counterclaim the defendant is awarded general damages of £25 with costs to be taxed.

Order accordingly.

TURAY *v.* REGINAM

COURT OF APPEAL (Ames, P., Bankole Jones, C.J. and Dove-Edwin, J.A.): October 24th, 1964
(Cr. App. No. 16/64)

[1] **Criminal Law—degrees of complicity—aiding and abetting—presence at scene of crime not enough—must be present with common purpose consenting and encouraging:** Mere presence at the scene of a crime cannot make a person guilty and there must be evidence that he was present consenting and with a common purpose with the principal in the first degree and by his presence encouraged him (page 146, lines 5–13; page 148, lines 26–32).

[2] **Criminal Law—murder—multiple offenders—accused present with principal in first degree—must be present with common purpose consenting and encouraging:** See [1] above.

[3] **Criminal Procedure—defence—calling witnesses—prosecution witness heard after defence closed—defence may apply to call rebutting evidence:** When a prosecution witness is heard after the close of the defence case, the defence may apply to call evidence in rebuttal or explanation (page 148, lines 6–9).

[4] **Criminal Procedure—defence—close of defence case—prosecution witness heard after defence closed—defence may apply to call rebutting evidence:** See [3] above.

[5] **Criminal Procedure—prosecution case—calling witnesses—witness's attendance delayed—conditions on which witness may be called after close of prosecution case:** Where owing to some natural cause outside anyone's control a prosecution witness fails to attend until the prosecution case has been closed and the prosecutor has commenced his closing address, the court may allow the witness to be called if the prosecutor has taken all necessary steps to call him and the defence is not taken by surprise (page 147, line 30—page 148, line 24).

[6] **Criminal Procedure—prosecution case—close of case for prosecution—witness's attendance delayed—conditions on which witness may be called after close of prosecution case:** See [5] above.

[7] **Criminal Procedure — record — contents — evidence recorded then shown to be inadmissible—evidence should be deleted:** Evidence which has been recorded and is subsequently shown to be inadmissible should be deleted from the record (page 147, lines 2–8).

[8] **Evidence—best evidence rule—confession reduced to writing—oral evidence inadmissible:** Oral evidence of a confession which has been reduced to writing is inadmissible if the confession is available (page 147, lines 2–12).

[9] **Evidence — confessions—proof of confession—interpreted confession cannot be proved by person to whom interpreted:** When a confession has been made through an interpreter the evidence of a person who heard it, but understood it only through the interpretation, is inadmissible to prove it (page 147, lines 2–10).

[10] **Evidence — confessions—proof of confession—interpreted confession must be verified by evidence of interpreter:** When a confession is made through an interpreter, the interpretation must be verified at the trial by the evidence of the interpreter (page 146, lines 28–37).

[11] **Evidence — confessions — proof of confession — written confession cannot be proved by oral evidence:** See [8] above.

[12] **Evidence—interpreted evidence—confession—evidence of person who heard interpretation inadmissible to prove confession:** See [9] above.

[13] **Evidence—interpreted evidence—confession—interpreter must give evidence to verify interpretation:** See [10] above.

[14] **Evidence—record—contents—evidence recorded then shown to be inadmissible—evidence should be deleted:** See [7] above.

[15] **Evidence—witnesses—calling witness after close of case—prosecution witness's attendance delayed—conditions on which witness may be called after close of prosecution case:** See [5] above.

[16] **Evidence—witnesses—calling witness after close of case—prosecution witness heard after defence closed—defence may apply to call rebutting evidence:** See [3] above.

The appellant was charged in the Supreme Court with murder. Various parts were missing from the deceased's body. The appellant made a confession to a police sergeant through an interpreter in which he said the deceased was killed by another man at the request of a third, who required parts of a male body for a sacrifice and had offered to pay for them. The sergeant did not understand what the appellant said except from the interpretation. He gave evidence of cautioning the appellant and taking his statement. He then stated what the appellant had said and the judge recorded

it. Later the sergeant said the statement had been taken down in writing and the prosecution tendered the written statement. The defence objected and the prosecution gave the defence notice of their intention to call the interpreter as an additional witness and obtained an adjournment to bring him.

When the trial was resumed, the interpreter was absent, having been delayed on his journey by a fallen tree. The prosecution closed its case and the defence made a no case submission which was overruled. The appellant made a statement from the dock in which he said that the police had beaten him and that he had always maintained that he had not killed the boy. The prosecutor commenced his closing address. The interpreter then arrived and the judge gave leave for his evidence to be taken, stating that after it had been given he would be prepared to consider any defence application to call evidence in rebuttal or explanation.

On appeal, the appellant contended that the judge was wrong in ruling that there was a case to answer, that he was wrong in allowing the prosecution to call the interpreter and that the conviction was unreasonable and such as could not be justified having regard to the evidence.

Cases referred to:

(1) *R.* v. *Coney* (1882), 8 Q.B.D. 534; 15 Cox C.C. 46, considered.

(2) *R.* v. *McKenna* (1956), 40 Cr. App. R. 65, considered.

(3) *Wilcox* v. *Jeffery*, [1951] 1 All E.R. 464; [1951] 1 T.L.R. 706, applied.

Taylor-Harding for the appellant;
D. M. A. Macaulay, Principal Crown Counsel, for the Crown.

AMES, P., delivering the judgment of the court:

This is an appeal against conviction for a most horrible murder. The victim was a boy of between four and five years of age. Various parts of his little body had been cut off with a sharp instrument and taken away, namely, the left arm and shoulder blade, the right hand, the private parts, the tongue and tissues under the jaw, the soft tissues of the left side of the face including the ear, the soft tissues of the right armpit, part of the right ear and both eyeballs. According to a confession of the appellant, which will have to be referred to later, the boy was killed in his presence by another man at the request of a third man, who wanted parts of a male body for a sacrifice in order to obtain a chieftaincy and who had offered

a monetary reward for them but who was not present at the killing.

At the close of the case for the prosecution, counsel for the appellant submitted that there was no case to answer. The learned judge ruled that there was and the first ground of appeal questions that ruling.

For reasons which will appear later, when the prosecution closed, the confession had not been put in evidence. At that stage of the trial the admissible evidence (some inadmissible evidence had been admitted) included the following.

The doctor (the first prosecution witness) stated his findings at the post mortem examination, named the various parts of the body which were missing and said that death was—"due to draining away of blood consequent on some injury to the missing parts." In other words, the body had been carved up while there was still life in the boy (but one hopes after unconsciousness from the first blow mentioned in the appellant's confession).

The eighth prosecution witness, a farmer from another village who was visiting Dambafe, met the appellant and one Yarima Yira about 100 yards from where the body was found in a small stream two days later by this witness on his way home. Yarima was carrying a country cloth bag, a cutlass and a bully of palm wine. He spoke to them and was given some palm wine. The appellant was not carrying anything.

The 10th prosecution witness, the section chief, who organised the search for the boy, said it was "nearly five days" before the body was found and brought to him. The police were then sent for.

The seventh prosecution witness, a local man, described how, after the police had come, the appellant said that they should follow him "to the place where they had killed [the boy]." The witness also said: "I went along with the others. He took us to a big rock and said —'This is the place where we killed the boy. . . .' The accused's son . . . was there. . . . Accused did not say he killed. He merely said he was present. . . . The accused only said that he was present at the killing. The killing was done by Yarima Yira."

The appellant's son, the 11th prosecution witness, describing the same incident said: ". . . I went together with many people. The accused led us to a grass field. He showed a big rock where he said he sat down. About nine paces from the rock. He was asked who took the boy. He said he was sitting down and Yarima took the boy. He said he saw Yarima take the matchet and chop the boy. That the boy fell down and Yira cut the boy's throat. He

did not say how he happened to be at the place. I said to the accused—'Eh father, you were sitting down when such a wonderful thing was happening; if you got killed I have no sympathy with you.' He did not reply. . . ."

Mr. Taylor-Harding's argument was that all this only showed that the appellant was merely present at the scene of the crime and that mere presence without participation cannot make him guilty of the murder. Mr. Macaulay, for the respondent, argued that the use of the pronouns "they" and "we" coupled with his presence was evidence of a common purpose, which was properly left to the assessors and judge (*qua* jury) to decide what inference should be drawn from it and the other circumstances. We agree with this and agree that the learned judge's ruling was right.

The next ground of appeal is that the learned judge was wrong in law to allow the prosecution to call an additional witness after the close of the defence and after—"counsel for the prosecution had commenced and almost completed his address." The additional witness was the interpreter of the confession and after his evidence verifying the interpretation of the written confession, the document was put in evidence. The circumstances were certainly unusual and we must refer to them in some detail.

The confession had been put in evidence at the preliminary enquiry in the magistrate's court, and was one of the documentary exhibits attached to the depositions. It had been made to a police sergeant in a language which he did not understand and so through an interpreter. It was written down by the sergeant, and signed by him and the interpreter and marked by the appellant with his thumb-print. It has been held, over and over again by all courts, that when an interpreter has to be used, he or she is an essential witness.

In this case the appellant had been committed for trial without the interpreter having been called as a witness. We notice that there is at the end of the confession what purports to be a formal "certificate" signed by the interpreter. This may be why the interpreter was not called in the magistrate's court but it did not cure the omission. Interpretation has to be verified by evidence on oath of a witness who can be cross-examined if desired.

What happened at the trial in the court below was this. When the sergeant gave evidence, he said how he came to take a statement from the appellant after cautioning him, in the presence of others, including the man who (as it transpired later) was the interpreter.

The sergeant then stated what the appellant had said. This was recorded by the learned judge. Later in his evidence, he said that the statement was taken down in writing, and it was tendered in evidence. Counsel for the appellant objected to its admission unless verified by the interpreter, and counsel for the prosecution agreed and it was not put in nor, apparently, was it marked for identification. Nor was the sergeant's oral evidence of its contents deleted from the record, as in our opinion it should have been for two reasons. Under cross-examination the sergeant said: "[W]hatever the accused said I understood only through the interpreter. . . ." and when a document is available it is the best evidence of its contents and the best evidence must be given.

The prosecution gave notice to the defence of their intention to call the interpreter as an additional witness and the trial was adjourned for three days because the interpreter was at a distance.

On that third day the prosecution called a witness to put in evidence a short statement, "I rely on my former statement given to the police sergeant," which the appellant made on the occasion of his being formally charged with murder a few days after the former statement. This one, like the other, had been made through the same interpreter, and had a similar "certificate." Its admission was objected to and disallowed. At that stage of the trial the interpreter had not arrived and the prosecution closed their case.

The appellant made a statement from the dock, exculpating himself and putting all the blame on Yarima Yira. He alleging that he had been beaten by the police and ended: "I persisted that I had not killed the boy. Yira is now dead and no action has been taken against Chief Bala. I am the only one now in trouble over the case. I have no witnesses. I did not kill. I just saw."

The case for the defence closed. Crown counsel started his address to the court, during which, as stated in the ground of appeal, the interpreter arrived. He had had to come from about 160 miles away and on the way met a tree across the road which took three hours to remove. But for that he would have been there in time. There was argument whether or not the witness should be called and the learned judge ruled as follows:

> "I give leave for the witness to be called. I do so because the defence cannot complain of being taken by surprise. It is not denied that accused made a statement to the police which was taken down in writing, but the contents of that statement could only be given by the proposed witness who

interpreted what accused said for Sergeant Kamara to record. All along it was assumed this witness would be called and in fact an adjournment was granted to enable him to be here. The defence right up to the last minute must have been based on the assumption that this witness would be called to put in the contents of the accused's statement. After his evidence has been given I shall be prepared to consider an application by defence counsel to call evidence in rebuttal or explanation if he thinks fit to make such application."

In our opinion the learned judge was right to allow the interpreter to be called. The circumstances were unusual. It was not the calling of a witness in rebuttal, a matter of which the limits are well settled by case law. Neither counsel was able to refer us to any similar reported case, and we have not been able to find any. Perhaps the nearest is that of *R.* v. *McKenna* (2) where there was a submission of no case to answer based on the prosecution's failure to prove an essential fact which was technical and such as common sense would take for granted. The judge himself recalled a prosecution witness to prove the fact. But even that is not on all fours. This is not a case of a judge calling a witness. The prosecution had intended him to give evidence and had taken all necessary steps to that end. Owing to a supervening natural cause outside anyone's control that intention could not be effected until that very late stage.

The last ground of appeal is that the conviction was unreasonable and such as cannot be justified having regard to the evidence. The cases of *R.* v. *Coney* (1) and *Wilcox* v. *Jeffery* (3) illustrate the difference between an inculpable passive presence at a crime and a culpable one. It can be granted that the appellant struck no blow; but the evidence amply indicated that he was present consenting and with a common purpose and by such presence encouraged Yarima Yira.

Appeal dismissed.