contemplation of law never did sign, the contract to which his name is appended."

In our view, the learned trial judge was correct in applying the principles of the law.

As to ground 2—weight of evidence. There was ample evidence on which the learned trial judge based his findings.

The grounds of appeal fail and the appeal is dismissed with costs assessed at 20 guineas awarded to respondent.

[COURT OF APPEAL]

MORIE GBENIE . . . . . *Appellant*

v.

REGINA . . . . . *Respondent*

[Criminal Appeals 2 and 3/63]

Criminal Law—Murder—Manslaughter—Provocation—Time for cooling—Necessity for clear direction to assessors.

Appellant had a bottle of "omole" (locally distilled gin). Deceased asked appellant for a drink, which appellant gave him. When deceased asked for more, appellant refused. Deceased grabbed the bottle and a struggle ensued, during which the bottle fell and was broken. Appellant became very angry, seized an axe handle and hit deceased on the back of the neck causing his death. Appellant was charged with murder, and was tried by a judge sitting with assessors.

In his instructions to the assessors, the trial judge stated that provocation was one of the main defences put up by the appellant, but he failed to direct them adequately and gave no direction at all on the question whether, provocation being established, the appellant had had time to "cool down."

The appellant was convicted and sentenced to death. Against this conviction he appealed.

Held, allowing the appeal, that, on a trial for murder, where there is some evidence of provocation, it is the duty of the trial judge not only to put the issue of provocation to the assessors so that they understand it, but also to instruct them on the question whether the defendant had had "time for cooling."

Lusenie Brewah for the appellant.
Donald Macauley (Senior Crown Counsel) for the respondent.

DOVE-EDWIN J.A. The appellant was charged with the murder of Lissah on August 3, 1962, at Gbenie Village in the Bonthe Chiefdom.

The facts were that appellant had a bottle of what is described as cooked wine (omole), that is, locally distilled gin. The deceased, it appears, asked appellant for a drink out of the bottle. Appellant gave some to him and deceased wanted some more. According to the evidence appellant was unwilling to give deceased any more from the bottle and deceased held onto the

bottle. As a result of this, the bottle appellant was holding fell down and was broken, with the result that the contents were lost.

Appellant then got hold of the handle of an axe and hit the deceased twice on the back of the neck, according to the first prosecution witness, Kebbie, and once according to the second prosecution witness, Nyah. Deceased fell down and died. Appellant then took the corpse away and it was never seen again.

There were only two eye-witnesses, the first and second prosecution witnesses. Appellant was tried by a judge sitting with two assessors. Both assessors found appellant guilty of murder and with this the learned trial judge agreed. Appellant was sentenced to death.

Against the conviction and sentence this appeal is lodged. Appellant was represented by counsel both in the court below and in this court. After his conviction and sentence he filed grounds of appeal dated December 31, 1962. These were abandoned at the hearing of the appeal.

His counsel also filed three grounds of appeal dated December 31, 1962, and an additional ground dated February 23, 1963.

Learned counsel abandoned the first and second grounds of appeal in his grounds of appeal of December 31, 1962, and argued the third ground, which was " that the verdict was unreasonable and cannot be supported having regard to the evidence," as also the ground of February 23, 1963, which was " that the learned trial judge failed to direct himself and the assessors on the issue whether or not the appellant was, at the time he committed the alleged offence, under the influence of alcohol and, if so, whether or not appellant knew the consequences of his act.

" In failing to direct himself and the assessors on this issue the learned trial judge deprived the appellant of the right to have the issue of manslaughter considered as there was evidence on which such a verdict of manslaughter could have been given."

It is convenient to deal with the grounds of February 23, 1963, that is, the question of appellant being under the influence of alcohol. This ground has no substance. At no time during the trial did appellant's counsel raise this question and there is no evidence to support it either directly or by inference. This ground of appeal must fail.

As to the third ground in the grounds filed on December 31, 1962, that the verdict is unreasonable and cannot be supported having regard to the evidence, we feel that this ground has some substance. The question of provocation was raised by the defence, and the learned trial judge said in his summing-up that it was one of the main defences put up by the appellant.

The learned trial judge directed the assessors on the question of provocation to a certain extent; but did he do so adequately so as to have the point fully considered by the assessors and himself? What are the facts from which provocation could be deduced? Appellant had a bottle of drink, called omole, which he wanted to drink in bed, according to the evidence of the first witness. He had given the deceased some of it when deceased begged for some; deceased wanted some more; appellant refused to give him any more and with the bottle in hand went into his house; deceased followed him and held on to the bottle. One witness said they struggled for it and the bottle fell down and was broken and the contents lost. Appellant was angry according to the second witness, but the first witness said he did not seem annoyed. These were the only two eye-witnesses and they both agree that appellant came out of

the house with the handle of an axe, not of itself a dangerous weapon, and hit the deceased at the back of his neck and he unfortunately died.

In his summing-up to the assessors the learned trial judge told them, dealing with provocation, that, if they found that appellant had been provoked, they should consider whether he had had time to cool down. He did not go on to explain whether or not there should be an interval between the provocation and the killing, in which interval the appellant should have cooled down. Left as it was, the assessors and, I am afraid, the learned trial judge, in our view, did not adequately consider the defence of provocation. The loss of his drink in the circumstances must have made appellant quite angry. There was no interval worth mentioning between this and the act which caused the death of deceased. The learned judge read paragraphs 2484 and 2485 of Archbold, Criminal Pleading, Evidence and Practice (34th ed.), to the assessors, dealing with malice and absence of the body or corpse. He did not read to them paragraph 2506, "Time for cooling."

There was evidence of provocation; the learned trial judge said: "As regards provocation [this in his judgment] I do not find this established in the legal sense by the evidence." Mr. Samai, one of the assessors, in his finding, seems to say that provocation was not established because appellant was not sorry after the act and he disposed of the body. This shows that he did not understand what provocation in the circumstances meant. Mr. Bindi, the other assessor, found that provocation had not been established.

Nobody seems to have considered the effect on appellant when he lost his drink in the manner he did, and that he acted in a sudden impulse immediately after the provocation before he had cooled down.

We think that appellant ought to have had this aspect of the case fully considered. If the learned judge felt that the evidence did not support a verdict of manslaughter it was his duty as a matter of law to so instruct the assessors. See paragraph 2508 of Archbold (34th ed.).

In the circumstances, we feel it would meet the ends of justice if the verdict of guilty of murder and the sentence of death be set aside and one of guilty of manslaughter be put in its place.

The appeal is allowed and the conviction for murder and sentence to death is set aside and one of guilty of manslaughter put in its place and a sentence of three years' imprisonment with hard labour imposed.

[COURT OF APPEAL]

Bo
Feb. 27, 1963.

REGINA . . . . . *Respondent*

v.

MOHAMMED CONTEH . . . . . *Appellant*

Ames Ag.P.
Benka-Coker C.J.,
Dove-Edwin J.A.

[Criminal Appeal 29/62]

Criminal Law—Homicide—Murder—Manslaughter—Killing by correction by person in loco parentis—Misdirection by judge.

Appellant was convicted of the murder of a boy 10–12 years old who was the son of appellant's first cousin. The boy's father had sent him to live with