REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 46 OF 1978

HASSAN ABDI REHMAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant and two others who had been jointly charged with him were convicted by the resident magistrate, Nairobi, of preparation to commit a felony, contrary to section308(1) of the Penal Code. The other two were placed on probation, but the appellant was sentenced to ten years' imprisonment with six strokes of corporal punishment and subjected to police supervision for five years after his release from prison.

The case put against the appellant, his co-accused and another man (who was shot dead by the police) and found proved in the court below, was that, at about 8.30 pm on 19th November 1977, four men drove to the warehouse of the Express Transport Co in the industrial area of Nairobi in a Land Rover. Two of them, who were armed with *simis*, ordered the watchmen at those premises to lie down, which the watchmen did, and those two stood guard over the watchmen. The other two managed to enter the compound of the warehouse with the Land Rover. At that time a police party, which was waiting in ambush as a result of information received, sprang out and arrested the appellant, who was shot in the arm and who had apparently tried to hide in a lavatory, and his two co-accused. The fourth person was shot dead when trying to attack the police in an attempt to resist arrest.

Upon these facts the senior State counsel for the Republic, Mr Rebelo, felt himself unable to support the appellant's conviction for preparation to commit a felony and, if we may say so with respect, quite properly so. It is manifest that the four men had gone much beyond the stage of merely preparing to commit the felony of theft.

However, Mr Rebelo invites us to substitute a conviction either under section 308(3) of the Penal Code, or for attempted theft. Provisions of section 308(3)(a) and (c) are clearly not applicable in the present circumstances. As to section 308(3)(b), the appellant was found in a lavatory which was not a part of the warehouse building itself but was in its compound and, in any event, even if the lavatory can be described as a "building", clearly his intention was not to commit a felony therein as section 308(3)(b) requires.

As to attempted theft, it is not one of the offences laid down in Chapter XXIX of the Penal Code, and hence the provisions of section 187 of the Criminal Procedure Code cannot be called in aid, and we

have to fall back on section 179 of the Criminal Procedure Code, to justify substitution under which section; and the offence sought to be substituted must be minor to and cognate with the offence with which an accused person had originally been charged. In order to constitute attempt to commit an offence, mere preparation does not suffice; see *Adamu Mulira v R* (1953) 20 EACA 223. However, in the instant case, preparations to commit felony constitute a specific offence under section 308(1) of the Penal Code: its elements being that a person is found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with the intent to commit any felony. It is obvious that these elements do not contain all the essentials of attempted theft in which a fraudulent attempt to take without claim of a right the property of another is necessary.

Mr Rebelo concedes that a conviction for any of the other offences specified in Part XXIX of the Penal Code cannot be substituted.

However, he invites us to order a retrial. With respect, we do not consider it to be a proper case for retrial. As the Court of Appeal observed in *Merali v the Republic* [1971] EA 221, 223:

It is well settled that an order for the retrial is not justified unless the original trial was defective or illegal. A retrial may also be ordered if the interests of justice so require, without causing prejudice to the accused. (See *Ahmed Ali Dharamshi Sumar v The Republic* [1964] EA 481 and *Fatehali Manji v The Republic* [1966] EA 343). Each case has to depend on its own facts and circumstances. We are of the opinion that an order for a retrial in this case was not justified and we accordingly set it aside.

In the instant case, the trial was neither defective nor illegal, and it was no fault of the appellant that a wrong charge was preferred against him. An order for retrial would clearly cause him prejudice. Whether or not the prosecution can bring another charge against the appellant is for it to decide, having regard to section 138 of the Criminal Procedure Code, but more particularly to section 77(5) of the Constitution of Kenya.

In the net result, this appeal is allowed. The appellant's conviction is quashed and the sentence passed upon him is set aside. He will be discharged from custody forthwith unless lawfully held otherwise.

Appeal allowed.

Dated and delivered at Nairobi this 28th day of June 1978.

E. TREVELYAN **S.K SACHDEVA**

AG CHIEF JUSTICE **JUDGE**