CRI/T/111/99

IN THE HIGH COURT OF LESOTHO

Rex

vs

MASUPHA EPHRAIM SOLE	**First Accused**
JACOBUS MICHIEL DU PLOOY	**Second Accused**
MARGARET BAM	**Eleventh Accused**
LAHMEYER INTERNATIONAL GmbH	**Fourteenth Accused**
ACRES INTERNATIONAL LIMITED	**Fifteenth Accused**

For the Director of Public Prosecutions:	Mr GH Penzhorn, S.C Mr H.H.T. Woker
For the First Accused:	Mr E. H. Phoofolo
For the Second Accused:	Mr G. Farber, S.C., Mr J. Nel
For the Eleventh Accused:	Mr K. Sello
For the Fourteenth Accused:	Mr A.H. Trikamjee
For the Fifteenth Accused:	Mr S. Alkema

Before the Hon. Mr Acting Justice B.P. Cullinan on 2nd October, 4th December, 2000 , 15th and 30th January, 6th and 26th February, 2001.

ORDER

INDEX

Cases referred to:

(1) *Chang Wing, Leong Soo and Dada Gia v R* 1905 TS 767;

(2) *R v Van Rooi and Others* 1913 CPD 283;

(3) *R v Carsens & Daniels* 1915 CPD 365;

(4) *R v Jaffer and Others* 1915 CPD 463;

(5) *R v Mdubana and Others* 1915 EDL 455;

(6) *R v Steenkamp and Another* 1916 CPD 524;

(7) *R v Keyter and Another* 1917 EDL 250;

(8) *R v Makaya* 1930 TPD 363;

(9) *R v Breed* 1931 EDL 298;

(10) *R v Crane* (1920) 3 KB 236; *sub nomine Crane v Director of Public Prosecutions* (1921) 2 AC 299;

(11) *R v Dennis and R v Parker* (1924) 1 KB 867; 18 Cr App R 39;

(12) *R v Bungwana* 1933 EDL 131;

(13) *R v Nefdt and Another* 1940 CPD 473;

(14) *R v Tembe and Another* 1945 NPD 374;

(15) *R v Meyer* 1948 (3) SA 144 (T);

(16) *R v Ndoweni and Others* 1949 (2) SA 86 (N);

(17) *Xolo and Others v Attorney-General of the Transvaal* 1952 (3) SA 764 (W);

(18) *David and Others v Van Niekerk, NO and Another* 1958 (3) SA 82 (T);

(19) *R v Adams and Others* 1959 (1) SA 646 (SC);

(20) *R v Heyne and Others* 1956 (3) SA 604 (AD);

(21) *S v Barnes and Another* 1962 (1) SA 418 (E);

(22) *S v Gelderbloem and Another* 1962 (3) SA 631 (C);

(23) *R v Juda, R v Magaya* 1962 (3) SA 937 (SR);

(24) *R v Ngwatya* 1949 (1) SA 556 (E);

(25) *R v Mkandlwana* 1949 (4) SA 1008 (E);

(26) *S v Gumede, S v Nsindane and Others* 1964 (1) SA 413 (N);

(27) *S v Mavundhla* 1964 (4) SA 318 (N);

(28) *S v Sithole and Others* 1966 (2) SA 335;

(29) *S v Chawe En 'n Andere* 1970 (2) SA 414 (NCD);

(30) *S v Marimo and Others, S v Ndhlovu and Others* 1973 (2) SA 442 (R);

(31) *S v Ramgobin and Others* 1986 (1) SA 68 (N);

(32) *R v Peerkhan and Lalloo* 1906 TS 798;

(33) *R v Nlhovo* 1921 AD 485;

(34) *R v Longone* 1938 AD 533;

(35) *R v Mlooi and Others* 1925 AD 131;

(36) *R v Jackelson* 1920 AD 490;

(37) R v Mkize 1960 (1) SA 276 (N);

(38) *R v Madongo* 1966 (1) SA 75 (SR);

(39) *R v Dube and Others* 1968 (2) SA 37 (R AD);

(40) *R v Mapolisa* 1965 (3) SA 578 (PC); 1964 (1) SA 647 (FC);

(41) *R v Cilliers* 1937 AD 278;

(42) *R v Chenjere* 1960 R & N 67; 1960 (1) SA 473 (FC);

(43) *R v Uys and Senden* 1911 CPD 211;

(44) *R v Moses and Another* 1919 CPD 81;

(45) *R v Rasool* 1924 AD 44;

(46) *R v M and Another* 1950 (4) SA 101 (T);

(47) *Veni Dume v R* 1908 EDC 461;

(48) *R v Schapiro and Saltman* 1904 TS 355;

(49) *R v Milne and Erleigh* 1951 (1) SA 791 (AD);

(50) *R v Bedhla* 1929 TPD 277;

(51) *S v Makawgama* 1977 4 SA 1 (EC).

THE INDICTMENT

There are a number of preliminary applications before the Court from the first, second, fourteenth and fifteenth accused which are conveniently dealt with under the particular subject matter. Before doing so, I consider it necessary to set out the names of the accused who initially appeared before the Court, namely

MASUPHA EPPHRAIM SOLE	**Accused No.1**
JACOBUS MICHIEL DU PLOOY	**Accused No.2**
HIGHLANDS WATER VENTURE	**Accused No.3**
UNIVERSAL DEVELOPMENT COPRORATION (PANAMA)	**Accused No.4**
ELECTRO POWER CORPORATION (PANAMA)	**Accused No.5**
MAX COHEN	**Accused No.6**
SOGREAH	**Accused No.7**
SPIE BATIGNOLLES	**Accused No.8**
LESOTHO HIGHLANDS PROJECT CONTRACTORS	**Accused No.9**
ASSOCIATED CONSULTANTS AND PROJECT MANAGERS	**Accused No.10**
MARGARET BAM	**Accused No.11**
ASEA BROWN BOVERI SCHALTANLAGEN, GmbH, GERMANY	**Accused No.12**
ASEA BROWN BOVERI GENERATION AG, SWEDEN	**Accused No.13**
LAHMEYER INTERNATIONAL GmbH	**Accused No.14**
ACRES INTERNATIONAL LIMITED	**Accused No.15**
DUMEZ INTERNATIONAL	**Accused No.16**
SIR ALEXANDER GIBB & PARTNERS	**Accused No.17**
CEGELEC	**Accused No.18**
COYNE ET BELLIER	**Accused No.19**

In brief, the indictment contained altogether nineteen counts, the first sixteen

thereof being counts of bribery involving *inter alios* the first accused in each of them: the other three counts, (no.17, 18 and 19) that is, two counts of fraud and one of perjury, are directed at the first accused only. As to the counts of bribery, they involve the first accused, as the then Chief Executive of the Lesotho Highlands Development Authority ("LHDA"), statutorily responsible for the supervision of the Lesotho Highlands Water Project ("the Project" or "LHWP"), twelve consultant engineering formations associated with the Project, namely, (represented by "A" for "accused" and appropriate number on indictment) A3, A7, A8, A9, A12, A13, A14, A15, A16, A17, A18 & A19. The bribery counts also involved six accused as alleged intermediaries, namely, A2, A4, A5, A6, A10 & A11. The sixteen counts of bribery thus originally involved the following accused:

Count1:	A1, A2 & A3
Count 2:	A1, A4, A5, A6 & A7
Count 3:	A1, A4, A5, A6 & A8
Count 4:	A1, A4, A5, A6 & A9
Count 5:	A1, A10 & A12
Count 6:	A1, A10 & A13
Count 7:	A1 & A14
Count 8:	A1, A11 & A14
Count 9:	A1 & A15
Count 10:	A1, A11 & A15
Count 11:	A1 & A16
Count 12:	A1 & A16
Count 13:	A1, A11 & A16
Count 14:	A1, A4, A5, A6 & A17
Count 15:	A1, A4, A5, A6 & A18

Count 16: A1, A4, A5, A6 & A19

That was the state of the original indictment. Seven accused however did not attend the initial hearing, whether in person, or by way of cited representative of the particular company, or by Counsel, namely

A4 UNIVERSAL DEVELOPMENT CORPORATION (PANAMA)

A5 ELECTRO POWER CORPORATION (PANAMA)

A6 MAX COHEN

A12 ASEA BROWN BOVERI SCHALTANLAGEN, GmbH, GERMANY

A13 ASEA BROWN BOVERI GENERATION AG, SWEDEN

A16 DUMEZ INTERNATIONAL

A18 CEGELEC

I should say that the Court was informed that A16 Dumez International had not been served, as it no longer had any representative in Lesotho, but had merely been invited to attend the trial. It will be seen that A4, A5 & A6, who apparently also were not served as such, but were invited to attend, were involved (as alleged intermediaries) in Counts 2, 3, 4, 14, 15 & 16, in which A7, A8, A9, A17, A18 & A19 were also involved. No doubt in view of the absence of A4, A5 & A6, the Crown then sought separation of trials in respect of the former accused, excluding A18 who had not attended, that is, in respect of

A7 SOGREAH

A8 SPIE BATIGNOLLES

A9 LESOTHO HIGHLANDS PROJECT CONTRACTORS

A17 SIR ALEXANDER GIBB & PARTNERS

A19 COYNE ET BELLIER

A8 & A9 had no objection to such application and the Court ordered separation in respect of those two accused. Ultimately, the Court dismissed an application by A7 Sogreah and A19 Coyne Et Bellier and their representative, in his personal capacity, and ruled that A7 and A19, and A17 Sir Alexander Gibb & Partners Ltd (which no later than 30th August, 1991, had in fact acquired corporate status) had been properly cited, that is, as being represented by the said representative. There being then no objection by the latter three accused to separation, the Court also ordered separation of trials in respect of those three accused, that is, in total, in respect of the above five accused, namely, A7, A8, A9, A17 & A19.

Meanwhile, the Court had granted a further application, by A3 Highlands Water Venture, seeking an order declaring that, being a partnership, it had been improperly cited. Further, upon application by the Crown, the Court ordered amendment of the indictment to delete reference therein to the seven accused who had not attended, namely A4, A5, A6, A12, A13, A16 & A18, that is, as accused as such, but nonetheless referring to them in the particulars of offence, in each count involved, by their corporate or personal names. Further again, in view of the fact that the principal representative of A10 Associated Consultants And Project Managers, Mr Z.M. Bam, the husband of A11 Mrs Margaret Bam, had passed away, the Crown withdrew against the said accused company, nonetheless retaining the name of the Company in the particulars of offence, in respect of Counts 5 and 6.

After those amendments, the present state of the indictment before this Court, consisting of 19 counts, in respect of five accused, is as follows: -

Count 1: A1 & A2 (involving the partners of HIGHLANDS WATER

VENTURE)

Count 2: A1 (involving UNIVERSAL DEVELOPMENT CORPORATION (PANAMA), ELECTRO POWER CORPORATION (PANAMA), MAX COHEN and SOGREAH)

Count 3: A1 (involving UNIVERSAL DEVELOPMENT CORPORATION (PANAMA), ELECTRO POWER CORPORATION (PANAMA), MAX COHEN and SPIE BATIGNOLLES)

Count 4: A1 (involving UNIVERSAL DEVELOPMENT CORPORATION (PANAMA), ELECTRO POWER CORPORATION (PANAMA), MAX COHEN and LESOTHO HIGHLANDS PROJECT CONTRACTORS)

Count 5: A1 (involving ASSOCIATED CONSULTANTS AND PROJECT MANAGERS and ASEA BROWN SCHALTANLAGEN, GmbH, GERMANY.

Count 6: A1 (involving ASSOCIATED CONSULTANTS AND PROJECT MANAGERS and ASEA BROWN BOVERI GENERATION AG, SWEDEN.

Count 7: A1 & A14

Count 8: A1, A11 & A14

Count 9: A1 & A15

Count 10: A1, A11 & A15

Count 11: A1(involving DUMEZ INTERNATIONAL)

Count 12: A1 (involving DUMEZ INTERNATIONAL)

Count 13: A1& A11 (involving DUMEZ INTERNATIONAL)

Count 14: A1 (involving UNIVERSAL DEVELOPMENT CORPORATION (PANAMA), ELECTRO POWER CORPORATION (PANAMA), MAX COHEN and SIR ALEXANDER GIBB & PARTNERS LTD)

Count 15: A1 (involving UNIVERSAL DEVELOPMENT CORPORATION (PANAMA), ELECTRO POWER CORPORATION (PANAMA), MAX COHEN and CEGELEC)

Count 16: A1 (involving UNIVERSAL DEVELOPMENT CORPORATION (PANAMA), ELECTRO POWER CORPORATION (PANAMA), MAX COHEN and COYNE ET BELLIER)

Count 17: A1

Count 18: A1

Count 19: A1

While that is the state of the indictment, due to the various orders made, there now remain five accused before me, namely,

A1 MASUPHA EPHRAIM SOLE

A2 JACOBUS MICHIEL DU PLOOY

A11 MARGARET BAM

A14 LAHMEYER INTERNATIONAL GmbH

A15 ACRES INTERNATIONAL LIMITED

THE APPLICATIONS

The applications by the first, second, fourteenth & fifteenth accused can be grouped under five main heads, thus:

(i) Joinder of the accused

(ii) Citation of the accused in the indictment

(iii) Sufficiency of particulars as to bribery

(iv) Relevance of certain particulars

(v) Further particulars

Originally the first accused also contested the Court's jurisdiction to try the offences of bribery, which allege payments into Swiss bank accounts. The Crown led some argument in the matter, but then the first accused withdrew his particular application. Mr Phoofolo for the first accused has given the Court to understand that the issue of jurisdiction will formally be raised, at the plea stage, as a plea to the jurisdiction. Meanwhile, I propose to deal with the above five applications in the

order indicated and in separate rulings. I turn then to deal with the first of those applications, namely the issue of the joinder of the accused. The application in the matter is made by the first and second accused, but of course, the outcome affects all accused.

The involvement of each accused before the court is as follows:

A1: 19 Counts, Counts 1 - 19

A2: 1 Count, Count 1

A11: 3 Counts, Counts 8, 10 and 13

A14: 2 Counts, Counts 7 and 8

A15: 2 Counts, Counts 9 and 10

The first accused objects to being tried with a number of other accused in respect of offences which, in the absence of any statement of an overall "course of conduct", common purpose, or conspiracy, are unconnected. The second accused does not object to being joined with the first accused in respect of Count 1, but he does object to joinder with the first accused in respect of Counts 2 to 19 inclusive and to joinder with the eleventh, fourteenth and fifteenth accused.

JOINDER: LEGISLATION AND AUTHORITIES

The question arises as to whether the law permits of such joinder. The law in the matter is to be found in the provisions of section 140 of the Criminal Procedure and Evidence Act, 1981 ("the Code", or "the 1981 Code"). The origins of such provisions are to be found in those of section 139 of the Criminal Procedure and Evidence Act, No31 of 1917 ("the 1917 Code") of the Union of South Africa.

Section 139 read thus (I shall reproduce marginal notes as headings in all cases):

Persons implicated in same offence may be charged together.

> "139. (1) *Any number of persons* charged with committing or with procuring the commission of *the same offence, although at different times*, or with having, after the commission of the offence, harboured or assisted the offender, and any number of persons charged with receiving, *although at different times*, any property which has been obtained by means of an offence or any part of any property so obtained, may be charged with *substantive offences* in the same indictment, summons or charge and may be tried together, notwithstanding that the principal offender or the person who so obtained the property is not included in the same indictment, summons or charge or is not amenable to justice.(Italics added)
>
> (2) A person who counsels or procures another to commit an offence, or who aids another person in committing an offence, or who after the commission of an offence harbours or assists the offender, may be charged in the same indictment, summons or charge with the principal offender and may be tried with him or separately or may be indicted and tried separately whether the principal offender has or has not been convicted, or is or is not amenable to justice".

The courts in South Africa had occasion to pronounce upon the issue of joinder in a number of cases decided before the advent of the 1917 Code. The seminal case in the matter is that of *Chang Wing, Leong Soo and Dada Gia v R* (1) decided in the Transvaal in 1905 by Innes CJ (Mason and Curlewis JJ concurring). In that case the three accused, who separately occupied three different rooms in the one building, were charged, on the same charge sheet, with illegal possession of opium (a different kind of opium in each case). Referring to such joinder, Innes C.J. observed at pp767/768

> "Now in my opinion such a course is not warranted by practice, and is wholly irregular and wrong Two or more men may be joined in the same indictment in respect of a criminal charge arising out of *the same transaction*, or connected with *the same set of facts*, but *they cannot be so joined for even the same class of offence*, if it arises in each case out of *different facts* and forms a *different transaction*. In my opinion this point now taken on appeal is a good one, and is fatal to the proceedings.

> . . . . [T]he charge sheet was wholly irregular and unwarranted by rule of court or statute; and if the mistake can be remedied I think the only way to remedy it should be to bring a fresh charge or indictment against each of the accused. Such being the nature of the irregularity, we are not prevented from dealing with the matter, although the point was not taken in the court below. I do not wish to say anything more. It is not necessary to express any opinion as to whether the accused were in jeopardy or not. That point may arise if the Crown institutes fresh proceedings. But the present appeal must be allowed, and the conviction set aside on the ground that the charge sheet was wrong. The point is one which enures to the benefit of all the accused, and the whole of the proceedings must be set aside". (Italics added)

Eight years later, the same issue arose before the Cape Provincial Division in the case of *R v Van Rooi and Others* (2), where fourteen accused were jointly charged and convicted of a breach of a municipal by-law. There was no evidence of any joint action by any two accused, much less by the fourteen. No objection to the charge was taken in the court *a quo,* but as Buchanan J (Hopley J concurring) observed at p286, "where the objection affects the verdict or punishment, it can be raised on appeal". Buchanan J continued at p286:

> "By our Rules of Court several persons may be joined in one indictment for offences arising wholly out of *some joint act or omission.* But it is not competent in one indictment to charge several persons for separate or unconnected offences".(Italics added)

The convictions were quashed on appeal. The facts of *R v Carsens & Daniels* (3), decided in the Cape Provincial Division in 1915, starkly illustrate the point. There the two accused were jointly charged and convicted of being drunk in a public place. De Villiers AJ on review quashed the convictions and sentences, observing at p366:

> "Now it is not competent to charge jointly in one indictment or charge persons who have committed separate offences or offences not arising out of *the same joint act*". (Italics added)

But one month later, in the same Court, in the case of *R v Jaffer and Others* (4), Buchanan & Gardiner JJ quashed the convictions of three appellants, jointly

charged with receiving stolen property (stolen from the one source), where there was no evidence of joint action by the receivers. Objection to the indictment was taken in the court below. Buchanan J observed at pp465/466:

> "The Rules of the Supreme Court lay down that several persons may be joined in one indictment for offences arising out of *some joint act or omission*, though they may be guilty *in different degrees*, but in this case it was not a joint act or omission, and was not one act committed at the same time, but a number of separate acts committed at different times by one or other of them. Another Rule of Court allows of two or more offences of different species, arising out of separate and unconnected acts, being joined in one indictment, against *one accused*, but nowhere is it permitted to indict separate defendants in one indictment for different species of offences arising out of separate and unconnected acts". (Italics added)

I do not take Buchanan J to there say, in the last sentence above, that the converse is permitted, that is, "to indict separate defendants in one indictment for [the same] species of offences arising out of separate and unconnected acts". That proposition would be in conflict with the learned Judge's earlier dictum, that is, that joinder was permissible "for offences arising out of some joint act or omission".

Later that year, in 1915, the same point arose in the Eastern Districts Local Division in the case of *R v Mdubana and Others* (5) before Hutton J. In that case no less than 47 accused were jointly charged with failing to dip their cattle: 43 accused pleaded guilty, two of those who pleaded not guilty were discharged and a total of 45 accused were convicted. On appeal Hutton J set aside the convictions. The learned Judge observed at p458:

> "This was not a case in which the prisoners were jointly concerned in *one and the same offence*. [I]t is not a case in which the whole lot of them had neglected to dip some particular specified cattle, but a case in which each one of them is alleged to have failed to dip his own particular cattle. This being so; it was clearly irregular to charge them jointly in the indictment; they should have been charged separately, each one for his own offence for having neglected to dip his own cattle".(Italics added)

The Crown submitted that inasmuch as 43 accused had pleaded guilty, no prejudice arose. Hutton J quoted the above dicta of Innes CJ in *Chang Wing* (1) and observed at p459:

> I think the fair inference from this decision is that in the opinion of the Chief Justice, whether there was prejudice to the prisoners or whether there was not, the framing of a charge in this manner is so wholly irregular that the whole proceedings should be quashed. With this view, if I may say so, I fully agree".

In the following year the case of *R v Steenkamp and Anor* (6) was decided by Juta JP and Gardiner J in the Cape Provincial Division. In that case the Attorney - General remitted two accused for trial for perjury arising out of one and the same case. In the letter of remittal the Attorney - General stated that the accused must be tried separately. The magistrate tried them jointly and convicted them both. Juta JP observed (Gardiner J concurring) at p527/528:

> "The view I take of the matter is - leaving out the question of jurisdiction - that when the Attorney - General remitted the case to the magistrate he had the power to try the accused in the same way as this Court would have the right to try two prisoners each charged with the crime of perjury, and that the question of the effect of trying two prisoners together, each charged with perjury, is a question not of the jurisdiction of the Court but a question of irregularity in the proceedings of that Court. When a superior Court tries two prisoners charged with perjury together it may be said that the proceedings are irregular because the ordinary rule of practice is that prisoners charged with perjury should be tried separately. And so, the magistrate, having been given jurisdiction by virtue of the remit *ex hypothesi* to try the two accused of the crime of perjury the question, What was the effect of trying them together, is a question of whether the proceedings were irregular and not a question of whether the magistrate had jurisdiction?"

The learned Judge President observed that "it might be very much to the advantage of two accused charged with perjury that they should be tried together". He had "no hesitation in saying that the irregularity did not prejudice the accused" and the proceedings were confirmed "as in accordance with real and substantial justice".

The case of *R v Keyter & Anor* (7) was decided, again in the Eastern Districts

Local Division, in 1917, that is, before the commencement of the 1917 Code (1st January, 1918). In that case two accused were jointly charged and convicted of using abusive language, when the evidence clearly indicated that each had made some contribution to the words spoken, that is, that the accused had not acted jointly. An exception was not raised in the court below, nonetheless it was raised and considered on appeal when the convictions were set aside by Graham JP (Hutton and Sampson JJ concurring).

The case of *R v Makaya* (8) was decided in the Transvaal Provincial Division in 1930, that is, on the basis of section 139 of the 1917 Code. There the two accused in a joint trial were convicted of theft of their mutual employer's goods, the first accused separately on one count, and jointly with the second accused (the appellant) on the second count. No objection to the joint trial was had in the court below, but the point was taken on appeal. Tindall J (Solomon J concurring) observed at p365:

> "There can be no doubt that it was irregular to charge and try the two accused jointly. The circumstances of this case do not fall within the provisions of the sec. 139 of Act 31 of 1917. No evidence was led to show that the two accused were *associated* in any way in the theft of the goods in question; they must be regarded as having acted independently and at different times". (Italics added)

Tindall J then referred to the authority of *inter alia* the cases of *Chang Wing* (1), *Carsens* (3), *Jaffer* (4) and *Mdubana* (5). He considered, however, at p366 the proviso to sub-section (4) of section 100 of the Magistrates' Courts Act, No.32 of 1917, to the effect that an appeal could only be allowed where any irregularity or defect had resulted in "a failure of justice" , or was such that the accused had "been prejudiced thereby". The learned Judge observed that the Court in *Chang Wing* (1) "was not fettered by the consideration of the question of prejudice to the accused". In the result Tindall J held that the appellant had not been prejudiced and the appeal,

on that and other grounds, was dismissed.

In 1931 the case of *R v Breed* (9) was decided by Graham JP and Gutsche J in the Eastern Districts Local Division. There the Solicitor - General had remitted the two accused (father and son) for trial under two separate letters of remittal: the father was charged with failing to report the infection or suspected infection of his sheep with scab over a certain period: the son was likewise charged in respect of another period, the latter also being charged with removing six rams infected with scab. As Graham JP observed at p299, "[i]t will thus be seen that the cases were remitted as separate and distinct cases against each accused". They were however jointly tried by the magistrate. Both accused were convicted. Gutsche J observed at p304:

> "Such a procedure is not authorized by the common law or by the Criminal Procedure and Evidence Act, or by the Magistrate's Court Act. In England the proceedings would be set aside as a nullity. *Crane v Director of Public Prosecutions* [10]: Lord ATKINSON said [p.321]:
>
> > "When an accused person has pleaded 'not guilty' to the offence charged against him in an indictment, and another accused person has pleaded 'not guilty' to the offence or offences charged against him in another separate and independent indictment it is, I have always understood, elementary in criminal law that the issues raised by those two pleas cannot be tried together."

This view expressed in the House of Lords was cited in the Court of Criminal Appeal by AVORY, J. in *Rex v Dennis* and *Rex v Parker [11]*. It was there contended that the fact that counsel for the defendants consented to the two indictments being tried together distinguished the case from *R v Crane [10]*. But it was said [by Avory J at p869]:

> "In our opinion consent cannot give jurisdiction in a criminal court . . . . where no jurisdiction exists. As was said during argument in the House of Lords in *Crane v Director of Public Prosecutions [10]:*
>
> > "An irregularity can be waived by consent, but jurisdiction in criminal matters cannot be conferred by consent."
>
> This appears to us a question of jurisdiction and not a question of regularity or irregularity. No criminal court has jurisdiction to try two separate indictments at one and the same time and therefore the consent given to such a trial cannot give jurisdiction."

As to the facts in Breed (9), suffice it for the moment to say that apart from the second count against the son, it was never for a moment argued that the failure by the father and son to report the infection, over different periods, constituted the "same offence".

In the case of *R v Bungwana* (12) decided in 1933 in the Eastern Districts Local Division, as many as 145 accused were jointly charged and tried for culpable homicide, and in the alternative for affray, arising out of the same transaction. Of that number, 84 were convicted, that is, 43 were convicted of culpable homicide and 41 were convicted of affray. On appeal, on behalf of all 84 accused, it was pleaded that although the accused had been jointly charged on one offence, in the alternative, yet they had been convicted of separate offences, giving rise to irregularity. This ground of appeal was rejected by Pittman J (Gutsche J concurring), on the basis it seems that the accused had been "charged with committing exactly the same offence", even though in the alternative. In reference to section 139 Pittman J observed at p135:

> "That section deals with possible cases where although two or more persons are joined in the same indictment, the charge against one of them is not precisely the same as the charge against the other or others. But the divergence *does not go to the extent of different crimes altogether being charged* in one indictment against different offenders, but only *different degrees of complicity in the same crime*". (Italics added)

That was the position in 1933. Under section 21 of the General Law Amendment Act, No46 of 1935 of South Africa, an addition was made to section 139 of the 1917 Code in the form of section 139*bis*. The new section read

> **"Joint trial of offenders on different charges**
>
> 139*bis*. Whenever any person in taking part or being concerned in any transaction commits an offence and any other person in taking part or being concerned in the same transaction commits a different offence, both such persons may be charged with such offences in the same indictment, summons or charge and may be tried thereon jointly".

In 1938 the Criminal Procedure and Evidence Proclamation, No59 of 1938 ("the 1938 Code"), was passed in Lesotho. Section 139 thereof reproduced the provisions of section 139 and 139*bis* of the 1917 Code. The Lesotho provisions (with the sole exception of the deletion of the reference to a "charge") adhered completely to the South African provisions. The legislation (in South Africa) remained unchanged until 1955.

Meanwhile, the point in issue came once more before the Cape Provincial Division in 1940, in the review case of *R v Nefdt and Anor* (13), where a husband and wife had been jointly charged with and (despite objection) convicted of each selling a half-bottle of wine to two different purchasers. De Villiers J quashed the conviction, observing at p474

> "These seem clearly to be *two entirely separate charges* and there seems to be no justification for jointly charging the accused in respect of different offences. The indictment itself makes it perfectly clear that the charges are separate and distinct. The magistrate in relying on sec. 139 of Act 31 of 1917, overlooks the fact that the section deals with the case where two or more persons are charged with committing *the same offence*". (Italics added)

It is significant that the same *species* of offence was involved, indeed, the particulars virtually coinciding, yet the joinder was held to be in breach of section 139. In 1945 in the Natal Provincial Division the review case of *R v Tembe and Anor* (14) came before Carlisle and Broome JJ. The two accused had been remitted for trial by the Attorney - General after a preparatory examination, under separate letters of remittal, on eight counts of housebreaking and theft, one count of stock theft, and one of resisting arrest, with increased jurisdiction in respect of some of the counts. The cases came before a judicial officer other than the magistrate who heard the preparatory examination: he dealt with the cases jointly and the accused were convicted on the relevant counts. Reliance was placed on the depositions; they were

not apparently read out, the matter was not heard *de novo;* the Crown apparently never closed its case; neither it seems was the accused given any opportunity to give or call any evidence. Broome J (Carlisle J concurring) considered that the joint hearing "constituted an irregularity", referring to the case of *Breed* (9). He then concluded that "because of these irregularities" the convictions and sentences ought not to stand.

R v Meyer (15) was a case decided in the Transvaal Provincial Division in 1948 before Blackwell and Neser JJ. Two motorists had collided; a passenger had died in the collision; both motorists were charged in the same indictment with culpable homicide; one was convicted, the other acquitted. On review (as to the issue of joinder) and an appeal (as to joinder and also the facts) both Judges agreed that (in view of the usual proviso, qualifying the appellate or revisional function) no failure of justice and no prejudice had arisen. Nonetheless, for our purposes, the dicta of Blackwell J are instructive. The learned Judge at p145 quoted the first sentence of section 139 (1) of the 1917 Code and observed

> "Therefore if these persons have committed the same offence they may be tried together. At a later stage sec. 139(*bis*) was added".

Blackwell J then quoted the provisions of section 139*bis*, and continued at p146:

> "In other words this is something added to the general rule. Although they commit different offences yet, if they are concerned in the same transaction they may be tried together".

The learned Judge considered that the section would cover *inter alia* offences arising "under the Liquor Law" (e.g. the sale and purchase of liquor after licensed hours), and continued at p146:

> "What I would stress about sec. 139(*bis*) is that you have two persons uniting in the same transaction but guilty of different offences, i.e. different classes of offences -

> offences under different sections of the same statute, or possibly different offences at common law. In the present case the offence charged against these two persons is the same offence; they are both said to be guilty of culpable homicide. For that reason, if my reading of sec. 139(*bis*) is correct, it has application to a matter like the present. And if it had no application then I think *it would be straining the meaning of sec. 139 (1) to say that these persons are guilty of the same offence. They are guilty of the same class of offence* - they can each be guilty of culpable homicide, but they were totally unconnected persons each driving his own car each guilty of his own negligence, and *I do not think that in the absence of sec.139(bis) they could possibly be charged together by virtue of sec. 139 (1)*, and, as I have already said, I do not think sec. 139(*bis*) was meant to apply to a case of this sort. But I will go further. I am inclined to think (although I am not deciding the matter) that the use of the word "transaction" would exclude a case of the present sort where the parties are total strangers to each other, who *transact nothing with each other* and merely met each other in the sense that they were both said to be guilty of negligence when they collided on a public road. The appeal and review are dismissed". (Italics added)

In the 1949 case of *R v Ndoweni and Others* (16) in the Natal Provincial Division, De Wet J (Hathorn JP concurring) held at pp86/87 that a charge which jointly charged three appellants with the same class of offence was "clearly . . . irregular, the three persons being joined in the same summons in respect of separate offences". That may well have been *obiter*, however, as the appeal was upheld for other reasons.

Williamson AJ in the Witwatersrand Local Division in the case of *Xolo and Ors v A -G of the Transvaal* (17), decided in 1952, was faced with an application, by eleven accused, not for separation of trials, but instead for joinder of trials. The eleven accused were charged under two indictments: in the first indictment ten of the accused were charged with two counts of murder on the same date in the same place; in the second indictment five of those ten and an eleventh accused were charged with two counts of murder of two more persons, on the same date at the same place as in the first indictment. The four offences arose out of the same transaction. Williamson AJ considered the provisions of section 139*bis*. He observed as follows at pp

768/769:

> "It must be noted that under sec. 139*bis* of Act 31 of 1917 as added by sec. 21 of Act 46 of 1935 it is now permissible for the Crown jointly to charge two or more accused persons in one indictment with the commission of different offences where such offences have been committed by the accused while taking part in or being concerned in "the same transaction" and on any such indictment such persons may be tried jointly. It is suggested that the four counts of murder charged in the two indictments against the petitioners really all form part of the "the same transaction" - the continuos riot which took place at Orlando on December 24th and 25th, 1951 - and that it might have been competent for the Crown to charge them all under one indictment in terms of this section. In fact, of course, it might have been possible on what is stated in the petition for the Crown to have charged all the persons concerned with the crime of *public violence, in which case they could have all been jointly charged and tried in terms of sec. 139* of Act 31 of 1917; this is conceded by the Crown. Mr *Verschuur,* however, does not concede that the separate murders formed part of one transaction. Once it is accepted that the events which took place could form the basis of one charge of public violence against all persons concerned therein, I think that those events remain part of one "transaction" for the purposes of sec. 139*bis*; the fact that the Crown chooses to isolate out and separately charge different acts as different offences does not make those acts any less part of one "transaction". Therefore, I think that, it was competent for the Crown to charge the accused in one indictment in terms of sec. 139*bis* in respect of the different murders alleged and to have caused them to have been jointly tried". (Italics added)

It will be seen that Williamson AJ considered that an indictment charging the eleven accused jointly with public violence was permissible "in terms of section 139" (as distinct from section 139*bis*). Presumably he was there referring to section 139 (1), inasmuch as the accused, if charged with public violence, would be charged with "the same offence". He never said however that the eleven accused could be jointly tried under section 139 in respect of the four counts of murder (being of the same species of offence): on the contrary he was of the view that they could be jointly tried on such counts under section 139*bis*, inasmuch as those offences constituted "*different*" offences committed in the course of "the same transaction".

Three years later the 1917 Code was repealed and replaced by the Criminal

Procedure Act, No56 of 1955 ("the 1955 Code"). Sections 139 and 139 *bis* were replaced by sections 327 and 328 of that Code. The differences between the 1917 (and 1935) and 1955 legislation are minimal and cosmetic. It is as well however, to here reproduce the new provisions, for the purposes of comparison with subsequent legislation. Sections 327 and 328 read thus:

> **"327. Persons implicated in the same offence may be charged together.**
>
> 1 Any number of persons charged with committing or with procuring the commission of the same offence, although at different times, or with having, after the commission of the offence, harboured or assisted the offender, and any number of persons charged with receiving, although at different times, any property which has been obtained by means of an offence or any part of any property so obtained, may be charged with substantive offences in the came charge and may be tried together, notwithstanding that the principal offender or the person who so obtained the property is not included in the same charge or is not amenable to justice.
>
> 2 A person who counsels or procures another to commit an offence, or who aids another person in committing an offence, or who after the commission of an offence harbours or assists the offender, may be charged in the same charge with the principal offender and may be tried with him or separately or may be charged and tried separately whether the principal offender has or has not been convicted, or is or is not amenable to justice.
>
> **328. Joint trial of offenders on different charges.-**
>
> Whenever any person in taking part or being concerned in any transaction commits an offence and any other person in taking part or being concerned in the same transaction commits a different offence, both such persons may be charged with such offence in the same charge and may be tried thereon jointly".

As indicated, the above provisions effected no change, so that the authorities as to the 1917 legislation lost none of their relevance. In the 1958 case of *David And Ors v Van Niekerk, NO and Anor* (18) in the Transvaal Provincial Division the court considered the situation where, as a result of the prosecutor accepting some pleas of guilty, the three applicants in a joint trial were jointly charged in some of 7 counts,

not all the accused being joined in respect of the remainder of the 7 counts, all 7 counts being similar in nature, that is, concerning the unlawful sale of liquor. Ramsbottom AJP (Marais J concurring) observed at p90:

> "In my experience it is not an unknown practice for the Crown to join two or more persons in one indictment which contains several counts while *not joining all the accused in all counts*. While this practice is sometimes convenient and may even be advantageous to the accused, there is nothing in the Criminal Procedure Act that authorises it, and on the authority of *R v Makaya [8], the practice is irregular*. If the accused do not object, and if there is no prejudice, the irregularity may not be fatal, *but still it is an irregularity*. It sometimes happens that the Crown joins two or more persons in a charge which contains several counts and charges all of them on all the counts although it is known that some of them cannot be proved guilty on some of the counts. That practice avoids a separation of trials, but as *Gardiner & Lansdown* point out, it is improper. See 6th ed. vol. 1 p. 291.
>
> .....In the present case the several offences charged were *not part of one transaction*; if they were committed, each was a distinct and separate offence". (Italics added)

The particular passage in *Gardiner & Lansdown*, where the learned authors consider the provision of section 328 of the 1955 Code, reads thus:

> "It is doubtful, however, whether under this provision persons who are alleged to have been concerned in a series of stock thefts where one or more of the series can be traced to one, and others of the series to others, can be properly conjoined, for the series of thefts cannot be regarded as a *single transaction notwithstanding that the items of the series are associated together by place and other circumstances, but each item of the series must, for this purpose, be regarded as a transaction.* In this last-mentioned instance the difficulty is frequently overcome by charging all the accused on all the counts although it is known that guilt cannot be proved against some of them on some counts. This is, however, an improper method of procedure which may result in difficulty in the event of remittal". (Italics added)

As to section 327, Ramsbottom AJP had this to say at p91:

> "In terms of section 327, several persons charged with committing the same offence may be charged and tried together but that section *does not authorise the joint trial of persons who are not charged with committing the same offence.* When the prosecutor realised that he had no case against No.2 accused on counts 2 and 3, or against No.3 accused on count 7, he very properly accepted their pleas of not guilty

> on those counts, but the result was that each of those two accused was to be tried with the others for offences with which he was not charged. In those circumstances, when Nos. 2 and 3 accused objected to a joint trial, I think that the magistrate was obliged to order separate trials on counts 2 and 3 and on count 7".

It is apparent from those dicta that although the counts concerned the unlawful sale of liquor, Ramsbottom AJP did not consider that "the same offence" was involved but that "each was a distinct and separate offence".

In the same year, 1958, the question of joinder arose before a special criminal court (Rumpff, Kennedy and Bekker JJ) at Pretoria, in the case of *R v Adams and Ors* (19). As many as 92 accused were jointly charged on a single count of high treason, based on a series of overt acts, in which various accused were involved: in brief, all of the accused were not involved in each overt act. Objection was taken to the joinder, Counsel for the accused referring the Court (at p666) to the above dicta of Ramsbottom AJP in *David* (18) at p90. The Court held, on the basis of the "course of conduct" rule formulated by Schreiner JA in *R v Heyne and Ors* (20) at p616, that the separate overt acts (each of which could form the basis of a separate offence of high treason) constituted a course of conduct, with the one criminal design, that of treason.

The decision in the *Meyer* (15) case was very much in point in the case of *S v Barnes and Anor* (21), decided in the Eastern Cape Division in 1961 before van der Riet J and Graham AJ. In that case the two motorist appellants had collided at an intersection and had both been jointly charged, in the one count, with crossing a public road when not clear of moving traffic. Both were convicted. As van der Riet J observed at p419 (Graham AJ concurring),

> "... the charge itself makes it clear that each committed a *different offence* though they may have contravened *the same section*". (Italics added)

The learned Judge did not advert to section 328, but quite clearly the two motorists were not involved in the one "transaction". In any event, van der Riet J considered that to join the appellants irregularly "in the hope that they would convict each other did constitute a prejudice and it cannot be said that there was no failure of justice". The convictions were set aside.

The point in issue in the 1961 case of *S v Gelderbloem and Anor* (22) decided in the Cape Provincial Division by Herbstein J (Theron AJ concurring) was simply that a count which jointly charged the two appellants with pointing the one firearm at another person was irregular. Apparently the evidence indicated that the two appellants pointed separate firearms, each at a different person, which as Herbstein J observed at p635, constituted an "*a fortiori* case of misjoinder". In any event as the learned Judge observed:

> "The correctness of the charge must be determined on its wording and without reference to the evidence ... two people cannot jointly point one firearm at a third; each can do so separately and if each does so he would commit an offence".

Herbstein J nonetheless considered that no prejudice had arisen and ultimately the appeals were dismissed.

There followed, in 1962, the review case of *R v Juda, R v Magaya (23) decided by Maisels J* (Lewis J concurring) in Southern Rhodesia, as it was then called. In that case the two accused had been separately summoned, the first accused on two counts of failing to pay tax and the second accused on seven such counts; nonetheless they were jointly tried and convicted. Maisels J, in reference to local legislation, observed at p938:

> "It is only in cases covered by sec. 144 (1) and (2) of the Criminal Procedure and Evidence Act that persons may be charged and tried together. The present cases plainly do not fall within the purview of that section, which does not authorize a joint trial of persons who are not charged with committing *the same offence, Cf. David and Others v van Niekerk, NO,* [17] at p91. ..... There can be no doubt that the magistrate had no right or power to try these cases together". (Italics added)

It will be seen there that, although the accused were charged with the same species of offence, the learned Judge considered that they had "not [been] charged with committing *the same offence".* The Crown submitted that neither accused had been prejudiced and no substantial miscarriage of justice had occurred: the Crown placed reliance in the matter on such cases as *Steenkamp* (6) *Makaya* (8) and *Meyer* (15). Maisels J observed that in the latter two cases the accused had appeared before the court on *a joint charge,* but that in *Steenkamp* (6), where there was a joint trial on separate letters of remittal, such trial had not been set aside. The learned Judge observed that on the other hand in *Tembe* (14) the Court set aside a joint trial based on separate letters of remittal. I respectfully observe that in that case the appeals were allowed because of that and other irregularities, which, I, consider were so grave that it cannot be said that the accused were ever tried at all. In any event, Maisels J continued at p939:

> "The Eastern Districts Court in South Africa has consistently set aside convictions in cases such as the present, and notwithstanding provisions in the South African legislation similar to those contained in sec. 55 (2) of our Magistrate's Court Act. Cf. e.g., *R v Breed [9], R v Ngwatya [24], R v Mkandlwana [25].* The basis of the decisions by the Eastern Districts Court is that no criminal court has jurisdiction to try separate persons on separate indictments at one and the same time. On this line of reasoning no questions of prejudice or miscarriage of justice can arise. It is simply a question of the court having no jurisdiction to try cases in this way. The Eastern Districts Court has in this respect followed English decisions such as *R v Crane, [10],* and, on appeal, *sub nomine, Crane v Director of Public Prosecutions [10],* and *R v Dennis and R v Parker [11]*"

Maisels J concluded that the issue before him was not simply one of irregularity but

that "the trial court simply had no jurisdiction to try these cases in this way and consequently the convictions and sentences cannot stand".

In the following year, 1963, in the Natal Provincial Division case of *S v Gumede, S v Nsindane and Ors* (26) nine appellants (in the *Nsindane* appeal) were jointly tried on the one charge of similar offences. James J (Fannin J concurring) considered the submission by counsel for the appellants that there had been a failure of jurisdiction. James J referred at p414 to the decision in *Breed* (9) and observed:

> "It is, I think, clear that the basis for this decision was simply
>
> > "that under our law no criminal court has jurisdiction to try two separate persons on separate indictments at one and the same time."
>
> See the judgment of Graham, J.P., at p.303. Breed's case, *[9] supra,* was followed in *Rex v Ngwatya [24],* in which case it was held that a court had no jurisdiction to try jointly seven accused all of whom had been charged under separate summonses. *Breed's* case [9] was also followed in *Rex v Tembe And Another [14],* a case in which a joint trial had taken place of two accused whose cases had been remitted to a magistrate on two separate letters of remittal. Lastly, in the case of *R v Juda; R v Magaya [23],* an Appeal Court held that where a number of accused had been separately summonsed to appear before a magistrate to answer individual charges relating to tax arrears and the magistrate had tried them, notwithstanding, at a joint trial, their conviction must be set aside because the magistrate had had no jurisdiction to try the accused in this way.
>
> In all these cases the convictions and sentences were set aside on the ground that a magistrate had no jurisdiction to join in one trial accused who have been brought before the Court on charges made out individually against them. None of the cases decide in express terms that a failure of jurisdiction vitiating the whole trial proceedings will take place if at the joint trial of two or more persons upon the same indictment or the same summons it is found that the circumstances did not warrant a joint trial. In my view the discovery of these circumstances would simply result in there being an irregularity in the proceedings: and that before an appeal would be allowed on this ground it would have to be shown that a failure of justice had resulted therefrom. See sec. 103 (4) of Act 32 of 1944 [the Magistrates' Court Act, containing the usual appellate proviso]; *Rex v Makaya [8]; Rex v Meyer [15], State v Gelderbloem and Another [22],* at p634.
>
> It is plain that in the present case all the accused in the second appeal were in fact charged on the same charge; it was not a case of them having to answer separate

> charges or indictments. In these circumstances if an irregularity has indeed been committed the appeal will not succeed unless the appellants have been prejudiced in their defence as a result".

The learned Judge found that no prejudice existed and that "if an irregularity had indeed occurred in the present case, it is not one which would justify this Court in setting aside the proceedings". Indeed, James J was of the view, at p416, without deciding the point, that although the appellants had committed (similar but) different offences, there was evidence of common purpose (and hence of one transaction) resulting in a proper joinder under section 328.

The following year in 1964, again in the Natal Provincial Division, in the review case of *S v Mavundhla* (27) Caney J (James J concurring) set aside the conviction of an accused after a trial in which he and his co-accused were jointly charged with assault with intent to do (the other) grievous bodily harm, the co-accused being acquitted. Caney J was of the view that the charge revealed that "each committed a separate offence".

There followed another Full Bench decision of the Natal Provincial Division in 1966 in *S v Sithole and Ors* (28). In that case the six appellants had been *separately* charged with similar offences, seemingly committed at approximately the same time and place. Despite the objection, the Magistrate jointly tried and convicted the appellants. Miller J (Leon AJ concurring) at p337 considered the cases of *Ngwatya* (24) and *Gumede* (26), and in particular the above-quoted dicta of James J in the latter case. He also considered the decision in *Tembe* (14) and the reliance placed therein by Broome J upon the decision in *Breed* (9). At p338 Miller J considered the dicta of Williamson AJ in *Xolo* (17). He continued at p338:

> "In view of the decision of this Division to which I have referred. I do not propose to enter into any discussion concerning the observations made by WILLIAMSON, A.J., in *Xolo's* case. It seems to me that there are Full Bench decisions of this Court which give a clear pointer to the course which we, sitting in this Court, should follow, and that is that unless there is some special provision which saves the matter for the State in some other statute or enactment, it should be held that the holding of a joint trial was either a purported exercise of a non-existent jurisdiction or constituted an irregularity of such a nature that it resulted *per se* in a failure of justice and in vitiating the proceedings entirely. Even if it is necessary to regard the matter as one of absence of jurisdiction, we are not convinced that the decision of the Full Bench (*Rex v Tembe [14], supra*) was wrong in regarding the proceedings as vitiated because of a gross irregularity".

In the context of the judgment, I take the view that the learned Judge was there speaking of a joint trial of accused who are *separately* indicted, a view which is supported by the headnote to the report of the judgment at p335D.

In the review case of *S v Chawe En'n Andere* (29), decided in the Northern Cape Division in 1969 by de Vos Hugo JP and van den Heever J, the two accused were jointly charged with being found in possession of meat reasonably suspected to have been stolen. The accused were in possession of separate meat, which was found in each of their houses. The first accused was acquitted, the other convicted. Such conviction was set aside, Van den Heever J (de Vos Hugo JP concurring) observing at pp416/417 (pp340/341 Official Translation):

> " ... from sec. 327 it is clear that it [a joint trial] may take place when persons took part in *the same crime*. Where accused commit *separate offences* as in this case it is a misjoinder to charge them jointly.....
>
> The only reason why the accused were charged jointly is apparently because they named each other mutually as the source of the meat which each possessed individually .....
>
> In the present case it is clear from the evidence that we have as little to do with the commission of *the same offence* as in cases where two drivers collide *R v Barnes and Another* [21]".

There followed in 1973 the Rhodesian review cases of *S v Marimo and Ors*, *S v Ndhlovu and Ors* (30), which concerned the same issue and were heard jointly by a Full Bench of Beadle CJ, Davies and Beck JJ. In both cases a number of accused were separately indicted: the *Marimo* case concerned five separate summonses, five accused and eight counts (each involving one or more accused). In each case however the Magistrate jointly tried all counts. The issue before the Full Bench was whether such joint trial amounted to an irregularity or defect, or whether the Magistrate simply lacked the jurisdiction to conduct a joint trial. Beadle CJ (Davies and Beck JJ concurring) at pp444/445 conducted a review of the authorities commencing with the line of authorities which hold that a Magistrate lacks for jurisdiction to jointly try accused persons separately indicted, or alternatively that to do so "constitutes an irregularity so gross that it cannot be condoned". The learned Chief Justice referred to the case of *Breed* (9) as the *locus classicus* of such cases: he also referred *inter alia* to the cases of *Tembe* (14), *Ngwatya* (24), *Juda* (23) and *Sithole* (28). On the other hand, he considered cases which reflected the other school of thought, namely that such misjoinder constitutes an irregularity, which may be condoned, if the accused has suffered no possible prejudice: in this respect Beadle CJ referred to such cases as *Makaya* (8), *Meyer* (15), *Xolo* (17) and *Gelderbloem* (22). The learned Chief Justice continued at pp445/446:

> "The case of *S v Gumede*; *S v Nsindane and Others* [26] seems to draw a distinction between cases where accused have been wrongly joined in the same indictment and cases where accused have been charged separately on different indictments. The view expressed is that, while it is not permissible on the grounds of lack of jurisdiction to try together cases indicted separately where the accused have all been joined in the same indictment, albeit irregularity joined, such trials can be condoned provided there is no prejudice to the accused.
>
> I am not greatly impressed by this line of distinction as it seems to be a highly artificial one depending entirely on the particular procedure adopted by the prosecution. In both cases the effect is that a "mass trial" has been held of a number

> of accused whose cases are entirely separate from each other, and the position does not seem to me to be affected by the fact that in the one case the accused have been irregularly joined together in one indictment, whereas in the other there has been no irregular joinder. It should not, I think, rest with the prosecution, by adopting the irregular procedure of wrongly joining accused together in one indictment, to make it possible to condone the irregularity of holding what is, in effect, a "mass trial", whereas if the prosecution follows the correct procedure of indicting the accused separately from each other, it would not be possible to condone the holding of such a "mass trial". I, therefore, do not think the *R v Makaya, supra*, line of cases can be distinguished on the ground that in those cases all the accused were joined together in one indictment.
>
> The issue seems to me to be a straightforward one. It either is or is not permissible to condone a "mass trial" where there is no prejudice suffered by the accused, and the issue does not depend on whether or not the accused were charged together in one indictment, or indicted separately in different indictments. *There is a lot to be said for the arguments on both* sides....." (Italics added)

Beadle CJ observed that the practice laid down in *Juda* (23) had been followed since 1962 and that it should continue to be followed unless clearly wrong: he was by no means satisfied that such was the case: indeed there was a great deal to be said for the above-quoted dicta of Miller J in *Sithole* (28) at p338 E -F. In the result, the convictions and sentences were set aside and "the cases remitted to another magistrate to be tried separately from each other".

That decision was delivered in 1973. In 1977 the 1955 Code was repealed and replaced (apart from sections 319 (3) and 384, which need not concern us,) by the Criminal Procedure Act, No51 of 1977 ("the 1977 Code"). In particular, sections 327 and 328 of the 1955 Code were replaced by sections 155 and 156 of the 1977 Code. Those latter sections read thus:

> **"155 Persons implicated in same offence may be tried together. -**
>
> (1) Any number of participants in the same offence may be tried together and any number of accessories after the same fact may be tried together or any number of participants in the same offence and any

number of accessories after that fact may be tried together, and each such participant and each such accessory may be charged at such trial with the relevant substantive offence alleged against him.

(2) A receiver of property obtained by means of an offence shall for purposes of this section be deemed to be a participant in the offence in question.

156 Persons committing separate offences at same time and place may be tried together. -
Any number of persons charged in respect of separate offences committed at the same place and at the same time or at about the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that evidence admissible at the trial of one of such persons will, in his opinion, also be admissible as evidence at the trial of any other such person or such persons".

Suffice it to say for the moment that, apart from the position of the receiver, the basic provisions of sec*tion 327 (1) re*mained uncharged. So much so, that Milne JP in the Natal Provincial Division in the case of *S v Ramgobin and Others* (31) in 1985 observed at p76D that

> "those provisions of ss 155 and 156 *which are relevant to the enquiry in this case,* are no wider than the provisions of ss 327 and 328 of the 1955 Act".

Whatever about sections 156 and 328, that certainly seems to me to be the case with regard to sections 155 and 327, in the context of the present case. In any event, the learned Judge President relied on the authority of *Chang Wing* (1) decided 80 years earlier, and *Adams* (19). At p74H he quoted with approval the following extract from the judgment of Rumpff J in *Adams* (19) at p666 C-D:

> "The general rule is of course,
>
> > "that two or more persons may be joined in the same indictment in respect of a criminal charge arising out of *the same set facts*, but they cannot be joined for even *the same class of offence* if it arises, in each case, out of *different facts* and forms a different transaction" (*per* Innes CJ in *Chang Wing* [1]" (Italics added).

More than three years before *Ramgobin* (31), on 5th February 1982, the 1938

Code was repealed and replaced by the (1981) Code in Lesotho. Section 139 of the 1938 Code was replaced by section 140 of the Code. Section 140 reads thus:

> **"Persons implicated in the same offence may be charged together.**
> 140. (1) Any number of persons charged with-
> (a) committing or with procuring the commission [of the] *same offence, although at different times*, or with having after the commission of the offence, harboured or assisted the [offender]; or
> (b) receiving, *although at different times*, any property which has been obtained by means of *an offence* or any part of any property so obtained
> may be charged with *substantive offences* in the same charge and may be tried together, notwithstanding that the principal offender or the person who obtained the property is not included in the same charge or is not amenable to justice.
>
> (2) A person who-
> (a) counsels or procures another to commit an offence; or
> (b) aids another person in committing an offence; or
> (c) after the commission of an offence harbours or assists the offender,
> may be charged in the same charge with the principal offender and may be tried with him or separately or may be charged and tried separately whether the principal offender has or has not been convicted, or is not amenable to justice.
>
> (3) Whenever any person in taking part or being concerned in any transaction commits an offence and any other person in taking part or being concerned in *the same transaction* commits a *different offence*, both such persons may be charged with such offences in the same charge and may be tried thereon jointly". (Italics added)

There are two apparently typographical errors in the above provisions and I assume that what I have inserted in square brackets represents the draftsman's intentions in the matter. In any event, it will be seen, that despite enactment more than four years after the 1977 Code, section 140 did not incline towards any of the provisions in sections 155 and 156 of that Code, but instead, apart from punctuation, faithfully

adhered to the 1917, 1935, 1938 and 1955 provisions. The authorities which I have considered above are then very much in point.

SECTION 154 (1) (e) OF THE CODE

Before embarking upon a consideration of the provisions of section 140, there is an ancillary point to be disposed of. Section 154 (1) (e) of the Code reads thus:

> "154. (1) No charge in respect of any offence shall be held insufficient -
> .....
>
> (e) for want of, or imperfection in addition of any accused or any other person;....."

The question arises as to whether such provisions absolve the Crown in the event of any misjoinder? Those provisions are based on those of section 151 (e) of the 1917 Code, section 152 (e) of the 1938 Code, section 176 (1) (e) of the 1955 Code, and see also section 92 (1) (e) of the 1977 Code. Both the South African provisions and those of the 1938 Code of Lesotho read

> "(e) for want of, or imperfection in, the addition of any accused or any other person",

which format, I consider, is clearer in meaning. In any event, such provisions were considered by Tindall J in *Makaya* (8) at p365/366 where the learned Judge observed that

> ".....the sub-section does not purport to authorise a joint trial in circumstances not covered by sec. 139. When the case of *Chang Wing v Rex* [1] was decided, a provision similar to sec. 151 (e) existed in the Criminal Procedure Code then in force - see sec. 147 of Ordinance 1 of 1903".

Again, in the case of Juda (23), Maisels J considered that the particular provision "plainly does not authorise a joint trial not covered by sec. 144" [the equivalent of section 140 of the Code]. In the case of *Ramgobin* (31) Milne JP at p74

E referred to the above decision on the point in *Makaya* (8) and concluded:

> I respectfully agree. Subsection 92 (1) (e) deals only with joinder or insufficient joinder, and not with misjoinder".

The learned authors, Etienne Du Toit *et. al.*, of *Commentary on the Criminal Procedure Act,* 3rd Reprint 1993, (Original Service, 1987), in dealing with section 92 (1) (e), observe at p14 -36:

> "Subsection(1) (e) provides that a charge is not invalid because of the non-addition or imperfect addition of an accused. This subsection is supposed to supplement ss 155 and 156 but actually contributes nothing to the regulating of joinder or improper joinder of accused. The State would not be able to rely upon s 92 (1) (e) where a charge is irregular because of an improper joinder of accused. The subsection only applies to non-joinder or imperfect joinder and not to improper joinder (*S v Ramgobin & Others* [31] 74 E)".

I respectfully agree with those observations. I turn then to consider the provisions of section 140 of the Code.

SECTION 140 OF THE CODE

Quite clearly sub-section (1) thereof, on which the Crown relies in support of the present joinder, can only be considered in the context of the section as a whole and indeed of the Code itself. It proves convenient therefore to first consider the provisions of sub-section (3).

Section 140 (3)

I do not see that the sub-section presents any difficulty of interpretation. As distinct from sub-section (1), the emphasis is upon "the same transaction" rather than the "same offence" and indeed on "different" offences. Marginal notes of course do not, under the Interpretation Act, 1977, form part of an enactment but nonetheless

they serve to indicate the draftsman's intentions. The marginal note to section 140, "Persons implicated in the same offence may be charged together", is hardly appropriate to sub-section (3); but then it must be remembered that when the sub-section first appeared, it did so in 1935 in the form of section 139*bis* of the 1917 Code, whose marginal note read, "Joint trial of offenders on different charges". In any event, all relevant authorities, particularly those of *Meyer* (15) and *Barnes* (21), indicate that the sub-section is concerned with situations where two persons each commit a different but reciprocal offence, in the course of the same transaction, for example where a licensed publican sells and a customer purchases alcohol after hours.

Section 140 (2)

Much is written in the textbooks about sub-section (2), but surprisingly little about sub-section (1). While sub-section (2) lends itself to interpretation, the relevant authorities are legion and consideration thereof is necessary to reach a better understanding of sub-section (1).

I pause here to say that while I appreciate that the term "accessory before the fact" is a stranger to Roman-Dutch law, and indeed while such and other terms have seen much change in England, particularly since 1967 (see *Archbold, Criminal Pleading, Evidence And Practice*, 1998 Ed, Chapter 18 pp 1437/1449, and *Criminal Law* by Smith and Hogan 7 Ed, Chapters 7 and 8, pp 132/169), such terms are nonetheless frequently used in the textbooks and it proves convenient on occasion to adopt them. Section 140 (2), covers all stages of participation in an offence, that of the accessory before the fact, the aider and abettor and the accessory after the fact (the latter phrase, adopted in South Africa over a century ago, has seen the

introduction in England of the Criminal Law Act, 1967, which created the offence of "assisting offenders").

As distinct from sub-section (1), which speaks of "any number of persons", sub-section (2) speaks in the singular of "a person". As I see it, the sub-section is concerned solely with the principle of joinder of the accessory, and aider and abettor, with the principal offender: it re-states the common law principle that a *socius criminis* or an accessory after the fact (it is not concerned with receivers), because of his association with the offence, may be joined in the charge (that is, of the substantive offence) with the principal offender and jointly tried with him. The sub-section also provides that the *socius* and the accessory after the fact, although jointly charged, may nonetheless be tried separately from the principal offender. Alternatively the *socius* and the accessory after the fact may be charged separately and tried separately. In any event, where tried separately, such trial may take place "whether the principal offender has or has not been convicted, or is not amenable to justice".

The provisions of section 140 (2) were, as indicated, introduced in 1917. The common law, as to substantive aspects, was stated thus in 1906 in the leading and oft-quoted case of *R v Peerkhan and Lalloo* (32) by Innes CJ (Wessels & Mason JJ concurring) at p802:

> "In the case of common law offences any person who knowingly aids and assists in the perpetration of a crime is punishable as if he had committed it. The English law calls such an one a principal in the second degree: and there is much curious learning as to when a man is a principal in the second, and when in the first degree. Our law knows no distinction between principals in the first and second degree, or between principals in the second degree and accessories. It calls a person who aids, abets, counsels or assists in a crime a *socius criminis* - an accomplice or partner in the crime. And being so, he is under Roman-Dutch law as guilty, and liable to as much

> punishment, as if he had been the actual perpetrator of the deed. Now it is clear that in our criminal courts men are convicted for being *socii criminis without being specially charged in the indictment as such.* They are so convicted under ordinary indictments *charging them with having actually committed the crime*". (Italics added)

The learned Chief Justice went on at p803 to observe,

> "The true rule seems to me to be that the common law principles which regulate the criminal liability of persons other than actual perpetrators should apply in the case of statutory as well as of common law offences, *unless there is something in the statute or in the circumstances of the crime* which negatives the possibility of such an application". (Italics added)

Section 183 (2) of the Code

In 1914, the Riotous Assemblies and Criminal Law Amendment Act, No27 of 1914, was introduced in South Africa section 15 (2) thereof read thus:

> " (2) Any person who -
> (a) conspires with any other person to aid or procure the commission of or to commit; or
> (b) incites, instigates, commands or procures any other person to commit,
> any crime or offence, whether at common law or against a statute or statutory regulation, shall be liable *on conviction* to the punishment to which the principal offender would be liable" (Italics added).

I wonder if the word "commands" in paragraph (b) above is not a typographical error. Sir Matthew Hale [illegible] Vol I at p615 defined an accessory before the fact as one who

> "being absent at the time of the felony committed, doth yet procure, counsel, *commend*, or abet to commit a felony" (Italics added)

But nothing turns on whether an accessory "commands" or commends": he is still guilty as a *socius*. Solomon JA considered the provisions of section 15 (2) in the case of *R v Nlhovo* (33) in 1921. He observed at pp492/493:

> "This enactment does not purport to provide that an inciter is guilty of an offence whether the crime has been actually committed or not. It merely regulates the punishment which may be inflicted upon the person who incites, and it clearly contemplates the case where the crime has been actually committed. For it speaks of the punishment to which the principal offender would be liable, but where the crime has not been committed there is no principal offender to punish. The Legislature in this section had no intention of laying down any rule on the subject of whether incitement is an offence even if no crime has been committed. That is a question which has to be determined by the common law apart altogether from statute".

Further on the learned Judge of Appeal at p493 considered that:

> "[i]n my opinion we should definitely lay down that it is an offence to incite a person to commit a crime even though nothing has been done by him in furtherance of its commission".

This Solomon JA concluded, as he considered it "repugnant to one's common sense" to hold otherwise, and secondly there were two supporting decisions in the matter in the Cape and in Natal. Juta JA was of the view at p503 that the above provisions did not create an offence but that nonetheless he was

> "of the opinion that inciting to commit a crime is a substantive offence and a crime in itself".

The provisions of section 15 (2) (b) above were amended by section 4 of Act No 39 of 1926 to leave the matter beyond doubt. The amended paragraph reads:

> "(b)incites, instigates, commands, or procures any other person to commit,
>
> any crime or offence, whether at common law or against a statute or statutory
>
> *to which a person convicted of actually committing that crime or offence would be liable".* (Italics denote amendment)

The amended provisions of section 15 (2) were introduced into section 179 (4) of the 1938 Code, section 18 of the Riotous Assemblies Act, no17 of 1956 of South Africa (but not into the 1955 or 1977 Codes), and ultimately section 183 (2) of the (1981) Code, which latter provisions I reproduce for convenience:

"(2) Any person who -

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands or procures any other person to commit,

an offence, whether at common law or against a statute or statutory regulation, is guilty of an offence and liable to the punishment to which a person convicted of actually committing that offence would be liable".

The difference between those latter and the South African provisions is but cosmetic. What emerges from all that is that those provisions clearly provide that e.g. procuring the commission of an offence is in itself a substantive offence. That may not have been the case under section 15 of Act 27 of 1914 (though the words *"on conviction"* are significant), that is, until amended in 1926, but it was the case under the common law. In brief, when the 1917 Code was enacted, procuring the commission of an offence was itself a substantive offence under the common law.

Accessory Before the Fact: Aider and Abettor

In 1938 the Appellate Division had occasion to refer to the aspect of framing a charge where an accessory was involved, in the case of *R v Longone* (34). Watermeyer JA observed at p537:

"It has been pointed out by this Court on several occasions that under Roman-Dutch law anyone who is a *socius criminis* can be convicted and punished as a principal offender. For example, in *Rex v Mlooi and Others* [35] at p134, INNES, C.J., said:

"The position of a man who associates himself with the crime beforehand is well settled. Whoever instigates, procures or assists the commission of the deed is a *socius criminis*, and may be indicted, convicted and punished as if he were the principal offender (*Rex v Peerkhan and Lalloo[32], Rex v Jackelson [36].*"

It is therefore unnecessary, in framing a charge under our law, to make use of a technical English legal term such as "accessory before the fact". Not only is it unnecessary but it creates difficulties, an example of which occurs in this case. If the accused had been charged with the crime of murder and convicted of that crime, then there would have been no question that he could have been sentenced to death. But because, instead of being charged with the crime of murder, he was charged with being an accessory before the fact to the crime of murder, the point has been raised in the second question of law reserved whether it was competent to pass sentence of death on him."

The dicta in *Longone* (34) have been applied in a number of cases. For example, in *R v Mkize* (37) decided in the Natal Provincial Division in 1959, Burne AJ after reviewing the authorities held (Henochsberg J concurring) at p283 that "there is no such crime as being an accessory before the fact to any crime". Young J, in the Rhodesian case of *R v Madongo* (38) decided in 1965, disagreed with that dictum, holding that it was not incompetent to charge the accused as an accessory before the fact to the particular crime. The Appellate Division in Rhodesia, however, in the 1967 case of *R v Dube and Ors* (39), did not approve of the decision in *Madongo* (38), Beadle CJ, (Quenet JP and MacDonald JA concurring) relying on the dicta in *Peerkhan and Lalloo* (32), *Longone* (34) and in particular the Privy Council decision of *R v Mapolisa* (40) and holding at p42 that,

> ".... in every case a *socius criminis* or partner in a crime can only be convicted of the same offence as the actual perpetrator of the crime".

The Privy Council judgment in *Mapolisa* (40) (per Lord Donovan) was based on the authority of *Peerkhan and Lalloo* (32), *Mlooi* (35), *Longone* (34) and indeed *Mkize* (37). His Lordship observed at p582:

> "Under the Roman - Dutch common law a *socius criminis* is regarded as committing the same offence as the principal perpetrator where that offence is a crime against that common law. This proposition rests upon many authorities. There is none to the contrary effect".

In particular Lord Donovan observed at p586:

> "In the Federal Supreme Court it was urged that the liability of the appellant as a *socius criminis* was to be found in the provisions of sec. 366 (2) (a) of the Criminal Procedure and Evidence Act of Southern Rhodesia, which provides as follows:
>
> "Any person who
>
> (a) conspires with any other person to commit or procure the commission of or to commit; . . . any offence whether at common law or against any law, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing the offence at common law or against such law would be liable".

> The Federal Supreme Court rejected this argument, holding that it simply established the offence of conspiracy but did not affect the liability of a *socius criminis* which still rested upon the common law. Their Lordships agree".

When the case had come before the Federal Supreme Court (40), Counsel for the appellant had submitted that the liability of the *socius criminis* was to be found in the provisions of section 366 A (2) of the Criminal Procedure and Evidence Act (of Southern Rhodesia). It appears from the judgment of that Court, at p650 F - G, that section 366 A was enacted no earlier than 1952. In any event, the provisions thereof reproduced those which originally appeared in section 15 of Act 27 of 1914 of South Africa (as amended in 1926). Clayden FCJ (Quenet FJ and Blagden AFJ concurring) had this to say at p649 of such provisions:

> "Sub-para. (a) was suggested as the provision which refers to the criminal liability of the *socius criminis*. I have no doubt that it does not: it refers to what is known in the criminal law as conspiracy to commit an offence. Apart from any construction based on the reasons for the enactment of the provisions of sub-para. (a), which first came into statute law in the Roman-Dutch law by sec. 15 of the Riotous Assemblies and Criminal Law Amendment Act, 27 of 1914, of South Africa, it is clear from cases after that Act that the liability of the *socius criminis* was still based on the common law. It is only necessary to refer to a case such as *Rex v Cilliers [41]*, at p.285, to show this. See also the cases referred to in *R v Chenjere [42]*, at p.74. And so it seems to me that sec. 366A (2) (a) has no bearing on the criminal liability of the *socius criminis*. The basis of liability of the *socius criminis* is as set out in the case of *Peerkhan and Lalloo [32], supra,* though that case does contemplate that there may be "something in the statute or the circumstances of the crime" which negatives the ordinary application of the common law principles".

R v Cilliers (41) was decided in 1937, 11years after section 15 of Act 27 of 1914 had been amended, that is to unequivocally provide that "any person who - conspires with any other person to . . . commit .... an offence .... is guilty of an offence". Nonetheless Stratford ACJ (de Villiers and de Wet JJ A and Watermeyer AJA concurring), observed at p284 that:

> "Criminal conspiracy in English law is shortly defined as an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means .... We have no such crime in our law".

As far as I can see no reference was ever made by the Court, or by Counsel to the 1914 or 1926 provisions. Neither was any mention thereof made in *R v Chenjere* (42), but that was a case of aiding and abetting and I do not see that such provisions were in point. In any event, on the facts of *Mapolisa* (40), I respectfully observe that the provisions of section 366 A (2) (b) were also in point namely,

> "(2) Any person who - .....
> (b) incites, instigates . . . . or procures any other person to commit, an offence ..... is guilty of an offence....."

Whether or not the 1914 provisions created offences, quite clearly the object, if not one of the objects of the legislation was to provide for the punishment of *socii criminis;* it was generally accepted that their participation was usually deserving of a lesser degree of punishment than that meted out to the principal offender, and that the word "liable" in the sub-section (apart from statutory minimum sentences) imported a discretion.

When it comes to the joint charging of a *socius criminis* the learned authors of *Gardiner and Lansdown op. cit.* 6 Ed (1957) have this to say at p149:

> *"Occasionally*, under the influence of the necessity of informing an accused person of the exact facts upon which the allegation against him is based, or because the substantive crime itself *cannot properly be charged against the aider and abettor*, or for both these reasons, an indictment has alleged not that the accused is guilty of having committed the substantive crime but of *having aided and abetted* in its commission". (Italics added)

The learned authors then refer to the cases of *R v Uys and Senden* (43) and *R v Moses and Anor* (44), decided in the Cape Provincial Division in 1911 and 1919 respectively, before Hopley J and Gardiner J respectively. Both cases concerned the offence of concealment of birth. The particular Ordinance (10 of 1845) provided that where charged with murder the mother might, in the alternative, be convicted of

concealment of birth. The Ordinance made provision only for the punishment of the mother (Uys), who was charged with murder, "or otherwise with concealment of birth". Senden was charged with murder, and in the alternative with "*aiding and abetting* in the commission of the crime of concealing the birth of a child ....". Exception was taken to the alternative count in respect of Senden, "on the ground that the mother alone can be indicted [for concealment] under Ordinance 10 of 1845." Hopley J held that Senden was rightly charged. In *R v Moses* (44), *Gardiner J* observed that the Ordinance "regarded the offence of concealment as one *committed solely by the mother*". That would seem to preclude a *socius criminis* being charged with the substantive offence. The report of the *Uys and Senden* case (43) concerns only the exception, so that I am unaware of the final outcome. In any event, the learned authors of *Gardiner and Lansdown op. cit.* observe at p150 of that case that "[h]ad the latter [Senden] not expressly been *charged as an aider and abettor* of the former, she could not have been convicted" [presumably of aiding and abetting concealment].

In the 1923 case of *R v Rasool* (45), the appellant was charged with and convicted of aiding and abetting his son, under three years of age, to enter or remain in Natal, well knowing him to be a prohibited immigrant. The charge was framed under section 20 (a) of Act 22 of 1913, which specifically made it an offence to aid or abet a prohibited immigrant, which of course took the case outside the scope of common law authority in the matter. Solomon JA and Kotze JA (Innes CJ concurring) (de Villiers and Wessels J J A dissenting) held that as the child was *doli incapax,* the father could not aid and abet him. Apart from the terms of the statute, I venture to suggest that an indictment charging the father with the substantive offence of wrongfully entering or remaining in the Province would, in the

circumstances, have been somewhat divorced from reality.

In the case of *R v M and Anor* (46) decided in the Transvaal Provincial Division before Price J in 1950, the indictment clearly was divorced from reality. The learned Judge had this to say at pp101/102:

> "The two accused are charged with the crime of rape, in that ...they are alleged to have had intercourse with one T. H. violently and without her consent. The indictment is very unhappily worded. It does not set out what should be set out and it sets out what should not be set out. What should be set out is that the first accused had intercourse with T. H. without her consent and that the second accused, who is a woman, assisted the first accused to have such intercourse. It is manifestly nonsensical to allege that the second accused had intercourse with the complainant".

Price J concluded, on the authority of *R v Jackelson* (36), that a person could be convicted of being accessory to an offence which he himself could not commit, and ultimately convicted the principal offender of unlawful intercourse with a girl under the age of 16 years, and the second accused "of aiding and abetting the first accused to commit [that] crime". The learned Judge also observed in effect at p104 that the second accused could well have been indicted under section 15 (2) of Act 27 of 1914, reproduced *supra*.

When it comes to "accessories before the fact indicted as principals", the learned authors of *Gardiner and Lansdown op. cit.* have this to say at p151:

> "In some parts of the Union, persons who would in English law and in the earlier practice of other parts of the Union have been charged as accessories before the fact have been indicted and convicted as principals".

The learned authors then quote the dicta of Innes CJ in *R v Peerkhan and Lalloo* (32). Further on they observe at pp 151/152:

> "In *Veni Dume* v R. [47], the question reserved for argument whether a person who counsels and procures a robbery but is not present at the actual commission of the crime could, under the law of the Cape Colony, rightly be convicted of robbery, was

answered in the affirmative.

But while it is undoubtedly in accord with the principles of the Roman-Dutch system that an accessory before the fact should be capable of being charged as a principal offender, the question of the desirability of conforming to the practice of charging an accessory before the fact as such, or with incitement *when the facts so warrant*, is, it is submitted, and this *notwithstanding what was said on the point in R v Longone [34], worthy of consideration.* Under the general principles of agency a man who procures or commands the commission of an offence may, it is true, logically be held chargeable and punishable as a principal for that offence, but this rule can hardly be said to cover the case of a man who merely counsels a crime. A more forceful objection to treating an accessory precisely in the same manner as a principal arises from the fact that the indictment of an accessory as a principal will frequently fail to answer one of the main essentials of an indictment in that it will omit to place before the accused *a statement of the facts* which he will be required at his trial to meet - see *R v Schapiro & Saltman [48],* at 360. Thus if A on 1st January at X counselled B to murder C at Y, and B a month later acted accordingly, it would be of little use to A, in acquainting him of the case which he was to meet, to present him with an indictment informing him that on 1st February at Y he murdered C. If in the case which provides the framework of the specimen indictment given at the end of the present section [at p153], A, who was said to have counselled B to commit bigamy, instead of being charged with being an accessory before the fact, had had presented to him an indictment alleging in the ordinary form that he had committed bigamy by taking in marriage a woman whom possibly he had never seen, not only would little warning have been given him of the facts upon which the charge against him was based, but the jury might have been greatly mystified at this apparent divorce of law from reason". (Italics added)

The learned authors quote the example of *R v M* (46), making reference to the dicta of Price J in the matter, and continue:

"This difficulty would be overcome if the charge, while alleging that the counsellor, procurer or commander was guilty of the crime he counselled, procured or commanded, set out the facts which in law went to make him guilty of crime. But *even with this* there would still arise the position, *often ludicrous* in view of the facts, of a man being charged with a crime which, although in the legal result he is equally guilty with the principal, physically he never committed and it might have been *impossible for him to commit*". (Italics added)

I respectfully agree with all of the learned authors' above observations. When it comes to the actual framing of a charge in the matter, there are a number of specimen indictments to be found in *Gardiner & Lansdown op. cit.* at the following

pages:

		Specimen Indictment	Pages
(i)		"....conspiring to aid or procure the commission of a crime in contravention of section 18 (2) (a), Act 17, 1956;"	127 - 128
(ii)		"....inciting to commit the crime of theft"; "The above is for the common law offence. If the charge be laid under section 18 (2), Act 17, 1956, the form given at p127 (*supra*) should be followed *mutatis mutandis*"	132
(iii)	(a)	"....A &B ..... disposing of the body of a child...."	152
	(b)	"...A ..... disposing of the body of a child.... and that B is guilty of the said crime in that he was an accessory before the fact thereto..... in that the said B did counsel, command or procure the said A to commit crime".	152/153
(iv)		".....A .... being an accessory before the fact to the crime of bigamy..." .... In that ... B did commit the crime of bigamy .... A did ... incite, counsel, command or procure ... B to commit the said crime of bigamy".	153

There is a specimen indictment in the matter of charging a *socius criminis* to be found in *South African Criminal Law and Procedure* by Burchell and Hunt, First Ed (1970) at p368. The learned authors observe:

> "While a *socius criminis* may be charged separately, he is usually charged together with the actual perpetrator in the same indictment, as in the following specimen".

There follows an indictment where Y and X are jointly charged with "disposing of the body of a child . . . .", the particulars alleging that Y disposed of the body of the child and "X did unlawfully and with the same intent take part in or assist the said Y in the said disposal".

When it comes to incitement, Burchell and Hunt *op. cit.* at pp394/395 refer to the Appellate Division decision in *R v Nlhovo* (33) and continue at p395:

> "Section 15 (2) (b) of the Riotous Assemblies and Criminal Law Amendment Act (No.27 of 1914) in its original form merely prescribed the penalty for incitement, but an amendment to the subsection in 1926 made it clear that incitement to commit an offence, whether at common law or by statute, is in itself an offence.
>
> The relevant section is now 18(2) (b) of the Riotous Assemblies Act (No.17 of 1956).....The subsection makes no distinction between the case where the incitee does commit the crime incited and where he does not. Strictly speaking, incitement should be confined to the latter situation for if the crime has been committed the inciter is guilty of the substantive crime itself either as a principal or as a *socius criminis* and should be charged as such".

One of the authorities quoted in support of that statement is the Appellate Division case of *R v Milne and Erleigh* (49). When it comes to framing a charge of incitement, the learned authors make a distinction between common law incitement and statutory incitement in two specimen indictments at pp405/406. In both specimens the accused is separately charged with "the crime of incitement", in the latter case "in contravention of section 18 (2) (b) of the Riotous Assemblies Act, No17 of 1956".

Accessory After the Fact

The Appellate Division in 1925 dispelled any doubt there may have been as to whether an accessory after the fact was a *socius criminis*, ruling in *R v Mlooi* (35) at p135 that such an accessory is not a *socius criminis* and cannot therefore be convicted of the principal offence, as he is guilty of a separate offence. As a result of that decision, section 27 of Act 39 of 1926 was passed, amending section 230 of the 1917 Code to provide that "any person charged with an offence may be found guilty as an accessory after the fact in respect of that offence if such be the facts proved. . . ."

Such provision was incorporated in the 1955 Code (section 191 (2)), the 1977 Code (section 257) and the 1981 Code (section 182 (2)).

When it comes to charging an accessory after the fact, the learned authors of *Gardiner and Lansdown op. cit.* observe at p156:

> "It will usually be found to be a practicable and the most convenient course to indict the principal and the accessory together, as was the case in the indictment of which the framework is given below, but *even if the accessory is indicted alone*, it will be necessary fully to set out particulars of the crime to which it is alleged he was an accessory." (Italics added)

There follows at pp156/157 a specimen indictment in which the statement of offence reads thus:

> "That A is guilty of the crime of murder, and that B is guilty of the crime of being an accessory after the fact to the commission of the crime of murder ..."

Thereafter the indictment alleges that A murdered her child and that B, "with intent to conceal the said crime . . . and to screen the said A from . . . punishment ..." buried, or assisted A in burying or caused to be buried the body of the child. Burchell and Hunt *op. cit.* display a specimen indictment with similar format at pp374/375, observing that the accessory after the fact may nonetheless be charged separately.

That concludes a consideration of the authorities and textbooks touching upon section 140 (2). The marginal note to section 140, (that is, to sub-sections (1) and (2)) reads, "persons implicated in the same offence may be charged together". That, as I see it, succinctly describes the main effect of sub-section (2), namely, that the *socius criminis* (the counsellor, or procurer, or aider and abettor) or the accessory after the fact, may be joined in the one charge with the principal offender. As to the nature of such charge, that is, as to whether or not anyone so joined with the principal

offender would be charged with the substantive offence of the latter, much depends upon the interpretation of the words "substantive offences" in sub-section (1), to which sub-section I now turn.

Section 140 (1)

I have received immense assistance from Counsel's submissions. I trust that I will be forgiven if I summarise them in brief if not in stark fashion, but I do so for the purpose of comparison and contrast. Further, I trust that I will be forgiven for not dealing with each and every submission: to do so would greatly add to the length of this, I regret, very long ruling.

Mr Penzhorn and Mr Woker for the Crown submit that the expression "the *same offence*" can only mean," the same *species* of offence"; this explains the use of the term, "at different times," and, "any number of persons", and in particular the phrase, "may be charged with *substantive offences*".

For their part, Mr Farber and Mr Nel for the second Accused submit that the words "the same offence" simply mean what they say. Mr Phoofolo in his written heads submits likewise.

Mr Penzhorn submits that after the pronouncement of the restrictions of the common law in the matter by Innes CJ in 1905 in *Peerkhan and Lalloo* (32) the legislature decided to remove those restrictions by enacting the provisions of section 139 of the 1917 Code. He submits that the legislature must have "intended to authorize different charges against different accused" and that "the legislature clearly had in mind . . . situations where there is a logical link between offences committed

at different times"; the sub-section contemplates "any number of persons" being charged with "more than one offence", "committed at different times"; the only requirement in the case of such joinder is that such persons must be charged with "the same offence", that is, "the same *species* of offence": this is the only way that the words "the same offence" can be reconciled with the words, "substantive offences".

Mr Farber submits in brief, that the common law as enunciated by the pre-1917 authorities, and particularly that of *Peerkhan and Lalloo* (1), can only be changed by express provision and that section 140 discloses no such provision.

Mr Penzhorn concedes, of course, that the Crown's interpretation of sub-section (1) is contrary to authority. But he submits that none of the authorities, which he has carefully set out and examined, ever embarked upon a detailed analysis of the provisions therein. It may be that the exposition could have been fuller in some cases, but that is not to say that the numerous learned Judges before whom such provisions were laid did not carefully consider them. I respectfully observe that they may well have considered that the provisions lent themselves to only one interpretation and did not call for any exegesis in the matter.

"the same offence"

To interpret those words, to start with, there is the marginal note, "Persons implicated in the same offence may be charged together". It is clearly of persuasive value. It speaks of one offence, the "same offence". It also speaks of persons *implicated* in one offence: I cannot see that persons charged with *different* offences, not arising out of "the same transaction" (as is the case under sub-section (3)), could be in any way jointly "implicated". Furthermore, the same marginal note was used

for sub-sections (1) and (2) - the draftsman saw fit to join both provisions in one section, presumably because the marginal note aptly describes the subject matter of both sub-sections. That indicates that both sub-sections are concerned with one offence. Sub-section (2) clearly deals with the one offence, enabling a *socius criminis* or accessory after the fact to be conjoined with the principal. That indicates that sub-section (1) is also concerned with the one offence.

Turning to the terms of that sub-section, there is first of all the ordinary and natural meaning of the words "the same offence". Mr Penzhorn submits that the expression "at different times" indicates that different offences are involved. But the words used in the sub-section are, "*although* at different times". It seems to me that the word "*although*", in particular, emphasises that what is involved is the one offence, in all its stages. For example, procurement of an offence may take place through different persons at different times; again the offence may be a continuing one, when persons "committing" the offence may so commit it at different times. Again, there may be more than one accessory after the fact and such persons may become involved as such accessories, in respect of the one offence, at different stages; for example a fugitive accused may take refuge in more than one home. If one is to interpret the words, "the same offence", as, "the same species of offence", it would mean that the sub-section would empower the joinder of "any number of persons charged with committing . . . the same species of offence". The sub-section empowers the joinder of many accused involved e.g. in an affray. Does it then empower the joinder of numerous unconnected affrays? Where would be the nexus in such joinder? Where would be the limit thereto? The mind boggles at the prospect.

It will be seen that paragraphs (a) and (b) of sub-section (1) are on an equal footing, in that the last paragraph of the sub-section applies to them both. The marginal note applies to paragraph (b) as it applies to paragraph (a). Paragraph (b) speaks of "*an offence*". It speaks for example of an offence of theft, enabling the receivers (as there may be more than one receiver) of the property stolen in that offence, to be conjoined with the thief. Again there is the expression, "*although* at different times", emphasising the fact that, if there is more than one receiver, they may have (indeed it is probable that they have) received "at different times".

If one is to apply the same plurality of interpretation to paragraph (b) as the Crown would apply to paragraph (a), it would mean that the words, "an offence", should be interpreted as meaning, "the same species of offence", which could result, in effect in an unlimited joinder of receivers involved in receiving property in respect of, e.g., entirely unconnected thefts. Clearly that strains the ordinary and natural meaning of the words "an offence", pointing to the necessity to equally give the words, "the same offence", their ordinary and natural meaning.

"substantive offences"

Mr Penzhorn submits, as I have said, that those words support the Crown's interpretation, indicating that "the same species of offence", rather than "the same offence", is involved in sub-section (1). The latter words appeared in 1917. At that stage the draftsman may well have been influenced by two matters, first of all the dicta in *Peerkhan and Lalloo* (1) in 1905 and secondly the provisions of section 15 (2) of Act 27 of 1914. While it was held in the case of *R v Nlhovo* (33) decided by the Appellate Division in 1921, that it was doubtful whether section 15 (2) ever created an offence as such, it seems to me that the words "on conviction" indicate that

that, in 1914, was the draftsman's intention, as was displayed by the amendment of section 15 (2) in 1926. It may well be that in 1917 the parliamentary draftsman considered that the statutory offence of e.g. procurement had been created in 1914. In any event, in view of the fact that the Appellate Division held in *Nlhovo* (33), at p493 and p506, that incitement *per se*, whether or not it had its effect, was an offence at common law, I cannot but see that procurement (which connotes the commission of the offence) was in itself also an offence at common law.

As indicated, in the case of *R v Milne and Erleigh* (7) (49) decided in 1950, the Appellate Division (per Centlivres CJ at p823) held that where the incitement had its effect, then the inciter should not be charged under section 15 (2) of the Act 27 of 1914, but should be charged with the substantive offence committed by the incitee. Indeed, in 1929 in the Transvaal Provincial Division in the case of *R v Bedhla* (50), Tindall J (Solomon J concurring) pointed out at pp280/281 that where the incitee committed *no* crime, the inciter could still be charged with the common law offence of incitement, rather than under section 15 (2), which he considered did *not* import a discretion where a statutory minimum punishment for the offence incited was involved. Those refinements however had not been enunciated in 1917, and further, different considerations arise in the case of procurement, which, as I have said, connotes the commission of the offence procured.

Subsection (1) also deals with accessories after the fact and receivers. While it was not until 1925 that the Appellate Division held in *Mlooi* (35) that an accessory after the fact was not a *socius criminis*, nonetheless although such an accessory could be conjoined with the principal in the substantive offence, seemingly it was the practice to join the accessory, but nonetheless to charge him with being an accessory

after the fact in respect of such offence. Similarly, while it was possible to join the receiver with the thief in the one count of theft (particularly where the receiver had initially instigated the theft, or where he was regarded as being involved in the *continuing* offence of theft, or where the receiver was regarded as an accessory after the fact of such theft; see e.g. the dicta of Innes CJ in *Mlooi* (35) at p138), it was nonetheless the practice, even where joining the receiver with the thief, to charge him in the same charge or in a separate count with receiving.

The purpose of the enquiry is to ascertain what the parliamentary draftsman meant by the words "substantive offences". The term could have been used to describe the substantive or main offence committed by the principal offender, or it could mean the offences, substantive in effect, committed by the procurer, the accessory after the fact and the receiver. The parliamentary draftsman could also have intended reference to both classes of offence.

Before deciding that issue, I have to say that sub-section (1) is curiously if not inelegantly worded. It will be seen that whereas sub-section (2) permits of the joinder of one who counsels or procures an offence and also an aider and abettor, there is no mention of such *socii criminis* in sub-section (1) but only of the procurer. If it is the case that the word "committing" in sub-section (1) embraces the one who counsels or aids and abets, why then does it not also embrace the procurer?; why was the procurer given separate treatment? Sub-section (2) permits of the joinder of e.g. the aider and abettor with the principal: it is hardly likely therefore that sub-section (1) permits of the joinder of a number of procurers, but does not permit of the joinder of a number of aiders and abettors.

Secondly, whereas sub-section (2) refers to a person who e.g. procures an offence or harbours or assists the offender, sub-section (1) refers to persons "*charged* with . . . procuring . . . or with having . . . harboured or assisted the offender". Having thus referred to persons so *charged*, the sub-section then provides that they "may be charged with substantive offences". I do not see that the opening line of sub-section (1) affects the meaning thereof. Whether or not the words, "charged with", therein, amount to mere surplusage, they serve, if nothing else, to indicate that what the parliamentary draftsman had in mind was that the procurer, accessory after the fact or the receiver might be charged with the offence appropriate to his actions.

In any event, those difficulties have been resolved in section 155 of the 1977 Code. As indicated earlier, in *Ramgobin* (31) at p76 Milne JP considered that the provisions of sections 155 and 156, *which were relevant to the enquiry in that case,* were no wider than the provisions of sections 327 and 328 of the 1955 Code. For convenience, I reproduce herewith the provisions of section 155:

> "**155 Persons implicated in same offence may be tried together**
>
> (1) Any number of participants in the *same offence* may be tried together and any number of accessories after the *same fact* may be tried together or any number of participants in the *same offence* and any number of accessories after *that fact* may be tried together, and each such participant and each such accessory may be charged at such trial with *the relevant substantive offence alleged against him.*
>
> (2) A receiver of property obtained by means of an offence shall for purposes of this section be deemed to be a participant in the offence in question".

It will be seen that section 155 refers simply to "participants" and accessories after the fact, a receiver being deemed to be a participant for the purposes of the section (who may thus be charged as a party to e.g. theft; see *South African Criminal Law*

and Procedure by Hunt and Milton Vol II, 2 Ed (1992) at p738). If anything, section 155 is explanatory of section 327 (of the 1955 Code) and thus of section 140 of the Code.

In view of the body of authority indicating that the words "the same offence" do not mean "the same *species* of offence", one would have thought that if such authority was misguided, the situation would have been corrected in 1977. But the same phrase , "the same offence," is to be found in section 155, in the marginal note and twice in the section itself. Further, the section refers in context not simply to "accessories after the fact," but to ,

> "[a]ny number of participants in the *same* offence . . . and any number of accessories after the *same* fact ... or any number of participants in the *same* offence and any number of accessories after *that* fact ..... ".

That phraseology, I consider, leaves no doubt that section 155 is concerned with the one offence. Had the legislature wished to widen the net contained in section 327 (1955) - to some extent it did so in the case of section 156, replacing section 328 (1955) - it would have left the matter beyond doubt: on the contrary it did no more in section 155 than clarify the meaning of section 327.

Section 156 is also relevant to the enquiry, inasmuch as it serves to illustrate the expansion of section 328 (1955) and the confirmation of section 327. For convenience I reproduce herewith section 156:

> **"156 Persons committing separate offences at same time and place may be tried together**
>
> Any number of persons charged in respect of *separate* offences committed at the *same place* and at the *same time* or at *about* the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that evidence admissible at the trial of one of such persons will, in his opinion, *also be admissible*

as evidence *at the trial of any other person or such persons"*. (Italics added)

There is an instructive commentary on section 156 by the learned author Johan Kriegler, in *Hiemstra, Suid-Afrikaanse Strafproses,* 5 Ed (1993) at pp403/4, a translation of which has been very kindly supplied by Mr Penzhorn and Mr Woker. The translation reads thus:

> "**Joinder and misjoinder** - the purpose of the section is to eradicate the duplication of evidence. The section complements section 155 that is intended for the joint trial of persons who *have participated* in the *same offence*, and the accessories to *that* offence, *even though* the charge against each accused *need not* or cannot be identical. Section 156 goes further, making a joint trial possible also where the charges *do not emanate from exactly the same facts*, but where the prosecutor considers that there is evidence that implicates more than one accused, *though not all the accused simultaneously*. It is sufficient, for example, if there is evidence that implicates A and B, and other evidence that implicates B and C. Then A, B and C can be tried jointly, provided that the offences occurred (i) at the same place; and (ii) at the same or nearly the same time. There need not have been any common purpose.
>
> In accordance with the previous version of this section (the old 328), it was decided in *S v Barnes [21],* that it was a misjoinder to charge together two motorists who had collided with each other; and the court spoke disapprovingly of the prosecution's anticipation that the two accused would implicate each other. It appears from the more recent phrasing, ... that the legislature intends precisely that the different accused should bring their differing versions to one common trial. If the accused implicate each other it would, in the judgment of the legislature, simply lead to determining objective justice. It is not considered disadvantageous to the accused that the truth should come out, even though their hope of acquittal be diminished. In *S v Makawgama* [51] two accused involved in a fight were charged jointly for assault. The joint charge was permissible, though a verdict of guilty was not the necessary consequence, as one accused might have acted in self-defence". (Italics added)

It will be seen that the aspect of "the same transaction" in section 328 (1955) has been enlarged to the concept of separate offences committed "at the same place. . . and at the same ... or ... about the same time", provided there is an 'overlapping' of evidence. The separate offences need not have occurred in the course of "the same transaction", but quite clearly if place and time (approximate) and indeed evidence

must coincide, the necessary nexus is seemingly not that far removed from the old requirement of "the same transaction". In any event, for our purposes the above - quoted commentary refers to section 155 as being "intended for the joint trial of persons who have participated in the *same* offence, and the accessories to *that* offence." Where the learned author says"

> "*even though* the charge against each accused *need not* or cannot be identical",

it seems to me that he emphasises that the section is concerned with one offence (and not one species of offence), inasmuch as one might expect some degree of similarity in the charges where one offence is concerned. As far as participants are concerned, the charges of the co-perpetrators would be identical, but those of the *socii criminis* would differ as to particulars (but not as to statements of offence). Again, the learned author distinguishes section 156 where he says that it covers the situation

> "where the charges do not emanate from *exactly the same facts*",

indicating that that is the basis of a joint trial under section 155.

To return to section 140, I am satisfied that in referring to "substantive offences" the parliamentary draftsman was not referring solely to the substantive offence of the principal offender. Had that been the case he would surely have used some expression in the singular. In the case of *Mlooi*(35) Innes CJ considered the 1917 provisions of sub-sections (1) and (2) of section 139, that is, as they affected an accessory after the fact. The learned Chief Justice observed at p140:

> "The first paragraph provides that any number of persons charged with committing or procuring the same offence "or with having after the commission of the offence harboured or assisted the offender" may be charged "with substantive offences" in the same indictment, although the principal offender is nor charged. And the second paragraph enacts that one who harbours or assists the offender after an offence may be charged in the same indictment with the principal offender. There the Legislature was dealing in terms with the crime of being an accessory after the fact, and the language used goes to show that it was to be dealt with as *a substantive offence and*

not as a crime covered by the main offence." (Italics added)

There the learned Chief Justice was dealing, as indicated, solely with the position of an accessory after the fact, but his dicta, the only dicta that I can find on the point, are of course highly instructive. Accordingly, there can be little doubt also that it was intended that a receiver might be charged with the substantive offence of receiving.

It will be seen in sub-section (1) that some emphasis is given to the aspect that joinder is permissible even in the absence of the principal offender. It may be that the parliamentary draftsman also intended that, in the case of such absence, all *socii criminis* (and not just procurers) might be charged at common law or statute (section 15, Act 27 of 1914) with the specific action of each *socius*. I hardly think, as earlier indicated, that procurers were to be given any special treatment, as distinct from other *socii criminis*. I hardly think also that, contrary to *Peerkhan and Lalloo* (32), it was intended that all *socii criminis,* where joined with the principal offender, should be charged with other than the principal's offence (except in the type of case highlighted in *Gardiner and Lansdown op. cit. supra*, exemplified by the facts of *R v M* (46)). In any event, as the learned authors of the textbooks indicate, where a *socius* is joined in the one charge with the principal offender, the particulars of offence should clearly indicate the role played by the *socius*. The provisions of section 155 (1977) I consider, as I have said, to be explanatory of those of section 327 (1955), and it will be seen that in the former section only accessories after the fact are grouped separately, *socii criminis* (and now even receivers) being regarded as "participants".

CONCLUSION

To conclude, I am satisfied therefore that the term, "substantive offences", in sub-section (1) of section 140 refers to the substantive offence of the principal offender, the substantive offence of being an accessory after the fact and also the substantive offence of receiving. It may also refer to the particular substantive offence of a *socius criminis* where e.g. he is not conjoined with the principal, or in the class of case exemplified by *R v M* (46), or *R v Uys and Senden* (43).

I do not see that it is necessary to decide the latter aspect. The point is I am satisfied that the term "substantive offences" cannot refer to a series of unconnected offences all of the same species. In brief I am satisfied that the words "the same offence" mean just that, and do not mean "the same species of offence".

To summarise, I have come to that conclusion for a number of reasons. Firstly, the interpretation I have placed on the words, "the same offence", accords with the ordinary and natural meaning. Secondly, it accords with the context of section 140. Thirdly, it accords with the provisions of section 155 of the 1977 Code.

Fourthly, the interpretation advanced by the Crown, while it is intended to lead to a more expeditious administration of justice, can hardly be said to be favourable to or be in the interests of each accused. Accordingly, the words involved must be given a strict interpretation, that is, one which favours the accused. Mr Penzhorn submits that the words should be given a purposive interpretation, but I agree with Mr Farber that such an interpretation gives effect to no more nor no less than the true purpose and intention of the Legislature, which can only be ascertained from the language of the statute.

Fifthly, as indicated, the suggested interpretation is contrary to the common law dicta found in the pre-1917 authorities. Mr Penzhorn submits that section 139 of the 1917 Code was intended to remedy the difficulties inherent in those authorities, that is, to change the common law. The long title to the 1917 Code reads thus:

> "To consolidate and amend the laws in force in the several provinces of the Union, relating to procedure and evidence in criminal cases; and to make provision for other matters incidental to such procedure and evidence".

The long title speaks of amending "the laws" rather than the law (including the common law) in force in the provinces of the Union. It also speaks of making "provision for other matters". In any event, the contents of the long title (recognised by the Appellate Division as part of an Act) are not conclusive in the present case. What is conclusive, is that the common law cannot be altered except by express provision. But it cannot possibly be said that section 140 (1) constitutes such express provision in the matter.

I hold therefore that the joinder in the indictment in its present state is contrary to the provisions of section 140 (1) and constitutes an irregularity. I do not see that any lack of jurisdiction arises. The authorities which dealt with that aspect were there dealing with the jurisdiction of a Magistrate, which depended upon a letter of remittal of the Attorney-General, which letter indeed might also confer increased jurisdiction as to sentence upon him. It seems to me that once the Director of Public Prosecutions places an indictment before the High Court, apart from substantive issues raised in a plea to the jurisdiction, the Court has jurisdiction to try the person or persons *named in that indictment.* I have little doubt that the Court has no jurisdiction, either at common law or under the Code, to *join* indictments. It is the indictment which at once confers jurisdiction in respect of, and limits jurisdiction to the person or persons

named therein. Thereafter. if the provisions of the Code are not adhered to, in the framing of the indictment or the conduct of the trial, there arises an irregularity.

The second accused has objected to the indictment in its present form. The eleventh, fourteenth and fifteenth accused raise no objection and indeed consent to the present joinder. That however does not take into consideration the first accused's position. He is involved in all counts, and objects to being tried with more than one accused in any one trial, that is, apart from any "intermediary" accused who may also be involved. So that, in the event of a separation of trials in respect of the second accused, the consent by the eleventh, fourteenth and fifteenth accused is nonetheless qualified by the objection of the first accused.

The aspect of consent arose before the various courts in the cases reviewed when considering whether or not to apply the proviso. But any such proviso can only be applied by an appellate court or a court of review in respect of the proceedings in a court below, which latter court might perhaps be unaware of any irregularity. It seems to me to be altogether a different matter for a court of first instance, fully aware of the irregularity, in the absence of any statutory discretion in the matter, to nonetheless embark upon a trial. I hasten to add that that is not the wish of the Crown in the matter. In their written heads Mr Penzhorn and Mr Woker very properly submit that "once an irregularity has been identified, the matter cannot properly proceed without the position being rectified"; Mr Penzhorn repeated that aspect in his verbal submissions.

I pause here to observe that Mr Penzhorn strenuously argued that the joinder before the Court was in the interests of justice. While the counts of bribery are

unconnected, they nonetheless have a common nexus in that they concern the operation of the Project and of course involve the first accused as Chief Executive of LHDA. But, of course, there was a common nexus, proximate or remote, in the majority of the authorities considered, which no doubt was the reason for the misjoinder therein. The bulk of the evidence which will be lengthy, Mr Penzhorn informs the Court, will concern the operation of the Project, tender procedures etc and in particular the first accused's role therein; while each accused would not wish to have to attend a lengthy trial involving evidence concerning other accused, yet at the same time he would hardly wish to wait indefinitely until his trial can proceed; multiple trials will then involve multiple repetition of such evidence before a number of Judges, involving perhaps conflicting findings of credibility etc.

If the Crown proceeds solely against the first accused, while the other accused will not be joined with him, the allegations against them in the various counts will nonetheless remain, which in effect will result in a trial involving such accused in their absence. Indeed, the eleventh, fourteenth and fifteenth accused consent to the present joinder presumably for that reason. In particular, the latter two accused, being international consultants, are anxious that the trial should proceed so as to provide them with an opportunity of removing the inevitable stigma of the indictment. Taking all of the above factors into account, the Court's function being to equally balance the scales of justice, it seems to me that the administration of justice, will not be best served by a separate trial in respect of the first accused and thereafter each, I calculate, of not less than seven other accused, that is, other than the "intermediary" accused, whose position may cause the number of trials to be increased. It may well be that a measure of partial joinder, such as is consented to by the eleventh, fourteenth and fifteenth accused, would best suit the convenience and the interests of

the administration of justice. Nonetheless, the statute is before me, and , as Mr Farber submits, I cannot rewrite the statute. Neither can I ignore the interpretation placed upon the statute for the last 84 years, based upon a practice in force for over a century.

In *Gardiner and Lansdown op. cit.* the following appears at p292:

> "Where at trial an indictment or charge is held bad for misjoinder, the prosecutor is entitled to elect which of the accused he will, upon that indictment or charge, proceed against individually, and, as against that one whom he elects, the indictment or charge will be good".

See *Ramgobin* (31) at p80 F-G. The Crown, as Milne JP observed in *Ramgobin* (31) *ibid.*, is *dominus litis* in the matter and as I see it, it is free to withdraw rather than amend the present indictment and present another. The Crown of course is free to proceed solely against the first accused. The Crown may not, however, join another or other accused on such an indictment, as such joinder will only be regular in respect of the count or counts in which *all* accused so joined are charged. Alternatively, therefore, the Crown may elect to proceed jointly against the first accused and another or other accused in respect of a count or counts in which all the accused so joined are charged.

In the result I uphold the objections of the first and second accused.

DELIVERED THIS 26TH DAY OF FEBRUARY, 2001.

B. P. CULLINAN
ACTING JUDGE

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