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

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sufficient evidence to connect shot extracted from deceased with gun from which it was alleged to have been fired—Whether appellant should have been convicted of manslaughter—Malice aforethought.

Appellant was tried for murder by a judge sitting with assessors, was found guilty and sentenced to death. Appellant's defence was an alibi. The grounds of the appeal were that the judge had erred in his summing-up to the assessors by failing to ask them whether appellant's alibi had left a doubt in their minds as to his guilt (it was also contended that the notes of the judge's summing-up were inaccurate since they had been written prior to its delivery); that there was no evidence to connect the shot extracted from the deceased with the gun from which it was alleged to have come; and that appellant should have been convicted of manslaughter instead of murder.

Held, dismissing the appeal, (1) that, in accordance with rule 55 (3) of the Court of Appeal Rules, the judge's notes of his summing-up must be accepted as accurate in the absence of evidence to the contrary;

(2) that, although he did not use the word "doubt," the judge's summing-up gave sufficient protection to appellant;

(3) that the testimony of eye-witnesses provided sufficient evidence to connect the shot extracted from the deceased with the gun from which it was alleged to have come; and

(4) that there was sufficient evidence of malice aforethought to warrant appellant's conviction of murder.

Cases referred to: *Regina* v. *Murtagh and Kennedy* (1955) 39 Cr.App.R. 72; *Regina* v. *Abisa Grunshire* (1955) 1 W.A.L.R. 36.

Berthan Macaulay for the appellant.
John H. Smythe (Solicitor-General) for the respondent.

WISEHAM C.J. The appellant stood his trial for murder, was found guilty, and sentenced to death.

The prosecution's case was that the appellant was a corporal in the security guard of the S.L.S.T. Ltd. He was paid £15 as a bribe by Alpha Mohamed Jallow, the understanding being that the latter would be allowed, with a gang of five boys, to dig for diamonds in the area under appellant's guard.

About 2 p.m. on June 29, 1961, Jallow and five others arrived at the pit. Almost simultaneously, six outsiders to the agreement also rushed to the place from the bush. The appellant, armed with a double-barrelled gun, came on the scene and remonstrated with Jallow that this was not the arrangement and that he had brought six additional men. Jallow denied any knowledge of these six men, who then ran back into the bush.

The appellant then told Jallow that if they stood there and did not get out he would kill them all. He loaded his gun. Jallow and his companions ran. Appellant fired one shot in the air—then four shots at the fleeing gang. Three men were wounded. One, Suliman Bah was killed outright, death being due to a lead shot going through his cervical spine.

In addition to the evidence of the surviving eye-witnesses, who saw the appellant fire his gun, kill the deceased and wound the remainder, there was evidence that the empty cartridge shells recovered from the scene could have been fired from appellant's gun. Two other witnesses, looking after cows, heard the gun shots and shortly after saw the accused running away with a gun.

The defence was a total denial and an alibi. All three assessors found the appellant guilty. The lengthy summing-up of the judge was followed by a very short judgment accepting the case for the prosecution.

The main grounds of appeal are that the learned judge did not appreciate that the failure to establish an alibi did not lessen the onus of proof and that the assessors had been asked to weigh both sides and had decided on a balance of probabilities.

It was contended at the outset that the notes of the judge's summing-up, judging by the wording, were written prior to its delivery. Such like notes " Tell the assessors . . . explain to them . . . refer to the evidence of . . . deal with . . ." indicated that the notes were the notes of an intended summing-up. They may or may not have been fully used or departed from in the actual summing-up delivered. In the absence of any reason to the contrary, these notes having been left on record by the judge, it must be taken that these notes constitute his statement of the summing-up and must be accepted as accurate within the meaning of rule 55 (3) of the Court of Appeal Rules.

Mr. Macaulay, for the appellant, submitted that nowhere in the summing-up did the learned judge say that even if the alibi failed to convince the assessors the defence of alibi would still avail the appellant if it created a doubt. Reference was made to two cases, namely, *Regina* v. *Murtagh and Kennedy* (1955) 39 Cr.App.R. 72, which was followed in *Regina* v. *Abisa Grunshire* (1955) 1 W.A.L.R. 36. The former was a case of accident, the latter a case of murder. In addressing the jury or assessors, it was held that three distinct possibilities should be put to them: (1) Was the explanation of accused true? (2) Short of being true, did it leave a doubt in their minds? (3) Apart from the explanation, on a consideration of the whole of the evidence, were they satisfied as to the guilt of the accused? Mr. Macaulay complains that the second possibility was never put to the assessors.

In both the authorities cited explanatory versions were given of the accident or homicide in defence. In the present appeal no explanation was put forward in defence. A defence of alibi does not explain the death of the deceased. It asserts the absence of the accused from the scene of the crime. The failure of that assertion to convince the jury or assessors does not lessen the onus on the prosecution—a proposition for which we need not quote the authorities cited.

From the following extract of the judge's notes, " Tell them if they believe the story of the accused, the witnesses for the defence that the accused was not the person who shot—that he was not at the scene at all—then accused is not guilty of murder or manslaughter—if after considering all the evidence they cannot seriously make up their minds whether the accused was the person who shot or whether or not he was at the scene then they must say Not Guilty at all." It is clear that though the word " doubt " is not expressly used, the direction that if, after considering all the evidence, they could not seriously make up their minds—they must say Not Guilty, was in effect a direction on " reasonable doubt." It related both to the prosecution case and to the defence of alibi.

The learned judge, in his judgment, accepted the prosecution story and was fully aware of the onus of proof. The next point put forward was that the evidence of the armourer was not that of an expert and that there was no evidence to connect the shot extracted from the deceased with the cartridge or gun from whence it was alleged to have come. We have carefully considered this part of the evidence. It is circumstantial evidence led with a view to corroborate the direct evidence of the eye-witnesses who saw the accused fire his gun. We are satisfied that in all the circumstances, apart from the expert

evidence so challenged, no other conclusion could have been reached on the testimony of the eye-witnesses.

This leads to the last question on appeal. Was it murder or manslaughter? Mr. Macaulay submits that if there was no prior agreement in fact between the appellant and the party of intending illicit diggers for diamonds, then the appellant was acting in defence or protection of his master's property and the appellant would only be guilty of manslaughter.

Even assuming the absence of a preconcerted understanding to permit an illegal digging, there was evidence of the avowed intention of the appellant to kill, the request to disperse, the loading of his gun, the firing of his gun several times at persons on the run. The malice aforethought must be implied from the appellant's acts themselves by the application of the general rule that a man is presumed to intend the natural and probable consequences of his own acts—the use of a lethal weapon.

The appeal is dismissed.

Freetown
Nov. 6,
1961

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

[COURT OF APPEAL]

COMMISSIONER OF POLICE . . . . . *Respondent*

v.

FOFANA BANGALI . . . . . *Appellant*

[Cr. App. 18/61]

Criminal law—Procedure—Hearing adjourned to day certain—Accused brought before different magistrate on day other than day specified—Criminal Procedure Ordinance (Cap. 39 of Laws of Sierra Leone, 1960), s. 92.

Appellant was brought before a magistrate (Mr. Hoare) on July 5, 1961, charged with an offence against section 21 of the Alluvial Diamond Mining Ordinance. Appellant was remanded in custody until July 7 "pending valuation of the stones." On July 10 the charge was read to him, he pleaded not guilty and the case was then "remanded until July 24, 1961." On July 17, appellant was brought before a different magistrate (Mr. Koroma). The record stated: "17/7/61—Mandingo Interpreter called. Adama Soh S.O.K. Accused present, pleads guilty." Appellant was convicted and sentenced to 18 months' imprisonment. He appealed to the Supreme Court. The judge, relying on the fact that appellant had pleaded guilty, decided to treat the appeal as an application for leave to appeal, and then refused leave.

From this refusal, appellant appealed on the ground that, "The appellant's case having been adjourned to July 24, 1961, in pursuance of the powers of the court vested by section 92 of the Criminal Procedure Ordinance, Cap. 39, the magistrate wrongfully exercised jurisdiction in taking a plea and convicting the appellant on July 17, 1961, that is seven days before the adjourned date and without notice to the appellant."

Held, setting aside the proceedings before the second magistrate, that, in the circumstances of this case, the second magistrate should have read the charge to appellant before accepting his plea of guilty.

The court also said, obiter, "In our opinion when a prosecution has been instituted before one magistrate and the procedure laid down in the Criminal