in this country. If anyone was allegedly libelled, it was Dr. Claude Nelson-Williams, who should have wasted no time in bringing an action to defend his integrity which had been publicly assailed. He did not. We of course cannot say why he did not. All we can say in the circumstances is, that we are appalled that the Attorney-General started these proceedings, when it ought to have been obvious to him that the statements in the article alleged to have been seditious were mere hearsay matters emanating from Dr. Claude Nelson-Williams and could not have touched the good name and reputation of Sir Albert Margai which he is presumed by law to have in common with all other men.

There are other grounds of appeal, which we do not consider ourselves called upon to determine, because we are clearly of the opinion that we have given sufficient reasons why we must allow the appeal. The appeal is accordingly allowed.

Appeal allowed.

KARGBO, KARGBO and KAMARA *v.* REGINAM

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Marke and Luke, Ag. JJ. A.): May 10th, 1967
(Cr. App. Nos. 43/66, 44/66 and 45/66)

[1] Criminal Law—degrees of complicity—accessories—accessory before the fact—accused acquitted where charged as accessory and proved to be principal: Where an accused person is charged with being an accessory before the fact to a felony and is proved to have been a principal, he may not be convicted of being either accessory or principal and should be acquitted (page 149, lines 11–15; page 149, line 40—page 150, line 1).

[2] Criminal Law—degrees of complicity—accessories—accessory before the fact—definition—person who counsels or procures commission of offence—must be absent at time of commission: To qualify as an accessory before the fact to a felony, a person must be absent at the time the crime is committed and the act must be done in consequence of some counselling or procurement of his (page 150, lines 1–4).

[3] Criminal Procedure—judge's summing-up—burden of proof—direction to jury essential: It is essential in every criminal trial that the judge's summing-up to the jury should include a direction on the burden of proof (page 152, line 37—page 153, line 1).

[4] **Criminal Procedure—jury—functions of jury—jury merely judges of fact—directions on law to come from judge:** Jurors are merely judges of fact and must look to the judge for directions as to the law (page 150, lines 6–8).

[5] **Criminal Procedure—verdict—conviction of offence different from that charged—accessory before the fact—conviction as principal not permissible:** See [1] above.

[6] **Evidence—burden of proof—criminal cases—burden on prosecution—acquittal upon reasonable doubt:** In a criminal case it is the duty of the prosecution to prove the guilt of the accused, subject to the exceptions of the defence of insanity and any statutory exception; the accused is under no obligation to prove his innocence, and where at the end of the trial there remains a reasonable doubt of his guilt the case has not been made out and the accused is entitled to an acquittal (page 152, lines 10–22).

[7] **Evidence—functions of court—jury trial—court judge of law, jury judges of fact:** See [4] above.

The first and third appellants were charged in the Supreme Court with murder and the second appellant with being an accessory before the fact to the same offence.

The three appellants invited the deceased, a young boy, to accompany them on a trip to another town. Shortly after their arrival the boy disappeared and his body was found the next day. He had died from head injuries. All three appellants denied knowledge of what had happened to him. At the trial in the Supreme Court (Massally, J.) there was no evidence connecting the appellants with the killing, but the judge directed the jury that since the appellants had taken the boy to the place where he disappeared they must account for him. All three appellants were convicted of manslaughter.

On appeal Crown Counsel stated that he could not support the conviction of the second appellant since he should not have been convicted of manslaughter on an indictment as accessory before the fact. He further submitted that there had been no direction to the jury on the burden of proof. The court considered these matters and also considered whether the evidence supported the convictions.

Cases referred to:

(1) *R.* v. *Brown* (1878), 14 Cox C.C. 144, considered.

(2) *R.* v. *Oliva* (1960), 46 Cr. App. R. 241; [1961] Crim. L.R. 111, *dicta* of Lord Parker, C.J. applied.

(3) *Woolmington* v. *D.P.P.*, [1935] A.C. 462; [1935] All E.R. Rep. 1, *dicta* of Viscount Sankey, L.C. applied.

The second and third appellants appeared in person.
The first appellant was not present and was not represented.
Chenery, Senior Crown Counsel, for the Crown.

MARKE, Ag. J.A., delivering the judgment of the court:

The three appellants were convicted at the sessions held at Port Loko in August 1966 on an indictment which read as follows:

"*Statement of Offence*

Murder

Particulars of Offence

Santigie Kargbo and Fasineh Kamara on or about March 28th, 1966 at Rolal Town, Samu Chiefdom, Kambia District in the Northern Province of Sierra Leone murdered Abdul Kamara.

Statement of Offence

Murder. Sorie Kargbo accessory before the fact to the same offence.

Particulars of Offence

Sorie Kargbo on or about March 28th, 1966 at Rolal Town, Samu Chiefdom, Kambia District in the Northern Province of Sierra Leone murdered Abdul Kamara."

On the opening day of the trial counsel for the prosecution obtained leave to amend the second count by deleting the whole of it and substituting therefor the following:

"*Statement of Offence*

Santigie Kargbo and Fasineh Kamara on or about March 28th, 1966 at Rolal Town, Samu Chiefdom, Kambia District in the Northern Province of Sierra Leone murdered Abdul Kamara.

Count 2 [*sic*]

Sorie Kargbo on or about the same day at Rolal Town, Samu Chiefdom, Kambia District in the Northern Province of Sierra Leone did counsel, procure and command the said Santigie Kargbo and Fasineh Kamara to commit the said offence."

On this indictment, as amended, the three appellants (who were represented by the same counsel) were tried. The jury returned a unanimous verdict of guilty of manslaughter and each appellant was convicted and sentenced to a term of imprisonment for 10 years.

It is necessary to observe in passing that when this case first came before the court on August 31st, 1966, each of the appellants

had pleaded to the indictment as it then was. There appears, however, nothing on the record to show that the three appellants pleaded to the indictment as amended.

The three convicted accused filed their applications for leave to appeal against their respective convictions. By the time their applications could be heard by us, the first appellant had escaped from prison. We considered the respective applications of the second and third appellants, however, for leave to appeal, granted them such leave and treated the applications as the appeal. Neither of the two appellants in this court was represented by counsel.

Learned counsel for the Crown frankly told us that he could not support the conviction of Sorie Kargbo (the second appellant) as he had been charged in count 2 on the indictment as an accessory before the fact and therefore could not be convicted of manslaughter in the alternative. He referred to *R.* v. *Brown* (1). He further submitted that he was unable to find in the judge's summing-up any direction on whom the burden of proof lay. This court, after carefully considering the judge's summing-up and the facts as alleged on the record, decided to allow the appeal of the two appellants appearing, as well as that of the first appellant, who had run away. The court quashed the sentence on each appellant, ordered a verdict of not guilty to be entered on the record and discharged the appellants. We promised to give our reasons later.

The learned trial judge in his summing-up to the jury referred to *R.* v. *Brown* (1). He is recorded as having told the jury:

> "Crown Counsel, however, has addressed me on the case of *R.* v. *Brown,* in which it was held that in a case of murder where no evidence is led or you are satisfied that the accused was not an accessory but took part in the crime, you can safely convict him of murder."

With due respect to the learned trial judge, this was clearly a misdirection in law and was sufficient to mislead the jurors into convicting an accused man for an offence with which he was never charged and for which he was never tried.

In *R.* v. *Brown,* the accused Brown was indicted for murder, his wife being also indicted as an accessory before the fact. It was proved that the blow which proved fatal was struck within a few feet of where the wife was standing. The report of the case states (14 Cox C.C. at 144):

> "Coleridge, L., directed the acquittal of the female prisoner, pointing out that she should have been indicted as a

principal, if anything. An accessory before the fact must be absent at the time when the crime is committed, and the act must be done in consequence of some counsel or procurement of his."

This is entirely different from the misdirection the learned judge gave the jury. We feel it necessary to emphasise that jurors are merely judges of fact and look, as they must, to the judge for direction as to the law. Though judges are presumed to know the law, they cannot be too careful in directing the jurors, who are laymen, what the law is. We cannot speculate how the judge came to misdirect himself and the jurors, but can only express the hope that it will not be necessary for this court again to make such comments on a judge's misdirection of the jury on a question of law.

Another point which led us to allow this appeal was the absence in the learned judge's summing-up of a direction as to the burden of proof. To give a summary of the material facts in this case: The three appellants invited a nine-year-old boy, Abdul Kamara by name, to go with them from a town or village called Yebat where they were all living at the time to another town, Rolal. From the evidence it appears that the normal means of communication between these two towns was by canoe. Arriving at Rolal, the three appellants with the boy went behind an old bakery.

None of the three appellants gave evidence at the trial but each of them made a statement to the police which was admitted in evidence. The first appellant (Santigie Kargbo) in his statement among other things said:

"We did not go to Fasineh's house, but he led us to the rear of a house whose owner I do not know before. There were some women at the back together with some little children but none of us talked to them. We did not enter this house but Sorie Kargbo, the boy Abdul Kamara and myself sat on a dry palm tree laid down as a seat in the verandah of an oven at the back of this house for a few minutes while Fasineh was standing. Sorie Kargbo first got up and promised to go and collect the paddle he had alleged earlier. A little while later I got up and told Fasineh I was going to greet a friend Kewullay who lives in a house opposite Fasineh's house. . . . I returned to the spot where I left Fasineh and the child, but did not meet both of them there."

The second appellant in his statement said:

"We landed at Moribaia section wharf . . . and went on to the

back yard of a house whose owner I don't know, but I passed straight away to collect my paddle leaving Santigie Kargbo and the little boy behind. I went together with Fasineh Kamara but he was before me when I went my way. I did not return to this spot again till I returned to Royala-Bat at about 7.30 p.m."

The third appellant in his statement (marked A3) said:

"On our arrival at Rolal town we passed at the back of one Mustapha's house and there was nobody. Santigie and the boy sat on the dry palm tree at the verandah of a newly built bakery while Sorie and myself stood up. Not too long I left for my house leaving the three of them sitting down. . . . I collected my cutlass and told my wife Fattu Kamara that I was going to brush my rice farm. . . . I returned home just before dark when I met up with Santigie outside opposite our house when I asked him about the little boy he had brought from Royala-Bat but he said that the boy had been missing from him; and further asked me to assist him seeking out for him. . . . Santigie and I went in search of the boy on to a village called Ragbaneh and returned home about 8 p.m. but in vain. . . . When day break we continued the search until about mid-day when I heard that the body of the boy had been found and I went there and saw it."

According to the evidence of the headman of Rolal, it was the first appellant who saw the dead body of the boy very near the shore of Rolal. The medical evidence was that the boy did not die from drowning but from severe head injuries, consistent with the boy having been hit with some heavy object.

The learned judge, having stated the three aspects of the killing, went on to tell the jury that as all three accused got to Rolal with the boy and it was at Rolal that the boy disappeared, the three accused must account for him. He then went on to the statements of each accused and, taking them separately, asked the jury if they believed them. He ended up in the case of the third accused by saying: "If you believe this, then he is not guilty of the charge."

With respect, the learned judge was telling the jury that these three appellants must prove their innocence, *i.e.*, that the three appellants, having admitted going out to Rolal with the boy, must in order to be acquitted give a satisfactory account of the boy's disappearance which would prove their innocence. That, with due respect, has never been the law of this land. In cases of

murder, the onus is on the prosecution to prove the guilt of each prisoner beyond reasonable doubt. It has never been the law that an accused person should prove his innocence. In this case the prosecution brought no evidence of the actual killing, and from the evidence no attempt had been made to investigate thoroughly, as might have been done, for example, how the boy came to sustain the injuries which caused his death.

In *Woolmington* v. *D.P.P.* (3), Viscount Sankey, L.C. said: ([1935] A.C. at 481; [1935] All E.R. Rep. at 8):

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

There are, however, one or two comments we feel necessary to make in passing. In the first place, the common law of England is part of the law of Sierra Leone; and, secondly, though in the above-quoted case there was evidence to connect Woolmington with the actual killing (in fact he admitted killing his wife by a gun he was carrying accidentally going off), in the case before us there is no evidence connecting any of the three appellants with the killing.

R. v. *Oliva* (2) stresses the necessity for the summing-up to refer to the burden of proof. According to the headnote of that case the sole purpose for having reported it was to bring out that defect. Lord Parker, C.J. says (46 Cr. App. R. at 242–243; [1961] Crim. L.R. at 111):

> "Now, it is a cardinal principle of our law that it is always for the prosecution to prove the prisoner's guilt and not for the prisoner to prove his own innocence. . . . [T]his court feels that it is a cardinal principle of our law that the burden of proof is on the prosecution; that it has become almost a rule of law that the jury in every case should be told that that is the law; and that nothing we say should be thought in any

way to whittle down that principle. . . . [T]he court feels that the principle in issue is so important that it has no option but to quash the conviction."

These two cases have restated a principle of law which is sometimes forgotten or perhaps overlooked, and from what happened in the instant case we feel it necessary again to restate it for the benefit of the profession in Sierra Leone. The learned judge should never have left the question of manslaughter to the jury. From the evidence before him it was a case of murder or an acquittal on the indictment. There was no *scintilla* of evidence suggestive of manslaughter. There again, with respect, the learned judge misdirected the jury.

For these reasons we held that the three accused were wrongly convicted by the learned judge, and made the order we did.

Appeals allowed.

ARUNA *v.* REGINAM

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Dove-Edwin and Marcus-Jones, JJ. A.): May 12th, 1967
(Cr. App. No. 2/67)

[1] **Criminal Law—larceny—larceny of animals—killing animals with intent to steal—larceny and killing with intent to steal separate offences—accused charged with one may not be convicted of other:** Section 3 of the Larceny Act, 1916, which deals with larceny of cattle, etc., and s.4, which deals with killing animals with intent to steal, create two separate and mutually exclusive offences, so that an accused charged under one of these sections may not be convicted under the other (page 156, lines 1–4).

[2] **Criminal Law—larceny—larceny of animals—Larceny Act, 1916, s.3 applies to live animals only:** Section 3 of the Larceny Act, 1916, which deals with larceny of horses, cattle and sheep, applies to live animals only (page 155, line 34).

[3] **Criminal Law—larceny—larceny of animals—words "horse" and "sheep" in Larceny Act, 1916, s.3 generic terms—goats included:** The words "horse" and "sheep" in s.3 of the Larceny Act, 1916 are generic terms and will include goats (page 155, lines 31–33).

[4] **Criminal Procedure—verdict—conviction of offence different from that charged—accused charged under Larceny Act, 1916, s.3 may not be convicted of offence under s.4 and vice versa:** See [1] above.