For these reasons their Lordships are of opinion that this appeal should be allowed and the judgment of the trial judge should be restored, and would humbly advise Her Majesty accordingly. The respondents must pay the costs of this appeal and of the appeal to the Court of Appeal for Sierra Leone.

Freetown
April 26,
1963.

Marke J.

[COURT OF APPEAL]

MOHAMED S. MUSTAPHA AND ANOTHER (Executors of E. J. Speck, deceased) . . . . . *Appellants*

v.

GBESSAY KEISTER . . . . . *Respondent*

[S.L.C.A. 13/61 (Civ.)]

Practice—Appeal—Application for leave to appeal to Privy Council—Whether application made in time—Notice of motion lodged but not filed within time allotted—Sierra Leone (Procedure in Appeals to Privy Council) Order in Council, 1961 (*P.N. No.* 79 *of* 1961), *s.* 3.

On June 23, 1961, respondent recovered judgment against E. J. Speck in the Supreme Court. Speck died on July 17, and, on October 31, a motion was filed asking that his two executors (appellants) be substituted for him for the purpose of taking an appeal. In November, the Court of Appeal extended the time within which to appeal, and, in February, 1962, the appeal was set down for hearing. At the hearing, counsel for respondent objected to the hearing of the appeal on the ground that no copy of the order granting the enlargement of time had been annexed to the notice of appeal as required by rule 14 (4) of the West African Court of Appeal Rules, 1950. The appeal was struck out on March 9, 1962.

On March 29, 1962, counsel for appellants lodged with the registrar a notice of motion for leave to appeal to the Privy Council with the intention that the registrar should fill in the return day. The registrar filled in "30th April, 1962" as the return day for the motion, and on that day the notice of motion was filed and served.

Section 3 of the Sierra Leone (Procedure in Appeals to Privy Council) Order in Council, 1961, provides: "Applications to the court for leave to appeal shall be made by motion or petition within 42 days from the date of the judgment to be appealed from. . . ."

Held, dismissing the motion, that the date of the filing of the notice of motion for leave to appeal to the Privy Council is to be regarded as the date of application, not the date of the lodging of the notice of motion with the registrar.

Case referred to: *Duvat and another* v. *Orcel* (1931) 1 W.A.C.A. 105.

Cyrus Rogers-Wright for the appellants.
Edward J. McCormack for the respondent.

R. B. MARKE J. This is an application by the appellants for leave to appeal to the Judicial Committee of Her Majesty's Privy Council against a decision of this court dated March 9, 1962, and for stay of execution of a

Supreme Court judgment dated June 23, 1961, and of the decision of this court dated March 9, 1962.

Briefly summarising the events which led up to this application, the respondent on June 23, 1961, obtained judgment against E. J. Speck in the Supreme Court. The appellants being out of time to appeal to this court from that judgment were granted leave by this court to prosecute their appeal out of time. When the appeal came to be heard counsel for the respondent pointed out that the appellants had not filed with their grounds of appeal the order granting leave to appeal out of time, as is required by Rules of this court. On March 9, 1962, the appeal was struck out.

From that decision the appellants now move to appeal to the Privy Council.

The main point for consideration is whether the appellants are within time for making this application. Public Notice No. 79 of 1961—section 3—provides:

> "Applications to the court for leave to appeal shall be made by motion or petition within 42 days from the date of the judgment to be appealed from, and the applicant shall give the opposing party notice of his intended application."

Mr. Wright stated that on March 29, 1962, he lodged with the registrar the notice of motion and affidavit in support, for the registrar to fill therein the return day. The registrar filled in "30th April, 1962" as the return day for the motion and he on that day filed and served the notice of motion.

On this Mr. Wright argued that the mere lodgment of an inchoate notice of motion with the registrar amounted to an application for leave to appeal and that time was to count from March 29, 1962, the date of such lodgment.

Mr. McCormack, in his affidavit in opposition, filed on May 3, 1962, swore as follows:

> "2. The application of the appellants herein for leave to appeal to Her Majesty's Privy Council herein dated March 29, 1962, was entered and filed herein on April 30, 1962, and made returnable the same day."

Mr. McCormack argued that time should begin to run from the date on which the notice of motion was filed and not from the date on which it was lodged. It is necessary here to state that Mr. Wright was unable to furnish me with any authority justifying this habit—if habit it is—of lodging an incomplete notice of motion which left the return date blank for the registrar to fill in.

However, both counsel referred me to *Duvat and Haquin* v. *Louis Orcel* (1931) 1 W.A.C.A. 105 where that point was taken and the court gave a unanimous decision on it: the court held—page 106:

> "In *Gladstone Bob Manuel & Ors.* v. *Quaker Bob Manuel & Ors.*, 3 Nigeria L.R. page 96, the Full Court of Nigeria, on a set of appeal rules similar in wording and identical in effect to those of Sierra Leone, and containing the same proviso, came to an opposite conclusion, and held that the Divisional Court may entertain an application for leave to appeal after the lapse of time prescribed by the Rules of the Supreme Court provided that notice of intention to move the court for such leave has been filed within the prescribed period; in such case the date of the filing of the motion paper is to be regarded as the date of application. This decision was based upon the invariable practice of the Supreme Court of Nigeria, and upon the view that, as the first step in making the application is the

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.