Court Rules, Eastern Nigeria because it could not be brought on (pigeon-hole into) any of the grounds set out by the said rule.

*Held:*

1. The effect of section 32 of the High Court Law and section 53 (f) of the Constitution of Eastern Nigeria, when read together was that an appellant, who had not been convicted by a magistrate could appeal to the High Court against the decision of the Magistrate.
2. The ground of appeal as filed by the appellants (though it ought to have been clearly stated that the decision of the learned trial Magistrate was erroneous in point of law) was proper under Order 55, Rules 9 (f) and 10 (1) of the High Court Rules.
3. The appellants were also entitled to appeal against the ruling of the Magistrate under the provisions of section 53 (1) (f) of the Constitution of Eastern Nigeria.

4. Although the trial Magistrate was wrong in making the ruling on the application brought by the prosecution under section 284 of the Criminal Procedure Law, he was, nevertheless, right in not discharging the appellants on the merits.

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Cases referred to:—

*R. v. Aladesuru* (1956) A.C. 49.

*Mbam Iboko v. Police* S.C.300/1964 of 25th June, 1965.

*Inspector-General of Police v. Sydney Marke* (1957) N.R.N.L.R. 97.

*Clement Nwali v. Inspector-General of Police* 1 E.N.L.R. 1.

*Bramman v. Peek* (1947) 2 All E.R. 572.

*Okon* for the appellants.

*Oguadi* for the respondents.

Aniagolu, J.

**Aniagolu, J.:** This is an appeal against the Ruling of the Calabar Magistrate, S. I. O. Aguolu, Esquire, in a case in which the accused persons were charged under section 390 (9) of the Criminal Code with stealing a sum of £650 belonging to one Okon Edet. State counsel who appeared for the prosecution called one witness, namely, the complainant, Okon Edet, and after he had concluded his evidence and had been cross-examined by counsel for the three accused persons, State Counsel applied to withdraw the charge under section 284 of the Criminal Procedure Law on the ground that he desired to proceed by way of preliminary investigation. Against the opposition of defence counsel, who argued that the proper order to be made by the Magistrate would be one of acquittal of all the accused persons, the Magistrate granted the application by the prosecution, allowing the prosecution to withdraw the charge.

The order of the Court was as follows:

“By Court: The application is granted. The accused are discharged and not on the merits of the case. Case struck out.”

The defence had argued before the Magistrate that under section 284 of the Criminal Procedure Law, State counsel cannot withdraw the charge because the accused were arraigned on a charge and not brought before the Court on a complaint. Alternately they argued that if the prosecution could withdraw the charge under section 284 of the Criminal Procedure Law, the consequential order to be made by the Magistrate was one of acquittal.

After the Ruling of the learned trial Magistrate, Mr Okon, counsel, gave oral notice of appeal on behalf of the appellants. He later, within time, filed a memorandum of the grounds of his appeal which contained only one ground as follows:

“The learned Magistrate was wrong in merely discharging the accused, but ought also to have acquitted them.”

Objection has been taken by State counsel, on behalf of the Commissioner of Police, the respondent to this Appeal, that the ground of appeal filed is not a ground of appeal permissible under Order 55 Rule 9 of the High Court Rules. Learned State counsel contends that the ground of appeal does not allege error in law and cannot be pigeon-holed to any of the grounds set out by the Rules under Order 55 Rule 9. Mr Okon on the other hand contends that the ground of appeal is a perfectly good one in law and that it is clear that the ground of appeal is one complaining of error in law.

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The High Court Rules 1955 were made by the Governor pursuant to section 85 of the High Court Law which empowered him to make the first rules of court on the introduction of the new High Court of Eastern Nigeria in January, 1956. Section 36 (1) of the High Court Law deals with the powers of High Court in Criminal Appeals, where the appellant appeals from a conviction in the Magistrate's Court. But it is not in this section that the authority of an appellant to appeal is to be found. The section simply stipulates what the powers of the Court would be where an appeal is one against a conviction by a Magistrate.

But section 32 of the High Court Law enacts that:—

“The Court shall have appellate jurisdiction to hear and determine all appeals from the decisions of Magistrate's Courts in Civil and Criminal Causes and matters given in the exercise of the original jurisdiction of the said Courts as well as cases stated by Magistrates in accordance with the provisions of this law or of any other written law.”

By section 14 of the Interpretation Law of Eastern Nigeria:

“Every law enacted by the Regional Legislature shall be read and construed subject to the Constitution of the Federation . . . etc.”

Section 53 (f) of the Constitution of Eastern Nigeria made pursuant to section 5 of the Constitution of the Federation gives an appellant right to appeal from a decision of a subordinate court of a Region to the High Court of that Region as of right in:

“(f) decisions in any other criminal proceedings before a subordinate court sitting at first instance from which no appeal lies as of right to another subordinate court.”

Reading therefore section 32 of the High Court law and section 53 (f) of the Constitution of Eastern Nigeria it is clear that an appellant who has not been convicted by a Magistrate may yet appeal to the High Court against the decision of the Magistrate since, in the words of section 53 (f) of the Constitution of Eastern Nigeria there is no other subordinate court in Eastern Nigeria to which an appeal lies in criminal cases from the decision of a Magistrate sitting at first instance. This answers the objection of learned State Counsel that the present appellants cannot appeal against the ruling of the Magistrate in this case since they were neither appealing against a conviction nor against a sentence. The law as it stood before the passing of the Constitution was what learned State Counsel was alluding to, but the position has changed with the coming into force of the 1963 Constitution.

Now the ground of appeal as filed does not specially state that it was complaining about error in law. One would have expected counsel to word his ground of appeal in such a way that it, categorically, would state that it is alleging error in law. The importance of clearly setting out one's grounds of appeal in the words of the Statute giving the right of appeal has often been stressed.

*R. v. Aladesuru* (1956) A.C. 49.

*Mbam Iboko v. Police* S.C. 300/1964 decided on 25th June, 1965.

But Order 55 Rule 10 (1) of the High Court Rules requires the appellant to set forth in his memorandum of grounds of appeal the particular matter on which he relies or of which he complains. The appellants in this case

are complaining that the Magistrate, instead of acquitting them of the offence with which they were charged, an acquittal that would render them free from further prosecution, merely discharged them stating that the discharge was not on the merits—an order making them liable to be further prosecuted.

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Again Order 55 Rule 9 (j) of the High Court Rules provides that a memorandum of the grounds of appeal may include all or any of the following grounds, that is to say:—

“(j) that some other specific illegality not hereinbefore mentioned and substantially affecting the merits of the case, has been committed in the course of the proceedings in the case;”—

It is, in my view, clear that the ground of appeal as filed (although it would have been more elegant if it had clearly stated that the decision of the learned trial Magistrate was erroneous in point of law) comes under Order 55 Rules 9 (j) and 10 (1) of the High Court Rules. I therefore hold that the ground of appeal complains of error in law and that it is properly before this Court. I further hold that under the Constitution the appellants were legally entitled to appeal against the Ruling of the Magistrate. Mr Okon's analogy with the cases of *Inspector-General of Police v. Sydney Marke* (1957) N.R.N.L.R. 97 and *Clement Nwali v. Inspector-General of Police* 1 E.N.L.R. 1 to show that the appellants have a right of appeal in this case does not, with all due respect, apply because the appeals in both cases were on the special pleas of *autrofois* acquit, which pleas were specifically provided for by statute. In *Sydney Marke* the prosecution appealed against the judgment of the Magistrate upholding a plea of *autrofois* acquit. In *Clement Nwali* the defence appealed against the rejection of the defence pleas of *autrofois* acquit. Order 55 Rule (f) (proviso) of the present High Court Rules retains that old statutory provision of appeals on the special pleas of *autrofois* acquit and *autrofois* convict.

The next question in this appeal is this: Was the Magistrate right in discharging the appellants not on the merits? Learned State Counsel, Mr Keazor, applied to withdraw the case under section 284 of the Criminal Procedure Law in order to proceed by way of preliminary inquiry. The words of section 284 of the Criminal Procedure Law are as follows:—

“If a complainant at any time before a final order is made in any case under this chapter satisfied the Court that there are sufficient grounds for permitting him to withdraw his complaint the Court may permit him to withdraw the same and shall thereupon acquit the accused unless the Court directs that the accused instead of being acquitted shall be discharged.”

Although the marginal note in a statute is never taken to have any legislative effect whatever and is not deemed to vary, limit, or extend the interpretation of any law (see section 48 of the Interpretation Law), yet the marginal note of section 284 of the Criminal Procedure Law tends to show that the section deals with complaints. “Complaint” is defined in section 2(1) of the Criminal Procedure Law as:—

“The allegation that any named person has committed an offence made before a Magistrate for the purpose of moving him to issue process under this Law;”

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section 284 of the Criminal Procedure Law was not in my view the appropriate section under which State counsel should have applied to convert the case to one of preliminary inquiry. There was no necessity for him to have applied to withdraw the case at all. Under section 306 of the Criminal Procedure Law, he had only, by order in writing under his hand, at any time before the decision of the Magistrate in the case, to require the Magistrate to deal with the case as one for trial on indictment and on receipt of the requisition the Magistrate would proceed with the case as of one in a preliminary inquiry.

Unlike *Sydney Marke* and *Clement Nwali* where the prosecution had closed their case and had later sought to re-open the matter after a discharge by the Magistrate, the prosecution in the instant case had not closed their case and had specifically applied to the Magistrate, and had their application granted, to treat the case as one on indictment. The objections in the two cases of *Nwali* and *Marke* were that the prosecution, in effect, was asking for leave to continue prosecuting the defendants until they are able to make a case against them. This obviously was in conflict with the established legal principle of the liberty of the subject and would not be allowed to stand. In the instant case, the Criminal Procedure Law allows the prosecutor to convert a summary trial case to one as of on an indictment. Indeed section 298 of the Criminal Procedure Law empowers the Magistrate to so convert a summary trial case, *suo moto*, if he considers that owing to the nature of the case it were better dealt by the High Court.

Although section 284 of the Criminal Procedure Law under which the Magistrate acted was an inappropriate section for the purpose intended by the State counsel; although the application for withdrawal of the case ought never to have been made in the circumstances; and although the objection raised at the trial that section 284 of the Criminal Procedure Law raised by appellants' counsel was the wrong section, yet I am of the view that the appellants, in the circumstances, were not entitled to be acquitted of the offence with which they were charged. It would have been different if the prosecution had closed its case, or stated that it had no evidence to offer. (*Brannan v. Peek* (1947) 2 All E.R. 572). In those circumstances the defence would be entitled to claim that the matter had been closed and that the prosecution would not be allowed to have a second bite.

Having regard to the foregoing I hold that the learned Magistrate was right in not discharging the appellants on the merits. The appeal is accordingly dismissed.

*Appeal dismissed.*

Port Harcourt High Court, 29th June, 1966—P/63C/65

PHIL-EBOSIE, J.

THE STATE

v.

SUNDAY OGBONNA

*Criminal Law—killing by dangerous driving—section 18 (2), Road Traffic Ordinance—charge laid under the Road Traffic Ordinance after it ceased to be operative in Eastern Region, Nigeria—whether charge so laid became non-existent thereby.*

*Criminal Procedure Law—where every amendment is made in a law whether mention should be made of the amended law in a charge.*

An accused person was charged with killing by dangerous driving contrary to section 18 (2) of the Road Traffic Ordinance. At the trial the defence counsel submitted as follows:—

- (a) that the information in the case was filed after the Road Traffic Ordinance had ceased to have any effect in the Region and as such the accused was charged on a non-existent charge, and
- (b) that as section 18 (2) of the Ordinance came into operation as a result of an amendment of the law, the amended law ought to have been mentioned in the charge.

*Held:*

1. The important question is what law was in operation at the time of the commission of the offence? It is not in dispute that the Road Traffic Ordinance was and, therefore, the accused was properly charged with the offence under the Ordinance.
2. It is erroneous to mention the amended law in the charge, for all that the amendment law did was to create another subsection of section 18 of the principal ordinance numbered subsection 2. It is, therefore, proper to refer to the subsection as section 18 (2) of the Road Traffic Ordinance.

Cases referred to:—

*Alphonsus Oruche v. Commissioner of Police* F.S.C. 73/1962.

*The Queen v. Tunke* (1961) All N.L.R. 258.

*Watson v. Thomas S. Whitney and Company Limited and Another* (1966) 1 All E.R. 122.

*Izchukwu* State counsel for the prosecution.

*Woyike* for the accused.

**Phil-Ebosie, J.:** The accused is charged with killing by dangerous driving contrary to section 18 (2) of the Road Traffic Ordinance.

Before going to the facts it will be proper to dispose of the first submission raised by the learned defence counsel on the issue whether the accused was charged on a non-existent charge. The grounds for his submission were that, the information in this case was filed after the Road Traffic Ordinance

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ceased to have any effect in this Region and in support of his submission counsel referred me to a similar case decided by Nkemena, J. in charge P/68C/65—*The State v. Macauley Pinwi Yobo*, where the learned trial Judge held that a charge under the Road Traffic Ordinance was non-existent as the Ordinance no longer apply to this Region. The judgment of Nkemena, J. was not made available to me and so I cannot accurately say the exact grounds on which he held such a view. With respect however to the learned Judge's views I should think that such a view is opposed to the decision of the Federal Supreme Court in the case of *Alphonsus Oruche v. Commissioner of Police* F.S.C. 73/1962 approving the decision of the same court in *The Queen v. Tunke* 1961 All N.L.R. 258. In the latter case the appeal court held that having regard to section 14 of the Interpretation Ordinance as the offence was committed at a time when the Criminal Code was in force and was an offence against section 319 of that Code, it was proper to prosecute for an offence against that section, even though that section had been replaced by a section of the Northern Region Penal Code 1959 at the time of return of trial.

The important question is what law was in operation at the time of the commission of the offence. It is not disputed that the Road Traffic Ordinance was the one and it is my view therefore that the accused can be charged with the offence under the Road Traffic Ordinance.

The other objection was that section 18 (2) came into operation as a result of an amendment of the law. The amended law it was submitted ought to have been mentioned in the charge. This view is erroneous for all that the amendment law did was to create another subsection of section 18 of the Principal Ordinance and was numbered sub. 2. It is therefore proper to refer to the subsection as section 18 (2) of the Road Traffic Ordinance.

Coming to the facts the case was simply this, that accused so drove his tanker on the day in question so close to the edge of the road that a part of it hit and pushed down the deceased. The deceased sustained injury and as a result of it he died. The facts of this case which are not seriously contested seem to me to be on all fours with the English case of *Watson v. Thomas S. Whitney and Company Limited and Another* 1966 1 All E.R. 122. In that case a driver of a van drove his van in such a way that its door handle overlapped the pavement and caught a pedestrian's sleeve tearing it and bruising his upper arm. It was held that the van driver was negligent: Following the decision in that case I hold that the accused in this case was also negligent and that his driving his vehicle so close to the edge of the tarmac that a part of it hit the deceased would amount to dangerous driving. As this was the cause of the death of the deceased, I find him guilty as charged.

*Allocation.*—I ask for leniency.

*Woyike.*—Associates himself with the plea of leniency. The accused has been driving for about twenty-three years without any accident. The tanker belongs to the Ministry of Works; and they are partly to blame. Accused stopped work since last year.

*Sentence.*—£50 or four months I.H.L.

*Accused found guilty.*

Enugu High Court, 11th July, 1966—E/5C/66

OPUTA, J.

PETER EZEDINACHI

*Applicant*

v.

THE STATE

*Respondent*

*Criminal Procedure—bail after conviction in the High Court—court has no jurisdiction to grant in absence of statutory provision—circumstances under which jurisdiction where it exists will be exercised.*

The applicant was convicted of a criminal charge by the High Court. He filed a motion in which he prayed for bail pending an appeal to the Supreme Court on the ground that he had bail during the preliminary inquiry before the Magistrate and during the trial in the High Court. On his behalf it was contended that the High Court could grant him bail by virtue of the provisions of O. 8 Rule 15 of the Supreme Court Rules.

*Held:*

1. There is no inherent jurisdiction nor a statutory provision conferring jurisdiction on the High Court of Eastern Nigeria to grant bail to a convicted person pending the determination of appeal to the Supreme Court. Order 8, Rules 15 (1) and 15 (6) of the Supreme Court Rules did not confer any jurisdiction on the High Court to grant bail to a convicted person.
2. Even where such jurisdiction exists the Court can only grant such bail in very special circumstances: such ground as that the applicant was on bail all through the trial cannot be relied upon.

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*Editor's Note.*—Edict No. 6 of 1971 has now inserted section 38A to the High Court Law Cap. 61 conferring the jurisdiction on the High Court of East Central State.

Cases relied on:—

*Ex-parte Blyth* (1944) K.B.D. 532 at 540.

*Re Lyttleton* (1945) W.N. 24.

*Ligali and Laja v. the Queen* 4 F.S.C. 7 at 14.

*John Henry Ernest Howerson and Louis Hardy* (1936) 25 Cr. App. R. 167.

*R. v. Edgar Gordon* (1912) 7 Cr. App. R. 182 at 183.

*Dr Nnamani* for the applicant.

*Oyudo and Amasiani* for the respondent.

**Oputa, J.:** The applicant in this motion is praying for (1) Leave to appeal to the Supreme Court against the conviction and sentence in the above case. (2) For bail pending the determination of the appeal.

The application for leave to appeal is brought under s. 117 (4) of the Constitution. The grounds of appeal are annexed to the affidavit in support of the motion. There is no doubt from these grounds that questions of fact, mixed law and fact are involved. The Court will not therefore hesitate in allowing the leave prayed for. The respondent did not oppose this part of the motion either.

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The second leg of the motion is for bail pending the determination of the appeal. The matter was fully argued for the applicant and the respondent. Dr Nnamani for the applicant relied on Order 8 Rule 15 (6) Rules of the Supreme Court for this application. He referred to Order 8, Rule 15 (1) which contains a reference to "the Court or the Court below". He then asked this Court to interpret Order 8, Rule 15 (6) to include the Court below. Dr Nnamani further relied on general principles with regard to the Court below. Dr Nnamani further relied on general principles with regard to the grant of bail by the Court and submitted that "here the Court has a jurisdiction to exercise a discretion it ought to do so here in favour of the accused because the liberty of the subject is involved".

Mr Oyudo, Senior State Counsel replying submitted that the main issue here is the issue whether or not the Court has jurisdiction to grant bail to a convicted person pending the determination of his appeal. He submitted that there is no such jurisdiction.

I have very carefully considered the points raised in this application and the arguments of counsel on both sides. The question whether or not bail should be granted by the High Court to a convicted person pending his appeal is by no means new.

In *Ex-parte Blyth* (1944) K.B.D. page 532 at page 540, Hallett, J. said:—

"Having considered the matter as best I can with the assistance of able arguments on both sides it seems to me that there is no foundation for the contention that a Judge of the King's Bench Division has an inherent jurisdiction to grant bail to convicted persons. Where that jurisdiction exists it has to be given by statutory provisions."

In *Re Lytton* (1945) W.N. page 24, Hallett, J. observed:—

"In the case of a convicted person no Justice or Bench of Justices and no Judge or Bench of Judges had any inherent jurisdiction to grant bail. The jurisdiction if it existed must be found within some statutory provision which defined the persons on whom the jurisdiction was conferred, the extent of the jurisdiction, the manner in which it was to be exercised and the consequences of exercising it."

In the case of *Ligali and Laja v. the Queen* (1959) IV F.S.C. page 7 at page 14 the Federal Supreme Court—

"noted with some concern that it would appear that after sentence had been pronounced on the two appellants in this case by the learned trial Judge the second appellant was granted bail pending the hearing of his appeal."

In this case there is an application by way of motion for the grant of bail. If there is no jurisdiction in the High Court to grant bail "after pronouncing sentence" pending an appeal to the Supreme Court no such jurisdiction can ever exist by the mere reason that the application is made by way of motion.

It is not disputed by counsel for the applicant that there is no provision in the High Court Law giving the High Courts of the Eastern Group of Provinces jurisdiction to grant bail in circumstances like the present. If there does not exist any inherent jurisdiction *ex debito justitiae* and if there does not exist any statutory provision conferring jurisdiction on the High Court to grant bail to a convicted person it will be idle to urge the Court either on general principles or by an exercise of an "alleged" discretion to do

that which it has no power to do. The exercise of a discretion implies the capacity and legal ability to do the act the subject matter of the discretion and to which the discretion applies. I have again been asked to derive jurisdiction from Order VIII, Rule 15 (1) read in conjunction with Order VIII, Rule 15 (6) of the Supreme Court Rules.

Rules of Court are usually made on the authority of the corresponding Law giving rise to the Rules. These Rules define the manner in which the jurisdiction conferred by the substantive Law is to be exercised. The Rules relate to an existing jurisdiction. They do not and cannot confer additional jurisdiction. S. 35 (1) of the Supreme Court Ordinance confers jurisdiction on the Supreme Court in appropriate cases and under very special circumstances to grant bail to a convicted person pending his appeal. S. 35 (1) just says the "Supreme Court"; it does not mention the "Court below". I am therefore of the view that Order VIII, Rule 15 (1) and Rule 15 (6) all relate to the exercise of the jurisdiction conferred on the Supreme Court by s. 35 (1) of the substantive Law. I also hold the view that this Order—(Order VIII R.15 (1) and R.15 (6)) was not intended to confer and could not and did not confer any jurisdiction on the High Court to grant bail to a convicted person.

Dealing briefly with the point raised about the liberty of the subject, there is no dispute that the Courts guard jealously the liberty of the subject and view with great concern questions touching that liberty of the subject. S. 21 of the Constitution dealing with the deprivation of personal liberty is an entrenched clause in the Constitution. The right to personal liberty is a fundamental right. But none of the provisions of the various subsections to s. 21 of the Constitution could be stretched no matter how unduly and interpreted to include the case of a person convicted and held in proper and legal custody in accordance with the due processes of Law. The liberty of the subject properly so called is not involved in this application. But even where the liberty of the subject becomes an issue, to adjudicate on that issue, the Court must have either inherent jurisdiction or jurisdiction conferred on it by some express provision of a statute. In the absence of these two requirements one wonders what the Court will be expected to do. In any event the Court cannot invest itself with jurisdiction because the liberty of the subject is alleged involved.

Even if this Court has jurisdiction to exercise a discretion in this matter (which it has not) the applicant in his affidavit must show some exceptional circumstances sufficient to justify the granting of bail. In his affidavit the applicant relied mainly on the assertion that he had bail during the preliminary inquiry before the Magistrate and during the trial in this Court. He did not jump bail. He will not jump bail. This seems to be the same grounds relied upon in an application of a similar character in the case of *John Henry Ernest Howerson and Louis Hardy* (1936) 25 Cr. App. R. p. 167. There Sir William Jowitt K.C. for the applicant Howerson applied for bail pending an appeal. He relied on the facts that at the Police Court and throughout the trial Howerson was admitted to bail in his own recognizances. The Director of Public Prosecutions did not oppose the application but left the matter entirely to the Court. Talbot, J. in refusing the application said:—

"The Court sees in this case none of those exceptional circumstances which alone justify the granting of bail by this Court."

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In that case there was a grant of a certificate for appeal from the trial Judge but the Court of Criminal Appeal refused bail for reasons given above. In the case *R. v. Edgar Gordon* (1912) 7 Cr. App. R. p. 182 at p. 183 the application for bail was supported by the fact that the applicant was granted bail before his trial and "he applies for bail in order that he may personally go into the matter and see his witnesses". Darling, J. in refusing the application said:—

"No sufficient reason has been shown to the Court why the unusual course should be taken of granting bail to a convicted prisoner."

I am therefore of the view that even if this Court had jurisdiction on the matter this application could not on the applicant's affidavit be granted. The Federal Supreme Court in the case of *Ligali and Laja v. the Queen* (1959) IV F.S.C. p. 7 observed at p. 14 that "Bail in such cases (i.e., bail to a convicted person pending appeal) is granted only under very special circumstances". For all the reasons given above the application for bail is refused. The applicant is however granted leave to appeal against his conviction and sentence.

*Order:*

*Application for leave granted.*

*Application for bail refused.*

Enugu High Court, 15th July, 1956—E/37C/65

OPUTA, J.

THE STATE

v.

SAUNDER BOB UDOFFIA (No. 1)

*Criminal Procedure—a witness giving evidence on a point not included in his evidence in the deposition or in the notice for additional evidence—admissibility of.*

The accused was standing trial on an information charging him with stealing contrary to section 390 (6) of the Criminal Code. A prosecution witness who deposed before the examining Magistrate had now given evidence of the accused employment and duties with regard to crediting a customer's account with amount converted from foreign exchange. On a further question touching the accused duties with regard to cash payment to a customer in similar circumstances the defence counsel objected on the ground that the record of the deposition of this witness did not contain such evidence, neither was it contained in the notice of additional evidence served on the defence. To determine whether this objection had any substance or not the Court most carefully considered the object and purpose of taking depositions and of giving notices of additional evidence and whether at the trial the prosecution is bound to lead evidence strictly in accordance with the contents of the deposition or whether it can elaborate on the contents of the deposition or notice of additional evidence.

*Held:* If evidence is otherwise admissible it cannot be excluded on the ground that it is not contained in the depositions of the witness or that it is not covered by a notice of additional evidence.

Cases relied on:—

- The State v. Ukochie* 1964 N.M.L.R. 100 at 101.
- Reg. v. Ward* 3 Cox 279.
- Reg. v. Donnell* (1965) 3 W.L.R. 1138.
- Reg. v. Green Slade* 11 Cox 412.
- Reg. v. Connor* 1 Cox 233.
- Reg. v. Ward* (1848) 175 E.R. 391.
- Reg. v. Pietro Stiginani* (1867) 10 Cox C.C. 552.
- Reg. v. Wain Wright* (1875) 13 Cox C.C. 171 at 173.
- Reg. v. Flannagan and Higgins* (1884) 15 Cox C.C. 403 at 406-407.
- R. v. Edward Turner* (1909) 3 Cr. App. R 103.
- R. v. Frank Fawcett* (1910) 5 Cr. App. R. 115.
- R. v. Tames Moran* (1910) 5 Cr. App. R. 219.
- R. v. Alfred Maxfield* (1912) 7 Cr. App. R 230.
- R. v. Shurmer* (1886) 17 Q.B.D. 323.
- R. v. Harris* 26 Cox 143.
- R. v. James Wright* 25 Cr. App. R 35 at 39-40.
- R. v. Johnson* (1847) 2 Car and Kir 354.

*Oyudo* for the State.

*Chuma Akpangbo* for the accused.

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**Oputa, J.:** Accused is charged on an information containing several counts of stealing by Clerks or Servants, contrary to section 390 (6) of the Criminal Code.

On 8th July, 1966 Mr Keith Lawrence Hales, Bank Manager of the Bank of West Africa, Enugu where the accused worked as a Foreign Exchange and Reception Clerk was giving evidence. He had given evidence of the duties and the responsibilities of the accused as a Foreign Exchange and Reception Clerk. This dealt with the conversion of the amount in a foreign cheque into Nigerian currency and crediting the account of the customer with the Nigerian monetary equivalent. On a further question as to the procedure and duties of the accused where a customer holding a foreign cheque wanted cash paid to him instead of having his account credited, learned counsel for the defence objected to the question on the ground that the record of the deposition of this witness before the Magistrate did not contain the evidence which was now being sought to be tendered. He further argued that the notice of additional evidence served on the accused simply mentioned that Mr Hales will tender certain document and that that notice did not contain any records to the procedure adopted in cashing a foreign cheque or the duties and responsibilities of the accused in such circumstances. I could have quite easily overruled this objection as completely lacking in substance. In view however of the fact that objections of similar character had always been raised by different counsel for accused persons in almost every case—objections which reveal some error or misconceptions, relating to the object—and purpose of depositions, the contents of depositions and in fact a far greater misconception about the question of admissibility of any evidence which does not appear either in the deposition or in the notice of additional evidence—I considered it necessary to adjourn this case to 11th July, 1966 to afford counsel on both sides an ample opportunity of addressing the Court fully and tackling the problem from its roots. I formulated the following questions as guides.

1. What is the real object and purpose of taking depositions ?
2. Is the Court of trial bound to receive evidence as it was led at the preliminary inquiry before the Magistrate, i.e., in accordance and in strict compliance with the contents of such depositions.
3. Can the prosecution lead evidence which though not contained in the deposition of a witness is in substantial conformity with it, i.e., can the prosecution elaborate on the evidence led at the preliminary inquiry ?
4. Can the prosecution elaborate on the proof of evidence contained in their notice of additional evidence ?

The answers to these questions will go to the very root of the general objection which one meets day in day out—objections which cause considerable delay in proceedings.

Learned counsel for the accused Mr Akpangbo submitted that the main object of taking depositions in the Court below is to give the accused an opportunity of knowing what is to be led in evidence against him at the trial in the High Court. Counsel however conceded that depositions may only contain the substance of the evidence to be led at the trial. He

also agreed that evidence led at the trial need not be strictly in line with what was said at the preliminary inquiry. It is sufficient if the evidence before the High Court is in substantial conformity with the evidence led at the preliminary inquiry. He argued that where new facts are introduced and these facts are facts which the prosecution knew of or ought to have known of during the preliminary inquiry before the Magistrate, evidence of such new facts ought to be rejected as inadmissible. On a question by the Court, learned counsel conceded that the rejection of such evidence need not be on the ground of irrelevancy or hearsay. Somehow counsel argued that the evidence thus tendered should be rejected mainly because although the prosecution knew of the existence of the facts evidence of which is now sought to be tendered, that evidence did not appear in the depositions. Learned counsel further submitted that the prosecution is bound by their notice of additional evidence and should not go outside it. Any evidence tendered which was not contained in the notice ought to be rejected as inadmissible.

Mr Oyudo, Senior State Counsel replying submitted that the evidence in the High Court is the evidence the witnesses are called to give. Their various depositions, he argued, is merely to apprise the accused of the evidence on which the prosecution intend to rely to prove the case against him. He cited the case *The State v. Ukochie* 1964 N.N.L.R. page 100 at page 101. The Digest page 277 Article 1798 and *Reg. v. Ward* 3 Cox 279. He submitted that depositions are not designed to give the accused details of the evidence but only the substance of the prosecution case.

He further submitted that if evidence is tendered and the defence think it is not in conformity with that tendered at the preliminary inquiry, the defence can move to quash the information—*Reg. v. Donnell* (1965) 3 W.L.R. 1138. He also submitted that the Court of trial is not bound to admit evidence as it was led at the preliminary inquiry and relied on *Reg. v. Green Slade* 11 Cox page 412 and *Reg. v. Connor* 1 Cox page 233 and additional evidence can be admitted. Where a notice of additional evidence is given the prosecution can still lead evidence of matters not contained in the notice. If the defence is likely to be prejudiced by lack of notice the only course open to it is to ask for an adjournment.

I have given serious and careful consideration to the able arguments of counsel on both sides. There is no statutory provision directly defining the object and purpose of depositions. The preliminary inquiry by a Magistrate into an indictable offence is provided for in Chapter V Part XXXVI of the Criminal Procedure Law. Sections 330 and 331 of the Criminal Procedure Law deal with the transmission of depositions, recognizances and exhibits. Section 331 Criminal Procedure Law provides that a person who has been committed for trial "shall be furnished free of charge before the trial with a copy of the depositions and where practicable any documents which have been put in evidence".

Sections 334-363 of Part XXXVII Chapter VI of the Criminal Procedure Law deal with trial after committal. Not one of these sections offer any assistance in discovering the object and purpose of depositions. Invoking the aid of section 363 of the Criminal Procedure Law one may then look for assistance, in this matter, from English Law and English judicial decisions.

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By the operation of section 34 and section 35 of the Evidence Law depositions of witnesses who attended before the inquiring Magistrate as well as those unable to attend taken under section 319 of the Criminal Procedure Law may be used in evidence at the trial. This to my mind seems to be the real and main purpose and object of taking depositions—to ensure that the ends of justice are not defeated by the death of a witness or by the fact of a witness being kept away and unable to attend at the trial, Cresswell, J. in *Reg. v. Ward* (1848) 175 E.R. page 391 observed “The learned counsel for the prisoner was in error in supposing that depositions are taken for the purpose of affording information to the prisoner. The object of taking depositions is that if any witness whose evidence is given before the Magistrate should be unable to attend at the trial, or die, there should not, by reasons of this be a failure of justice. That is the real ground on which depositions are taken, and until within a few years the prisoner had even no right to see them”. Section 331 C.P.L. requires that an accused person be supplied with a copy of the depositions if he so desires. When he thus gets the copy of the depositions it will surely apprise him of the character and substance of what it is being expected the witnesses would prove at the trial. It is therefore also true to say that another purpose of taking depositions is to apprise an accused person of the names of the witnesses and the substance of their evidence in order to enable him enquire as to the character of those witnesses and also get evidence in rebuttal to the evidence proposed. This purpose is however incidental and subsidiary to the main purpose stated above. Support for this second purpose of taking depositions is to be found in the dictum of Willes, J. in *Reg. v. Pietro Stiginani* (1867) X Cox C.C. 552:—“The object for which the Legislature required depositions to be taken was that the person charged might know what was going to be proved against him and who was going to prove it, and thus might be able, if necessary, to make inquiries as to the character of the witnesses on the part of the prosecution or prepare to defend himself in any way he thought fit”. Also refer to dictum of Sir Louis Mbanefo, C.J. in *the State v. S. T. Ukochie* 1964 N.M.L.R. page 100 at page 101—“The purpose of a preliminary inquiry is to apprise an accused person of the evidence on which the prosecution rely to prove the case against him”.

Now turning to the second question whether the Court should receive evidence in strict accordance with the contents of a deposition the obvious answer is definitely no. There is no statutory requirement that evidence at the trial ought to follow that led at the preliminary inquiry. Depositions are not meant to serve as a check or a castiron jacket to control and restrict the movement of the prosecutor. The consensus of judicial opinion is that it is only the character of the evidence—the substance of the evidence that the depositions need contain. The prosecution can lead evidence in elaboration and amplification of that “substance of evidence” contained in the depositions, although that evidence in elaboration was not contained in the depositions. Dealing with the variation between the evidence appearing on the deposition and that given at the trial Cockburn, L.C.J. in *Rex v. Wain Wright* (1875) 13 Cox C.C. page 171 at page 173 said “Too much importance ought not therefore to be attached to such variations, and if there were a substantial agreement between the evidence at the preliminary inquiry and that adduced at the trial that was sufficient”. It is also my view that the same thing applies to evidence led after notice of additional evidence

has been served on the accused. The prosecution is not bound to limit themselves to a reproduction of what appears on the notice of additional evidence. I shall however deal in greater detail with this aspect of decision later. To suggest that a court of trial should confine itself to the evidence appearing on the depositions and treat any other evidence as inadmissible would be to over emphasize the real purpose of taking depositions. To insist that the prosecutor should only tender evidence as it appears on the depositions would be to put an undue restraint on the prosecution, a restraint which has no legal or statutory basis. If depositions are not to be departed from the High Court would and could give judgment on the depositions after hearing the accused in his defence. But that is far from the law or practice relating to the trial of indictable offences after committal.

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I am of the view that at the trial evidence can be led whether such evidence appeared in the deposition or not and such evidence ought to be accepted if it is relevant and otherwise by law admissible. In fact section 317 of the Criminal Procedure Law confirms this view.

Cresswell, J. in *Rex v. Ward* (1848) 175 E.R. page 319 stated "It is therefore by no means incumbent on the prosecutor to abstain from giving at the trial any additional evidence which may be discovered, subsequent to the taking of the depositions."

In *Reg. v. Greenslade* (1870) 11 Cox C.C. page 412 Pickering, Q.C. for the Crown proposed to call a witness whose name did not appear on the depositions taken before the Magistrate. Cottingham for the defence objected on the ground that it was most unfair to call a witness who had not given evidence before the Magistrate and whose name and substance of whose evidence had not been given to the prisoner or his attorney and also that it was contrary to the usual practice in Criminal Courts.

Brett J. however overruled the objection and admitted the evidence. In *Reg. v. Flanagan and Higgins* (1884) 15 Cox C.C. 403 at 406-407, Aspinall for the Crown called Dr Campbell Brown and proposed to begin with some questions relating to flask and fly paper which did not appear in the depositions. She for defence objected. He did not urge its exclusion, on the ground that it was irrelevant but, as being unfair to the prisoner. Brett J. said that if he had any reason to suppose that the proposed evidence was likely to bear upon the prisoner's case and that it had taken them by surprise, he should postpone the trial in order that they might have analysis made on their own behalf to rebut this evidence. He could not exclude the evidence but if the prisoner's counsel desired he would postpone the case so that they might obtain evidence in answer to it. It is very clear from the authorities cited above that the Courts do not limit themselves only to evidence appearing on the depositions. Where however the fresh evidence takes the defence by surprise an adjournment may be granted if requested by the defence. But that is a totally different thing from saying that the fresh evidence is inadmissible because it is not contained in the depositions.

We now come to the final question:—Whether the prosecutor is bound to limit himself to a reproduction of what appears in his notice of additional evidence or whether he can elaborate and amplify the evidence appearing on his notice or even call fresh evidence not specified in the notice of additional

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evidence. Where fresh evidence is sought to be tendered it is usual to give the accused or his counsel notice of additional evidence. The question then arises:—Is this notice a legal requirement or a mere matter of practice? If it is a rule of law then evidence can only be admitted which conforms with the provisions of the particular statute requiring the notice. A good example of this is the notice required under section 10 (2) and (4) of the Prevention of Crimes Act, 1908. The Courts have consistently held that any evidence not in keeping with the statutory requirements of that notice should be excluded as inadmissible.

The cases of *R. v. Edward Turner* 1909 3 Cr. App. R. page 103, *R. v. Frank Fawcett* (1910) 5 C.R. Appeal Report, page 115 both refer. In the case of *R. v. Fawcett Channell, J.* observed:—

“The only principle in this case is that in the notice you must give the grounds but not the evidence. Obviously the line is rather difficult to draw as to how much you must say. You must however say something to draw attention to the kind of evidence you are going to give in order to enable him to meet the case. Now the prosecutor did not give notice to the appellant and gave what evidence they were aware of in support of the case made by the notice. But in addition they gave evidence through Detective Inspector William Eustance who happened by chance to be in Court. That officer said he had seen the appellant associating on thirty to forty different occasions with dangerous criminals and acting in concert with them”. This was not contained in the notice. The question then arose—was the notice served on the appellant such as to cover the case or did it give the appellant a fair opportunity of meeting it? Allowing the appeal, the Court of Criminal Appeal held: “We think that the notice did not fully cover the case which was in fact made against the prisoner and was indeed misleading”.

In the case of *R. v. James Moran* 1910 5 Cr. App. R. page 219 it was held that in a trial of an allegation of being a habitual criminal no evidence may be given of “other grounds” except those specified in the notice under section 10 of the Prevention of Crimes Act.

In the case of *R. v. Alfred Maxfield* (1912) 7 Cr. App. R. page 230 Pickford, J. allowed an appeal against a conviction as a habitual criminal on the ground that evidence was admitted to show that the appellant was a habitual criminal which was not referred to in the notice given him as required by statute. The Judge held that that evidence was inadmissible because it was not referred to in the notice.

Another instance where a statute requires notice to the accused as a condition precedent to evidence being admitted will be found in cases decided under section 6 of Criminal Law Amendment Act, 1867 which is in *pari materia* with section 319 of the Criminal Procedure Law. In *R. v. Quigley* 18 L.T. 211 N.P. a statement made by the deceased while lying critically ill in hospital and taken down in the presence of a Magistrate was held to be inadmissible under section 6 of the Criminal Law Amendment Act, 1867 without prior proof that proper notice was given to the accused before that statement was taken where even the accused was present and the deposition of the patient was taken in his presence as well as that of a Justice of the Peace and a clerk of the Justice but no notice in writing was served on the

accused of the intention to take the evidence it had been held that the deposition was not admissible in evidence under the Criminal Law Amendment Act, 1867. The cases of *R. v. Shurmer* (1886) 17 Q.B.D. 323; 16 Cox CC. 94, and *R. Harris* (1918) 26 Cox C.C. 43 both refer.

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The most important question then arises:—

Under what statute is the prosecution bound to give an accused person notice of additional evidence? If such a statute exists then its provisions will be carefully examined to see whether they enact exclusion of all evidence not contained in the notice as inadmissible merely on the ground that such evidence is not contained in the notice of additional evidence. Neither the learned counsel for the accused nor the learned Senior State Counsel was able to refer me to any enactment (Nigeria or English) requiring the prosecution to give an accused person notice of additional evidence. I have not been able to find one myself. From a careful review of all the cases cited in this ruling, I hold the view that notice of additional evidence is a mere matter of practice founded on good sense and fairness. An accused person ought to have an idea of what is being alleged against him. It is not a right it is only a privilege.

In *Reg. v. Stiginani* (1867) X Cox C.C. page 552 at page 553 Willes, J. dealing with a case where the prosecution tendered a new witness without the usual notice of additional evidence noted, "The Central Criminal Court was the principle Criminal Court in the Kingdom and should be the one which all other inferior tribunals should look up to as a model in cases of practice and closely follow". The procedure of notice of additional evidence was copied from the practice of the Central Criminal Court. Being a rule of practice as opposed to a rule of law I hold the view that failure to give notice of additional evidence does not and cannot render the evidence sought to be tendered inadmissible. *Reg. v. Ward* and *Reg. v. Greensland* all refer. It may have other effects and results but that is a different matter. In *R. v. James Wright* (1934) 25 Cr. App. R. page 35 at page 39 and 40, Avery, J. dealing with effect of failure to give notice of additional evidence to the defence said—

"It was said that the appellant had a grievance because he had no notice that the prosecution proposed to put in evidence the specimens of his handwriting which had been taken when he was in custody . . . It is quite true that there was an omission to give specific notice of these two specimens of the appellant's handwriting. At most that is a grievance and cannot affect the admissibility of the evidence put before the jury and if the appellant and his counsel thought that he was being prejudiced by having had no notice and really desired to call an expert evidence to deal with the question of handwriting he could have applied for an adjournment, but he did not do so. We think there is no ground for saying that on this question of handwriting any injustice was done to the appellant."

The emphasis is on the duty of the Court to prevent an injustice being done to an accused person by admission of evidence which takes him by surprise. Such evidence should be admitted but if the justice of the particular case required it the Court will grant the accused an adjournment to consider the new evidence and tender one in rebuttal. It is not in all cases of fresh evidence that an adjournment ought to be granted. In *R. v. Johnson* (1847)

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2 Car and Kir 354, an application to postpone a murder trial in order to afford defence the opportunity of investigating the evidence and characters of certain witnesses who had not been examined before the Magistrate but who were to be called for the prosecution to prove previous attempts by the accused on the life of the deceased was refused by Alderson B. after consulting Rolfe B. In *Reg. v. Flannagan and Higgins* referred to earlier in this ruling Brett, J. was quite prepared to grant a postponement of the trial to give the defence the opportunity of analysing the fly paper and collecting evidence in rebuttal. In *Flannagan's* case, Dr Campbell Brown proceeded with his evidence without a postponement as none was asked for by the defence.

In conclusion I am of the view that if evidence is otherwise admissible no question of its exclusion can be entertained on the ground either that such evidence is not contained in the depositions of a witness or that it is not covered by a notice of additional evidence.

I have dealt at great length with these allied questions of admissibility of evidence, depositions and notice of additional evidence in the hope that defence counsel should in future consider their grounds properly before objecting to the admissibility of evidence on the ground that it did not appear on the depositions or that it was not covered by a notice of additional evidence.

Now dealing with learned counsel's objection to Mr Hale's answer to a question put by the prosecution as to the procedure where a customer with foreign cheque wants cash and the duties of the accused in those circumstances, I am satisfied that the evidence sought to be elicited was relevant and admissible. In fact when the case was before the Magistrate evidence was given which indicated that the prosecution were going to rely on this matter of procedure and duties of the accused in those circumstances. The objection of learned counsel for the defence is without substance. It is hereby overruled.

*Objection overruled.*

Aba High Court, 29th July, 1966—A/34C/1964

BALONWU, J.

THE STATE

*Complainant*

*v.*

SAMUEL NLUMA

*Accused*

*Criminal Law—manslaug' ter—Criminal Code section 325—dangerous driving—Road Traffic Act section 18 (2)—reckless and negligent act; driving a motor vehicle on a public highway in a manner so rash as to endanger human life—Criminal Code section 343 (1) (a).*

*Evidence—admissibility of sketch plan.*

The accused was charged with manslaughter contrary to section 325 of the Criminal Code, dangerous driving contrary to section 18 (2) of the Road Traffic Act and with reckless and negligent Act contrary to section 343 (1) (a) of the Criminal Code. On the 21st of November, 1963, the accused who was the driver of Armel's Lorry No. WB 2140 was returning from Calabar to Aba by the Ikot-Ekpene-Aba road. At about 7 p.m. while descending the Ogbor hill near Aba, he deviated from the tarmac to the grass verge where his lorry knocked down one Orji Agwu, the deceased and one Uke Etun who later gave evidence for the prosecution. The accident took place at a point with a gradual slope in a built-up area with usually heavy traffic. The road was clear and dry, and there was no evidence of one vehicle overtaking the other or of any mechanical defect of the lorry driven by the accused.

In his defence, the accused denied coming from the direction of the Ikot-Ekpene-Aba road, and said that he entered the Ikot-Ekpene-Aba road from the Umuahia-Mbawsi road near a petrol station which was below the point of impact. He did not however deny signing the sketch of the scene made by the police officer who testified that he revisited the scene with the accused and made the sketch in his presence.

In his address the learned counsel for the defence submitted that the sketch made by the police was inadmissible and that there was no evidence to convict of dangerous or careless driving. With reference to the charge of manslaughter the prosecution conceded that the evidence adduced was not sufficient to discharge the burden of proof required in a charge of manslaughter.

*Held:*

1. The prosecution did not adduce sufficient evidence in the discharge of the high burden of proof required for proof of charge of manslaughter.
2. Road Traffic Act section 18 (2) contains an absolute prohibition against dangerous driving. On the evidence adduced, the accused failed to exercise due care by driving dangerously when the accident occurred.

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3. The sketch was admissible as:—

- (i) it was prepared with the consent and co-operation of the accused, who signed it as an accurate representation of the actual features on the ground at the time it was made;
- (ii) the sketch did not contain any hearsay or statements which were not proved or incapable of being proved;
- (iii) the features shown in the sketch provided valuable information to both the accused and his counsel which enabled them to know the nature of the case being made against the accused.

Cases referred to:—

*Beamon v. Ellice* (1831) 172 E.R. 836.  
*Rex v. Mitchell* (1852) 6 Cox Criminal Cases 82.  
*Tarbox v. St. Pancras Borough Council* (1952) 1 A.E.R. 1306.  
*Alexander v. Adair* (1938) Scottish cases J. 28.  
*Tribe v. Jones* (1961) 105 Scottish Journal 931.  
*Davane v. Murphy* (1958) Jr. Jur. Rep. 73.  
*Hill v. Baxter* (1958) 1 All E.R. 193; 42 Cr. App. R. 51.  
*R. v. Parker* (1957) 41 Cr. App. R. 134.  
*R. v. Evans* (1962) 3 All E.R. 1086.

*F. O. Offiah*, Senior State Counsel for the State.  
*C. A. C. Ikeotuonye* for C. O. Nwokedi for the accused.

**Balonwu, J.:** The accused in this case was tried on a three-count information charging him with—

- (1) Manslaughter, contrary to section 325 of the Criminal Code, in that he on 21st November, 1963, unlawfully killed Orji Agwu at Aba, in the Aba Judicial Division;
- (2) Causing the death of the said Orji Agwu on the same day, along Aba-Ikot-Ekpene Road, a public highway in the Aba Judicial Division, contrary to section 18 (2) of the Road Traffic Act, by driving the motor vehicle No. WB 2140 in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the highway, and to the amount of traffic which might reasonably be expected to be on the highway; and
- (3) Reckless and negligent act, contrary to section 343 (1) (a) of the Criminal Code, in that he on the same day and at the same place drove the aforesaid motor vehicle on the public highway in a manner so rash as to endanger human life.

The case for the prosecution may be thus summarized—

The accused was the driver of the Armels lorry No. WB 2140. On 20th November, 1963, accompanied by his two apprentice drivers or motor boys, Alphonus Apeh and Wilfred Ugwu (Exhibits "G" and "G1"), he drove this lorry to Calabar. On 21st November, the following day, he and these two motor boys returned to Aba from Calabar, at about 7 p.m., by the Ikot-Ekpene-Aba road. As they were descending the Ogbor Hill, but before they had got to the Ogbor bridge, the two boys twice heard a noise like that made by the bursting of tyres. Later, however, they examined the

tyres and found nothing wrong with them. Their positions in the lorry were such that they could not, and did not, see what was the cause of the noise.

On the same day, 21st November, Jenny Samuel (P.W. 5) was selling fish and other things along the Ikot-Ekpene-Aba road, when two men, who were going down the Ogbor Hill towards Aba township, passed her. These two men, namely, the deceased and one other person (P.W. 6) were walking on the left-hand side of the road, off the tarmac. After they had passed, Jenny saw a lorry, which went down the said hill to their side, knock them down. This lorry, which was described by those who saw the accident as an Armels Lorry, was going to Aba from the direction of Ikot-Ekpene. Jenny said she did not see any lorry cross or overtake this lorry at the point of impact.

One Njoku Kalu (P.W. 2), a sand-digger, said he was on the said date returning to his house, along Ikot-Ekpene road, from his work place, and he had come very close to the Ogbor bridge, when he heard a bang in front of him. It was then getting dark. Immediately thereafter, he saw the accused's lorry No. WB 2140, with its side lights on, come towards the Ogbor bridge, where it crossed him. He said he was able to see its registration number with the aid of its side lights. He continued his journey homewards, and, having walked a distance of 120 feet from the bridge, he met two boys, who were selling groundnut and bread respectively, and who gave him paper and pen. He used the pen to write the above registration number of the accused's lorry on the said paper, Exhibit "A" still continuing his journey along the Aba-Ikot Ekpene road, he passed, on his left-hand side, the junction of that road with the road to Mbawsi and Umuahia, and, at a point about 450 feet from the bridge, he saw two injured men on the grass verge adjacent the tarmac, on the right-hand side of the road facing Ikot-Ekpene. The two injured men were Orji Agwu, the deceased, and Uke Etum (P.W. 6). He said that it did not rain on that day. His evidence on the position of the injured men on the ground and away from the tarmac, and as to the condition of the road, was confirmed by Kalu Agwu (P.W. 4).

Constable Edward Adukwu (P.W. 7) said that he went to the scene on the 21st November, the same day as that on which the accident happened, and that he saw two spots on the ground stained with blood. On the following morning, he revisited the scene with accused, in whose presence he made the sketch, Exhibit "B" showing thereon the blood stains on the grass verge, as well as other features and the surrounding buildings. He showed the width and length of the road at the scene of accident. He said that the accused signed the sketch on the 22nd November after he had said that he was satisfied with it, and not on the 29th November, the date the accused put on the sketch. He further said that the accident occurred in a built-up area, with usually heavy traffic, in a tarred portion of the Ikot-Ekpene-Aba road, with a gradual slope, at a point between the bridge and two police warnings on either side of the road, about 150 yards from the bridge, to the effect that there should be no overtaking by one vehicle of the other. He also said he saw another driver who drove one of the Armels lorries from Calabar to Aba on the 21st November, and that that driver delivered his mail to the old Post Office at 6.30 p.m.

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The Vehicle Inspection Officer, Assistant Superintendent William Adeniji Vaughan (P.W. 8), who inspected the lorry, said that he found its brakes, engine, tyres, steering rod, kingpin, steering and suspension in good condition; that he did not discover in the lorry any mechanical defect which could have caused the accident.

The medical evidence was to the effect that death was due to cerebral laceration or tearing of the brain, with consequent haemorrhage. In the opinion of the doctor, the injury could have been caused by a strong impact between the deceased's head and any heavy object with a narrow edge, like the metal rim of the wheel of a lorry, the impact causing the fracture of the skull, and the fractured piece of the skull bone causing the laceration of the brain, which resulted in the cerebral haemorrhage and death.

The accused gave sworn testimony and denied the charge. He adopted the two statements he made to the police, Exhibits "C" and "D", as part of his defence. He admitted he was the driver of the Armels Lorry No. WB 2140, but denied driving it past the scene of the accident on the 21st November. He agreed that he drove the said lorry from Aba to Calabar on the 20th November, 1963, but said that, on the 21st November, he left Calabar for Aba at 12.30 p.m., returning via Ikot-Okpura, Arochuku junction to Ohafia, Umuahia and thence to Aba. He said that, on reaching Umuahia, he passed through the Umuahia-Mbawsi road, also called Umuoba road, entering the Ikot-Ekpene-Aba road at the junction between those two roads, where there is a petrol station. Having got to that petrol station, he turned right and proceeded to Aba. This point as to the route, by which he returned to Aba from Calabar on the 21st November, was made by the accused in his second statement to the police, dated November, 22nd, but not in the first, which was made on the 21st November. He, however, admitted that after he had reached Aba, he went to the police station on the invitation of the police, and there he saw Njoku Kalu (P.W. 2) bring out a piece of paper, Exhibit "A" on which he wrote WB 2140 being the number of the lorry which knocked down the deceased Orji Awgu and one other person on the Ikot-Ekpene-Aba road.

The accused further admitted that he was taken to the scene of the accident by constable Edward Adukwu (P.W. 7), on the 22nd November, and that he saw and signed the sketch, Exhibit "B". He did not deny that he signed it on the 22nd November, as was testified to by the constable, although he had put 29th November thereon as the date he did so. And he said that he travelled to and from Calabar on the 20th and 21st November, respectively, with only Gabriel Ukaegbu (P.W. 11), and denied being accompanied also on those occasions by Alphonsus Apeh and Wilfred Ugwu.

Gabriel Ukegbu (P.W. 11), called by the Court, confirmed the testimony of the accused as to the route whereby he returned to Aba on November, 21st. He said that the distances from (1) Ikot-Okpura to Ikot-Ekpene and (2) from Ikot-Okpura to Umuahia are 49 miles and 31 miles respectively. This means that from Ikot-Ekpene to Umuahia is 32 miles. He also said that from Umuahia to Aba, and from Ikot-Ekpene to Aba, are respectively 40 miles and 24 miles. And he said that he issued receipts Nos. 12555 to 12560 in the receipt book, Exhibit "E".

I accept the story told by the prosecution witnesses, to the effect that the route by which the accused returned to Aba from Calabar on the 21st November, was the road leading from Ikot-Ekpene to Aba, and to the effect that only one Armels lorry passed through the point of impact on that date, between the time it knocked down the deceased Orji Agwu and Uke Etum (P.W. 6), and the time Njoku Kalu (P.W. 2) arrived at the scene of the accident, and that that lorry was lorry No. WB 2140 driven on that day by the accused. I find as a fact that the accused passed through Ikot-Ekpene on this date, and returned to Aba through the 24-mile direct route. I accept the medical evidence as to the cause of death. And I find as a fact that it was the accused's lorry which knocked down the deceased at Ogbor Hill on the said date, and caused the injuries which resulted in his death. And I accept the evidence of Njoku Kalu, of constable Edward Adukwe (P.W. 7) and the vehicle Inspection Officer (P.W. 8), including the portions thereof touching the nature, condition and use of the Ikot-Ekpene-Aba road, and the volume of traffic actually and potentially thereon, as well as the condition of the accused's lorry on the date in question.

I reject the story told by the accused and Ukegbu (P.W. 11) concerning the route taken by the accused on his return journey from Calabar to Aba. It is noteworthy that, although his attention was drawn to the fact that the accident occurred on the Ikot-Ekpene road, the accused made no mention in his first statement of the route whereby he said he came back from Calabar on the 21st November. Nor did he mention this route specifically in his second statement. Furthermore, nowhere in the whole evidence before the Court is the reason disclosed why the accused, having come to Ikot-Ekpene by any route, should undertake the long journey through Umuahia to Aba, involving in all a distance of about 72 miles, instead of the short and direct journey from Ikot-Ekpene to Aba, covering a distance of only 24 miles. And the receipt book, Exhibit "E", does not carry the accused's case any farther, as the internal evidence which it contains, relating to the number of the vehicle, and the Aba-Oron route which it plies, merely shows that the vehicle of which the receipts are issued, belongs to the Aba branch of the Armels Transport, Limited. The prosecution witnesses are independent witnesses, and have no motive to misrepresent the facts. It is my finding that the denials made by the accused as to the route he took on the return journey of the 21st November, and as to the date he signed the sketch, Exhibit "B", were made in order to conceal the true fact of the case.

Learned counsel for the accused has raised two points. First, he submitted that the sketch, Exhibit "B", is inadmissible in evidence, and he cited in support the cases of (1) *Beamon v. Ellice* (1831) 172 E.R. 836 (2) *Rex v. Mitchell* (1852) 6 Cox Criminal cases 82: and (3) *Tarbox v. St. Pancras Borough Council* (1952) 1 All E.R. 1306. Secondly, he contended that there is no evidence of dangerous or careless driving against the accused, and he submitted that the legal doctrine of *Res Ipsa Loquitur* does not apply on its own to prove a case, and he cited in support *Alexander v. Adair* (1938) *Scottish cases* (J) 28: *Tribe v. Jones* (1961) 105 *Scottish Journal* 931: and *Davane v. Murphy* (1958) Jr. Jur. Rep. 73.

As regards the sketch, Exhibit "B", I had ruled that it is admissible for the following reasons. First, it was prepared with the consent and co-operation of the accused, who signed it as an accurate representation of

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the actual features on the ground at the time it was made. These features were, namely, the blood stains on the grass verge denoting the point of impact; the width of the grass verge on both sides of the tarred road, and of the tarred road itself; and the buildings and market sheds on both sides of the said road. The accused saw these features at the scene. Secondly, the sketch did not contain any hearsay or statements which were unproved or incapable of being proved in that manner. Finally, the above features incorporated in the sketch provided valuable information to the accused and his counsel, in that they enabled them to know the case that was being made against the accused. In my opinion, these reasons do not run counter to the principles enshrined in the cases cited on this aspect of the case by learned counsel for the accused.

With regard to the other question of the accused's guilt or innocence in relation to the offences charged, learned Senior State counsel has conceded, quite rightly in my view, that the evidence adduced was insufficient to discharge the high burden of proof on the prosecution in a case of manslaughter. That concession leaves us with the offences charged under section 18 (2) of the Road Traffic Act, and section 343 (1) (a) of the Criminal Code.

One of the offences created by section 18 (2) of the Road Traffic Act, which is the same as that created by section 17 (2) of the Road Traffic Law of the Eastern Group of Provinces, is driving in a manner which is dangerous to the public, actually or potentially, having regard to all the circumstances of the case. Thus the section contains absolute prohibition against driving dangerously. This section is the same as section 2 of the English Road Traffic Act, 1960 (formerly section 11 of the 1930 Act). It includes driving in a dangerous manner, driving at a dangerous speed and driving recklessly. We are here concerned only with driving in a dangerous manner. In *Hill v. Baxter* (1958) 1 All E.R. 193: 42 Cr. App. R. 51, Lord Goddard, C.J., 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 the 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.'"

There is evidence, which I accept, to the effect namely:

- (1) that it was getting dark when the accident took place;
- (2) that the accident occurred on a slope on the road, and on the portion of the road which carries a heavy volume of traffic;
- (3) that the accused was on the wrong side, that is on the grass verge or pedestrian's side of the road, when the accident occurred, and in a built-up area with buildings and market sheds on either side of the road;
- (4) that the ground was dry and the vehicle in good condition;
- (5) that there was no on-coming vehicle at the material time, nor was the accused overtaking any vehicle. It was under the above circumstances that the accident occurred.

With dangerous driving, the test applicable is an objective one. Applying this test, I have come to the conclusion that the accused failed to exercise due care, and was driving dangerously when the accident occurred, having regard to the condition of the vehicle, the type and condition of the road, the volume of traffic, the situation of the occurrence and other circumstances of the case. For one thing, the accident would not have occurred, if the accused had controlled the vehicle and kept it, undeviatingly, along his proper side of the road on the tarred portion, which is sufficiently wide at the point of impact. All the evidence shows that, at that point, the accused could have driven along a clear unobstructed highway, if he had kept his vehicle on the tarmac. Furthermore, the gradual nature of the slope of the road at that point, meant that the accused must have seen the deceased and Uke Etum (P.W. 6), when he was approaching them from behind, before he knocked them down. It is my finding that his failure to stop the vehicle or to avoid hitting the deceased was due to his culpable inability to control the vehicle, whose brakes and tyres were in good condition. The visibility and weather were good. It was not the defence of the accused that, without any fault of his own, he was deprived of control of his vehicle by a mechanical defect therein, of which he did not know and which he could not have discovered, if he had exercised reasonable care and prudence. Nor is there any evidence of such a defect. It seems to me that the case in hand was one of momentary inattention, resulting in a failure to control the vehicle.

In *R. v. Parker* (1957) 41 Cr. App. R. 134, the Court of Criminal Appeal in England held that it was not a misdirection to tell a jury that momentary inattention resulting in a failure to see traffic lights can amount to dangerous driving. The defendant in that case was driving in a busy main street and went over a dangerous crossing, colliding with a bus. In the instance case, the accused was driving on a clear and unobstructed highway, with potentially heavy volume of traffic and went over to the pedestrians' side of the road, knocking down two of the pedestrians thereon. The reason the accused knocked down the two pedestrians was because he left the tarmac and went over to the pedestrians' side of the road. He knew that that was the pedestrians' side and that the two pedestrians were there or were expected to be there, and he was apparently taking a chance when he drove his car along that course. And the question must be viewed objectively. As Fenton Atkinson, J. in delivering the judgment of the Court of Criminal Appeal in *R. v. Evans* (1962) 3 All E.R. 1086, at page 1088, said:—

"It is quite clear from the reported cases that 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."

In explaining the difference between dangerous driving and careless driving, Winn, J. said at *nisi prius* that dangerous driving was a deliberate choice of a course of driving whereby danger arose.

Accordingly, I find the accused guilty of the offence charged under section 19 (2) of the Road Traffic Act.

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The other offence charged is driving any vehicle on a public way in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person. The penalty for this offence is imprisonment for one year. In the case of dangerous driving under *section 18 (2)* of the Road Traffic Act, the punishment is imprisonment for five years. That means that dangerous driving is a more serious offence than rash or negligent driving under *section 343 (1) (a)* of the Criminal Code. As I have convicted the accused on the more serious charge, it is unnecessary to consider rash or negligent driving any further.

Accused guilty under *section 18 (2)* of the Road Traffic Act.

*Allocutus:—Ikeotuonye for the accused.*—I ask for the utmost leniency. The accused has been a commercial driver for twenty-two years during which he had maintained a clean record. He is married with nine children. He is a breadwinner of the family. I respectfully ask for option of a fine.

*Senior State Counsel.*—Nothing on record against the accused. I do not oppose application for infliction of a fine in lieu of imprisonment, if the Court considers that necessary.

*Punishment.*—Accused is sentenced to four years' imprisonment with hard labour.

Accused is informed of his right to appeal to the Supreme Court against his conviction and sentence within thirty days.

Aba High Court, 8th August, 1966—A/2A/65

BALONWU, J.

SUNDAY WILLS BASSEY

*Appellant*

v.

COMMISSIONER OF POLICE

*Respondent*

*Criminal Procedure—failure to inform an unrepresented accused of his right to recall a witness after an amendment to a charge—whether the trial is necessarily thereby rendered a nullity.*

The accused who was a cashier of a Local Government Council was charged with stealing the sum of £172 9s 6d the property of the Council contrary to section 390 of the Criminal Code. The charge alleged that the offence took place "on the 11th day of October, 1963". The first prosecution witness was the Secretary of the Council who gave evidence to the effect that:—

- (a) the accused was an employee of the Council and his duties thereto;
- (b) on 11th October, 1963 he received a report of the stealing against the accused and he informed the accused and reported the matter to the Police, and
- (c) the accused later produced £111 of the stolen money.

After this evidence the prosecution amended the charge to allege that the offence took place "between the months of May and October", 1963. But the trial Magistrate did not inform the accused of his right to recall P.W. 1 for cross-examination if any. The accused was not represented by counsel. The trial proceeded and subsequent witnesses including the accused himself who gave evidence repeated in substance this evidence given by P.W. 1. The accused was convicted. He appealed to the High Court where a counsel argued on his behalf that the trial was a nullity for non-compliance with section 165 of the Criminal Procedure Law. The Appeal Court was satisfied that having regard to the nature of the amendment coupled with the testimony of the subsequent witnesses including the appellant himself, the omission did not and could not have occasioned a miscarriage of justice.

Section 165 of the Criminal Procedure Law provides that—

"when a charge is altered by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon any witness who may have been examined and examine or cross-examine such witness with reference to such alteration."

*Held.*—Failure to comply with section 165 of the Criminal Procedure Law does not necessarily render the trial null and void. Accordingly where a Judge on hearing an appeal is satisfied, as in this case, that the omission does not occasion a miscarriage of justice, it is competent for him in exercise of the powers under the proviso to section 36 (1) (b) of the High Court Law to dismiss the appeal on that issue.

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Cases relied on:—

*Shoaga v. the King* 14 W.A.C.A. 22.  
*The King v. Oladimeji* 13 W.A.C.A. 275.  
*Atinder v. Commr. of Police* 14 W.A.C.A. 171.  
*Jones v. Police* 5 F.S.C. 38 at 41.

*Ononiba State Counsel* for the respondent.

**Balonwu, J.:** The accused, who is the appellant in this case, was on 20th May, 1965, convicted of stealing the sum of £172 9s 6d, the property of Four Group County Council, Mgbat Enin, between months of May and October, 1963, by the Acting Chief Magistrate (Mr C. Inko Tariah), of the Aba Magisterial District.

Shortly put, the facts of the case are as follows:—

The accused was the licence clerk of the Four Group County Council (hereinafter to be referred to as "the Council"). As the licence clerk, he had the duty of collecting fees for bicycle licences and other fees. It was also his duty to issue receipts for the fees he collected, to make relevant entries respecting these moneys in his cash-book, and, after presenting the moneys, receipts and cash-book to the cashier of the Council for checking, to pay over the moneys to him. According to the standing rules, he should pay to the cashier every day the moneys he collected on that day. Between May and October, 1963, the accused collected various sums which amounted to £172 9s 6d. He gave receipts for these various sums, but did not enter them into the appropriate cash-books. After he had examined these cash-books and discovered that the accused did not enter therein the moneys he collected, the Treasurer of the Council, on two occasions—on the 11th and 17th October, 1963, that is—vainly requested the accused to produce these moneys for payment into the Treasury. The accused asked for time within which to do so.

As a result, the Treasurer reported the matter to the Secretary of the Council, who endorsed the report to the police on 17th October, for investigation. In the course of their investigation, the police recovered the sum of £111 from the accused, leaving a balance of £61 9s 6d, which sum the latter, up till the period of the trial in the Court below, had failed to pay into the Council Treasury.

On the above facts, the Acting Chief Magistrate in his judgment dated 20th May, 1964, convicted the accused of stealing the said sum of £172 9s 6d, the property of his employer, namely, the Council, and sentenced him to a three-year term of imprisonment.

From this judgment, the accused has appealed to this Court on four grounds. Of these grounds of appeal, only one was argued, and this was that the trial was a nullity, in that the learned trial Magistrate failed to inform the accused, who was not defended by counsel, of his right to recall the first prosecution witness, who had given evidence before the charge was amended, so as to cross-examine him as a result of the amendment to the charge.

The charge reads:—

“That you Sunday Wills Bassey, *on the 11th day of October, 1963*, at Four Group County Council, Mgbat Enin, Opobo, in the Aba Magisterial District, did steal £172 9s 6d, the property of Four Group County Council, Mgbat Enin, and thereby committed an offence punishable under section 390 (6) of the Criminal Code.”

The amendment referred to was made by deleting the words italicized in the charge above, “*on the 11th day of October*” and substituting therefor the words “*between the months of May and October*”.

The evidence of the first prosecution witness, Geoffrey Okon Edet, in so far as it had any relevance to the charge against the accused, was to the effect that—

- (1) the accused was at the material time a licence clerk employed by the Council, whose duty it was to collect money from the public and pay same to the Treasurer within three days;
- (2) on 11th October, 1963, he, the witness, received from the Treasurer (P.W. 2) a report which he endorsed to the police, Mgbat Enin, for investigation;
- (3) thereafter, he saw the accused, whom he informed orally of the report against him; and
- (4) after the matter had been brought to the attention of the police, the accused produced £111 of the stolen money.

Two points may be noted about the testimony given by the first prosecution witness who was not recalled, and about the amendment to the charge. First, the said testimony was between them repeated and confirmed by the second and third prosecution witnesses, who gave evidence after the amendment. Secondly, the nature of the amendment made, could not, as a result of any cross-examination thereon of the first prosecution witness, lead to the alteration, in any material particular, of the said testimony. This in effect means that the omission to recall the first prosecution witness for purposes of being cross-examined by the accused, after the amendment to the charge, could not and, in fact, did not occasion a miscarriage or failure of justice.

Section 165 of the Criminal Procedure Law provides that—

“When a charge is altered by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or resummon any witness who may have been examined and examine or cross-examine such witness with reference to such alteration.”

In *Shoaga v. The King* (14 W.A.C.A. 22), to which my attention was drawn by both the learned Senior State counsel and learned counsel for the accused, portion of the headnote reads:—

“The appellant was tried with others in the Supreme Court on two counts and convicted. He appealed, without substance, on questions of fact; but the Court raised two points for him: (a) one a point of procedure relating to count 1; and (b) another on the adequacy of the finding on count 2: (the conviction on count 2 was warranted and no more need be said here). On point (a); the information filed did not

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name the appellant but only the others; at the close of the Crown case, his name was added and his plea taken. The appellant had counsel at the trial; the trial Judge did not ask counsel whether he wished to have the witnesses recalled."

Then the headnote went on to set out the provisions of *section 165* of the Criminal Procedure Act, which are the same as those of *section 165* of the Criminal Procedure Law of the Eastern Group of Provinces.

In delivering the judgment of the West African Court of Appeal in *Shoaga (supra)*, Verity, C.J. said at page 23:—

"In the present case, the accused who now appeals was represented by counsel at the trial. Now it appears quite clear from other provisions of the Criminal Procedure Ordinance in regard to the cross-examination of witnesses at a trial that where an accused person is not represented by counsel, the Court shall inform him of his right to cross-examine. It appears to us a legitimate inference from such provisions that where an accused person is represented by counsel there is no need for the Court to inform counsel of the rights of the accused person. Under *section 165* it is clearly laid down that where an alteration or addition has been made to the charge, the accused person must be allowed to recall and cross-examine any witness who has already given evidence, if he so desires. That is a right which cannot be taken away from him, and of which he must be informed if he is not legally represented."

In the instant case, the prosecution amended the charge after the first witness had given evidence, and the accused, who was not represented by counsel, was not informed by the Magistrate of his right to recall this first witness for cross-examination, learned counsel for the accused, relying on *Shoaga (supra)*, has submitted that the effect of this omission would be that this Court would quash the conviction on the ground that the accused person had not been given a fair trial. And he further submitted that, should the conviction be quashed, an order of retrial is not the proper order to make in the circumstances, as such an order would afford the prosecution an opportunity to conduct another trial. Learned Senior State Counsel has submitted in reply that non-compliance with *section 165* of the Criminal Procedure Law does not render the trial a nullity, and that the Court in such a case can order a new trial on the analogy of cases decided on *section 287* of the Criminal Procedure Law, where the Appeal Court has ordered a new trial, even though the accused was not informed of his right to call witnesses, and failure to do this amounted to lack of fair trial. And he cited in support *The King v. Oladimeji* (13 W.A.C.A. 275); and *Atinde v. Commissioner of Police* (14 W.A.C.A. 171).

I agree with learned Senior State Counsel that failure to comply with *section 165* does not necessarily render the trial null and void. And I find support for this view in an obiter dictum of the Federal Supreme Court in *Jones v. Police* (5 F.S.C. 38 at page 41), in which *Shoaga (supra)* was referred to with approval, to the effect that "it is not in every case that the irregularity in a trial caused by not calling witnesses results in adverse effect on the defendant's case; the omission does not in every case occasion a

miscarriage of justice. Where a Judge on hearing an appeal is satisfied, as in this case, that the omission does not occasion a miscarriage of justice, we think under section 38 of the High Court of Lagos Ordinance it is competent for him to dismiss an appeal stated on that issue."

As has been indicated earlier on in this judgment, failure to recall the first prosecution witness in this case, for cross-examination by the accused, has not in any way resulted in adverse effect on the case for the accused who, in his second statement, Exhibit "G", had admitted producing the sum of £111, being part of the missing amount. It is my view, and I so hold, that the omission to recall the first prosecution witness, in the present case on appeal did not occasion a miscarriage of justice.

In the circumstances, I will dismiss this appeal.

*Appeal dismissed.*

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Ealonwu, J.

Enugu High Court, 8th August, 1966—E/6D/66

OPUTA, J.

*Between*

GRACE OKON EDET

*Petitioner*

AND

BASSEY OKON EDET

*Respondent*

*Husband and wife—application by the wife in a divorce proceeding for return of her property—form of the application—jurisdiction of the Court.*

The wife petitioned the Court against the husband praying for dissolution of their marriage. She then filed an application headed "Motion on Notice: Order XXXV, Rule 1" in which she prayed the Court to order her husband the respondent to return to her several items of property which she alleged the respondent seized from her.

The respondent raised a preliminary objection on the ground that as the return of property was neither interlocutory to the petition nor an ancillary relief as defined by the Matrimonial Causes Rules, the Court had no jurisdiction to deal with the issue in the divorce proceedings.

The Court also observed that the petitioner appeared to have founded her application under the provisions of the High Court Rules instead of the appropriate provisions.

*Held:* The Court has jurisdiction by virtue of the provisions of the Matrimonial Causes (Property and Maintenance) Act, 1888 as extended by the Act of 1958 to entertain an application by the wife in a pending petition for divorce, for recovery of her property which she alleges are unlawfully detained by the other spouse.

*Obiter.*—Application in divorce matters should be modelled on and adapted to the forms provided in the Matrimonial Causes Rules.

*B. D. O. Anyaegbunam* for the petitioner.

*Dr Nnamani* for the respondent.

**Oputa, J.:** This is a motion brought by a wife petitioner in a divorce proceeding against her husband respondent for the return to her of several items of property which the applicant alleges the respondent seized from her.

Learned counsel for the petitioner headed the motion thus: "Motion on Notice—Order XXXV Rule 1". It was observed by court that except where specially provided for the High Court Rules do not control procedure and proceeding in Matrimonial Causes, and learned counsel for the applicant was asked to refer the Court to these sections of the Matrimonial Causes Rules under which this motion could be entertained.

Counsel then relied on Rule 82 and Rule 52 of the Matrimonial Causes Rules, 1957. Thereupon learned counsel for the respondent raised a preliminary objection on the issue of jurisdiction. He submitted that there is no rule under the Matrimonial Causes Rules giving the Court jurisdiction

to entertain this motion and submitted that the subject matter of this motion cannot rightly be regarded as ancillary relief as it is not covered by the list of ancillary relief, mentioned and enumerated in Rule 3 (3) (g) of the Matrimonial Causes Rules, 1957. Counsel for the respondent submitted that this list is exhaustive.

Learned counsel for the respondent further submitted that this is really not a motion for interlocutory relief. He however conceded that section 17 of the Married Women Property Act, 1882 gave the petitioner the right to sue for the preservation or protection of her separate property but in so suing she has to come through the proper rules of court.

Mr Anyaegbunam in reply relied on Rule 82 and Rule 52 of the Matrimonial Causes Rules, 1957 and section 17 of the Married Women Property Act, 1882.

I have carefully considered all the points raised for and against this motion.

A court in any action has jurisdiction to grant any interlocutory relief. The question then arises what is an interlocutory relief? A proceeding in an action is said to be interlocutory when it is incidental to the principal object of the action, namely, the judgment. Thus interlocutory applications in an action include all steps taken for the purpose of assisting either party in the prosecution of his case whether before or after final judgment or of protecting or otherwise dealing with the subject matter of the action before the rights of the parties are finally determined; or of executing the judgment when obtained. If one applies the principle above stated to the present case which really is on a different plane being as it is a divorce proceedings, one will nevertheless discover that the present motion is in no way incidental to the real purpose of the petition as contained in paragraph 35 of the petition viz:—

1. That the marriage be dissolved.
2. That the respondent be ordered to pay the cost of the suit.

Any order in this motion will not have the effect of assisting either the petitioner or the respondent to prosecute more effectively this divorce petition. The subject matter of this petition—being the dissolution of the marriage—does not require an interlocutory order to keep it alive pending the final determination of the rights of the parties.

The next question to consider is whether the application can conveniently be grouped under the heading of the ancillary relief? Ancillary relief is dealt with in Chapter XXIV of *Latey on Divorce*, 14th Edition. Rule 3 deals with the subject of ancillary relief and groups this into two broad headings (a) that which may be claimed either—by petition or by separate application. (b) That which may only be claimed by a separate application. Rule 3 (3) (g) and Rule 3 (3) (h) both deal with the subject of the settlement of property. These deal with contingencies quite different from the present motion. I do hold that it will be a misconception to bring the present application under Rule 3 (3) (g) or Rule 3 (3) (h) of the Matrimonial Causes Rules 1957.

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In any event the present application is like the ordinary motion before the High Court exercising its ordinary Civil jurisdiction. Application in divorce matters should be modelled on and adapted to the forms and proceedings attached to the Matrimonial Causes Rules. Notice of application for ancillary relief in accordance with Rule 3 (3) and (4) of the Matrimonial Causes Rules, 1957 should be as in form 2—see page 1595 of Rayden on Divorce.

The subject matter of this motion is for the return of the wife's property alleged detained by the husband when he deserted the wife petitioner. It is too late in the day to urge that the wife cannot maintain an action in *detinue*. Section 12 and section 17 of the Married Women Property Act 1882 clearly gave and defined the rights of the married woman with regard to the protection and preservation of her separate property. In *Larner v. Larner* (1905) 2 K.B.D. 539 it was held that an action will lie at the suit of a married woman against her husband for the return of her personal property detained by him.

Section 17 of the Married Women Property Act of 1882 is an enabling section. It enables the husband or wife to have a dispute as to the title or possession of property determined in a summary way. The only issue in this motion is whether the High Court in Nigeria can so determine in a summary way the issue or dispute to title or possession of property on an application by way of motion during the pendency of a divorce proceeding between the parties.

Rule 52 of the Matrimonial Causes Rules 1957 gives the Registrar in England, in an application for ancillary relief other than those excepted by that rule, the power to investigate and make an order.

Rule 53 of the Matrimonial Causes Rules 1957 gives the Registrar power to investigate an application for settlement of a wife's property, or variation of marriage settlement, etc. . . and "report the result thereof in writing to the judge to whom the application should be adjourned". These two rules do not help the petitioner applicant in this motion.

There is however Rule 77 of the Matrimonial Causes Rules 1957 giving the Registrar power to exercise all the jurisdiction and powers conferred upon a Judge of the High Court by section 17 of the Married Women Property Act 1882. These powers deal however with applications under Rule 3 (3) (g) and (h) of the Matrimonial Causes Rules 1957. These dealt with specified types of ancillary relief and settled property.

There is however section 7 of the Matrimonial Causes (Property and Maintenance Act) 1958 which gave the High Court additional jurisdiction under the act of 1882 as now extended by the Act of 1958 a wife (or *mutatis mutandis* a husband) may make an application where she claims that the husband has had in his possession or control:—

- (a) Money to which or to share in which she is lawfully entitled.
- (b) property, other than money, to which or to an interest in which she is lawfully entitled.

In such application the Court has power to investigate the respective rights of the husband and wife to the disputed property and may make such order as may be appropriate for its return or for its restitution.

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In view of the above I rule that this Court has jurisdiction to entertain this Motion. The objection of learned counsel for the respondent is therefore overruled.

I make no order as to costs.

*Objection overruled.*

Aba High Court, 15th August, 1966—A/38A/65

BALONWU, J.

OBIOHA NWOSU

*Appellant*

*v.*

COMMISSIONER OF POLICE

*Respondent*

*Criminal Law—claim of right—burden of proof when pleaded—falsity of the claim does not oust the claim.*

The appellant was charged with and convicted of the offence of malicious damage to property in the Magistrate's Court Aba. The complainant was his senior brother who claimed that a piece of land was communal to the family and that the appellant without his consent had entered the land and caused a number of palm trees therein to be felled down. The appellant in his statement to the police and in his evidence before the Court claimed exclusive ownership of the land saying that he redeemed it from various pledges and that the trees were felled in a farming process. The Magistrate rejected his claim and thus holding that the land was communal property convicted the appellant without considering further his defence of claim of right as provided by sections 23 and 25 of the Criminal Code. He appealed to the High Court.

*Held:*

1. Once an accused introduces evidence of a claim of right in a charge of malicious damage to property, the burden is on the prosecution to prove absence of a claim of right because the defence of a claim of right negatives the requisite *mens rea* for malicious damage.
2. If the Court rejects the claim of an accused to the ownership of the property, it should not stop there; it shall go further to consider whether the accused made the claim honestly and without intention to defraud, and whether he really had any belief in his claim, for the issue is not whether the property in fact belongs to the accused but whether he did in fact believe that he had the right in the property to do the act for which he has been charged.

*S. M. Ojukwu* for the appellant.

*F. O. Offiah* Senior State counsel for the respondent.

**Balonwu, J.:** The appellant was tried by the Magistrate (Mr H. O. Nwazota) under section 451 of the Criminal Code, having been charged with wilfully and unlawfully damaging two hundred palms situated at Umulelu Itu Ngwa, in Aba Magisterial District, belonging to Erondu Uzaru.

The prosecution story, which was accepted by the learned trial Magistrate, is as follows:—

Erondu Uzaru, the (P.W. 1), and the appellant are members of the same family, of which Erondu (P.W. 1) is the head. This family is the owner of Alaaji land on which numerous palm trees were standing. In the month of June, 1964, or thereabouts, the appellant without the prior permission of Erondu (P.W. 1), leased the aforesaid family land to one Uche (D.W. 2), and subsequently in the same month he and Uche cut down and destroyed over 200 palm trees thereon worth about £200.

Giving evidence of claim of right, which the learned trial Magistrate rejected, the appellant said that the disputed land, on which the destroyed palm stood, is his exclusive property; and that the said land was formerly pledged by one Onuha, appellant's relative, to the father of Eluwa (D.W. 1); and that on the death of Eluwa's father, the appellant redeemed the land. The appellant and his witnesses also said that the palm trees were cut and destroyed by Mr Uche.

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Having rejected the story of the appellant, and without considering his defence of claim of right, the learned trial Magistrate convicted him of the offence charged, and sentenced him to a fine of £75 or six months' imprisonment with hard labour, in default of payment of fine.

From the judgment of the learned trial Magistrate convicting him, the appellant has appealed to this Court on the solitary ground that the learned Magistrate erred in law in failing to hold that the appellant acted under a claim of right under *section 23* of the Criminal Code.

*Section 23* of the Criminal Code is in these terms:—

“A person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.”

And *section 25* reads:—

“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 has been such as he believed to exist.”

In his statement to the police, Exhibit “A”, adopted in court as part of his defence, the appellant introduced evidence of claim of right to the effect that the near ten acres of land and the damaged palm trees thereon belonged exclusively to him; that he redeemed portions of both the said land and palm trees from various people, to whom they were pledged; and that he inherited a portion of the said land, the inherited portion being part of the family land. Finally, he said that he disputed the said land in court in 1962 with Erundu (P.W. 1), and he won the case. In effect the appellant was saying that he has right of property in both the land and palm trees, and that his act in cutting down the palm trees was done in exercise of that right.

*Section 451* of the Criminal Code, under which the appellant was charged, stipulates that any person who wilfully and unlawfully destroys or damages any property is guilty of an offence. Here, the term “wilfully” is interchangeable with “maliciously”, and a person in this context is said to act maliciously if he wantonly or recklessly interferes with the rights of others. The defence of “claim of right” negatives the requisite *mens rea* of malicious damage. Once an accused introduces evidence of “claim of right”, as the appellant has done in this case, the burden is on the prosecution to prove absence of a claim of right, that is to say, to show, as in this case, that the appellant did not entertain the belief in his right of property in the said land and palm trees. In other words, the question for the learned Magistrate was not whether the land did in fact belong to the appellant, but whether

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the appellant did in fact believe that he had a right of property in the said land and palm trees, that is to say, whether he believed that he had a right to do the very damage that he is here charged with. To put the matter another way: Did the appellant suppose the damage to be legally justified?

The position then comes to this, namely, that after the learned trial Magistrate had come to a finding that the said land with the palm trees thereon is family property, and not the exclusive property of the appellant, he should not have stopped there. He should have gone on to consider the further question whether the appellant made the claim of right honestly and without intention to defraud; and whether he really had any belief in his legal right to the land and the palm trees thereon, and, if so, whether his belief, though mistaken, was honest and reasonable. These are the questions which necessitate consideration of *sections 23 and 25* of the Criminal Code. It seems to me that had the learned trial Magistrate considered those questions, he would on the evidence have come to the conclusion that the "claim of right" was made honestly and without any intention to defraud, that is to say, that the appellant did the damage with which he is here charged, because of his mistaken belief, at once honest and reasonable, while in the exercise of a supposed right. For as one learned author put the matter, one cannot be said to be maliciously destroying the property of another, if one thinks that one is destroying ones own property, even though the property belongs to that other. See Granville Williams, *Criminal Law*, the General Part, Second Edition, page 309, last paragraph.

In the circumstances, I would allow this appeal, and acquit and discharge the accused person.

*Conviction quashed.*

Aba High Court, 15th August, 1966—A/23A/64

BALONWU, J.

EZEKIEL OKOYE

*Appellant*

v.

LEVI ONYEKWUM

*Respondent*

*Assault—when it may be committed without actual battery. Damages—when Appeal Court may intervene with the award by the Court below.*

The respondent who was proved to be a person of a considerable position in the locality sued the appellant in the Magistrate's court claiming £500 for an assault. It was established that while the respondent was addressing a meeting, the appellant who bore him grudge for a previous disagreement, angrily left his own seat, menacingly spoke and advanced towards the respondent, and would have struck him a blow but for the timely intervention of another person. The Magistrate found as a fact that the appellant had advanced sufficiently near the respondent with an intention to strike him and would have done so had he not been prevented by another person. The Magistrate found for the respondent and holding that the assault was accompanied by a malicious intent and having regard to the station in life of the respondent, awarded £150 damages to the respondent.

The appellant argued in the High Court firstly that the evidence amounted to a threat and not an assault, and secondly that the damages were excessive.

*Held:*

1. Assault consists of three elements—to wit—(a) an overt act, which (b) indicates an immediate intention to commit a battery, coupled with (c) the capacity to carry that intention into effect. These three elements were complete in the findings of the trial Magistrate that the appellant menacingly advanced towards the respondent within four or six feet of him and would have struck him but for the timely intervention of one of the invitees.
2. The burden is on the appellant to satisfy the Appellate Court that the award of damages by the Court below was manifestly so large as to amount to an erroneous estimate. This burden was not discharged in this appeal as the Magistrate was entitled to take into consideration, in the assessment of damages, the position of the respondent and the spite or ill-will manifested by the appellant.

Cases relied on:—

*Stephens v. Myers* (1830) 4 C and P 349.

*Ziks Press Limited v. Alvan Ikoku* 13 W.A.C.A. 188 at 188-189.

*Watt v. Watt* (1905) A.C. 115.

*Reaney v. Co-operative Wholesale Society* 1932 W.N. 78.

*Roach v. Yales* (1938) 1 K.B. 256.

*Mahtani v. Daswari* 7 W.A.C.A. 187.

*Smith v. Schilling* (1928) 1 K.B. 429.

*Flint v. Lovell* (1935) 1 K.B. 360.

*Owen v. Sykes* (1936) 1 K.B. 192.

*London v. Ryder* (1953) 2 Q.B. 202.

P. K. Nwokedi for the appellant.

A. B. C. Ikeotuonye for the respondent.

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**Balonwu, J.:** In this appeal, the defendant complains against the judgment of the Acting Chief Magistrate (Mr J. O. Obianwu), delivered at Aba on April 28, 1964, awarding £150 damages to the plaintiff with costs assessed at twenty guineas. The claim was cast in tort for assault.

The facts of the case are briefly as follows:—

In 1962, the defendant was the tenant of the premises known as 58 Azikiwe Road, Aba, where he was then operating a native liquor bar. In December of that year, the plaintiff, a well-known contractor and trader successfully petitioned the Aba Urban County Council against the renewal of the defendant's liquor licence, presumably on the ground of nuisance constituted by the great noise made by customers who frequented the defendant's bar, without previous warning to the defendant. This circumstance, it would appear, made the defendant nurse a grievance against the plaintiff.

On August 5, 1963, an organization, the Charity Transport Service, to which the defendant had sublet a portion of the premises hereinbefore-mentioned, invited the plaintiff and the defendant and some other people to a social function on the said premises. The defendant, who was sitting right inside the hall, and the other invitees were already at the party before the plaintiff arrived. As the plaintiff rose from his seat and began to explain the reason for his being late to the function, the defendant angrily left his seat, which was some twenty-four feet away from the plaintiff, and menacingly spoke and advanced towards the plaintiff, and would have struck him a blow, but for the timely intervention of some of the other invitees. The learned Acting Chief Magistrate found that the defendant had advanced sufficiently near to the plaintiff to be in a position to deal him a blow, and had in effect indicated an intention to do so, and would have done so, but for the intervention of Mr Ndefo (P.W. 2).

At the conclusion of hearing, the learned Acting Chief Magistrate gave judgment in the terms already stated. The defendant has appealed from this judgment on the following grounds:—

1. The decision is unwarranted and unreasonable and cannot be supported having regard to the weight of evidence.
2. That the learned trial Chief Magistrate erred in law when he held that a case of assault had been proved against the defendant.
3. That the damages awarded are grossly excessive.

Grounds 1 and 2 were argued together. Arguing these grounds, learned counsel for the defendant submitted that all the evidence amounted to was a threat of bodily harm by the defendant to the plaintiff, and that such a threat without more cannot constitute assault. He then drew the attention of the Court to the definition of assault in the 11th Edition of "Clerk and Lindsell" on torts at page 266, and in the 11th Edition of "Bullen and Leake" at page 644. According to "Clerk and Lindsell", "An assault is an overt act indicating an immediate intention to commit a battery coupled with the capacity of carrying that intention into effect,". And in "Bullen and Leake" assault is defined as "an attempt at a battery a menacing attitude as holding up a hand or stick to strike a person who is within reach thereof at the time".

Three elements are common to the above two definitions, and they are as follows:—

1. There must be an overt act.
2. The overt act must evince an immediate intention to commit a battery.
3. There must be capacity to carry that intention into effect.

On the other hand, learned counsel for the plaintiff drew my attention to *Stephens v. Myers* (1830) 4 C and P. 349, noted at page 267 of "Clerk and Lindsell" already referred to, in which it was held that if the defendant made a rush at the plaintiff so that a blow would almost immediately have reached him, but was stopped before he was near enough to give a blow, then an assault had been committed. In the instant case, there was evidence, which the Chief Magistrate accepted, that the defendant menacingly advanced towards the plaintiff, and came within four or six feet of him, and would have struck him, but for the timely intervention of one of the invitees. In the present case, as in *Stephens v. Myers* (*supra*), the three constitutive elements of an assault are present:—

- (1) There was the defendant's overt act of threateningly advancing towards the plaintiff;
- (2) the threatening manner in which the advance was made clearly indicated an immediate intention to commit a battery, and the learned Chief Magistrate, quite rightly in my view, drew that inference from the facts found; and
- (3) the defendant had the capacity to carry that intention into effect, for he had come within striking distance of the plaintiff, and would have struck him, if he had not been prevented from doing so by Mr Ndefo (P.W. 2).

In the circumstances, I uphold the Chief Magistrate's decision that a case of assault had been made out, and the first two grounds of appeal are accordingly dismissed.

The final ground argued was that the damages awarded were excessive, the tort being a trivial wrong. It will be recalled that the damage claimed is £500, which is the monetary limit of the jurisdiction of the Chief Magistrate, who tried the case. Learned counsel for the plaintiff drew my attention to all the surrounding circumstances which, in his submission, rendered the defendant's act peculiarly obnoxious. He said that the plaintiff is a wealthy and well-known contractor and trader, and a highly respected member of the local community. And he was at the material time a member of the Aba Urban County Council. The deliberate and relentless persistence with which the defendant threatened to carry out the assault made some of the invitees to the party to persuade the plaintiff to leave the function, without partaking of the entertainment. It seems to me that the assault was accompanied by a malicious intent, and the learned Chief Magistrate was entitled to take into consideration in assessing the damages, the spite or ill-will manifested by the defendant. The question of his estimate of the damages, subject to certain well-established principles with which I shall presently deal, is a matter of discretion of the learned Chief Magistrate.

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These principles are clearly set out in the case of *Ziks Press Limited v. Alvan Ihoku* (13 W.A.C.A. 188 at page 188 to 189), where Lewey, J. A. delivering the judgment of the West African Court of Appeal, said:—

“Where the case has been tried before a jury, the Court of Appeal may order a new trial if it appears that the jury applied a wrong measure of damages, or that the amount was so large that no jury could reasonably have arrived at it, or that the jury must have taken into consideration matters which they ought not to have considered; as to all this there is abundance of authority. But the Court of Appeal, cannot, in a jury case, instead of ordering a new trial, itself alter the amount at which the jury have assessed the damages unless both parties agree to such a course. *Watt v. Watt* (1905) A.C. 115. No such consent, however, is necessary where the trial has been by a judge alone (*Reaney v. Co-operative Wholesale Society* (1932) W.N. 78 and *Roach v. Yates* (1938) 1 K.B. 256.”

Then His Lordship referred to the case of *Mahtani v. Daswari* (7 W.A.C.A. 187) where the West African Court of Appeal appeared to consider that consent of the parties might be required, even where a judge alone had awarded the damages, before the amount of damages could be changed on appeal. And after pointing out that the case of *Smith v. Schilling* (1928) 1 K.B. 429, to which the Court of Appeal referred was, in fact, a jury case, and that the parties in *Mahtani v. Daswari* (*supra*) did not consent, so that the case went back for re-trial, His Lordship expressed the opinion that what the West African Court of Appeal said in that case might be treated as merely obiter. He then went on to re-hear the tests which the Court of Appeal should always apply before it will interfere with the damages awarded by a trial judge—

“It seems to me, with all respect, that it is clear from the authorities which I have cited, that this Court has the power to interfere in cases where a judge sitting alone has awarded the damages, and that in such cases the agreement of the parties is not required before the power can be exercised. But it is equally clear that the Appellate Courts are very reluctant to exercise this power and to attempt to re-assess the amount of damages which the trial judge has given, and that they will never do so unless it can be established that at the trial the judge proceeded upon a wrong principle of law or that his award was clearly an erroneous estimate, since the amount was manifestly too large or too small.”

These tests, which will justify reversing the trial judge by the Appellate Court on the question of the amount of damages, were formulated by Greer, L.J., in *Flint v. Lovell* (1935) 1 K.B. 360, and in the leading case of *Owen v. Sykes* (1936) 1 K.B. 192, Slessor, L.J., delivering the judgment of the Court of Appeal in England, commented on these tests as follows:—

“I read these words to mean that if the amount given is an amount which this Court itself might feel disinclined to agree with as an amount which they themselves would assess, that circumstance alone would not necessarily justify this Court in making any amendment of the Judge’s award, and this Court would normally have to be satisfied that there really was, again to quote the words of Greer, L.J., “an entirely erroneous

estimate of the damage to which the plaintiff is entitled". That is a question of degree, but I wish to guard against the supposition that because this Court is hearing such a case by way of re-hearing, therefore it would be ready to re-assess damages according to what this Court, if they had been trying the case, might have given as damages, and not what the judge below gave. It is incumbent, I think, on the parties wishing to disturb the damages awarded, to satisfy this Court that the Judge had acted upon an erroneous estimate—meaning thereby something in which the error had so tinged the proceedings that it was a proper case for this Court to assess the damages."

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So in *London v. Ryder* (1953) 2 Q.B. 202 where the jury awarded a total of £5,500 damages against a man who had broken into a young woman's flat, beaten her and dragged her downstairs by the hair, the Court of Appeal in England, thought the damages were greater than it would itself have awarded, refused to interfere with the jury's assessment, which it did not regard as so excessive as to amount to an erroneous estimate.

It seems to me that the above tests applicable to damages awarded by trial Judge sitting alone are similar to, or same as, those applicable to award of damages by the Chief Magistrate, whose jurisdiction extends to £500. According to these tests, the burden is on the defendant to satisfy this Court in its appellate capacity that the award of damages made by the Chief Magistrate was manifestly so large as to amount to an erroneous estimate. And this burden he has failed to discharge. For I think that the award of £150 made by the Chief Magistrate was reasonable in all the circumstances including the circumstance of malice, which is here laid only in aggravation of damages.

In view of the foregoing, I will also dismiss the third ground of appeal.

In the result, I dismiss the appeal in this suit, and affirm the judgment of the learned Chief Magistrate.

*Costs:*

*Ojukewu.*—I ask for 35 guineas costs. There have been seven appearances.

*Nwokedi.*—The appeal itself did not last long. I offer 10 (ten) guineas.

*Court.*—Costs to the respondent assessed at 15 (fifteen) guineas.

*Appeal dismissed.*

Enugu High Court, 19th August, 1966—E/2D/66

OPUTA, J.

BELLA ADA NWANYA

*Petitioner*

v.

ONUORAH NWANYA

*Respondent*

*Divorce—cruelty averred not proved—marriage however broken down irretrievably—Decree nisi granted.*

The petitioner charged her husband with cruelty and asked for the dissolution of their under two-year old marriage. The evidence did not establish the cruelty alleged or at all. On the other hand, although the husband took part in the proceedings and cross-examined the petitioner he did not appear very strongly in favour of the continuation of the union. The petitioner, though on the evidence, was the guilty spouse, had for all intents and purposes regarded the union at an end. Both parties were still very young. The Court was satisfied that there was no further hope of reconciliation between the parties, and, having regard to all the circumstances, was of the opinion that to refuse a decree in such situation will work undue hardship to both parties.

*Held:*

1. In a divorce proceeding, even where the respondent makes some admission in the pleadings, the duty is still on the petitioner to satisfy the Court that on the evidence he is entitled to the relief sought.
2. Where in a divorce proceeding the charge is not proved, the Court still has a discretion in special circumstances to dissolve the marriage; as in this case, in which the Court was satisfied that as far as the petitioner was concerned the marriage was at an end, and there was no hope of reconciliation between the parties, and both parties were still very young and would want to re-marry. (N.B. The marriage had lasted for under two years during which period they cohabited for only six months, and there was no issue of the marriage).
3. In view of the Court's finding that it was the petitioner who wanted and had succeeded in breaking up the marriage, the respondent's costs would be paid by the petitioner even though she was the wife.

Cases relied on:—

*Fidelia Eleje v. Emmanuel Eleje and Another* 7 E.N.L.R. 126.

*Raper v. Raper* (1962) 42 L.T.R. 619.

*Nnaemeka-Agu (Orefo with him)* for the petitioner.

*Ifebigh* for the respondent.

**Oputa, J.:** This is a petition for dissolution of a marriage on the ground of cruelty. Although the petitioner in paragraph 9 of her petition stated that the respondent "is a man of immoral habits and has continually used immoral obscene and abusive language to the petitioner" adultery has not

been urged as a ground for relief in this petition. The petitioner and the respondent were married under the Ordinance on the 24th October, 1964. The marriage was celebrated in the St. Barth's Church at Enugu and the marriage Certificate was tendered as Exhibit 4.

After the marriage the parties lived and cohabited at No. 1 Dennis Drive Uwani Enugu. Both parties are Nigerian citizens domiciled in Enugu in the Eastern Group of Provinces. There are no children of the marriage.

This petition has been brought wholly and solely on one ground—that of cruelty. The respondent in his answer denied the allegation of cruelty. The respondent did not himself give evidence in proof of the several points and issues raised by him in his answer. He closed his case at the end of the petitioner's case. This is however a divorce proceeding and even where a respondent makes some admission in his or her answer the duty is still on the petitioner to satisfy the Court that on the evidence led he or she is entitled to the relief sought. The respondent took part in the proceedings, cross-examined the petitioner and at the close of the petitioner's case submitted that the evidence led has been so discredited by cross-examination that the Court cannot in the circumstances of this case make any finding of cruelty against the respondent.

It thus becomes necessary to review in some details the evidence led in this petition. The petitioner's evidence is that since the celebration of the marriage the respondent had been cruel to her. She relied on the following facts in proof of this alleged cruelty.

1. They never sat together to plan their lives.
2. The respondent was in the habit of leaving the matrimonial home in the evenings and coming in rather late thus leaving her lonely and alone.
3. The relatives of the respondent were hostile to her and the respondent did not correct or chastize them openly. This was more so in the case of respondent's sister called Emily.
4. After March 1965, the respondent formed the habit of sleeping in an arm-chair in the sitting room when he returned home from his nocturnal perambulations.
5. Sometime in March 1965, the petitioner found dures in the pocket of the respondent's raincoat.
6. The respondent was in the habit of leaving her in the middle of a discussion.
7. The respondent accused her of infidelity after the visit of a near relation of hers called Abili.
8. In February 1965, the respondent did not allow her to attend a meeting of physiotherapists in Lagos.

It is also the case of the petitioner that in consequence of the above treatment of her by the respondent she became depressed, could not concentrate and got frightened at the thought of going home. On 28th April, 1965, barely six months after the celebration of the marriage the petitioner packed away from the matrimonial home. As a result of this action of hers the

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respondent wrote her two letters tendered as Exhibits 1 and 2. She received both these two Exhibits on 30th April, 1965. Her reply to Exhibits 1 and 2 was tendered as Exhibit 3.

In May, 1965 there was an abortive attempt by the parents of the parties to settle the dispute between the petitioner and the respondent and to bring them back again to continue normal cohabitation. In addition Mrs Nkemena the wife of Bishop Nkemena pleaded with the petitioner not to leave but to quote the very words of the petitioner, "I did not heed this pleading because I did not see any hope of the marriage succeeding. I did not see how we could live together because the respondent was very hostile to me and left me alone in the house. He never talked to me".

The petitioner in her evidence in chief admitted that the respondent was and I hope is still, a Public Relations Officer attached to the Coal Corporation and also a free lance journalist.

Under cross-examination the petitioner admitted that when their parents met at Onitsha in an attempt to resolve their differences the respondent expressed willingness to have her back and continue normal cohabitation. It was the petitioner herself who refused to consider any suggestion of resuming cohabitation with the respondent. The petitioner admitted that if respondent had arranged for his sister Emily to be transferred to Onitsha from Enugu that was an attempt by him to remove at least one of the causes of friction between them. The petitioner however denied knowledge of the fact that in fact Emily left the matrimonial home two weeks after she herself had packed out.

The petitioner admitted that the respondent paid £40 for her wedding gown and over £30 for her wedding rings. The petitioner further admitted that within two months of their marriage she locked the respondent out of the house when they had a disagreement over the behaviour of Emily. She also admitted that within two months of their marriage a gentleman called Abili who she proposed to marry before but could not do so because their parents said they are related visited their home at No. 1 Dennis Drive. He came in at 6 p.m. and was introduced to the said Abili. He the respondent welcomed him and soon rushed out of the house for a T.V. programme. The petitioner then entertained Abili to dinner. Respondent came in at about 10 p.m. obviously annoyed at this visit of Mr Abili. I have no evidence that the petitioner ever apologized to the respondent for "inadvertently hurting his pride" by entertaining Abili in the matrimonial home.

I have given serious and anxious considerations to the evidence led in this petition. I am satisfied that the respondent had a high regard for the petitioner before their marriage. That explains the lavish nature of their wedding—a wedding which (according to Exhibit 2, a fact which was neither denied in Exhibit 3 or by evidence in court by the petitioner) cost the respondent £300. The petitioner herself admitted that the wedding gown alone cost £40 and the rings cost well over £30. The parties proceeded to Port Harcourt for their honeymoon and after that returned to their matrimonial home in Enugu. The petitioner admitted that at the onset they lived quite happily. I have no direct evidence on when, why and how the respondent so drastically changed so much so that he did not even want to talk to the petitioner or share the same bedroom with her. I have no evidence of any abnormality in the respondent which may account for such a sudden change.

But I have evidence that barely two months after their wedding a gentleman called Abili visited the matrimonial home at No. 1 Dennis Drive. I have evidence that the petitioner had told the respondent about this Abili—that she wanted to marry him but their parents objected on the ground that both were related.

I have no evidence that prior to this visit by Abili the respondent knew that he was visiting the family and consented to his proposed visit. The evidence was that Abili called at No. 1 Dennis Drive in the absence of the respondent. The respondent came in, saw Mr Abili and was introduced to him. He welcomed Abili and soon after found an excuse for leaving the matrimonial home. He said he was going for a T.V. programme. He left. After this the petitioner in the absence of the respondent entertained Mr Abili to dinner. One should have thought that if Mr Abili was their common visitor the respondent should have been present at this dinner but he was not. There is no evidence even that the respondent knew Mr Abili was going to have dinner in his house. The respondent came in at 10 p.m. upset and annoyed. It was then clear and evident that he did not take at all kindly to Mr Abili's visit—a visit of a man who was to marry the petitioner, a visit which was unfortunately ill-timed coming as it did barely two months after their wedding. Very many people in the position of the respondent may also resent this visit. The respondent was jealous which is a negative way of expressing his affection and regard for the petitioner. I have no evidence that the petitioner ever apologized to the respondent for this inadvertently hurting his pride and feelings. The respondent was thus left to feel and conclude that this visit was planned to upset and annoy him. I am satisfied that the rift in the relationship between the parties to this petition was caused by this rather unfortunate visit of Mr Abili and what is worse the more unfortunate way in which the petitioner handled the whole situation. I am also satisfied that any future conduct of the respondent was provoked by this Abili's visit. I have evidence that the respondent after their wedding retained a paid driver for the petitioner. This driver was dismissed after the second month by the respondent. One can safely infer that this dismissal was also another way of showing his resentment against Mr Abili's visit.

I do not accept the petitioner's evidence that the respondent either incited or procured his relatives especially Emily to abuse or ill-treat her. I have no medical evidence as to the result or effect of the alleged acts of the respondent on the health physical or mental of the petitioner. I am not satisfied that the petitioner's health was affected or could have been affected adversely by the alleged conduct of the respondent which to my mind had been grossly exaggerated. I do not believe that the respondent was going out and coming in at 2 a.m. everyday. At least there is evidence that on the night Mr Abili visited, he came in at 10 p.m. The sum total of the petitioner's evidence is that she does not think she will live happily with the respondent. But in order to obtain relief under the Matrimonial Causes Act on the ground of cruelty it is not enough for the petitioner to establish that the respondent's character has developed in such a way as to make it impossible for the petitioner to live happily with the respondent.

There must be proof that the respondent has committed wilful and unjustifiable acts inflicting pain and misery upon the petitioner and causing

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him or her injury to health or reasonable apprehension of such injury; *Horton v. Horton* (1940) page 187 at page 193 refers. Also in *Russell v. Russell* (1897) at page 395 Lord Herschell observed: "It is indeed beyond controversy, that it was not every act of cruelty, in the ordinary and popular sense of the word, which amounted to *saevitia*, entitling the party aggrieved to a divorce, that there might be many wilful and unjustifiable acts, inflicting pain and misery in respect of which that relief could not be obtained". And in *Neeld v. Neeld* 1831 4 Hag Ecc page 263 at page 271 Dr Lushington observed: "Short of personal violence or reasonable apprehension of it, I have no power to interfere".

I am not satisfied that the acts of the respondent complained of were not unjustifiable coming as they did after the Abili affair. I hold that those actions were provoked by the conduct of the petitioner and were the reflex of the bitterness, pain and humiliation suffered by him the respondent with regard to Mr Abili's visit. Counsel for the petitioner relied mainly on the recent case of *Gollins v. Gollins* (1963) 2 All E.R. page 966. But *Gollins v. Gollins* decided that whether cruelty, as a matrimonial offence, has been established is a question of fact and degree which should be determined by taking into consideration the particular individuals concerned and the particular circumstance of the case. Where the two spouses are of normal physical and mental health, and the conduct of the respondent spouse, so considered is so bad that the other should not be called upon to endure it, cruelty is established. In *Gollin's* case the root cause of the trouble was that the respondent was incorrigibly and inexcusably lazy, in this case I found as a fact that the root cause of the trouble between the parties was the unfortunate visit of Mr Abili, an incident that can be attributable to the fault of the petitioner herself. In *Gollin's* case the wife petitioner who was a normal and active and capable woman was reduced to a physical and mental state where she would no longer be able to maintain herself and her children; in this case there is complete lack of credible and weighty evidence that the health of the petitioner—health either physical or mental—deteriorated. Before her health deteriorated Mrs Gollins only tried to get a non-cohabitation order without alleging cruelty, but it was only when her health began to be affected that she brought a divorce proceeding on the ground of cruelty.

On the facts and on the law I am not satisfied that the petitioner from the evidence before me has proved legal cruelty upon which I can grant her any relief.

But the matter does not end here. The petitioner has told Mrs Nkemena that she does not intend to marry the respondent again. In May, 1965 when their parents went into this dispute the respondent was quite prepared to take the petitioner back and continue cohabitation. Then it was the petitioner who stated categorically and in no uncertain terms that she does not intend to go back to the respondent. It was the petitioner who packed away from the matrimonial home barely six months after their marriage. It was the petitioner who refunded the dowry paid by the respondent in accordance with native law and custom. It takes two to marry and to discharge the marital obligations. It is apparent that as far as the petitioner is concerned this marriage is at an end. It will be useless pretending otherwise. I am therefore satisfied that there is no hope of reconciliation between the parties. Again the petitioner and the respondent are both very young people and each may want to remarry. To refuse a decree in such a

circumstance will work undue hardship not only on the petitioner but also on the respondent to whom no blame attaches. In the case of *Fidelia Eleje v. Emmanuel Eleje, Gabriel Agozu* 7 E.N.L.R. 126 Sir Louis Mbanefo, C.J. held that in circumstances such as the above a marriage may be dissolved at the discretion of the Court. On that ground therefore I am inclined to grant the petition and dissolve this marriage. I hereby order a *Decree Nisi* to issue.

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On the question of costs the Court has an unfettered discretion to grant costs or to refuse them to the wife or to give costs against the wife.

*Baldwin Raper v. Baldwin Raper* 1962 42 L.T.R. page 619 refers. In this case I have no evidence of the financial position of the respondent. I do not know what his salary is. There is evidence that the petitioner earns £822 per annum and in view of my findings that it was the petitioner who wanted and now has succeeded in breaking up this marriage, I am satisfied that this is a proper case to order costs against the wife petitioner. I therefore award costs to the respondent assessed at fifty guineas.

*Decree Nisi granted.*

Aba High Court, 29th August, 1966—A/M.7/65

BALONWU, J.

THE STATE

v.

1. PROVINCIAL SECRETARY,  
UMUAHIA, ETC.
2. OGBONNA NWANKWOCHA
3. NWAMUO ULELU
4. WORGU DUGHUYOR

Respondents

*Ex parte* ABRAHAM AJUZIE

Applicant

*Certiorari*—application for order nisi made after six months of the proceedings—application for the order made after fourteen days of the order nisi—validity of the application.

Pursuant to O.22 r.1. of the High Court Rules the applicant sought for and obtained on the 5th May, 1965, leave to apply for an order of *certiorari* to remove to the High Court for the purpose of their being quashed the proceedings and judgments in Asa Native Court suit No. 849/55. On that date the proceedings in that suit consisted of—

- (a) Proceedings in the Asa Native Court with its judgment dated 6th March, 1956;
- (b) Proceedings before the District Officer with his judgment dated 18th March, 1958;
- (c) Proceedings before the Chief Justice exercising judicial powers of the Governor with his judgment dated 11th October, 1963; and
- (d) Proceedings before the Provincial Secretary with Resident's judicial powers with his judgment dated 27th January, 1965.

Having obtained the leave, the applicant, pursuant to O.22 r. 3 moved the Court for the order and the motion came up for hearing on 10th June, 1966—more than a year after the leave was granted. The respondents raised preliminary objection on two grounds—firstly that the leave granted had lapsed in view of O.59 r. 5 (1) (a) of the rules of Supreme Court in England which provides that “unless, within fourteen days after leave has been granted, the notice or summons is put in the list for hearing, the leave shall lapse”, and secondly that the application for the leave to apply was barred by O.22 r. 2 of the High Court Rules which provides that an application must be made “not later than six months after the date of the proceedings”. The Court considered whether the English rules were applicable and whether the period of six months was reckoned from the date of the native court judgment or not.

*Held:*

1. The English Supreme Court Rules on *certiorari* O.59 r. 5 (1) (a) do not apply to Eastern Nigeria since there is a local set of rules in Order 22 of the High Court Rules and the Rules' Committee must be deemed to have chosen and incorporated in the local rules such English rules that it has considered desirable for local application.

2. The decisions of the Native Court and of the subsequent higher courts on appeal are each a distinct proceeding and the period of six months ran from the date of each decision in respect of that proceeding. In the circumstances the application for certiorari is barred in all the proceedings in this suit except the proceedings before the Provincial Secretary.

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Cases relied on:—

*The Queen v. Customary Court, Grade I, Ilesha and Another* (1961) All N.L.R. 811.

*Elliott v. Thompson* (1875) 33 L.T. 337.

*Umulu Group Court Ex-parte Macauley and Another* 20 N.L.R. 111.

*The State v. W. O. Wogu and Others* 1965 N.M.L.R. 219.

*R. v. Middlesex Justices* (1836) 5 Ad and EC. 626.

*The Queen v. The Deputy Governor E.N. ex parte Iloka* 4 E.N.L.R. 103.

*A. I. Aseme* for the applicant.

*F. O. Offiah* for first respondent.

*R. A. Bell Gam* for second to fourth respondents.

**Balonwu, J.:** On the 5th May, 1965, the applicant sought and obtained the leave of the Court to apply for an order of *Certiorari* to remove to this Court for the purpose of their being quashed the following proceedings and judgments in Asa Native Court Civil Suit No. 849/55, namely: (a) Asa Native Court proceedings and judgment dated 6th March, 1956; (b) Proceedings before the District Officer and his judgment dated 18th March, 1958; (c) Decision, dated 11th October, 1963, given on appeal by the learned Chief Justice exercising the judicial powers of the Governor; and (d) Proceedings before the Provincial Secretary with Resident's judicial powers and his judgment dated 27th January, 1965. The grounds on which the application was brought were as follows:—

1. That the proceedings and decision of the Asa Native Court in Suit No. 849/55 are a nullity and cannot stand in law.
2. That there was an error in law apparent on the face of the record, in that some witnesses gave evidence not on oath, and others through representatives.
3. That the proceedings in the aforesaid Asa Native Court Suit being a nullity, all subsequent proceedings and decisions which arise therefrom, that is to say, the respective appeal proceedings and judgments of the District Officer, of the Provincial Secretary with Resident's Judicial powers, and of the learned Chief Justice with the judicial powers of the Governor, are likewise null and void.

On the 10th June, 1966, when the motion came on for arguments, learned counsel for the respondents took two preliminary points. On the first point, he contended that the leave granted by this Court to the applicant on the 5th May, 1965, had lapsed by reason of non-compliance with paragraph (a) of sub-rule (1) of rule 5, in Order 59, of the English Rules. The paragraph is in these terms:—

“Unless, within fourteen days after leave has been granted, the notice or summons is put in the list for hearing, the leave shall lapse.”

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The paragraph, which is in the 1966 Annual Practice, is not in that of 1956. I have sought in vain for the Annual Practice of 1960, to which year *section 16* of the High Court Law of Eastern Nigeria relates. The argument is that *section 16* let in the aforesaid paragraph, and the respondent's counsel referred the Court to the Western Nigeria case of *The Queen v. Customary Court Grade A, Ilesha and Another ex-parte* Chief Emmanuel Oriewe (1961) All N.L.R. Part 4, page 811 at page 813, decided on *section 5 (2)* of the Administration of Justice (Crown Proceedings) Law, 1959 (Western Nigeria). The second point is based on the provisions of Rule 2 in Order 22 of the High Court Rules of Eastern Nigeria, 1956. Under this rule, leave shall not be granted to apply for an order of *Certiorari* to remove any judgment, order, conviction or other proceeding for the purpose of being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any written law. And where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired. On this latter point learned counsel contended that the statutory period of six months begins to run from the date of the judgment in the Native Court. This being so, he submitted that the relief sought in this motion in relation to the judgments and orders of the Native Court made in March 1956, of the District Officer in March 1958, and of the learned Chief Justice with Resident's judicial powers in October 1963, was statute-barred. And he cited in support the cases of (1) *Elliot v. Thompson* (1875) 33 L.T. 337; (2) *Umuolu Group Court ex-parte Macaulay and Ben* (20 N.L.R. 111); and (3) *The State v. W. O. Wogu and Others* (N.M.L.R. 219 of May, 1965). I shall deal with the two points in the order in which they were argued.

To return to the first preliminary point. *Section 16* of the High Court Law (Eastern Nigeria), on which reliance is placed, provides as follows:—

"The jurisdiction vested in the Court shall be exercised (as far as regards practice and procedure) in the manner provided by this Law and in any other written law or by such rules and orders of Court as may be made pursuant to this Law or any other written Law, and, in default thereof, in substantial conformity with the law and practice observed in England in the High Court of Justice, on the thirtieth of September, 1960."

The words that are to be construed are "in default thereof". As I read the section, these words seem to mean that recourse can only be had to the English rules in force on the date specified, if there has been a default in providing in the local law, or by means of rules and orders made pursuant to the said law, for the necessary rules of practice and procedure in accordance with which the jurisdiction of the Court shall be exercised. The point of difficulty arises when the question is asked: When does a default occur? Is it when there is an entire lack of provision in respect of a whole subject-matter of an *ORDER*, like the complete absence of provision in respect of rules regulating applications in Crown Proceedings, e.g., *Mandamus, Certiorari, Prohibition and Quo Warranto*? Or when, although we have local rules dealing with the subject-matter, such rules are not exhaustive, in the sense that they do not incorporate all the English rules on the subject? This

latter alternative was what in effect the learned counsel for the respondents has urged upon the Court to hold as the correct interpretation of *section 16*, although the Western Region case he cited does not seem to substantiate his contention.

The Western Region case of *Queen v. Customary Court, Grade "A", Ilesha and Another ex-parte* Chief Emmanuel Oriewe (*Supra*), as has been noted, was a decision on *section 5 (2)* of the Administration of Justice (Crown Proceedings) Law (Western Nigeria), which provides as follows:—

"Until rules of court are made by virtue of the provisions of subsection (1) of this section, the procedure for the time being applicable in the High Court of Justice in England in relation to the matters specified in that subsection shall apply in the High Court of the Region with such adaptations as are necessary for the circumstances of the Region."

In that case, it was held in effect that *section 5 (2)* above-mentioned let in *Rule 5 (1) (A)* in *Order 59* of the English Rules hereinbefore mentioned, so that where leave has been granted to an applicant to apply for an Order of Prohibition, such leave will lapse unless the Motion is listed for hearing within fourteen days after the granting of the leave. Learned counsel for the applicant here has rightly submitted that in the Western Region case recourse was had to the English Rule because there were no provisions in the Western Nigeria High Court Law at that time for the rules governing applications in Crown Proceedings. And until such rules of court were made, it was specifically provided in the Administration of Justice (Crown Proceedings) Law that the corresponding English Rules should apply.

I find myself in agreement with the submission made on this aspect of the matter by learned counsel for the applicant. If the local rules have provided for a subject-matter, although not in as exhaustive and complete a manner as the English Rules, it seems to me that there is no default within the meaning of *section 16* of the High Court Law (Eastern Nigeria), to warrant a recourse to the English Rules. As was pointed out by learned counsel for the applicant, *Rules 3 and 3 (1)* in *Order 22* of the local rules are respectively the same as *Rules 5 (2) (a)* and *5 (1)* in *Order 59* of the English Rules, so that it may be said that the local rule-making authority has chosen and incorporated in our rules such English rules that it has considered desirable for local application. A contrary view would mean that the section in effect makes all the English rules, which are not specifically incorporated in our rules, to be applicable here. And it would have been the easiest thing for the legislature to have said so in terms, if that were the intention. The first point, in my view, lacks substance, and is dismissed.

As regards the other point involving the statutory period of six months within which to apply for an order of *certiorari*, it has been argued that the period begins to run from the decision in the Native Court, and that if that construction be accepted, the relief sought is statute-barred. Two apparently conflicting authorities have been cited to me on this point. The first is the case of *R. v. Middlesex Justices* (1836) 5 Ad and EC 626 in which it was held that where there has been an appeal to quarter sessions, and the sessions have adjudicated thereon, the six months run from the date of the order of sessions, not from that of the order appealed against. And in the other case of *Elliott v. Thompson* (1875) 33 L.T. 339 it was decided that

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where an order was made subject to a case being stated, the period runs from the date of the order, and not from the date when the case is settled. It seems to me that the former case is more appropriate to the instant case, as both were cases which went on appeal. Under the decision in that case, time would be reckoned from the date of the order on appeal.

But the wording of the local rules appears clearly to state that time must be calculated in regard to each proceeding, from the date of the judgment, order, etc., in such proceeding. And as Betuel, J. said in *The Queen v. The Deputy Governor, Eastern Nigeria and Another ex-parte Iloka* (E.N.L.R. 1960 Volume 4 page 103 at page 104), "the decisions of the Native Court and on appeal are each of them distinct proceedings in so far as they terminated in a decision that was not merely interlocutory, but final; if that is so, each appeal was the institution of a distinct proceeding, resulting in a distinct decision, and the decision of the Deputy Governor is the only one within time". His Lordship went on in the next paragraph:—

"I find the above statement is fortified by the *dicta* of Willmer, L.J. in *In Re Vernaza* (1960) 1 Q.B. 197 at page 215: Speaking for myself, I would have thought that there 'is much to be said for the view that, when one institutes an appeal in an action which has already been disposed of, one can fairly be said to be instituting proceedings . . .'"

Consequently, if it is sought to quash the proceedings in the Native Court, as well as those on appeal, the reckoning, it seems to me, must respectively be from the date of the judgment or order in the Native Court, and on appeal. By this reckoning, only the application in respect of the proceedings before the Provincial Secretary with Resident's Judicial Powers is within time.

In the circumstances, I uphold the submission of learned counsel for the respondents in respect of the second preliminary point. But the question whether the Provincial Secretary could himself have taken the point of lack of jurisdiction in the Native Court is open to argument. That is not a question before me at this stage.

*Costs:*

*Bell Gam.*—I ask for twenty guineas costs.

*A. I. Aseme.*—I offer five guineas.

*Costs.*—Costs to respondents assessed at ten guineas. No costs to the Provincial Secretary.

Motion fixed for arguments on 21st September, 1966.

*Objection partly upheld.*

Port Harcourt High Court, 5th September, 1966—P/52C/65

OPUTA, J.

THE STATE

v.

ANTHONY FRANOWOFO

*Criminal Law—repeal of criminal statute—offence committed prior to repeal—prosecution by filing information under repealed statute—whether information proper.*

*Evidence—nature of evidence required—proof of killing by dangerous driving.*

The accused was charged with the offence of killing one Agu Ajoku on the 9th January, 1965 by driving a motor vehicle EP 3540 on the highway in a manner which was dangerous to the public contrary to section 18 (2) of the Road Traffic Ordinance (Amendment) Law, 1963. The offence was committed before the coming into force of the revised edition of the Laws of Eastern Nigeria on 5th May, 1965. The prosecution did not adduce evidence as to the manner in which the accused drove his vehicle immediately before the accident. The defence counsel made a no case submission on two grounds, namely:—

- (a) that the accused should have been charged under the law in force when the information was filed which was Road Traffic Law Cap. 116, Vol. VI Laws of Eastern Nigeria and not under the Road Traffic Ordinance (Amendment) Law, 1963;
- (b) that there was no evidence to prove the manner in which the accused drove to establish that he drove in a dangerous manner.

*Held:*

1. The information as filed was proper.
2. The prosecution failed to prove that it was either the speed of the accused or his not keeping a proper look out or that his brakes were defective that caused the accident. All the prosecution proved was that an accident took place and that death resulted from it. It failed to prove an essential element of the offence which was that the accused person drove dangerously.

Cases referred to:—

*Bennet v. Tatton* (1918) W.N. 291.

*R. v. Swan* (1849) 4 Cox C.C. 108.

*R. v. Ellis Exp. Amalgamated Engineering Union* (1921) W.N. 141.

*Queen v. Akanbi Layiwola* (1960) W.R.N.L.R. 77.

*Dabholkar v. The King* (1948) A.C. 221.

*Andrews v. D.P.P.* (1937) 26 Cr. App. R. 34.

*Rex v. Lamidi Balogun* 16 N.L.R. 75.

*Baker v. Longhurst and Sons Limited* (1933) 2 K.B. 461.

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*Admiralty Commissioners v. The Owners of S.S. Volute* (1922) A.C. 129.  
*Josephine Okoli v. Okolo Nwagu* (1960) 5 F.S.C. 16.  
*Regina v. Tatimu* (1952) 20 N.L.R. 60.  
*Frank Onyenankeya v. The State* (1964) N.M.L.R. 34.  
*Simpson v. Peat* (1952) 1 All E.R. 448.

*Azike* for the State.

*Mbanefo* for the accused.

**Oputa, J.:** The accused stands charged of the offence of killing by dangerous driving, contrary to section 18 (2) of the Road Traffic Ordinance (Amendment) Law, 1963. The particulars of offence alleged that the accused caused the death of one Agu Ajoku by driving a motor vehicle to wit: taxi car No. EP 3540 on the highway in a manner which was dangerous to the public.

The prosecution called a total of three witnesses. Meshack Echebelem, P.C. No. 11802 called as first prosecution witness was returning from work on the morning of 9th January, 1965. He was riding his cycle along Industry Road, Port Harcourt. He suddenly heard a loud noise from behind indicating a collision of some sort. He looked back but could not see very clearly as it was not yet daylight. It was then about 6 a.m. On turning back he saw an old man whom he later knew as Agu Ajoku lying wounded on the edge of the road by the left-hand side facing the wharf direction. He also saw a Morris Minor saloon car EP 3540 close by on the tarred portion of the road. The accused who was standing there introduced himself to him as the driver of the vehicle and solicited his assistance.

He helped the accused to put the injured man into the taxi EP 3540. Before they reached the General Hospital the old man died. Under cross-examination this witness admitted that as the accused drove from Industry Road to the Hospital and later to the Police Barracks he did not notice anything unusual in the manner of accused's driving or his breaking. His taxi pulled up normally at the Hospital and at the Barracks. Following the death of Agu Njoku, P.W. 2, Nicholas Otuchere, Lance Corporal No. 1062, identified his body to the Doctor, prepared the sketch of the scene tendered as Exhibit 1; arrested the accused and obtained his statement tendered as Exhibit 2.

Following this accident and the death of the deceased the taxi car of the accused was examined by the Vehicle Inspection Officer, Okon Etim Inyang called as P.W. 2 on 11th January, 1965. This witness found that the foot brakes were defective. They were not effective even at slow speed. The braking system—the hydraulic type—had to be pumped several times before the brakes could react. This the witness admitted will result in utter failure in an emergency. The offside front and rear tyres were worn out and smooth and could not have effective grip of the road especially when the brakes are applied.

The windscreen was broken and there was a small dent on the near side part of the bonnet. The Vehicle Inspection Officer was positive that the

defects he saw in this vehicle were not caused by the accident. They existed before the accident. According to this witness, Industry Road is a very busy road used by pedestrians, cyclists and motorists. There are several buildings abutting this road and there are two schools on it. Under cross-examination the Vehicle Inspection Officer testified that an experienced driver ought to know of the defects he found in the accused's taxi car. He however admitted that a driver will not know that his hydraulic braking system is defective until he actually applies the brakes. This is the case for the prosecution and the case against the accused.

At the close of the prosecution case, learned counsel for the accused made a submission of no case and relied on his submission. He indicated that he was not putting the accused into the witness box to give evidence on his own defence and that he was not calling any witnesses.

The first leg of the submission is that the charge against the accused under the Road Traffic Ordinance (Amendment) Law, 1963, was misconceived and wrong. He submits that the information in this case was filed on the 9th July, 1965. He admitted that the incident giving rise to the charge took place in January, 1965, before the coming into force of the revised edition of the Laws of Eastern Nigeria which with regard to the Road Traffic Law was 5th May, 1965. He submitted that the operative law should be the law in force when the information was filed and not the law in force when the offence was committed. He referred the Court to the unreported judgment of Nkemen, J., in charge No. P/58C/65: *The State v. Macaulay Pinwi Yobo*.

On the second leg of the submission learned counsel for the accused argued that there being no evidence to prove the only contentious issue—the manner in which the accused drove on that fatal morning—the prosecution had failed to prove that the accused drove in a dangerous manner as it alleged.

I shall deal first with counsel's submission that the charge before the Court is misconceived and wrong being a charge under a non-existent law. There is a revised edition of the laws of Eastern Nigeria.

Section 9 of the revised edition (Laws of Eastern Nigeria) Law, 1961, dealt with the validity and operation of the revised edition. Section 9 stipulates—

- (1) subject to section 5 and subsection (4) of section 6 the revised edition, when brought in force in accordance with section 10, is in all courts and for all purposes the sole and authentic edition of:—
  - (a) the Laws of Eastern Nigeria enacted on or before the appointed date; and
  - (b) the subsidiary legislation included in the revised edition.
- (2) Section 12 of the Interpretation Law shall apply to the—
  - (a) laws, and
  - (b) subsidiary legislation comprised in the revised edition as though the revised edition had repealed those versions of the laws and subsidiary legislation in force prior to the commencement of the revised edition.

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(3) where in

- (a) an enactment or
- (b) document of any kind, reference is made to an enactment repealed or otherwise affected by the operation of this law, the reference shall where necessary and practicable, be construed as applying to the corresponding enactment contained in the revised edition.

Section 10 of the Revised Edition (Laws of Eastern Nigeria) Law 1961 provides and outlines the procedure for bringing the revised edition into force. Once this happens section 9 becomes operative and the revised edition becomes the sole and authentic edition, in all courts and for all purposes. Also by the operation of section 9 (2) of the Revised Edition (Laws of Eastern Nigeria) Law 1961

“those versions of the laws and subsidiary legislation in force prior to the commencement of the revised edition”

will to all intents and purposes be regarded as repealed by the revised edition.

The Road Traffic Law *Cap.* 116 Vol. VI Laws of Eastern Nigeria forms part of the revised edition of the Laws of Eastern Nigeria. It came into operation by Proclamation of His Excellency the Governor of Eastern Nigeria on the 5th May, 1965 (*vide* Eastern Nigeria *Gazette* No. 36 of 5th May, 1965). When the Road Traffic Law thus came into operation it had the effect of repealing all laws and subsidiary legislations existing prior to 5th May, 1965 regulating Road Traffic in Eastern Nigeria including the Road Traffic Ordinance (Amendment) Law, 1963.

The information in this case charging the accused with killing by dangerous driving contrary to section 18 (2) of the Road Traffic Ordinance (Amendment) Law 1963 was dated and filed on the 9th July, 1965—that is after 5th May, 1965 when the Road Traffic Law of Eastern Nigeria came into force. It is obvious that when the information in this case was filed the operative law governing Road Traffic in Eastern Nigeria was not the Road Traffic Ordinance (Amendment) Law 1963 but the Road Traffic Law 1965. It is not in dispute that when the alleged offence was committed in January, 1965 there was no Road Traffic Law 1965 in Eastern Nigeria. The operative law then was the Road Traffic Ordinance (Amendment) Law 1963.

There is no express provision of the Road Traffic Law giving it retrospective effect to cover cases like the instant case where an offence was committed before the coming into force of the law and the prosecution was commenced or to be more precise the information was filed after the coming into force of the law. Statutes are normally construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended. *Nova constitutio futuris formam imponere debet, non praeteritis*. In view of the above one arrives at the awkward position where the accused in this case cannot be proceeded against under the Road Traffic Ordinance (Amendment) Law 1963 because when the information was filed that law was non-existent—it had been repealed. He cannot be proceeded against under the Road Traffic Law because when he committed the alleged offence that law was not in existence.

I do not think that in 1965 our legislature intended this to be the correct legal effect of section 9 (2) of the Revised Edition (Laws of Eastern Nigeria) Law 1961.

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Formerly, in England, where an Act expired or was repealed it was regarded, in the absence of provision to the contrary, as having never existed, except as to matters and transactions past and closed—*Bennet v. Tatton* (1918) W.N. 291 refers. Where therefore a penal law was broken the offender could not be punished under it if it expired or was repealed before he was convicted, although the prosecution was begun while the Act was still in force. Nor could the offence be dealt with under the later Act for it was not in force when the offence was committed. *R. v. Swan* (1849) 4 Cox C.C. 108 and *R. v. Ellis Exp. Amalgamated Engineering Union* (1921) W.N. 141 both refer. In *R. v. Swan* referred to above Rolfe B. at page 114 observed:—

“I think it perfectly clear that when a Statute is repealed simpliciter, you cannot afterwards proceed against a person for anything done under it.”

But the above difficulty was cleared up by the Interpretation Act 1889. Now under the provision of section 38 (2) of that Act a repeal, unless the contrary intention appears does not affect the previous operation of the repealed enactment or anything duly done or suffered under it and any investigation, legal proceeding, or remedy may be instituted, continued or enforced, in respect of rights, liabilities and penalties under a repealed Act, as if the repealing Act had not been passed. Compare section 13 (e) Interpretation Law *Cap.* 66.

Now turning to the operation and the effect of coming into force of the revised edition of the Laws of Eastern Nigeria section 9 (2) of the Revised Edition (Laws of Eastern Nigeria) Law 1961 repealed the existing versions of the law prior to the commencement of the revised edition subject to section 12 of the Interpretation Law. This means that the amending Law (the Revised Edition) shall so far as is consistent with the tenor thereof, and unless the contrary intention appears, be construed as one with the amended Law.

Now causing the death of another by dangerous driving has not been abolished by the revised edition of the laws. The Road Traffic Law comprised in the revised edition makes that an offence under section 17(2). It is thus apparent that in this regard one cannot read into the amending law a contrary intention.

2. Again section 9 (3) of the Revised Edition (Laws of Eastern Nigeria) Law 1961 empowers the Court to construe a reference in this information (which is a document) to causing death by dangerous driving contrary to section 18 (2) of the Road Traffic Ordinance (Amendment) Law 1963 as applying to the corresponding section 17 (2) of the Road Traffic Law.

3. By section 36 of the Road Traffic Law—

“all registers, records and other documents kept in accordance with the provisions of the Motor Traffic Ordinance shall be deemed to be registers—records and documents kept in accordance with the provisions of this Law—the Road Traffic Law.”

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One may then ask if the new revised edition of the Road Traffic Law thus seeks to maintain its links with the former Road Traffic Ordinance why should this link not be continued in respect of offences committed under the former Road Traffic Ordinance ?

4. Section 13 (e) of the Interpretation Law *Cap.* 66 provides—

“The repeal of any law or any part thereof shall not, unless the contrary intention appear

(e) affect any investigation, legal proceedings or remedy in respect of such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty forfeiture or punishment may be imposed, as if the repealing Law had not been passed.”

It is therefore my considered opinion and view that the information before the Court is in order. It is not misconceived and it is not wrong. In view of all the reasons given above the information in this case is only subject to the proviso to section 13 of the Interpretation Law. I therefore overrule learned counsel's objection to the information itself.

The next objection deals with the merits of the case. Charles, J. in the case of *the Queen v. Akanbi Layiwola* (1960) W.R.N.L.R. page 77 at page 78 outlined the six essential elements to be established before a conviction on a charge of manslaughter by negligence could be sustained. It is my view that all these elements need also be established in a charge of causing the death of another by dangerous or reckless driving. The only difference will seem to be that the degree of negligence required under section 325 of the Criminal Code would seem to be higher than that required under section 18 (2) of the Road Traffic Ordinance (Amendment) Law 1963 or section 17 (2) of the Road Traffic Law of Eastern Nigeria. There is no doubt that in criminal law there are degrees of negligence and that the degree necessary to constitute the offence of manslaughter under section 325 must be very high indeed. In the case of *Dabholker v. the King* 1948 A.C. page 221 His Majesty's Board of Privy Council held that the negligence charged in section 222 of the Tanganyika Penal Code (which is in *pari materia* with section 343 (1) of the Criminal Code of Eastern Nigeria) is not necessarily as grave either in its nature or its consequences as in the offence of manslaughter where a higher degree of negligence is required.

Lord Atkin in the case of *Andrews v. D.P.P.* (1937) 26 Cr. App. R. page 34 at page 48 observed:

“Death caused by the negligent driving of motor vehicles, though unhappily much more frequent, is to be treated in law as death caused by any other form of negligence and juries should be directed accordingly . . . The Road Traffic Acts have provisions which regulate the degree of care to be taken in driving motor vehicles. They have no direct reference to causing death by negligence. Their prohibitions while directed no doubt to cases of negligent driving, which if death be caused would justify convictions of manslaughter, extend to degrees of negligence of less gravity . . . It is perfectly possible that a man may drive at a speed or in a manner dangerous to the public and cause death and yet not be guilty of manslaughter.”

I am of the view that it was to meet this particular contingency that section 18 (2) of the Road Traffic Ordinance (Amendment) Law 1963 and section 17 (2) of the Road Traffic Law were enacted. It is to be noted that this section was absent in the 1958 edition of the Road Traffic Ordinance. This absence greatly tied the hands of the Courts in dealing with cases where the negligence of an accused person in driving a motor vehicle resulting to the death of another was punishable under the Road Traffic Ordinance or Law but not under section 325 of the Criminal Code.

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In this case it is common ground that the accused was the driver of Morris Minor taxi car No. EP 3540, that on the 9th January, 1965, the accused drove this vehicle along Industry Road, Port Harcourt; that along that road the accused's vehicle was involved in an accident; that in this accident Agu Ajoku sustained injuries; that the said Agu Ajoku died as a result of those injuries. The only point left to be resolved is the question: How did the accused drive his vehicle immediately before this accident? The Statement of Offence alleged that the accused drove in a manner dangerous to the public. Of the three witnesses called in this case none saw the accused person drive on the 9th January, 1965. They did not and could not therefore give evidence of the manner in which he drove. There is however evidence from P.W. 2, Okon Etim Inyang, the Vehicle Inspection Officer whom I believe that the accused's vehicle had defective brakes and worn out tyres. I am satisfied from this evidence that the accused's vehicle was in a state of disrepair. It would be careless and a bit risky to put such a vehicle on the road. But that in itself is not evidence as to the manner in which the accused drove. There is also no evidence that the defective brake was the *causa causans* of the collision resulting in the death of Agu Ajoku—*Rex v. Lamidi Balogun* 16 N.L.R. 75 at page 79 refers.

The accused in his statement to the police Exhibit 2 stated as follows:

"I saw one man suddenly on the main road and I applied my brakes. Before the car could stop the car hit him and he fell down at the side of the road."

There is also evidence from P.W. 1 whom I believe that it was not yet daylight he could not see what made the noise when he looked back. He had to ride back before he saw the accused, his vehicle and the old man Agu Ajoku. These two pieces of evidence taken together do tend to suggest either that the accused was driving at such a speed that he was unable to pull up within the limits of his vision—*Baker v. Longhurst and Sons Limited* 1933 2 K.B. page 461 at page 468 refers. Or that in view of his defective brakes he was unable to stop and avoid colliding with the deceased.

The effect of the evidence may also be that Agu Ajoku dashed suddenly unto the road and the accused had no sufficient separation of time, place and space to avert a collision—refer to *Admiralty Commissioners v. the Owners of S.S. Volute* (1922) A.C. 129 at page 145; and to the case of *Josephine Okoli v. Okolo Nwagu* (1960) 5 F.S.C. page 16 at page 18. I am not satisfied that from the evidence the prosecution has proved that it was either the speed of the accused or his not keeping a proper look out or his defective brakes that caused this accident. All the prosecution has proved in this case is an accident and a death resulting from it. This is not sufficient. There is no onus on the accused to explain how the accident happened; there is

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no onus on him to prove his innocence—*Regina v. Tatimu* (1952) 20 N.L.R. page 60 and *Frank Onyenankeya v. the State* (1964) N.M.L.R. page 34 both refer. As Lord Gaddard, C.J. observed in the case of *Simpson v. Peat* (1952) 1 All E.R. page 448:

“It is by no means impossible, and indeed, it must on occasions happen that a situation of danger arises in which a motorist is involved but it cannot be said that he caused it by driving dangerously . . . Equally, because an accident does occur it does not follow that a particular person has driven either dangerously or without due care and attention.”

It is for the prosecution to prove as in this particular case that the accused drove dangerously. This it has failed to do. There has therefore been a failure to prove an essential element of the offence charged.

In a Practice Direction dated 9th February, 1962, the Queen's Bench Divisional Court laid down:

“A submission that there is no case to answer may properly be made and upheld

(a) where there has been no evidence to prove an essential element in the alleged offence.”

In the final result I uphold the submission of learned counsel for the accused that the prosecution has not made out any case for the accused to answer. The charge is hereby dismissed and the accused acquitted and discharged.

*Order:* Accused acquitted and discharged.

*Accused acquitted and discharged.*

Port Harcourt High Court, 10th September, 1966—P/77/1963

PHIL-EBOSIE, J.

HANSA (NIGERIA TRADING AND  
MOTOR COMPANY)

*Plaintiff/Respondent*

v.

SAMUEL A. JOSEPH

*Defendant/Applicant*

*Practice and Procedure—application by debtor for stay of execution, variation of order for instalmental payment and for reduction of amount of instalments—whether a judgment debtor could bring such application under Order 49 Rule 8, High Court Rules.*

Judgment was given for the plaintiff against the defendant for the sum of £5,982 10s 8d payable by monthly instalments of £83 6s 8d. After paying a total sum of £902 the defendant became unable to comply with the Court's Order for monthly instalment and in consequence of this applied to court for stay of execution and reduction of the monthly instalment to £25. He relied on Order 49 rule 8 of the rules of the High Court.

*Held:*

1. Order 49 rule 8 of the rules of the High Court does not expressly confer on the High Court power to review its order for instalmental payment of a judgment debt nor has the Court an implied power to make a new order after rescinding its previous order.
2. A judgment debtor cannot bring an application under Order 49 rule 8 of the rules of the High Court asking the Court to rescind its previous order for instalmental payment of a judgment debt nor for a new order to reduce the amount of the instalments.
3. It is only the judgment creditor who can move the Court to rescind its previous order where it has come to his knowledge that the judgment debtor is in a position to satisfy the judgment debt at once.

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*Editor's note.*—This decision is in accord with that in *Eastern Nigeria Co-operative Rubber Marketing Society v. Agu Okorie* 7 E.N.L.R. 118 and has gone further to make it clear that a judgment debtor cannot bring such an application. Also see *B.W.A v. Okwesa* 10 E.N.L.R. 136.

*Amobi* for the defendant/applicant.

*Onwuamaegbu* for the plaintiff/respondent.

**Phil-Ebosie, J.:** This Court on the 7th of June, 1965, by consent of the parties gave judgment for the plaintiff against the defendant for the sum of £5,982 10s 8d and the Court further ordered that the judgment debt and costs be liquidated by monthly instalments of £83 6s 8d. The defendant has paid the sum of £902 of this amount but now finds it difficult to comply with the Court's order for instalmental payment as a result of adversity in his business. He is now moving this Court to stay execution of it's previous order and to grant him leave to liquidate the debt by monthly instalments of £25.

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(Nigeria  
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and  
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Company)  
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A  
Joseph

Phil-  
Ebosie,  
J.

The motion paper did not specify under what rules of court this application was brought but the counsel for plaintiff on the presumption that it might have been brought under Order 49 rule 8 raised a preliminary objection that the said order was inappropriate. The defendant's counsel confirmed that the application was under the said order and submitted that the said order covered the application.

Order 49 rule 8 reads:

"When any judgment or order directs the payment of money, the Court may for any sufficient reason order that the amount shall be paid by instalments with or without interest. Such order may be made at the time of giving judgment or at any time afterwards and may be rescinded upon sufficient cause at any time."

The provisions of the above order no doubt deal with two matters, first, the power of the Court to rescind such order upon sufficient cause shown. The order does not, I am afraid, expressly confer the power on the Court the power to review its order for instalmental payment. It cannot also be said that the Court having the power to rescind it's order can impliedly have the powers to make a new order. In the face of the provisions of the Order, there are no grounds to draw such a conclusion. It is not of course stated on whose application the Court can rescind the order but it will be absurd to say that the judgment debtor can make such an application. It stands to reason that the only person who could move the Court to exercise it's powers to rescind can only be the judgment creditor, for instance where it has come to his knowledge that the judgment debtor is in such a position to satisfy the judgment at once.

As this motion cannot be brought under Order 49 rule 8, I uphold the learned counsel's objection and strike out this motion with costs.

*Costs.*—Onwuamaegbu asks for 10 guineas.

*Amobi.*—Offers 3 guineas.

*Court.*—7 guineas costs to plaintiff/respondent.

*Application refused.*

Owerri High Court, 19th September, 1966—HOW/1/65

NKEMENA, J.

NWAPA UDEOGU

*Plaintiff/Respondent*

v.

OSEKE OKEREKE AND THREE  
OTHERS*Defendants/Applicants*

*Practice and Procedure—application for an order to discharge an order for injunction—power of court and conditions under which court can vary its order.*

The defendants were on the 19th day of July, 1965 ordered by the High Court not to erect fish-traps across the Utu Stream in Oguta. They subsequently applied to the Court for an order discharging the order for injunction on two grounds one of which the Court found to be untrue and the other being one that existed when the order was made.

*Held.*—High Court has an inherent power as well as power under Order 21, Rule 4 of the High Court Rules to vary its own order so as to carry out the true meaning of the order, where the language of the order appears doubtful. But it is not a power to review a previous order, as such the applicant must adduce fresh reasons which did not exist at the time of the order so as to thereby show that there are supervening circumstances which would necessitate the discharge or variation of the order. Accordingly where, as in this case, the application is founded on the same hardship which existed at the time the order was made, the Court should refuse to discharge or vary the order.

Cases referred to:—

*Laurie v. Lees* 7 A.C. 19.

*Chief Okoro Orukumkpor v. Ifebu and three Others*—selected judgments of W.A.C.A. 1955, p. 39.

*Cristel v. Cristel* 1951 2 All E.R. 574.

*Mbaegusi Obiekwoife and Others v. Ikwuobodo Umumma and Others* 2 F.S.C. 70.

*S. A. Nsofor* for the defendants/applicants.

*H. Okwuosa* for the plaintiff/respondents.

**Nkemena, J.:** This is an application by the defendants for an order to discharge the order for injunction made against the defendants on the 19th day of July, 1965.

This Court had on 19th July, 1965 ordered the defendants not to erect fish-traps across the Utu Stream in Oguta. The defendants have now applied to discharge the order on two grounds—

- (1) That they have settled with the plaintiff.
- (2) Of balance of convenience.

- (1) The documents attached to the defendants' affidavit showed clearly that there was no settlement, rather an attempt was being made by the Oguta National Union to settle the

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v.  
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Okereke  
and three  
Others  
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matter. There has been finality on the discussions going on between the parties. It would appear that the negotiation had broken down and the parties are as they were when the order was made.

- (2) Proviso to Rule 4 of Order 21 of the High Court Rules of Eastern Nigeria gives the Court the power to discharge, vary or set aside an order for an interim injunction on an application made to it by a party dissatisfied with such order.

There can be no doubt that the Court has an inherent power to vary its own order so as to carry out its meaning where the language of the order appears doubtful.

(a) *Lawrie v. Lees* 7 A.C. 19.

(b) *Chief Okoro Orukunkpor v. Ifebu and three Others*—Selected Judgments of W.A.C.A. 1955 39.

This is not the case in the present application. The words of the order are clear and unambiguous.

I am of the opinion that the Court can discharge or vary its order in special circumstances. To do this the applicant must adduce fresh reasons which did not exist at the time the order was made. A Court sitting to discharge or vary its own order should not sit as an appellate court to review its order unless new circumstances arose which would necessitate a variation.

The fact that the same hardship now exists and which existed at the time the order was made should not be a ground for discharge or variation of the order. There should be evidence of supervening event which would necessitate the discharge or variation—

*Cristel v. Cristel* 1951 2 All E.R. 574.

What the learned counsel for the applicant has asked this Court to do is to discharge an order made by my learned brother on 19th July, 1965 on the same facts as existed when the order was made. No special circumstances have been shown which would necessitate the discharge. To order a discharge of the order would amount to reviewing the order of my learned brother in order to find out if he made a proper assessment of the facts in considering the balance of convenience. To do this will be tantamount to sitting as an appellate Court in order to consider the merits of the order made by a brother Judge of concurrent jurisdiction. I have no power to do this, unless it is an order made for convenience.

*Mbaegusi Obiekwife and Others v. Ikwuobodo Umunma and Others* 2 F.S.C. 70.

For the reasons given I shall dismiss the defendants' application to discharge the order for interim injunction against them.

£10 10s costs to the respondent.

*Application dismissed.*

Enugu High Court, 20th September, 1966—E/2A/66

MBANEFO, C.J.

A. ONUH

*Appellant*

*v.*

SAMUEL NNAJI

*Respondent*

*Practice and Procedure—relistment of suit struck out for absence of the plaintiff—whether costs must be paid before the application. Magistrates' Courts Rules Order 9 rule 12 (1) and Order 15 rule 2.*

The appellant sued the respondent in the Magistrate's Court. On a hearing date the defendant appeared but the plaintiff was absent. The Magistrate, in absence of any explanation for the plaintiff's absence, and in exercise of his powers under Order 9 rule 12 (1) of the Magistrates' Courts Rules, struck out the case and awarded one guinea costs to the defendant. Thereafter the appellant, without first paying the costs, filed a motion pursuant to Order 15 rule 2 of the Magistrates' Courts Rules, praying the Magistrate to relist the suit. The respondent objected to the hearing of the motion on the ground of the non-payment of the costs. Upholding the objection the Magistrate struck out the motion. The appellant appealed to the High Court.

*Held:*

1. Each of Order 15 rule 2 and Order 9 rule 12 (1) of the Magistrates' Courts Rules is meant to deal with a specific situation. To import rule 12 (1) of Order 9 in interpreting Order 15 rule 2 would be to import a restriction which the legislature did not intend. The power to relist under Order 15 rule 2 is a special power given to a Magistrate which he would not otherwise have had.
2. In the context of Order 9 rule 12 (1) the phrase "no action shall be brought . . ." clearly means a *fresh action* in respect of the same cause of action. It does not include an application to relist a suit struck out. The latter is a step taken in a cause or matter which has already been brought.

*Obiter:—*

- (i) Whether a case is to be relisted or not (under Order 15 rule 2) depends on the discretion of the Magistrate, whereas under Order 9 rule 12 (1) a plaintiff, provided he has paid the costs, can commence the suit afresh.
- (ii) Order 15 rule 2 gives the Magistrate full discretion to permit the case being relisted on such terms as to the Court may seem fit. The terms may include payment of the costs awarded, or waiving such costs or making the payment of the costs a condition for relisting.

*Anyamene* for the appellant.

*Dr Nnamani* for the respondent.

**Mbanefo, C.J.:** This appeal depends on the interpretation and application of Order 9 rule 12 and Order XV of the Magistrates' Courts Rules.

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Nnaji  
Mbanofo,  
C.J.

The facts briefly are that the plaintiff/appellant sued the defendant/respondent in the Magistrate Court claiming possession of a room, arrears of rent and mesne profits. The case after several adjournments came before the Court on the 10th day of August, 1965. The defendant appeared but the plaintiff was absent. The Magistrate, exercising his powers under Order 9 rule 12 (1) of the Magistrates' Courts Rules which empowers the Magistrate to strike out a cause, if on the day of hearing the plaintiff fails to appear, struck out the case and awarded one guinea costs to the defendant. Pursuant to Order XV rule 2 of the Magistrates' Courts' Rules, the plaintiff filed a motion praying the Court to relist the case. In his supporting affidavit he explained that although he was present in the registry at the time the case was struck out his failure to be present in court was because of a confusion which had arisen over the fixture. The reason is however immaterial for the purpose of this appeal. The Magistrate had not considered the affidavit but acting under Order 9 rule 12 (1) struck out the cause on the ground that the costs of one guinea awarded had not been paid before applying to relist the case.

Order 9 rule 12 (1) reads as follows:—

"If, on the day of hearing or at any continuation or any adjournment of the Court or Cause, the plaintiff shall not appear or sufficiently excuse his absence, the Cause shall, unless the Court sees good reason to the contrary, be struck out except as to any counter-claim by the defendant; and if the plaintiff appears but does not make proof of his claim to the satisfaction of the Court, the Magistrate may non-suit him or give judgment for the defendant; and in either case, where the defendant appears and does not admit the claim, the Magistrate may award the defendant, in addition to costs, such further sum, not exceeding five pounds, by way of compensation for his trouble and attendance, as the Magistrate, in his discretion, may think just. Such sum shall be recovered; and no action shall be brought by the plaintiff in respect of the same cause of action until such sum and costs have been paid."

Order 9 rule 12 (1) provides for (a) what should happen where a plaintiff fails to appear and does not sufficiently excuse his absence and (b) what if he appears but does not make proof of his claim to the satisfaction of the Court. In the former case his case shall be struck out; in the latter, his case may either be non-suited or judgment given for the defendant. The rule goes further and says that in either case which I take to mean cases (a) and (b), where the defendant appears and does not admit the claim the Magistrate may award costs and compensation as therein provided, to the defendant. The rule goes on further to provide that no action shall be brought by the plaintiff in respect of the same cause of action until such sum and costs have been paid. The Magistrate acted under this arm of the rule when he struck out the application to relist.

Order XV rule 1 of the Magistrates' Courts' Rules gives the Magistrate the power to set aside any judgment or Order given or made against a party in his absence and may grant a new trial or hearing. And rule 2 Order XV states:—

"Any cause struck out may, by leave of the Court, be replaced in the causelist on such terms as to the Court may seem fit."

Order 9 rule 12 (1) and Order XV rule 2 being provisions of the same Court Rules must be interpreted *in pari materia*. Each is meant to deal with a specific situation and they must be given full effect. To import rule 12 (1) of Order 9 in interpreting Order XV rule 2 would be to import a restriction which the legislature did not intend.

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C.J.

When a plaintiff applies to relist under Order XV rule 2 he sets out in the affidavit in support of his application his reason for failing to appear on the day the case was struck out and why he asks the Court to relist the case. The rule gives the Magistrate full discretion to permit the case being relisted on such terms as to the Court may seem fit. The terms may include payment of the costs awarded, if any, or waiving such costs. Order XV rule 1 gives the Court power to set aside the judgment or order given and that may include the order for costs given under Order 9 rule 12 (1). If the intention as has been contended for by the defendant/respondent is that if the plaintiff pays the costs he could have the matter relisted, why have Order XV at all? That order would have been unnecessary since every plaintiff whose case has been struck out would know that he could have his case relisted on payment of the costs. The Court would then not be in any position to exercise the discretion given to it under Order XV rule 2. I do not agree that Order 9 rule 12 (1) should be imported in interpreting Order XV rule 2. The words of rule 12 (1) of Order 9 are clear. They say that "no action shall be brought by the plaintiff in respect of the same cause of action until such sum and costs have been paid". The rule clearly intends a fresh action in respect of the same cause of action and not an application to relist under Order XV rule 2. Order 9 rule 12 (1) would not talk of action in respect of the same cause of action if it meant relisting the same action. "Action" in this context means civil proceeding commenced by a writ of summons or in such other manner as may be prescribed by a rule of court. It does not mean any step taken in a cause or matter. The power to relist under Order XV rule 2 is a special power given to a Magistrate which he would not otherwise have had, and does not give a plaintiff, where his case had been struck out, a right to relist. Whether a case is relisted or not depends on the discretion of the Magistrate whereas under Order 9 rule 12 (1) a plaintiff, provided he has paid the costs, can commence the suit afresh.

The application in this case was specifically made under Order XV rule 2. Taking the view I do of that rule, I am of the opinion that the Magistrate was wrong in holding that he could not entertain the application unless the costs had been paid as provided under Order 9 rule 12 (1). The Magistrate should have entertained the application, and if in the exercise of his discretion under Order XV rule 2 he felt that the costs should be paid as a condition for relisting the case, he could say so. By holding as he did, he deprived himself of the opportunity of exercising that discretion by not considering the plaintiff's affidavit.

I am therefore of the view that the order of the Magistrate striking out the application was made in error and that the appeal should be allowed.

I allow the appeal, set aside the order of the Magistrate and order that the application to relist should go back to the Magistrate's Court for it to be heard on its merits with six guineas costs.

*Appeal allowed.*

Owerri High Court, 23rd September, 1966—HOW/50A/66

NKEMENA, J.

AHAMEFULA T. MBEGBU

*Appellant*

*v.*

MODERN SHOE INDUSTRY LIMITED

*Respondent*

*Legal Practitioner—claim for professional services—jurisdiction of Magistrate to entertain claim—section 11, Legal Practitioners Act 1962.*

The appellant, a legal practitioner took out a civil summons in the Chief Magistrates Court, Owerri claiming from the respondent the sum of £267 14s (two hundred and sixty-seven pounds, fourteen shillings) for professional services rendered. The learned Chief Magistrate ruled that pursuant to the provisions of the Legal Practitioners Act 1962, the Magistrate's Court, Owerri had no jurisdiction to entertain the claim. The plaintiff appealed against this ruling.

*Held.*—Magistrate Courts have no jurisdiction to entertain claims by legal practitioners for professional services rendered as the Legal Practitioners Act 1962, defines "the Court" in which proceedings shall be instituted to mean the High Court.

*Mbegbu and Nsofor* for the appellant.  
*Njiribeako* for the respondent.

**Nkemena, J.:** This is an appeal against the ruling of the Owerri Chief Magistrate, dated 7th July, 1966.

The appellant is a legal practitioner. He took out civil summons in the Chief Magistrate Court, Owerri claiming from the respondent, the sum of £267 14s for professional services.

The learned Chief Magistrate ruled that the Magistrate's Court has no jurisdiction to entertain the claim pursuant to the provisions of the Legal Practitioners Act of 1962.

It is against this ruling that the appellant has appealed. There is only one ground of appeal which reads—

"The learned Magistrate erred in law in the interpretation of 'any court' in section 11 of the Legal Practitioners Act 1962 to be synonymous with the definition of 'the Court' in section 14 of the same Act without having regard to the proviso in the said section 14."

It does seem from this ground of appeal that the appellant's concern is this Court's interpretation of "any court" under section 11 of the Legal Practitioners Act. That being the case I find myself unable to bring in any other consideration in dealing with the ground of appeal. I am quite aware that many issues will be left unanswered but these issues, important as they may be, are not before me.

Sections 10, 11, 12, 13 and 14 of the Legal Practitioners Act come under the heading "Remuneration of Practitioners".

Section 11 (1) states—

“Subject to the provisions of this Act, a legal practitioner shall be entitled to recover his charges by action in any court of *competent jurisdiction*.”

The wordings of this subsection of section 11 are clear. What I have to consider is what is “any court of competent jurisdiction”. What court is referred to here? This has been defined under section 14 of the Act. Subsection 1 of section 14 stipulates—

“Without prejudice to the provisions of section nineteen of the Act, in the four last foregoing sections and this section (hereinafter in this section referred to as “the remunerations provisions”) the following expressions have the following meanings unless the context otherwise requires, that is to say—

‘*the Court*’ means the High Court of the territory in which the legal practitioner in question usually carries on his practice or usually resides or in which the client in question usually resides or has his principal place of business or, in the case of a practitioner authorized to practise by warrant, the High Court of the territory in which the proceedings specified in the application for the warrant were begun.”

The last four foregoing sections referred to in section 14 are sections 10, 11, 12 and 13 and the definition of court under section 14 applies wherever the word court is used in any of the last four foregoing sections to section 14. That includes section 11. Court there means High Court. How can one determine if a particular High Court is competent or has jurisdiction to entertain the action? It makes it clear under the definition of the “High Court” in section 14 that the High Court which can entertain the action is that of the territory in which the legal practitioner resides or carried on his practice or the High Court in which the client in question usually resides or has his principal place of business.

It does seem therefore that “any court of competent jurisdiction” means a High Court of the territory in which the legal practitioner resides or carries on his practice or the principal place of business of the defendant.

In the context of this case the Court of competent jurisdiction would be High Court of Eastern Nigeria because the appellant has given his address as 29 Old Market Road, Owerri.

Finally the nature of the appellant’s claim shows he was suing under the Legal Practitioners Act. Paragraph 4 of the claim reads—

“The plaintiff accordingly submitted a bill dated 20th September, 1965 with accompanying letter informing the defendant that both the letter and bill should be regarded as notice under the Legal Practitioners Act.”

That being the case he should have sued in the Court of competent jurisdiction, in this respect the High Court of Owerri.

The appeal is dismissed. I make no order as to costs.

*Appeal dismissed.*

Ahamefula  
T.  
Mbegbu  
v.  
Modern  
Shoe  
Industry  
Limited  
Nkemena,  
J.

Port Harcourt High Court, 6th October, 1966—P/24CA/66

PHIL-EBOSIE, J.

1. SUNDAY ETE
2. HARRY ETE
3. LIONEL OFFOR
4. KARUS IYE
5. BIJI ARUGU
6. TUBONIMI PREBO
7. SUNDAY ARIERI

*Appellants*

*v.*

COMMISSIONER OF POLICE

*Respondent*

*Criminal Law—claim of right—section 23 of the Criminal Code—whether it is available to persons who had lost a land case.*

The appellants were convicted by the Magistrate for stealing fish from a pond. The evidence disclosed that the Native Court had awarded the pond to the complainant in 1958 in an action between the complainant and the appellants. That decision had not been set aside even though the appellants believed that an appeal was pending against that decision at the time they went to the pond in 1964. The appellants argued that they were protected by section 23 of the Criminal Code.

*Held.*—The appellants being aware of the subsisting judgment which has not been set aside, know or are presumed to know that their act is forbidden in law as such they cannot successfully plead a *bona fide* claim of right.

*Whyte* for the appellants.

*Izuchukwu* for the respondent.

**Phil-Ebosie, J.:** The appellants were convicted on a charge of stealing fish from a pond belonging to one Agadaga Iwariso.

The pond is within a piece of land in dispute between the appellants' people and the complainants' people. The argument then was whether in such circumstances the provision of section 23 of the Criminal Code could not afford the appellants a complete defence. The said section will no doubt apply if the act of the appellants could be said to have been done by them in the exercise of an honest claim of right or without intention to defraud.

As I had earlier mentioned the pond is in dispute between the parties. It has been the subject matter of two court actions. The first was the Native Court of Oloibiri Suit No. 210/57: Sunday Ete (the first accused) and others against Chief D. C. Agadaga Iwariso (the complainant) Exhibit "D". In this suit the first accused and others claimed a declaration of title of ownership to the piece of land. The claim was dismissed with costs. The second action was the Oloibiri Native Court Suit No. 17/58 between Chief D. C. Agadaga (the complainant in this case) against Sunday Ete (the first accused in this case) and others, Exhibit "A". The claim was also the declaration of title of ownership of the same piece of land and an injunction

to restrain the defendants from use of the land. Judgment was given for the Chief in terms of his writ. Both judgments were delivered on the 20th June, 1958. On the 8th July, 1958, under cover of a letter the first appellant and others, the unsuccessful party forwarded the sum of fifty shillings to the clerk of the Native Court as appeal fees for these two cases and two others which presumably were connected with these two.

Sunday  
Eve  
and six  
Others  
6.  
Commissioner  
of  
Police  

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Phil-  
Ebois,  
J.

On the 18th of July, 1958, the court clerk returned the money by post to the sender under cover of a letter (Exhibit "C") pointing out that their letter was not explicit as to the cases they had lodged the appeal. This letter and money were never claimed at the post office and they were returned to the court clerk who on the instructions of the District Officer paid the money into revenue for it to be paid later to the senders whenever they applied. Nothing again happened in these cases, the appellants never bothered to prosecute the appeals or even find out what happened to them.

In 1962, however, as it would appear from Exhibit "P", the latter had moved the High Court for an order to restrain the former from trespassing into the land but the application was dismissed. It would also appear that the District Officer had issued a summons for contempt of court against the client on the strength of the judgment of the Native Court in Suit No. 17/58—Exhibit "A". The President was warned that if he did not take the action off the list the High Court would be moved for contempt. Apart, from the above, nothing else happened. The judgments, Exhibits "A" and "D" were still not set aside. It was not until the 10th January, 1964, almost six years after the appeal was lodged that the first appellant wrote a letter, Exhibit "T", to the Registrar, District Court, Oloibiri enquiring about his letter of 8th July, 1958, and fifty shillings enclosed. On the same day the Registrar replied (*vide* Exhibit "O" referring him to the action taken in 1958, by the court clerk).

Prior to this letter, however, the appellants had committed the offence with which they were charged. The position then from the evidence is that prior to the commission of the crime, the appellants were well aware that there was a subsisting judgment against them which awarded ownership of the land including the pond to the complainant and restraining them from trespass. From paragraph 1 of Exhibit "T" they had not received any information as the outcome of their appeal.

The question then is whether with such knowledge the appellant could be protected under section 23 of the Criminal Code.

The authorities are against the contention for the appellants being aware of the subsisting judgment which has not been set aside, knew or are presumed to know that their act is forbidden by law and they cannot therefore successfully plead a *bona fide* claim of right. (See paragraph 1389 of Bret and Maclean). For this reason this appeal will be dismissed.

*Appeal dismissed.*

Onitsha High Court, 10th October, 1966—O/17A/66

KALU ANYA, J.

TIMOTHY OFODUM

*Defendant/Appellant*

*v.*

R. S. ONYEACHO (SUING AS AGENT OF  
THE ADMINISTRATOR-GENERAL FOR THE  
ESTATE OF ERNEST EGBUNA—DECEASED)

*Plaintiff/Respondent*

*Administration of Estates—agent—procedure in instituting legal proceedings by holders of powers of attorney or agency—Order 16, Rule 1, Rules of the Supreme Court of England—Order IV High Court Rules 1955—Order III, Magistrate Courts' Rules, 1955 considered.*

*Practice and Procedure—circumstance where it is proper to dismiss claim, rather than order non-suit.*

The plaintiff/respondent was appointed by the Federal Administrator-General as his agent for the estate of Ernest Egbuna deceased. He then sued the defendant/appellant for the possession of certain premises belonging to the estate of the deceased. The plaintiff/respondent brought the action in his own name and obtained judgment in the Magistrate Court. The defendant/appellant appealed to the High Court.

*Held:*

1. As both the High Court and Magistrates' Courts Rules are silent on the procedure to be adopted in instituting legal proceedings by holders of powers of attorney or agency, the donee of a power or an agent must sue in the name of the donor or his principal in accordance with procedure contained in Order 16 rule 1 of the Rules of the Supreme Court of England. The donee of a power or an agent may indicate on the writ his capacity as an attorney or agent.
2. Where there is no express provision in a document authorizing an attorney or agent of another to institute legal proceedings for and on behalf of his principal, it is unnecessary to make an order for a non-suit. The claim should be dismissed.

Cases referred to:—

*Jones v. Gurney* (1913) W.N. 72 and Butterworth's Empire Law List (1964) 1007.

*Ikeazor* for Iguh for defendant/appellant.

*Umeadi* for Egonu for plaintiff/respondent.

**Kalu Anya, J.:** This is an appeal from the judgment of the Magistrate's Court, Onitsha, delivered by Eziri, learned Magistrate, on 19th August, 1965. The appeal is brought by the defendant in the lower Court.

The respondent who sued in his own name as an agent of the Administrator-General of the Federal Republic of Nigeria duly appointed in that behalf by a document received in evidence and marked Exhibit A in the lower Court.

The respondent's claims in the Court below are couched in these terms:—

- "1. The plaintiff is entitled as agent of the Administrator-General for the estate of Ernest Egbuna deceased to the possession of the premises namely a shop and store with the appurtenances therefore situate at No. 12 Bright Street, Onitsha, which were let by the plaintiff to the defendant for a quarterly tenancy under the rent of £48 which said tenancy was determined by Notice to Quit given by the plaintiff, R. S. Onyecho, on the 31st day of May, 1965, and on the 12th day of June, 1965, the plaintiff did serve on the defendant, Timothy Ofodum a notice in writing of his intention to apply to recover possession of the said shop and store with the appurtenances thereof (a duplicate of which notice is hereto annexed) by the Magistrate's Court Bailiff, Onitsha, and that notwithstanding the said notice the said defendant refused to deliver up possession of the said premises, and still detains the same.
2. The plaintiff claims possession of the said premises."

Although the appellant was duly served with the summons and other papers necessary for the institution of the proceedings in the lower Court, he did not appear to defend the action. The learned trial Magistrate heard the evidence of the respondent and gave the judgment now appealed from.

Learned appellant's counsel filed nine grounds of appeal. He argued eight and abandoned one—ground eight. Grounds one and four were argued together. In his argument on these grounds learned appellant's counsel submitted that the suit before the learned Magistrate was not between the proper parties in that the respondent who is an agent or attorney sued in his own name instead of in the name of the Principal, the Federal Administrator-General, and argued that the claim ought to have been struck out.

In support of his argument learned appellant's counsel cited *Jones v. Gurney* (1913) W.N. 72 and *Butterworth's Empire Law List* (1964) p. 1007. He also referred to *Annual Practice* (1956) p. 220.

In his reply the learned respondent's counsel referred to s. 2 of the Recovery of Premises Law of Eastern Nigeria which defines landlord as including his agent and submitted that where a landlord could sue, his agent can, so that in the present case the respondent though an agent could properly sue in his own name.

I have considered the arguments of both counsel on these grounds—

Order 16, Rule 1 of the Rules of the Supreme Court of England in dealing with "parties" provides under the heading "attorney" as follows:—

"A person holding the power of attorney, and suing on behalf of his principal, should sue in the name of his principal only."

This view is also taken in *Jones v. Gurney*, which is discussed in *Butterworth's Empire Law List* (1964) at p. 1007. Order IV of the Rules of the High Court and Order III of the Magistrate's Courts Rules both of which

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Ofodum  
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R. S.  
Onyecho  
K. Anya, J.

Timothy  
Ofodun  
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R. S.  
Onyecho  
K. Anya, J.

deal with "parties" are silent as to the procedure to be adopted in instituting proceedings by holders of powers of attorney or by agents. In the circumstances it seems to me in the absence of any authority to the contrary—and none has been brought to my notice—that the donee of a power or an agent must sue in the name of the donor or his principal though he may indicate on the writ his capacity as an attorney or agent. Grounds one and four, in my view, succeed.

Since these grounds have succeeded it appears to me unnecessary to deal with the arguments adduced on other grounds and I do not deal with them. As the success of the appeal on these grounds appears merely technical the first inclination is to substitute an order of non-suit for the judgment of the lower Court but I do not cherish this disposition for the reason that it will serve no useful purpose to order a non-suit.

It is clear from a perusal of Exhibit A which is the document from which the respondent derives his powers that he has no power to institute legal proceedings. The powers he can exercise are clearly and expressly set out. Clause 1 of the Instructions contained in Exhibit A provides as follows in no ambiguous terms:—

"The Federal Administrator-General constitutes the Agent his Agent for the collection of rents of the property shown under and for no other purpose *except as authorized in writing.*"

The underlining in the clause quoted is by the donor of the power and emphasizes the occasion in which the respondent may act outside the limit of Clause 1. There is no express provision in Exhibit A which empowers the respondent to institute legal proceedings against any tenant for and on behalf of his principal. This lack of power in the respondent to sue is the reason why an order for non-suit is unnecessary.

The appeal shall be and is hereby allowed. The judgment and order for costs in the Court below are hereby set aside and a judgment for dismissal of the claim substituted. The costs awarded against the appellant in the lower Court if already paid shall be refunded. There will be costs of the appeal to appellant assessed at thirty guineas.

*Appeal allowed.*

Owerri High Court, 10th October, 1966—HOW/29A/66

NKEMENA, J.

DAVID MGBEREKPE

*Appellant*

*v.*

COMMISSIONER OF POLICE

*Respondent*

*Criminal Law—charge of negligent driving—lies only when the road is a public highway.*

The appellant was charged and convicted in the Magistrate's Court with the offence of negligent driving contrary to section 17 (1) of the Road Traffic Law, *Cap.* 116. No evidence was led to show whether the road on which the accident took place was a public highway or not. The appellant questioned his conviction on the ground that the ingredients of the charge were not proved.

*Held.*—In a charge of negligent or dangerous or reckless driving, the prosecution must prove that the road in question is a public highway. It is not a fact which the Court can take judicial notice of.

*A. B. C. Ikeotuonye* for the appellant.

*Ejiofor* for the respondent.

**Nkemena, J.:** This is an appeal against the decision of Owerri Magistrate dated 24th February, 1966.

The appellant was charged with driving his vehicle on the public highway negligently and colliding with Anabu Ojiagu contrary to section 17 (1) of the Road Traffic Law of Eastern Nigeria (Vol. VI *Cap.* 116).

The appellant was convicted and sentenced to a fine of £15 or two months I.H.L.

The appellant through his counsel filed three grounds of appeal but I shall consider only one of them.

This reads: "That is an error in law for the Court to convict the defendant when on the evidence before it the prosecution have failed to prove the elements of the charge."

One of the ingredients which must be proved by the prosecution in an offence under section 17 (1) of the Road Traffic Law is that the negligent, dangerous or reckless driving took place on a public highway. The fact that the particular road in question is a public highway must be proved. It is not such a fact that the Court should take judicial notice of under section 73 of the evidence law, *Cap.* 49 in Vol. III, Laws of Eastern Nigeria.

The learned defence counsel has submitted that no evidence has been led to show that the incident the subject matter of the charge took place on a public highway. This has been conceded by the learned Senior State Counsel, who agrees that it is fatal to the prosecution's case not to prove that the road in question is a public highway.

For the reasons given I shall allow the appeal, set aside the decision of the learned Magistrate, and in substitution thereof I shall enter an order for discharge and acquittal. Any fine paid by the appellant to be refunded forthwith.

*Conviction quashed.*

Port Harcourt High Court, 13th October, 1966—P/140/1965

PHIL-EBOSIE, J.

BANK OF WEST AFRICA

*Plaintiff/Respondent*

*v.*

AUGUSTINE O. OKWESA

*Defendant/Applicant*

*Motion—Instalmental payment—stay of execution—review of an earlier order. Order 49 Rule 8 of the High Court Rules.*

On the 18th January, 1966, judgment was entered for the plaintiff/Respondent in the motion against the defendant/applicant for the sum of £5,058 4s 7d plus £61 6s costs. On the 20th January, the defendant/applicant filed a motion asking for stay of execution of the judgment debt and costs and seeking an order for instalmental payments. The application was granted on 11th February, 1966, and an order was made that the judgment debt and costs be liquidated in four years. On the 6th May, 1966, the defendant/applicant again filed another motion asking the Court to review its order for instalmental payment made on 11th February, 1966, as he was not in a position to comply with the terms of the order on account of adverse trade in his business. This latter application was said to have been brought under Order 49 rule 8 of the High Court Rules.

*Held:*

Order 49 rule 8 of the High Court rules does not confer on the Court any jurisdiction to review a previous order for instalmental payments with a view to making another order in substitution, but only with a view to rescinding the order.

*Obiter.*—The proper section under which a judgment debtor can move the Court in the circumstances is section 22 of the Sheriff and Civil Process Act Cap. 118 in conjunction with Order 3 of Judgment (Enforcement) Rules. Cases referred to:—

*Hansa (Nigeria) Trading and Motor Company v. Samuel A. Joseph*, (Suit No. P/77/63) 10 E.N.L.R. 121.

*Ojiakor* for respondent.

**Phil-Ebosie, J.:** On the 18th January this year judgment was entered for the plaintiff/respondent in the motion, against the defendant/applicant for the sum of £5,058 4s 7d plus £61 6s costs. On the 20th January, the defendant filed a motion asking for stay of execution of the judgment debt and costs and an order to liquidate them by instalmental payments. On 11th February, the Court granted the defendant the application and made an order that the judgment debt and costs be liquidated in four years, on the following terms—for the first three years and eleven months, the sum of £83 6s 8d monthly beginning from 31st March, 1966, and in the 12th month of the fourth year the sum of £202 17s 3d. On the 6th May, the defendant/applicant again filed another motion asking the Court to review its order for instalmental payment made on the 11th February, as he was not in a position to comply with the terms of the order on account of adverse trade in his

business. In his affidavit supporting the application he offered to pay £30 per month. The application was opposed on the grounds that the applicant has a very good business.

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This application is said to be brought under Order 49 Rule 8 of the High Court Rules. It reads:

“When any judgment or order directs the payment of money, the Court may, for sufficient reasons order that the amount shall be paid by instalments with or without interest. Such order may be made at the time of giving judgment or at any time afterwards, and may be rescinded upon sufficient cause at any time.”

As I had ruled in the case of *Hansa (Nigeria) Trading and Motor Company v. Samuel A. Joseph*, Suit No. P/77/63, this order does not confer any jurisdiction on this Court to review a previous order for instalmental payment with a view to making another order in substitution, but only with a view to rescinding the order. In that ruling I had said that in such circumstances it does not appear that a judgment debtor could bring an application under the order, but that a judgment creditor could, for example where he later became aware that the debtor's financial position has improved since the instalmental payment order was made. I still hold this view as I think the provisions of rule 8 are quite clear. If the intention is that apart from rescinding the order the Court could also make another instalmental order, I think this power should have been expressly conferred on the Court.

As this issue in this case seems to be occurring rather frequently in this Court, I think it will be proper to point out the proper section under which a judgment debtor can move the Court in the circumstances of this application. The relevant law is section 22 of the Sheriff and Civil Process Act Cap. 118 in conjunction with Order 3 of Judgment (Enforcement) Rules. Under this law subject to the provisions contained therein, this Court can vary its prior order made for instalmental payment, on sufficient cause shown. This application is not brought under that section as can be gathered from the argument of the learned counsel for the applicant, and so must be dismissed as not being proper before this Court. The applicant is at liberty of course to bring another application under the proper order if he chooses to do so. It is then that the application can be examined on its merits.

Costs to the plaintiff/respondent assessed at fifteen guineas.

*Appeal dismissed.*

Owerri High Court, 18th October, 1966—HOW/2D/63

NKEMENA, J.

MATTHIAS AMADI

*Petitioner*

*v.*

1. DORAH AMADI

*Respondent*

2. CHRISTIAN NJOKU

*Co-Respondent*

*Divorce—adultery—form for presenting petition—whether person cited as having committed adultery with petitioner's spouse was properly joined as co-respondent—Rules 4 and 5, Matrimonial Causes Rules 1957.*

When petition for divorce was called up for hearing, counsel for the man cited by the petitioner as having committed adultery with his wife, the respondent, submitted that his client was wrongly brought to court. He argued that the name of his client was merely mentioned in a paragraph of the petition without any indication as to whether he was being treated as a co-respondent. He further argued that the title of the petition did not show that his client is a co-respondent.

The point for consideration is whether the man cited has been made a party in the form the petition is presented as required by Rule 5 of the Matrimonial Causes Rules 1957.

*Held:*

1. The petition as presented conformed in all material particulars with the requirements of rules 4 and 5 of the Matrimonial Causes Rules 1957.
2. The person cited by the petitioner as having committed adultery with his wife was properly joined in the petition as co-respondent.

*Osuji* for the petitioner.

*Omo* for the co-respondent.

**Nkemena, J.:** When this petition for divorce was called up for hearing the learned counsel for Christian Njoku—the man cited by the petitioner as having committed adultery with his wife, the respondent, submitted that his client has been wrongly brought to court. He argued that Christian Njoku's name was merely mentioned in paragraph 12 of the petition without any indication as to whether he was being treated as a co-respondent. He further argued that the title of the petition did not show that Christian Njoku is a co-respondent. He finally asked that Christian Njoku should be discharged with costs as he came to court on being served with a copy of the petition, and on receiving a hearing notice.

Rule 5 of the Matrimonial Causes Rules 1957 stipulates:—

“(1) Unless otherwise directed, where a husband's petition alleges adultery, the alleged adulterer shall, if living at the date of the filing of the petition, be made a co-respondent in the cause...”

In the present petition Christian Njoku had been cited as the alleged adulterer, and should be made a co-respondent. The point to consider is whether he has been made a party in the form the petition is presented as required by Rule 5 of the Matrimonial Causes Rules 1957.

*Rayden on Divorce* 9th Edition gives specimen of forms and precedents to be followed in presenting a petition in Divorce Courts. It appears that in a petition for dissolution of marriage it is not necessary to state the names of the parties as a preamble before commencing the petition. All that the petitioner is expected to state as preamble before the petition are:—

- (1) That the petition is being brought in the divorce court of the Probate, Divorce and Admiralty Division of the High Court.
- (2) The High Court to which the petition is being presented.
- (3) Immediately after (2) the date on which the petition is presented.

After (1)–(3) the petitioner can then proceed with his petition and make the recitals as contained in rule 4 of the Matrimonial Causes Rules 1957. It is in the body of the petition that the name, and address of the alleged adulterer are to be inserted and made a co-respondent by stating that the adulterer shall be 'hereinafter called the co-respondent'.

It is only when an answer is to be filed that the preamble contains the names of the parties including that of the co-respondent.

*Forms 3 and 5 at page 1720 and 1725 of 9th Edition of Rayden on Divorce* give the forms the petition should take in a case where an adultery has been alleged by the husband against another man.

The petition under consideration conforms in all material particulars with the requirements of rules 4 and 5 of the Matrimonial Causes Rules 1957 and with form 5 referred to above.

I am satisfied, therefore, that Christian Njoku, is properly joined in this petition. It was the duty of the co-respondent, Christian Njoku, to enter an appearance and file an answer if he had wished to be heard.

The co-respondent to pay £5 5s costs to petitioner.

*Objection overruled.*

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Dorah  
Amadi  
and  
Another  
Nkemena,  
J.

Umuahia High Court, 1st November, 1966—HU/54/65

ALLAGOA, J.

JOSEPH ONYEKWERE

Plaintiff

v.

1. S. OKWULEHIE
2. C. N. AGU
3. H. O. OGBONNA
4. B. O. UDOKWU
5. G. N. NGENE
6. G. O. NLEWEDIM
7. E. U. UKEWOLONU
8. U. OLUGHU
9. S. M. ONWUAKAGBA
10. A. I. ENYIOKO
11. J. O. EMERSON
12. R. AMOBI
13. S. O. EZE

Defendants

*Local Government—resolution of a council suspending a councillor for alleged misconduct involving his private and domestic affair—whether valid.*

*Tort—conspiracy—whether passing of a resolution suspending a councillor and his actual suspension thereafter amounted to conspiracy to injure him—*

The plaintiff a councillor of the Umuahia Urban County Council was suspended by a resolution of the council from participating in the activities of the council following some disagreement between him on the one hand and the chairman and some other councillors on the other hand over the allocation of market stalls at the Umuahia township.

The plaintiff also quarrelled with the chairman during a discussion at the latter's house, during which the plaintiff took exception to how certain privileged allocations of the market stalls were to be made.

Later during an emergency meeting of the council called for the only business of market development, the chairman alleged that the plaintiff was in the habit of fighting with his wife in the streets and that his conduct was a disgrace to the council.

It was later resolved by all the councillors with the exception of a few that the plaintiff be suspended indefinitely from participating in the activities of the council, because of his alleged misconduct.

The plaintiff was consequently suspended and was prevented from sitting at meetings of the council and from drawing his sitting allowance.

He then brought an action in the High Court for a declaration that the alleged resolution of the council was illegal, unconstitutional and null and void.

*Held:*

1. The resolution of the council passed on 23rd October, 1965, purporting to suspend the plaintiff indefinitely from participating in the activities of the council was illegal, unconstitutional and null and void.

2. Defendants Nos. 1, 3, 5, 7, 8, 9, 10, 12 and 13 who were councillors between 16th and 23rd October, 1965, combined wilfully to cause injury to the plaintiff in his office and interest as a councillor by depriving him of the opportunity to take part in the deliberations of the council and of earning his sitting allowance.

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*Obiter dictum.*—As a councillor elected by his ward to the Umuahia County Council, the plaintiff not only represents other members of the ward in the council to whom he owes a duty but has a private interest as a member of that ward to attend council meetings. If he is illegally prevented from attending such meetings he is perfectly entitled to apply to this Court in either of his dual capacities for a remedy.

Cases referred to:—

- De Jelly Marks v. Greenwood* (1936) 1 All E.R. 863.  
*Crofter Harris Tweed Company v. Veitch* (1942) 1 All E.R. 146.  
*Chief J. I. G. Onyia v. Governor-in-Council* 1962 2 All N.L.R. 174.  
*The Queen v. the Governor of Western Nigeria Ex parte I. O. G. Adebode*  
 1962 2 All N.L.R. 195.  
*G. Boshali and Company Limited v. Okoi Arikpo* S.C. 157/65.  
*M. O. Ayeni v. Olatunji Okwunubi* S.C. 477/64.

**Allagoa, J.:** The plaintiff who during October 1965 was a councillor of the Umuahia Urban County Council claims a declaration of this Court that a resolution of the Council which was passed by the instigation of thirteen defendants his fellow councillors at the meeting of the council on the 23rd of October purporting to suspend him indefinitely from participating in the activities of the council is illegal, unconstitutional and null and void.

He also claims general damages of £1,000 for the damage he suffered by the conduct of the defendants.

From the pleadings and evidence led in support of the plaintiff's case the following facts emerge:—

The 1st defendant was the chairman of the said council the membership of which subsequent to the institution of this action was revoked by the Military Governor of the Eastern Region in February, 1966. On the 16th of October 1965 an emergency meeting of the council had been summoned to discuss the allocation of new built lock-up shops and market stalls in the Umuahia township market which allocation should have according to the previous decision of the council been made on the 22nd of October. It was resolved at this meeting to postpone the allocation to 11th November. At the end of the meeting 1st defendant asked all the councillors to meet in his house at 7 p.m. The discussion at the chairman's house initiated by him was over how certain privileged allocations were to be made to which suggestion the plaintiff took exception which caused him and the chairman to disagree. He was rebuked and told by the chairman before he walked out of the house with councillors Nwokoma, Ofor, Emerson and Nlewedim that he would be surprised that the day the market stalls would be allocated by the council he would not be present. On the 23rd of October, 1965 the 1st defendant summoned another emergency meeting of the council and according to the summons Exhibit "B" the only business for that

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meeting was Market Development. On the conclusion of this business according to the minutes Exhibit "D" the 1st defendant reported that the plaintiff was in the habit of fighting with his wife on the streets and this conduct was a disgrace to the council. It was then resolved by all the councillors present who are the present defendants except councillors Nwokoma, Duruibe, Ihenacho who thought plaintiff should be warned, that the plaintiff be suspended indefinitely from participating in the activities of the council.

The Town Clerk Mr Eboy David who was called by the plaintiff told this Court that as Chief Executive Officer and adviser of the councillors that following the resolution of the council which was confirmed at a subsequent meeting against his repeated advice that the suspension was improper the plaintiff has not been allowed to attend any of the meetings of the council even though he served him summons to attend. Plaintiff was asked out of a meeting of 28th October, 1965.

That plaintiff was also asked out of the meeting on the 11th of November, 1965 wherein the main business of the council was the allocation of market stalls. The minutes of this meeting Exhibit "H" show that at paragraph 346 that the plaintiff had written a petition to the Minister of Local Government that there was a move by councillors after a secret meeting in the Chairman's house to allocate 4 stalls to each councillor with a view to selling them at £350 each. The Local Government Commissioner attended this meeting and with a view to avoiding any irregularities supervised the allocation.

Paragraph 347 of the minutes also shows that at this meeting plaintiff was asked out in spite of the advice of the Local Government Commissioner and in the presence of the public and the Press who attended the meeting. The suspension was published in Eastern State Express. The plaintiff was consequently not paid his sitting allowance of £1 each meeting for the meetings of 28th October, 11th, 19th, 23rd, 30th November and 30th December.

Mr Francis Maduekwe District Officer Bende Division and Local Government Commissioner for the area produced a letter dated 8th November Exhibit "J" which he wrote to the Town Clerk advising against the suspension of the plaintiff following the petition of the plaintiff and members of plaintiff's ward. He also wrote a letter to the Permanent Secretary, Ministry of Local Government dated 20th December 1965 about the matter Exhibit "M". It reads as follows:—

"I refer to your endorsement No. F. 1358/108A of 14th December, 1965 and wish to inform you that the original is being delivered to councillor J. Onyekwere.

2. Contrary to the undertaking given by Mr Sam Okwulehie, Chairman of the Umuahia-Ibeku Urban County Council that the suspension of councillor Onyekwere would be lifted on 29th November, 1965, the suspension has not been lifted. The Town Clerk invited councillor Onyekwere to the meeting but the Chairman asked him out and took no steps to rescind his illegal motion. I think the stage has been reached when the Honourable Minister should use his powers to call a stop to Mr Okwulehie's bluff and the sooner this is done, the better

it will be for all of us here, who are constantly being embarrassed by the growing number of *ultra vires* actions being taken by councillor Okwulchie."

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Under cross-examination Mr Maduekwe said he did not get the impression as was suggested by Mr G. C. Nonyelu for the defence that the plaintiff was interested in discipline.

The plaintiff testified that he did not at any time fight with his wife as was put forward in the resolution.

The defendants in their statement of defence admitted paragraphs 4, 8 and 9 of the statement of claim by which the plaintiff pleaded that the Umuahia-Ibeku Urban County Council is governed by the Eastern Nigeria Local Government Law, 1960 and the council's standing orders and rules made under the said law.

That the procedure according to the standing orders is that no business at council meetings shall be transacted other than that specified on the summons relating to it. Also that the council is open to the press and the public. The standing orders of the council was produced and tendered Exhibit "A".

At the close of the plaintiff's case Mr Nonyelu who led Mr Nedd for all the defendants except the second, sixth and eleventh defendants rested his case on the plaintiff's evidence. Second, sixth and eleventh defendants who are not represented by counsel elected to give evidence and each explained that they were opposed to the resolution, but were not allowed by their Chairman to express their views on the 23rd October and had to lead a delegation to the Divisional Officer to show their stand. As to what took place at the house of the Chairman, second defendant who was Vice-Chairman was not at the meeting. Eleventh defendant walked out with the plaintiff after he had opposed the suggestion of the chairman about reserving some plots for some personalities. Sixth defendant was indifferent after plaintiff quarrelled with the chairman and left.

The question I have to decide is whether the resolution passed on the 23rd October, 1965 is *ultra vires* and illegal, if so whether it was instigated by the defendants as a result of their conspiracy to injure the plaintiff, and whether plaintiff suffered actual damage.

The Umuahia Urban County Council is a statutory body not a private club or family meeting and the conduct of its affairs which affect the public and its members is regulated by the statute creating it and can only perform its functions within the four walls of that statute and the rules and orders made under it. Its business at meetings is limited by rule 7 of the standing rules which provides as follows:—

"Except for business required by the Ordinance to be transacted at the annual meeting of the council no business *shall* (the italicized is mine) be transacted at any meeting of the council other than that specified in the summons relating thereto."

The summons for the meeting of Saturday the 23rd October, 1965, Exhibit "B" and signed by first defendant had on its agenda market re-development

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and any urgent matter. But the minutes of the meeting at paragraph 279 show the resolution complained of as part of the business. To have embarked on this resolution as was done and having regard to its nature and consequence was clearly a flouting of rule 7 of the standing rules. I note from the minutes of 11th November, 1965, that the defendants are quite familiar with this rule because it was quoted against the plea of the Local Government Commissioner that the resolution suspending the plaintiff be rescinded; to quote the particular minute.—

“The Chairman said he had earlier discussed the matter with the Local Government Commissioner but that at the moment according to the standing rules, councillor Onyekwere should be out of the meeting pending six-man motion to rescind the suspension order. Other councillors spoke on the same vein pointing out that since the matter was not on the agenda it was improper to discuss it.”

I therefore find that the said resolution was passed with a clear knowledge that it was a flagrant breach of the standing rules.

Mr Nonyelu for the defendants submitted that the resolution passed was that of the council and not the defendants who are agents and cannot be held liable.

Before considering this submission and the case of *De Jelly Marks v Greenwood* 1936 1 All E.R. 863, cited in support of the submission I must first of all deal with the question whether or not the tort of conspiracy has been established because the submission and the case quoted are tied up with this question. The history and the definition of the tort of conspiracy is well dealt with in *Winfield on Tort* 2nd Edition pages 466-7. It is defined as follows:

“When two or more persons combine for the purpose of inflicting unlawful injury upon another person and cause damage to him in pursuance of that purpose they commit the tort of conspiracy.”

The distinction between conspiracy as a crime and as a tort was dealt with by Viscount Simon in the famous case of *Crofter Harris Tweed Company v. Veitch* 1942 1 All E.R. at page 146.

“Conspiracy, when regarded as a crime, is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it. (I am omitting consideration of those cases on the borderline of illegality, where the combination was held to amount to a criminal conspiracy because the purpose aimed at, though not perhaps specifically illegal, was one which would undermine principles of commercial or moral conduct). The crime consists in the agreement, though most cases overt acts done in pursuance of the combination are available to prove the fact of agreement. The tort of conspiracy, however, is constituted only if the agreed combination is carried into effect in a greater or less degree and damage to the plaintiff is thereby produced. It must be so, for, regarded as a civil wrong, conspiracy is one of those wrongs (like fraud or negligence) which sounds in damage, and a mere agreement to injure, if it was never acted upon at all and never led to any result affecting the party complaining, could not produce damage to him.”

On the facts of this case it was Mr Nonyelu's submission that no conspiracy has been proved because the particulars of the alleged conspiracy given by the plaintiff at the request of the defendants show that the conspiracy took place at the Chairman's house on the 16th of October, and therefore there was no *nexus* between what happened at the meeting of the 23rd October 1965 when the Resolution was passed and the meeting in the Chairman's house. He cited the case of *Crofter Harris Tweed Company v. Veitch*.

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According to the evidence of the plaintiff which is uncontradicted and indeed supported by the evidence of 2nd, 6th and 11th defendants, it was after the disagreement between the plaintiff and 1st defendant about proposals of 1st defendant which others present did not object to concerning allocation of market stalls, that the plaintiff was threatened that he would not in fact be present when the allocations were to be made. When the plaintiff attended the next meeting on the 23rd October he was suspended from attending the council on a purely private and domestic matter. The whole basis of the said suspension according to the uncontradicted evidence of the plaintiff is that it was trumped up and I do so find as fact. Now I do not see how it can be reasonably said there is no *nexus* between the incident in the Chairman's house and what took place on the 23rd October. In the first place why must councillors who are elected to represent their wards' interests be invited to the house of the Chairman to discuss the allocation of market stalls when they had opportunity to do so at meeting in the Council Hall they held the same day. Moreover, according to Rule 10 every meeting of the Council must be open to the public unless it resolves itself into a Committee. The meeting in the Chairman's house was no meeting of the Council. If therefore the plaintiff was invited to the Chairman's house with a view to taking a certain line of action over allocation of market stalls to which he objected and was then threatened with expulsion and he left the defendants at the meeting still conferring amongst themselves; if he subsequently finds himself a week later to be suspended from attending council meetings to which he is legally entitled to attend and draw sitting allowance by reason of a trumped charge of fighting with his wife, can it not be said that those who produce this result have combined for the purpose of inflicting unlawful injury upon the plaintiff and caused him damage in the absence of explanation for their conduct. In my view on the evidence and having regard to a plea of good faith contained in paragraph 7 of the Statement of Defence but not established by any evidence by 1st, 3rd to 5th 7th to 10th, 12th and 13th defendants the tort of conspiracy has been proved by the plaintiff.

The case of *Crofter Harris Tweed Company v. Veitch* quoted is not on all fours with this case. In that case the plaintiffs sued official of a Trade Union for instructing Dockers not to handle plaintiffs' yarn or to export the cloth made from it. It was in the interest of the Mill owners to eliminate competition and that of the Union to have only members employed as weavers and they *bona fide* believed their action to be in the general interest of the Industry. It was held that even if there was a combination between the defendants and the Mill owners, the plaintiffs had no cause of action since the predominant purpose of the combination was the legitimate promotion of interest of the persons combining.

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I will now deal with the earlier submission of Mr Nonyelu in support of which the case of *De Jelly Marks v. Green Wood* was quoted. The finding of fact in that case by Porter J. that the plaintiff (the Managing Director of the Company who sued the Chairman and other Directors for wrongful dismissal and conspiracy) was not dismissed before the writ was issued did not enable him to go into the proposition put forward by Mr Nonyelu, which was also what Mr Birkett counsel for the plaintiff was urging the Court to hold. At page 872 in dealing with the submission the Judge stated—"It was further contended that the cause of action was the conspiracy and that even though the breach occurred after the writ was issued the plaintiff had a good cause of action provided the breach was induced by the defendants. I do not agree. The breach is I think an integral part of the cause of action and must take place before the issue of the writ. But in any case in my opinion, the plaintiff was never dismissed, he dismissed himself by his ill-advised resignation from his directorship on May 21. This view is decisive of the action, but in case I should have come to the conclusion that there was a wrongful dismissal by the Company, Mr Birkett argued that the servants or agents of a company could never be guilty of conspiracy to dismiss one of the Company's servants. . . . There is force in this argument and I think it is true that directors in a board could not induce or conspire to induce that meeting to break a contract at any rate not without malice. But I think that some at any rate if not all of the directors could conspire before the board meeting was held to induce the board as a whole wrongfully to break a contract by dismissing one of the Company's servants". The last sentence of the quoted passage is in fact what happened in this case. The conspiracy was hatched in the house of the first defendant and was manifested at a meeting of the council whereat the plaintiff was by illegal procedure founded on malice suspended indefinitely. If the 1st, 3rd to 5th, 7th to 10th, 12th and 13th defendants claim they are agents of the council I do not think they can be allowed to hide behind the council if they were conducting its affairs clearly outside the scope and purpose for which the council is set up i.e., to impose rates and use the revenue collected for providing amenities for the rate payers, see sections 74 and 84 of the Local Government Law Cap. 79 Vol. 5 Laws of Eastern Nigeria.

Mr Nonyelu further submitted that the plaintiff has no legal right to bring this action since no private rights of his has been transgressed. He quoted the case of *Chief J. I. G. Onyia v. Governor in Council* (1962) 2 All N.L.R. page 174 and the *Queen v. The Governor of Western Nigeria Ex parte I. O. G. Adebo* (1962) 2 All N.L.R. 195.

The first case was an attempt by Chief Onyia to question the appointment of certain members to the Asaba District Council and when objection was taken that he had no *locus standi* in the matter since a relator action cannot be brought without joining the Attorney-General his counsel asked for amendment but Quashi Idun, J. as he then was refused the amendment. A passage in the last quoted case decided by Charles, J. as was pointed by Mr Onyiuke supports the plaintiff's case. It is at page 200. "An office is not in the strict sense itself a right but it may have a right (in the strict sense) to be appointed to it or to hold it for a period of time. It may also have such rights appurtenant to it such as a right to a salary. In so far as deprivation of the office extinguishes such rights a decision to deprive it is a determination affecting the right of the office holder". I entirely agree with the view of Charles, J.

As a councillor elected by his ward to the Umuahia Urban County Council, the plaintiff not only represents other members of the ward in the council to whom he owes a duty but has a private interest as a member of that ward to attend council meetings. If he is illegally prevented from attending such meetings he is perfectly entitled to apply to this Court in either of his dual capacity for a remedy.

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Mr Nonyelu submitted that the act of the first defendant about whom the Divisional Officer gave evidence cannot be related to all the defendants. In my view this is taking a narrow view of the evidence of the activities of the defendants. Looking at it objectively and on the totality of the evidence I have arrived at the conclusion that although the first defendant was the main architect of the conspiracy and the other defendants his chorus boys, they are nevertheless all councillors and since as provided by Rule 12 of the Standing Orders all acts of the council and all questions coming up or arising before the council must be done and decided by a majority of councillors present and voting, all the defendants who took part in the illegal resolution must be equally liable.

Finally Mr Nonyelu submitted that for the resolution to be set aside the council must be a party under Order 4, Rule 5 (1) of the High Court Rules. I do not agree with his submission because in my view non-joinder cannot defeat a claim. In the case of *G. Boshali and Company Limited v. Okoi Arikpo*, S.C. 157/65 the Supreme Court held it was wrong of the learned trial Judge (who tried the case and struck it out because of non-joinder) to allow the action to be defeated solely because he thought all the partners ought to have been sued. The case of *M. Ayeni v. Olaturuji Okwunubi and Others*, S.C. 477/64 was referred to by the Court wherein it stated as follows: "It rests on rather with the defendant to raise as early as possible, the point that not all interested persons are before the Court so that the Court may direct the plaintiff to give them notice and have every body concerned as a party at the trial". On the evidence therefore before me I find as a fact that 1st, 3rd, 4th, 5th, 7th, 8th, 9th, 10th, 12th, and 13th defendants who are councillors between the 16th and 23rd October, 1965, combined willfully to cause injury to the plaintiff in his office and interest as a councillor and consequently deprived him taking part in the deliberation of the council and of earning his sitting allowance for the 28th October, 11th, 19th, 23rd 30th November and 30th December, 1965.

2nd, 6th and 11th defendants have explained that although the minutes do not show they objected to the resolution that it was due to the fact the 1st defendant as Chairman did not allow them to express their views and that they followed this up with leading a delegation to the District Officer. I will therefore dismiss the action as against them.

On the question of damages Mr Onyiuke has asked for exemplary damages on the grounds that the object of the conspiracy was to demonstrate the power of the defendants and to prove themselves masters of a given situation. I find myself in complete agreement with his submission. Indeed I will add that it is a notorious fact that corruption and abuse of authority is rife amongst most Municipal and Urban County Councils in this country which facts I believe is responsible for the removal of most councillors

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in Eastern Nigeria. By the picture painted by this case I can see the defendants concerned in my mind's eye standing arms akinbo like a colossus and the plaintiff and perhaps many others like him walking under their huge legs to find themselves dishonourable graves. In awarding damages, I have not only the defendants in mind but such others like them that may rear their ugly heads in future as councillors in a like manner.

There will be judgment against the 1st, 3rd, 4th, 5th, 7th, 8th, 9th, 10th, 12th, and 13th defendants jointly and severally for £800 general damages. The declaration sought is granted.

Mr Onyiuke says the out of pocket is £59 2s and eight appearances asks for 150 guineas costs. Mr Ogbuagu for Nonyelu says he will leave the question of costs to the Court. Costs to plaintiff 100 guineas.

Mr Onyiuke says that the action brought against 2nd, 6th and 11th defendants was based on the Resolution Costs to each defendant will be nominal and assessed at £3 3s each.

*Judgment for plaintiff.*

Enugu High Court, 2nd November, 1966—E/13C/66

MBANEFO, C.J.

THE STATE

v.

ANGELINA OKOLUE AND ANOTHER

*Criminal Law—charge under section 112 (a) of the criminal code—whether and when it may be preferred against a person not in public service: charge under section 390 c.c.—does not lie when money is given voluntarily.*

The accused, a private woman, who was described as a contractor was charged in one count under section 112 (a) of the Criminal Code with "obtaining a sum of fifty pounds from Godwin Ugwuanyi on account of something to be done with regard to the appointment of the said Godwin Ugwuanyi in the Public Service of Eastern Nigeria": and in another count under section 390 of the Criminal Code with stealing the fifty pounds. The facts established at the hearing were that the complainant Godwin Ugwuanyi was invited for interview for the post of Veterinary Assistant in the Ministry of Agriculture whereupon he approached the accused to assist him. The accused told him she could help provided he paid fifty pounds which should be given to the Permanent Secretary. The money was given to her. Nevertheless the complainant failed the interview. He immediately went to the accused to collect back the fifty pounds but not finding her he reported to the police who searched the house of the accused and recovered the fifty pounds intact in the envelope as was handed over to her. The Court rejected the accused's denial of receiving the fifty pounds, and accepted the Permanent Secretary's evidence that he did not ask the accused to ask for money on his behalf and that no money was given to him by the accused.

*Held:*

1. The accused who was not in the Public Service was not in a position to help or do anything with regard to the appointment of the candidate as such she cannot be charged under section 112 (a) of the Criminal Code unless it can be shown that the money was received on account of someone responsible for the appointment.
2. As the complainant voluntarily gave the fifty pounds to the accused, the accused cannot be convicted of stealing the money. The accused's denial of receiving the money would not in the circumstances of this case make her guilty of stealing the money in as much as no conversion of the money had taken place by the time it was recovered.

*Ekong* for the prosecution.

*Nnaemeka-Agu* for the accused.

**Mbanefo, C.J.:** The two accused are charged on the information containing five counts. The first count against both of them jointly is for conspiracy to defraud and the remaining counts are against the first accused alone—namely 2 of bargaining for offices, one of obtaining money under false pretences, and the fifth of stealing.

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The case for the prosecution is that there were vacancies for Veterinary Assistants-in-training in the Ministry of Agriculture. These were advertised and applications invited. The complainant Godwin Ugwuanyi applied and was summoned for interview before the Departmental Board on June 4th, 1965. He mentioned this fact to the second accused who said he could introduce him to somebody who could help him. The second accused went with him to the first accused, a lady of independent means who describes herself as a contractor. The first accused said she could help Godwin Ugwuanyi provided he paid £50 which should be given to the Permanent Secretary. Godwin Ugwuanyi borrowed £50 and gave to the first accused but when he went for interview he was not selected, whereupon he went to the first accused to demand the return of his money. He did not meet her at home. Godwin had not done anything further about it until the police summoned him for interview and he then told them all he knew about the matter. At a search of the first accused's house a sum of £50 was found in an envelope. With the money inside the envelope is a slip of paper Exhibit "D" with Godwin Ugwuanyi's name and false address. Godwin Ugwuanyi said that he wrote his name and the address on the piece of paper at the request of the first accused at the time he gave her the £50.

At the close of the case for the prosecution counsel for the accused persons submitted that no case had been made out sufficient to put either accused in his or her defence. Counsel for the prosecution agreed that no case had been made out on counts 1, 3 and 4. On count 5 he said there was at least a case of attempt to steal. I agreed with the submissions of counsel with regard to counts 1, 3, and 4 and accordingly discharged the accused persons on those counts. I called on the first accused for her defence with respect to counts 2 and 5.

On count 2 the first accused is charged with obtaining the sum of £50 from Godwin Ugwuanyi "on account of something to be done with regard to the appointment of the said Godwin Ugwuanyi in the Public Service of Eastern Nigeria", contrary to section 112 (a) of the Criminal Code and on count 5 with stealing the said sum of £50 contrary to section 390 of the Criminal Code.

The first accused in her defence denies asking for or obtaining the sum of £50 from Godwin Ugwuanyi. She said that the sum of £50 found in her room belonged to the Eastern Nigeria Catholic Council of which she is the Organizing Secretary. She denies that the piece of paper Exhibit "D" containing Godwin Ugwuanyi's name and address was found in her house.

I am not impressed by the accused's evidence. I cannot see why Godwin Ugwuanyi should want to lie against her and to say that he had given her some money when he did not. Godwin Ugwuanyi had not complained to Police before they interviewed him following the search of first accused's house. I accept his evidence that he gave to the first accused the sum of £50 in an envelope and that the slip of paper Exhibit "D" was written by him and put in the same envelope with the £50. Godwin Ugwuanyi, as counsel for the prosecution concedes, is an accomplice. He was anxious to get the appointment and was not under any duress when he paid the money to the first accused. On that finding, I do not agree with the prosecution that the first accused could be charged with stealing the money.

The evidence is that the first accused asked for the money to be given to the Permanent Secretary. The acting Permanent Secretary Mr Odinamadu denies asking the first accused to ask for money on his behalf or that any money was given to him by the first accused. The money was paid on June 3rd, and the interview was the next day. When, on the fifth Godwin Ugwuanyi went to the first accused to ask for his money, he did not find her at home. Whether or not the first accused would have given him his money back on that day no one could say. Following the search of the first accused's house the money was discovered and she, of course, denied receiving any money from Godwin Ugwuanyi. In these circumstances I cannot say that she had stolen the money. It was received with the consent of Godwin Ugwuanyi and up to the time of the investigation by the Police there is no evidence of any conversion.

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To steal, the first accused could have obtained the money against the consent of Godwin Ugwuanyi or having done so with his consent subsequently converts it to her own use. The evidence was that the first accused said she could help, provided Godwin Ugwuanyi paid £50 for the Permanent Secretary. This statement is capable of two interpretations—either that the Permanent Secretary had indicated he could help if he got £50 or that first accused expected that with £50 she could influence the Permanent Secretary to appoint Godwin. The evidence is therefore vague. The money was found with the first accused as she received it and before any demand of its return had been made. In these circumstances it is difficult to say that the charge of stealing has been proved.

As regards count 2, the first accused is not in the public service and not in a position to help or do anything with regards to the appointment.

The word "Corruptly" as stated on *Biobaku* 20 N.L.R. 30 and approved in *Nkansu* Vol. V (1961) E.N.L.R. page 4 implies an inducement to sway or deflect the accused from an honest and impartial discharge of his duties. This definition was given while interpreting sections 98 (1) and 99 of the Criminal Code. I do not think that the definition is any the less valid under section 112 (a) of the Criminal Code. The first accused is charged in count 2 with corruptly asking for the money on account of something to be done with regard to the appointment. The accused not having any duty with respect to the appointment, has nothing she could do, with respect to the appointment for which she could "corruptly" ask for money. Even if she received the money with a view to corrupting someone in authority that could not amount to an offence under the section. The corruption must relate to something the accused has to do relative to the appointment. Where it is shown that the accused received the money on account of someone responsible for the appointment a charge could validly be made. In the count under consideration the accused was charged with receiving the money for herself. That being so the charge on the evidence before this Court is bound to fail.

Finding not guilty on both counts acquitted and discharged.

*Order.*—£50 to be returned to Godwin Ugwuanyi. Exhibits 2, 5, 6 and 7 to be returned to the first accused through the Police.

*Accused acquitted.*

Enugu High Court, 14th November, 1966—E/43CA/65

MBANEFO, C.J.

INSPECTOR-GENERAL OF POLICE

*Appellant*

*v.*

NWOBA ONUOHA

*Respondent*

*Criminal Law and Procedure—accused charged with corruptly demanding, corruptly receiving and stealing a sum of money—during trial, some prosecution witnesses unaccountably absent—refusal of court to adjourn trial—prosecution unable to continue—accused discharged—subsequent trial on identical charge—plea of autrefois acquit—sections 75, 181–185, 221 (2), 286 and 301, Criminal Procedure Law.*

The accused respondent was charged on three counts with (a) corruptly demanding (b) corruptly receiving and (c) stealing the sum of four pounds (£4). During trial before a Chief Magistrate, the prosecution after three prosecution witnesses had testified applied for adjournment stating that four prosecution witnesses including a police corporal were not available in court. The prosecution also stated, that they had no idea why the witnesses were absent. The application for adjournment was refused, whereupon the prosecution indicated that they could not continue. The Court then made an order discharging the accused.

The accused was subsequently charged on identical charge before the trial Chief Magistrate who adjourned the trial. The matter finally came before an Acting Chief Magistrate, who commenced hearing *de novo*, during which the accused pleaded *autrefois* acquit to the charge.

In a reserved ruling the Acting Chief Magistrate upheld the accused person's plea and dismissed the charge.

The prosecution then appealed against the decision to the High Court.

*Held:*

1. It seemed too belated to raise the issue for the first time on appeal, that the trial Chief Magistrate failed to comply with the provisions of section 221 (2) of the Criminal Procedure Law in that he did not try the issue—whether the plea of *autrefois* acquit was in fact true or not. An inquiry into the issue will be justified only if the facts as contained in the record of the previous proceedings tendered in court were contradicted. If they were admitted, an inquiry into the issue would be unnecessary.
2. The trial Chief Magistrate was correct in discharging the accused as the facts so far proved did not establish a case sufficient to put the accused on his defence.
3. In determining the effect a Magistrate intends his discharge order to have, where such effect is not so stated expressly, the intention of the Magistrate may be gathered either from the reasons he gave for the discharge or dismissal or from the course of the case,

**Mbanefo, C. J.:** In 1964 the respondent Nwoba Onuoha was charged on three counts with (a) corruptly demanding (b) corruptly receiving and (c) stealing the sum of £4. Trial began before the Chief Magistrate on the 15th day of February, 1965. Three prosecution witnesses were heard and the prosecuting State Counsel then asked for adjournment, stating that four of his witnesses including a police corporal were not in court. He said he had no idea why they failed to come. The application for adjournment was opposed by counsel for the respondent and the Court ruled as follows:—

“It is not fair to the accused for me to grant the adjournment sought for, there is no reason for the witnesses for the prosecution particularly Corporal S. Unachukwu not coming to court. I accordingly refuse the application for adjournment.”

The prosecuting counsel then said he was unable to go on, whereupon the Court made an order discharging the respondent. Subsequently on the 17th of May, 1965, the respondent again was charged and brought before the same Chief Magistrate on an identical charge with three counts as before and pleaded not guilty to all the counts. On that occasion his counsel was not in court. On the 9th of June, 1965, his counsel appeared and raised, for the first time, the issue that the respondent had been tried and discharged on a similar charge and that the discharge amounted to an acquittal. The Chief Magistrate could not deal with the issue then and adjourned the case to be taken by his relief as he was going on leave. On the 19th day of July, 1965, the matter finally came before Mr Nzeribe, Acting Chief Magistrate. He commenced the hearing *de novo*, had the charge read and explained to the respondent who pleaded *autrefois* acquit. His counsel tendered the record of the previous proceedings. The Acting Chief Magistrate in a reserved ruling upheld respondent's counsel's submissions and dismissed the charge. It is against the decision of the Acting Chief Magistrate that the prosecution has appealed.

The first issue raised by counsel for the appellant is that the Acting Chief Magistrate has failed to comply with the provisions of section 221 (2) of the Criminal Procedure Law, in that he did not try the issue whether the plea of *autrefois* acquit is true in fact or not. After raising the plea counsel for the respondent tendered in evidence, apparently by consent, the record of the previous proceedings containing an order of court discharging the respondent. That evidence was not contradicted and the argument of the prosecuting counsel proceeded on the basis that the facts on which the plea was based are correct; the Court proceeded to give its ruling on that basis also. It seems to me too belated now to raise the point, for the first time, on this appeal. Furthermore, appellant's counsel does not appear to be serious in raising the issue, for even at this stage he cannot tell me that he disputes the facts. His view is that the Magistrate, whatever the attitude of the parties, should stop the proceedings and inquire into that issue whether or not the facts alleged by the defence are true. I do not agree. The inquiry into the issue will be justified only if the facts as contained in the record of the previous proceedings tendered are contradicted. If they are admitted an enquiry into this would be unnecessary.

The next point dealt with is that the Chief Magistrate having only discharged and not acquitted the respondent in the former proceedings the

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Acting Chief Magistrate was wrong to have upheld the plea of *autrefois* acquit. Counsel relies on section 185 of the Criminal Procedure Law which says that a dismissal of a complaint or the discharge of the accused is not an acquittal for the purposes of sections 181-184 which subject to certain exceptions therein defined provide that when a person has once been convicted or acquitted of an offence he is not to be tried again for an offence on the same facts. Reference was also made to section 286 of the Criminal Procedure Law which enjoins on the Court to discharge an accused if at the close of the case for the prosecution no case is made out sufficient to put him on his defence.

The position in the present case is that the accused was discharged because the prosecution for no apparent reason had not their witnesses in court and so could not continue. The Magistrate felt it would be unfair to the respondent to adjourn the case. He did not intend that the case should be left hanging over the respondent by granting an adjournment. When he made an order discharging the respondent he did not state expressly whether or not the discharge was on merit. The facts are similar to those in the *Inspector-General of Police v. Sydney Marke* (1957) 2 F.S.C. 5, the only difference is that in that case the Magistrate acted under section 286 of the Criminal Procedure Ordinance and discharged the accused holding that no *prima facie* case has been made out. In the present case the Magistrate merely discharged the accused. But the legal position is the same in both cases. The Chief Magistrate in the instant case discharged because the prosecution could not go on and also, although he did not say so expressly, because the facts so far proved do not establish a case sufficient to put the accused on his defence. If there was sufficient evidence on record to warrant a conviction it would be wrong for the Chief Magistrate to have discharged the respondent. Appellant's counsel has not argued that there were enough evidence on record to justify a conviction.

In *Sydney Marke* the Federal Supreme Court considered the effect of sections 185, 286, 301 and 75 of the Criminal Procedure Ordinance and came to the conclusion that the underlying principle where an accused person is discharged or the charge is dismissed is what effect the discharging Magistrate intends his Order to have. Where he expressly states that the discharge or dismissal is on the merits the position is simple. In that case the discharge or dismissal amounts to an acquittal. Where it is not so stated expressly, the intention of the Magistrate may be gathered either from the reasons he gave for the discharge or dismissal or from the course of the case. In the present case it appears that in discharging the respondent he did not intend that the prosecution would continue to vex him with the charge. If he intended that, he would have granted the adjournment and not asked the prosecution to go on with their case. This is in effect the line of reasoning followed by the Acting Chief Magistrate in upholding the plea of *autrefois* acquit and I agree with him. The appeal is therefore dismissed.

*Appeal dismissed.*

Owerri High Court, 15th November, 1966—HOW/98C/65

NKEMENA, J.

THE STATE

v.

1. TOBIAS DIKEOCHA
2. NNODIM AKUFUOME
3. ALFRED IROBI
4. AMANKWE NNEMIGWE

*Criminal Law—alibi—onus of proof.*

The accused persons were jointly charged with housebreaking contrary to section 411 (1) and stealing contrary to section 390 of the Criminal Code. All the accused persons pleaded alibi in their defence in court. Only the first and second accused raised alibi in their statements to the police but did not give sufficient particulars to enable proper investigation to be carried out.

*Held:*

1. An accused who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer. The burden of proof is on the prosecution.
2. If alibi is not raised at the first opportunity, or at such a time that the police would be in a position to investigate it then the prosecution should not be expected to prove an unknown fact.
3. A person who raises an alibi must give sufficient particulars to enable proper investigation to be carried out.

Cases referred to:—

*R. v. Anthony Hugh Johnson* 46 Cr. App. R. 5.

*R. v. Patrick Moran* 3 Cr. App. R. 25.

*R. v. William Littleboy* 24 Cr. App. R. 192.

*Ejiofor, Senior State Counsel* for the State.

*Amadi* for the defence.

**Nkemena, J.:** The accused persons are jointly indicted on a two count charge of—

1. *Housebreaking* contrary to section 411 (1) of the Criminal Code. Particulars of the offence are that the four accused on 27th day of January, 1965, at Obudi-Agwa in Owerri in Owerri Judicial Division, did break and enter the dwelling house of Chief Ugwoegbu Ugbukpu with intent to commit a felony therein to wit; stealing.
2. *Stealing* contrary to section 390 of the Criminal Code. Particulars are that the four accused at the same time and place as in count 1 stole all the articles enumerated in the charge the property of Chief Ugbukpu.

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The case is mainly one of facts. The prosecution's case is shortly this:—

On 26th January, 1965, the complainant, P.W. 1 had left his home town of Obudi-Agwa for Owerri because of political disturbances arising out of the election into Federal Parliament. He had come to Owerri to report to the police about the beatings and various acts of molestation received from the supporters of the opposing political party.

On 27th January, 1965, while P.W. 1 was still in Owerri P.W. 2 said she was in her house, which is in the same place with the house of P.W. 1, when she heard some noise. She came out and saw the accused persons with some others numbering more than forty. P.W. 2 said they carried guns, matchets and sticks. They were proceeding to the house of P.W. 1. Both she and the mother of P.W. 1 begged them not to do anything but they were ignored. P.W. 2 said she was present when they broke into the house of P.W. 1 and began to destroy and remove his money and other properties. She was able to identify the four accused persons because—

1. They are all related to her;
2. Because she spoke to them and appealed to them personally not to remove the properties of P.W. 1.

Later P.W. 2 sent one Obi, the son of P.W. 1 to Owerri to inform his father what had happened. P.W. 1 reported to the police. After police investigation the accused persons were arrested and charged to court.

Each accused made a statement to P.W. 3, a police officer. These statements are in evidence as Exhibits 1, 2, 3 and 4.

*Defence: First accused.*—In his evidence accused No. 1 said that on 27th January, 1965, he did not go to the house of P.W. 1, nor did he steal therefrom. He said that on 27th January, 1965, he was at home with belly-ache. Later on that day he heard a noise and ran with his family to the mission. From there he ran away, having heard that the police and his town's people were fighting.

He said that P.W. 1 made the allegation against him because P.W. 1 quarrelled with his mother. Consequently when P.W. 1 met him in the market he told him he would get him into trouble. First accused called no witness.

*Second accused.*—Second accused denied breaking into the house of P.W. 1 and stealing his properties. He said that he is not on the best terms with P.W. 1 because P.W. 1 and his father contested a chieftaincy title. He said that for five or six years since that contest he had not been to the house of P.W. 1.

He said that on 27th January, 1965, he sharpened his matchet with which to go to the farm, when he heard a noise. He learnt that someone had been killed in a fight. He collected his wife and children and ran to a village called Mgbala. He said he was away for about a month before returning home. Second accused called no witness.

*Third accused.*—He said he travelled to Port Harcourt with his wife before 27th January, 1965 and was still in Port Harcourt on that day. He said they went to Port Harcourt because their daughter delivered a baby. They stayed in Port Harcourt for two months.

He denied the charge. He said he quarrelled with P.W. 1 because he (P.W. 1) thought that he gave money to one Oluwuihe to contest the post of a councillor against P.W. 1.

Third accused however said that after this incident he had been on good terms with P.W. 1 and had in fact given him his younger sister to marry.

*Fourth accused.*—Fourth accused denied the charge and said that P.W. 1 did not like him when P.W. 1 wanted to kill his junior brother for having carnal knowledge of P.W. 1's sister, and he protested. Furthermore, he said that P.W. 1 gave false evidence against him when he had a case with one Chief Mmbebuige. He said further that P.W. 1, a court member had sentenced him for destroying an N.C.N.C. symbol.

Fourth accused finally said that he ran away from the village during the election and did not come till much later; that on 27th January, 1965, he went to his farm and from there ran away to the neighbouring village.

In reviewing the evidence I would like to deal first with the alibi raised by the accused persons, and the alleged quarrels between them and P.W. 1.

*Alibi.*—Though an alibi is commonly called a defence, it is to be distinguished from a statutory defence such as insanity. It is analogous to a defence such as self-defence and provocation. An accused who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer. It is for the prosecution to do so—*Anthony Hugh Johnson* 46 Criminal Appeal Reports 55. This is so because the police have better machinery for conducting such investigations than a single individual. Nevertheless, if the alibi is not raised at the first opportunity, or at such a time that the police would be in position to investigate it then the prosecution should not be expected to prove an unknown fact. *Rex v. Patrick Moran* 3 Criminal Appeal Report 25. *Rex v. William Littleboy* 24 Criminal Appeal Report 192.

Furthermore a person who raises an alibi must give sufficient particulars to enable proper investigation to be carried out.

As far as third and fourth accused are concerned they raised their alibi in court. They did not do so when they made exhibits 3 and 4 or at any other time before the defence opened. Having raised it too late the prosecution could not be expected to direct an investigation. I am satisfied that the alibi raised is an afterthought.

*First accused* was asked to produce the person who saw him sick, but he did not do so. He was not so sick because if he was he could not have run to the mission with his family, and from there to the neighbouring village. The fact that he was sick and the fact that somebody saw him when he was sick are matters particularly within his knowledge. If he withheld the necessary information from the police he cannot turn round and accuse them of inactivity.

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three  
Others  
-----  
Nkemens,  
J.

*Second accused:* He did not give enough particulars which would have enabled proper investigation to be carried out. He did not state when the house of P.W. 1 was attacked or if he could not do that he would have said when he ran away. The time factor would have been of assistance to determine whether he was in the village at the time of looting.

In any case P.W. 2 said she saw first, second, third and fourth accused. If her evidence is believed and those of the accused are disbelieved then their alibi that they were not in the house of P.W. 1 will be of no consequence.

I shall, therefore, reject the alibi, if any, raised by the accused persons.

*The alleged quarrels.*—None of the accused persons mentioned in his statement to the police that he had any sort of quarrel with P.W. 1. First accused said P.W. 1 quarrelled with his mother. Because of that P.W. 1 included him in this charge. I do not believe this. If there was such a quarrel and P.W. 1 threatened to put first accused into trouble first accused would have stated so in exhibit 1, well knowing that it was a strong point in his favour.

Second accused said there was a chieftaincy dispute six years ago in which P.W. 1 thought he was assisting the opposing party. I am satisfied there was no such dispute. If there was and second accused and P.W. 1 were not on speaking terms second accused would have said so as soon as he was arrested. Besides, the incident was so remote as to have any bearing on the issue now.

*Third accused.*—Third accused could not have quarrelled with P.W. 1. He said that he was on the best of terms with P.W. 1 and that he even gave his sister to him to marry.

*Fourth accused.*—If anybody should bear grudge against the other it would be this accused against P.W. 1. He recounted all his grievances against P.W. 1.

On the totality of evidence I find as a fact that there is no reason why P.W. 2 should lie against her relatives. There is no suggestion of an existing quarrel between the accused and P.W. 2, except the flimsy one that the fathers of second accused, and fourth accused pressed on her to return to her husband. P.W. 2 is an elderly woman of about fifty years of age. She is of age and can decide when to return to her husband's place. She denied having any quarrel with any of the accused persons nor with their parents.

I am satisfied that P.W. 2 is a witness of truth. She saw the accused and many others destroying and looting the properties of P.W. 1. It cannot be denied that on 27th January, 1965, the house of P.W. 1 was broken into and most of his properties removed. These properties have not been recovered up till now.

I am satisfied that the accused persons lied when they denied taking part in the looting. I find as a fact that they and others broke into house of P.W. 1 and stole the articles enumerated in count 2.

I find the four accused persons guilty on counts 1 and 2.

*Allocutus.*—Mr Amadi for accused persons asks court to be lenient in passing sentence.

First to third accused persons have nothing to say.  
 Fourth accused begs for leniency.

Apart from admission of fourth accused that he was convicted at one time there is nothing known about first to third accused.

<i>Sentence.</i> —Count 1	First accused	15 months I.H.L.
	Second accused	15 months I.H.L.
	Third accused	15 months I.H.L.
	Fourth accused	15 months I.H.L.
Count 2	First accused	15 months I.H.L.
	Second accused	15 months I.H.L.
	Third accused	15 months I.H.L.
	Fourth accused	15 months I.H.L.

*Sentence consecutive.*

Each accused is advised of his right of appeal to Supreme Court within thirty days from today.

*Accused persons convicted.*

The State  
 v.  
 Tobias  
 Dikeocha  
 and  
 three  
 Others  


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 Nkemena,  
 J.

Enugu High Court, 16th November, 1966—E/41CA/65

MBANEFO, C.J.

INSPECTOR-GENERAL OF POLICE

*Appellant*

*v.*

LOUIS OKWUOSAH

*Respondent*

*Criminal Law—appeal by prosecution—motion for leave to argue additional grounds filed but later abandoned—another motion for extension of time to file fresh memorandum of grounds of appeal—whether proper to grant the latter application.*

The prosecution appealed against an order made by an Acting Chief Magistrate dated 9th August, 1965, dismissing a charge and acquitting and discharging an accused. The notice of appeal was filed shortly afterwards. The appeal came before the High Court on 4th August, 1966 but could not be dealt with as the accused/respondent was not served. The appeal came up for hearing at the High Court on a number of occasions but was on each one adjourned.

In the meantime, the prosecution filed their first motion asking for leave to argue additional grounds. The appeal eventually came up for hearing, the respondent having been served. At this stage, the prosecution filed yet a second motion asking for extension of time within which to file a fresh memorandum of the grounds of appeal. The prosecution later withdrew their first motion.

Counsel for the prosecution, while arguing the second motion said that he did not intend to argue any of the original grounds filed with the notice of appeal, and that after studying them it was felt that fresh grounds ought to be filed.

*Held:*

1. The right of appeal against an acquittal was given to the prosecution grudgingly and should not be lightly exercised.
2. Before filing an appeal the prosecution should make sure that they are doing so for very substantial reasons and not merely as a way of showing their displeasure with the judgment of a Magistrate.
3. An accused person must not be made to suffer unduly mainly because the prosecution chose to be unnecessarily dilatory in prosecuting an appeal.

*Amasiani*, State Counsel for the appellant.

*Ezeilo* for the respondent.

**Mbanefo, C.J.:** This is an appeal by the prosecution against an order of Mr Nzeribe, Acting Chief Magistrate, dated 9th August, 1965, dismissing the charge and acquitting and discharging the respondent. Notice of appeal was filed on the 13th August, 1965, with the memorandum of the grounds of appeal. The appeal first came before the Honourable Mr Justice Oputa on the 4th August, 1966, but could not go on as the respondent could

not be served with hearing notice. The case came up again before the Court on the 26th, 29th, 30th September, 1966 and 13th October, 1966 and on each occasion the respondent had not been served and the case was further adjourned. In the meantime, on the 17th September counsel for the appellant filed a motion asking for leave to argue additional grounds which were filed with the motion. This motion had not been dealt with until this morning when counsel for the appellant filed another motion asking for extension of time within which to file memorandum of the grounds of appeal. The motion for leave to argue additional grounds was withdrawn. In arguing the second motion counsel for the appellant said he did not intend to argue any of the original grounds filed with the notice of appeal. The position is that unless this application is granted there will be no grounds of appeal before the Court which the appellant wants to argue. This application was filed more than twelve months after the notice of appeal and the original memorandum of appeal were filed. The only reason given in the supporting affidavit for the delay is that the original memorandum of the grounds of appeal was filed by the police and that after studying the grounds of appeal it was felt that fresh grounds should be filed.

Respondent's counsel has opposed the application and on principle I think it should be refused. The right to appeal against an acquittal was given to the prosecution grudgingly and should not be lightly exercised. That power did not exist originally in our law and when it was first given it was limited to questions of law only. Now it is extended to include questions of mixed fact and law. Before filing an appeal the prosecution should make sure that they are doing so for very substantial reasons and not merely as a way of showing their displeasure with the judgment of the Magistrate. I do not say that that was so in the present case but the way the case has been handled leaves one with the impression that they were not serious with the appeal. If the reason for filing an appeal was obvious from the start it should have been so stated in the grounds filed. Where a reasonable application is made, the Court should grant leave either to amend the grounds filed or to file fresh memorandum of the grounds of appeal. In the present case, the delay is over twelve months and the reason given for it is not only cruel but unconvincing. For that reason I feel it ought to be refused.

In dealing with this type of application the Court must always remember that the liberty of the subject is involved and that it is the duty of the Court to see that the accused is not made to suffer unduly mainly because the prosecution chose to be unnecessarily dilatory in prosecuting the appeal.

The appeal was adjourned on the 11th November till today in order to give the respondent opportunity to study the application and argue additional grounds served on him that morning. Today he is confronted with another application with fresh set of grounds. It would be unfair to expect him to go on with the appeal this morning and a further adjournment is in my view unjustified. The application is refused.

Amasiani says that he cannot go on with the appeal and asks for leave to withdraw it.

*Ezeilo*: Nothing to say.

*Court*: Appeal dismissed.

*Appeal dismissed.*

Inspector-  
General  
of Police  
v.  
Louis  
Okwoosah  
Mbanefo,  
C.J.

Calabar High Court, 22nd November, 1966—MISC/5/65

ANIAGOLU, J.

NTUFAM J. A. OFFIONG

*Applicant*

*v.*

EASTERN NIGERIA DEVELOPMENT  
CORPORATION

*Respondent*

*Practice and Procedure—commencement of action by a motion—Order II Rule 1 of the High Court rules.*

The applicant and the respondents were parties to a lease which stipulated for periodical revision of the rent with a proviso that on the event of a disagreement as to the rent, the matter should be referred to an arbitrator appointed by the High Court. Such disagreement arose and the applicant filed a motion praying the High Court to appoint an arbitrator. The Court was of the opinion that the application could not be said to be interlocutory, as such it had to consider whether as a suit it could be commenced by an originating motion. The High Court Rules do not provide for commencement of this sort of proceedings by motion. The Arbitration Act contains no provision for the procedure for making such application.

*Held:*

1. The provisions of High Court Rules in order II rule 1 that every suit shall be commenced by a writ of summons should normally be followed, subject however, to this that where provisions for initiating proceedings are made in any other written law these provisions may be followed, and subject further to this that in default thereof the proceedings may be initiated in substantial conformity with the law and practice observed by the High Court of Justice in England on 30th September, 1960.
2. This application is properly before the Court. In England by 30th September, 1960 it is an application which could be made by a motion.

Cases referred to:—

*The Chairman Executive Development Board v. W. F. Onimole and 11 Others* 6 W.A.C.A. 96.

*Coker v. Coker* 21 N.L.R. 14.

*Bassey* for the applicant.

*Okwuosa* for the respondent.

**Aniagolu, J.:** The issue that has called for determination at this stage in this matter is a preliminary one, although fundamental.

By an Indenture of Lease dated the 21st day of April, 1955 between the representatives of Oban Town in Calabar Division and the Eastern Nigeria Development Corporation, for consideration therein specified, a parcel of land measuring approximately 11,472 acres was granted by the Oban people to the Corporation for a term of ninety-nine years. Clause 4 (3) (i) of the Deed provided for a revision of the rent reserved at the end of the tenth

and twentieth years of the term granted, such rent to be agreed between the parties. Clause 4 (3) (f) has made provision for the event of a disagreement between the parties on the amount of the rent. The words of the clause are as follows:—

“If the Lessors and the Lessees are unable to agree as to the revised rent to be paid the matter shall be referred to an arbitrator appointed by a Judge of the Supreme Court”.

It is to be noted here that on 21st April, 1955 when the Deed was executed the High Court was known as the Supreme Court.

The first ten years of the term granted having now expired the rent is now overdue for revision. Unable to agree, apparently, on the rent, Ntufam J. A. Offiong, presumably acting on behalf of the Oban people (this, of course, would have to be determined when this case is gone into) filed a motion on Notice in the High Court Calabar seeking *inter alia* that one B. G. Whyte, Esq., LL.B., a counsel, should arbitrate to fix the new rent payable by the Eastern Nigeria Development Corporation.

The issue that now calls for determination is whether the applicant can originate proceedings in the High Court of Eastern Nigeria having regard to the High Court Law and Rules by the procedure for interlocutory applications of simply filing a motion on notice.

Section 85 of the High Court Law gave power to the Governor to make the first Rules of Court, and the Eastern Nigeria High Court Rules which came into force on 3rd January, 1956 were made pursuant to that section. Order II Rule 1 of the said Rules makes provision for the commencement of suits in the High Court. The rule reads in part as follows:—

“1. Every suit shall be commenced by a writ of summons signed by a Judge, Magistrate or other officer empowered to sign summonses. The writ of summons shall be issued by the Registrar or other officer empowered to issue summonses, on application . . .”

Special provisions existed for initiating proceedings in the High Court for specialized matters such as Election Petitions. Such may be found, for example, in the House of Assembly (Disputed Seats) Regulations, made under the Elections (House of Assembly) Law. Again there does not exist in the High Court Rules any comprehensive form for originating proceedings in prerogative orders of Mandamus, Prohibition, *certiorari* and *quo warranto*. Resort is made in this regard, to the Rules of the Supreme Court in England by reason of the provisions of section 16 of the High Court Law of Eastern Nigeria which state as follows:—

“The jurisdiction vested in the High Court shall be exercised (as far as regards practice and procedure) in the manner provided by this law and in any other written law or by such rules and orders of court as may be made pursuant to this law or any other written law, and, in default thereof, in substantial conformity with the law and practice for observed in England in the High Court of Justice, on the thirtieth of September, 1960.”

I do not think that it would be disrespectful for me to point out that there is an error in this section, for the word “for” after the word “practice” does not

Ntufam  
J. A.  
Offiong  
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Anisagolu,  
J.

Nwufam  
J. A.  
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v.  
E.N.D.C.  
Anigbolu,  
J.

seem to occupy any grammatically correct position in the sentence. A deletion of that word would appear to be necessary in order to portray the meaning intended in that part of the section.

Returning to the topic Order II of the High Court Rules makes provision for commencing suits in the High Court of Eastern Nigeria and those provisions should normally be followed, subject, however, to this that where provisions for initiating proceedings in the High Court are made in any other written law those provisions may be followed, and subject further to this that in default thereof the jurisdiction of the High Court with regard to practice and procedure shall be exercised in substantial conformity with the law and practice observed by the High Court of Justice in England on 30th September, 1960.

The Deed of lease between the Oban people and the E.N.D.C. dated 21st April, 1965, aforementioned, would appear, by reason of the provisions of the Arbitration Law of Eastern Nigeria *Cap. 10* Laws of Eastern Nigeria 1963, to be a "submission", for, submission in section 2 of the law is defined to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not".

Section 6 (2) of the Arbitration Law enacts that:—

"If the appointment is not made within seven clear days after the service of the notice, the Court or a Judge may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

The operative words are: on "*application by the party* who gave the notice . . ." The Arbitration Law does not provide the form for the application to the High Court. The High Court Rules do not make provision for the form of the application under section 6 (2) of the law. What the applicants, namely, the Oban people have done is simply to file the present motion on notice applying for the appointment of an arbitrator. True enough section 6 (2) provides that application is to be made to the Court or a Judge. It does appear to me that where the application is made to the Court the practice and procedure for initiating proceedings in the High Court have to be followed. This would have to be in an appropriate case either under Order II of the High Court Rules, or, having regard to section 16 of the High Court Law, under some other accepted mode of initiating proceedings in the High Court of Justice in England on 30th September, 1960.

The Eastern Nigeria High Court Rules have not made provisions for originating summonses, Order II having only provided for the issuing of writs of summonses. It is clear from authorities that a substantive action cannot be initiated in the High Court by way of originating motion or originating summonses. The West African Court of Appeal held as much in *the Chairman, Lagos Executive Development Board v. W. F. Onimole and 11 Others* 6 W.A.C.A. 96 where the Court held as invalid the procedure by which the Chairman of the Lagos Executive Development Board, under the provisions of section 44 of the Lagos Town Planning Ordinance No. 45 of 1928 which empowered him to submit a matter for the decision of the then Supreme Court (now High Court), commenced by originating summonses in the High

Court (then called Supreme Court) an action for the determination of the ownership of the land then in dispute in the light of the claims made by the Olorogun family. At page 98 the Court stated as follows:—

“An ‘Originating Summons’ is quite foreign and unknown to the Rules of the Supreme Court of Nigeria. For that reason probably it was enacted by section 48(2) of the Ordinance that the Court should hear and determine all matters herein as if the proceedings had been commenced in the ordinary way by civil summons issued under the Supreme Court Ordinance and Rules which shall govern all matters of procedure.

Now a civil summons under the Supreme Court Ordinance provides at once a plaintiff and a defendant and the whole subsequent procedure under the rules of court is based on the fundamental fact that there is a plaintiff and a defendant. An ‘Originating Summons’ does not provide either a plaintiff or a defendant so that it is rather difficult to apply the rules of the Supreme Court strictly to an ‘Originating Summons’. Probably on account of that difficulty the Court below decided to call one party to these proceedings plaintiff and the other defendants.”

Again in *Coker v. Coker* 21 N.L.R. 14 De Comarmond, S.P.J., held that the High Court Rules (then called Supreme Court) made no provisions for originating summons. In consequence he struck out an originating motion by which an application was made for an Order “that the Court do give directions” as to the person or persons entitled to the estate of Albert Mosebi Coker. The Editor’s note to this report says that “on appeal to the Federal Supreme Court (W.A.C.A. 143/55) it was held that such proceedings could be commenced by originating motion”.

In the present application, the issue would appear on the face of it to be the person to be appointed an arbitrator and not whether the agreement between the parties does provide for the appointment of an arbitrator in the circumstances. If in proceedings touching administration of estate originating motion can be used to obtain an order of court giving “directions” as to the person or persons entitled to an estate, I cannot see that the same procedure may not be used by an applicant under the Arbitration Law for an order of court appointing an arbitrator. Section 6 (2) of the Eastern Nigeria Arbitration Law has identical provisions with the last paragraph of section 5 of the Arbitration Act, 1889, which provisions have been re-enacted by section 10 of the Arbitration Act, 1950. Under the said acts, if after the expiration of the seven clear days after the service of the notice an appointment of an arbitrator is not made by the parties, the application is made by originating summons to a Judge or Master in Chambers. (See the *Annual Practice*, 1952, p. 3371, the *Annual Practice* 1966 Vol. 1 p. 1999/15).

Similarly an application to court for the revocation of the appointment of an arbitrator appointed by the parties is made to the Chancery Division by motion or originating summons and in the K.B.D. by originating summons. ((1952) the *Annual Practice*, p. 3355).

It follows, therefore, that in matters of application under the Arbitration Act, in England the procedures by way of originating motion and originating summons are available to the applicant. (See Vol. 1 *Annual Practice* 1966 p. 81). Our High Court Rules do not provide for originating summonses. We have, however, the procedure by way of motion on notice.

Ntufam  
J. A.  
Ofiong  
E.N.D.C.  
Aniagolu,  
J.

Nwafam  
J. A.  
Effiong  
vs.  
E.N.D.C.  

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Anigolu,  
J.

In the result I hold that this application by notice of motion was properly brought.

Bassey asks for thirty guineas costs.

Court: Mr Bassey, this matter of the procedure by which this matter was brought to court was raised by court.

Okwuosa: The Court raised the point.

I order that the costs should be costs in the cause.

*Motion proper.*

Enugu High Court, 25th November, 1966—E/10A/66

MBANEFO, C.J.

MARK UYESI

*Appellant*

*v.*

PETER OKONKWO AND FIVE OTHERS

*Respondents*

*Appeal—notice of appeal—when it must be served on every person named as a respondent—O. 56.r.1.*

There were six defendants sued jointly and severally. They were represented jointly by a counsel. Appeal was filed and the notice thereof was served jointly on the defendants through one of them. They all appeared at the High Court of appeal and were again jointly represented by a counsel. The claim against them was that they together acting in concert broke and entered the house of the appellant and removed certain properties the value of which was claimed.

An objection was taken by the respondents' counsel that the notice of appeal was not served on all the defendants.

Order 56 rule 1 of the High Court Rules states that the notice of appeal shall "be served on all the other parties affected by the appeal".

*Held:*

1. Order 56 rule 1 of the High Court Rules requiring service of Notice of Appeal on all the other parties should not be disregarded and where any of the parties is prejudiced or likely to be prejudiced by the fact that they were jointly served through one of them, the Court must insist on separate service even if it means striking out the appeal. But in certain circumstances service on the parties may be joint and "the other parties" may be regarded as one party for that purpose.
2. The circumstances of this case warranted a joint service of the notice of appeal, and no respondent had shown that he had a separate interest from the others or that he was prejudiced by the fact that they were not separately served.

**Mbanefo, C.J.:** When the case opened respondent's counsel raised by way of a preliminary objection the point that the appeal was not properly before the Court and should therefore be struck out. The grounds for his submission were:—

- (a) that the notice of appeal was not served on all the defendants, and
- (b) that a certified copy of the judgment was not attached to the notice of appeal served on some of the defendants.

To save time, I reserved ruling on the two points and proceeded to hear the appeal on the merits. I now give my ruling.

On the first point, it was not denied that the respondents were served jointly and that they were jointly represented by counsel in the Court below. On this appeal they were all represented by the same counsel. Rule 1 of

Mark  
Uyeai  
v.  
Peter  
Okonkwo  
and  
five  
Others

Mbanefo,  
C.J.

Order 56 of the High Court Rules in force in August 1961, when the appeal was filed, states that the notice of appeal shall "be served on all the other parties affected by the appeal".

The claim against the respondents was that they in company with others "together and acting in concert" broke and entered his house and removed certain properties whereof the plaintiff/applicant claims from them jointly and severally the sum of £193 5s. When the case came before the Court it was struck out for reason not clear from the record. Plaintiff/appellant applied to the Court by motion to have it relisted. Respondent's counsel opposed the application and it was refused. It is against this refusal that the plaintiff/appellant has appealed. The respondents' interest in the outcome of this appeal is still joint. It is therefore not surprising that they were all represented by the same counsel. They have all appeared. Appellant's counsel has not shown who of the respondents were served and who were not. One can only assume having regard to the course the case has taken that the person who was served had the authority to accept service on behalf of the others. No respondent has shown that he has a separate interest from the others *vis-a-vis* this appeal nor that he is prejudiced. It will be difficult for me to say which of the respondents have not been served and in the circumstances I could only conclude that none of them has been prejudiced by the fact that they were not separately served and that the appeal has not abated timely. In saying so I am not to be understood as saying that Order 56 Rule 1 requiring service of Notice of Appeal on all the other parties should be disregarded. The effect of my ruling is that in certain circumstances as in the present case service on the parties may be joint and that the other parties may be regarded as one party for that purpose. Where any of the parties is prejudiced or likely to be prejudiced by the fact that they are jointly served through one of them the Court must insist on separate service even if it means striking out the appeal. I hold that this is not one of such cases and that the appeal is properly before me.

On the second point the same issue with respect to Order 56 Rule 2 (1) of the High Court Rules was raised before me in *Dabipi v. Anyabogwu* Appeal No. E/55A/61 in which I held interpreting Rule 2 (2) that failure to attach a copy of the Notice of Appeal only makes the Notice of Appeal defective and that the appeal would be saved by Rule 15 Order 56. I see no reason for departing from the views expressed in that case. It may be mentioned that the old Order 56 Rule 2 (2) which requires a copy of the judgment to be attached to the Notice of Appeal has now been repealed. That requirement is no longer necessary under the existing Rules.

I hold therefore that the appeal is properly before me.

I now proceed to deal with the appeal on the merits. Two cases between the parties are involved. The first case was ME/718/58. Before that case came up for hearing on 15th January, 1959, the plaintiff had on 6th of January 1959, filed a Notice of Discontinuance. The case was struck out pursuant to the Notice and costs awarded. The second case ME/10/59 was filed on 6th January, 1959, at the same time that the Notice of Discontinuance was filed. Respondent's case is that this second case would not be entertained because the costs awarded subsequently to the filing of the case had not been paid. For this he relied on Order 9 Rule 12 of the Magistrates Courts Rules.

I do not think that the rule is meant to cover cases such as this one. The plaintiff/appellant in filing his action on 6th January, 1959, could not have anticipated what costs would be awarded against him. No plea has been taken which is a condition precedent to the application of Order 9 Rule 12 and no sum of money which shall not exceed £5 by way of compensation for his trouble and attendance has been awarded to the respondent. It is this sum if awarded that the Rule says must be paid before a plaintiff can bring another action in respect of the same cause of action. These requisites of Order 9 Rule 12 have not been fulfilled and the Rule cannot therefore apply.

I allow the appeal set aside the order of the Magistrate and order that the case be restored in the Magistrates Court list for hearing and determination.

No order as to costs. The costs of the Court below if paid to be refunded.

*Objection overruled: Appeal allowed.*

Mark  
Uyesi  
v.  
Peter  
Okonkwo  
and  
five  
Others  

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Mbanefe,  
C.J.

Onitsha High Court, 29th November, 1966—O/41A/66

KALU ANYA, J.

P. O. UYANWA

*Appellant*

v.

L. M. O. NWORDA

*Respondent**Practice and Procedure—action in wrong form—evidence discloses liability for the claim—judgment may be given for the plaintiff.*

In the Magistrate's Court, the plaintiff (now the respondent) sued the appellant "for the sum of £171 being arrears of rent from July, 1964 to December, 1965 in respect of three rooms, one store and one shop at No. 5 Christ Church Street, Onitsha which the defendant agreed to let from the plaintiff". The respondent's case was that he took a lease of the property from the appellant with effect from the 1st of January, 1963 at an annual rent of £168 payable in advance which rent he duly paid for 1963, 1964 and 1965. He sublet the rooms therein to various persons. In July, 1964 the appellant demolished three rooms, one shop and one store in the building and promised to refund the rents due for those rooms. The £171 claimed was the total rent due to be refunded since that time.

The appellant did not give evidence neither did he call witnesses. He submitted that the claim was misconceived as the respondent was not his landlord and so no action could lie as arrears of rent against him the appellant. The Magistrate held that this could have been raised as a preliminary objection but as it was not and as he had found the claim for £171 proved against the defendant he gave judgment for the plaintiff in the interest of justice. The defendant appealed.

*Held.*—The trial Magistrate was wrong in holding that it was a matter for a preliminary objection because until the evidence was led the defendant would not know what case he was to meet. Nevertheless, although the form of action was wrong, the Magistrate was not wrong in looking at the substance rather than form since the writ disclosed the amount claimed and the evidence explained the circumstances in which it arose as a liability against the appellant and the appellant had not destroyed that evidence.

*A. Obi-Okoye* for the appellant.

*Anah* for the respondent.

**Kalu Anya, J.:** The respondent's claim in the lower Court reads:—

"The plaintiff's claim against the defendant is for the sum of £171 (one hundred and seventy-one pounds) being the arrears of rent from July, 1964 to December, 1965 in respect of 3 (three) rooms, 1 (one) store and 1 (one) shop at No. 5 Christ Church Street, Onitsha which the defendant agreed to let from the plaintiff as per particulars hereunder:—

*Particulars*

	£	s	d
(1) Three rooms at £2 8s 0d each for 18 months ...	129	12	0
(2) One store at £1 5s 0d each for 18 months ...	22	10	0
(3) One shop at £3 3s 0d each for 6 months ...	18	18	0
<b>Total</b> ... ..	£	171	0 0

The defendant has unreasonably refused to pay the said sum of £171 (one hundred and seventy-one pounds) in spite of repeated demands."

The respondent gave evidence and called one witness and closed his case. The appellant rested his case on the respondent's. The learned trial Chief Magistrate gave judgment to the respondent for £171. It is from this judgment that the appellant has appealed. The grounds filed and argued are:—

"1. Having held that the claim is misconceived and or that evidence does not support the claim, the learned trial Magistrate erred in treating that as a matter for preliminary objection which has been cured by the evidence and erred further in entering judgment for the plaintiff in spite of the fact that the claim is not even amended.

2. The claim is misconceived and the evidence led does not support the claim for any arrears of rent. At all event there is so much conflict in the oral and documentary evidence touching the number of rooms vacant, period they were vacant and the rent receivable for each room, so much so that if the plaintiff sustained any loss, such loss being special damages, was not proved, and the learned trial Magistrate erred in entering judgment for the plaintiff, and the learned trial Magistrate misdirected himself by not even directing his mind to these conflicts.

3. The learned trial Magistrate misdirected himself in that part of his judgment in which he held that the appellant wrote to the respondent undertaking to repay to the respondent any loss he sustained. In so holding the learned trial Magistrate failed to observe that there was no such promise in so many words and that at all events such loss must be claimed specifically and proved.

4. The decision is against the weight of evidence."

The respondent's case briefly is that he took a lease of the property situate and lying at 5 Christ Church Street, Onitsha from the appellant by a Deed dated 17th October, 1962, and exhibited as "E" in the lower Court. A yearly rent of £168 was payable in advance to the appellant on the 1st day of January of each year commencing from January, 1963. The respondent paid for 1963 and for 1964. In July, 1964, the appellant demolished three rooms, one shop, and one store, of the property which the respondent had let to tenant whom he lost. In 1965 the respondent also paid to appellant the normal rent of £168. Between July, 1964 and December, 1965, the respondent lost in rents from the demolished rooms, shop and store a total of £171. He complained to the appellant who agreed to pay to the respondent the rents lost—Exhibit "A" refers.

The appellant's counsel in the lower Court rested his case on the respondent's and relied mainly on technical grounds. He argued there, as in this Court, that the claim was misconceived. He contended that the respondent did not let any rooms to the appellant and so could not claim arrears of rents. Counsel for the appellant argued that the respondent who, admittedly is the appellant's tenant cannot sue the appellant for arrears of rent. In this Court appellant's counsel has submitted that the oral testimony of the respondent and his witness is in conflict with the documentary evidence carried in Exhibits "F", "G" and "H",

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Nwora  
Kalu Anya,  
J.

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Kalu Anya,  
J.

Mr Anah, learned respondent's counsel, does not accept the contention that Exhibits "F", "G" and "H" form part of the respondent's case. He argued that respondent's evidence was not challenged by the appellant who failed to defend.

I have considered all the arguments. It seems to me that the main ground of attack of the judgment of the lower Court is that it is based upon a claim the appellant considers misconceived. On the evidence of the respondent it is quite clear that he paid rents up to and including December, 1965. It is equally clear that in July, 1964, the appellant demolished three rooms, one store and one shop. The rents the respondent lost in respect of these rooms, shop and store from July, 1964, to March 1965, amounted to £91 16s 0d according to his evidence. The respondent demanded this amount from the appellant who wrote Exhibit "A" on 20th April, 1965, asking him to pay for 1965 only £76 4s 0d instead of £168 the full rent. The appellant did not deny Exhibit "A". The £91 16s 0d which the appellant agreed to pay represented the rents of three rooms at £2 8s 0d each and one store at £1 5s 0d for nine months. More losses resulted after March and up to December, 1965, bringing the total lost by the respondent to £171 0s 0d as claimed and found by the learned trial Chief Magistrate.

The big question is can the respondent claim this amount as arrears of rent. The learned Chief Magistrate was not sure whether or not the claim could be prosecuted in the form in which it was brought but considered it to be in the interest of justice to give judgment to the respondent for £171 which he found proved by him. He thought any objection to the form of the claim should have been taken as a preliminary objection. I must say I do not agree with him here. I am inclined to the appellant's counsel's view that until evidence was led, it would not be known what case he was to meet. It is not his duty to reframe the claim for the respondent. On the other hand the writ disclosed the amount claimed and the respondent's evidence explained the circumstances in which the claim arose.

The form of the action may be wrong or unusual but the substance is there and was not destroyed. The learned Chief Magistrate might have non-suited the respondent on the technical ground of form but that would only be postponing the evil day as on the evidence received, liability could not be evaded. For this reason, I do not see he was wrong in looking at the substance rather than the form and giving judgment for the respondent.

It is my view that unless the lower Court's judgment is perverse, substantially unjust or unreasonable it should not be disturbed on appeal. In substance, I do not find the learned Chief Magistrate's judgment perverse, unjust or unreasonable having regard to the facts he found.

In these circumstances, I find no good reasons for interfering with the lower Court's judgment. I therefore dismiss the appeal.

*Anah.*—I ask for 50 guineas comprehensive costs.

*Obi-Okoye.*—The respondent incurred no out-of-pocket expenses. The copy of the record of appeal was supplied by the appellant. There was only one hearing. I think no costs should be awarded.

*Court.*—There will be costs of 15 guineas to the respondent.

*Appeal dismissed.*

Enugu High Court, 30th November, 1966—E/37C/65

OPUTA, J.

THE STATE

v.

SAUNDER BOB UDOFFIA (No. 2)

*Criminal Law—Procedure—trial of an issue within the main trial—objection to admissibility of statement made by accused on the ground that it was not voluntary.*

The accused person in his evidence during an interlocutory trial alleged that he was taken to the Police Station at 4.30 p.m. on the day in question and put in the police cell. On two occasions he was taken away from the cell and was questioned. On the second occasion, a police officer wrote down the accused person's answers to the questions put to him. At the end of the exercise, the police officer asked him to sign the paper meaning the statement. The accused signed the statement in about four or five places.

The accused further alleged that he signed the statement because the police officer "told me that when I finished signing I would be released on bail".

After signing, the accused continued, he was sent back to the cell.

During cross-examination the accused admitted (a) that he could read and write; (b) that the very statement in issue was read over to him at the preliminary investigation before the Magistrate; (c) that at the time he did not raise any objection to its admissibility (d) that he did not read the statement.

It is on these facts that the defence relied to show that the statement was not voluntarily made.

*Held:*

1. What a person having knowledge about a matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight, rather than admissibility.
2. The words complained of referred only to the point of time, when the accused would be granted bail. They were adverbial in nature and did not relate to the making of the statement. The words did not amount to an inducement, but even if they did they did not move the accused to make the statement. The inducement ought to precede the statement not follow it.

*Per curiam.*—The fact that an accused person did not object to the admissibility of a statement during the preliminary investigation does not preclude him from taking that objection during the trial. But failure to object might be a factor to be considered along with other facts and circumstances in assessing the credit to be reposed in accused's assertion that he did not make the statement voluntarily.

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Bob  
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## Cases referred to:—

- R. v. Jarvis* (1867) X Cox C.C. 574, 576.  
*R. v. Wickshall* 1 Leach page 263.  
*The King v. Christie* (H.L.) 1914 A.C. 545.  
*R. v. John Thomas Straffen* (1952) 36 Cr. App. R. 135.  
*R. v. Ronald Dennis Bass* (1953) 37 Cr. App. R. 56.  
*R. v. Knight and Thayre* 20 Cox C.C. 711, 713.  
*R. v. Voisim* (1918) 13 Cr. App. R. 89.  
*Ibrahim v. The King* 1914 (Privy Council) A.C. 599, 609.  
*R. v. Patrick Joseph Cleany* (1944) 48 Cr. App. R.

*Oyudo*, Senior State Counsel for the State.  
*Akpamgbo* for the accused.

**Oputa, J.:** This case has become "famous" for the number of objections taken and the corresponding rulings on those objections. On the 18th November, 1966 at the resumed hearing of the case, an Assistant Superintendent of Police, Gabriel Anyanwu (called as the P.W. 7) who investigated the case sought to tender a statement made to him by the accused. Objection was taken to the admissibility of this document on the ground that it was not voluntarily made. Because of the nature of this objection it was necessary to conduct a trial within the main trial with a view to finding out whether the statement sought to be tendered was or was not a voluntary statement. In his evidence the P.W. 7 stated that he cautioned the accused after that caution the accused volunteered a statement in English. The P.W. 7 testified that he recorded the statement of the accused but that the accused himself read over the statement and signed it as correct. The accused in this "Interlocutory" trial gave evidence. He was taken to the station at 4.30 p.m. and put inside the police cell along with other suspects.

About 6 p.m. of the same day he was taken upstairs from the cell. There he was questioned for about an hour. After this he was sent back to the cell. At about 8.30 p.m. of the same day he was again taken upstairs to the P.W. 7 where he was again questioned and the P.W. 7 wrote down his answers to these questions. At the end of this exercise the P.W. 7 asked him to sign the paper (meaning the statement). The accused admitted he signed the statement as requested in about four or five places. The accused further alleged that he signed the statement because the P.W. 7 "told me that when I finished signing I would be released on bail". After signing, the accused continued, he was sent back to the cell.

Cross-examined the accused admitted (1) that he can read and write; (2) that that very statement was read over to him at the preliminary investigation before the Magistrate; (3) that then he raised no objection to its admissibility; (4) that he signed the words of caution because he was asked to. He did not read this statement. It is on these facts that the defence rely to show that the statement was not voluntarily made. During his address learned counsel for the accused submitted that the mere fact that the statement was a result of questions and answers makes it inadmissible. Secondly he further submitted that the suggestion that the accused would be released on bail after signing the statement was improper inducement.

Before dealing with the main objections let me first dispose of a point that arose under the cross-examination of the accused. In my view the fact that an accused person did not object to the admissibility of a statement during the preliminary investigations does not preclude him from taking that objection during the trial. But his failure to object to the statement and to say at the earliest opportunity that he did not make it voluntarily may be a factor to be considered along with other facts and circumstances in assessing the credit to be reposed in his assertion that he did not make the statement voluntarily.

On the facts it may well be that the accused was asked some questions by the P.W. 7 and his answers recorded in the statement. I saw the accused in the witness box. I watched him. He looked very intelligent and sophisticated and I do not believe that he is the type who will just sign anything without first reading it. I am fortified in this view by the evidence that when his house was searched by the P.W. 7 and a sum of £1,200 was recovered, the accused said that the money belonged to his visitor. Asked for the name and address of his visitor the accused replied "I am not prepared to tell you his name and address". I am satisfied that the accused read the statement over and read the words of caution before signing the statement as a correct recording of what he told the P.W. 7.

On the law whether or not the accused read the statement over, if there had been an inducement or threat the statement will all the same be inadmissible. But as Kelly C.B. observed in the case of *Reg. v. Jarvis* (1867) X Cox C.C. page 574 at page 576:

"I have always felt that we ought to watch jealously any encroachment on the principle that no man is bound to criminate himself and we ought to see that no one is induced either by threat or promise to say anything of a criminatory character against himself. But on the other hand I watch jealously every attempt to break in upon rules of evidence and decisions that have been laid down for reasons of public justice."

The Court will then have to hold a balance between an accused being induced or threatened to criminate himself and defence counsel breaking in on the rules of evidence and judicial decision covering cases of this nature. The issue before the Court at this stage is however the question of the admissibility of the statement alleged made by the accused. Logically the objection of learned defence counsel will go to the weight and not to the admissibility of the statement. What a person having knowledge about the matter in issue says of it is itself relevant under circumstances of hope, fear, interest or otherwise strictly goes only to its weight. As Eyre C. B. observed in the case of *Rex v. Wickshall* 1 Leach page 263:—

"A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape when it is considered as evidence of guilt that no credit ought to be given to it."

This obviously is a reference to weight rather than admissibility.

The Courts however have not kept to this rather fine distinction. The point is that where evidence though strictly admissible would have little probative value and might unfairly prejudice the jury against the accused good sense dictates that such evidence ought not to be admitted: the case of the *King v. Christie* (House of Lords) 1914 A.C. page 545 refers.

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The first objection is that the proposed statement consisted of questions and answers. The P.W. 7 did not go into the witness box to deny ever questioning the accused after cautioning him. On the facts therefore I am satisfied that the prosecution conceded this point. Questioning an accused after the usual caution is obviously against the Judges Rules. But the more interesting and substantial question is: What happens where there is an infringement of those Rules? There is a consensus of judicial opinion—that the Judges Rules are merely administrative directions for the guidance of the police authorities. The Rules are designed to secure that no advantage be taken of a prisoner or an accused person who is in custody and whom the police have already made up their mind to charge with the commission of an offence. Those Rules have no force of law in the sense that answers given by the accused person to any inquiries made in breach of those Rules are inadmissible. It is always a matter for the discretion of the trial Judge whether in spite of the breach of those Rules the answers should be admitted or not. *Reg. v. John Thomas Straffen* (1952) 36 Cr. App. R. p. 135 and *Reg. v. Ronald Dennis Bass* (1953) 37 Cr. App. R. p. 56 both refer. As was observed by Channel, J. dealing with the same point in the case of *Rex v. Knight and Thyre*: 20 Cox C.C. p. 711 at p. 713:—

“I am not aware of any distinct rule of evidence that if such improper questions are asked the answers to them are inadmissible but there is clear authority for saying that the Judge at the trial may in his discretion refuse to allow the answers to be given in evidence where that is the right course to take.”

In exercising his discretion the trial Judge has to be satisfied that the breach of the Judges Rules notwithstanding the proposed statement was made voluntarily. *R. v. Voisin* (1918) 13 Cr. App. R. p. 89 refers.

This naturally leads me on to the next objection—that the statement was induced by the promise of the P.W. 7. Quite apart from the Judges Rules it is part of the Law of the Eastern Region that no confession is admissible unless the prosecution satisfy the Court that it was voluntarily made and that it was not induced by any threat or promise by any person in authority sufficient, in the opinion of the Court, to give the accused person grounds for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature—section 28 of the Evidence Law refers. The statement in question here is not yet in evidence. I have not read it and I am therefore not in a position to decide whether it amounts to a confession or not in order to come within the purview of section 28 of the Evidence Law.

However Lord Summer in the case of *Ibrahim v. The King* (1914) (Privy Council) A.C. 599 at p. 609 observed:—

“It has long been established as a positive rule of English Criminal Law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.”

I am not in any doubt that the above principle represents what the Criminal Law of Eastern Nigeria also is.

There is no dispute in this case that the P.W. 7 is a person in authority. The objection to the statement on this ground is that after recording the statement the P.W. 7 told the accused that he would be granted bail after signing the statement. It is to be noted that the accused had already made a statement. Signing a statement and making a statement are two different things. It sometimes does happen that a police officer records a voluntary statement of an accused person and at the end of the exercise the accused may just refuse to sign it. In my view the mere fact that the statement is not signed will not militate against its admission if it is otherwise admissible. In any event oral answers to questions by investigating police officers are never signed but yet still they are admissible in proper cases. On the objection that the statement was obtained by an inducement two questions arise: First, are the words alleged used by the P.W. 7 capable of being an inducement? Secondly, were they in fact an inducement and *did the accused person feel moved by them to make his statement?* The case of *Patrick Joseph Cleary* (1944) 48 Cr. App. R. p. 120 refers.

In my view the words used referred only to the point of time when the accused would be allowed bail. They are adverbial in nature. They do not relate to the making of the statement. It would have been otherwise if the P.W. 7 said "if you make a statement admitting the offence you would be allowed bail" or words of similar import. Even if the words complained of are capable of being an inducement it would then be a question of fact whether in fact those words constituted an inducement. It is only when it is so found that the words were an inducement that the prosecution has to prove that the accused was not affected by the inducement in order to make the statement admissible. But an inducement does not operate or exist *in vacuo*. It must be an inducement which moved the accused to make his statement. As Finnermore, J. observed in the case of *Patrick Joseph Cleary* referred to above at p. 119:—

"The inducement must of course act on the mind of the person who thereupon makes a statement."

In *Cleary's* case after his father had talked to him, Cleary said: "I am alright now". Then the father put his hands on the prisoner's shoulders and said to the hearing of the police officers "Put your cards on the table. Tell them the lot. If you did not hit him they cannot hang you". After that Cleary then said "I will now make a statement".

In this case, sitting as the Jury I am satisfied that the words do not amount to an inducement and that even if they did they did not move the accused to make the statement. The inducement ought to precede the statement not follow it. I do not even believe the accused that the P.W. 7 uttered those words. I think this is an afterthought raised for the first time in this Court.

In view of all the reasons given above, I overrule defence counsel's submission and hold that the statement of the accused is admissible in evidence. I therefore admit the statement accordingly.

*Objection overruled.*

Enugu High Court, 22nd December, 1966—E/MISC/66

MBANEFO, C.J.

MABEL A. IKEDINGWU

*Caveatrix*

v.

LEVI N. OKAFOR

*Respondent*

X

*Co-Respondent*

*Husband and wife—marriage under customary law—when it is sufficient to caveat a marriage under the Act.*

The caveatrix entered a caveat to the proposed marriage of the respondent to the co-respondent on the ground that there was a subsisting marriage under their customary law between her and the respondent. The Court found as a fact that the respondent, with his people had been to the caveatrix's father, bargained for the marriage of the respondent and the caveatrix, paid part of the bride price agreed upon, and effected the customary exchange of drinks by the two families as part of the ceremonies. But the respondent subsequently changed his mind and engaged the co-respondent with whom he was to marry in the church in two days time. The respondent and the caveatrix never cohabited, and the customary ceremony of taking the caveatrix to the respondent's home had not taken place.

*Held.*—When parties contemplate marriage under customary law and part of the dowry is paid, the girl is loosely regarded as having been married to the man who paid or on whose behalf such payment was made, but until the girl according to custom is taken to the home of the man and there is cohabitation, the marriage is not complete. There is therefore no subsisting marriage between the caveatrix and the respondent and he is at liberty to marry another girl as proposed.

*Uzoegwu* for the caveatrix.

*Anyamene* for the respondent.

**Mbanefo, C.J.:** The only issue in the case is whether there is a subsisting marriage between the co-respondent and the respondent. It is not disputed that they have gone through part of the ceremony of marriage according to customary law. It is admitted in the evidence that the respondent, with his people, went and met the caveatrix's father. They bargained and agreed on £180 as bride price. Of this amount the respondent has paid £100 and there has been the customary exchange of drinks between the two families as part of the ceremonies.

The caveatrix was a teacher at the School in Alor and since then she has been under training at the Womens Training College, Enugu, as a teacher and has just completed her training. She said that she and the respondent had talked of getting married in the Church at a later date. The understanding was that the balance of the dowry would be completed before the marriage. The caveatrix said that after the payment of part of the dowry she went home with the respondent and has been living with him as husband and wife since then. I do not believe that evidence and I do not think it

does her good to give that kind of evidence merely because she wants to boost her case. A good Christian girl like her, with all her training, would not agree to start life immorally before marriage, and I think she is saying that out of anger in order to strengthen her case, and I do not accept it. I do not accept the evidence that the ceremony of *Iduno* has been performed, which means taking her to the matrimonial home. I do not think that the marriage has been completed. It is true that when you have paid some money on a girl it is loosely regarded as being married to the man but the marriage is not, by that act, consummated and until cohabitation, the marriage is not complete.

As it happened in this case, the respondent, before completing the ceremony according to Native Law and Customs, sent to the father of the caveatrix to say that he no longer wanted to continue with the marriage. According to the evidence this was done in the traditional manner through the middleman. The respondent says that he has engaged and paid dowry on another girl, the co-respondent in this case, and that they want to get married under the Marriage Ordinance in two days from now and this case has arisen because the caveatrix entered a caveat to stop the marriage. The caveat will not be sustained as I am satisfied there is no valid existing marriage between the caveatrix and the respondent. I do not accept that there is subsisting such a marriage as to prevent the caveat being removed. The respondent says that he has renounced the bride and the £100 paid as bride price. The caveatrix is free to marry again and, the caveat cannot be sustained. That being so, I order that the caveat be removed.

I know the amount of ill-feeling that will be generated by the respondent's action, but I am not here to sit in judgment over his behaviour. That is not the issue before me. The caveat is removed. The respondent can go ahead with his marriage. There will be no other costs.

*Caveat removed.*

Mabel A.  
Ikedingwu  
v.  
Levi N.  
Okafor  
and  
Others  

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Mbanefo,  
C.J.

Onitsha High Court, 19th January, 1967—O/23/66

EGBUNA, J.

JOHN EZEIGBO

*Plaintiff*

*v.*

THE LION OF AFRICA INSURANCE  
COMPANY LIMITED

*Defendants*

*Contract of Insurance—effect of arbitration clause therein—effect of incomplete payment of premium.*

*Practice and Procedure—claim for lesser amount than is proved in evidence—whether judgment can be given for the amount proved.*

The plaintiff took out a comprehensive insurance of his tanker vehicle with the defendants at their office at Port Harcourt for the year beginning 7th of May, 1964 and paid the annual premium of £560 14s 4d. At the expiry of the year, the plaintiff on 7th May, 1965 deposited £400, for the premium and received from the Port Harcourt office a cover note for thirty days while the head office was being contacted at Lagos. On 28th May, 1965 the head office of the defendant sent out a registered letter to the plaintiff at his last known address rejecting further insurance of the tanker and offered him the return of the premium deposited at Port Harcourt after deducting an amount for the thirty days cover. On the same date the Port Harcourt office sent the plaintiff a cheque for £355 7s 2d balance of the premium. Plaintiff made no reply to these letters but the Court was satisfied that he received them.

The cover note expired on 6th June, 1965. On 23rd June, 1965 the plaintiff's tanker was involved in an accident which wrecked the tanker. He did not immediately report this accident to the defendants. But on 7th July, 1965 he went to the defendants office at Onitsha and presented the cover note with the expiry date altered to read 6th July, 1965 and paid a further sum of £250 to complete the premium for the year. He then reported the accident and was given a claim form which he completed and submitted. The defendants head office in due course disowned liability. The plaintiff then brought this action claiming damages for breach of contract to indemnify him. He also claimed the refund of the balance of the £650 he deposited as premium but he claimed only the sum of £560 4s 4d on this head. The defendants did not contest this latter item and the evidence showed that what was due to him was £605 7s 2d. On the first item of the claim the defendants contended firstly that the contract contained an arbitration clause which was not invoked, secondly that the policy had been effectively cancelled before the accident, and thirdly that at all events payment of the premium was not completed on the date of the accident.

*Held:*

1. An arbitration clause does not necessarily preclude the assured from bringing an action to enforce his claim; but the insurers are entitled to apply under the clause to have the action stayed. The defendants in this case did not apply for a stay pending the arbitration, and so the Court could proceed to judgment.

2. There is no obligation on the part of the insurers to see that the insured received a notice of the cancellation of a policy (once the letter was, as provided in the policy, registered to him as per his last known address). Accordingly this policy had been cancelled before the accident. Also—
3. There can be no doubt that where the assured is not covered but there is a binding contract to issue a policy, it is an implied term of that contract that the risk shall not materially change prior to issue of the policy. But on the date of the accident the "insured" shall have fulfilled his part of the agreement, namely, payment of the appropriate premium as this is a condition precedent to liability. The plaintiff in this case who on the date of the accident had paid part but not the whole of the agreed premium could not succeed.
4. Although the Court found that the total amount ought to be returned to the plaintiff by the defendants was £605 7s 2d, the Court could only award him £560 4s 4d which was what he claimed.

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Ezigbo  
v.  
L.A.I.C.  
Ltd.  
Egbuna, J.

Cases referred to:—

- Stoneham v. Ocean Rly, etc.* (1887) 19 Q.B.D. 237 at 240.  
*Kayode v. Royal Exchange Assurance* 1955-56 W.R.N.L.R. 154.  
*Harrington v. Pearl Life* (1914) 30 T.L.R. 613.  
*London and Lancashire Life Assurance Company v. Fleming* (1897) A.C. 499.

*Mr Adimora* for the plaintiff.  
*Mr A. Obi-Okoye* for the defendants.

**Egbuna, J.:** This is a claim for general damages for breach of contract and for £2,050 for loss under Policy No. C.V. 7005/5 upon Mercedes Benz tanker EO 1539 or in the alternative the plaintiff claims the sum of £950 as the estimated cost of repair of the damaged tanker and loss of use of the said tanker from 24th June, 1965 till the wrecked tanker is repaired at £20 per day.

Another item of claim is for £560 14s 4d being the premium paid which the plaintiff is entitled to recover back from the defendant.

The defendant company is an insurance company operating throughout Nigeria. On 7th May, 1964 the plaintiff took out a comprehensive policy of Insurance No. C.V. 7005/5 on three of his Mercedes Benz tankers. It was for one year.

Later in the year a notice to renew was sent to the plaintiff by the defendant company showing £525 16s 6d as the amount of premium payable after deduction of 15 per cent. no claim bonus in respect of two of the vehicles.

On 7th May, 1965 the plaintiff paid £400 as deposit in respect of the policy for renewal and receipt was given to him.

On the same date cover notes were given to the plaintiff, No. 2837 for a period of thirty days. They were to expire on 6th June, 1965.

On 28th May, 1965 the defendant company despatched a registered letter to the plaintiff, care P.O. Box 2, Gboko, indicating that they would

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not continue with the Insurance after the expiry of the cover notes. The receipt of this was denied by the plaintiff. In this letter of 28th May, 1965 the defendant company informed the plaintiff that *pro rata* refund of premium would be made by their office in Port Harcourt by cheque in due course. The letter was written at the defendant's head office in Lagos.

On 28th June, 1965 the Port Harcourt branch of the defendant company forwarded a cheque for £355 7s 2d being *pro rata* premium due to the plaintiff as instructed by their head office in Lagos, with renewal endorsement.

On 7th August, 1965 the plaintiff went to the defendant's branch office at Onitsha and reported that one of his tankers was involved in an accident on 23rd June, 1965 taking with him the sum of £250, which he paid to the cashier as being balance on premium of Policy No. C.V. 7005/5. He collected Accident forms from the Onitsha branch office which he filled. The receipt of the claim made was acknowledged by letter dated 31st July, 1965 signed by the General Manager of defendant company in Lagos.

The defendant company refused to pay on the ground that there was no cover note at the time of the accident, and, also on the ground that the defendant had cancelled the Policy, if any, by notice duly given to the plaintiff in accordance with condition 6 of the Policy.

The case of the plaintiff was that at the material time, that is on 23rd June, 1965 when the tanker was involved in an accident he was in possession of a valid cover note and that it was after the accident that the defendant company indicated to him that they were not prepared to continue with the Insurance.

In this Court the plaintiff produced a cover note Exhibit "E". It was the old cover note issued to him on 7th May, 1965 when he paid £400 deposit (part of the premium) on the day he went for renewal of his Policy. This cover note reads as follows:—

"Mr John Ezeigbo of P.O. Box 2, Gboko Northern Region having proposed for Insurance in respect of the Motor Vehicle described in the Schedule below and having paid the sum of (£400 deposit), the risk is hereby held covered in terms of the company's usual form of Comprehensive Policy applicable thereto for a period of thirty days, that is to say from 9.10 a.m. on the above date to the same time on the thirtieth day after such date unless the cover be terminated by the company by notice in writing in which case the Insurance will thereupon cease and a proportionate part of the annual premium otherwise payable for such Insurance will be charged for the time the company has been on risk."

The cover note was dated 7th May, 1965. The plaintiff testified that when the cover note expired he returned it to the defendant's office at Port Harcourt and that he asked for his policy but was told it had not arrived and that the agent of the defendant company at Port Harcourt altered the date on the expired cover note to read 7th June, 1965 and handed it back to him, and that on 23rd June, 1965 his tanker met with an accident,

No mention of this cover note was made by the plaintiff in any paragraph of his pleading nor the alteration of the date on it. The defendant's company in this Court denied such alteration. The 3rd D.W. testified that whenever a cover note has expired a new one is always issued.

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The alteration of the date from 7th May, 1965 to 7th June, 1965 was not initialled. I am to say that from the manner in which the plaintiff gave evidence about this cover note, I do not believe him that the alteration was made by any member of the staff of the defendant's company. I accept the evidence of the 3rd D.W. that a fresh cover note is always issued in place of expired one. Counsel for the plaintiff submitted that the 3rd witness admitted that there were five employees of the defendant company at Port Harcourt and that he did not know the plaintiff. I am to add that the onus is on the plaintiff to prove that the alteration was in fact made by an employee of the defendant and the mere fact that the 3rd D.W. did not know the plaintiff does not help the plaintiff.

I find as a fact that on 23rd June, 1965 when the plaintiff's tanker was involved in an accident there was no valid cover note. It had expired and there was none in force. It was for a limited period of time that is 7th May, 1965 to 6th June, 1965. The plaintiff therefore cannot recover on this expired provisional cover note.

As I have indicated above the plaintiff did not in any paragraph of his pleadings refer or plead this cover note. He seems to have based his claim on payment of premium for renewal. I refer to paragraphs 3 and 4 of Statement of Claim which read as follows:—

3. "The period of Insurance was for one year and for any subsequent period for which the plaintiff shall pay and the company shall agree to accept a renewal premium.
4. Following the company's invitation to renew, the plaintiff on 7th May, 1965 and 7th July, 1965, paid to the company a renewal premium of £650."

There can be no doubt that where the assured is not covered, but there is a binding contract to issue a policy, it is an implied term of that contract that the risk shall not materially change prior to issue of the policy.

*Harrinton v. Pearl Life* (1914) 30 T.L.R. page 613.

By paragraph 3 of Statement of Claim which is admitted in paragraph 3 of Statement of Defence—it is averred that the plaintiff shall pay and the defendant company shall agree to accept a renewal premium. The renewal premium according to Exhibit "B" was £525 16s 6d. On the date of the alleged accident this amount was not paid but only a part payment or deposit of £400. On the date of the accident the plaintiff has not fulfilled his part of the agreement, namely, to pay the premium. As was stated in *Halsbury's* 3rd Edition page 238 (Vol. 22).

"In practice payment of the premium in advance is usually made a condition precedent to liability, not only in the case of the first premium; but also of the renewal premiums. The assured is then precluded from recovering for a loss which happens before the premium is paid."

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*London and Lancashire Life Assurance Company v. Fleming (1897) A.C. 499 P.C.*

It seems to me that the condition precedent to liability has not been fulfilled by the plaintiff namely payment of the appropriate premium. The agreement was not for part payment of the premium but for payment of the agreed premium.

Apart from non-payment of the agreed premium before the time of the accident there is also a condition (condition 6) in the Policy for renewal which reads as follows:—

“The company may cancel his policy by sending seven days notice by registered letter to the insured at his last known address and in such event will return to the insured the premium paid less the *pro rata* portion thereof for the period the policy had been in force or the policy may be cancelled at any time by the insured on seven days notice and (provided no claim has arisen during the then current period of insurance) the insured shall be entitled to a return of premium less premium at the company's short rates for the period the policy has been in force.”

It is clear from Exhibit “D” that the plaintiff paid balance of the premium after he received a letter from the defendant company informing him that they no longer wished to continue with the insurance. This letter was registered to the plaintiff. A copy of it was tendered by the defendant Exhibit “J” dated 28th May, 1965 and followed up by another letter returning part of the premium to him. I refer to Exhibit “G” dated 28th June, 1965. By sending Exhibit “J” the defendants are exercising their right under the policy which they are entitled to do. The defendant company have proved to my satisfaction that they in fact registered this letter of cancellation of policy to the plaintiff to his last known address in accordance with condition 6 of the Policy. There is nothing to show it was returned to the defendant.

There is no obligation on the part of the defendant to see that the plaintiff received that notice. I am satisfied that the plaintiff received that registered letter and I do not believe him that he did not receive it.

On 28th June, 1965 another letter was written to the plaintiff, Exhibit “G”, in which the defendant indicated the cancellation of this policy, part of which (Exhibit “G”) reads:—

“We refer to your Motor Insurance in the above connection and as advised by our Head Office, Lagos, they no longer wish to continue with this Insurance. In the circumstances, we enclose herewith Cheque, Number P.A. 017480 for £355 7s 2d being *pro rata* premium due you.”

When the plaintiff received this letter dated 28th June, 1965 refunding the premium he did nothing to find out why the Head Office did not want to continue with the policy. This points at no other inference except that the plaintiff did in fact receive the registered letter cancelling the policy, in which letter it was clearly explained why the defendant cancelled the policy—namely the old age of the vehicles. There can be no doubt that it was after the plaintiff received Exhibits “J” and “G” that he went to Onitsha to pay in the balance of the premium. At the time of paying it he knew very well that the policy has been cancelled. Why should he pay in the balance of the premium? He was at that time (that is 7th July, 1965) also in possession of

the cheque for £355 7s 2d being refund of the previous premium paid by him on 7th May, 1965. The alleged accident happened on 23rd June, 1965 but the plaintiff made no immediate report to the defendant company in writing in accordance with condition 1 of the policy. It was on 7th July, 1965 the plaintiff went to Onitsha branch office of the defendant's company to pay in £250 and to report of the accident. One wonders why the plaintiff had to go to Onitsha to pay the £250 instead of Port Harcourt where he made his first payment and was given a cover note. The clerk at Onitsha knew nothing about the cover note. He testified that if he knew the insurance had expired he would not have given the plaintiff accident forms to fill as the defendant company could not accept liability.

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I am convinced that the plaintiff knew his cover note had expired and also knew that the policy had been cancelled and knowing that if he were to go to Port Harcourt where he dealt with the renewal this would be discovered and so cleverly went to Onitsha and somehow got the clerk there to give him a form and to pay in the sum of £250 balance of premium.

I am satisfied that the defendant company have effectively exercised their powers under condition six of the policy and there was no breach of any contract on the part of the defendant. The defendant company is not liable for any breach.

The defence counsel referred to condition 8 of the policy. This condition 8 contains the arbitration clause which says that the making of an award shall be a condition precedent to any right of action against the company.

It was the contention of the defence counsel that this action is premature and not in accordance with the terms of the policy in force.

The short answer to this is to be found at page 257—Vol 22 *Halsbury's Laws of England* 3rd Edition paragraph 505 where it was stated as follows:—  
Headed:

“*Effect of arbitration clause on right of action.* An arbitration clause does not necessarily preclude the assured from bringing an action to enforce his claim. The clause may be nothing more than a collateral term of the contract between the parties by which a tribunal for determining disputes is provided (*Stonham v. Ocean: Rly and General Accident Insurance Co.* 1887) 19 Q.B.D. 237 at 240 per Matthew, J.) In this case there is a complete cause of action before the cause becomes operative and if the assured brings an action, the insurers are not released from liability: but they are entitled to apply under the clause to have the action stayed.”

This condition 8 of the agreement does not in my view prevent the parties from bringing their action in the Court but if it was not complied with the defendant can ask for a stay.

*See Kayode v. Royal Exchange Assurance*: 1955-56 W.R.N.L.R. page 154. The defendant company have not applied for a stay pending any arbitration.

The plaintiff has failed in his claim both as to liability and for general damages. However in paragraph 7 of the Statement of Claim the plaintiff

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also claimed the return of the sum of £560 14s 4d being premium paid upon policy No. C.V./7005 as money received by the defendant to the use of the plaintiff. The particulars given were as follows:—

“Premium for 1965 paid to the defendant £650. *Pro rata* premium due to the defendants from 7th May, 1965, to 7th July, 1965, in the sum of £44 12s 10d per month—£89 5s 8d.”

The defendant by letter dated 28th June, 1965 returned to the plaintiff the sum of £355 7s 2d, being the proportionate part of the premium not utilized out of the £400, the cover note being for only a period of thirty days. This the plaintiff did not accept and had to return it to the defendant before instituting his action.

I have found as a fact that this is the amount of premium the plaintiff is entitled to receive as the cover note was only for thirty days and the policy had been cancelled before the accident.

On 7th July, 1965, after the policy had been cancelled and communicated to the plaintiff (*see* Exhibit “G”) he rushed to Onitsha branch of the defendant’s company and paid in £250. This £250 it would appear had not been returned to the plaintiff. The total amount to be returned to the plaintiff, is therefore £605 7s 2d. But in view of the fact that he claimed only £560 4s 4d, basing his case that he had a cover note up to 7th July, 1965, this Court can award him only what he claimed.

There will be judgment for plaintiff for £560 4s 4d as claimed. As for costs I do not intend to award any costs to the plaintiff in respect of this amount of £560 4s 4d. From the evidence led these amounts were not disputed by the defendant’s company. There was no evidence that the plaintiff demanded them and the defendants refused to pay.

I award thirty guineas costs to the defendants as the plaintiff has failed in his claim as to damages and liability.

*Judgment for plaintiff with costs to the defendants.*

Onitsha High Court, 10th February, 1967—O/107/67

OPUTA, J.

GABRIEL C. M. ONYIYUKE

Plaintiff/Applicant

v.

THE VOICE OF THE PEOPLE LIMITED  
AND TWO OTHERS

Defendants/Respondents

*Practice and procedure—application for leave to deliver interrogatories to defendants/respondents—courts' discretionary powers to allow or refuse interrogatories.*

This is an application by the plaintiff/applicant for leave to deliver to the defendants/respondents interrogatories as to who the proprietors, publishers and editors of the newspaper called the *Voice of the People* are. Objection was taken on the ground that the interrogatories if granted would disclose the defendants' evidence.

*Held:*

- (1) Interrogatories cover the getting of an admission of anything which plaintiff has to prove on any issue which is raised between him and the defendants.
- (2) Plaintiff who alleges that he has been libelled in a newspaper has a right to obtain discovery of the name of any person concerned as printer, publisher, or proprietor of that newspaper, or any matter relative to the printing and publishing complained of.
- (3) Courts have discretion to allow or to refuse application for discoveries and in exercising this discretion the Court ought to be guided by the well established principle that the main aim of pleadings generally is to narrow down the issues and save costs.

Cases referred to:—

1. *Codd v. Delap* (1906) W.N. p. 57.
2. *Attorney-General v. Gaskill* (1882) 20, Q.B.D. p. 528.
3. *Plymouth Mutual Co-operative Society v. Traders Publishing Association* (1906) 1, K.B. at p. 416.
4. *Hillmans Airways Ltd v. Societe Anonyme D Editor Aeronautiques Internationales and Others* (1934) 2, K.B. p. 356.

*Obianyo* for the applicant.  
*Araka* for the respondents.

**Oputa, J.:** This is a motion on notice for an Order of Court granting the plaintiff/applicant leave to deliver interrogatories to the defendants/respondents. The interrogatories sought to be administered to the respondents are contained in Annexure A attached to the applicant's motion and verified by paragraph 8 of the affidavit in support of that motion. No counter-affidavit was filed by or on behalf of the respondents and no objection on oath has been filed either. On the hearing of the motion however learned counsel for the respondents opposed the motion and objected to the interrogatories being delivered. He submitted that under certain circumstances

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the opposite party can resist as of right the delivery of interrogatories. Learned counsel referred the Court to the Annual Practice 1956—Order 31 Rule 1 under the heading: "*Grounds on which discovery can be resisted*" at p. 492. He relied on ground (c). There are four grounds on which discovery can be resisted as of right. The third ground or ground (c) relied on by counsel for the respondent allows him to resist interrogatories whose aim would be to "disclose the party's evidence".

There is no dispute that the Court has a discretionary power to allow or refuse interrogatories—the case of *Codd v. Delap* (1906) W.N. P 57 refers. Order 31 rule 1 under which this application is brought also makes this clear. In exercising this discretion the Court ought to be guided by well established principles, one of which is that the main aim of pleadings generally is to narrow issues and save costs. Interrogatories generally will be allowed if they tend to narrow issues and save costs and if they are not otherwise objectionable. The plaintiff in his Statement of Claim in paragraph 2 averred that the defendants are the Proprietors, publishers, printers and Editor respectively of a daily Newspaper called "the *Voice of the People*". The defendants in paragraph 2 of their Statement of Defence only pleaded thus:

"The defendants are not in a position to admit or deny paragraph 2 of the Statement of Claim and will put the plaintiff to very strict proof."

The interrogatories sought to be delivered relate to the question—who the proprietors, printers, publishers, Editors of the Newspaper—the *Voice of the People* are. When objection is taken that an interrogatory will tend to disclose the party's evidence common sense and the plain words of the Order both dictate that the party thereto referred is the party interrogated. I do not see how the interrogatories in this case, will have that effect—of disclosing the respondents evidence. In *Attorney-General v. Gaskill* (1882) 20 Q.B.D. Cotton L.J. at page 528 held that:—

"Interrogatories are not limited to giving the plaintiff a knowledge of that which he does not already know, but include the getting of an admission of anything which he has to prove on any issue which is raised between him and the defendant."

In this case it is obvious that the plaintiff has to establish who the proprietors, printers, publishers and Editors of the *Voice of the People* are. Paragraph 2 of the Statement of Defence puts the plaintiff to very strict proof thereof. The above point has therefore been made an issue by the pleadings. In my view therefore interrogatories can legitimately be delivered to get an admission of any of these facts raised in and by the pleading from the defendants who are respondents in this application.

Also sections 10 and 11 of the Newspaper Law require that every copy of a newspaper shall contain the "true and real name of the printer and publisher" and also the "true and real name and place or residence of the Editor of that newspaper". If the defendants/respondents have not complied with the provisions of sections 10 and 11 of the Newspaper Law or if having complied with it refuse to admit who the printer or printers, publisher or publishers and Editor or Editors are, for at least the purpose of saving costs. I hold that interrogatories can rightly be administered to them to get the necessary admissions.

Also interrogatories can be delivered with the sole object of supporting the plaintiff/applicant's case as disclosed in paragraph 2 of his Statement of Claim or of impeaching or destroying the defendants/respondents' case as disclosed in paragraph 2 of their Statement of Defence. *Plymouth Mutual Co-operative Society v. Traders Publishing Association* (1906) 1 K.B. at p. 416 C.A. per Stirling L.J. refers.

In *Hillmans Airways Limited v. Societe Anonyme D.T., Editor Aeronautiques Internationales and Others* (1934) 2 K.B.D. p. 356 at p. 359 Du Parcq, J. held that the right of a plaintiff who alleges that he has been libelled in a newspaper to obtain discovery "of the name of any person concerned as printer, publisher or proprietor" of the newspaper "or of any matters relative to the printing and publishing" still existed and since the Judicature Acts that right is enforceable by the administration of interrogatories.

For all the reasons given above the respondents objection is bound to fail. I therefore overrule that objection and hereby grant the applicants leave as prayed.

*Order.*—The applicant is hereby granted leave to administer to the respondents the interrogatories annexed to the motion and marked Annexure A. The applicant is entitled to the cost of this motion (which ought not to have been opposed) and I assess the cost at £5 5s to the applicant against the respondents.

*Interrogation ordered.*

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Onitsha High Court, 27th February, 1967—O/79C/66

OPUTA, J.

THE STATE

*Complainant*

*v.*

STEPHEN OGBUEBUNU

*Accused*

*Criminal Law—stealing—no direct evidence connecting the accused with the offence—circumstantial evidence—effect of.*

The prosecution alleged that the accused person broke into the room of one of its witnesses and stole the money and ear-rings belonging to the wife of another prosecution witness. There was no direct evidence connecting the accused with the offences. There was, however, the following facts—that one of the prosecution witnesses and the accused occupied adjacent rooms separated by a wall with a fan light—neither the door nor the window of the prosecution witness's room was tampered with. The accused person was present in the premises and in his room, when the prosecution witnesses went to a morning church service during which time the offences were committed. The accused did not live with any other person in his room, nor was he visited in his room by anybody else during the period the offences were committed.

*Held.*— In the absence of any evidence that any other person occupied the room with the accused or had access to it within the material period, there is no other rational hypothesis that can otherwise explain the fact of the case, other than that the accused stole the articles.

Cases referred to:—

*R. v. Wallace* (1931) 23 Cr. App. R. 32.

*R. v. Harry* (1952) N. L.Z.L.R. 111.

*R. v. Mary Ann Noah* (1911) 6 Cr. App. R. 225.

*R. v. Omufrejczyk* (1955) 2 W.L.R. 275 (1955) 1 All E.R. 247.

*Mrs Mbanefo*, State Counsel for the State.

Accused in person.

**Oputa, J.:** There is no direct evidence that the accused broke into the room of the first P.W. and stole the money and ear-rings of his wife the second P.W. But there is evidence that the first P.W. and the accused occupied adjacent rooms separated by a wall and on that wall was a fan light with expanded metal. There is evidence that the expanded metal was ripped off. There is evidence that neither the door nor the window of the first P.W.'s house was tampered with. If entry was obtained into the room of first P.W. it must of necessity be from the broken fan light. I have evidence from first and second P.W. whom I believed that the accused was present in the premises and in his room when first and second P.W. went to the morning service on 13th March, 1966.

When they returned they did not see the accused. His door was locked from the outside and he was not in. He had travelled to his home town Akure. I have no evidence that any other person lived with the accused in his room or visited his room from the time first P.W. went to church and the time he returned to find his room broken into from the fan light. I agree

that suspicion no matter how grave cannot amount to proof. *R. v. Wallace* (1931) 23 C.A.R. page 32 refers. As Hewart, L.C.J. observed at page 35: "In criminal cases the Court is not concerned with suspicion no matter how grave or with theories no matter how ingenious". In this case, however, I am satisfied that the case has gone beyond the realm of suspicion. I do not see how else the loss of the money and ear-ring of the second P.W. can be explained except that the thief came from the fan light separating the room of the accused and that of the first P.W. In the absence of evidence that any other person occupied the room with the accused or had access to it within the material period, I hold that on no other rational hypothesis other than that the accused stole the articles lost by second P.W. can the facts of the case be otherwise explained.

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I am supported and fortified in this view by the New Zealand case of *R. v. Harry* 1952 N. L.Z. L.R. page 111: also in *R. v. Mary Ann Noah* (1911) 6 C.A.R. page 225 the Court held that the facts of death and the complicity of the accused in the crime can be deduced from circumstantial evidence. The accused was the last seen near the room of the first P.W. and his room separated from that of the first P.W. only by a fan light which was damaged. In *Reg. v. Onufrejczyk* 1955 2 W.L.R. at page 275 it was held that if the facts proved lead only to one conclusion the Jury will be at liberty to convict although the evidence is merely circumstantial. In this case I am satisfied that the facts lead only to the conclusion:— that the accused stole the articles lost by the second P.W. In the final result I find the accused guilty as charged. Accused is found guilty on counts 1 and 2 and convicted accordingly on those counts.

*Allocutus*.—I plead for leniency. I have been in custody for eleven months.

Mrs Mbanefo says that nothing is known.

*Court*: Accused is sentenced on count 1 to five years I.H.L. On count 2 to three years I.H.L. Sentences concurrent. I have taken into consideration the period of eleven months he had been in custody in this case.

*Accused found guilty.*

Onitsha High Court, 27th February, 1967—O/34C/66

OPUTA, J.

THE STATE

v.

CHARLES OKWUELU

*Arson contrary to section 443 (a) of the Criminal Code—motive—section 24 of the Criminal Code—failure to call material witness—effect.*

The accused was charged with offence of setting fire on his own house contrary to section 443 (a) of the criminal code. The accused denied the charge and alleged that he and one Ojuka had a disagreement and that Ojuka was annoyed that those present prevented him and the accused from fighting and that Ojuka boasted to the accused that the accused would never succeed in any criminal proceeding against him as he Ojuka had many influential people, and then Ojuka proceeded and set the accused's house on fire. Accused said he reported the incident to the police.

*Held:*

- (1) Motive in itself, except as provided for by section 24 of the criminal code, is not an element to be considered in assessing the criminal responsibility of an accused person, yet it will be of assistance in considering the plausibility or otherwise of the defence set up by the accused.
- (2) If there is any vital point in issue and there are witnesses whose evidence would settle the issue one way or the other such witnesses ought to be called, in the interest of Justice.
- (3) Where a witness whose evidence must have been conclusive one way or the other is not called a court of trial may refuse to convict and a Court of Appeal may quash any conviction thus obtained.

Cases referred to:—

1. *Harry Lazarus Lobell* (1957) 41, Criminal Appeal Report page 100.
2. *State v. Ngene Be Ogbodo* suit No. E/23C/66.
3. *Queen v. Sharmal Singh* (1962) 2, W.L.R. p. 238.
4. *R. v. Harris* (1927) 2, K.B. p. 587.
5. *Regina v. Edwards Underwood and Edwards* (1848) 3, Cox C.C. p. 82.
6. *R. v. George Kuree* (1941) 7, W.A.C.A. p. 175.

*Mrs Mbanefo* for the State.  
*Ofomata* for the accused.

**Oputa, J.:** The accused in this case stands charged with the offence of arson contrary to section 443 (a) of the criminal code. It is alleged in the particulars of offence that the accused on the 14th November, 1965, at Ukwueze, Odekpe, wilfully and unlawfully set fire to a dwelling house. The evidence disclosed that the house burnt was the house of the accused himself. The case for the prosecution is that the accused along with others attended a party at the house of one Nwogu Ezeafajulu Awogu who was called as the

P.W. 1. In that party the accused became drunk and unruly. He picked up a quarrel with one Ojuka. This would have led to a fight but for the intervention of those present at the party. In the evening while Ojuka was still in the house of the P.W. 1 there was a fire alarm. One Nnabuenyi Obi was alerted by the shouts of the wife of the accused. He and others rushed out to the house of the accused to control the fire. Nnabuenyi Obi was called by the prosecution as the P.W. 2. The P.W. 2 testified that he saw the accused strike a match and set fire to his own house. This was of course the second fire for the P.W. 2 did not know who set the first fire to the house of the accused. On a report by the accused himself the P.W. 3, Timothy Dilinyelu, police constable No. 11452 took up the investigations, interviewed Ojuka and obtained a statement from him. At the end of his investigation the P.W. 3 charged the accused with setting fire to his own house.

In addition to his statements, Exhibits 2 and 2A and Exhibits 3 and 3A the accused gave evidence on Oath in his own defence. The accused said he was not a mad man and had no reason to burn down his own house. His case is that following the disagreement he had with Ojuka at the house of the P.W. 1, Ojuka annoyed that those present prevented both of them fighting proceeded to his house and burnt it out of spite and hatred. The accused further stated that he held Ojuka but his people including the P.W.s 1 and 2 intervened and promised to see about the burnt down house. Instead of apologizing for what he did Ojuka boasted that the accused will never succeed in any criminal proceeding against him as he Ojuka has many influential people at Onitsha. As a result of this boast the accused reported the incident to the police.

I have given cool and careful consideration to the evidence led for the prosecution and the defence. The whole prosecution case rests on the evidence of the P.W. 2. If the P.W. 2 is believed there will be no difficulty in finding the accused guilty. The P.W. 2 at first gave the impression that he was present, saw the accused set fire to his house, saw him run into the bush, saw him come out of the bush and finally saw him set fire to the remaining portion of the roof not consumed by the fire. Under cross-examination it became apparent that the P.W. 2 did not in fact see the accused set his house on fire on the first occasion. He did not see the accused run into the bush. He accepted and repeated what he was told. During the first fire people gathered. There was a crowd. No reasons were suggested why this crowd was unable to hold the accused and prevent him setting the remaining portion of the roof on fire. The P.W. 2 whose house is adjacent to that of the accused would in his own interest have wished this to happen.

I am not satisfied that there were two fires. I am satisfied and find as a fact that there was only one fire. Was it the accused or was it Ojuka who originated this fire. The prosecution says it was the accused the defence says it was Ojuka. The onus is on the prosecution to prove that it was the accused and no one else who set the fire to his own house. There is no such onus on the defence to prove that it was Ojuka who set the house on fire. If the story of the defence only succeeds in creating a doubt in the mind of the Court then the prosecution's case cannot be held to have been proved beyond reasonable doubt:— the case of *Harry Lazarus Lobell* (1957)

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41 Criminal Appeal Report page 100 at page 104 refers. In this case no reasons are given why the accused would wish to burn his own house. In the case of *State v. Ngeve Be Ogbodo* Suit No. E/23C/66 I held that although motive itself, except as provided for by section 24 of the Criminal Code, is not an element to be considered in assessing the criminal responsibility of an accused person yet it will be of assistance in considering the plausibility or otherwise of the defence set up by the accused. In criminal cases the prosecution is not under any obligation to allege and or prove a motive but just as the presence of motive can greatly strengthen the case for the prosecution so its absence can considerably weaken it: per Lord Devlin in the *Queen v. Sharnpal Singh* (1962) 2 W.L.R. page 238 at page 244.

In this case there is a complete absence of motive. Only an abnormal man would set fire to his own house with his wife right in there. There is however no suggestion of any abnormality in the accused. The P.W.s 1 and 2 testified that the accused was drunk at the party but it was never suggested, and it is better it were not, that normally when people are drunk they set fire to their houses. But from the evidence the accused walked home unaided, he complained that it was Ojuko who burnt his house. I am not satisfied and I do not believe the P.W.s 1 and 2 that the accused was so drunk that he did not know what he was doing. Also the star witness for the prosecution the P.W. 2 was challenged by the defence as not being completely impartial. It was not disputed that he was related to Ojuko. Interest arising from the fact of relationship detracts proportionately from the credit of a witness—2 Hale 276. The credibility of a witness depends to some considerable extent on his knowledge of the facts to which he testifies. Having found as a fact that there was only one fire I am satisfied that the P.W. 2 gathered his knowledge about this burning from what his children told him. I am satisfied that he did not see how the fire started. He was alerted by the spreading smoke and the shouts of the wife of the accused. He could not possibly have known who set the house of the accused on fire. If the evidence of the P.W. 2 is discounted then the bottom is knocked off the case for the prosecution.

The only outstanding question to consider is the failure of the prosecution to call Ojuko in spite of an order of court that he be called. In this case it was the accused himself who made a report to the police accusing Ojuko of burning down his house. From the word go the prosecution knew what the case of the accused was. On the issue whether it was Ojuko or the accused who committed the arson a jury would have liked to see two of them in the witness box watch their demeanour and assess who having regard to his behaviour in the witness box and the surrounding circumstances ought to be believed. I hold that Ojuko in this case was a relevant and material witness. In the case of *R. v. Harris* (1927) 2 K.B. page 587 Lord Hewart stated as follows:—

“In criminal cases the prosecution is bound to call all material witnesses before the Court even though they give inconsistent accounts in order that the whole of the facts may be before the jury.”

This of course does not mean that a whole host of witnesses must be called on the same point. But it does mean that if there is any vital point in

issue and there are witnesses whose evidence would settle the issue one way or the other such witnesses ought to be called. The overriding consideration should be to see that justice is done. Eric, J. in *Reg. v. Edwards Underwood and Edwards* (1848) 3 Cox C.C. page 82 at page 83 described counsel for the prosecution as a Minister of Public Justice and he is in the interest of justice bound to lay such facts before the jury as he thinks the interest of justice demands. The trial court also has a discretion to call witnesses. The trial judge may himself call a witness in the interest of justice especially when by so doing he will be in a better position to ascertain the real truth and resolve any issue in controversy and be in a better position to accept and believe either the prosecution story or the defence. Conscious of this duty and because on reading the depositions and considering all the circumstances of this case it appears as though the alleged boast of Ojuko—that he has many influential persons in Onitsha and that he can commit any offence including arson with impunity—will after all materialize, I ordered that Ojuko be brought before the Court to testify. He has not been brought. The name of Ojuko was not mentioned *ex improviso*. The fact that the accused alleged that Ojuko was the one who burnt his house was known to the police before the investigation even started. It was necessary therefore for the prosecution to establish in this case that it was the accused and not Ojuko who burnt the house. I have the evidence of the accused on oath on this issue. I have not seen Ojuko in spite of a court order. There is nothing, no credible evidence, I am being asked to prefer to the accused's sworn evidence on this point. I have already dealt with the evidence of the first P.W. and second P.W. none of them was present when the fire started and none of them can give credible evidence as to who started the fire. From the totality of the evidence led I am not satisfied that the prosecution has established beyond reasonable doubt that it was the accused and no other who set fire to his own house. It is settled law that the prosecution has a discretion as to what witnesses to call. But where a witness whose evidence must have been conclusive one way or the other is not called a court of trial may refuse to convict and a Court of Appeal may quash any conviction thus obtained: *R. v. George Kuree* (1941) 7 W.A.C.A. page 175 refers.

For all the reasons given above the prosecution in this case has failed. The accused is entitled to an acquittal. He is accordingly acquitted and discharged.

*Order:* Accused acquitted and discharged.

2. Ojuko should be arrested and charged.

*Accused acquitted.*

The State  
vs.  
Charles  
Okwuelu  
Oputa, J.

Onitsha High Court, 6th March, 1967—O/65C/1967

OPUTA, J.

THE STATE

v.

1. EDWIN CHILOZIE
2. CHRISTOPHER UYAMADU
3. FIDELIS ANIEMEKA
4. KACHIFULU ORAEKI

*Criminal Law—breaking into building and committing felony—Criminal Code s.413 (a)—stealing—Criminal Code s.390—no case submission and resting on it by defence.*

The accused persons were charged on a count of breaking into a building and committing felony therein contrary to section 413 (a) of the Criminal Code and another count of stealing contrary to section 390 of the Criminal Code. The case for the prosecution was that the first prosecution witness, one Cecilia Okafor, engaged the accused persons who were carpenters to roof her house. On the 26th of February, 1966 she bought eight bundles of corrugated iron sheets and one bundle of roofing ridges and had them packed into a store at No. 41 Okosi Street, Onitsha. The accused persons knew of the purchase and the store into which the said materials were packed. On the 27th of February, 1966 the first prosecution witness was roused from sleep by a strange noise around the vicinity of the store. On coming out with one Fidelis Aniogu and Victor Okezue she noticed that the store had been broken into and five out of the eight bundles of the corrugated iron sheets removed. She heard the sound of a lorry moving off and, accompanied by Fidelis Aniogu, she went out to look for the thieves. Hearing some footsteps from a nearby bush she ordered Fidelis to give chase but no one was caught. She and the two boys followed some alleged footprints to No. 7 Ugwunobankpa Street where she alleged she saw the accused persons panting. She raised alarm and telephoned the police. One corporal Peter Ejimonu eventually arrived at No. 7 Ugwunobankpa Street and saw second, third and fourth accused persons lying down at the corridor sleeping. The first accused sleeping in the room opened the door when the police tapped at the door. They were all taken to police station and after investigation were charged with housebreaking and stealing. The accused persons in their respective statements to the police denied the charges against them.

At the close of the case for the prosecution learned counsel for the defence submitted that no case has been made against the accused persons and indicated that he was resting on his submission. He relied on the *Practice Direction* reported in (1962) W.L.R. 227. Replying, the prosecution stated that they relied on circumstantial evidence to prove their case against the accused persons.

*Held:*

1. On a submission of no case, the defence counsel is not allowed to address on issues relating to credibility of witnesses for the prosecution and on the weight to be attached to the evidence

led. Where, however, the defence rests on its submission, it adopts by so doing the case for the prosecution as its own and the defence counsel is at liberty to address on issues of fact, credibility of the witnesses and on the weight to be attached to the evidence before the Court.

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Oputa, J.

2. To convict on circumstantial evidence, such evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than that of guilt of an accused can the facts be accounted for.
3. The prosecution has not discharged the heavy onus cast on it as to the guilt of the accused persons.

Cases and material referred to:—

*Practice Direction* (1962) 1 W.L.R. 227.

*R. v. Wallace* 23 Cr. App. R. 32.

*Miller v. Minister of Pensions* (1947) 2 All E.R. 373.

*R. v. Harry* (1952) N.Z.L.R. 111.

*Mrs Mbanefo State Counsel* for the State.

*Chinwuba* for the accused.

**Oputa, J.:** The four accused persons were charged and tried on an information containing one count of breaking into a building and omitting felony therein contrary to section 413 (a) of the Criminal Code and another count of stealing contrary to section 390 of the Criminal Code. The prosecution called six witnesses and tendered seven exhibits. It is the case for the prosecution that Cecilia Okafor called as the first P.W. engaged all four accused persons who are carpenters to roof her house under construction. On the 26th February, 1966 the first P.W. bought eight bundles of corrugated iron sheets and one bundle of roofing r dges. These materials were transported by truck pushers and packed inside a small store in the premises of the first P.W. at No. 41 Okosi Road. The accused persons knew of the purchase of these materials and knew they were kept in the store. In the early hours of the morning of the 27th February, 1966 the first P.W. was roused from her sleep by strange noises round the vicinity of the store. On coming out with one Fidelis Anioigu whose deposition was tendered as Exhibit 1 and Victor Okezue called as the sixth P.W. the first P.W. noticed that her store had been broken into and five out of the eight bundles of the corrugated iron sheets she packed in there the previous day had disappeared. The first P.W. heard the sound of a lorry moving off and accompanied by sixth P.W. and Fidelis Anioigu she went out to look for the thieves. She saw no one. The first P.W. heard some footsteps from a nearby bush. She ordered the sixth P.W. and Fidelis Anioigu to give chase. This they did but no one was caught.

The prosecution then alleges that the first P.W. and the two boys with her followed the alleged footsteps and ended up in a house at No. 7 Ugwu-nobankpa Road where the four accused persons were seen panting. The first P.W. raised an alarm and sent for the police by telephone. In response to this telephone message one Corporal Peter Ejimonu called as the fifth P.W. proceeded first to No. 41 Okosi Street and was later taken to No. 7

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Ugwunobankpa Street by the first P.W. The fifth P.W. saw the second, third and fourth accused persons lying down at the corridor sleeping. The room was locked and fifth P.W. tapped at the door and the first accused opened the door. The four accused persons were then taken to the Police Station probably on the suspicion that they committed the breaking and stealing alleged by the first P.W. At the station the fifth P.W. handed all four accused persons to another officer, Corporal Joseph Ekulume called as the 4th P.W. who investigated the case and charged the accused persons with breaking and stealing. In their statements all four accused denied the charges preferred against them. The statements were tendered as Exhibits 2, 3, 4 and 5 respectively. This is a short summary of the case presented by the prosecution against the accused persons.

At the close of the case for the prosecution learned counsel for the four accused persons submitted that no case has been made out for any of the accused persons to answer and relied on the Practice Direction by Lord Parker, L.C.J. a practice direction dated 9th February 1962 and reported in (1962) 1 W.L.R. 227. Learned counsel indicated that he was resting on his submission and was not putting any of the accused to his defence. Mr Chinwuba pointed out a series of material contractions in the story of the prosecution and submitted that no reasonable jury could on the evidence led in this case convict any of the accused persons. Mrs Mbanefo for the State in a reply which lacked, and quite understandably lacked, any enthusiasm or force stated that the prosecution was relying on circumstantial evidence.

I have considered the evidence and the various points raised in the addresses. It is true that on a submission of no case counsel is not allowed to address on issues relating to credibility and weight but where counsel rests on his submission he in a way adopts the prosecution's case as his case. An accused if unrepresented has a discretion under section 287 (1) (a) (iii) of the Criminal Procedure Law to say nothing, if he so desires, in answer to whatever case the prosecution has presented against him. In that case the Court has a duty to consider the evidence, look at the facts, consider issues of the credibility of prosecution witnesses and the weight to be attached to the evidence led. I do not see why an accused should lose this discretion of saying nothing in answer to the prosecution's case if he is represented by counsel. When counsel rests on his submission of no case he virtually asks his client to say nothing in answer to the prosecution's case. In such a case counsel is at liberty to address on issues of fact, on issues of belief or disbelief of witnesses who testified and on issues of the weight to be attached to the evidence thus led.

There is not a shred or scintilla let alone a modicum of direct evidence connecting the accused persons with the offences of breaking and stealing charged in the two counts of the information.

Under section 148 (a) of the Evidence Law this Court can presume that the accused persons were either the thieves or the receivers with guilty knowledge if they were found in possession of any of the bundles of corrugated iron sheet stolen from the store of the first P.W. But that is not the case for the prosecution. The accused persons were not found in possession of any corrugated iron sheets stolen from the first P.W. The only evidence I am being asked to go by and on which I am asked to convict the accused persons

is the evidence that when the first P.W., the sixth P.W. and Fidelis Aniogu came outside the gate of their house at No. 41 Okosi Road the first P.W. saw some figures whom she did not identify as any of the accused persons or even as human beings; that she asked the sixth P.W. and Fidelis Aniogu to give chase; that this was done but no one was caught. It is very difficult to place in perspective the further evidence of the first P.W. that she heard footsteps and that following these footsteps she and the two boys with her landed in the house of the accused persons where they were met panting for breath. If the people she alleged she saw earlier and who were chased ran away it is not clear from where the alleged footsteps came. Furthermore there is no evidence that the footsteps the first P.W. heard were the footsteps of the accused persons.

The only evidence against the accused persons is thus the shaky evidence of the first P.W. that she saw the accused persons in one room panting for breath.

The fifth P.W. an independent and impartial witness saw second, third, and fourth accused persons sleeping on the corridor of their house. The door of the first accused person was closed and he was obviously also asleep.

He was roused from his sleep by the fifth P.W. I do not believe the first P.W. that she saw any of the accused persons panting for breath. There is no evidence that the first P.W. and her boys chased the accused persons into their room. The first P.W. made a statement to the police at the earliest opportunity—Exhibit 6. In that statement she said she suspected the accused persons. She had or might have had some reasons for suspicion. After all the accused persons knew that the corrugated iron sheets were in the store, they knew the geography of the premises. But between the time she made exhibit 6 and the time she appeared in court for the preliminary enquiry before the Magistrate the first P.W. convinced herself that the accused persons stole her bundles of zinc. No one quarrels with first P.W. for doing this. In this Court she however has the onerous duty of convincing not herself but the Court that it was the accused and no others who stole her bundles of zinc.

On the facts I am satisfied that the store of the first P.W. was broken into and that five bundles of zinc were stolen therefrom; that the first P.W. and her boys did not see or catch any of the thieves; that the first P.W. went to the house of the first accused and reported to him that thieves broke into her store and stole therefrom; that the first P.W. suspected the first accused and his boys as being the thieves. In criminal cases the Court is not concerned with suspicion however grave nor with theories however ingenious *R. v. Wallace* 23 Cr. App. R. 32 refers. What is required is proof beyond reasonable doubt by evidence which must reach such a high degree of probability that what is left is only a remote possibility in favour of the accused:—the case of *Miller v. Minister of Pensions* (1947) 2 All E.R. page 373 refers. I see no such evidence in this case. This high standard of proof is required whether the evidence tendered in support of the charge be direct or circumstantial. The learned State Counsel conceded that all the evidence she was relying upon was circumstantial. To convict that circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than the guilt of the accused can the facts be accounted for;— The New Zealand case of *R. v. Horry* (1952) N.Z.L.R.

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page 111 refers. Sitting as Judge and jury in this case I am very far from being satisfied that an inference of the guilt of the accused persons on the two counts of the information is the only inference the facts and circumstances of this case can allow. I am not satisfied that the prosecution has discharged the heavy onus cast on it in this case. In the circumstances all the four accused persons are each entitled to an acquittal and I acquit and discharge each and every one of them accordingly on all the two counts of the information.

*Order:* Each accused acquitted and discharged on each count.

*Accused persons acquitted and discharged.*

Owerri High Court, 10th March, 1967—HOW/46/66

NKEMENA, J.

EASTERN NIGERIA DEVELOPMENT  
CORPORATION

*Plaintiff*

v.

1. FELIX DURUNNA }  
2. STEPHEN OZUZU }

*Defendants*

*Practice and Procedure—affidavit attached to Notice of intention to defend a suit commenced in an undefended list discloses no defence—but plaintiffs affidavit appears to suggest that the interest claimed is excessive—whether the case may be transferred to the general cause list—O.3 rule 11.*

The plaintiffs filed the suit in the undefended list for a liquidated amount based on an agreement between the parties copy of which was exhibited to their affidavit. From the wording of the agreement it appeared that the interest claimed by the plaintiffs was more than their entitlement. Nevertheless the affidavit of the defendants in support of their notice of intention to defend the suit, except praying the plaintiffs to accept a lesser amount in full settlement of the claim, did not disclose any defence whatsoever to the claim. The issue was whether the Court should enter the suit in the general cause list for hearing.

*Held:*

1. There being no defence disclosed by the affidavit of the defendants, the suit should be treated as undefended and should not be placed on the general cause list; but—
2. As the interest claimed seems to be more than what the plaintiffs are entitled to in view of the indenture exhibited to their affidavit, court would hear argument on the interest claimed.

*A. Obi-Okoye* for the plaintiffs.

*Njoku and Ugoagwu* for the defendants.

**Nkemena, J.:** The plaintiff's claim against the defendants was for the sum of £2,149 9s 6d. The claim was accompanied by an affidavit, and by court's leave the case was placed on the 'undefended list' pursuant to the provisions of Order III rule 9 of the High Court Rules.

The defendants filed "a notice of intention to defend together with an affidavit".

The suit has not been entered in the general cause list for hearing on the objection by the learned counsel for the plaintiffs that no defence was disclosed in the defendants' affidavit as required by rule 11 of Order III of the High Court Rules. He argued that since no defence was disclosed judgment should be entered for the plaintiff.

The learned counsel for the defendants referred me to paragraphs 14 and 15 of their affidavit which read as follows:—

"14. That I am not in a position to pay the sum of £2,149 9s 6d which the plaintiffs claim from me.

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 Durunna  
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 Stephen  
 Ozuzu  
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15. That I therefore pray the plaintiffs to accept from me the sum of £1,652 8s 9d in settlement of their claim."

He argued that the only meaning that could be gathered from these averments was that the defendants admitted owing the sum of £1,652 8s 9d.

Having heard the arguments of counsel it is clear from the affidavit filed by the defendants that they did not aver that they have a good defence, nor did they set out the grounds of their defence as required by rule 11 of Order III of the High Court Rules.

Paragraph 3 of the defendants' affidavit reads—

"That I have read the plaintiff's affidavit and I agree that paragraphs 2-8 thereof are substantially correct."

By making this admission the defendants have unequivocally admitted the claim based on the indenture and the guarantee referred to in paragraphs 6 and 7 of the plaintiff's affidavit respectively.

Paragraphs 14 and 15 of the defendants' affidavit merely state that even though the claim is for £2,149 9s 6d the defendants are begging the plaintiffs to accept a lesser sum of £1,652 8s 9d in settlement of the larger amount. I cannot read into these paragraphs a different meaning other than the ordinary meanings conveyed by the words used by the defendants themselves. If the defendants felt they were not liable for the larger amount why could they not have so stated.

I am satisfied that the defendants' affidavit disclosed no defence whatsoever. That being the case I refuse to enter the suit on the general cause list.

I shall therefore treat it as a suit in the undefended list and proceed to judgment pursuant to Order III rule 13 of the High Court Rules.

However, I have looked closely at the Indenture Annexure A, and it does seem that the interest being claimed is more than what the plaintiffs are entitled to. There is no dispute as to the capital amount of £1,500.

I shall hear argument on the interest claimed.

Mr Obi-Okoye for plaintiffs says that he agrees that the capital and interest should be £1,775. Mr Ugoagwu says the defendants will consent to judgment being entered for that amount. He says the defendants have paid £550 16s 3d leaving a balance of £1,224 3s 9d. Mr Obi-Okoye agrees.

*Judgment.*—There will therefore be judgment for the plaintiffs against the defendants jointly and severally in the sum of £1,224 3s 9d.

Mr Obi-Okoye asks for inclusive costs of eighty guineas. Mr Ugoagwu offers sixty guineas.

I assess the costs at seventy guineas (out of pocket expenses included).

*Judgment for plaintiffs.*

Onitsha High Court, 10th March, 1967—O/189/66

OPUTA, J.

MRS CAROLINE OKAFOR

*Plaintiff/Applicant*

v.

MADAM NGOZI EZEIGBO AND ANOTHER *Defendants/Respondent*

*Practice and Procedure—Motion on Notice—joinder of parties—Fatal Accidents Law—Motor Vehicles (Third Party Insurance) Ordinance s.10 (1)—application by plaintiff to join an Insurance Company, as a defendant.*

The plaintiff/applicant sought to join an Insurance Company as a defendant—The plaintiff/applicant relied on section 10 (1) of the Motor Vehicles (Third Party Insurance) Ordinance, and on a Judicial opinion expressed by the Supreme Court in *Sun Insurance Office Ltd. v. Victoria Ojemuyiwa* (1965) N.M.L.R. Page 451 at page 454.

*Held:*

- (1) The Insurance Company at common Law is not a party to the dispute, nor has the plaintiff under the statute any cause of action against the Insurance Company, so as to proceed against it and the other defendants jointly and severally, for negligence.
- (2) Since there is no cause of action to sue the Insurance Company directly before the issue of negligence is determined and judgment entered in favour of the plaintiff then no cause of action exists to join the Insurance Company in a suit claiming damages for negligence at the instance of the plaintiff.

Cases referred to:—

1. *Sun Insurance Office Ltd. v. Victoria Ojemuyiwa* (1965) N.M.L.R. page 461 at page 454.
2. *Carpenter v. Ebbelwhite* (1938) 4, All E.R. page 41.
3. *Joel Ojo and Others v. Gabriel Awe and the Lion of Africa Insurance Co. Ltd.* (1962) W.N.L.R. page 254.
4. *Raleigh v. Goschen* (1898) 1 Ch. P. 81.
5. *Moser v. Marsden* (1892) 1 Ch. 487.

*Egemonye* for the plaintiff/applicant.

*Umeziniwa* for the New Africa Insurance Co. Ltd.

**Oputa, J.:** This is a Motion on Notice under Order IV Rule 5 of the High Court Rules to join the New African Insurance Company Limited of No. 46 New Market Road, Onitsha as a defendant in suit No. O/189/66. This motion was brought not by the defendants but by the plaintiff. The plaintiff/applicant relied on section 10 (1) of the Motor Vehicles (Third Party Insurance) Ordinance, and on a judicial opinion expressed by the Supreme Court in the case of *Sun Insurance Office Limited v. Victoria Ojemuyiwa* 7965 N.M.L.R. page 451 at page 454 to wit:—

“The remaining reflection is that as in Nigeria civil cases are tried by a judge alone, there is no need to conduct these fatal accident cases in a world of make believe. At present it is usual to name the owner

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of the Vehicle and his driver as the defendants to a suit claiming damages and to leave the insurers, who control the defence, formally out of the suit; we would ask the Solicitors of the parties to consider whether in these third party insurance cases it would not be better to have the insurers also joined."

The applicant also relied on an unreported ruling of *Balonwu, J.* in *Suit No. A/13/66:— Christian Echefu v. Emmanuel Obi and Another*. The main argument of the applicant is that the New African Insurance Company Limited is "a person who may be likely to be affected by the result" of this suit under Order IV Rule 5 (1) and as such can be joined as a co-defendant.

Replying Mr Umezinwa for the Insurance Company submitted that it is up to the Legislature to amend the existing laws and make Insurance Companies parties in all cases arising out of an accident involving a vehicle that has been insured against third party risks, and until that is done parties to an action ought to be parties to the dispute which gave rise to the action. The present suit is obviously founded on negligence. The dispute is between the plaintiff and those whose negligence injured her. Counsel further submitted that the Fatal Accidents Law has only conferred capacity to sue on the dependants but has made no change to the position that the action is founded on the common law tort of negligence. It is further submitted that section 10 (1) of the Motor Vehicles (Third Party Insurance) Ordinance becomes operative only after judgment. Counsel relied on the case of *Carpenter v. Ebbelwhite* (1938) 4 All E.R. page 41 and asked the Court to dismiss this motion.

Order 4 of the High Court Rules deals with *Parties to an Action*. The High Court Rules are rules of procedure only. By section 84 (1) (a) of the High Court Law the High Court Rules Committee are authorized to make rules "regulating the pleading practice and procedure of the Court in respect of civil matters". Rules of Court only regulate the exercise of an existing jurisdiction or the enforcement of an existing right they do not by themselves alone confer any new jurisdiction or new rights. Parties to an action become parties at common law or are made parties by the requirements of a statutory provision. A good example is section 3 of the Fatal Accidents Law which conferred a right of action on the plaintiff in the present suit, a right she did not have at common law. If there exists a right of action either at common law or by Statute then the provisions of the High Court Rules may be invoked to join all those having such a right as plaintiffs. If also there exists a right of action against some persons either at common law or by Statute those persons may all be made defendants and if they are not so made the provisions of Order IV may be invoked to join those who should have been made parties as co-defendants. It is in this spirit that I think Order IV of the High Court Rules should be read and interpreted.

Under Order IV Rule 5 of the High Court Rules the Court has a discretion, "if it appears to it . . . that all persons who may be likely to be affected by the result have not been made parties" to "direct that such persons shall be made either plaintiffs or defendants". This discretion like any other discretion must be exercised judicially and in accordance with established legal principles. One of such principles is that parties to an action become such either at common law or by Statute. Under Order IV

Rule 5 of the High Court Rules the Court can direct that any other member of the immediate family of the deceased in this case should join the present plaintiff. The Court would have authority to do this under section 4 of the Fatal Accidents Law. The cause of action in the present case is negligence. At common law the plaintiff in such an action should be the person who suffered a legal injury due to that negligence and the defendant or defendants the person or persons whose default to exercise a duty of care, in other words whose negligence caused the injury suffered by the plaintiff. It is obvious that at common law the New African Insurance Company cannot be made a co-defendant in this suit. The Insurance Company at common law is not a party to this dispute. It now remains to consider whether by Statute the Insurance Company can be made a party to the present action at the instance of that plaintiff. If the Insurance Company can be joined at this stage, at the instance of the plaintiff, it does seem to mean that at this stage the plaintiff has a *cause of action* against the Insurance Company or that the plaintiff can proceed jointly or severally against the Insurance Company and the other defendants.

In the case of *Joel Ojo and Others v. Gabriel Awe and The Lion of African Insurance Company Limited* 1962 W.N.L.R. p. 254, the plaintiff first proceeded against the Insurance Company claiming ₦2,500 damages for a fatal accident in which one Moradeke Agbeke was killed. Before the plaintiff joined the 1st defendant the owner of the vehicle the action against him was statute barred. Somolu, J. held in that case that the original summons filed against the Insurance Company on the 7th October, 1961 did not create any cause of action against the Insurance Company because as he put it at p. 256 "in reality of law the action was as good as dead from its inception on 7th October, 1961". And referring to the joinder of the 1st defendant by an Order of 11th December, 1961 the learned Judge observed: "It was futile to tag something to nothing. What has no life of its own cannot purport to sustain something and give it life. *Ex nihilo nihili fit.*" I fully agree. If there is no cause of action to sue the Insurance Company directly, before the issue of negligence is determined and judgment entered in favour of the plaintiff, I hold that none exists to join the Insurance Company in a suit claiming damages for negligence at the instance of the plaintiff. If the joinder is allowed it will then mean that the Insurance Company is being sued by the plaintiff either jointly or severally with the other defendants. And this the plaintiff cannot do unless she has a cause of action against the Insurance Company.

The only relevant Statute and the one relied on by the plaintiff/applicant is the Motor Vehicles (Third Party Insurance) Ordinance. That ordinance makes the insurer liable "to pay to the person entitled to the benefit of *such judgment* any sum payable thereunder in respect of the liability". It is obvious that by section 10 (1) of the Motor Vehicles (Third Party Insurance) Ordinance the Insurance Company becomes liable to the plaintiff only after the liability of the actual tortfeasors (the defendants), at common law had been determined and a judgment given against them. The plaintiff can there and then only enforce that judgment against the Insurance Company. After the said judgment the plaintiff acquires a cause of action against the Insurance Company but not before. The Court cannot by a joinder or simply by acting under a Rule of practice create a cause of action where none existed either at common law or by Statute.

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N.  
Ezeigbo  
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Another  

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I agree however with learned counsel for the plaintiff that "the Insurance Company can rightly be described as a person who may be likely to be affected by the result" of the present suit. The Insurance Company may be affected subject of course to the provisions of subsections 2, 3 and 4 of section 10 of the Motor Vehicles (Third Party Insurance) Ordinance. The liability of the Insurance Company to satisfy any judgment obtained by the plaintiff in this case is not absolute. It is subject to all the provisos and subsections of section 10 of the Motor Vehicle (Third Party Insurance) Ordinance. But what is important is that the Motor Vehicles (Third Party Insurance) Ordinance confers on the plaintiff a new cause of action against the Insurance Company distinct from the original cause of action against the 1st and 2nd defendants which sounded in negligence.

In *Releigh v. Goschen* (1898) 1 Ch. 81 it was held that where the addition of a new defendant will have the effect of adding a new cause of action the order to join may be refused. On this ground the present application can be resisted.

Also the interest of the Insurance Company in this suit is not direct. It is indirect. It stems out of the possibility of the Company being called upon to satisfy a judgment obtained against the actual tortfeasors. In *Moser v. Marsden* (1892) 1 Ch. 487 it was held that a person indirectly interested in the suit will not be joined as co-defendant. This also militates against the present application.

I have read the ruling of my learned brother Balonwu, J. in *Suit A/13/66 Christian Echefu v. Emmanuel Obi and Another*. It does not seem as though the case of *Carpenter v. Ebbelwhite* was brought to the notice of the learned Judge. In *Carpenter's* case the question involved was exactly the same as that posed by the present application—Whether in an action for damages for personal injuries caused by a motor vehicle the plaintiff can add the defendant's Insurance Company as a defendant. The unanimous opinion of the three Judges who heard the application to strike out the portion of the Statement of Claim referring to the Insurance Company was that the company could not properly be made a defendant.

In that case Greer, L.J. held at page 44:—

"It seems to me that no dispute has arisen between the Insurance Company and the defendant Ebbelwhite nor can any dispute arise until after the disposal of the action as between the plaintiff and Ebbelwhite . . . It has never been determined that there can be a claim for a declaration where no dispute has arisen between the plaintiff and the defendant and it would not have made any difference if this claim had been made in a separate action. It would still have been frivolous and vexatious—at any rate, vexatious—to bring an action before the dispute has arisen."

I will, with respect, prefer to be guided by the reasoning in the case of *Carpenter v. Ebbelwhite* referred to above.

I will now deal with the observation of the Supreme Court in the case of *Sun-Insurance Office v. Victoria Ojemuyiwa*. The effective part of their observation is:—

"We would ask the Solicitors of the parties to consider whether in these third party insurance cases it would not be better to have the Insurance Company joined."

It is desirable that in all these insurance cases all the issues be resolved in one action to avoid a multiplicity of actions and to avoid the rather awkward situation in which the Insurance Company found itself in the case of *Sun-Insurance Office Limited* referred to above. It is well known that the Insurance Companies in view of section 10 (1) of the Motor Vehicle (Third Party Insurance) Ordinance really conduct these cases from behind the scenes. The observation of the Supreme Court is to the effect that the Insurance Companies be made actors on the open stage. This will no doubt save time and expenses. The Fatal Accidents Law may be amended to give the plaintiff the right to proceed against both the actual tortfeasors and the Insurance Company in the same suit. In the present state of the law I am not satisfied that the plaintiff can sue the Insurance Company along with the other defendants whose negligence is the initial dispute. If the plaintiff can sue the Insurance Company direct I see no reason for suing the actual defendants first and then applying later to have the Insurance Company joined. But the Supreme Court's observation in *Sun-Insurance Office* case used the words "have the Insurance Company joined". The defendant in an action of this nature can apply "to have the Insurance Company joined". Under section 6 (3) of the Motor Vehicle (Third Party Insurance) Ordinance "a person issuing a policy of insurance . . . shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the cases of those persons or classes of persons."

The defendants in this case can claim a right of indemnity against the Insurance Company for any sum they may be adjudged to pay the plaintiff.

Under Order IV Rule 4 "where a defendant claims contribution, indemnity or other relief over against any other persons, he may apply to have such person made a party to the suit". I am satisfied that a defendant in this type of action can apply to have the Insurance Company joined but for all the reasons given above I am not satisfied that a plaintiff can so apply.

The present application is therefore dismissed. I make no orders as to costs.

*Application dismissed.*

Mrs  
Caroline  
Okafor  
v.  
Madam  
N.  
Ezeigbo  
and Another  
Oputa, J.

Owerri High Court, 10th March, 1967—HOW/CCA 15/66

NKEMENA, J.

IMO OJI

*Plaintiff/Appellant*

v.

OKIKE OJI  
UDUAGU OJI }

*Defendants/Respondents*

*Appeal—declaration of title to land—value of land not stated—appeal from Magistrate's Court to the High Court—whether there was any right of appeal.*

The plaintiff claimed from the defendants in Ndizuogu District Court for declaration of title to some swamp lands and an injunction to restrain the defendants and their agents from further trespass on the land. The value of the land was not stated in the claim nor given in evidence. The District Court gave judgment for the plaintiff and the County Court on appeal confirmed the judgment of the District Court; but on further appeal to the Magistrate's Court the judgments of the Courts below were set aside and the appeal allowed.

On appeal to the High Court the learned counsel for the defendants/respondents raised a preliminary issue that the appeal be struck out on the ground that the leave of the High Court was not obtained pursuant to the proviso to section 61 (3) of the Customary Courts Law, *Cap. 32 Volume II*, Laws of Eastern Nigeria which provides that there shall be no right of appeal to the High Court in any civil cause or matter from any order or decision of the Magistrate's Court without the leave of the High Court when the claim thereby determined shall not be of or above the value of ten pounds. The Customary Courts Law does not provide a schedule of fees by which the value of the land in question can be determined and as the claim did not state the value of the land the Court could not determine whether the value of the land was ten pounds or less.

*Held:*

1. The onus is on the appellant to satisfy the Court that he has a right to appeal to the High Court pursuant to section 61 (3) of the Customary Courts Law.
2. It is well established law that no appeal lies unless a right of appeal is expressly conferred by Statute. In the absence of any evidence as to the value of the land, the Court is left with no alternative than to strike out the appeal.

Case followed:—*The Queen v. The Resident, Ijebu Province* 1959 W.R.N.L.R. 87 at p. 91.

*Igbudu* for plaintiff/appellant.

*Obianyo* for defendants/respondents.

**Nkemena, J.:** The plaintiff claimed in Ndizuogu District Court from the defendants—

- (1) A declaration of title over some swamp lands "which the defendants had been trespassing on since 1960 despite repeated demands".

- (2) An injunction to restrain the defendants, and their agents from further trespass on those parcels of swamp lands.

Imo Oji  
v.  
Okike Oji  
and  
Another  

---

Nkemena, J.

The District Court found for the plaintiff. The defendants appealed to Orlu County Court. The appeal was dismissed.

On further appeal to the Magistrate's Court the judgments of the Courts below were set aside and the appeal allowed.

The learned counsel for the defendants/respondents raised a preliminary point and asked that the appeal be struck out as leave to appeal to the High Court was not obtained by the plaintiff/appellant pursuant to proviso to section 61 (3) of the Customary Courts Law, *Cap. 32 Vol. II Laws of Eastern Nigeria*. I shall reproduce hereunder the provisions of subsection 3 of section 61 referred to—

- “(3) Any party aggrieved by the decision or order of a Magistrate's Court may appeal to the High Court which court shall have Appellate Jurisdiction to hear and determine such appeals:

Provided always that there shall be no right of appeal to the High Court in any civil cause or matter from any order or decision of the Magistrate's Court without the leave of the High Court when the claim thereby determined shall not be of or above the value of ten pounds.”

It does seem from the above that where a claim is for a specific sum of money the appellant will have a right of appeal if the sum is above ten pounds. On the other hand where the claim is in respect of a property other than money, or where it is in respect of a right or relief in respect of such property the value of such property must be above ten pounds for a right of appeal to be conferred on the appellant.

In either case if the claim is in respect of a sum of £10 or less, or in respect of a property the value thereof is £10, or less, there is no right of appeal without the leave of the High Court.

The schedule of fees chargeable for claims under Customary Court Law would have been of assistance had there been a graduated table of fees for assessing claims in land matters.

Part IX of the Schedule to the Customary Court Rules *Cap. 32 Vol. II* page 882 *Laws of Eastern Nigeria* gives an amount chargeable for claims to title to land. The fee chargeable is £5 for non-communal land as in the present case. It takes no cognizance of the value of the land in question in the assessment of fees. If it did the Court would have worked out the value of the land from the fees paid.

I am now left with a claim which did not state the value of the subject matter of the claim. I am not in a position to know whether the value of the land is less or more than £10. The onus is on the appellant to satisfy the Court that he has a right to appeal to this Court pursuant to section 61 (3) of the Customary Court Law.

If the claim is silent as to the value of the land the Court cannot presume that it is above the value of £10.

Imo Oji  
v.  
Okike Oji  
and  
Another  
Nkemena, J.

It is well established that no appeal lies unless a right or appeal is expressly conferred by Statute.

*The Queen v. The Resident, Ijebu Province* Part II 1959 Western Nigeria Law Report page 87 at page 91.

In the absence of any evidence as to the value of the land I shall be left with no alternative than to strike out the appeal with £5 5s.

*Appeal struck out.*

Owerri High Court, 17th March, 1967—HOW/61A/66

NKEMENA, J.

OKWARAEBIZIE OKWARANNACHUKWU

*Defendant/Appellant*

*v.*

EZEALA OKWARAJI

*Plaintiff/Respondent*

*Jurisdiction—section 18 of the Magistrate's Court Law—issue of title in a case of trespass—whether a Magistrate can continue to hear evidence after title has been raised bona fide.*

The plaintiff's claim was trespass to a piece of land. At the trial in the Magistrate's Court the defendant *bona fide* claimed title to the land but the Magistrate continued the case to a finish and found for the plaintiff. The defendant then appealed to the High Court on the ground that the Magistrate acted without jurisdiction.

*Held:*

1. A Magistrate has no original jurisdiction to entertain claims involving title to land or title to interest in land.
2. A Magistrate has original jurisdiction in trespass actions, but the moment evidence is led which puts title in issue, *bona fide*, his jurisdiction is completely ousted and the case ought to be stopped.
3. In trespass cases issue of title may arise in the following instances.
  - (a) Where the defence *bona fide* puts title in issue.
  - (b) Where the issue of title has not been determined by any Court of law and it is not clear who owns title. In such a case the issue of title must first be adjudicated upon by a court of competent jurisdiction.
  - (c) Where parties to the suit claim that they derive their title from a common source or original owner.

Cases referred to:—

*Iyatsere Igiokwe v. Chief John Nanna* 17 N.L.R. 5.  
*Adetutu Agbeke v. Oyaniru Anike*, (1960) W.N.L.R. 12.  
*Samuel Nelson v. S. Annmah and Yawa Aruna* 6 W.A.C.A. 134.  
*A. Makanjuola v. Hazan Khalil* (1962) W.N.L.R. 149.

*Mr Obioha* for defendant/appellant.

*Mr Igbudu* for plaintiff/respondent.

**Nkemena, J.:** This is an appeal against the decision of an Orlu Magistrate, dated 27th August, 1965.

The plaintiff's claim against the defendant was for £150 special and general damages for trespass. The Magistrate awarded £120 special damages and £10 general damages with 20 guineas costs against the defendant.

It is against this judgment that the defendant has come to this Court on appeal.

O.  
Okwaranna-  
chukwu  
E.  
Okwara  
Nkemena, J.

There are six grounds of appeal. Only the first ground was argued. This ground is that "*The learned trial Magistrate acted without jurisdiction*".

Section 18 of the Magistrate's Courts Law *Cap.* 82 in Vol. V Laws of Eastern Nigeria defines the civil jurisdiction of Magistrates. This includes personal actions like cases of trespass.

Proviso to section 18 of the law clearly excludes a Magistrate from having an original jurisdiction in matters involving title to land or title to interest in land unless as directed by the Governor or transferred to it pursuant to sections 35 and 58 of the Customary Courts Law.

Having come to the conclusion that a Magistrate has no original jurisdiction to entertain claims involving title to land or title to interest in land it becomes incumbent on a Magistrate, who finds in a trespass action before him that genuine issues involving title to land or title to interest in land arise, to stop the trial and non-suit the plaintiff.

A Court may have original jurisdiction to try a case but during the trial events may supervene to prevent the trial continuing. A Magistrate, *prima facie*, has original jurisdiction in trespass actions, but the moment evidence is led which puts title in issue, *bona fide*, that jurisdiction is completely ousted and the case ought to stop.

In trespass cases issue of title may arise in the following instances:—

- (1) Where the defence *bona fide* puts title in issue—  
*Iyatsere Igiokwe v. Chief John Nanna* 17 N.L.R. 5.  
*Iydetutu Agbeke v. Oyaniru Amike* 1960 W.N.L.R. 12.  
*Bolarin Bucknor v. Yumsa Ogunsasan* 1960 W.N.L.R. 113.
- (2) Where the issue of title has not been determined by any Court of law and it is not clear who owns title. Then the issue of title must first be adjudicated upon by a court having jurisdiction—  
*Samuel Nelson v. S. Ammah and Yawa Aruna* 6 W.A.C.A. 134.
- (3) Where parties to the suit claim they derive their title from a common source or original owner. In this case before trespass can be adjudicated upon there should be an investigation as to title, and a Magistrate has no such jurisdiction—  
*A. Makanjuola v. Hazan Khalil* 1962 W.N.L.R. 149.

The proceedings in the present appeal show that the action was one based on trespass. *Prima facie*, a Magistrate has jurisdiction to entertain it.

The defendant claimed the land to be his and put title in issue. The learned Magistrate in his judgment stated that issue of title was not raised *bona fide*. He gave no reasons.

I am satisfied that the issue of title was raised by the defendant *bona fide*, for the following reasons:—

- (1) The defendant's plea reads as follows "The land in question belongs to me. I did not trespass on his land".

This is the first indication that the defendant was to raise in Court issue as to title to this land.

- (2) The plaintiff in his evidence confirmed that the defendant had six years before the filing of the action asserted his right over the land by cutting iroko trees on the land. He also said that the defendant harvested palm trees, and sold an akpula tree.
- (3) The plaintiff has further stated in his evidence that the "Amalas" (Elders) attempted to settle the dispute over this land between him and the defendant, but that the defendant refused to accept the terms of the settlement.
- (4) Finally, the defendant has in his evidence categorically and unequivocally stated that the land was his, and he gave evidence of acts of ownership.

The learned Magistrate was wrong to have come to the conclusion that the issue of title was not raised *bona fide*. The defendant had not only asserted his right over this land openly before the action was commenced, but had refused to compromise with the plaintiff when the "Amalas" went into the matter long before the plaintiff sued him. These are sufficient for the Magistrate to hold that the defendant, in raising the issue of title in Court, did so *bona fide*.

Having come to the conclusion that the issue as to title was raised *bona fide*, the learned trial Magistrate should have stopped the case and non-suited, instead of proceeding to judgment. This is so because he had no more jurisdiction to continue as in doing so he must of necessity be compelled to try the issue of title which he had no jurisdiction to do.

The appeal is allowed. The judgment of the Magistrate is set aside and in substitution I shall enter an order for a non-suit.

The plaintiff/respondent is to pay forty guineas costs to the defendant/appellant.

*Appeal allowed.*

Owerri High Court, 22nd March, 1967—HOW/60A/66

NKEMENA, J.

GABRIEL UKWUOMA

*Appellant*

*v.*

COMMISSIONER OF POLICE

*Respondent*

*Criminal Law*—section 125A (1) (b) of the Criminal Code—*mens rea* of the offence.

*Criminal Procedure*—plea of guilty to non-existing offence.

The appellant pleaded guilty and was convicted at the Owerri Chief Magistrate's Court for an offence under section 125A (1) (b) of the Criminal Code. The charge did not aver the requisite intent namely "with the intention of causing such person...". Appellant then appealed to the High Court.

*Held:*

1. An appeal will lie against conviction, where a plea of guilty had been recorded, if it appears (a) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (b) that upon the admitted facts he could not in law have been convicted of the offence charged.
2. That in the present case the charge did not contain the *mens rea* of the offence, and so the appellant pleaded guilty of a non-existent offence.

Cases referred to:—

*R. v. Forde* (1923) 2 K.B. at 403.

*Mononye v. Police* (1959) N.R.N.L.R. 152.

*Moses Okoro v. I. G. of Police*, 14 W.A.C.A. 370.

*Ejimofo* for the appellant.

*Ononiba*, State Counsel for the respondent.

**G. C. Nkemena, J.:** This is an appeal against the decision of the Owerri Chief Magistrate, dated 20th July, 1966.

The appellant was charged with an offence under section 125A (1) (b) of the Criminal Code. The appellant pleaded guilty to the charge and the learned trial Chief Magistrate convicted him and sentenced him to nine months L.H.L.

Only one ground of appeal against conviction was filed and argued. It is "That the learned Chief Magistrate erred in law in convicting the appellant in that the facts do not support the charge".

Since no evidence was led this ground of appeal should have read: "That the learned Chief Magistrate erred in law in convicting the appellant

on a non-existent offence". However, I allowed the learned counsel for the appellant to argue the point of law which arose on the face of the record of proceedings, as I think this Court can consider a point of law not made a ground of appeal.

The learned counsel argued that the *mens rea* in the offence under section 125A (1) (b) was not stated in the charge; that is, the intention of the appellant in giving the false information.

An Appeal Court will, in certain circumstances, entertain an appeal against conviction where the appellant pleaded guilty. Avery, J. in *Rex v. Forde* (1923) 2 K.B. at 403 laid down this rule—

"A plea of guilty having been recorded, this Court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it or (2) that upon the admitted facts he could not in law have been convicted of the offence charged."

The present case appears to fall within the second class of cases under the rule referred to above.

The charge as framed did not allege the intention of the appellant as the words "with the intent of" have been omitted, nor were words with similar meaning used in framing the charge. The charge therefore alleged a non-existent offence.

Brett and Mclean at page 552 paragraph 1550 under the heading interpretation has this to say on this point—

"The intention of causing an officer in the public service to act on false information in the manner prescribed in paragraphs (a) and (b) of subsection 1 of this section (meaning section 125A) is the element of *mens rea* in the offence and must be alleged in any charge under the section."

It then referred to the Northern Nigeria case of *Mononye v. Police* 1959 N.R.N.L.R. 152.

I must stress the importance of following the wording of the section creating an offence in framing a charge. Failure to allege certain ingredients of an offence in framing a charge is always fatal to the prosecution's case. If an appellant is convicted on such defective charge the Appeal Court does not hesitate to allow the appeal as the appellant has been convicted on a non-existent offence:—

*Moses Okoro v. Inspector-General of Police* 14 W.A.C.A. 370.

In the present appeal under consideration it is clear that the charge to which the appellant pleaded did not allege the *mens rea* in the offence. That being the case he pleaded guilty to a non-existent offence for reasons which I have already given. The trial was therefore a nullity.

I allow the appeal and quash the conviction and sentence under section 125A (1) (b) of the Criminal Code.

G.  
Ukwuoma  
v.  
Commis-  
sioner of  
Police  
Nkemena, J.

Section 36 (1) (f) of the High Court Law empowers me to order the appellant in this type of case to be tried by a Court of competent jurisdiction, but the section is permissive, not mandatory, on the point. I shall abstain from making such an order because the only charge before me is the one which I have held to be bad. To order a retrial on the charge, which has not been amended, amounts to bringing the appellant back to Court on a non-existent offence.

*Appeal allowed.*

Enugu High Court, 3rd April, 1967—E/102C/66

KAINE, J.

THE STATE

v.

REGINALD O. WALLACE

*Criminal Procedure—discharge of the accused at the end of a preliminary inquiry—section 325 (1) of the Criminal Procedure Law. Whether the Prosecution can file information in the High Court without the direction or consent of a Judge of the High Court—sections 340 (2) (b) and 325 (3) of the Criminal Procedure Law.*

The accused person was at a preliminary inquiry before the Chief Magistrate discharged on all the eight counts of the charge owing to a no case submission made by learned counsel for the defence. As the accused was leaving the Court premises he was rearrested by the police and taken into custody and later brought before another Magistrate on a second preliminary inquiry based on the same charges, same facts and the same witnesses. At the end of this second preliminary inquiry, the learned counsel for the defence made a no case submission which was overruled and the accused was committed for trial; in consequence whereof an information was filed in the High Court.

At the trial in the High Court the learned defence counsel raised a preliminary objection to the information before the Court on the ground that the prosecution could not file the information without the direction or consent of a Judge of the High Court under section 340 (2) (b) of the Criminal Procedure Law, and argued that the whole proceedings at the second preliminary inquiry was a nullity.

*Held:*

1. That when a Magistrate at the end of a preliminary inquiry refuses to commit the accused person for trial and discharges him, the proper course to be taken is for the Director of Public Prosecutions to apply to a Judge for his direction or consent to file an information against the accused person under section 340 (2) (b) of the Criminal Procedure Law.
2. The application to the Judge must be accompanied by a copy of depositions and proofs of evidence which it is proposed to call in support of the charges so far as that evidence is not in the depositions, and the application must embody a statement that the evidence shown by the proofs and the evidence shown by the depositions will be available at the trial and that the case disclosed by the depositions and proofs is, to the best of the knowledge, information and belief of the applicant substantially a true case.
3. That where the Magistrate has committed the accused on some of the counts and has refused to commit him on the other counts, the prosecution can file an information and include those counts on which the accused has been discharged without leave of a Judge; but it is open to the defence to file a motion to quash those counts

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of the charge in which the accused has been discharged at the preliminary inquiry, and it is for the Judge at the trial to rule whether the counts are founded on facts or evidence disclosed in any examination or deposition taken before the Magistrate; and if he holds that the counts are so founded, to allow their inclusion and otherwise to disallow them.

4. That if an accused person has been discharged after a preliminary inquiry and later there is fresh evidence of something which has happened since the former hearing or has come to the knowledge of the party applying since the hearing and could not by any reasonable means come to his knowledge before that time, then another preliminary inquiry on the same charge can be held before the same Magistrate who had formerly discharged the accused person at the prior preliminary inquiry or before any other Magistrate.
5. In the present case the second preliminary inquiry was a nullity.

Cases referred to:—

- Clement Newali v. Inspector-General of Police* 1 E.N.L.R. 1 at 4.  
*Cadogan v. Regina* (1963-1964) West Indian Law Reports Vol. 6 page 292 at 295.  
*R. v. Morry* 31 C.A.R. 19 at 25.

*Miss Ayalogu*, State Counsel for the State.  
*G. C. Nonyelu* for the defence.

**Kaine, J.:** When this case came up for hearing, Mr G. C. Nonyelu the learned counsel for the accused said that the whole proceedings from the preliminary investigations were a nullity. He said that in charge No. ME/867C/66—*Commissioner of Police v. Reginald Wallace* which came up before the Chief Magistrate, Mr Onwunyi, the accused was being tried summarily until the tenth witness was taken when the prosecution applied under section 306 of the Criminal Procedure Law that the trial be made a preliminary investigation and the learned Chief Magistrate agreed and continued the case as a preliminary investigation; that only one more witness was called by the prosecution to conclude the preliminary investigation; that he then made a submission of no case to put the accused on his trial and the learned Chief Magistrate upheld his submission and the accused was discharged in all the eight counts of the charge; that as the accused was going away he was rearrested by the police and taken into custody and later brought before another Magistrate and a second preliminary investigation started on the same charges, same facts and same witnesses; that at the end of the preliminary investigation he made a submission which was overruled and the accused was committed for trial by the learned Magistrate in consequence of which the information now before the Court was filed.

Mr Nonyelu then referred the Court to the Criminal Prosecution in England by Devlin at pages 96 and 97 and to section 340 (2) (b) of the Criminal Procedure Law and he contended that the prosecution cannot file the information without the direction or consent of a Judge of the High Court. He cited authorities to show that "subsequent charge" in section 325 (1) of the

Criminal Procedure Law means "any other charge" and not the same charge on which the accused has been discharged. He then refers to the case of *Clement Nwali v. the Inspector-General of Police*, Volume 1, Eastern Nigeria Law Reports at pages 1 and 4 and to the case of *Cadogan v. Regina*, West Indian Law Reports Vol. 6, 1963-1964 at page 292.

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In reply Miss Ayalogu the learned State Counsel who appeared for the prosecution said that the facts as stated by the learned counsel for the accused were correct but she contended that the second preliminary investigation was in order and therefore it was not a nullity. She referred to section 325 (1) of the Criminal Procedure Law and she said that since the discharge is not a bar to any subsequent charge based on the same facts the section gives the prosecution the power to start another preliminary investigation or file an information straight to the High Court on the same charge on which the accused has been discharged. I have to start by referring to section 325 (1) of the Criminal Procedure Law of Eastern Nigeria *Cap.* 31 which runs as follows:—

"If the Court considers that the evidence against the accused is not sufficient to put him to his trial, the Court shall forthwith order him to be discharged as to the particular charge under inquiry but such discharge shall not be a bar to any subsequent charge in respect of the same facts."

It can be seen that this section gives the Magistrate the mandatory power to discharge the accused at the end of preliminary investigation if the Magistrate considers the evidence against the accused not sufficient to put the accused on his trial but the same section also says that "such discharge shall not be a bar to any subsequent charge in respect of the same facts".

The question that arises is the procedure to be adopted by the prosecution if in the opinion of the prosecution the accused ought to have been committed from the facts laid before the learned Magistrate. It appears that our Criminal Procedure Law is silent about the procedure in such a case where the Magistrate has refused to commit and the prosecution is not satisfied. The counsel have not been able to refer me to any local decision on the matter but section 16 of the High Court Law of Eastern Nigeria *Cap.* 61 provides as follows:—

"The jurisdiction vested in the Court shall be exercised (as far as regards practice and procedure) in the manner provided by this law and in any other written law or by such rules and orders of court as may be made pursuant to this law or any other written law, and, in default thereof, in substantial conformity with the law and practice observed in England in the High Court of Justice, on the thirtieth of September, 1960."

I am of opinion that this section gives this Court the power to look into the practice and procedure observed in England in the High Court of Justice on the 13th day of September, 1960.

In Devlin on the *Criminal Prosecution in England* pages 96 and 97 it is written as follows:—

"I said in an earlier chapter that in the proceedings before the Justices there were still two vestigial features of the private investigation which

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it used to be. The first is that the proceedings have no finality; the discharge by the Magistrate is not an acquittal. In theory the prosecution could submit a fresh case to the same or another set of Magistrates, but in practice they never do so. If they disagree with the discharge because they think the Magistrates have taken a wrong view of the evidence, they may proceed at once to ask for leave to file a voluntary bill of indictment; I shall describe later what the procedure is. If they do not do this, they accept the Magistrate's conclusion as final. So that, subject to what is equivalent to an appeal on a point of law, a refusal by the Magistrates to commit is final."

It can be seen from the above that in England although in theory the prosecution could submit a fresh case to the same or another set of Magistrates for another preliminary investigation but in practice they *never* do so. Let us see what Devlin says about the procedure to be adopted. He wrote at page 105 as follows:—

"During these five years there have been only four applications of substance, by which I mean applications that are made by way of appeal from a refusal by the Magistrates to commit on what the police think is sufficient evidence. The Director (of Public Prosecutions) will not take this course merely because the police disagree with the decision which the Justices have arrived at on the facts; and indeed for every case which during this period he made an application, there were two in which he was asked by the police to make an application and he refused to do so. The process is used to put right *any error of law by the Magistrates or an incorrect appreciation* of the evidence amounting to an error of principle. If Justices refuse to commit because they have taken an erroneous view of the Law, no doubt a writ of mandamus would lie to compel them to do so; but the simpler procedure is to apply to the Judge for leave to prefer a voluntary bill."

It can be seen from the above that what the Director of Public Prosecutions in England does where the Magistrate refuses to commit and when he is of opinion that the evidence before the Magistrate at the preliminary investigation is sufficient to put the accused on his trial is to apply to the Judge of the High Court in Chambers for leave to file an information. It is where this leave is granted that the Judge orders a warrant to issue for the arrest of the accused person and for his committal to prison for trial. See also *Cadogan v. Rex*, Vol. 6 1963-64—*The West Indian Reports* page 292 at page 295.

I have to say that section 340 (2) (b) of the Criminal Procedure Law of Eastern Nigeria *Cap.* 31 provides that an information can be preferred by the direction or with the consent of a Judge. I am of opinion therefore that when a Magistrate at the end of a preliminary investigation refuses to commit the accused for trial and discharges him, the proper course to be taken is for the Director of Public Prosecutions to apply to a Judge for his direction or consent to file an information against the accused under section 340 (2) (b) of the Criminal Procedure Law.

According to *Halsbury's Laws of England*, third Edition, Vol. 10, page 384 paragraph 693, the application to the Judge where the Magistrate has

refused to commit "must be accompanied by a copy of the depositions and proofs of evidence which it is proposed to call in support of the charges so far as that evidence is not in the depositions and the application must embody a statement that the evidence shown by the proofs and the evidence shown by the depositions will be available at the trial and that the case disclosed by the deposition and proofs is, to the best of the knowledge, information and belief of the applicant substantially a true case". I am therefore of opinion that the procedure adopted by the prosecution in this case by re-arresting the accused on its own and taking the accused before another Magistrate for another preliminary investigation is irregular and improper.

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If on the other hand the Magistrate has committed the accused on some of the counts and has refused to commit him on the other counts, the prosecution can file an information and include those counts on which the accused has been discharged without the leave of a Judge but it is open to the defence to file a motion to quash those counts of the charge in which the accused has been discharged at the preliminary investigation and it is for the Judge at the trial to rule whether the count is founded on facts or evidence disclosed in any examination or deposition taken before the Magistrate and if he holds that the count is founded, to allow its inclusion and otherwise to disallow it. See *Archbold's Pleading, Evidence and Practice*, 33rd Edition at page 2 and the case of *R. v. Morry*, 31 Criminal Appeal Reports 19 especially at page 25.

Also section 325 (3) of the Criminal Procedure Law *Cap.* 31 provides as follows:—

"Nothing contained in this section shall prevent the Court from either forthwith, or after such adjournment of the investigation as may seem expedient in the interests of justice, proceeding to investigate any other charge upon which the accused may have been summoned or otherwise brought before the Court, or which in the course of the charge so dismissed as aforesaid it may appear that the accused has committed."

I am of opinion that this section gives the Court the power to investigate any other charge which the evidence at the preliminary investigation may disclose. If for example the accused is charged with murder and the evidence is in the opinion of the Magistrate not sufficient for the accused to be committed for trial, then the accused shall be discharged but this will not prevent the prosecution from starting another preliminary investigation before the same Magistrate or any other Magistrate for an offence like unlawful wounding based on the same facts disclosed by the former depositions.

If also an accused person has been discharged after a preliminary investigation and later there is fresh evidence of something which has happened since the former hearing or has come to the knowledge of the party applying since the hearing and could not by any reasonable means come to his knowledge before that time, then another preliminary investigation on the same charge can be held before the same Magistrate who had formerly discharged the accused at the prior preliminary investigation or before any other Magistrate.

In conclusion I have to say that the fact that the prosecution can apply to a Judge in Chambers to direct or to consent that an information be filed against the accused on the same charges and on the same facts after he has

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been discharged by the Magistrate shows that a discharge by a Magistrate under section 325 (1) of the Criminal Procedure Law is not a bar to a subsequent charge in respect of the same facts. I do not therefore agree with Mr Nonyelu that any subsequent charge here means any other charge. It may mean the same charge based on the same facts but the procedure to be adopted must be on substantial conformity with the law and practice before the High Court of England as on the 30th day of September, 1960.

I therefore hold that the second preliminary investigation held in this case was a nullity and so also is the information filed in consequence of the second preliminary investigation. I strike out the case and discharge the accused but without prejudice since this is a matter of jurisdiction to the prosecution adopting a proper procedure to bring the accused for trial if the prosecution is of opinion that the accused ought not to have been discharged at the first preliminary investigation having regard to the evidence before that Court.

*Charge struck out.*

Onitsha High Court, 3rd April, 1967—O/44C/66

OPUTA, J.

THE STATE

Complainant

v.

EMMANUEL UNA

Accused

*Criminal Law—defilement of child of four and a half—s. 218 Criminal Code.*

*Evidence—calling as witness—child who later became seven at trial of accused—weight to attach to evidence of child—corroboration—common condition found in both child and accused—whether corroboration of evidence of child—s. 218 Criminal Code and s. 182 (1) Evidence Law.*

The accused person was charged with the offence of defiling a little girl of four and a half. The mother of the little girl in her evidence stated that the little girl was then seven at the time of the trial.

The child in her testimony in court stated that the accused invited her into a corn grinding mill, where he placed her on a chair and defiled her. On reaching home, the child's mother observed that she walked with an unsteady gait and asked her what was wrong. The child then promised to take her mother to the person who tampered with her. The mother also observed that blood and pus trickled down the lap of the child.

The child later identified the accused as the person, who tampered with her a day earlier. The accused promptly denied ever doing anything to her.

The child and the accused were both examined by a doctor. The doctor found that there was spermatic fluid and pus over the private part of the child, and also found on examining the accused that pus was discharging from his private part too.

*Held:*

1. The evidence of the mother of the little girl afforded enough corroboration of the evidence of the little girl showing that she was defiled.
2. The existence of a common condition namely the abnormal presence of pus mixed with spermatic fluid found on the girl and the discharging of pus by the accused corroborated the little girl's evidence as to the identity of the accused as the person, who defiled her and was also a strong circumstantial evidence, that it was the accused and no other person, who defiled the girl.

Cases referred to:—

*The State v. Dominic Okongwu*, Suit No. O/62C/66 unreported judgment of the High Court, Onitsha.

*R. v. William Evans Walkwork* (1958) 42 Cr. App. R. 153, 160 and 161.

*R. v. G. Beakerville* (1916) 12 Cr. App. R. 81, 91.

*The State v. Christopher Esumei* Suit No. E/20C/65 unreported judgment of the High Court, Enugu.

*R. v. Mitchell* (1892) 17 Cox C.C. 505, 507.

*R. v. George Basnett Jones* (1939) 27 Cr. App. R. 33.

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**Oputa, J.:** The accused person is charged with the offence of defilement contrary to s. 218 of the Criminal Code. The star witness for the prosecution is Rita Ifeyinwa Obiechie called as the second P.W. From the evidence of her mother Grace Obiechie called as the first P.W. this little girl Rita was seven years old on the 25th January, 1967. I had to decide whether I could receive the evidence of this little girl unsworn under s. 182 (1) of the Evidence Law. Rita Obiechie was an extremely intelligent girl and I was satisfied that she was possessed of sufficient intelligence to appreciate the evidence she was called upon to give. She also understood the duty to speak the truth. I had no hesitation in receiving her evidence with the Court cleared. The second P.W. Rita did not know the accused before the 25th July, 1964 when this incident was alleged to have taken place. On that day her mother the first P.W. sent her to go and buy soap for their domestic washing.

On her way back along Akor Street (where they lived) the accused invited her into a corn grinding mill where he (the accused) worked. There the accused placed her on a chair and forced his penis into her private part. The little girl felt some pain and shouted.

As the little girl shouted the accused closed her mouth with his hand. The accused gave her a penny when he finished. On reaching home, the first P.W. Grace Obiechie noticed that her daughter was walking with an unsteady gait. Asked what happened to her the second P.W. Rita promised to take her mother to the person who did it. The first P.W. observed blood and pus trickling down the little girl's lap. The first P.W. raised an alarm and followed her daughter Rita to the mill where the accused worked. The door was locked and neighbours said that the inmates were out. After four other unsuccessful attempts on the 25th July, to contact the accused, the first P.W. made a report to the police.

Early in the morning of the 26th July, 1964, the first and second P.W.s again visited the corn mill at No. 10 Akor Street. This time the door opened and the second P.W. Rita identified the accused as the person who defiled her the day before.

The accused promptly denied ever doing anything to the little girl. Under cross-examination Rita was quite emphatic that it was the accused and no other who defiled her. Following a report to the police Cletus Anyanwu, Lance Corporal No. 3953 took up the investigation. Cletus Anyanwu was called as the third P.W. He took both the accused and the victim, the second P.W. to the General Hospital, Onitsha for Doctor's examination.

The deposition of Dr Oku who conducted the medical examination was tendered by the Registrar of Sessions, Christopher Iwobi, called as the fourth P.W. as Exhibit 2. The third P.W. also obtained a voluntary statement from the accused. The statement was tendered as Exhibit 1. This is a summary of the prosecution's case against the accused.

The accused gave evidence in his own defence and called no witnesses. He admitted he worked at the corn mill at No. 10 Akor Street. He admitted that on the 26th July, quite early in the morning, the first P.W. came to the mill along with her daughter Rita, the second P.W. His case was that the first P.W. asked whether he could help identify one of the workers who

chased Rita into a dustbin where she fell and injured herself the previous day and that the first P.W. never mentioned anything about defiling the second P.W. As he was discussing this issue with the first P.W., one Ben a relative of the first P.W. arrived. It was this Ben who persuaded the first P.W. to send for the police. The police came and collected him the first P.W. and second P.W. to the Station. It was at the Police Station that he first heard anything about defiling the second P.W. He immediately made a statement Exhibit 1 denying the allegation.

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So many difficult problems arise in this case. If the second P.W. the little girl Rita were an adult I would have had no difficulty in believing her and in acting on her evidence. I must say that the second P.W. did impress me as a witness of truth, but the question is how much reliance can a court place on the evidence of a little girl who was just seven years old when she gave evidence and about four and a half years old when the incident occurred.

I discussed this same problem in Suit No. O/62C/66: *The State v. Dominic Okongwu* and I will not mind repeating the views expressed in that case. It is well known that a child's power of observation and memory tends to be less reliable than that of an adult. Children are suggestible and sometimes given to living in a world of make believe. They are egocentric and only slowly learn the duty of speaking the truth.

Second P.W., the little girl Rita, quite honestly admitted that it was her mother the first P.W. who told her that the substance exuding from her private part was a mixture of blood and pus. Now the danger is that in this type of case these mothers in an attempt to find out what happened may put leading questions and so put the story into the child's mouth and the child would afterwards, and quite honestly though, confuse the suggestions with the facts. It is because of this real danger that the law insists upon corroboration in cases of defilement under s. 218 of the Criminal Code and in cases where the evidence of a child is taken under s. 182 (1) of the Evidence Law. I shall deal with the issue of corroboration later in this judgment.

On the issue of what reliance I am to place on the evidence of Rita, the second P.W., I will prefer to be guided by the observation of Lord Goddard, L.C.J. in the case of *Reg. v. William Evans Walkwork* (1958) 42 Cr. App. R. page 153 at paragraphs 160 and 161. Viz:—

“The Court deprecates the calling of a child of this age (five years) as a witness ... The Jury could not attach any value to the evidence of a child of five, it is ridiculous to suppose they could.”

Rita, the second P.W. was only four and a half years old when the incident happened.

If the case were heard in 1964, this Court could not have admitted or relied on her evidence. I do not think that the memory of the second P.W. will grow stronger with the years. The fact is that it ought to grow more blurred and less defined. It will, in my view, be ridiculous to suppose that this Court could attach much weight on the evidence of this little girl, Rita unsupported and uncorroborated. This leads naturally on to the question of corroboration. The accused is charged under s. 218 of the Criminal Code. Under that section no person can be convicted on the

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uncorroborated testimony of one witness. The little girl Rita also gave unsworn evidence under s. 182 (1) of the Evidence Law and under s. 182 (3) of the same law, "a person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused".

In this case also therefore the need for corroboration is doubly emphasized. In this case also the victim, the second P.W., is a girl of tender years and in such cases the proceedings start with an understandable sympathy for the little victim. This notwithstanding, the Court should make strenuous efforts to test the truth of the prosecution evidence. In this case before the accused can be convicted there must be independent testimony which confirms in some material particular not only the evidence that the second P.W. was defiled, but also the evidence that it was the accused and no other who defiled her:— *R. v. G. Beakerville* (1916) 12 Cr. App. R. 81 at page 91 refers.

In this case the evidence of the first P.W. the mother of the little girl is evidence of complaint by the second P.W., thus showing consistency of the story told by her. It also affords corroboration of the fact that the little girl was tampered with otherwise the mother could not have seen blood and pus exuding from the private parts of the second P.W. Also the distress shown by the second P.W. is corroborative of the fact of defilement.

On the issue of defilement, I accept the evidence of the first and second P.W.s, and find as a fact that the second P.W., the little girl Rita, was tampered with. I am satisfied she was defiled. I am also satisfied that the mother's evidence offered sufficient evidence of corroborating the fact of defilement. The more serious question is:— who defiled the second P.W.? The second P.W. says it was the accused, and the accused denied this.

In corroboration of the evidence of the second P.W., implicating the accused, the prosecution tendered as Exhibit 2 the deposition of Dr Oboko Oku, who examined the second P.W. and the accused. Exhibit 2 was admitted pursuant to s. 34 (1) of the Evidence Law. Proviso (b) to s. 34 (1) Evidence Law makes it a condition precedent "that the adverse party in the first proceeding had the right and opportunity to cross-examine". Exhibit 2 contains the evidence of Dr Oku during the preliminary inquiries before the Magistrate. There is no record like:—"Cross-examined by the accused—Reserved". This is usually found at the end of the evidence of each deponent where the accused or his counsel chooses to reserve his cross-examination till the trial in the High Court. Such a record would make it abundantly clear that the accused was given the right and opportunity to cross-examine. If he failed to avail himself of that right he cannot afterwards complain especially as s. 34 (1) (b) of the Evidence Law does not prescribe that to make a deposition admissible as proof of its contents, the right to cross-examine ought to be exercised first. I considered this point in the case—*Christopher Esunei* E/20C/65. It would however be otherwise if the accused or his counsel started cross-examination but was not allowed to conclude. In that event it would be impossible to say that there had been full opportunity of cross-examination: per Cave, J. in *Reg. v. Mitchell* (1892) 17 Cox C.C. 505 at page 507. In this case as I observed earlier, there is not that familiar record:—"Cross-examined by the accused—Questions re-

served", but there is a certificate in typed form attached to the deposition Exhibit 2 and signed by the Magistrate. This certificate contains *inter alia*, the following:—

"I hereby certify that the above deposition of Oboko Oku was sworn and taken before me at Onitsha this 30th day of September, 1964 in the presence and hearing of the accused and the said accused having been informed of the right of cross-examination had full opportunity of cross-examining the said Oboko Oku."

S. 312 of the Criminal Procedure Law makes provisions for the taking of depositions. S. 312 (c) of the C.P.L. enacts:—

"The evidence of such witness shall be given in the presence of the accused and the accused shall be entitled to cross-examine them and shall be informed of such right if not represented by a legal practitioner."

In this case the accused admitted that the doctor's evidence was given in his presence. There is a certificate certifying that the accused was informed of his right to cross-examine the doctor.

It is my view that it is more desirable that the familiar entry:—

"Cross-examined by the accused — Questions reserved" should be made in the handwriting of the Magistrate at the end of the deposition of a witness, whom the accused did not intend to cross-examine. This will not preclude the type-written certificate which also is usually attached to the deposition and signed by the Magistrate. This practice has a good deal to commend it. It will make assurance doubly sure, and *abundans cautela non nocet*.

I am however, satisfied that the certificate on Exhibit 2 fully satisfies the requirements of s. 312 (c) of the Criminal Procedure Law and that the accused had full opportunity to cross-examine the doctor at the preliminary investigations. From Exhibit 2 it is significant that there was "spermatic fluid and pus dispersed over the vulva" of the little girl Rita—(second P.W.). The doctor who examined the accused a day following the allegation against him also found that "pus was discharging from his penis". It is therefore clear that a similar condition, and an abnormal condition at that, was found in both the accused and the little girl.

In the case of *R. v. George Basnett Jones* (1939) 27 Cr. App. R. page 33, it was argued by Nigel Robinson in favour of the appellant that the fact that the appellant and the girl were both suffering from the same disease was not a matter which could properly be regarded as corroboration of the girl's evidence. It was there further argued that the evidence did not tend to implicate the appellant, but a class of persons, Charles, J. dismissing the appeal held that evidence of a common condition—the existence of gonorrhoea—in both the appellant and the girl was treated and rightly treated by the trial Judge as being corroborative of the child's evidence. Charles, J. added:—

"If the Jury were entitled so to regard the fact that the appellant ... was found to be suffering from gonorrhoea and that the child who alleged that an attack had been made by him on her body was also suffering from gonorrhoea, then the conviction of the appellant was almost inevitable."

In this case, I am satisfied that the existence of the same abnormal condition in the second P.W. and the accused was corroborative of the evidence of the second P.W. as to the identity of the accused as the person

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who defiled her, and strong circumstantial evidence that it was the accused and no other person who defiled the second P.W. Rita Ifeyinwa Obiechie.

I believe the prosecution witness in this case and disbelieve the accused. I am satisfied on the totality of the evidence that the second P.W. was defiled and that the evidence of the second P.W. that it was the accused who defiled her was sufficiently corroborated by the doctor's evidence. I therefore find the accused guilty as charged and convict him accordingly.

*Allocutus.*—The accused says I do not know anything about this case. I have been in custody since I was committed on 20th December, 1964.

*State Counsel.*—after commitment the accused was granted bail and it is no one's fault that he was unable to get a surety to take him on bail. Says the offence is serious. Accused has one previous conviction for defilement on 22nd September, 1964 at the Chief Magistrate Court, Onitsha, was convicted for defilement and sentenced to eighteen months I.H.L.

*Sentence.*—Accused is sentenced to five years I.H.L.

*Accused convicted.*

Onitsha High Court, 6th April, 1967—O/18/1964

EGBUNA, J.

THE SINGER COMPANY

Plaintiff

v.

PIUS ASUZU

Defendant

*Tort—INFRINGEMENT OF TRADE MARKS—PASSING OFF DEFENDANT'S GOODS AS THOSE OF THE PLAINTIFFS—INJUNCTION—CLAIM FOR ACCOUNTS OF PROFITS MADE BY THE DEFENDANT AND SPECIAL DAMAGES FOR PLAINTIFF'S LOSS OF PROFITS—REGISTRATION OF TRADE MARKS—REJECTION OF DEFENDANT'S APPLICATION TO REGISTER—EFFECT OF DEFENDANT'S ORDER OF GOODS BEFORE ACCEPTANCE OF APPLICATION TO REGISTER.*

The plaintiffs' claim against the defendant is for the sum of £20,000 for the infringement of their trade marks and passing off of defendant's goods as those of the plaintiffs, injunction, an order for delivery up and destruction of goods bearing the offending marks, accounts for profits derived from sale of such goods and special damage for loss of profits.

The plaintiffs, a manufacturing company incorporated in the United States of America and registered in Nigeria, are the manufacturers of all kinds of machinery including the Singer sewing machines for the past 100 years. The defendant who resides at Onitsha and trades under the name of Asuzu Brothers and Company had been buying Singer sewing machines from the plaintiffs and their agents for sale to the public.

The plaintiffs are proprietors of certain trade marks registered under the laws of Nigeria which trade marks are known by their numbers and the words "Nigersew" and "Bird in flight machine Transfer No. 475".

Without the knowledge and consent of the plaintiffs the defendant placed orders for sewing machines with trade marks similar to those of the plaintiffs and bearing the words "Bird in Flight" and "Niger", and there-after applied for the registration of these trade marks, but his application was rejected. Without waiting to hear from the Registrar the defendant continued to place orders and in consequence of this sold several sewing machines bearing the offending trade marks to the public at a price less than half of the plaintiffs' price due to the inferiority of his own machines.

*Held:*

1. In considering the similarity of the defendant's trade mark to that of the plaintiffs it is not necessary to show or prove that there was any intention to deceive. The question is whether the design of the defendant so nearly resembles that of the plaintiff.
2. In the case of passing off what the Court is to consider is whether the defendant's action naturally tends to cause the ordinary dealer or purchaser to think that he is dealing with the plaintiffs or buying the goods of the plaintiffs; and the plaintiffs may without alleging individual sales or deception of named persons, rely on the similarity of the name or mark as in itself establishing probability of confusion.

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3. At common law the mere proof of an infringement entitles the plaintiff to nominal damages, but under exceptional circumstances, further damages are recoverable, for instance, where the spurious goods are so inferior to the genuine as to impair the trade reputation of the plaintiffs.

Cases followed:—

1. *Schnapp Limited v. Gibbons* (1905) 22 R.Q.C. 113, 601.
2. *Reddaway v. Benthon Spinning Company* (1892) 9 R.P.C. 503.
3. *Millington v. Fox* (1838) 3 Mv. and Cr. 338.
4. *Sykes v. Sykes* (1824) 3 B and C. 541.
5. *Barlow and Jones, Jabex and Company* (1890) 9 R.P.C. 395, 411 C.A.
6. *Wood v. Lambat* (1886) 32 Ch. D. 247.
7. *Kutuow's T. M.* (1893) 10 R.P.C. 401. (Carlsbad Salts) and note (b) at page 645.
8. *Phomian Fuel Economiser v. National School of Salesmanship Limited* (1943) 6 R.P.C. 219.
9. *United Kingdom Tobacco Company Limited v. Carieras Limited* 16 N.L.R. page 2.
10. *G. B. Ollivant and Company v. John Christian* 6 N.L.R. page 102.
11. *Baschieras T. M.* (1889) 5 T.L.R. 480.
12. *Blofeld v. Payne* (1833) 4 B and Ad. 400.
13. *Rodgers v. Nowill* (1847) 5 C.B. 109.
14. *Spolding v. Garmage* (1915) 84 L.J. Ch. 449.
15. *Neilson v. Betts* (1871) L.R. 5 H.L.

*Mbanefo* for the plaintiffs.

*Ubezuonu and Ofodile* for the defendant.

**Egbuna, J.:** The plaintiffs are Manufacturing Company incorporated in the United States of America and also registered in Nigeria. They have been manufacturing machinery of all kinds including the Singer sewing machines for the past 100 years both in the United States and other countries including Nigeria.

The defendant is resident at Onitsha and trades under the name of Asuzu Brothers and Company and has been buying Singer sewing machines from the plaintiffs and from their agents and selling them to the public.

The plaintiffs are claiming:—

1. £20,000 for the infringement of their Trade Marks and passing off the defendant's goods as those of the plaintiffs.
2. An injunction against the defendant, his servants and/or agents from infringing the plaintiffs' Registered Trade Marks or alternatively to restrain the defendant from passing off their machines as machines of the plaintiffs' manufacture.
3. An Order for delivery up and the destruction of all such machines bearing the offending marks.

4. An account from the defendant as to the profits derived from the sale of the sewing machines bearing the offending marks and an order for the payment of special damages for the loss of profits to the plaintiffs resulting from such unlawful sales.

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The plaintiffs allege that they are the proprietors of the Registered Trade Marks No. 10384 and 10385 known by the plaintiffs as their "Bird in Flight Machine Transfer No. 475". They are also proprietors of Trade Mark No. 12229 comprising the word 'Nigersew'.

The plaintiffs tendered their Certificate of Incorporation Exhibit "B". The trade marks were also tendered Exhibits "D", "D1" and "D2".

The defendant tried to register a trade mark but this was rejected. This is shown in Government *Gazette* of 6th of July, 1963 Exhibit "E". It was as a result of the opposition of the plaintiffs that the Registrar of Trade Marks rejected the defendant's application. The letter of rejection is Exhibit "G".

The defendant admitted that he made application for the registration of a trade mark which appeared in the *Gazette* Exhibit "E". He said that since his application he did not receive any letter or communication from the Registrar of Trade Marks and started to make use of the Trade Mark. According to the defendant no letter was written to him and no Certificate was issued to him and he started placing orders using the trade mark but for the Court's order he would have continued importing the machines.

The defendant in this Court denied receiving any letter of acceptance of his application from the Registrar of Trade Marks and testified that he started placing orders when he did not receive any communication and on seeing the publication in the *Gazette* dated 6th July, 1963. The defendant did not state when he forwarded his application but the date shown at the bottom right of Exhibit "E" seems to suggest it was dated 12th November, 1962.

It is clear from Exhibit "G" that the application of the defendant was rejected. In paragraph 1 of Exhibit "G" the rejection was made having regard to section 25 of the Trade Marks Act which reads as follows:—

"Except by Order of the Court or in the case of Trade Marks in use before the 30th day of March, 1901, no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the Register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive."

It would appear from Exhibit 'G' that the Registrar of Trade Marks had previously accepted the application of the defendant in view of paragraph two of Exhibit 'G'. This paragraph reads as follows:—

"In this connection and in exercise of the powers vested in me under Regulation 30 of the Trade Marks Regulation, I hereby withdraw my previous acceptance as communicated to you under cover of my letter No. RTM. 13425/3 of 30th January, 1963."

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Regulation 30 referred to reads as follows:—

“Where an application has been accepted by error, the Registrar may withdraw his acceptance and refuse to register, and any such refusal shall be deemed to be a refusal under section 15 of the Ordinance.” It is not the case of the defendant that he received letter of acceptance.

He was not acting on such acceptance when he placed his orders. He said categorically that he received no such communication. I am satisfied that he placed his orders without even waiting to hear from the Registrar of Trade Marks. This is clear from Exhibit “G” (tendered by the plaintiffs) and Exhibit “K” (tendered by the defendant). From Exhibit “G” a letter was said to have been written to the defendant dated 30th January, 1963. The defendant placed his orders on 4th January, 1963 long before the letter of 30th January, 1963 was written. The contents of Exhibit “K” show that a similar order had previously been made. It follows that before the defendant ever applied to have his trade mark registered he had placed orders with it.

As to the registration of trade marks it goes without question that the plaintiff company had a registered trade mark Exhibits D, D 1-D 2, and the defendant had none.

A registered trade mark is defined by section 2 of *Cap.* 199—Laws of the Federation of Nigeria as meaning “a trade mark which is actually in the register”. This is confirmed by Exhibits “D”, “D 1” and “D 2”. These are Certificates of Registration and under section 57 of Trade Marks Law they are *prima facie* evidence of their entry in the register.

The next point I have to consider is the purported trade mark of the defendant and its similarity to the trade mark of the plaintiffs. The question which this Court is to consider is this—Is this design so nearly resembling that of the plaintiffs? I have compared the marks and having regard to the evidence led, I have no hesitation in finding that the marks resemble each other. In *Schnapp Limited v. Gibbons* 1905 22 R.O.C., 113, 601 Warrington, J. whose judgment was approved by the majority of the Court of Appeal and by the House of Lords said:—

“It seems to me that each of these cases must be looked at by itself, and the Judge looking at the label or the get up, or the device, whole or it may be that is complained such assistance as to the practice of the trade as he can get from witness, must decide for himself whether the article complained of is calculated to deceive or not.”

In this connection, I am to add that it is not necessary to show or prove that there was any intention to deceive. *Reddaway v. Benthon Spinning Co.* (1892) 9 R.P.C. 503. *Millington v. Fox* (1838) 3 Mv. and Cr. 338.

This trade mark of the plaintiffs is inscribed in Singer Machines manufactured by them which are sold all over the country. The defendant did not deny importing machines into Nigeria and being sold at Onitsha with this offending trade mark. The defendant claims to have imported only eighty of such machines. I do not believe him that he imported only eighty. From Exhibit “K”, it is clear he had previously imported some prior to 4th January, 1963.

The defendant testified in this Court that he had sold seventy-nine of the imported machines remaining one which he tendered in evidence. But this contradicts paragraph 11 of his Statement of Defence portion of which reads:—

“Further the defendant says that he only imported eighty of Niger Sewing Machines in 1963 which have all been sold out by now. The defendant has withheld further order on account of the institution of the present action.”

I am satisfied that Exhibit ‘H’ was purchased from the defendant and that Exhibit ‘L’ was one of those received on orders placed by the defendant. I find that the defendant has infringed the plaintiffs’ trade mark.

I now come to the question of passing off. What this Court is to consider is whether the defendant’s action naturally tends to cause the ordinary dealer or purchaser to think he is dealing with the plaintiff or buying the plaintiffs’ goods. *Sykes v. Sykes* (1824) 3 B. and C. 541. I am to add that the plaintiffs may without alleging individual sales or deception of named persons, rely on the similarity of the name or mark as in itself establishing probability of confusion. The confusion, of course, must be in the minds of the public or the trade so as to produce an impression that the goods are the plaintiffs’ goods. See *Barlow and Jones, Jabex and Company* (1890) 7 R.P.C. 395, 411 C.A.

It was argued by defence counsel that no trader was called to say that he was deceived. My view is that this is unnecessary for the question is—Is the mark calculated to deceive any probable purchaser who buys from the plaintiffs directly or indirectly through others to whom he sells? *Wood v. Lambat* (1886) 32 Ch. D. 247.

It has been held that evidence of ordinary members of the public who are not acquainted with the usages of the trade involved, that they think they would or would not be deceived by the resemblance of the mark to another is of little assistance in the determination of questions of alleged deceptive similarity. See *Kutuow’s T. M.* (1893) 10 R.P.C. 401 (Carlsbad Salts) and note (b) at page 645. It was also held in *Phomien Fuel Economiser v. National School of Salesmanship Limited* (1943) 6 R.P.C. 219 that where defendant in a passing off action had issued deceptive literature, it was quite open to the Court to draw an inference that some people were deceived.

Evidence has been given in this Court that the predominant feature in the trade mark of the plaintiffs is the ‘Bird in Flight’ and the words ‘Niger Sew’. The defendant cleverly adopted this symbol as the principal feature of his offending trade mark. He has the ‘Bird in Flight’ and ‘Niger’. There are little difference in the ornamentation, but the distinctive and characteristic symbol is there. Perhaps an educated person can spot out the difference, but it has to be remembered that the bulk of the purchasers in Onitsha main market are illiterate people and in many parts of this country for that matter. I am of the considered opinion that these people might take the offending marks as that of the plaintiffs. The colouring on both machines are the same with very minor difference. I have come to the conclusion that this was deliberately designed by the defendant and calculated to mislead the natives of this country. The deciding factor is if it is likely to deceive the purchasers.

The Singer  
Company  
vs.  
Pius Asuzu  
Egbuna, J.

In the *United Kingdom Tobacco Company Limited v. Carieras Limited* 16 N.L.R. page 2, Butler, J. said:—

“It is a well established principle, not only in this country, that the likelihood of deception varies with the intelligence and education of the consumers and in accordance with this principle this Court has repeatedly held to be likely to deceive illiterate natives marks which would certainly not have been likely to deceive an educated European”. See *G.B. Ollivant and Company v. John Christian* 6 N.L.R. page 102.

The plaintiffs testified that the defendant has been their customer for some years and buying their sewing machines. The defendant admitted this and said that he knew the design of the plaintiffs. He imitated the design of the plaintiffs which in my view is likely to deceive purchasers. It is not even necessary to prove that any one was in fact deceived. What is required is reasonable probability of deception. As I indicated before there is a minor difference in the two designs (plaintiff's and defendant's) but the impression conveyed by both are the same (The *Taendstikkik* case (1886) 3 R.P.C. 541 and the dominating characteristic is the deciding factor namely the “Bird in Flight” *Baschieras T. M.* (1889) 5 T.L.R. 480.

The defendant admitted that he sold his machines with these offending marks on them. I am satisfied that he passed off these machines as those of the plaintiffs to the public and he is liable to the plaintiffs.

As to damages the defence counsel argued that no evidence was given by the plaintiffs of the impact on the business of the plaintiffs by the importation of these machines by the defendant, and that there was no evidence of their sales going down. He submitted that if no damage is proved to have been done the plaintiffs are entitled to only nominal damages.

It is true that at common law the mere proof of an infringement entitles the plaintiff only to nominal damages, *Blofeld v. Payne* (1833) 4 B and Ad. 400 and as such no allegation of special damage is a necessary part of the plaintiffs' case *Rodgers v. Nowill* (1847) 5 C.B. 109.

“In general, the only injury which is done by an infringement is that the defendant's goods are sold instead of those of the plaintiffs' and the sale of the latter is, in some degree, diminished in consequence. But it may under exceptional circumstances, appear that further damage has been done, for instance where the spurious goods are so inferior to the genuine as to impair the trade reputation of the plaintiffs.”

In this Court the General Manager of the plaintiffs' company, Mr Inglessis testified that as a result of this importation by the defendant of those machines, the company's name have suffered a great setback throughout the Federation. He also testified that customers were doubting the authenticity of their machines. He testified that their claims are not made in relation to the quantity of the machines imported and that the name of their company is more important and that they are claiming £20,000 for the heavy loss of the company's reputation, goodwill and damage to the company's name. No question was put to the witness on this heavy loss of reputation.

There is evidence before this Court that the defendant's machines are inferior to that of the plaintiffs' company. The price of the plaintiffs'

machines is £26 10s 0d each whereas that of the defendant is sold at £13 each. There is evidence before this Court that the defendant sold these inferior machines to the public as though they were the goods of the plaintiffs of a superior and distinctive class. The defendant had been buying plaintiffs' machines and knew their price and quality before he embarked on this venture of his. This in my view is to aggravate the offence.

I have no doubt in my mind that injury has been done to the plaintiffs' trade reputation and they are entitled to damages. The authority for this is the case of *Spalding v. Garmage* (1915) 84 L.J. Ch. 449 in *Clerk and Lindsel* 12th Edition page 2036. The head note in the above reads:—

"No person has a right to sell or offer for sale, goods of another trader of an inferior or different class or quality under conditions calculated to represent such goods as goods of that trader or a superior and distinctive class. If this is done, an actual wrong is committed, irrespective of motive or fraud. A plaintiff who establishes a case of this character is entitled to an Injunction and if necessary to damages."

In *Spalding v. Garmage* Lord Palmoor remarked as follows:—

"I desire to express my concurrence with the view of Sergeant, J., that a tort having been committed, the plaintiffs are entitled to such damages as naturally flow from their unlawful act and that there is no artificial limitations in the case of a passing-off action."

The plaintiffs' Company is a well known Company throughout the Federation. Their Singer machines are popular in Nigeria and in great demand. The General Manager testified that he estimated about 2,000 of the machines were imported by the defendant. This he got from his agents and is no evidence to be relied upon. Those agents were not called to give evidence.

Although the General Manager said they were not claiming £20,000 based on the value of machines imported, still yet this, appears to me important. For, the more machines injected in the market, the more damage is done to the plaintiffs' trade reputation.

However, I am satisfied that the defendant imported over eighty of these machines and all sold to the public except the one tendered in Court by the defendant.

I am of the view that the plaintiffs are entitled to damages in respect of injury to their trade reputation which I assess at £1,000. In assessing this damages I took the conduct of the defendant into consideration. The plaintiffs are also entitled to the Injunction for which they ask restraining the plaintiffs Trade Registered Marks or passing off their machines as machines of plaintiffs' manufacture. The plaintiffs are also entitled to an Order for the delivery up to them of such machines as may now be in possession of the defendant and which have on them the marks complained of.

I refrain from making any order in respect of item 4 of the claim for account as it is alternative to damages. *Neilson v. Betts* (1871) L.R. 5 H.L.

I assess costs at 60 guineas.

*Judgments for plaintiffs*

Port Harcourt High Court, 7th April, 1967—P/39CA/66

MBANEFO, C.J.

GODPOWER OFONDA alias  
G. O. ORLU

*Accused/Appellant*

*v.*

THE COMMISSIONER OF POLICE

*Respondent*

*Criminal Procedure—visit to locus in quo—failure to record what transpired at the locus in quo.*

The appellant was charged in the Magistrate's Court with obtaining by false pretences and stealing. After the case for the prosecution had closed and the appellant had given evidence, the Magistrate decided to visit the *locus in quo*. According to the note made after the inspection the appellant was asked questions at the scene but his answers were not recorded. It was not shown on record who were present at the scene. The record merely showed that the Acting Chief Magistrate questioned the inmates of the four rooms in the house and their evidence was not recorded, nor was it shown that they were sworn. In his judgment the Acting Chief Magistrate relied on the statements made by these individuals and convicted the appellant. Against this conviction, the appellant appealed to the High Court.

*Held:*

1. When a court visits the scene, the proceedings there form a part of the trial and what anyone said must be recorded. Evidence of the witnesses heard at the scene should all be recorded and the parties given opportunity of cross-examination.
2. If the Court fails to record the evidence or to give the parties opportunity of cross-examination, that will be irregular and a conviction based on that sort of evidence cannot stand.
3. The procedure to be adopted is that each of the witnesses who made statements or pointed out material places at the scene should on the reassemble of the Court be put into the witness box to state on oath what part he took at the inspection and what he said or did.

Cases referred to:—

*R. v. Togbe* 12 W.A.C.A. 184.

*Arutu v. The Queen* 4 F.S.C. 66.

*M. C. Izuchukwu*, State Counsel for the respondent.

*Editor's note*—See section 76 (d) (ii) of the Evidence Law Cap. 49.

**Mbanefo, C.J.:** The appellant was charged in the Magistrate Court on the first count with obtaining the sum of £100 by false pretences, and, on the second count, with stealing the same amount. The Acting Chief Magistrate convicted him on both counts and sentenced him accordingly. The appellant has appealed against his conviction on both counts.

It is submitted on behalf of the appellant and not disputed by the respondent that the conviction on both counts cannot stand. If the complainant parted with the property in his money willingly to the appellant, it could not be said that the appellant, stole it. The conviction on the second count cannot therefore be maintained.

Godpower  
Ofonda  
v.  
The  
Commissioner  
of Police  

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Mbanefa,  
C.J.

Altogether nine grounds of appeal were filed and argued. Two points which were reflected in grounds 3, 4 and 9 merit serious consideration. One is that the Magistrate relied on the testimony of witnesses not on the record to convict, and the other, that the Magistrate failed to consider the defence of *bona fide* claim of right put up by the appellant.

As to the first point, it appears that after the case for the prosecution had closed and the appellant had given and concluded his evidence, the Court decided to visit the *locus in quo*. It is not clear who were present at the inspection. According to the note made in the record after the inspection, the appellant was asked certain questions at the scene. His answers were not recorded. The record merely says that the accused showed the portion of land sold to Ofonedum and the portion sold to Michael Ndubuisi. There were people living in each of the four rooms in a thatched house on the latter plot. The Acting Chief Magistrate proceeded to question the inmates of the rooms who said they were tenants of Ofonedum. The names of these tenants were not given, their evidence was not recorded and nowhere is it stated that they were sworn. The Acting Chief Magistrate in his judgment relied on the statement made by these individuals in finding that the land sold to the complainant was the same as that which the appellant had sold to Ofonedum. Having so found, he convicted the appellant. This is highly irregular. When the Court goes to visit the scene, the proceedings there is part of the trial and what anyone said must be recorded. Evidence of witnesses heard at the scene should all be recorded and the parties given the opportunity of cross-examination. If the Court fails to record the evidence or to give the parties opportunity of cross-examination, that will be highly irregular and a conviction based on that sort of evidence cannot stand. The procedure to be followed on an inspection of the locus has been considered and laid down in *R. v. Togbe* 12 W.A.C.A. 184.

In that case the appeal Court said that each of the witnesses who pointed out the material place should on the reassemble of the Court be put into the witness box to state on oath what part he took at the inspection and what he did. That procedure has not been followed in this case.

As to the consequence of such irregularity, in *Arutu v. The Queen*, the Federal Supreme Court held that where the irregularity amounts to denying an accused the right to cross-examine a witness for the prosecution, it is grave enough to amount to a miscarriage of justice. The present case cannot escape that consequence. I allow the appeal, set aside the conviction and sentence of the appellant and order that he be acquitted and discharged.

*Appeal allowed.*

Port Harcourt High Court, 8th April, 1967—P/17/62

MBANEFO, C.J.

RT. REV. E. T. DIMHEARI  
CHIEF R. T. E. WILCOX  
A. D. WILLIAM JUMBO

}

*Plaintiffs*

*v.*

CHIEF EMMANUEL S. C. JUMBO

*Defendant*

*Civil claim—pronouncing the Will of the deceased in solemn form—whether Will is the act of the deceased—whether defendant's claim to be the son of the deceased, head of Cyrus Jumbo House and person entitled under Bonny native law and custom to succeed to the estate of the Testatrix can affect the Will.*

The plaintiffs as executors named in the last Will dated 10th November, 1958, of Jenie Ayogogo Cyrus Jumbo asked the Court to pronounce the Will in solemn form. The defendant claimed that the will was invalid in that it was not the act and Will of the deceased and was not signed by her and further, that he is a son of the deceased and the head of Cyrus Jumbo House and as such the person entitled under Bonny native law and custom to succeed to the Testatrix's estate.

*Held:*

1. It is immaterial for the purpose of proving the Will whether the defendant was a natural son of the deceased or the head of the Cyrus Jumbo House. What the Court is concerned with in the action is whether the deceased did execute the Will, whether she did so in the presence of two witnesses both being present at the same time, and whether at the time she signed it she was in full possession of her mental faculties and knew what she was doing.

*Obiora* for the plaintiffs.

*Young Harry* for the defendant.

**Mbanefo, C.J.:** The plaintiffs as executors named in the last Will dated the 10th November, 1958, of Jenie Ayogogo Cyrus Jumbo are asking the Court to pronounce the Will in solemn form. The defendant claims that the Will was invalid in that it was not the act and Will of the deceased and was not signed by her and further, that he is a son of the deceased and the head of Cyrus Jumbo House and as such the person entitled under the Bonny native law and custom to succeed to the Testatrix's estate.

The Will which purports to be signed by "J. A. C. Jumbo" has a jurat in which it is stated that it was signed in the presence of two witnesses D. I. Allison and S. S. Peterside both being present at the same time and subscribing as witnesses. To prove the Will the plaintiffs called Mr Allison who said that on the 10th day of November 1958 he was called to No. 45 Niger Street and asked to witness the signature of the deceased. He said he did not read the Will but that he saw the deceased Jenie Ayogogo Cyrus Jumbo put her signature to it. He said the deceased was quite well although very old and that her mind was clear. He said he asked why she was making

a will and she said that she did not want death. He said that the other witness in their joint presence the deceased signed he and Mr Peterside appended their sign.

Another witness called by the plaintiff one of the beneficiaries in the Will. His Will was executed. He said he had been at the time, was staying in the house, that active. He said she was in full possession to write her name. Cross-examined he was Chief R. T. E. Wilcox, one of the executive law who at the time was a Magistrate. According to the witness, it is not disputed 17th of December, 1958 five weeks after

The defendant, on the other hand, is feeble and sickly and that, for sometime from loss of memory and behaving like a ridden and a complete illiterate who claimed that the deceased was his natural son contested by the plaintiffs who say that he is a son of Jumbo House. He also claims that he is a son of which Isaac Dagogo Jeapudoari does not claim he too is a son of Cyrus Jumbo. It appears to be divided on this matter, and I wish to mention the status or paternity of the defendant is immaterial for the purpose of proving that the deceased is a natural son of the deceased or the head of the family. I am concerned with in this action is whether the deceased executed the Will, whether she did so in the presence of the witnesses at the same time and whether at the time of her mental faculties and knew what she was doing when the Will was her own act and in accordance

In support of his case the defendant called his wife and the other, Moses Jumbo, who is a son of Cyrus Jumbo House. The point of dispute is that on 10th of November, 1958. On that date the deceased was in Port Harcourt where the Will was executed and he said he had been away to Umuahia for three months and only returned to Bonny on 10th of November. He died on 10th of November. He could not therefore from his testimony prove the deceased's mental condition or state of mind at the time the Will was executed. If this testimony is true, then it would be about two months before the 10th of November. Moses Jumbo was vague in his evidence that the deceased was very old and with a loss of memory and walked with a stick. He was the state of her mental health on the date that the deceased died after a brief illness. Dora Cyrus Jumbo was of the same age as the deceased could not speak for about the deceased admits that the deceased was removed to Bonny where she died.

Rt. Rev.  
E. T.  
Dimicari  
and two  
Others  
v.  
E. S. C.  
Jumbo  
Mbanefo,  
C.J.

I do not believe the defendant and his witnesses when they say that the deceased was so ill that she could not speak or that she was so illiterate that she could not write. The deceased was trained in the Anglican Mission and ran domestic service classes where she taught girls how to weave. I believe the evidence of Mr Allison that the deceased could write and that she signed the Will Exhibit P. 1. The Will contains detailed descriptions and dispositions of the deceased's properties. Looking at the Will it seems to me the act of a person with an active mental health and with good memory. I believe that the descriptions of her properties in the Will were made by her and that she was in full possession of her mental faculties when she made them. I do not accept the evidence of the defendant that he looked after the deceased. The deceased had hoped that by making a Will she could avoid dispute in her family after her death. Her hope has not materialized.

I believe and find as a fact that the Will Exhibit P. 1 was the act and Will of the deceased Jenie Ayogogo Cyrus Jumbo and was duly made and executed by her in the presence of two witnesses both being present at the same time. Accordingly I pronounce the Will as valid and declare that it has been proved in a solemn form.

Plaintiffs' costs of the action to be taxed and paid out of the estate.  
Defendant to bear his own costs.

*The Will pronounced valid.*

Port Harcourt High Court, 28th April, 1967—P/14M/67

PHIL-EBOSIE, J.

CHIEF MICHAEL D. KALIO AND 52 OTHERS

*Applicants*

*v.*

COMMISSIONER OF POLICE

*Respondent*

*Criminal Procedure—bail—sections 118 (2) and 118 (3) of the Criminal Procedure Law—exercise of discretion in granting bail.*

The applicants were charged before the Chief Magistrate, Port Harcourt, with the offences of riot, conduct likely to cause a breach of the peace, going armed in such a manner as to cause terror to any person, malicious damage to property and stealing. They applied for bail to the Chief Magistrate who refused on the grounds that there was a troubled situation in the country and that the arrest of the applicants was connected thereto. The applicants then filed a motion in the High Court asking for bail.

The learned State Counsel for the respondent raised a preliminary objection to paragraphs 12 and 16 of the affidavit on the ground that they offend section 87 of the Evidence Law and further argued that the applicants had not discharged the onus on them to show that the Chief Magistrate wrongly exercised his discretion.

*Held:*

1. If the applicant is charged with a felony, the onus is on him to show that the Magistrate wrongly exercised his discretion under section 118 (2) of the Criminal Procedure Law; but if the applicant is charged with any other offence then by section 118 (3) of the Criminal Procedure Law the onus would be on the prosecution to show cause why the applicant should not be admitted to bail.
2. The learned Chief Magistrate correctly exercised his discretion in view of the troubled situation in the country with which the offences charged were connected.

Cases referred to:—

*Orwuka Okeke and Another v. Commissioner of Police* (1960) N.R.N.L.R. 1  
*Whyte, Fiberesima* with him for the applicants.  
*M. C. Izuchukwu* State Counsel for the respondent.

**Phil-Ebosie, J.:** This is an application for bail for 53 accused persons, who were charged before the Chief Magistrate, Port Harcourt, with offence of riot, conduct likely to cause a breach of the peace, going armed in such a manner as to cause terror to others, malicious damage to property and stealing.

An application for their bail had been made to the Chief Magistrate when the accused persons were arraigned. It was refused by the presiding Magistrate and this application was then brought.

The application is supported by an affidavit deposed to by one of the counsel for the applicants. The grounds for the application may be said to contain in paragraphs 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the affidavit.

Chief  
M. D.  
Kallo  
and  
fifty-two  
Others  
v.  
Commis-  
sioner  
of Police

Phil-  
Ebosie, J.

The grounds are that it is not certain how long the accused persons would remain in custody, that it is difficult to obtain instructions from them while in prison custody; or for them to arrange their defence, that if released on bail they will appear to stand trial and will do nothing to prejudice the case or endanger the peace and lastly that they are innocent of the charge as no guns or sticks or matchets were found on them; some of them having been arrested in their homes and offices.

The learned State Counsel opposing the application first raised a preliminary objection to paragraphs 12 and 16 of the affidavit on the ground that they offend section 87 of the Evidence Law and on the application generally he argued that the applicants have not discharged the onus on them to show that the Magistrate wrongly exercised his discretion in refusing bail. The affidavit of the applicants he argued was not enough discharge. This proposition is based on the judgment of Smith J, in the case of *Onwuka Okeke and Another v. Commissioner of Police* 1960 N.R.N.L.R. 1.

In the Okeke's case, Smith, J. at page 4 setting out the modification of the English rule having regard to our law said thus:

"Fifthly, if the applicant is charged with a felony, the onus will be on him to show that the Magistrate wrongly exercised his discretion under section 118 (2) of the Criminal Procedure Ordinance; but if the applicant is charged with any other offence under section 118 (3) then the onus would be on the prosecutor to show cause why the applicant should not be admitted to bail."

I am of the view that this is the correct statement of the law. In that case as the accused persons are charged with riot which is a felony the onus is on them to show that the Magistrate wrongly exercised his discretion.

In his ruling refusing bail the presiding Magistrate said thus:

"Application by the prosecutor is allowed in view of the nature and circumstances of the case. The Court cannot fail to take judicial notice of the troubled situation in the country, that gave rise to the arrest of accused persons."

The trial Magistrate in other words refused bail on account of the nature and circumstances of the case and in particular the troubled situation in the country which caused the arrest of the applicants. To succeed in their application, therefore, and on the authority of *Okeke's* case, the onus is on the applicants to show that the nature and circumstances of the case were not such as to refuse bail and in particular must show that their arrest was not due to the troubled situation in the country. It is quite obvious that the affidavit has failed to do so. Their affidavit which is the only basis of the application omitted to touch on these points, and so the Magistrate's findings remain unchallenged.

The only question then left for this court, if the Magistrate's reasons for refusal are correct and true is, are they sufficient reasons to support his refusal? I agree with the Magistrate that one cannot fail to take judicial notice of the present troubled situation in the country. If therefore the offence of the accused persons are connected with the said situation I think it is proper to refuse bail. For this reason I hereby refuse the bail of the applicants and dismiss this application.

*Application dismissed.*

Owerri High Court, 17th May, 1967—HOW/CCA 3/65

NKEMENA, J.

IDIMOGU EZURIKE AND OTHERS

*Defendants/Applicants*

v.

RAYMOND EZIKA

*Plaintiff/Respondent*

*Declaration of title—decisions of native tribunals. Evidence—when an appeal Court can substitute its own conclusion on the evidence—onus of proof.*

An action was brought in the District Court Mbanasa, for "declaration of right and title to plaintiff's land known and called Uhu Umeagbumia Ezenkulie land . . . situated at Obodo". The District Court dismissed the plaintiff's claim. The County Court of Orlu Division on appeal confirmed the decision of the District Court. The plaintiff further appealed to the Chief Magistrate, Owerri, who allowed the appeal.

The defendants then appealed to the High Court against the Chief Magistrate's decision on three grounds—one of the grounds being that the Chief Magistrate erred in law by holding that the finding of facts by the County Court was contrary to the evidence; and secondly, that the Chief Magistrate erred in law by giving title to the respondent when the plaintiff failed to prove acts of ownership.

*Held:*

1. It is not for the Appeal Court to substitute its own conclusion on the evidence if the inference drawn on such evidence by the trial court is also reasonable. It can only do so if there is clear evidence that the trial Court was biased or that it based its findings on an erroneous view of the evidence led.
2. The onus lies on the plaintiff to satisfy the Court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff must rely on his own case and not on the weakness of the defendant's case.

## Cases referred to:—

*Efi of Mankessim v. Enyiful of Enyan Apan* 14 W.A.C.A. 424.*Kojo II v. Bonie and Manuh* 14 W.A.C.A. 242.*Seckna Allie and Others v. Ahmed Alhadi* 13 W.A.C.A. 320.*Oluwo v. Odunikan* (1959) L.R. and F.T.L. 95.*Kodilinye v. Mbanefo Odu* 2 W.A.C.A. 336 at 337.*Ntoe Ekpo Eta Ekpo v. Chief Eta Ita* 11 N.L.R. 68.*Nwokajor v. Udegbe* F.S.C. 440/1961.*Mr Azike* for the defendants/appellants.*Mr Agbu* for the plaintiff/respondent.

**Nkemena, J.:** This is an appeal against the decision of the Owerri Chief Magistrate, dated 16th October, 1963.

The action originated in the District Court of Mbanasa and the claim was for a "declaration of right and title for plaintiff's land known and called

Idimogu  
Ezurike  
and Others  
v.  
Raymond  
Ezika  
Nkemena,  
J.

Uhu Umeagbumia Ezenkulie land given to defendants to dwell and pay homage which defendants have failed to pay according to the terms of oral agreement over the land since three years. The land in question is situated at Obodo".

The District Court dismissed the plaintiff's case. The County Court of Orlu Division on appeal confirmed the decision of the District Court. The plaintiff further appealed to the Chief Magistrate Owerri. The Chief Magistrate allowed the appeal and awarded title to the plaintiff.

It is against the Chief Magistrate's decision that the appeal has been lodged. The learned counsel for defendants/appellants filed and argued three grounds of appeal. I shall consider them separately.

*Ground 1.*—The learned Magistrate erred in law in giving judgment to the plaintiff/respondent by holding that the finding of facts of the County Court was contrary to evidence. It has been held in *Efi of Mankessim v. Enyinful of Enyan Apan* 14 W.A.C.A. 424 that decisions of native tribunals on land cases within their jurisdictions, arrived at after a fair hearing on relevant evidence, should not be disturbed without very clear proof that they are wrong. In the case of *Kojo II v. Bonie and Manuh* 14 W.A.C.A. 242 it was held that the presumption is that the trial Court which saw and heard the witnesses decided rightly on the facts, and a court of appeal would not interfere with that court's findings unless it came to an affirmative conclusion that the finding was wrong. The onus is on the appellant to show that.

It is a well established principle of law that the Appeal Court does not interfere with the concurrent findings of fact of the Courts below unless it is shown that such findings are contrary to the evidence— *Seckna Allie and Others v. Ahmed Alhaadi* 13 W.A.C.A. 320. Finally in *Olowu v. Odunikan* 1959 L.R. and F.T.L. 95 it was held that where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion.

The learned Chief Magistrate observed that the issue was whether the defendants were given the land to settle on the payment of customary tributes. He was of the opinion that both the District and County Court failed to consider the point whether the defendants were strangers on the land.

To enable the District Court ascertain the veracity of the plaintiff's story that one Imo Ezerioha was present when the customary payment was made it ordered the plaintiff to produce this witness to testify on his behalf. This witness was not produced and the plaintiff said the witness refused to testify for him. He who asserts must prove. The District Court and the County Court came to the conclusion that the plaintiff could not be speaking the truth when he said that the defendants paid the customary tribute to him.

On the issue of Iroko trees, there was evidence that the plaintiff being a timber merchant bought Iroko trees from them and their relatives. The District and the County Court accepted that evidence.

In the absence of these two pieces of evidence there is nothing more on which the Courts could have found for the plaintiff. The District Court gave an explanation which appears satisfactory why the church members testified for the plaintiff.

It is not for the Appeal Court to substitute its own conclusion on the evidence if the inference drawn on such evidence by the trial court is also reasonable. It can only do so if there is clear evidence that the trial court was biased or that it based its finding on an erroneous view of the evidence led.

I am satisfied that the findings of fact by both the District and County Courts are reasonable in the circumstances, and the learned Chief Magistrate was wrong to upset such concurrent findings of fact.

*Ground 2:* The learned Magistrate erred in law in giving declaration of title to plaintiff/respondent when the plaintiff has failed to prove acts of ownership.

The general legal principles as to burden of proof which should guide the Court in deciding cases of title to land have been well and fully enunciated in *Koditinye v. Mbanefo Odu* 2 W.A.C.A. 336 at page 337.

"The onus lies on the plaintiff to satisfy the Court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff in this case must rely on the strength of his own case and not on the weakness of the defendants' case. If this onus is not discharged, the weakness of the defendants' case will not help him and proper judgment is for the defendant."

Both this case and *Ntoe Ekpo Eta Ekpo v. Chief Eta Ita II* N.L.R. have been cited from time to time. They state the same principle, and it will be enough to say that it was followed in *Nwokafor v. Udegbe* F.S.C. 440/1961 decided in the Supreme Court on 19th day of February, 1963, and affirmed in the Privy Council on 14th day of July, 1964 in the appeal by Udegbe.

The proposition is undoubtedly correct, that in a case of claim to land the onus lies firmly upon the claimant.

There are two reasons given by the claimant for claiming title to the land in dispute. They are:—

- (1) That the defendants pay tribute to him;
- (2) That he had been cutting Iroko trees and other economic trees on the land.

The District Court disbelieved him for the reasons I had given earlier.

Against this evidence can be compared the evidence of the defendants that they have houses, farms and shrines on the land. This was admitted by the plaintiff.

Since the plaintiff had no other evidence to establish title his claim was bound to fail.

*Ground 3:* The decision of the learned Magistrate cannot be supported having regard to the weight of evidence.

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This is a question of evidence. The plaintiff who asserted failed to prove:—

- (1) That there was homage. He failed to call the only witness whom he said knew about the homage.
- (2) The plaintiff and his relations who were his witnesses disagreed as to when the last homage, if any, was paid.
- (3) Jeremiah Dim a relation of the plaintiff gave evidence for the defendants and stated that the land in dispute belonged to the defendants.

Finally I must state that the plaintiff failed to tender the plan of the land in dispute as required by rule 33 of the Customary Court Rules. I would have ordered a non-suit but the evidence clearly showed that he had a bad case. It will be unjust to give him an opportunity to have a second bite at the case.

I am satisfied that the learned Chief Magistrate was wrong in his decision. I shall set aside his decision and restore the judgment of the District Court.

The respondent to pay 50 guineas costs to the appellants.

*Appeal allowed.*

Onitsha High Court, 19th May, 1967—O/2/65

EGBUNA, J.

<ol style="list-style-type: none"> <li>1. GEORGE MOKWUGWO OKAYO</li> <li>2. OGBEVI OBUORA NNAMDI</li> </ol> <p>(FOR THEMSELVES AND ON BEHALF OF OTHER MEMBERS OF THE UMULERI COMMUNITY)</p>	}	<i>Plaintiffs</i>
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v.

<ol style="list-style-type: none"> <li>1. THE HON. J. U. NWODO (MINISTER OF LOCAL GOVERNMENT)</li> <li>2. ANAMBRA COUNTY COUNCIL, NTEJE</li> <li>3. OTUOCHA LOCAL COUNCIL, OTUOCHA</li> </ol>	}	<i>Defendants</i>
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*Declaratory action—action against Ministers and servants of the State other than by petition of right improper—Petition of Right and Crown Proceedings Act, 1947—whether declaratory claims within the ambit of the Petition of Right Law of Eastern Nigeria.*

The plaintiffs claim against the defendants a declaration that Eastern Nigeria Legal Notices No. 137 of 1964 and No. 138 of 1964 are illegal and *ultra vires*.

Before hearing, the learned counsel for the first defendant referred to the preliminary issue raised in paragraph 4 (c) of the Statement of Defence filed by the first defendant, namely: that the claim is not properly brought against the first defendant and should be dismissed.

He contended that the proper cause for the plaintiffs was by Petition of Right in which case the proper person to be sued would be the Attorney-General and not the first defendant. He referred the Court to section 3 of the Petition of Right Law *Cap.* 93 Volume V of the Laws of Eastern Nigeria.

In his reply, counsel for the plaintiffs submitted that there are specific actions which can be brought by Petition of Right and that a declaratory action is not one of them. He said that there are different ministries with specific duties and functions and are liable to be sued, there being nothing in section 3 of the Petition of Right Law which states that a Minister cannot be sued.

*Held:*

1. The only actions which must be instituted or commenced by a Petition of Right are those claims which are of the same nature as claims which might have been preferred against the Crown in England before the enactment of the Crown Proceedings Act, 1947 by Petition, Manifestation, or plea of right; and in such a case it must be against the Attorney-General as defendant or such other officer as the Governor may designate for that purpose.
2. The Petition of Right as Remedy at Common Law or by Statute before the Crown Proceedings Act was confined to four main cases, namely:
  - (1) Recovery of a debt or liquidated sum due under contract or by statute;

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- (2) Recovery of an unliquidated sum due by Statute;
- (3) Recovery of Damages for breach of contract; and
- (4) Recovery of Property (land or chattel) in the hands of the Crown.

3. The declaratory action which is the claim before the Court is not one of those cases which must be brought by Petition of Right.

Cases referred to:—

*Enwezor v. Onyejekwe and Ministry of Local Government*, F.S.C. 215/63.

*Churchward v. R.* (1865) L.R. I Q.B. 173.

*Kildaro C. C. v. R.* (1909) 2 L.R. 199.

*Attorney-General v. De Keyser's Royal Hotel Company* (1920) A.C. 508.

*Thomas v. R.* (1874) L.R. 10 Q.B. 31.

*Dyson v. A. G.* (1911) 1 K.B. 410, 421.

*Feathers v. The Queen* 12 T.L. 114 (1865) 6 B and S 257.

*Ofofile and Jideani* for the plaintiffs.

*Okadigbo* for the defendants.

**Egbuna, J.:** The plaintiffs claim against the defendants a declaration that Eastern Nigeria Legal Notice No. 137 of 1964 and No. 138 of 1964 are illegal and *ultra vires*.

When this case came up on 28th July, 1966, Chief Rotimi Williams, counsel for the plaintiffs submitted that Chief Nwodo was no more a Minister and referred this Court to section 55 of the Interpretation Law *Cap.* 66 as being wide enough to cover the first defendant; the Minister.

He submitted that the action or defence can be continued by whoever took the duties of the Minister and that section 55 referred to was to meet such a situation. He also referred to Order 36 Rule 1 of the High Court Rules dealing with alteration of parties. The State Counsel who was to appear for the Minister was not present and the matter was adjourned to give him opportunity to contribute in the point.

On the adjourned date Mr Okadigbo appeared but Chief Williams did not appear. Instead Mr Ofofile with him Jideani appeared for the plaintiffs.

Mr Okadigbo raised an issue as to whether the correct procedure was adopted in this case. He referred to section 55 of Interpretation Law and Order 36 Rule 1 and submitted that what Chief Williams was asking was in effect for leave to amend. He argued that if it was for leave to amend such application should be by Motion on Notice and he referred this Court to Order 35 Rules 1 and 2 of the High Court Rules.

Mr Ofofile informed the Court during his reply that the plaintiffs are not asking for any leave to amend and that the action is proper as it stands. It is therefore unnecessary to deal with any issue as to amendment as none has been asked for.

The issue which calls for consideration is the point raised by Mr Okadigbo in paragraph 4 (c) of the Statement of Defence filed by the first defendant, the Minister of Local Government, which reads as follows:—

“The claim is not properly brought against the first defendant and should be dismissed.”

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It is submitted by counsel for the first defendant that this action should have been brought by a Petition of Right and that in such a case the proper person to be sued is the Attorney-General. He referred this Court to section 3 of the Petitions of Right Law *Cap.* 93 Vol V Laws of Eastern Nigeria.

Mr Ofodile says that there are specific actions which can be brought by Petition of Right and he referred the Court to *Crown Proceedings* by Granville Williams page 2, and submitted that this action is purely a declaratory one and cannot be brought by a Petition of Right.

He submitted that there are different ministries in Eastern Nigeria with specific duties and functions and are liable to be sued and that it is not stated in section 3 of the Petitions of Right Law that a Minister cannot be sued.

He referred this Court to *Zemir on Declaratory Judgments* page 290 and the case of *Enwezor v. Onyejekwe and Ministry of Local Government*, F.S.C. 215/63 and submitted this action is properly brought against the Minister.

In reply Mr Okadigbo submitted that declaratory actions are within the ambit of the Petition of Right and referred this Court to *Zemir on Declaratory Judgment* page 17 and also to the case of *Churchward v. R.* (1865) L.R. 1 Q.B. page 173. He further submitted that prior to the Petition of Right Act, 1860 Petition of Right was limited to recovery of land or chattel which finds its way to the Crown and he referred to the Law and Practice of Petition of Right under the Petition of Right Act, 1860 by Clode at pages 108, 109 and also to *Crown Proceedings* by Granville Williams page 78.

He finally submitted that the Attorney-General should be sued and not the Minister and it should be by Petition of Right.

As to this action being dismissed it seems to me that only in case of demurrer under Order 29 of the High Court Rules that this suit can be dismissed and of course should be by motion as required by Order 29 Rule 1. The first defendant having filed a defence and the facts as alleged by the plaintiffs not being admitted by the first defendant any such application should be under Order 33 Rule 19 of the High Court Rules which deals with striking out pleadings or any part of it and not to dismiss the claim.

There is Law in Eastern Nigeria entitled—Petitions of Right Law *Cap.* 93. The title is misleading for it is a law to make provision relating to suits by and against the Government and for recovery of costs in such cases and not only with Petitions of Right.

Whether this action is to be brought by a Petition of Right depends on section 3 of *Cap.* 93.

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Section 3 reads as follows:—

“All claims against the Government of Eastern Nigeria or against any Government Department thereof being of the same nature as claims which might have been preferred against the Crown in England before the enactment of the Crown Proceedings Act, 1947, by petition manifestation, or plea of right, may with the consent of the Government be preferred in the High Court in a suit instituted by the claimant as plaintiff against the Attorney-General as defendant or such other officer as the Governor may from time to time designate for that purpose”. (Italicized is mine.)

It is clear from this section that the only action which must be instituted or commenced by a Petition of Right are those claims which:

- (1) Are of the same nature as claims which might have been preferred against the Crown in England before the Crown Proceedings Act, 1947 by Petition Manifestation or plea of right”, and
- (2) it must be against the Attorney-General as defendant or such other officer as the Governor may designate for that purpose.

Now what are the claims which might have been preferred against the Crown before the Act of 1947 ?

These claims are mentioned in Chapter I *Crown Proceedings* by Granville Williams page 2—Headed “Remedies at Common Law or by Statute before the Crown Proceedings Act”.

It is there stated as follows:—

“The Petition of Right was confined to four cases, the recovery of—

1. a debt or liquidated sum, due under contract or by statute: *Kildare C.C. v. R.* (1909) 2 L.R. 199.
2. an unliquidated sum due by statute. *Attorney-General v. De Koyser's Royal Hotel Company* (1920) A.C. 508.
3. Damages for breach of contract: *Thomas v. R.* (1874) L.R. Q.B. 31.
4. Property (land or chattel) in the hands of the Crown. More detailed type of claims or cases which can be brought by Petition of Right before the enactment of Crown Proceedings Act are enumerated in Volume XI *Halsbury's Laws of England* Third Edition pages 8 and 9.

This present claim is not of the same nature as any of the claims enumerated at page 2 of *Crown Proceedings* by Granville Williams or as detailed at pages 8 and 9 of *Halsbury's Laws of England* Third Edition Volume XI.

Another point which was argued is whether declaratory claims are within the ambit of the Petition of Right. Counsel for the first defendant referred this Court to Zamir—on *Declaratory Judgment* page 17 where this appeared:

“Before the Crown Proceedings Act, 1947, proceedings against the Crown could be instituted in two ways, and in both declaratory relief was claimable. One was by Petition of Right . . .”

This was the opening remark by the author in discussing—*Declaratory Judgment* as a remedy against the Crown in his book. Counsel for the first defendant referred this Court to the case of *Churchward v. R.* as a case on Declaratory Judgment but that case concerns contract. On dealing with Declaratory Judgment Zamir at page 21 said:

“For a long time this problem of respective sphere of the Petition of Right and the Declaratory Judgments as remedies against the Crown remain obscure. . .”

But when was the Petition of Right the proper remedy? He went on:—

“It is well established that certain cases, such as breach of contract and detention of property, were to be determined by Petition of Right.”

But the position was not so clear with regard to certain other matters.

It seems, however, that in practice the Courts adopted the test suggested by Farwell L.J. in the *Dyson's* case—

“that is, that where the estate of the Crown is directly affected the only course of proceedings is by Petition of Right. See *Dyson v. A.G.* (1911) 1 K.B. 410, 421”—

At page 23 of the same book, the author summed up as follows:—

“The Crown may now be sued for declaratory relief, to the extent allowed by Order 25 Rule 5 of the Supreme Court Rules, England either by *Writ or Originating summons* under Order 54 and it is immaterial whether its interests are directly or indirectly affected thereby”. (Italicized mine.)

I have carefully considered this preliminary objection and to say that this claim is not of the same nature as envisaged in section 3 of *Cap. 93 Laws of Eastern Nigeria* or that such action must be by Petition of Right.

The observation of Cooborn in *Feathers v. The Queen* 12 T.L. 114 (1865) 6 B and S 257, which was decided after the Petition of Right Act, 1860 shows clearly instances and cases which can be brought by Petition of Right. He said at 257:—

“... the cases in which the Petition of Right is open to the subject are where land or goods or money of the subject have found their way into the hands of the Crown and where the purpose is to obtain restitution, or where that cannot be obtained, compensation in money or where the claim arises out of a contract for goods supplied to the Crown or the public service. It is in such cases only that instances of Petition of Right having been are to be found in the books and no case has been adduced (after all the industry and research which has been brought to bear on the subject) in which a Petition of Right has been brought in respect of a wrong, properly so called, by the Crown.”

I therefore hold that this claim before the Court is not one of those cases which must be brought by Petition of Right under section 3 of the *Petitions of Right Law Cap. 93 Laws of Eastern Nigeria*.

The preliminary objection is overruled.

*Preliminary objection overruled.*

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Nwodo  
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Port Harcourt High Court, 22nd May, 1967—P/91/1967

PHIL-EBOSIE, J.

IFEABUNIKE UDEAJA

*Plaintiff*

*v.*

REX JIM LAWSON

*Defendant*

*Contract—agreement to perform musical entertainment at the plaintiff's hotel—independent negative stipulation expressly precluding the defendant from playing for other persons or institutions—breach of contract—security for further breaches pending determination of suit.*

The plaintiff and the defendant entered into a contract whereby the defendant who is a band leader agreed to perform musical entertainment at the plaintiff's Maryland Hotel at Diobu for a period not exceeding two years beginning from the 16th of January, 1967. One of the terms of the agreement was that the defendant would not play for any other person or institution other than the plaintiff except with the plaintiff's written consent. The defendant having committed breach of this contract by playing for other persons without the plaintiff's consent, the plaintiff brought this action claiming a declaration that the said contract is valid and subsisting, and injunction to restrain the defendant from playing for other persons and £10,000 damages for breach of contract.

After pleadings had been ordered, the plaintiff brought this application to restrain the defendant and members of his orchestra from continuing the breach pending the determination of this suit. In his affidavit in support of his application the plaintiff deposed to the fact that the defendant had inserted in the "Daily Flash" newspaper of the 26th of April an advertisement to the effect that he and his band would be touring and would be playing at Enugu on the 6th of May and thereafter at the Club Peninsula, Port Harcourt.

The defendant in his counter-affidavit averred that the contract was subject to an oral agreement by which he was permitted to honour all previous agreements entered into with other persons before the execution of the agreement between him and the plaintiff.

*Held:*

1. The Court will not grant an injunction the result of which would be to compel the defendant to either work for the plaintiff or starve; but where, as in this case, there are other ways in which the defendant can earn a living, an injunction may be granted.
2. Since injunction is never granted where damages will be the appropriate remedy, the defendant will give security for damages caused by further breaches of the contract. Therefore an injunction will be granted but it will be lifted when the defendant gives security by way of a bond in the sum of £2,000 with a surety in the same amount. The surety will be a property owner in Port Harcourt whose property is worth £2,000.

Cases referred to:—

*Lumley v. Wagner* (1852) 1 De EM and G 604.

*Whitwood Chemical Company v. Hardman* (1891) 2 Ch. 416/427.

*Warner Brothers v. Nelson* (1937) 1 K.B. 209.

*Murtima v. Becket* (1920) 1 Ch. 571.

*Ikokwu* for plaintiff.

*Ogba* for defendant.

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Lawson  
—  
Phil-  
Ebosie.

**Phil-Ebosie, J.:** The plaintiff/applicant in this motion entered into contract with the defendant/respondent for the latter who is a band leader to perform musical entertainment at the applicant's Maryland Hotel, Diobu for a period not exceeding two years beginning from the 16th January, 1967. One of the terms of the agreement was that the respondent will not play for any other person, company or institution other than the applicant except with the applicant's written consent. The respondent by playing his band for other persons without the plaintiff's consent committed a breach of the contract. The applicant then brought an action claiming a declaration that the said contract is valid and subsisting, an injunction to restrain the defendant from playing for any other persons and £10,000 damages for breach of contract. Pleadings had been ordered. The plaintiff/applicant has, however, filed this motion seeking for an order to restrain the defendant and members of his orchestra from continuing a breach of the contract, pending the determination of the substantive suit.

The application is brought under Order 21, Rule 4 and is supported by affidavit alleging that the defendant intends to continue the breach of the contract as proved by an advertisement inserted in the "Daily Flash" newspaper of the 26th April to the effect that the defendant and his band would be touring and would be playing at Enugu on the 6th May and thereafter at Club Peninsula, Port Harcourt.

The defendant filed a counter-affidavit. While not disputing the contract annexed to the plaintiff's affidavit deposed that the contract was subject to an oral agreement between him and the plaintiff by which he was permitted to honour all previous agreements entered into with other persons prior to the execution of the agreement between him and the plaintiff. As to the newspaper advertisement, the defendant deposed that it was made without his consent. He further deposed that the plaintiff had also engaged another band to play in his hotel and that if the application of the plaintiff is granted he would be deprived of his livelihood.

The plaintiff filed a further affidavit denying the allegations made by the defendant.

It is well settled that in a contract for the performance of personal service as in this case the Court have in appropriate cases made an order for injunction restraining the defendant from performing a like personal service for other persons. An instance is the celebrated case of *Lumley v. Wagner* (1852) 1 De EM and G 604, where Miss Wagner agreed to sing at Lumley's theatre, and during a certain period to sing nowhere else. Afterwards she made a contract with another person to sing at another theatre and refused to perform her contract with Lumley. The Court refused to enforce Miss Wagner's positive engagement to sing at Lumley's theatre but compelled

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performance of the promise to sing elsewhere by an injunction. The Court, however, will not grant an injunction where the result would be to compel the defendant to either work for the plaintiff or otherwise starve. *Whitwood Chemical Company v. Hardman* (1891) 2 Ch. 416/427. But where there are other ways in which the defendant may earn a living the Courts have granted injunction as in the case of *Warner Brothers v. Nelson* (1937) 1 K.B. 209. Lastly, injunction will not be granted unless the defendant has entered into an independent negative stipulation by which he expressly precludes himself from acting inconsistently with his positive contract *Murtima v. Becket* (1920) 1 Ch. 571. In other words one of the terms of the contract must expressly state that the defendant will not perform a similar contract for others.

Having set out the law the facts of this case may now be examined. The basis of the contract between the parties is the annexure to the plaintiff's affidavits. The document speaks for itself. There is no doubt that the defendant agreed to play for the plaintiff and not for any other person except with the written consent of the plaintiff. See paragraphs 5 and 10 of the agreement. These terms will appear to satisfy the decision to *Lumley v. Wagner (supra)* or *Murtima v. Becket (supra)*. Paragraph 10 of the agreement is a term which expressly precludes the defendant from acting inconsistently with his positive contract (paragraph 5). The next question will then be whether the inevitable result would be to compel the defendant to work for the plaintiff or starve. The text as enumerated in *Warner Brothers v. Nelson* is whether there are no other ways in which the defendant may earn his living. The present case is not the same as in *Whitwood Chemical Company v. Hardman (supra)* where the term was that the defendant will not serve anybody in any capacity whatever. The position here seems to fall in with the case of *Warner Brothers v. Nelson (supra)* for apart from playing music there are many other ways the defendant can earn a living. The facts in this case have not been seriously contested. The defence counsel's substantial point is that the plaintiff has not established a *prima facie* case of an irreparable loss to him following a continuation of the breach of the defendant. I must concede to the counsel that the affidavit of the plaintiff has not stated so in very clear terms. I am, however, of the opinion that the affidavit have stated enough as required by Order 21, Rule 4 taking the writ of summons into consideration. The purpose of this application is no doubt to prevent further breach of contract for which the plaintiff has claimed £10,000. I think the only point for consideration here is whether an injunction without any other condition is the proper remedy. Injunction is never granted where damages will be an appropriate remedy. In this case the continuation of the breach will only cause the plaintiff, I think, loss of financial earnings and no more. For that reason I think an outright order for injunction will not serve any useful purpose. I think the more useful order would be that the defendant would give security for damages caused by further breaches. Failure to give security the defendant will, however, be restrained.

*Order.*—I grant the plaintiff the injunction but this will be lifted on the defendant giving security by way of bond in the sum of £2,000 with a surety in the same amount. The surety to be a property owner in Port Harcourt whose property is worth £2,000. Costs to applicant three guineas.

*Conditional injunction granted.*



*Price: Cloth Bound: Two Guineas*

*Limp: Thirty Shillings*

GPE 1085(71)172/3,000