Case Number:	Criminal Appeal Nos 588, 589 and 596 of 1979
Date Delivered:	10 Dec 1979
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Edward Trevelyan, Alan Robin Winston Hancox
Citation:	Charles Jim Wachira & 2 Others v Republic [1979]eKLR
Advocates:	Thiong'o v The Republic[1977] Kenya LR 180 EACA. The appellants were not represented on the appeal. John Ndegwa State Counsel for the Republic.
Case Summary:	**Charles Jim Wachira, Joseph Thumbi and Osman Mukiri v Republic** **High Court, Appellate Side, Nairobi 27th November, 10th December 1979** **Trevelyan & Hancox JJ** **Criminal Appeal Nos 588, 589 and 596, respectively, of 1979** ***Theft*** *– robbery – assault with intent to steal with violence – charging offence – use of statutory words – Penal Code (cap 63), section 297.* ***Criminal law*** *– evidence – corroboration - Retracted confession - corroboration not essential by reason of contents and manner of challenge.* ***Criminal law*** *– accomplice - common purpose - abandonment of common purpose – intention – opportunity to dissuade fellow accomplice from acting not taken – escape from scene of crime.*

Criminal law *– trial - reference to defendant - co-defendants – desirability of avoiding reference only by number.*

C, O and J raided a store in broad daylight with intent to steal money; C was armed with a pistol and ammunition. As they entered the store C told I (who was inside) to lie down; as he did not do so, C shot him with his pistol. Mrs M (a shop assistant) was also shot before the gang decided to leave, their plan having been foiled; as they were escaping one of them shot at and wounded T. O subsequently made a statement to the police in which he said that when C drew the pistol and fired at I he (ie O) did not wait to see the result but ran back to the get-away vehicle. The statement, however, was not as damning to O as might have been expected had it been fabricated by the police with intent to secure O's conviction; moreover, it contained details which were not known to the police. C, O and J were charged with "being armed with a pistol and with intent to steal, jointly attempted to steal money from Mrs M and at or immediately before or immediately after the time of the attempted robbery wounded Mrs M, T and I". At their trial O denied having made the statement to the police and claimed that, having been beaten and slapped at the police station, he had been forced to sign a document which had been prepared by someone else. Although a police inspector was cross-examined about the statement, no reference was made in cross-examination to the alleged beating or slapping. The magistrate ruled that the statement was admissible, that what it said was, true and that it was corroborated by the evidence of other witness. C, O and J were convicted and appealed.

Held:

Dismissing the appeals,

(1) although it was desirable that the offence of attempted robbery should be charged in the actual words of section 297 of the Penal Code and although the fact that T had been wounded should not have been referred to in the charge as he was wounded in the course of the escape after the proposed robbery had failed, the errors in the form of the charge did not in the circumstances

prejudice the appellants nor did they constitute a failure of justice. *Dictum* of Lord Morris of Borth-y-Gest in *Director of Public Prosecutions v Merriman* [1972] 3 All ER 42, 47, and *Abubakali v Uganda* [1973] EA 230 applied. *Gakuu Macharia v The Republic*, page 264, *ante*, approved.

(2) There was sufficient corroboration of O's statement to the police to justify the magistrate's reliance on it; even had there not been, the magistrate would have been entitled to rely on it by reason of its contents and the manner in which it had been challenged. *R v Wanjerwa* (1944) 11 EACA 93 and *Dictum* of Lord Hailsham of St Marylebone LC in *R v Kilbourne* [1973] 2 WLR 254, 263, applied. *Sahal Mohammed Hussein v The Republic* [1976] Kenya LR 53 approved.

(3) O could not be said to have dissociated himself from the crime as he did not attempt to stop C from using the pistol (which he knew that C had and had seen him draw) and the mere escape to the vehicle did not constitute an abandonment of the joint enterprise. *Thiong'o v The Republic* [1977] Kenya LR 180 followed. *R v Becerra (Antonio)* (1976) 62 Cr App Rep 212 applied. Observation on the undesirability in a criminal trial of referring to coaccused in Court only by numbers (such as "the first accused").

Appeals

Charles Jim Wachira, Joseph Thumbi and Osman Mukiri appealed to the High Court (Criminal Appeal Nos 588, 589 and 596, respectively, of 1979) against their convictions and sentences at the Senior Resident Magistrate's Court, Nyeri (Criminal Case No 183 of 1979) on a charge of a attempted robbery. At the trial, Charles was accused No 1, Joseph was accused No 3 and Osman was accused No 2. Their appeals were consolidated. The facts are set out in the judgment of the court which was delivered by Trevelyan J.

Cases referred to in judgment:

1. *Abubakali v Uganda* [1973] EA 230, EACA.
2. *Anyangu v The Republic* [1968] EA 239, EACA.
3. *Balbir Sain Joshi v R* (1951) 18 EACA 228.

	4. *Director of Public Prosecutions v Merriman* [1973] AC 584, [1972] 3 WLR 545, [1972] 3 All ER 42 HL. 5. *Gakuu Macharia v The Republic*, page 264, ante, 6. *Gitonga v The Republic* (1977) (unreported) Criminal Appeal Nos 529 and 721 of 1976, Trevelyan and Platt JJ. 7. *Makin v Attorney-General of New South Wales* [1894] AC 57, 63 LJPC 41, 69 LT 778, PC. 8. *Mbugua v The Republic* (1979) (unreported) criminal appeals 166 and 291 of 1979 High Court; criminal appeal 28 of 1979, CA 9. *R v Becerra (Antonio) and John David Codrer* (1976) 62 Cr App Rep 212 CA. 10. *R v Seaman* (1978) 67 Cr App Rep 234, CA. 11. *R v Wanjerwa* (1944) 11 EA CA 93. 12. *Republic, The Kasungu Kombe* [1966] EA 69, EACA. 13. *Sahal Mohammed Hussein v The Republic* [1976] Kenya LR 53, Trevelyan and Sachdeva JJ *Thiong'o v The Republic*[1977] Kenya LR 180 EACA. The appellants were not represented on the appeal. *John Ndegwa* State Counsel for the Republic.
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeals dismissed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-

Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT APPELLATE SIDE NAIROBI

CRIMINAL APPEAL NOS 588, 589 AND 596, OF 1979 (CONSOLIDATED)

CHARLES JIM WACHIRA.....1ST APPELLANT

JOSEPH THUMBI .....2ND APPELLANT

OSMAN MUKIRI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The three appellants, Charles, Osman, and Joseph, were put up for attempted robbery under section 297(2) of the Penal Code, and the prosecution set about the proof of their guilt by calling evidence that they robbed a man of his car which they then used in the raid, that they were seen carrying out the raid, that two of them made statements to the police, and that one of them had bullets in his possession, two of which had been filed down so that they were capable of being used in a pistol which another of them had and used in the raid. As we shall explain, we do not think that the evidence about the robbery was of use to the prosecution; it is to be observed that the evidence of visual identification varied in value from the indifferent to the satisfactory, and it must be said that one of the statements which, from the record could quite correctly have been allowed in evidence was excluded, not on the facts, but because the trial magistrate appears not to have consulted the books, and so overlooked decisions which were in point, such as *Balbir Sain Joshi v R* (1951) 18 EACA 228 *The Republic v Kazungu Kombe* [1966] EA 69 and *Anyangu v The Republic* [1968] EA 239. Whether (upon a proper appreciation of the law and the facts) the statement would in the end have been allowed in evidence, is not for us to say. The three appellants were convicted as charged. The charge set against the appellants was that they:

On 19th March 1979, at Karatina in Nyeri district of the Central Province, armed with a pistol and with intent to steal, jointly attempted to steal money from Mary Mbuki Mugambi and at or immediately before or immediately after the time of the attempted robbery wounded Mary Mbuki, Karume Theuri and Peter Wahome,

which had regard to neither the section under which the charge was laid, nor the judgment of the Court of Appeal in *Abubakali v Uganda* [1973] EA 230 which this Court recently applied in *Gakuu Macharia v The Republic,* page 264, *ante*.

Under section 297(1), crime is committed when any person:

..... assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen ....

And that is how it should be charged. The definition is undeniably cumbersome and calls for simplification as the Court pointed out in the *Abubakali* case, but (until it is) it must be taken as it stands.

Moreover, it is to be borne in mind that it provides that the use, or the threatened use, of actual violence is only an ingredient of the offence where it was used to obtain the thing intended to be stolen or to prevent or overcome resistance to its being stolen. On the other hand, drawing on the comments of Lord Morris of Borth-y-Gest in *Director of Public Prosecutions v Merriman* [1972] 3 All ER 42, 47, the charge may refer to whomsoever was the recipient of actual or threatened violence because the offence relates to one activity involving more than one act and not to more than one activity. Accordingly, on the facts before us (which we do not propose to detail) whilst Mr Ithato (who is referred to in the charge sheet as "Peter Wahome") was properly mentioned in the charge because he was shot almost immediately the raid was mounted (no doubt to instil fear in those who were present at the time and so facilitate theft) and Mrs Mugambi was also properly mentioned in it (she being, if we may take leave so to call her, the other complainant), Mr Theuri was shot when the gang was attempting to escape (their purpose having been foiled), and so his name should not have appeared in it for the gang had,' by then, given up their intention to steal and were bent on escaping. But then, the prosecution case was in essence that there had been an assault on Mrs Mugambi to enable money to be stolen and that actual violence to achieve that purpose was used, so that the errors in the form of the charge cannot possibly have caused any prejudice or failure of justice to the appellants.

It was put to us by Charles that the evidence about the robbery should not have been allowed in as this offence was not charged, and what he told us is not without its attraction. Had the robbery been charged the situation would not have been unlike that in *Mbugua v The Republic* (1979) (unreported). But it was not charged. Accordingly, to the extent that the evidence about the incident showed that only a few hours before the attempted robbery the men equipped themselves with a car, and were in possession of a pistol, both of which were used in the raid, it was no doubt legally admissible (rather like evidence of the purchase of weedkiller in a poisoning case); but the fact that a robbery is carried out in a morning is not, of itself, probative of an attempt to commit one that afternoon. Such evidence can only go to show propensity to commit robbery, and this is not enough if the evidence is sought to be put in as what is usually called "similar fact evidence". For such evidence to be legally admissible it must be able to prove at least one of the essential features of the offence charged *(Makin v Attorney-General of New South Wales* [1894] AC 57 and *R v Seaman* (1978) 67 Cr App Rep 234); and that is not the case here. In any event, when considering whether or not to proffer such evidence the question of undue prejudice must always be weighed against its probative value. On the facts before us, a case was not made out for the introduction of the robbery as similar fact evidence, and the evidence about it could only have been admitted to the extent we earlier indicated and subject to what we have said.

The offence charged was laid as having been committed towards the end of the afternoon (some witnesses said that it was carried out at about 4.30 pm, and others said that the time was about half an hour later) and the robbery was said to have occurred at 7.45 am, ie some eight or nine hours earlier. The evidence of the man robbed, Mr Shah, could have gone to the identification of the pistol, his car, and those who relieved him of it. But it did not do so. Mr Shah purported to identify the three appellants; but, looking at his evidence in perspective, it amounts to no more than that one of the robbers wore a red shirt (an article of clothing incidentally referred to by Mr Theuri as being worn by a man concerned in the raid) and drove the car away; another of them who was "darkish and hefty" and wore a black shirt; and the third of them who pointed a pistol at Mr Shah and took his car keys from him (or perhaps did not and someone else did, for the record is none too clear at this point) "had a shirt and was bright-coloured", the colouring referring, as we think, to the man rather than to his shirt. Nor, although he said that he saw his car in a distressed condition at or near the scene of the attempted robbery shortly after the time when it must have been committed, was he asked in Court to identify it although photographs of it were exhibited. And not only was he not asked to attend an identification parade (none was held), but at the police station, as he put it:

I was shown three persons .... I was told to identify. There were only three people there. The police asked me if they were the people who robbed me of the vehicle, and I said “Yes”.

No doubt confrontation evidence can, in a proper case, be excellent testimony; but Mr Shah was told whom to identify; and, however good a witness he might have been found to be, the fact of the police action must have its effect when the question of the weight of his evidence is considered. But we need consider this no further for his evidence did not help the prosecution to prove the charge which they brought.

There is no doubt that the purpose of the raid was to get money; and we do not doubt that, having regard to where it was to be mounted and the fact that it was to be done in broad daylight, the use of violence was, upon the evidence, part of the scheme to rob. The evidence, as led, is perhaps not too easy to follow; but, as we understand it, the incident occurred in a store which is of some size, is entered through large corrugated-iron and wood doors, and has an office partitioned off from (but part of) the store just inside those doors, that office having a counter in it. No-one gave evidence of having seen the three appellants (or anyone of them) arrive, whether on foot or in a car, although Mr Ithato noticed two men as they went into the store. He was the first object of the gang’s attention, and he says that Charles called upon him to lie down; he did not immediately do so, and he was shot. We are satisfied that this was so, and it was the first step in the raid. We say this because Mrs Muthoni (a customer who was in the office at the time) heard a noise behind her, Mr Muhota heard two shots fired and saw people running from the office, and Mr Theuri heard two shots fired and saw what he referred to as a “fight” going on in the office. Mrs Mugambi was fired on only once and the gang desisted from their purpose, although another shot was fired when the gang was essaying its escape (as we have mentioned). At all events, the object of the raid is clear. Mrs Muthoni told the Court that, after she heard the noise, someone caught hold of her from the back and this person asked her to give him “the keys to the box and the money”, which, of course, she did not have because she was only a customer at the depot. Mrs Mugambi said that the same man, having thrown Mrs Muthoni out of the office, attacked her and was “checking the cash boxes which were at the counter”. The object was to steal money by force. What falls to be considered is whether the prosecution proved that the three appellants as a joint venture attempted that robbery (as described in section 297 of the Penal Code).

Charles says that he was not identified at the scene; and that even if he were it was not sufficient to enable him to be convicted because, in answer to a question which Osman put to Mrs Mugambi, she said, “I never saw the first accused [Charles]”. But this was an obvious error as a reading of her evidence makes clear; and it was not the only such error which the magistrate made for when he was taking Joseph’s statutory statement, he recorded that he was told “I met the first accused [Charles] and later we were joined by the third accused” and Joseph was his third accused. It is a better practice to use names and numbers, or just names, rather than numbers only. At all events, Charles was not only identified by Mrs Mugambi and Mr Ithato, but also by Mr Theuri who saw what went on in the office although he did not then see the face of the man involved, but then he hit that man first with a bottle and then with a chair, and he saw his face as he (ie the man) was about to get into the car. He says that the man was Charles. In addition, Mr Gachau and Mr Muhota said that they identified Charles, but it was probably only from the back, until Mr Muhota (who gave chase) saw him when he had been arrested. Others speak of Charles’s arrest, such as Mr Wanjau, who saw him running away holding a revolver which he fired towards those who were chasing him. Charles’s defence that he simply happened to be in a Karatina street at the time when a crowd of people came screaming from his right, he being involved only because he thought that they had something to do with a political election, was for obvious rejection. He himself told the Court that, accompanying the screams, were the throwing of stones and shouts

of “thief, thief”; that being so, he could not possibly have thought that the crowd was bent on electioneering. And if (as he says) a man held his shirt and slapped him, he could not fight back because three others joined in the attack on him, and he was “weak and drunk”, he could not (as he claims) have “decided to run away in the direction people had been running while throwing stones”. And one may not unfairly ask where the alleged thief was while all this was going on"

The only visual evidence linking Osman with the attempted robbery was given by two witnesses, PC Abok and Inspector Mathenge who happened to be in Karatina at the time. The constable simply said “After that we followed the public who were shouting ‘thief’ and near the East Africa Industries depot I found [Osman] lying on the ground”. The inspector only saw him after he had been arrested. As the constable had been detailed to go to the scene and, on arrival, had first attended to Mrs Mugambi, and no-one saw fit to tell the Court where, in relation to the scene of crime the East Africa Industries depot was, the constable’s evidence is of no great value; and the main plank of the prosecution case against Osman must be the statement which he made, but which he says he did not make, to the police. The magistrate took the view, and it was a very definite view; that what Osman said in the statement was true. He said, “There can therefore be no doubt that the statement of [Osman] told the truth”; but we think it not quite the truth. At all events he found corroboration for it in the evidence of Mr Ithato that Charles had pulled out a pistol and shot him with it, and the evidence of Mr Theuri, Mr Gachau, and Mr Muhota as to what generally occurred. We think that was correct for the word “corroboration” as Lord Hailsham of St Marylebone LC pointed out in *R v Kilbourne* [1973] 2 W LR 254, 263, means no more than evidence tending to confirm other evidence. And one is not only entitled, but required, to look at surrounding circumstances: *R v Wanjerwa* (1944) 11 EACA 93. But we think that a case was made out for acting upon the statement without corroboration. We say so for two reasons, the statement’s contents and the manner in which it was challenged. It was said to have been taken by Chief Inspector Gachanja at 10.30 pm, some five or six hours after the raid, and before it was put in evidence; and, in answer to the trial magistrate, Osman said “I did not make any statement to this officer”, and a trial within a trial was held. The chief inspector gave evidence and was not seriously cross-examined upon it (in passing we observe that the magistrate incorrectly denied the co-accused the right to take part in the sub-trial) and Osman’s cross-examination only related to his being brought to the Chief inspector’s office, what he told him, and how the officer knew why he was there. The evidence under cross-examination reads:

The second accused [Osman] was brought to my office by Corporal Ndegwa [who] then left. He did not tell me. I knew why the accused was there as I had particulars of the charges from the investigating officer....

The corporal confirmed that he took Osman to the office of the chief inspector and left, and was not cross-examined at all. But when he made his statutory statement in the course of the sub-trial, Osman told the magistrate that he did not make a statement to the officer at all; all that had happened being that he was forced to sign some papers without knowing what was in them having been beaten at the “police station”. Looking at the officer’s evidence given under cross-examination, what emerges is the suggestion by Osman that the corporal gave the chief inspector information which he could translate into a statement, there being nothing about the officer forcing him to sign, or anyone beating him. The statement is a very detailed one. It speaks of the gang driving its car into a side road, entering Karatina from a different direction, parking the car, going on foot into the town, moving the vehicle and:

Our purpose for going to Karatina on foot was to survey the place we wanted to rob, the locality of the police station and also the possible roads of escape.

But while it amounts to an admission of participation in the affair, it is not as damning as one would

expect it to be if it were an invention by someone intent on getting an innocent man into trouble. For instance it says:

The man did not move and [Charles] shot at him; but I did not wait to see whether the man was wounded or not, and I ran back to the vehicle.

Some of what appears in the statement must have been known to the police, but some of it would not; and we believe it was not fabricated as Osman claims. This being so, and having regard to the manner in which the statement was challenged, we repeat and endorse what was said in *Sahal Mohamed Hussein v The Republic* [1976] Kenya LR 53, 56, and *Jotham Watikha s/o Nandikwe v The Republic* (1979) (unreported) ie

.... but we ask, fairly as we believe, why an accused person making a wholly unjustifiable allegation in the sense of putting up a suggestion of wickedness on the part of the police without trying in the least to prove it should be in a better position than a man not prepared to be specious"

Then in his defence Osman told the Court that an undisclosed policeman beat him. He said:

I met Ndegwa [ie the corporal to whom we have referred] and two others where I was taken .... I .... was beaten by an *askari* who has not come here .... he left me inside the office of [the chief inspector]

going on to say that this officer slapped him. But, as is clear from what we have already set out, neither the officer nor the corporal was examined along these lines.

Osman's defence was that he left his home at Nakuru at 8.00 am and went to Karatina to see a friend there. As this friend had gone out, he went for a walk in town. While doing so he heard "two sounds" and people shouting "*mwizi! mwizi*!" with people throwing stones "at people who were coming towards me". And he went on to say:

While I was about thirty yards I turned to avoid stones and after running for about five yards I slipped and fell into mud. I rose up and tried to run again but I again fell down. When I was rising up I felt stones raining on my back. I began to run away and also heard people say "even this is one of them". I also fell for the third time. People surrounded me and stoned me.

But if people were chasing suspected thieves and Osman was not running, why was he taken to be a thief" It would have been seen that he had merely moved a little way away to avoid being stoned. But returning to Osman's statement, what is one to make of it; and is it as true as the magistrate held" And does it afford him a defence to the charge" It says:

We then watched the place and after the workers had entered we followed them inside and there [Charles] drew out the pistol and pointed it to the nearest man and ordered him to sit down or move back into the hall. The man did not move and [Charles] shot at him; but I did not wait to see whether the man was wounded or not, and I ran back to the vehicle. By the time I reached near the vehicle, I heard another explosion of the gun and as I was trying to get into the vehicle, I fell down and my two companions stepped on me ....

But after Charles shot Mr Ithato he went into Mrs Mugambi's office where he spent some little while, however small it was. Therefore Osman could not have run back to the car so quickly as he would have already reached it by the time Charles arrived. Thus Charles could not have stepped on him as he says. In any case according to Mr Muhota:

I heard some noise of a bullet. I heard two shots .... I .... abandoned what I was doing and went towards the counter. Before reaching the counter I saw three people running away from it ....

With Osman's statement in mind, he must have been one of the three (it is worth mentioning that Mr Gachau also referred to there being three men in the gang); but, that apart, can it be said that Osman disassociated himself from the crime, and if he did so, did he do so too late" The statement was taken in English, and the word "the" in reference to the pistol suggests prior knowledge; but in any event, having seen Charles draw the pistol, and having heard the order which he issued, Osman made no effort to stop him using it. Nor (assuming what Osman has said to be true), was the fact of his running to the car an abandonment by him of his part of the common enterprise to rob. There were no exceptional circumstances; and in law something more than a mere mental change of intention and physical change of place is needed by someone wishing to disassociate himself from the consequences attendant upon his willing assistance up to the time of the actual commission of the crime. There must be a timely communication of the intention to abandon the common purpose (*R v Becerra* (1976) 62 Cr App Rep 212, *Gitonga v The Republic* (1977) (unreported) and *Thiong'o v The Republic* [1977] Kenya LR 180) and there was none. There was no disassociation, whether one goes on what Osman says or on what Mr Muhota says (although we have no doubt that Mr Muhota spoke the substantial truth as to what happened).

Joseph's defence was that he happened to be in Karatina because he had "been sent by a cousin of mine to go to Othaya to certain people's place". Who the cousin is, why he chose him to go, and the purpose of the mission Joseph did not say. He was in Karatina because he had to change transport there; and, as he had to wait for his vehicle and had never been there before, he resolved to walk round the town, and did so. He says that when he was near to some shops he saw someone running fast, saying that there were thieves "in that direction", and he went on to tell the Court:

I and others also following him running. I then saw a straight road and there were many people running. I ran faster ahead to see who the thieves were so that I could go back to the vehicle. I then heard a noise, "*Hawa Wezi! Hawa wezi!*" (These are thieves). And the sounds mixed up with the noise I had heard earlier on. While I was near a certain rail line I saw a group of people there and, on reaching them, I saw one person down being stoned. On seeing him I told them "please, do not kill him". Thereupon one person asked me whether I was sympathizing with the thief because he was my brother" Another one asked whether I was in the person's company" I told him I was not in the person's company.

He questioned me, but I told him I was from Nairobi. Someone said that, "You thieves from Nairobi have come to disturb people here". One man tried to slap me, but for fear I stepped back. One other person said "*Swaga huyo ni mwizi*" (Smash him he is a thief). Thereupon I was stoned, but the stone did not hit me. I ran away for about ten yards along the rail line. I found an old man there nailing a nail into a wall. He had a hammer in his hand, watching what was taking place. I passed him and entered in the house nearby. He told people that "the other thief has entered here". I closed the door for fear, and sat inside the house. Nobody tried to open the door or enter the house. I looked through the window and when I saw a police officer (uniformed) around with a pistol I opened the door and removed my coat and hat so that he does not shoot me.

He says that he was searched and cigarettes, matches and money were taken from him. He did not specifically say that he had no bullets upon his person, but that was his case. The evidence, however, is otherwise. Inspector Mathenge said that he heard shots being fired and went to investigate and, having arrested Charles and hearing shots coming from the direction of "the go-down" (which must, as we believe, refer to the depot which was the scene of the crime), he went towards it and " [Joseph] emerged from an office there and was surrounded by members of the public".

If a crowd is chasing a suspected thief, the direction of the chase would be away from the scene of the alleged crime, unless (which is not the case here) there was a doubling of tracks; Joseph was certainly arrested at the scene. He must have got out of the car and ran straight into the office of Mrs Mugambi seeking to hide himself in there. The inspector spoke the truth. And when he searched Joseph he "recovered fourteen bullets from his front pocket wrapped in a polythene bag". One may not unfairly, as we think, ask where the officer would have got the rounds of ammunition from to plant on Joseph and why he selected him and not all three suspects"

And it is surely too much of a coincidence that Joseph, in transit, happened to have in his possession several rounds of ammunition, two of which had been filed down and could thus be used in a pistol whose bore had also been tampered with and which was undoubtedly used in an abortive attempt to rob. But it must be said that evidence of visual identification of Joseph was poor. Mr Ithato said that he saw him standing behind Charles when the shot was fired, but he told the police that he "did not get the appearance of the second [man]" (which could only have referred to Joseph) and Mr Gachau also purported to identify him, but he only saw him from the back. The evidence concerning Joseph therefore is, thus, no more than circumstantial. But having considered it all and again recalling that the evidence is that three men were involved in the raid there can be no doubt that Joseph was one of those engaged in the crime and actively participating in it.

We are not insensible of the fact that there are discrepancies in the case. The appellants drew our attention to some of them; but in a case like this where there is a suddenness of happening and where, perhaps, fear plays its part in some of those who are present there at, it would be surprising if there were no discrepancies (although their existence cannot, of course, increase the value of the evidence which has been given). We have not thought fit to deal specifically with each of the points which each of the appellants put to us, or to comment upon every facet of the evidence; but we have everything in mind and, making our own assessment upon the written word as we are required to do, we do not doubt the guilt of each one of them. Charles's guilt is quite patent, admitting of no possible doubt; so, too, is Osman's guilt beyond reasonable doubt, his defence being for rejection; and although Joseph's guilt depends entirely on circumstantial evidence, his guilt, too, was established beyond reasonable doubt. As we see it, the three men resolved to carry out a raid in broad daylight, prepared to use arms in its commission and, although they failed to achieve their object, what they did by way of common enterprise fell squarely within the offence with which they were charged and each one of them was inevitably convicted.

Appeals dismissed.

Dated and delivered at Nairobi this 10th day of December 1979.

E. TREVELYAN

JUDGE

A.R.W HANCOX

JUDGE