Now it is our considered view that ss. 3 and 4 create two separate and distinct offences in law and are mutually exclusive one of the other, so that an accused person charged under one of these sections cannot be found guilty under the other. The facts on the record show that the appellant killed only one goat and that the meat was taken away or stolen, by whom it was not stated. Six other goats were killed and the meat taken away or stolen, and again, by whom it was not stated. Thirty live goats were taken away or stolen, and again, by whom it was not stated. The question that arises is whether the appellant was lawfully convicted under s.3 of stealing 37 live goats. We opine not. Could he have been convicted under this same section or under s.4 of killing a goat with the intent of stealing the meat? Again we opine not. Mr. Awoonor-Renner for the Crown conceded, and we think rightly so, that the appellant was wrongly charged and unlawfully convicted. We agree with him. On May 9th last, when this appeal was heard by us, we allowed it, and set aside the conviction and sentence and ordered that a verdict of not guilty be entered on the record. We then acquitted and discharged the appellant and stated that we would give our reasons for our decision. We have now done so.

Appeal allowed.

TUBOKU-METZGER *v.* TUBOKU-METZGER and PIETERSON

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Dove-Edwin and Marcus-Jones, JJ. A.): May 12th, 1967
(Civil App. No. 29/66)

[1] **Civil Procedure—appeals—procedure—withdrawal of appeal—may be withdrawn by leave of court at hearing without compliance with Court of Appeal Rules (cap. 7), r.22:** An appellant may withdraw his appeal by leave of the court at the hearing without having complied with the Court of Appeal Rules, r.22, and a party with regard to whom the appeal is withdrawn will be entitled to his costs (page 158, line 36—page 159, line 8).

[2] **Civil Procedure—costs—withdrawal of appeal—respondent entitled to costs of appeal withdrawn by leave of court at hearing:** See [1] above.

[3] **Family Law—divorce—adultery—evidence—normal sexual intercourse, not mere masturbation:** To constitute adultery grounding divorce there must be sexual intercourse in which both the man

and the woman play their normal role, and mere masturbation is insufficient (page 160, lines 23–30; page 161, lines 5–8).

The appellant petitioned for the dissolution of his marriage with the first respondent on the ground of her adultery with the second respondent.

In an action by the second respondent against the first respondent (reported in 1964–66 ALR S.L. 442; 1966 (2) ALR Comm. 331), certain letters written by her to him were put in evidence and referred to in the judgment. The judgment was put in evidence at the trial of the present proceedings before the Supreme Court (Forster, Ag. J.). It quoted one of the first respondent's letters in part, as saying that she had had to masturbate. The court was unable to find evidence of adultery in this. It dismissed the second respondent from the suit on a no case submission and found that the first respondent did not commit adultery with the second respondent, and dismissed the petition.

During the hearing of the appeal, the appellant, without having complied with the Court of Appeal Rules (*cap.* 7), r.22, applied for and obtained leave to withdraw the appeal against the second respondent.

He also applied for the production of some of the letters exhibited in the second respondent's action against the respondent, on the ground that they would show that the Supreme Court's finding that the respondent did not commit adultery with the co-respondent was erroneous, and the application was granted. Ten letters were produced which raised an overwhelming inference of her adultery. The letter about her masturbation showed that this had occurred in the co-respondent's absence when she was remembering an adulterous act of sexual intercourse with him.

Cases referred to:

(1) *Pieterson* v. *Tuboku-Metzger,* 1964–66 ALR S.L. 442; 1966 (2) ALR Comm. 331.

(2) *Sapsford* v. *Sapsford,* [1954] P. 394; [1954] 2 All E.R. 373, distinguished.

Statute and Rules construed:

Courts Act, 1965 (No. 31 of 1965), s.65:

"The Court of Appeal may, if they think it necessary or expedient in the interest of justice—

(a) order the production of any document, exhibit, or other thing

connected with the proceedings, the production of which appears to them necessary for the determination of the case; . . . ."

Court of Appeal Rules (Laws of Sierra Leone, 1960, *cap.* 7), r.22:

". . . [I]f the appellant files with the Registrar a notice of withdrawal of his appeal the Registrar shall certify that fact to the Court, which may thereupon order that the appeal be dismissed with or without costs. Copies of the notice of withdrawal shall at the expense of the appellant be served on all or any of the parties with regard to whom the appellant wishes to withdraw his appeal, and any party so served shall be precluded from laying claim to any costs incurred by him after such service unless the Court shall otherwise order.

Any party served with a notice of withdrawal may on notice to the appellant apply to the Court for an order to recover such costs as he may necessarily or reasonably have incurred prior to the service on him of the notice of withdrawal together with his costs incurred for purposes of obtaining the order and for attending upon the Court."

McCormack for the appellant.
The first respondent did not appear and was not represented.
Barlatt for the second respondent.

SIR SAMUEL BANKOLE JONES, P.:

This is an appeal by a husband-petitioner in a divorce suit tried in the court below, against the refusal by Forster, Ag. J. to grant a decree nisi for the dissolution of his marriage with the respondent.

The appellant founded his case on charges of adultery alleged to have been committed by the respondent, his wife, with a Mr. Christopher Ben Pieterson who was cited as co-respondent. The respondent did not enter an appearance, and therefore could not have been represented by counsel, although one purported to appear for her. At the close of the appellant's case, counsel for the co-respondent submitted that there was no case of adultery made out against his client. The learned judge agreed with him and dismissed the co-respondent from the suit with costs in his favour. He also found that the respondent did not commit adultery with the co-respondent and accordingly dismissed the appellant's petition. In a written judgment the learned judge reviewed the entire case and gave the reasons for his decision.

During the course of his argument in this court, Mr. McCormack asked leave to withdraw the appeal against the co-respondent. This application was granted and the co-respondent was dismissed from the appeal, although, if I may say so with the utmost respect, there was, in my considered opinion, *prima facie* evidence in the court below which tended to show that the relationship between the

co-respondent and the respondent amounted to adultery on his part, and therefore his premature dismissal from the suit was, to say the least, unfortunate. Although the point was not taken, yet we have since discovered that Mr. McCormack's application for withdrawal of the appeal against the co-respondent was irregular, as he had failed to comply with r.22 of the Court of Appeal Rules. However, we do not consider this fatal, especially as the costs occasioned thereby were awarded to the co-respondent.

Another application was made, under s.65(a) of the Courts Act, 1965, by Mr. McCormack for the production of certain documentary exhibits which had been tendered in the Supreme Court in *Pieterson* v. *Tuboku-Metzger* (1). In that case, the plaintiff, who was the co-respondent in the divorce case, sued the defendant Oni Tuboku-Metzger, the respondent in the divorce case and in this appeal, and another person for the return of the sum of Le1980. At a very early stage of the hearing, the other defendant was dismissed from the case. The defendant, the present respondent, admitted receiving the sum claimed, but her defence was that all the monies given to her by the plaintiff, amounting to the said sum of Le1980, were gifts showered by the plaintiff on her, and which she accepted, to win and secure her love and affection and in order that she would agree to unlawfully and immorally cohabit and commit adultery with him. During the trial of that case, the plaintiff produced several letters written by the defendant to him, in order to negative the defendant's defence. The learned trial judge, Luke, Ag. J., in his judgment made reference to several of these letters, and gave judgment for the plaintiff. His entire judgment was put in evidence as Exhibit D in the divorce case before Forster, Ag. J. Mr. McCormack's application was therefore to the effect that a perusal of some of the letters tendered in evidence before Luke, Ag. J., and to which that judge made reference in his judgment, would clearly show that the learned trial judge—Forster, Ag. J.—was wrong in law and in fact in holding that from the evidence he did not find that the respondent committed adultery with the co-respondent. We granted the application, and Mr. Barlatt, who was until then appearing for the co-respondent, produced 10 of these letters, dated between July 1964 and August 1964. All of them were written in the most intimate and endearing terms, some so lurid and pornographic in nature, and containing, for example, in one instance revoltingly immoral sketches depicting the respondent's sexual abandonment with the co-respondent, that the inference of the

commission of adultery by the respondent was overwhelming and compelling. The respondent began some of her letters to the co-respondent thus: "Hello Sweetie," "My darling sweetie," "Dear, Dear sweetie," "My darling K.B. sweetie," and the like. All these, penned by a married woman, were more than suggestive as to the nature of her relationship with the man whom she styled her "lover," whom she promised to marry, and from whom she accepted an engagement ring whilst her marriage was still subsisting.

The learned trial judge in his judgment among other things had this to say:

> "In his notes of judgment (Exhibit D), the learned trial judge [Luke Ag. J.] quoted an extract from a pornographic letter of the respondent's to the co-respondent, admitted in evidence before him as follows: 'I had to masturbate. I had great pains later.' In answer to a question on the foregoing extract—the question was not recorded in the note of judgment—the respondent is said to reply 'My answer is, it is a matter of opinion whether masturbation is a form of sexual perversion.' If from the foregoing extract and answer, I am to find an admission of adultery by the respondent, I confess I cannot. In *Sapsford* v. *Sapsford* (1) ([1954] P. at 400; [1954] 2 All E.R. at 374) Karminski, J. said:
>
> > 'Now, mutual intercourse, in my view, means that there has to be intercourse in which both the man and the woman play what may be described as their normal role, and that mere masturbation by itself cannot come within the ambit of mutual intercourse. If, therefore, I came to the conclusion that masturbation was all that had taken place here, I should be bound to find, I think, on the authorities that no adultery had taken place.'"

With the greatest respect, the learned judge inadvertently quoted out of context the extract from the respondent's letter referred to in the judgment of Luke, Ag. J. The respondent had written the following to the co-respondent in a letter dated July 10th, 1964 from Tooting, London, reporting her activities whilst travelling on board a boat to England:

> "I tried to recall what happened a year ago. Bed at 1 a.m. Could not sleep until 5 a.m. I recalled and re-lived all that happened on June 29th, 1963. There was no one standing in the grass as you did. I had to masturbate. I had great pains later."

It is quite obvious that what she meant was, that on June 29th, 1963 she had such satisfactory intercourse with the co-respondent that the very memory of it caused her to masturbate. I find therefore that the case of *Sapsford* v. *Sapsford* (1) was wholly inapplicable to the present case. In that case, the facts found proved were that on a number of occasions the wife masturbated the co-respondent. It was held, and rightly so, by Karminski, J. that that by itself did not constitute adultery. In the present case, the wife was stating that on June 29th, 1963 she committed adultery with the co-respondent, and that a year afterwards, so vivid was her recollection of the act, in order to satisfy her carnal appetite on board a boat where she was lonely and without him, she stimulated her sexual organ to bring back memories of her adulterous relationship with the co-respondent.

Also, in the case before Luke, Ag. J., that judge in his judgment said, *inter alia,* about the respondent as follows:

> "She then told the court that their friendship came to an end on account of three things:
>
> '(a) My going to see him at Pultney Street on December 17th, 1964 about noon and finding him in a very compromising position with a lady;
>
> (b) I found out that he had used my letters to him rather freely with his female friends;
>
> (c) I found out that he was a sex pervert.'"

How, for example, did the respondent find out that the co-respondent was a sex pervert? Was it from observation, or from personal knowledge? In my view, there was an overflowing wealth of evidence from which the court below should have pronounced a decree nisi in favour of the appellant on the ground of proved adultery committed by the respondent with the co-respondent. In the circumstances, therefore, the appeal is allowed, and it is ordered that the marriage had and solemnised between the parties on August 18th, 1956 be dissolved by reason of the adultery of the respondent, notwithstanding the petitioner's own adultery committed during the said marriage.

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

Appeal allowed.