the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

An extract from the judgment of Lord Esher, M.R. in *Colonial Securities Trust Co.* v. *Massey* (2), quoting Lopes, L.J., may also be mentioned ([1896] 1 Q.B. at 39—40; 73 L.T. at 498):

"Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant."

Applying this principle one comes with great reluctance to the conclusion now arrived at in the judgment just read, after listening to the exhaustive arguments of counsel and reviewing all the facts, that the relationship of medical attendant and patient was established, that the presumption of undue influence thereby created has not been rebutted, and that this appeal must be allowed.

Appeal allowed.

REX v. SARD

West African Court of Appeal (Webber, C.J. (Sierra Leone), Strother Stewart, J. (G.C.) and Brooke, J. (Nig.): April 16th, 1935

[1] **Courts — Supreme Court — jurisdiction — criminal jurisdiction — Governor's fiat transferring case under s.50 of Protectorate Courts Jurisdiction Ordinance, 1932 not condition precedent to court's power to try non-native for offence against native in Protectorate:** Section 50 of the Protectorate Courts Jurisdiction Ordinance, 1932 is permissive and merely gives a general power to the Governor to transfer proceedings to any court of the Colony; so that its terms cannot be read as being a condition precedent to the assumption of jurisdiction by the Supreme Court to try a non-native for an offence against a native in the Protectorate (page 400, line 34—page 401, line 3).

[2] **Criminal Law — provocation — consideration in judge's summing-up — where evidence of provocation, jury to be directed on it even though defence not raised:** Where there is evidence of provocation which would, if the jury believed it, justify a verdict of manslaughter rather than murder, the judge must put that possibility to the jury even though the accused has not relied on that defence (page 402, lines 17—20).

[3] **Criminal Procedure — appeals — appeals against conviction — wrongful admission of corroborative evidence — fatal to conviction unless jury**

would have reached same conclusion if evidence excluded: Where hearsay evidence is wrongly admitted in a murder trial and where this evidence is the only one to supply a motive for murder, the fact that the judge directs the jury to ignore it does not cure the harm done: if it cannot be said that such evidence had no effect on the jury and that it would have reached the same conclusion had such evidence been excluded, then the conviction must be quashed (page 404, lines 25—35; page 405, lines 24—34).

[4] **Criminal Procedure — committal for trial — non-native charged with capital offence against native in Protectorate "shall" be tried before Supreme Court — "shall" renders proviso in s.36 of Protectorate Courts Jurisdiction Ordinance, 1932 mandatory:** By reason of the proviso in s.36 of the Protectorate Courts Jurisdiction Ordinance, 1932, a non-native charged with a capital offence shall be comitted for trial before the Supreme Court, and the use of the word "shall" makes it imperative and not in any way qualified (page 400, lines 30—36).

[5] **Criminal Procedure — institution of proceedings — Governor's fiat — Governor's power under s.50 of Protectorate Courts Jurisdiction Ordinance, 1932 to transfer case to Supreme Court merely permissive and not condition precedent to Supreme Court's assumption of jurisdiction to try non-native for offence against native in Protectorate:** See [1] above.

[6] **Criminal Procedure — judge's summing-up — manslaughter as alternative verdict to murder — possibility to be put to jury where evidence of provocation even though not raised by defence:** See [2] above.

[7] **Criminal Procedure — judge's summing-up — provocation — possibility of manslaughter as alternative verdict to murder to be put to jury where evidence of provocation even though not raised by defence:** See [2] above.

[8] **Criminal Procedure — judge's summing-up — record — no record of summing-up — judge's recollection of facts considered adequate:** In the absence of shorthand notes, the trial judge's recollection of the facts as stated in his summing-up is considered adequate (page 403, lines 5—7).

[9] **Criminal Procedure — record — contents — judge's summing-up — failure to record — judge's recollection of facts considered adequate:** See [8] above.

[10] **Evidence — confessions — questioning in custody — prisoner's statement in answer to question while in custody not ipso facto inadmissible:** The fact that a prisoner's statement is made by him in reply to a question put to him after he has been taken into custody does not of itself render the statement inadmissible in evidence (page 403, lines 38—41).

[11] **Statutes — interpretation — mandatory and directory enactments — Protectorate Courts Jurisdiction Ordinance, 1932, s.50 merely permissive:** See [1] above.

[12] **Statutes — interpretation — mandatory and directory enactments — use of word "shall" renders proviso in s.36 of Protectorate Courts Jurisdiction Ordinance, 1932 mandatory:** See [4] above.

The appellant was charged in the Circuit Court with murder.

The prosecution alleged that the appellant, a non-native, killed a native woman with whom he had been living because, after a quarrel, she had reported him to the District Commissioner for stealing money. The appellant alleged that he had been provoked and assaulted by the woman and had killed her with a knife in self-defence. The appellant was convicted of murder.

On appeal to the West African Court of Appeal, the three main grounds of appeal were (a) want of jurisdiction, (b) misdirection, and (c) misreception of evidence. On the want of jurisdiction, the appellant contended that under s.39(1) of the Protectorate Courts Jurisdiction Ordinance, 1932 the Circuit Court could not try a non-native charged with a capital offence, nor could the case be transferred to the Supreme Court's jurisdiction without a fiat by the Governor, obtained under s.50 of the same Ordinance. On misdirection, the appellant alleged that the judge failed to direct the jury as to the distinction between murder, manslaughter, and justifiable or excusable homicide, and misdirected them on the law affecting these charges; and that he misdirected them by stating that the only possible verdict, if the evidence for the prosecution was to be believed, was one of murder. On misreception of evidence, counsel for the appellant contended that the appellant had been improperly cross-examined about a previous offence; that the evidence of the Paramount Chief as to the appellant's confession after he had been taken into custody was inadmissible; and that, material hearsay evidence having been wrongly admitted, the judge should have directed the jury as to the inadmissibility of such evidence.

In addition to these issues the court considered whether its powers to substitute another verdict should be exercised.

The appeal was allowed.

Cases referred to:

(1) *Knowles v. R.*, [1930] A.C. 366; (1930), 143 L.T. 28, distinguished.

(2) *Lawrence v. R.*, [1933] A.C. 699; (1933), 149 L.T. 574, distinguished.

(3) *Maxwell v. D.P.P.*, [1935] A.C. 309; [1934] All E.R. Rep. 168, *dictum* of Viscount Sankey, L.C. applied.

(4) *R. v. Deana* (1909), 25 T.L.R. 399; 2 Cr. App. R. 75, distinguished.

(5) *R. v. Stedman* (1704), Fost. 292, distinguished.

(6) *R. v. Taylor* (1914), 11 Cr. App. R. 41, distinguished.

(7) *R. v. West* (1910), 4 Cr. App. R. 179, distinguished.

Legislation construed:

West African Court of Appeal (Criminal Cases) Ordinance, 1929 (No. 10 of 1929), s.4(1):

"The Court of Appeal on any such appeal against conviction shall allow the appeal if they think... that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

s.5(2): "Where an appellant has been convicted of an offence and the judge who tried him or the jury... could, on the information, have found him guilty of some other offence, and on the finding of such judge or the jury it appears to the Court of Appeal that such judge or the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found... a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence...."

Criminal Procedure Ordinance, 1932 (No. 38 of 1932), s.10(1):

"Whenever it is made to appear to a Judge —

...

(c) that an order under this section will tend to the general convenience of the parties or witnesses; or

(d) that such an order is otherwise expedient for the ends of justice; the Judge may order:-

...

(ii) That an accused person be committed to the Supreme Court or the Circuit Court for trial."

Supreme Court Ordinance, 1932 (No. 39 of 1932), s.3:

The relevant terms of this section are set out at page 400, lines 24—26.

Protectorate Courts Jurisdiction Ordinance, 1932 (No. 40 of 1932), s.36:

The relevant terms of this section are set out at page 400, lines 13—16.

s.39(1): "... Provided that the Circuit Court shall not have jurisdiction to try any criminal case in which a non-native is charged with a capital offence...."

s.50: "The Governor may. . . direct by a fiat under his hand that proceedings shall be instituted in or transferred to any Court of the Colony in any cause or matter where such Court could have exercised jurisdiction had such cause or matter arisen within the Colony, notwithstanding that it shall have arisen within the Protectorate."

Beoku-Betts and *Kempson* for the appellant;
Evans for the Crown.

WEBBER, C.J. (Sierra Leone), delivering the judgment of the court:

The appellant Abdul Hassan Sard was convicted on information charging him with the murder of Adiatu, a female. Against his conviction he has appealed on the following grounds:

1. The court had no jurisdiction to try the case.
2. The learned trial judge failed to direct the jury as to the distinction between murder, manslaughter and justifiable or excusable homicide.
3. The learned trial judge misdirected the jury as to the law in regard to manslaughter and justifiable or excusable homicide.
4. The learned trial judge misdirected the jury by stating that if they believed the evidence of the prosecution in its entirety the only verdict that could be returned was that of murder.
5. Material hearsay evidence was wrongly admitted.
6. The learned trial judge failed to direct the jury properly as to inadmissibility of such hearsay evidence.
7. The prisoner was cross-examined as to his having been charged before the District Commissioner at Makeni and convicted and fined for an offence against the deceased.
8. The learned trial judge directed the jury in such a way as to preclude them from considering whether they should give a verdict of manslaughter or justifiable or excusable homicide.
9. The learned trial judge directed the jury in such a way as to amount to a withdrawal of certain facts from them.
10. The learned trial judge otherwise misdirected the jury.

By leave of this court another ground was added, namely:

11. The evidence of Paramount Chief Alimamy Suri as to the alleged confession by the appellant was improperly received.

From these gounds it will be seen that the appeal is brought on three main points:

(a) Want of jurisdiction (Ground 1)
(b) Misreception of evidence (Grounds 5, 6, 7, 11)
(c) Misdirection (Grounds 2, 3, 4, 8, 9, 10).

The question of jurisdiction must first be considered. The defendant moved in arrest of judgment after conviction, and was referred to his right of appeal.

The plea to the jurisdiction was based on the contention that the Circuit Court had no jurisdiction owing to the proviso in s.39 (1) of the Protectorate Courts Jurisdiction Ordinance, 1932 and that the Supreme Court could only be given jurisdiction by virtue of the Governor's fiat obtained under s.50 of the same Ordinance, and that action under this section is a condition precedent to the bestowal of jurisdiction. It was also contended that s.50 falls within Part V of the Ordinance to which the heading is "Jurisdiction of the Courts of the Colony" and that the proviso to s.36 of the same Ordinance, which enacts that in all cases in which, *inter alia*, a non-native is charged with a capital offence against a native the accused, unless discharged, "shall be committed for trial upon information before the Supreme Court of the Colony," is directory and cannot confer jurisdiction.

It is clear that if this contention were correct, no consent or waiver can give jurisdiction. If the act or thing was required by the Ordinance as a condition precedent to the jurisdiction of the court compliance cannot, as Maxwell says in his *Interpretation of Statutes* be dispensed with, and the jurisdiction fails if it has not been complied with. The jurisdiction of the Supreme Court is set out in s.3 of the Supreme Court Ordinance, 1932 which enacts that it shall be "in addition to the jurisdiction conferred by this or any other Ordinance." It will be seen that a power of transfer is given to a judge of the Supreme or Circuit Courts, in cases in which it appears expedient, by s.10(1) of the Criminal Procedure Ordinance, 1932, and that the judge may order that an accused person be committed to the Supreme Court for trial. Except in this case and that of *ex officio* informations no information may be filed without a previous committal. Such committal shall in the case of a non-native charged with a capital offence be to the Supreme Court. The proviso in s.36 of the Protectorate Courts Jurisdiction Ordinance, 1932 reads "*shall* be committed for trial." It is imperative and not in any way qualified. Section 50 is permissive and merely gives a general power to transfer to the Governor similar to that in the legislation of neighbouring colonies which cannot be read as being a condition precedent to the assumption outside the colony of jurisdiction by the Supreme Court. The effect would be to give no court jurisdiction in cases in

which a non-native is charged with a capital offence in the Protectorate except upon a fiat of the Governor under a general clause which is permissive.

The argument based on the Sierra Leone Protectorate Order in Council, 1924 and the Foreign Jurisdiction Act, 1890 and purporting to exclude the jurisdiction of the Supreme Court was also unconvincing. We are of opinion therefore that the first ground as to lack of jurisdiction fails.

The next heading under which grounds 2, 3, 4, 8, 9 and 10 fall is that of misdirection. In this is alleged: (a) a failure on the part of the learned judge in his direction to the jury to distinguish clearly between the three possible verdicts of guilty of murder, guilty of manslaughter, and an acquittal; (b) a misdirection as to the law in regard to manslaughter and justifiable or excusable homicide; (c) a misdirection to the effect that the only possible verdict, if the evidence for the prosecution was believed, could be that of murder, and a further direction to the jury which precluded a verdict of manslaughter or an acquittal; (d) a withdrawal of certain facts from the jury; and (e) a failure to draw attention to the conflict of evidence, and an absence in the note as to what the learned judge directed the jury as to facts.

The first paragraph of the learned judge's statement of the substance of his summing-up to the jury is clearly a general one which was amplified in the body of the summing up.

The portion of the learned judge's summing-up objected to in ground 4 is merely a statement that there was evidence on which the jury could come to a conclusion, and not a direction to convict of murder.

The fact that a reference was made to the accused being so injured that he became physically unable to control his acts did not exclude other grounds of self-defence, as the subsequent reference to *Archbold* in the said judgment shows.

There was no evidence to show that the accused thought he was in imminent danger of his life or committed an act that he thought was the only means to protect himself. In *R.* v. *Stedman* (5) there would appear to have been no doubt whatever about the facts, whereas in this case there is some doubt as to what actually happened. To that extent the judge was entitled to allude to the inapplicability of those facts for comparison; it is for him to say whether the facts can be held the same, for the jury to say if they are the same. The whole section in *Archbold's Criminal Pleading,*

Evidence and Practice on provocation was explained to the jury. The trial judge dealt at length with the defence and the effect of the medical evidence must clearly have been taken into consideration here, as well as the accused's own statement.

It is not for a moment suggested that had there been a wrong direction or a possibility of the jury being misled by a direction of the judge, or that they would not have returned the same verdict owing to the omission of a proper direction, the conviction would not have been invalidated. But it must be shown that the direction was rendered necessary by the facts or that there was a definite misdirection which upon the record is not apparent.

R. v. *Deana* (4) was a case in which the blow missed, and is a strong case, but the facts on the record cannot be said to show that a similarity to this case has been established. It is true that if in the absence of other evidence the jury accepted the accused's evidence they could have found a verdict of self-defence. It is also true that where there is evidence of provocation as would, if the jury believed it, justify a verdict of manslaughter, the judge must leave the question of manslaughter to the jury, even though counsel for the accused has not relied on that defence.

What was the evidence on which the jury could determine whether the action of the accused was necessary for his protection, or the force employed was proportionate thereto, or the question of the weapon used, the degree of provocation, or whether there had been time for his passion to cool, or whether he was deprived as a reasonable man of his self-control? Medical evidence as to the appellant's injury was consistent with a fall; no bottle was within reach, and the accused did not mention his injury in his first account of what happened.

The court clearly envisaged these possibilities by the question put to the medical witness and did not omit other explanations. *R.* v. *Taylor* (6) quoted was in a different category. In it the misdirection was in telling the jury that unless they believed that the witnesses for the prosecution had committed perjury they must convict, when the defence alleged a possible explanation as to a mistake of identity of the prisoner.

It cannot be said that there was any direction to convict for murder and that a verdict of murder was the only one possible. It was only stated that there was no evidence to establish a plea of self defence.

There was no positive direction to convict as in *R.* v. *West* (7).

There was no real conflict in the evidence to which attention should have been drawn. There were no diametrically opposite stories and no single issue on which there should have been a full direction.

We have the judge's statement that he dealt at length with the defence and, in the absence of shorthand notes, the judge's recollection can scarcely be considered as inadequate. A fuller note could have been called for under r.42 of the West African Court of Appeal Rules of Court, 1929.

It cannot therefore be found that there has in this case been any definite misdirection by the judge or any omission in his direction to the jury which would justify the court in coming to the conclusion that there had been an erroneous summing-up. The record of the judge's summing-up is a summary and his direction as to law was adequate to the facts before the court.

We come last to the third division in which grounds 5, 6, 7 and the additional ground 11 may be included. In ground 7 counsel for the appellant maintained that the prisoner was cross-examined as to his having been charged before the District Commissioner at Makeni and convicted and fined for an offence against the deceased. This did not appear on the judge's notes. A question as to the procedure in introducing this ground arose which it is unnecessary to pursue. The Solicitor-General states that he had no knowledge as to the nature of the case before the District Commissioner until after the trial was over, and there is nothing to show that any question, whatever it may have been and if put in cross-examination, could have had any effect on the minds of the jury.

In ground 11 the evidence of the witness Chief Alimamy Suri as to the alleged confession by the appellant is objected to: the Crown should, it is urged, have excluded this evidence, as the fact that the accused was in the stocks clearly showed that there was an intention to arrest and no question should have been addressed thereafter; and if so addressed, the replies were inadmissible in evidence.

Actually, the only question put to the accused after arrest was with regard to the knife. The question did not elicit any evidence which was not already available. The appellant had already mentioned the knife. The fact that a prisoner's statement is made by him in reply to a question put to him after he has been taken into custody does not of itself render the statement inadmissible in evidence.

We come to the last and most substantial objection in grounds 5 and 6: that material hearsay evidence was wrongly admitted, and that the learned trial judge failed to direct the jury properly as to the inadmissibility of such hearsay evidence. The evidence referred to is that of the witness Santigi Loya.

As regards the direction of the judge it will be seen that he says in his statement of the summing-up: "I told them to ignore entirely Santigi Loya's evidence so far as he purported to have heard the accused's confession to the Chief."

The evidence objected to was that —

> "the accused spoke and said he had killed someone and the Chief should handcuff him. The Chief asked him why? The accused said he was living together and she had no money and I assisted her so she got money. We had palaver and she reported me to D.C. who fined me £5 and I killed her so she shouldn't eat the money alone."

And: "Later I saw the accused he was talking with the Chief, who asked him if he was owner of the knife. The accused said yes." It is indisputable that this evidence was hearsay and as such was inadmissible; it was only discovered to be such after the testimony was given by the question addressed to the witness by the court, and it was then too late to exclude it. We have therefore to consider the weight of this objectionable evidence, and the effect it may have had on the verdict of the jury.

The only evidence of motive is that of the admission of the accused to the witness Chief Alimamy Suri. This testimony becomes infinitely stronger if the corroboration supplied by the evidence objected to is taken into account; it further, by the suggestion of interpretation, may have introduced into the minds of the jury an idea of the confession being listened to by a number of persons. It cannot be said that it could have had no effect on the minds of the jury and that the latter could have come to no other conclusion than the one they did arrive at had it been excluded; or that the direction in the summing-up must have cured the harm done. It was clearly evidence for the prosecution brought to corroborate other evidence, and though parts of the statement were admissible as evidence, it makes no difference. The nature of the evidence should have been discoverable beforehand as it must have appeared on the depositions. It was called and the witness's statement could have been restricted to the admissible portion.

In this connection we must consider *Maxwell* v. *D.P.P.* (3). In this case a prisoner had given evidence of his good character but it was held that he could not be cross-examined as to a previous charge of which he had been acquitted. It was submitted that as the cross-examination ought not to have been administered it was not possible to tell the jury in summing up to treat the case as though that cross-examination had not taken place. The direction of the judge was a strong one to ignore the evidence and contained these words ([1935] A.C. at 315, [1934] All E.R. Rep. at 171): "Now my advice to you is, and I am sure you will act upon it; put that out of your minds altogether." The question was whether, if the evidence had been excluded, the jury must have convicted. It was held that the conviction could not properly stand after the admission of the objectionable evidence.

It was contended by the prosecution in the case quoted that even if the evidence was wrongly admitted the accused was not entitled to have the verdict set aside by reason of s.4 of the Criminal Appeal Act, 1907 on the ground that no substantial miscarriage of justice had actually occurred. This section is identical with s.4(1) of the West African Court of Appeal (Criminal Cases) Ordinance, 1929. The following passage occurs in the judgment of Viscount Sankey, L.C. ([1935] A.C. at 322—323; [1934] All E.R. Rep. at 175):

> "The rule which has been established is that, if the conviction is to be quashed on the ground of misreception of evidence, the proviso cannot operate unless the evidence objected to is of such a nature and the circumstances of the case are such that the Court must be satisfied that the jury must have returned the same verdict even if the evidence had not been given."

It is impossible to say what the effect of this corroborative evidence was on the minds of the jury and to conclude in this case that the reception of this evidence was not the deciding factor which made the jury give the verdict they did.

It has been pointed out that every rule in favour of the accused must be observed and no rule broken so as to prejudice the chance of the jury fairly trying the true issues. The conviction for murder must therefore be quashed.

We have then to consider whether the power of the court under s.5 (2) of the West African Court of Appeal (Criminal Cases) Ordinance, 1929 in substituting another verdict should be exercised.

There has been no misdirection or omission in the direction to the jury; the misreception of evidence only goes to the verdict of murder. Counsel for the appellant, in referring to the question of substitution of verdict, quoted *Knowles* v. *R.* (1) ([1930] A.C. at 376; 143 L.T. at 31) and referred to *Lawrence* v. *R.* (2). These cases are, however, not *in pari materia.* They relate to an erroneous summing-up, active misdirection on the elements of the offence and a disregard of the forms of legal justice. In the former case the question of manslaughter was not before their lordships. It was pointed out that the Board do not sit as a Court of Criminal Appeal, in which case they would have been entitled to consider what would have been their own verdict, but had to be satisfied that the accused was deprived of the substance of a fair trial. They held that unless it could be predicated that properly directed the jury must have returned the same verdict, a substantial miscarriage of justice appeared to be established.

This court, however, considers that the objectionable evidence of Santigi Loya could only affect the jury so far as motive was concerned. The jury by their verdict showed that they had no doubt about the homicide. With the other facts before them, but without the corroboration of motive, the jury must have been satisfied of facts which proved the accused guilty of the less serious crime of manslaughter.

The court, therefore, quashes the conviction for murder and, by virtue of s.5 (2) of the West African Court of Appeal (Criminal Cases) Ordinance, 1929, substitutes a conviction of manslaughter and sentences the appellant to seven years' imprisonment with hard labour to date from January 16th, 1935, the day on which the trial concluded.

Appeal allowed.