the house with the handle of an axe, not of itself a dangerous weapon, and hit the deceased at the back of his neck and he unfortunately died.

In his summing-up to the assessors the learned trial judge told them, dealing with provocation, that, if they found that appellant had been provoked, they should consider whether he had had time to cool down. He did not go on to explain whether or not there should be an interval between the provocation and the killing, in which interval the appellant should have cooled down. Left as it was, the assessors and, I am afraid, the learned trial judge, in our view, did not adequately consider the defence of provocation. The loss of his drink in the circumstances must have made appellant quite angry. There was no interval worth mentioning between this and the act which caused the death of deceased. The learned judge read paragraphs 2484 and 2485 of Archbold, Criminal Pleading, Evidence and Practice (34th ed.), to the assessors, dealing with malice and absence of the body or corpse. He did not read to them paragraph 2506, "Time for cooling."

There was evidence of provocation; the learned trial judge said: "As regards provocation [this in his judgment] I do not find this established in the legal sense by the evidence." Mr. Samai, one of the assessors, in his finding, seems to say that provocation was not established because appellant was not sorry after the act and he disposed of the body. This shows that he did not understand what provocation in the circumstances meant. Mr. Bindi, the other assessor, found that provocation had not been established.

Nobody seems to have considered the effect on appellant when he lost his drink in the manner he did, and that he acted in a sudden impulse immediately after the provocation before he had cooled down.

We think that appellant ought to have had this aspect of the case fully considered. If the learned judge felt that the evidence did not support a verdict of manslaughter it was his duty as a matter of law to so instruct the assessors. See paragraph 2508 of Archbold (34th ed.).

In the circumstances, we feel it would meet the ends of justice if the verdict of guilty of murder and the sentence of death be set aside and one of guilty of manslaughter be put in its place.

The appeal is allowed and the conviction for murder and sentence to death is set aside and one of guilty of manslaughter put in its place and a sentence of three years' imprisonment with hard labour imposed.

[COURT OF APPEAL]

Bo
Feb. 27, 1963.

REGINA . . . . . *Respondent*

v.

MOHAMMED CONTEH . . . . . *Appellant*

Ames Ag.P.
Benka-Coker C.J.,
Dove-Edwin J.A.

[Criminal Appeal 29/62]

Criminal Law—Homicide—Murder—Manslaughter—Killing by correction by person in loco parentis—Misdirection by judge.

Appellant was convicted of the murder of a boy 10–12 years old who was the son of appellant's first cousin. The boy's father had sent him to live with

appellant in order to be taught Arabic by him. When the boy ran away, appellant found him and punished him by placing him in a hot oven, from the effects of which the boy died. In his summing-up, the trial judge failed to instruct the assessors on the law relating to killing by correction.

Held, that since appellant was in loco parentis it was a case of killing by correction, and, therefore, the judge's failure to instruct the assessors on this branch of the law was error.

Case referred to: *Bharat* v. *Reg.* [1959] A.C. 533.

Berthan Macaulay for the appellant.
Donald Macauley (Crown Counsel) for the respondent.

AMES AG.P. This is an appeal from a conviction for the murder of a boy, 10–12 years old, the son of a first cousin of the appellant. The boy's father had sent him to live with the appellant in order to be taught Arabic by him. The appellant was thus in loco parentis and had, therefore, a right to inflict chastisement on the boy, to a lawful extent on lawful occasions.

The appellant made a detailed statement to the police of what happened, which can be accepted as the truth: it is, as Mr. Berthan Macaulay for the appellant pointed out, corroborated by the prosecution witnesses to a very large extent and is nowhere materially different. The boy was a naughty boy, unwilling to learn and given to running away, and to stealing food; and the appellant had punished him for these on previous occasions.

On this particular occasion, the appellant returned to the house and found that the boy had run away again. He searched for and found him later that day and decided to punish him again. The punishment meted out to the boy was a dreadful one. The appellant is a baker, and had baked bread two days previously. The oven was still hot. The appellant put the boy into the oven, closed it and left him in it while he went to the latrine.

While in the latrine, he heard the boy shouting, and when he had finished there, he returned to the oven. Others were there. The boy was taken out of the oven, alive but unconscious and badly burnt. The appellant was very distressed and he and others did their best to revive the boy with mud and sand by the water-side but it was all to no purpose and the boy died that same day, while being taken to hospital at Bonthe.

Those facts indicate that it was a case of killing by correction. The appeal is based on the omission of the trial judge to refer to this aspect of the matter in his summing-up.

After the prosecution had closed their case, no witnesses for the defence were called, counsel saying that the appellant relied on his statement to the police. The prosecuting counsel addressed the court and the appellant's counsel did so, saying (so the learned judge noted) that the defence was one of insanity. How counsel could have said that is difficult to understand. There was not one word in evidence or one question put in cross-examination bearing on insanity. Insanity was manifestly not the defence; yet the learned trial judge, in his summing-up, explained the law as to insanity at some length (without indicating what evidence was relative to it). The defence very clearly was indicated by the appellant's long statement to the police on which he relied: not that he was insane at the time and did not know what he was doing, but that the boy needed to be punished and was punished although the punishment proved to be unintentionally excessive, resulting in his death.

The learned judge, in his summing-up, treated the case as one of killing with malice aforethought, not in the sense of an express intention to kill the boy, but in the sense of implied malice from a proved intention to do grievous bodily harm by an act of which the natural and probable consequence would be death, as any reasonable man would realise. He read to the assessors the provisions of paragraphs 2484 and 2486 of Archbold (34th ed.). He did not read to them or refer to paragraph 2510, "Killing by correction." In it the learned author says:

> "Where a parent or person in loco parentis is moderately correcting his child, a master his servant or scholar, or an officer punishing a criminal and he happens to occasion his death, it is only misadventure, but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at the least, and in some cases (according to the circumstances) may be murder. . . . In all cases where the correction is inflicted with a deadly weapon, and the party dies of it, it will be murder: if with an instrument not likely to kill, though improper for the purpose of correction, it will be manslaughter. . . . Beating a child for theft so severely as to cause death has been held manslaughter."

We agree with the argument of Mr. Berthan Macaulay, which can best be summarised by setting out most of his ground of appeal.

> "The learned trial judge failed to direct or direct adequately himself and the assessors on the issue whether or not the appellant was, as a guardian of the deceased, entitled to punish the latter and, if so, whether or not the means of punishment adopted were excessive in circumstances as to amount to either murder or manslaughter. In failing to direct or direct adequately himself and the assessors on this issue the judge deprived unwittingly the appellant of the right to have the issue of manslaughter considered or considered adequately as there was evidence on which such a verdict of manslaughter could have been given."

The learned Senior Crown Counsel in his argument equated the incident to killing by correction inflicted with a deadly weapon. He may be correct, but the appellant was entitled to have that question decided by the tribunal of facts, which was ultimately the learned judge, having been aided by assessors. This aspect was not considered and not put to the assessors, whose opinion about it was not obtained and is not known. This makes applicable what was stated in the judgment of the Privy Council (*per* Lord Denning) in the appeal of *Bharat* [1959] A.C. 533, 535, in which it was a question of misdirection of assessors; but the same will apply here where it is a question of omission to direct the assessors:

> "What is the consequence of the misdirection given by the judge to the assessors? According to section 246 of the Criminal Procedure Code the trial is by the judge with the aid of assessors. The judge is not bound to conform to their opinions, but he must at least take them into account. If they have been misdirected on a vital point, their opinions are vitiated. Take this very case. Suppose the assessors had been properly directed, is it not possible that one or more of them might have been of opinion that the appellant was guilty of manslaughter only? If the majority of them had given such an opinion, the judge might possibly have accepted it in

preference to his own. At any rate, he could hardly have rejected it without saying why he did so. He has, in truth, by his misdirection, disabled the assessors from giving him the aid which they should have given; and thus in turn disabled himself from taking their opinions into account as he should have done. This is a fatal flaw."

One or both assessors might have been of opinion that, dreadful as the facts were, they amounted to manslaughter and not murder. One or both might have been of opinion that they amounted to murder. We do not think it possible to say that they must inevitably have been of the latter opinion had the matter been referred to them. Consequently, we do not think this a case in which the proviso (as it is called) should be applied.

We, therefore, allow the appeal, quash the conviction, substitute a finding of manslaughter and impose a sentence of seven years' imprisonment.

Freetown
March 20,
1963.
Ames Ag.P.
Dove-Edwin
J.A.
Bankole Jones
Ag.C.J.

[COURT OF APPEAL]

ROYAL EXCHANGE ASSURANCE CO. . . . . *Appellants*

v.

JAMIL KARRIT . . . . . *Respondent*

[Civil Appeal 2/63]

Contract—Insurance—Fire Insurance—Evidence—Goods lost in fire—Merchant's evidence as to value of goods lost—Whether evidence credible—Onus of proof.

Respondent, an illiterate merchant at Kangahun, carried insurance with the appellant company on his shop, furniture and stock of merchandise. The shop was insured for £2,000, the furniture for £1,000 and the merchandise for £10,000. The shop and everything it it, including all records, were destroyed by fire, and respondent brought suit against appellants. The court gave judgment for respondent for £3,000 for the shop and furniture, but referred the claim for merchandise to the master and registrar to determine the actual loss sustained by respondent. The master and registrar held an inquiry and reported to the judge that respondent should be indemnified in the amount of £10,000. The judge entered judgment for that sum. Against this judgment the company appealed on two main grounds: (1) that the master and registrar erroneously placed the burden on the company to prove that there was not a £10,000 loss; and (2) that there was insufficient evidence of the loss.

Respondent's evidence of his loss consisted of a list which he compiled from memory showing the items of merchandise in the shop at the time of the fire and their values totalling over £14,000.

Held, dismissing the appeal, (1) that the master and registrar correctly placed the burden on respondent to prove the amount of his loss; and

(2) That respondent's list of the items of merchandise and their values, compiled from memory, was credible evidence, and, therefore, was sufficient to support the judgment.

John E. R. Candappa for the appellants.
Zinenool L. Khan for the respondent.