Was this to apply a test which had nothing to do with negligence? In our opinion, it was not. It is a matter of language. What is careless driving but driving without care? And without care is negligently. Dangerous driving is likewise negligent, but more so. The very case of *Andrews* itself shows this: ". . . driving without due care and attention. This would apparently cover all degrees of negligence" (at p. 48). And "dangerous driving may be committed, though the negligence is not of such a degree as to amount to manslaughter if death ensued" (at p. 49). And elsewhere, too.

In our opinion, the learned judge's summing-up taken as a whole was not at variance with what was said in *Andrews'* case, and the appellant was not deprived of any opportunity of acquittal which was fairly open to him.

The appeal is dismissed.

[COURT OF APPEAL]

KILBERT TURAY . . . . . *Appellant*

v.

REGINA . . . . . *Respondent*

[Criminal Appeal 23/63]

Criminal Law—Homicide—Murder—Manslaughter—Malice aforethought.

Appellant and two others were tried at Makeni by a judge and assessors for murder. The two others were acquitted and appellant was convicted.

The evidence for the prosecution was that the deceased (Ansumana Kamara), who was an old man of between 60 and 70 years, had a "bush dispute" with appellant's nephew; that one Saturday night appellant "beat up" Kamara, dragged him to appellant's house and tied him to a fence; that he then took his matchet from his house and struck Kamara on the head; and that Kamara then escaped but died the next day. A doctor testified that the cause of death was "syncope resulting from traumatic shock" which could have been caused by the blow on the head or the beating.

The ground of appellant's appeal was that the conviction for murder was unreasonable and unwarranted and such as could not be supported by the evidence. His counsel argued that appellant should have been convicted of manslaughter instead of murder.

Held, dismissing the appeal, that the evidence that appellant intended to cause at least grievous bodily harm to the deceased warranted a finding of killing with malice aforethought.

Ulric Coker for the appellant.
Constant S. Davies for the respondent.

AMES AG.P. The appellant and two others were tried at Makeni by a judge with the aid of assessors for the murder of one Ansumana Kamara. The two others were acquitted at the close of the case for the prosecution, and the appellant was convicted at the end of the trial.

The ground of appeal is that the conviction for murder was unreasonable and unwarranted and such as cannot be supported by the evidence. Mr. Coker's argument for the appellant is not that the appellant should have been

acquitted but that his conviction should have been for manslaughter and not murder.

The appellant's defence at the trial was not that he killed the deceased under provocation but that one Sorie Yerimah, who was a prosecution witness, killed him. The learned trial judge in his summing-up did leave the question of killing upon provocation to the assessors and himself, but without indicating what was the evidence of provocation. The actual defence of the appellant was treated fully and fairly. Both assessors and the learned judge said that they disbelieved the statement made by the appellant from the dock in his defence. One assessor's opinion was that the appellant was guilty of murder; the other assessor said manslaughter at first but changed it to murder. The learned judge convicted him of murder.

The appellant called no witness to support his version of what happened, which was not believed. What has to be decided is whether upon the evidence given for the prosecution the conviction for murder was reasonable and warranted.

The deceased, who was an old man of between 60 and 70 years, had a "bush dispute" with Sorie Thollah, who was one of the other two accused persons, and who was a nephew of the appellant. The appellant "took sides in the dispute."

One Saturday night Sorie Yerimah (the prosecution witness already mentioned) was on his bed when the appellant came and said that he was wanted by someone. Sorie Yerimah was a nephew of the deceased. He got up from his bed and went outside, whereupon the appellant seized him and "beat him up" and took him to the house of Santigie Kamara, who was the other of the other two accused persons. Santigie Kamara is a nephew of Sorie Yerimah. When they arrived at that house, the deceased was already there, and sitting on the ground. (It is nowhere stated whether or not he lives there or why he was there.) What happened there and thereafter was summarised by the learned judge as follows:

> "Accused continued to beat up the witness" (i.e., Sorie Yerimah) "and also the deceased, with his bare hands, after which he proceeded to tie up their two hands together jointly and to drag them to his own house where on arrival he separated them and tied each of them separately to his fence. All this while he was beating up the deceased and the witness. He threatened that if anyone came to their aid he would kill them. After accused had tied them to his fence he shouted out to his wife to fetch him his matchet but on hearing no response from her he himself went inside his house, took out his matchet and then went up to the deceased and struck him with it on his head. The matchet, however, fell off his hands and whilst he stooped down to pick it up, the deceased managed to make his escape. The accused was seen chasing the deceased but it is not known whether he actually caught up with him as he returned from the chase soon afterwards. The deceased succeeded in making his way to Mapaki, where the Paramount Chief resided, but on the following day he died."

The body was taken to Makeni Hospital "some days" later when "putrefaction was fairly well advanced."

The doctor found on external examination an incised wound 3 inches long and $\frac{1}{4}$ inch wide and $\frac{1}{8}$ inch deep from the middle of the top of the head in a direction backwards. This could have been caused by a sharp instrument. It

was a scalp wound and " did not penetrate through to the skull." The state of putrefaction prevented the doctor from being able to see if there were any other external wounds or abrasions. Internally blood was found in the chest. This was attributable to haemorrhage in the lower left lung.

The cause of death was " syncope resulting from traumatic shock." What could have caused that? The doctor said:

> " The blow which caused the incised wound could have caused the trauma, especially in a person as old as the deceased. If the deceased had been beaten up this also could have caused the trauma."

and also

> " . . . the haemorrhage could have been caused if the deceased had been subjected to any external force. The haemorrhage was not due to natural causes; if the deceased had been subjected to some physical stresses such as beatings or being dragged about this could have caused it."

This medical evidence and the other evidence for the prosecution warranted the finding of fact that the appellant caused the death of the deceased. Did it warrant the finding of malice aforethought?

When a man deliberately and intentionally and not under provocation strikes another person on the top of his head with a matchet as the culmination of what the learned judge called " beating him up," what intention can be attributed to him other than an intention to cause at least grievous bodily harm? Every reasonable person, and the appellant is a reasonable person, must know that such an act would probably cause at least grievous bodily harm. In this case the man, so struck, died as a consequence of this blow and his other ill-treatment at the hands of the appellant.

The evidence warranted a finding of killing with implied malice and aforethought, although not necessarily aforethought until he called to his wife to bring him his matchet, and, there being no answer from his wife, he went and got it himself.

The appeal must be dismissed.

[COURT OF APPEAL]

Freetown
Nov. 14,
1963.

Ames Ag.P.,
Dove-Edwin
J.A.,
Cole Ag.C.J.

IN THE MATTER OF THE WILL AND CODICIL OF T. I. SCOTT (DECEASED)

[Civil Appeal 1/63]

Wills—Application for construction of will—Whether application was for purpose of closing administration of estate—Whether originating summons was proper procedure—Discretion of judge to dismiss application—Whether judge acted on wrong principles in exercising discretion—Supreme Court Rules, Ord. XLII (10).

T. I. Scott (the testator) died at Freetown in 1938, and probate of his will and codicil was granted in 1943 to A. T. Manley, the executor named in the will. On February 9, 1961, S. B. Scott (the applicant), the only surviving lawful son and next-of-kin of the testator, took out an originating summons in which he requested a construction of various paragraphs of testator's will and codicil. The respondent named in the summons was A. T. Manley. Applicant filed an affidavit in support of the summons. Respondent entered appearance to the summons and also filed an affidavit.