secondly, all rents since the execution of the lease had been paid to the landlady and not to the respondent or any other agent.

The respondent did not complain of the first leg in the appellant's request contained in his letter, but he complained of the second leg.

I do not think that the appellant by writing as he did was using the occasion for an indirect or improper motive—the motive imputed to him by the respondent. He had just cause and excuse—the lease spoke of the landlady having herself to give consent in writing before sub-letting could take place. The respondent's letter stated that he was instructed, rightly or wrongly, to give that consent. Again, whereas hitherto all rents had been paid to the tenant in person, the respondent's letter stated that all rents should be paid to him in future. Whilst it is understandable that in some natures a letter of this kind may give no cause for ire, in others perhaps passion may be roused and pride hurt; but neither passion nor hurt pride in my view could have supplied material sufficient to establish malice in this case. All the circumstances were at one in demonstrating that the appellant acted within the scope of his privilege and was therefore entitled to protection. In the result the appeal is accordingly allowed. The judgment of the court below is set aside and I order that judgment be entered for the appellant.

DOVE-EDWIN and MARCUS-JONES, JJ. A. concurred.

Appeal allowed.

HARRISON v. REGINAM

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Dove-Edwin and Marcus-Jones, JJ. A.): May 2nd, 1967
(Cr. App. No. 52/66)

[1] **Criminal Procedure—appeals—appeals against conviction—judge's summing-up not recorded—fatal where misdirection possible and same verdict uncertain on proper direction:** Failure to record the judge's summing-up in a jury trial will not necessarily prove fatal, but where the appellate court cannot be sure that the jury have been properly directed and that, if properly directed, they would have brought in the same verdict, the conviction will be quashed (page 122, lines 26–31; page 123, lines 27–30, 34–39).

[2] Criminal Procedure—judge's summing-up—omission to record—fatal where misdirection possible and same verdict uncertain on proper direction: See [1] above.

[3] Criminal Procedure—record—contents—judge's summing-up not recorded—fatal where misdirection possible and same verdict uncertain on proper direction: See [1] above.

The appellant and another man, the second accused, were charged in the Supreme Court with robbery with violence.

There were two prosecution witnesses. One, the complainant, said that when he boarded a taxi-cab driven by the second accused the appellant got in after him, and the appellant and the second accused assaulted him and robbed him of some money. The other, a special constable, said he saw the appellant getting into the cab after the complainant, but he was certain the driver was not the second accused. The complainant appeared tipsy. Later, the complainant complained that the appellant had assaulted and robbed him. In cross-examination, the witness said the complainant had complained only of assault.

At the close of the case for the prosecution, the judge directed the jury to return a formal verdict of not guilty in favour of the second accused. The appellant was convicted but no record was made of the judge's summing-up to the jury.

On appeal the court considered whether the failure to record the summing-up was fatal to the conviction.

Cases referred to:

(1) *Kabba* v. *R.*, Court of Appeal for Sierra Leone, Cr. App. No. 11/65, unreported.

(2) *R.* v. *Daniels, The Times,* April 13th, 1967; [1967] Crim. L.R. 418, considered.

(3) *Wango* v. *R.*, West African Court of Appeal, Cr. App. No. 47/59, unreported, applied.

Statute construed:

Criminal Procedure Act, 1965 (No. 32 of 1965), s.197:
The relevant terms of this section are set out at page 122, lines 15–22.

King for the appellant;
Awoonor-Renner, Principal Crown Counsel, for the Crown.

SIR SAMUEL BANKOLE JONES, P., delivering the judgment of the court:

The appellant and another man were charged with the offence of robbery with violence alleged to have been committed by them on the night of June 1st, 1966 against one Bankole Williams, who is referred to in this judgment as the complainant. At the close of the case for the prosecution, the learned trial judge directed the jury to return a formal verdict of not guilty in favour of the other man; they did so and he was acquitted. This other man for the purposes of convenience will be referred to as the second accused.

The case against the appellant rested on the evidence of two men, the complainant and one Ernest Battison Nicol, a man attached to the Special Constabulary. According to the complainant, on the night in question between 8.30 p.m. and 9 p.m. he stopped a taxi-cab No. WU 1440 which was being driven along Kroo Town Road from west to east by the second accused, whom he said he had known prior to this date as a taxi-driver. He asked to be driven to his home at Bailey Street, Brookfields. After he had entered the cab the appellant appeared, as it were from nowhere, and took a seat beside him at the back. He protested to the driver, who said that it was all right. He succeeded in alighting from the cab after the appellant had attempted to pull him in again. The second accused then also alighted, and the complainant was assaulted by both men, who emptied his pockets and robbed him of, among other things, the sum of Le23 which was in one of his hip pockets. While he held on to the appellant, the second accused escaped in his cab. Several persons came to his assistance and the appellant was taken to the Western Police Station.

According to the special constable Nicol, the first time he saw the appellant and the complainant was at about 11 p.m. at Kroo Town Road. The complainant appeared tipsy at the time. The appellant was with a group of about 11 or 12 persons and they were pulling at the overcoat the complainant was carrying. The witness warned them, but they started doing the same thing about 15 minutes later. The witness then stopped a passing taxi-cab, No. WU 1440. He was certain that the driver was not the second accused. The complainant boarded the cab and the appellant hung on to it and succeeded in boarding it as well. About 30 minutes later the witness saw the complainant being pursued by the appellant and some other men. The complainant told him that the appellant had pulled him out of the cab and robbed him of Le23. He then took

all of them to the Western Police Station. Under cross-examination by the appellant, the witness said that the complainant only complained that the appellant had beaten him up.

The appellant made a statement to the police in which he denied either assaulting the complainant or robbing him. He went into the witness-box and repeated the same story. He admitted, however, being at the scene, and stated that he was arrested at about 3 a.m. by the special constable, who alleged that he had seen him hanging on to the cab which the complainant had boarded.

The judge summed up to the jury and, without retiring, they returned a unanimous verdict of guilty as charged. It is, however, unfortunate that there was no record of the judge's summing-up as required by law. Section 197 of the Criminal Procedure Act, 1965, which came into operation on October 7th, 1965, provides as follows:

> "(1) When, in a trial by jury, the case on both sides is closed the Judge shall sum up the law and evidence in the case.
>
> (2) Where the Judge gives no directions for the recording of his summing up or of any direction given by him, he shall prepare a statement as soon as possible according to the best of his recollection and, for the purpose of preparing such statement, may consult any notes he may have made for his summing up or for any such direction."

In the case of *Kabba* v. *R.* (1), this court made reference to the observation made by it in an earlier case, namely that of *Wango* v. *R.* (3), where it was stated as follows:

> "In a jury trial the summing-up is an essential part of the trial. . . . It will be appreciated that if there is no note of the summing-up, neither the appellant nor counsel for the Crown can usefully help the Court of Appeal with argument nor can this court say whether the jury were properly directed in arriving at their verdict."

It is obvious that when the learned trial judge, with respect, rightly or wrongly directed the jury to return a formal verdict of not guilty in favour of the second accused, he must have accepted the story of the constable and disbelieved that of the complainant, who had said that it was both the appellant and the second accused who had assaulted and robbed him. It seems to us that had not Nicol given evidence, the judge would have left the fate of the second accused as well to the jury, and it is not unlikely that they would have accepted the complainant's story in its entirety and convicted him.

In our opinion, this was a case which called for a careful summing-up. We do not know, for example, whether the jury were told that just as the learned trial judge by himself found that the complainant was wrong or mistaken as to the identity of the second accused and the part it was alleged he took in the commission of the offence, so too the complainant might have been either wrong or mistaken as to the precise details in respect of the part the appellant played, especially as he (the complainant) was "tipsy" at the time.

Whilst it is true that the constable said he saw the appellant hang on to the cab and eventually enter it, and that later the complainant complained to him that the appellant had assaulted and robbed him, yet under cross-examination by the appellant this witness made this significant admission: "I have not told lies on you—the first prosecution witness [the complainant] *only* complained that you beat him up. He said that you pulled him out of the cab." We do not know whether the learned trial judge directed the jury that if they believed this piece of evidence it tended to contradict the evidence of the complainant himself to the effect that the appellant robbed him of Le23. We do not know whether he directed them that in the circumstances, if they believed that the appellant merely assaulted the complainant, then the former might be found guilty of an alternative offence although not charged with that offence, provided there was evidence of an intention to rob.

All these were matters which, had there been a recorded summing-up or a statement of such summing-up, would have greatly assisted this court. In the circumstances, therefore, it would be dangerous for us to uphold the conviction because we are not sure that if the jury had been properly directed they would have brought in the verdict they did.

We accordingly allow the appeal, quash the conviction, set aside the sentence and order that a verdict of not guilty be entered in favour of the appellant.

We would like to state quite clearly that this case is no authority, nor is it intended to be one, for the proposition that whenever a judge's summing-up to a jury is not recorded or a statement of such summing-up is not prepared by the judge himself, in every such case the conviction must be quashed. Each case must depend upon its own peculiar facts. For example, in a recent English case, *R.* v. *Daniels* (2), it was held that although there was a failure to give a direction that ought to have been given, such non-direction did

not vitiate the conviction because the court was satisfied that whatever the warning given to the jury they would still have come to the conclusion, beyond any reasonable doubt, that the appellant was guilty, and the appeal was dismissed although there had been a non-direction, that is, a failure to direct the jury in the summing-up of a most material matter.

Appeal allowed.

NAVO *v.* NAVO

SUPREME COURT (Browne-Marke, J.): May 4th, 1967
(Divorce Case No. 28/65)

[1] **Family Law—divorce—answer—allegation of petitioner's adultery—respondent cannot give evidence of petitioner's alleged adultery unless cross-petitions:** Where the respondent to a divorce petition alleges in her answer that the petitioner has committed adultery but does not cross-petition for divorce, she will not be entitled to give evidence in support of her allegation (page 135, lines 10–12).

[2] **Family Law—divorce—cruelty—test of cruelty—intention to injure only to be proved if acts do not allow its inference:** Where the acts of one spouse readily allow the inference of an intention to be cruel to the other, no affirmative evidence of actual intention will be necessary; where the acts do not allow such an inference to be drawn, however, the court will look for evidence of an intention to injure (page 127, line 37—page 128, line 2).

[3] **Family Law—divorce—petitioner's adultery—alleged in answer—respondent cannot give evidence of petitioner's adultery alleged in answer unless cross-petitions:** See [1] above.

[4] **Family Law—divorce—petitioner's adultery—discretion of court—factors to be considered:** In exercising its discretion to grant a petition for divorce despite the petitioner's adultery, a court should consider all the facts of the case and every interest involved, and in particular (a) the position and interest of any children of the marriage; (b) the interest of the party with whom the petitioner has committed adultery, with special regard to the prospect of their future marriage; (c) the prospect of reconciliation of the spouses if the marriage is not dissolved; (d) the interest of the petitioner, particularly that he or she should be able to remarry and live respectably; and (e) the interest of the community at large, balancing respect for the sanctity of marriage and the public policy which does not support the continuance of a marriage which has completely broken down (page 133, line 37—page 135, line 9).