other £400 from the Diamond Corporation. The next day the complainant sent one, Musa Gboso, with another message (which is referred to below) without result. The complainant then reported to the police.

5. If the matter was thus reported to the police, the lapse of time was not such as to make it difficult, much less impossible, to calculate the date of the offence. Yet the charge could only aver that it was "sometime in the month of January." The court file shows that the appellant was arrested at 11.50 a.m. on March 2.

6. The message, which was given to Musa Gboso to give to the appellant, was "that if he (appellant) knew that the money was his (complainant's) he should pay him but if he thought that the money was his (appellant's) he should tell him." This message seems to us to be a revealing "cri de coeur." If the transaction was about the Land Rover, how could the complainant possibly imagine, even for a moment, that the appellant might think that he was entitled to keep the £800. On the other hand, if it was about the sale of the diamond, there was every reason to imagine that the appellant might think himself entitled to keep the £790.

The assessors and the learned judge believed the prosecution witnesses and disbelieved the appellant, and the appellant was convicted, as has been said.

We notice, however, that the summing-up of the learned judge, while being beyond criticism as to matters of law, appears to omit mention of some matters of fact, which in our respectful opinion, should have been mentioned.

There appears to have been no reference to the cost of the Land Rover being so much above the £800, not to mention insurance and licensing, or how the difference was to be met. There was no reference to the message sent by Musa Gboso which, we think, needed to be very carefully considered. There was no reference to the proximation of the sums of money in the two versions of what happened, £800 and £790. Nor, and perhaps most important, was there any reference to the Diamond Corporation's purchase voucher, which the appellant produced and which proved it to be a fact that he had indeed sold a single diamond to the Corporation for £900 on January 4.

Of course, had these matters of fact been discussed in the summing-up, the result of the trial might have been the same. But we think it impossible to hold that it must inevitably have been the same.

Consequently we think it dangerous to allow the conviction to stand and it is quashed.

[COURT OF APPEAL]

JAMIL IBRAHIM . . . . . *Appellant*

v.

GEORGE ANTHONY . . . . . *Respondent*

[Civil Appeal 1/61]

Claim for an accounting—Submission of no case overruled by judge—Prima facie proof—Rate of commission on sale of ginger—Whether account should be taken by Master and Registrar or professional accountant.

Appellant owned a shop in Moyamba. Between September 1, 1953 and December 8, 1954, he was in Syria. Before going there, he entered into

partnership with respondent, who also had a shop at Moyamba and who agreed to manage appellant's shop during his absence. Profits were to be divided equally, and any loss was to be borne by respondent. There was a stock-taking before appellant left, and another when he returned. In addition to the stock in the shop, appellant left a large quantity of ginger in the custody of respondent. While he was away, appellant instructed respondent to sell the ginger.

On appellant's return, two documents were drawn up, both dated December 8, 1954. These two documents, together with records of the two stock-takings, were said to constitute a "settled account" of the transactions between the parties. A dispute arose, however, and respondent issued a writ of summons in which he claimed "that an account be taken of their business transactions." Regarding the ginger, respondent's evidence was that it was to be sold by him as agent for appellant on a commission basis, while appellant's counsel argued that it had "entered into the partnership business."

At the close of respondent's case, appellant's counsel submitted that respondent's evidence was so unsatisfactory that the court should find that the burden of proof had not been discharged. The judge, however, overruled the submission and gave judgment for the respondent. The judge ordered that the parties' "settled account" be reopened on the ground of "serious errors"; that the Master and Registrar take an account of the business relations; that there was prima facie proof of agreement to pay commission on the sale of the ginger; and that such commission should "be determined on a quantum meruit basis."

Held, (1) that there was evidence to support the judge's action in overruling appellant's submission that respondent had failed to sustain his burden of proof;

(2) that respondent's commission on the sale of the ginger should be calculated at five per cent; and

(3) that a qualified professional accountant should be appointed as referee to investigate the accounts instead of the Master and Registrar.

Cases referred to: *Storey* v. *Storey* [1961] P. 63; *Laurie* v. *Raglan Building Co.* [1941] 3 All E.R. 332.

Solomon A. J. Pratt for the appellant.

Cyrus Rogers-Wright for the respondent.

AMES AG. P. This is an appeal against an order for the reopening on the ground of "serious errors," of what has been referred to, here and in the court below, as a settled account, and for the taking of an account by the Master and Registrar of the business relations of the plaintiff and defendant between September 1, 1953, and December 8, 1954, on the basis of certain findings of fact set out in the formal order.

The appellant, who was the defendant, has a shop at Moyamba. During the period mentioned above he was away, and in Syria. Before going there, he entered into partnership with the respondent, who also has a shop at Moyamba, so that his shop should not be closed during his absence but should be managed by the respondent. Profits were to be divided equally, and any loss was to be borne by the respondent. There was a stock-taking before the appellant left, and, of course, another when he returned; both included outstanding debts due to the shop from credit customers.

In addition to the stock in the shop, the appellant left behind in a store at Moyamba a large quantity of ginger. This was not to be in the partnership business but was left in the custody of the respondent. Later on, while he was

away, the appellant instructed the respondent to sell it. According to the evidence of the respondent, it was to be sold by him as agent for the appellant on a commission basis. Mr. Pratt, for the appellant, argued that the ginger " entered into the partnership business " whether that was intended at first or not.

In addition to the stock-taking on the appellant's return, two other figured documents (as I will call them) were made, both dated December 8, 1954, and signed by the respondent (although the typed copy of one of them in the record is not shown as having been signed). They are exhibits 11 and 12. The former contains a mention of ginger and a figure £956 12s. 7d. referring to it. It is these two documents and the documents of the two stock-takings, which together have been called the settled account. It may be that they are correctly so called, but to my mind they constitute a very unsatisfactory settled account, because their connection with each other is not self-evident but needed to be explained to me. Moreover, exhibit 12 contains a figure of £563 7s. 9d. for " goods supplied " and neither Mr. Pratt nor Mr. Rogers-Wright, for the respondent, was able to make clear to me what the item referred to; and moreover there is but the one mention of ginger, and it caused argument as to its meaning.

After the respondent issued his writ of summons, in which he claimed " that an account be taken of their business transactions " during the period mentioned, there were interrogatories by the appellant, and the respondent's answer thereto, and pleadings and a counterclaim by the appellant for £468 14s. 1d. due on account of goods supplied on credit and delivered by the appellant to the respondent at the latter's request from time to time " since the 18th day of December, 1954." It seems that the 18th may have been a mistake for the 8, but, if it was, it has gone unamended. In his defence to the counterclaim, the respondent admitted having received certain goods averred that on a proper account being taken it would be obvious that they were not given on credit and denied being indebted in the sum stated or at all. Notwithstanding this, he admitted the counterclaim when giving evidence. " When this action was taken I was owing the defendant £468 14s. 1d. I have not yet paid the defendant anything."

At the hearing in the court below, the respondent gave evidence, during which he put in evidence twelve documents and was cross-examined, during which he put in evidence two more documents and was re-examined. His case was then closed.

Mr. Pratt, who was also in the court below as was Mr. Rogers-Wright, thereupon (as noted in the record) " submits no case to answer and elects that he intends to call evidence." Mr. Rogers-Wright objected that he could not do so. There was further argument (as is agreed before us, although there is no note of it in the record) and then (as noted in the record), " At this stage Mr. Pratt informs court that he now elects to rest upon his submission without calling any evidence."

Mr. Pratt said that his submission was not, to use the words of Ormerod L.J. in *Storey* v. *Storey* [1960] 3 All E.R. 279 at 282, which he cited, that, accepting the plaintiff's evidence at its face value, no case had been established in law but that the evidence led for the plaintiff was so unsatisfactory or unreliable that the court should find that the burden of proof had not been discharged.

The learned judge heard argument on the submission, and after an adjournment for consideration overruled the submission and gave judgment for the respondent, as I have said.

Before us, Mr. Pratt cited a number of other cases about the submission of no case: but I do not find it necessary to refer to any of them. They show, as is well settled, that where a judge is sitting also as jury, he has a discretion to refrain from giving any ruling at that stage where the submission is of that sort unless the defendant undertakes (whether expressly or impliedly, as it may be—see *Laurie* v. *Raglan Building Co.* [1941] 3 All E.R. 332 at 337, *per* Lord Greene, which Mr. Rogers-Wright cited) to rest on the submission and not to call evidence.

Mr. Pratt argued that the learned judge's ruling was wrong and that he should have non-suited the respondent. (I think that in the circumstances " dismissed " is a more appropriate term than " non-suited "). He argued that there were 22 respects in which the respondent's evidence was unsatisfactory.

I should think that the respondent may be a muddle-headed business man and also a bad witness: but it is a judge's duty to see whether or not a party who appears to be such is indeed such and has some substance in his case, or appears to be such because his case is without substance. Here, notwithstanding Mr. Pratt's criticisms and comments, the learned judge found that the respondent had made out a case and overruled the submission. There was evidence to support the learned judge's findings of fact (as he called them and as I will call them for the moment) which were his reasons for ordering the account to be re-opened on the ground of serious error. These were, to put them briefly, that the partnership was confined to the stock in the shop (and outstanding debts no doubt); that the ginger was apart and that the respondent was to have had commission on its sale and it appeared that he had not been credited with any; that a remittance of £1,000 to one Halloway at the appellant's request came out of the partnership money and not out of the ginger money and had not been credited to the respondent in the account.

The learned judge referred to these things as facts, no doubt because the appellant adduced no evidence in rebuttal. I prefer to call them prima facie proof. But whatever one calls them, what else could the learned judge do but hold that a case had been established for reopening the account on the ground of serious error. Consequently, in my opinion, this appeal should be dismissed in so far as it seeks to have the ruling reversed, and an order dismissing the claim substituted.

The appellant has asked for other relief in the alternative. First that this court should now hear evidence in rebuttal, or remit the case to the court below for it to be done there. This would be to allow him to do what he elected not to do. The argument before us has made me think that a reopening of the account is desirable in the interests of the appellant no less than the respondent; and the accounts are such that it would be inconvenient for the court to have to go into them and that it would be much better for it to be done by a qualified accountant. The appellant will have an opportunity to explain, and support, alleged errors in the respondent's contentions; and to set up his version of the accounts.

The other item of alternative relief sought is reasonable. It is that when the account is reopened the investigation should include: (1) The partnership business; (2) the ginger transactions; (3) the articles and commodities taken

from the partnership business by the plaintiff and transferred to profit in the plaintiff's own private business.

I would order all these to be done. As to (3), this was in contravention of the terms of the partnership. Under clause 9 of the deed of partnership the respondent undertook not to be concerned or engaged directly or indirectly in any business or trade other than the business of the partnership without the consent in writing of the appellant. Under cross-examination the respondent said: "During the period defendant was away I made a profit out of my own shop . . . I used to take goods from the partnership business and credit my own shop. I had a book which contains that account. I agree that defendant did tell me that he was annoyed. . . ."

I would add another item, namely, (4) the respondent to be credited with commission on the sales of ginger, on credit or for cash, calculated at 5 per cent.

The learned judge found that there was prima facie proof of agreement to pay commission, and it was not rebutted. This is a question of fact, and not of accounting. Its calculation is a matter of accounting. There was no finding as to any agreed rate. The learned judge directed that it should "be determined on a quantum meruit basis." With respect, I do not understand what he meant by that in the circumstances. In the absence of any agreement as to rate, the law implies agreement to pay a reasonable rate. I think 5 per cent. would be a reasonable rate.

I do not think the Master and Registrar a suitable person to investigate the accounts. I think that a qualified professional accountant should be appointed referee to do so, to be agreed upon by the parties. The respondent should initiate steps to get agreement. In the absence of agreement within 30 days, the court below should appoint one, on the application of the respondent. Upon agreement or appointment each side to deposit in court within seven days 25 guineas on account of his remuneration. His remuneration to be decided by the court below when report submitted and amount of work involved consequently ascertainable.

The referee should be empowered to require the production of documents and to hear evidence relevant to the accounts and to report to the court upon the inquiry and stating as closely as may be possible the net indebtedness of one party to the other. There should be liberty to either party to apply to the court below at any time, after the determination of the appeal, which court will then be seised of the matter.

I would amplify in these ways the order made by the court below and subject to that dismiss the appeal.

[COURT OF APPEAL]

Freetown
Nov. 6,
1961

REGINA . . . . . *Appellant*

v.

MUSA KOROMA . . . . . *Respondent*

Ames P.
Benka-Coker
and Wiseham
C.JJ.

[Criminal Appeal 14/61]

Criminal law—Homicide—Murder—Whether judge's notes of his summing-up to assessors accurate—Rule 55 (3) of Court of Appeal Rules. Whether judge properly instructed assessors regarding prosecution's onus of proof—Whether