filing of the motion paper, the date of the filing of the motion was to be accepted as the date of the application. It does not appear that the Nigerian Full Court considered the effect of the proviso to the rules."

In view of this decision, I must hold that the application was made on April 30, 1962—that is, 52 days after the judgment (or order) to be appealed against and is, therefore, out of time.

In this result, this motion is dismissed out of this honourable court with costs.

Costs to be taxed and paid by appellants to respondent.

Freetown
Aug. 12,
1963.
Ames Ag.P.,
Dove-Edwin
J.A.,
Bankole Jones
C.J.

[COURT OF APPEAL]

AMARA KOIJU . . . . . *Appellant*

v.

REGINA . . . . . *Respondent*

[Criminal Appeal 17/63]

Criminal Law — Homicide — Murder — Manslaughter—Provocation—Summing-up—Duty of judge.

The deceased was a woman about 25 years old. She was not married to appellant, but they had been living together as husband and wife in her village with her children. She cooked his food; he worked on her farms; and they had sexual intercourse. Early in February, 1963, the deceased's affection for appellant slackened. From what appellant observed, he concluded that she was transferring her affection to another man. She refused to cook food for him and refused to have intercourse. On February 18, appellant was brushing a farm with a son of the deceased. He left the farm and was next seen chasing the deceased, whom he overtook and killed with his matchet.

Appellant was convicted of murder in a trial at Kailahun by a judge with the aid of assessors. He applied for leave to appeal on the ground that "the summing-up of the trial judge was inadequate in that he failed to put to the assessors the defence of provocation. . . ."

Held, refusing the application for leave to appeal, (1) that, if there is nothing which could entitle the assessors to return a verdict of manslaughter, the judge is not bound to put the question of manslaughter to them; and

(2) that, although deceased's conduct in withdrawing her affection from appellant and giving it elsewhere was very provoking in the ordinary sense of the word, there was no evidence of anything amounting to provocation in the legal sense of the word.

Cases referred to: *Mancini* v. *Director of Public Prosecutions* [1942] A.C. 1; *Kwaku Mensah* v. *Rex* (1945) 11 W.A.C.A. 2.

Shahib N. K. Basma for the appellant.
Albert L. O. Metzger for the respondent.

AMES AG.P. This is an application for leave to appeal against a conviction for murder, in a trial at Kailahun by a judge with the aid of assessors.

The deceased was a woman, aged about 25. She died in the evening of February 18 from the effect of "four severe deep lacerations of an incised nature" inflicted upon her earlier in the same day by the appellant while she was running away from him. There were eye-witnesses to the incident, which took place in the farm land.

The deceased woman was not the appellant's wife, but they had been living together as though she were, in her village and with her children. She cooked his food; he worked on her farms; and they had sexual intercourse.

Earlier in February, the deceased's affection for the appellant had slackened. From what the appellant observed, he concluded that she was transferring her affection to another man, Brima Lahun.

She refused to have intercourse with him. She refused to cook food for him.

Then came the 18th: and on that day the appellant was brushing a farm with a son of the deceased, when he left the farm with his matchet and was next seen chasing the deceased, whom he overtook, and attacked with his matchet.

In a statement to the police, the appellant said:

> ". . . From this date I started to watch her closely. The night previous to the incident, I called the deceased in my room but she refused to come but later I saw her going towards her lover's room Brima Lahun. I chased her but she ran away into the bundo bush. That was the date I would have killed her but she was fortunate. I did not meet her. I did not sleep thoughout that night as I was expecting her to go to her friend Brima but she did not. Since my effort was becoming abortive, I therefore decided to kill her. In the morning of the date in question, the deceased, myself, and Musa, the deceased's son, left for the farm. We were going to brush and the deceased was going to collect palm oil from Yendela, a place where women are preparing palm oil. After some time when we were brushing I told Musa that I was going to collect water. I went straight at Yendela but I did not meet the deceased. I heard her talking at the other farm belonging to Faimata Nowoh. I went there and met the deceased. I asked the deceased why she is ignoring me and to explain if it is on account of her lover Brima. She answered and stated that she is intending to marry with Brima. As soon as she said this, I chopped her at once. I chopped her twice and she fell down and I jumped into the bush."

In the witness box at the trial, he said:

> ". . . At the time the incident occurred I was very hungry. I went down to the stream to drink water and there I saw the deceased. My head through hunger was dizzy and as I was reeling to and fro I hit the deceased with the matchet as she was approaching me."

and under cross-examination, he said:

> "I was very vexed when I knew that the deceased was in love with Brima Lahun. I did not kill her because she was in love with Brima Lahun. I killed her because she refused me food and because she refused to have sex with me. . . ."

The ground of appeal is:

"That the summing-up of the trial judge was inadequate in that he failed to put to the assessors the defence of provocation and omitted to direct them upon the law as to provocation, and resulted in a miscarriage of justice."

Mr. Basma's argument was that the deceased's conduct was provocation and that consequently the learned judge should have addressed the assessors on the subject of provocation, which may reduce murder to manslaughter, and left it to them to say whether in their opinion the killing was murder or manslaughter. He pointed out that the word "manslaughter" does not appear in the summing-up. There was a short reference to provocation, no doubt because counsel for defence had submitted, ". . . accused was provoked to do this act. No food, no sex, being friendly with Lahun. . . ." But the learned judge did not put to the assessors the question of murder or manslaughter.

Since the decision of the House of Lords in the case of *Mancini* v. *Director of Public Prosecutions* [1942] A.C. 1, it is settled law that in a trial of a charge of murder, if on the evidence there is any question whether or not the offence might be manslaughter only, on the ground of provocation or on any other ground, the judge must put that question to the jury, even if the defence have not relied on it, as for example where the defence was that the killing was accidental: if, on the the other hand, there is nothing which could entitle a jury to return the lesser verdict, the judge is not bound to leave it to them to find murder or manslaughter. This was followed in *Kwaku Mensah* v. *Rex* (1945) 11 W.A.C.A. 2, a Privy Council appeal.

Now applying that principle to the evidence in this case, what is the result? There was nothing which could have warranted the reduction of the offence to manslaughter. Of course, the deceased's conduct in withdrawing her affection from the appellant and giving it elsewhere, together with her ceasing to cook his food, was very provoking in the ordinary sense of the word, in that it incensed him and was his reason for killing the woman on the second occasion of his chasing her. But there was no evidence of anything, which could be provocation in the legal sense of the word and such as might, if believed and found to be fact, have justified a reduction of the offence to manslaughter. We are of the opinion that the judge was not bound to put any issue of whether murder or manslaughter to the assessors. On the contrary the evidence indicated a conviction for killing with malice aforethought, and no other sort of killing.

The application for leave to appeal is refused.