MUTAMBO AND FIVE OTHERS v THE PEOPLE (1965) ZR 15 (CA)

COURT OF APPEAL

BLAGDEN CJ, DENNISON AND CHARLES JJ

6th May 1965

Fly note and Headnote

[1] Civil Procedure - Judicial notice - test for determining what can be subject to judicial notice:

See [8].

[2] Criminal Law - Common criminal purpose - resulting liability - express agreement not necessary - section 22 of Penal Code construed:

Under section 22 of the Penal Code the 'common purpose' need not be by express agreement or otherwise premeditated.

[3] Criminal Law - Common criminal purpose - resulting liability - 'probable consequence' defined - section 22 of Penal Code construed:

For purposes of section 22 of the Penal Code a 'probable consequence' is that which a person of average competence and knowledge might be expected to foresee as likely to follow from a given course of action.

[4] Criminal Law - Mistake of fact - burden of proof - 'full mens rea' offences:

In 'full *mens rea*' offences such as murder or manslaughter, the accused has the burden of raising the issue of mistake of fact by adducing or pointing to relevant evidence, but, once the issue is raised, the prosecution must prove beyond reasonable doubt the absence of a reasonable mistake of fact.

[5] Criminal Law - Mistake of fact - 'reasonable' construed - section 11 of the Penal Code construed:

For purposes of section 11 of the Penal Code (reasonable mistake of fact as a defence), whether a belief or act is reasonable depends upon an objective test: whether it is likely to be held or suffered in the circumstances by a member of modern society who has average modern knowledge, average perception, average intelligence, average judgment and average self- control.

[6] Criminal Law - Provocation - relationship between provocation and response - test for determining reasonableness - 'average member of modern society' - section 182 (2) of Penal Code construed:

The 'reasonable relationship' of the force used to the provocation must be determined by reference to the reactions of the average member of a modern society.

[7] Criminal Law - Witchcraft - reasonable mistake of fact within section 11 of Penal Code not applicable:

A belief in witchcraft cannot constitute a defence under section 11 of the Penal Code.

[8] Criminal Procedure - Judicial notice - test for determining what can be subject to Judicial notice:

Judges are entitled to take judicial notice of that which is the common knowledge of the great majority of mankind.

CHARLES J

[9] Evidence - Discretion of trial judge - admissible evidence excluded - when proper:

A judge should exercise his discretion to exclude admissible evidence only when it appears clearly that the evidence has an unfair prejudicial tendency against the accused out of proportion to its probative value.

[10] Evidence - Hearsay - statement made in presence of witness - admissible for limited purpose:

Evidence of statement made in the presence of a court witness is inadmissible hearsay if offered to prove the truth of what is contained in the statement but not if offered to prove the fact that the statement was made.

Cases cited:

(1) *Subramaniam v Public Prosecutor* [1956] 1 WLR 965.

(2) *R v Willis* [1960] 1 All ER 331.

(3) *Brennan v R* 1936 55 CLR 253 HC

(4) *Tenson Simukona and Others v R* NRCA Cases 105, 106, 107 of 1964.

(5) *R v Tolson* (1889) 23 QB D. 168; [1886 - 90] All ER 26.

(6) *R v Malcolm Mark and Others* 1961 Criminal Law Review 173.

(7) *R v King* [1963] 3 All ER 561.

(8) *Thomas v R* 1937 59 CLR 288 HC

(9) *R v Bonnor* 1957 V.R 227, 31 ALJ 468.

(10) *R v Reynhandt* 1962 107 CLR 381.

(11) *Woolmington v D P P* [1935] AC 462; 25 Cr. App. R 72.

(12) *R v Mkize* 1951 (3) SA 28.

(13) *Lim Chin Aik v R* [1963] 1 All ER 223; [1963] AC 160.

(14) *Muyakwi Paul v R* (NRCA, Case No. 2 of 1964).

(15) *Greyson v R* 1961 R & N 337.

(16) *Liversidge v Anderson* [1941] 3 All ER 338.

(17) *Hardie and Lane Ltd v Chilton* [1928] 2 KB 306; [1928] All ER 36.

(18) *R v Denyer* [1926] 2 KB 258.

(19) *R v Mbombella* 1933 App. D. 269; 14 E & E. Dig.

(20) *R v Gadam* 14 WACA 44.

(21) *Chan Kau v R* [1955] 1 All ER 266; [1955] AC 206.

(22) *R v Robell* [1957] 1 All ER 734; [1957] 1 QB 547.

(23) *Jackson v R* 1962 R & N 157.

CHARLES J

(24) *Howe v R* 1958 C.L.R. 448.

(25) *Christie v Leachinsky* [1947] 1 All ER 567; [1947] A.C.573.

(26) *Attorney-General for Nyasaland v Jackson* 1957 R & N 443.

(27) *R v Aspinall* 13 Cox 563.

(28) *Chenjera v R* 1960 R & N 67.

Statutes construed:
Penal Code (1965, Cap. 6), ss. 11, 22, 182 (2), 183.
Carruthers, Smallwood, Gardner, for the appellants
Reilly, State Advocate, for the respondent

Judgment

Charles J: The six appellants have appealed against their convictions of murder, contrary to section 177 of the Penal Code (Cap. 6), by the High Court sitting at Ndola on the 9th December, 1964. The alleged murder was of one Derek Smith at Chapaula Village in the Lundazi District on the 24th July, 1964. We have dismissed the appeals for reasons which we now give.

It was not in dispute at the trial that Derek Smith, a European Inspector of Police, sustained wounds from which he died on the 24th July, 1964, while in command of a police

patrol at Chapaula Village, a village which had been established by a religious sect known as the Lumpa Church.

According to the evidence of members of the police patrol, the patrol had gone to Chapaula Village on the 24th July, 1964, in order to investigate an alleged refusal of admission of a kapasu and two Boma messengers to the village on the previous day: the village had a stockade on three sides with a small gate: the members of the police party were armed with rifles, and the inspector also had a revolver and one member also had a bayonet: the messengers and the kapasus were with the patrol: as the patrol approached the village a man was seen lurking in the bush end was chased by members of the patrol but he got away: nearer to the village, a woman was seen and she was also chased by members of the patrol: the woman ran through the gate into the village, followed by the Inspector and some other police: while the Inspector was near a house he was stabbed in the back with a fishing spear: a shout of 'Jericho' was then raised and a number of men, armed with spears and axes, and a woman armed with a machette, rushed out towards the police: one of the other police received a spear wound in the arm: some of the police then opened fire upon the oncoming villagers, some of whom were shot: the police, headed by the Inspector, who still had the spear sticking in his back, and had lost his rifle, ran out of the village, pursued by the men: after he had run about a hundred yards from the village, the Inspector fell down and a number of villagers then stabbed him with spears: and all six appellants joined in the attack on and pursuit of the police and in the stabbing of the Inspector after he had fallen. One of the prosecution witnesses deposed that the Inspector had not done anything to any villager before he was first stabbed and that the police did not open fire until spears were thrown. Another prosecution witness deposed that the police were not chased until after he heard the sound of a gun and he thought some of the guns being fired were muzzle loaders. Yet another deposed that the first shot which he heard fired was from a gun which he recognised by the sound as a muzzle loader.

The Provincial Medical Officer, Kasama, gave evidence as to the result of a post - mortem examination which he performed on the 26th July, 1964, on Inspector Smith's body. He found: two wounds in the mouth and one in the left cheek; a wound on the back of the head; two wounds in the back of the right side of the chest a wound of the right hip, and a wound of the left leg. In the opinion of the witness, these wounds were inflicted by spears and produced shock and haemorrhage which caused death. The post - mortem examination showed that the body had thirty - four other wounds which appear to have been inflicted by spears after death. In the opinion of the medical officer, the Inspector could have run some distance after wounds in the back of the chest and face had been inflicted.

All the appellants, with the exception of the fourth, made three statements to the police: the fourth appellant made two. All the statements, except the first statement by the second appellant, were admitted in evidence without objection. The first statement of the second appellant was admitted in evidence after a trial within a trial. The substances of these statements may be summarised as follows:

First Appellant:

1st statement: While he was preparing mud for house making on the 24th July at noon, he heard the noise of firearms and people shouting 'War, war'; he then took a spear and an axe and went towards the noise; he then saw a villager lying dead on the ground and a crowd stabbing a European police officer on the ground; and he stabbed the latter who was already dead.

2nd statement: We were many when we killed him and I speared him.

3rd statement: I killed him together with my friends.

Second Appellant:

1st statement: He and others had left their village and gone to reside at Chapaula Village in order to be together; they were told by one man that there would be a big fight with UNIP and to be ready and start making weapons, which they did; on the Thursday, two Boma messengers and a kapasu were refused admittance to the village; on the following day the man who had told them to start making weapons said the police would come to the village

because of the refusal to admit the kapasu and messengers, and that, in that event, they must fight back; that he then collected his spear and took up a position on a hill; while there he heard shouts that the police were coming; he saw one man stab a European in the back with a spear; the European started to run and the appellant and others followed; he saw the European struck again and fall down; and then appellant and another struck the European, the appellant's blow being after the European had died.

CHARLES J

2nd and 3rd statements: An admission of having speared the European after he was dead and that the villagers had killed him.

Third Appellant:

1st statement: About one month before Christmas, 1963, villagers who had been residing in UNIP villages in the area started to build Chapaula Village; on the 23rd July, 1964, he was informed that messengers and a kapasu had been refused admission to the village; on Friday, at l p.m., a deacon shouted 'Come here, come here'; he and others ran to the deacon and found him with a villager who said that he had been chased by police; the deacon then instructed the villagers to collect weapons and fight the police; they found two policemen, a European and an African; the European was stabbed in the back with a spear while running away; two other villagers stabbed him with a spear and the appellant chopped him with an axe; and the fight was because the villagers did not want to be removed from Chapaula Village.

2nd statement: He admitted that he and others had killed a European police officer.

3rd statement: The European was already dead when he axed him.

Fourth Appellant:

1st statement: He saw a European police officer and an African constable firing guns, and he joined other villagers in running towards the former with spears and axes; a woman axed the European in the shoulder and the group chased him; the European tripped and he was then speared by two others who the European killed with his revolver before dying.

2nd statement: Admitted that 'we killed an African policeman but not the European'.

Fifth Appellant:

1st statement: He was told that a kapasu and messengers had been chased away from the village; one of their leaders told the villagers that he did not want messengers in the village and he (the leader) then posted guards; next day a leader told them that a guard had been chased by the police; a couple of minutes later the leader called the villagers to the eastern entrance; a European police officer then entered the gate and was attacked with an axe by a ten - year - old boy; the European fired at the boy and missed, and was then attacked by the boy's parents, one, the mother, hitting him on his shoulder with an axe: the police then opened fire; the European was stabbed in the back with a spear and ran off; the appellant was in a group which chased the European; and the European fell to the ground and all the group, including the appellant, stabbed him with their spears.

2nd statement: Admitted striking the European with a spear.

3rd statement: The appellant repeated in substance the account which he had given of the killing of the European in his first statement, with the addition that the European was dead when he stabbed him and the police had killed four of the villagers.

Sixth Appellant:

1st statement: He was told that, while he was away collecting wood, messengers had been chased away from the village; at a meeting in the village that night, a deacon said that if the messengers returned and wanted to fight, the villagers would fight them; guards were then posted; on the following day, at about noon, a guard reported that the police were coming; the villagers then put the children into the houses, one of the villagers was thrown to the ground by a European police officer; struggle ensued between the villager and the

officer for the latter's revolver, the European fired the revolver and wounded the villager; African police then opened fire and wounded the villager's wife who was approaching the European officer with a panga, she hit the European officer on the shoulder; more villagers were shot by the police; the European started running away and was chased by a group of villagers, of whom the appellant was one; one of the villagers speared the European in the back and he fell down; and the rest of the group, including the appellant, speared the European and he died.

2nd statement: The appellant was in a group of persons who killed the European. When this statement was read over to the appellant he said 'I was not there, I was not in the group of people who killed the European. I admit that I was in Chapaula Village.'

3rd statement: He did not see the man he was alleged to have killed; he had gone to the village to buy food and returned on the 25th July, 1964; and he did not know that the police had come to the village or that a European had been killed on the previous day.

Before leaving the evidence given by the witnesses called by the State, it is necessary to notice that the following evidence was elicited from some of them, and was not contradicted: According to a senior police officer, it was not normal police practice to chase a woman about a village, or to chase a person seen sitting in the bush; the purpose of the chasing of the man and woman by the patrol on the day of the tragedy was not known to members of the patrol who gave evidence; a statement made by the Prime Minister on the 13th July, 1964, had been published to local government authorities and the people; the statement, a full translation of which was placed before this court, said, *inter alia*: 'Lenshina (Lumpa) Villages which are not authorised must be destroyed within one week': It also said that the people in these villages must go back to their former villages, the Government providing, if possible, a motor vehicle for their effects; on the 22nd July, 1964, that is two days before the tragedy, Inspector Smith and his patrol visited Chapaula Village in order to see if the instruction to move was being complied with; and the Inspector was then told by the villagers that they would move if transport were made available to them. There was a conflict of evidence as to whether Inspector Smith did or did not tell the villagers that if they did not leave the village of their own accord they would be forced to leave.
All the appellants gave evidence at the trial but called no other witnesses. All deposed to having moved to the village and stockaded it because they had been victims of violence towards the Lumpas by members of UNIP, that is the political party known as the United National Independence Party. The substance of the evidence of each was as follows:

First Appellant: At noon on the 24th July, he heard guns being fired in the village and people shouting 'We are dying, this is war'; he ran towards the shouting and saw police running away; he noticed that two of his friends were dead and thought that there was war between the police and Lumpa members; he ran after the police, carrying a spear, to where a European police officer had died; and as he was very angry because a relative had been killed he stabbed the body of the dead European. In cross - examination, he said the police would have killed all the villagers, if they had not been chased by the latter.

Second Appellant: He gave similar evidence to that of the first appellant. He also stated that he had run after the European and had come up to him when he was already dead on the ground, and that he then speared him. This witness' evidence contained several inconsistencies with his statements to the police, which he explained in cross - examination was due to the police having forced him to tell lies. He denied that the villagers had been instructed to make weapons.

Third Appellant: At 1 p.m. on the 24th July, he heard a villager shouting to come as the police had come; before that he had heard a gunshot; he ran with a spear and an axe, as he thought war had come; he saw policemen running away and a dead European; he was angry because relatives had been killed and he struck the dead European with an axe; and he thought that UNIP, being the Government with the police in its hands, had caused the

police to come to kill them. In cross - examination he said that if he had told the police that the villagers had been instructed to collect weapons and fight the police, it was because he was being tortured by them at the time.

Fourth Appellant: He gave similar evidence to that of the third appellant, including that he only saw the European's dead body, and he stabbed it with a spear as the European had killed his relatives. In cross - examination, he stated that he first saw the European while he was alive and firing his revolver and that he and other villagers had chased the European, intending to kill him, as they were angry because of the death of their relatives. He denied seeing a spear in the European's body when he first saw him but admitted seeing a woman axe the European, after which the latter started to run away.

Fifth Appellant: He also gave similar evidence to that of the third appellant, including having stabbed the European after he was dead because he had killed relatives, and to thinking that the police were working with UNIP and had come to kill the villagers. In cross examination he denied that any precautions had been taken before the police came, alleging that his statement to the contrary to the police was not true and it had been forced from him.

Sixth Appellant: He stated that he saw the European being chased to a stream, that he went to the stream where he saw the European's dead body lying on the ground, and that he stabbed it as he was angry over the death of relatives. He also said that he thought the police had come to kill the villagers because they were hated by UNIP and that all the Lumpas would have been killed if the European had not been killed.

The learned trial judge accepted the evidence of the witnesses or the prosecution as to the circumstances in which Inspector Smith was killed, and rejected the evidence of the appellants, who impressed him most unfavourably, and of whose evidence, he said, he did not believe a word. On the evidence which he accepted he found the following:

(i) That Inspector Smith was performing a lawful act when he went to Chapaula Village on the 24th July, 1964, to carry out an investigation.

(ii) That on the afternoon of that day a number of persons, including the appellants, formed a common intention to prosecute in conjunction with each other the purpose of attacking Inspector Smith and his patrol with spears and axes.

(iii) That the common purpose was unlawful.

(iv) That the prosecution of that purpose was by itself such that the death of or grievous harm to Inspector Smith was a probable consequence and, indeed, the inevitable consequence.

(v) That each of the appellants prosecuted the common purpose as a principal in the first degree.

(vi) That the appellants and their colleagues had no legal justification or excuse for attacking the police, since the latter had gone to the village for a lawful purpose, and that they did not act under provocation.

(vii) That, accordingly, the appellants were guilty of murder by reason of section 22 of the Penal Code.

In the course of reaching his conclusions the learned trial judge rejected an argument in favour of the appellants that they had acted under a mistake of fact within the meaning of section 11 of the Penal Code. He dealt with the argument in these words:

'I have given my most careful consideration to this line of defence and have taken the view that in the circumstances of the case the expression "an ordinary person" shall mean an ordinary person of the community to which the accused belonged and I am satisfied that the accused cannot honestly and reasonably have believed that the police party, led by Inspector Smith, dressed as they were in regulation police uniforms, had come to Chapaula Village for the purpose of attacking them and destroying their village.'

The grounds upon which the appellants have appealed to this Court are substantially that the learned trial judge erred in rejecting the defence of mistake under section 11 of the Penal Code and in refusing to admit evidence relevant to that defence. The alleged mistake on the part of the appellants was that they and the other villagers violently attacked the police in the belief that the police had come to their village for the purpose of expelling them forcibly in execution of the Government instruction, referred to above, and of destroying them in accordance with the policy of Government and the political party from which the members of Government were drawn. The argument, based on the alleged mistake, was that the belief of the villagers under which they forcibly resisted the police rendered their resistance lawful, so that their common purpose was not unlawful and the killing of Inspector Smith was a justifiable or excusable homicide, or, if the homicide were not justifiable or excusable, it was the result only of excessive force having been used, and it was manslaughter only on that account. The second appellant also appealed on the ground that his first statement to the police should have been excluded from evidence by the trial judge in the exercise of his discretion. The learned trial judge's disbelief of the appellants' evidence was also made a ground of appeal.
As indicated from the recital of facts, some evidence relevant to the issue of mistaken belief was admitted in evidence, whether deliberately or inadvertently does not appear. As will appear later, that evidence was sufficient, in my judgment, to enable a proper determination of the issue to be made. Consequently, it seems to me to be necessary to notice only two exclusions from evidence which were made grounds of appeal.

The first is that the learned trial judge refused to admit evidence as to the conduct of the police when they returned to the village, on the day following the tragedy, in order to recover Inspector Smith's body. As we were informed, this evidence would have shown that the police approach to the village was by way of attack and indiscriminate slaughter, and it was argued that it was relevant as supporting the appellants' belief that the police were the aggressors on the fatal day.
In my judgment, the learned trial judge rightly rejected that evidence. It was irrelevant as the events to which it related could not have had any influence upon the appellants' state of mind at the time of anterior events.
[1] The second rejection was of evidence by the kapasu as to the orders which were given to the Boma messengers when they were despatched to the village. That evidence was rejected as hearsay. In my judgment, it was clearly not hearsay. If A delivers a chattel to B, both A and B can depose to the fact of delivery and receipt of the chattel, as can a third person who was present and witnessed the delivery and receipt. What difference is there really between such acts and the giving of a verbal order by a superior to a subordinate? Insofar as the order contains allegations of fact, the evidence as to the giving and receipt of the order and its terms is no more than hearsay as to the truth of the allegations and clearly is not admissible as to them. But I can see no reason why evidence by the recipient, or by a third party who was present and heard the order given, is not admissible as to the facts of the giving and terms of the order when those facts are relevant to a matter in issue. So far as my experience goes, such evidence is continually admitted before courts martial. The point seems to me to be clearly covered by the decisions of the Privy Council in *Subramaniam v Public Prosecutor,* 1956, 1 WLR 965 and the Court of Criminal Appeal in England in *R v Willis,* 1960, 1 All ER 331. In the former case, the accused was charged with possession of firearms without lawful excuse, and evidence was brought on his behalf, in support of a plea of duress, of what had been said by terrorists. The trial judge had held that the evidence was not evidence but hearsay. In giving the opinion of the Privy Council that the appeal should be allowed, Mr Da Silva said:

' Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.'

That passage was quoted with approval and applied by Lord Parker, CJ, when giving judgment for the Court of Criminal Appeal in *R v Willis supra*.

Nonetheless, I am of the opinion that the rejection of the evidence was right. The ground of that opinion is that the evidence was irrelevant, as what was relevant was not the instruction which the Boma messengers received but what they told the villagers.

The ground of appeal relating to the learned trial judge's reception of the second appellant's first statement to the police also requires comment. That statement was made, partly under caution, after the appellant had been some days in police custody for his own protection. Its admission was objected to on the ground that it had not been made voluntarily, in that it had been extracted by threats and violence. After a trial within a trial, the learned trial judge found that it had not been made as alleged. In the course of giving his reasons for so holding, he stated erroneously that the *onus* was on the accused to prove that the statement had not been made voluntarily. Later, however, he corrected that error by deciding that he was satisfied beyond reasonable doubt that the statement had been made voluntarily. Having regard to the circumstances here, there is no ground for challenging the learned judge's final conclusion that the statement was admissible, once he was satisfied that the alleged threats and violence had not been used.

As stated, the ground of appeal was that the learned trial judge wrongly failed to exercise his discretion by excluding it. I can see no substance in that. [2] While a judge has a discretion to exclude admissible evidence, it is a discretion which should only be exercised when it appears clearly that the evidence in itself or by reason of the circumstances in which it was obtained has an unfair prejudicial tendency against the accused out of all proportion to its probative value. Here the only circumstances relied upon as rendering the statement in question unfair is that it was taken or obtained after the second appellant had been in custody. It was not suggested by the evidence, however, that he was improperly questioned or otherwise improperly treated within the period of detention, apart from the use of violence - and the use of violence was disproved. Moreover, the custody was apparently with the appellant's consent and for his own protection.

The common grounds of appeal call for a consideration of both section 22 of the Penal Code, by virtue of which the appellants were convicted, and section 11 of the Penal Code, under which the defence of mistake was raised.

Section 22 of the Penal Code is as follows:

> ' When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.'

To bring an appellant within that section as being guilty of murder, the following facts must have been proved against him beyond reasonable doubt:

(i) That two or more persons, of whom the appellant was one, each formed an intention to prosecute a common purpose in conjunction with the other or others.

(ii) That the common purpose was unlawful.

(iii) That the parties, or some of them, including the appellant, commenced or joined in the prosecution of the common purpose.

(iv) That, in the course of prosecuting the common purpose, one or more of the participants murdered a person, that is:

(a) in terms of section 21 of the Penal Code, caused, or participated in causing, the death of a person;

(b) by a voluntary act which was done without legal justification or excuse, with malice aforethought as defined by section 180 of the Penal Code, and without provocation as defined in sections 182 and 183 of the Penal Code.

(v) That the commission of the murder was a probable consequence of the prosecution of the common purpose. [3] It would seem that a probable consequence is that which a person of average competence and knowledge might be expected to foresee as likely to follow

upon the prosecution of the particular purpose; though it may be that the particular consequence was not intended or foreseen by the appellant. (An adaptation of the dictum of Starke, J, in *Brennan v The King,* 1936, 55 CLR 253 HC at 261.)

Two points affecting the application of the section need to be noted:

(i) [4] The formation of the common purpose does not have to be by express agreement or otherwise premeditated; it is sufficient if two or more persons join together in the prosecution of a purpose which is common to him and the other or others, and each does so with the intention of participating in that prosecution with the other or others.

(ii) It is the offence which was actually committed in the course of prosecuting the common purpose which must be a probable consequence of the prosecution of the common purpose. If a different offence to that committed was a probable consequence an accused cannot be convicted under the section. Thus, if the offence actually committed was murder but the offence which was a probable consequence was manslaughter, the section does not apply. (*Tenson Simukona and others v Regina,* N.R.C.A. Cases 105, 106, 107 of 1964; *Brennan v The*

King, sup. at 264 per Dixon and Evatt, JJ.) Stated another way, if the offence charged is murder and that offence is proved to have been committed but it was not a probable consequence of the common purpose, the section does not operate to enable any one to be convicted of any offence, though, of course, those proved to be guilty of murder or manslaughter by reason of section 21 of the Penal Code may be convicted. If on the other hand, the offence proved to have been committed on the charge of murder was a manslaughter, and manslaughter was probable consequence of the unlawful common purpose, all participants in the unlawful common purpose are liable to conviction of manslaughter under section 22.

Pausing here, it is to be noted that, subject to consideration of the grounds of appeal relating to the learned trial judge's disbelief of the appellant's evidence and to mistake, and of his rejection of provocation, the convictions cannot be impeached. The only conclusions to be drawn from the evidence relied upon by the prosecution as to the circumstances in which Inspector Smith met his death are: All the appellants joined in the prosecution of a common purpose to attack and pursue to his death Inspector Smith: Inspector Smith had come with his patrol for a lawful purpose and, accordingly, the common purpose of the appellants was unlawful: the homicide of Inspector Smith was murder: and that murder was a probable consequence of the unlawful purpose.

The ground of appeal relating to the learned trial judge's disbelief of the appellants' evidence was that he was wrong in not believing a word of that evidence, and that, consequently, he did not give it proper consideration, at least in respect of the first, third, fourth and fifth appellants. Those appellants had deposed, in their evidence in chief, that they did not join in the pursuit of Inspector Smith but only came upon him when he was dead. Unless that evidence was properly disbelieved, none of the four appellants had been proved, it was suggested, to have joined the common purpose until after the Inspector's death, and, consequently, they were not caught by section 22 of the Penal Code.

The learned trial judge's disbelief of the appellants' evidence was obviously stated in far too sweeping terms. That evidence, *inter alia*, referred to friction having existed between members of the Lumpa sect and members of the political party known as UNIP. In that respect it at least was true, as the existence of such friction is so notorious as to be a matter of judicial knowledge.

Nonetheless, this Court must assume that the learned trial judge directed his sweeping and, on their face, inaccurate remarks to the evidence of the appellants in respect of the stages of their participation in the actual attack on and pursuit of the police, and not to matters antecedent to any preparation which may have been made for the attack. I am confirmed in that assumption by the learned trial judge's obvious concern not to allow the trial to become an inquiry into the relationship between the Lumpa sect and UNIP.

CHARLES J
Apart from that, it seems to me apparent from the record that the appellants' evidence as to the stages of their actual participation in the attack on and pursuit of the police was false. Each admitted to the police that he had joined in the pursuit of Inspector Smith before he died and most repeated their admissions as to that in cross - examination.
It follows that the question whether a joining in the continuation of the common purpose by an appellant only after Inspector Smith's death would have attached responsibility for that death by reason of section 22 does not arise. As I have indicated, the evidence from the State's witnesses clearly manifested that all the appellants had a common purpose to pursue Inspector Smith, as well as other police, to their death, and that they joined in the prosecution of that common purpose. Consequently, whether an appellant actually struck Inspector Smith or did not strike him until death had already occurred, is irrelevant to his responsibility under section 22 for that death, and his responsibility under that section depends entirely on whether the common purpose was unlawful and if it were unlawful, whether the homicide was in circumstances amounting to either manslaughter or murder.
I turn now to the defence of mistake.
Section 11 of the Penal Code is as follows:

'A person who does or omits to do an act under the honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
The operation of this rule may be excluded by the express or implied provisions relating to the subject.'

It was not suggested in argument that the operation of the rule was excluded in relation to homicide by implication from the sections of the Penal Code relating to the subject and, in my judgment, there is nothing in those sections rendering such an implication necessary.
[5] The rule expressed in section 11 follows closely the language in which a similar rule under the common law has been expressed by eminent judges. If the authorities on the common law rule are taken at their face value, they indicate that it applies as a defence in the strict sense, that is by way of confession and avoidance, with the result that the *onus* of establishing it, on the preponderance of probabilities, is upon the accused. (See *R v Tolson,* 1889, 23 QB D. 168, 1886 - 90, All ER Rep. 26; *R v Malcolm Mark and others,* 1961, Criminal Law Review, 173; *R v King,* 1963, 3 All ER 561, at 563 per Lord Parker, CJ; *Thomas v The King,* 1937, 59 CLR 288 H.C.; *R v Bonnor* 1957, V.R. 227, noted 31 ALJ 468; *The Queen v Reynhandt* 1962, 107 CLR 381, HC at 389, 396, 399.) Those authorities all relate, however, to statutory offences, such as bigamy and assaulting a police officer in the execution of his duty, which had been created in terms which were regarded as not making the form of *mens rea* covered by the alleged mistake an element of the offence and the statutory provisions were construed as permitting mistake to be proved as a defence. Full *mens rea* however, is a constituent element of both the offence of manslaughter and the offence of murder by reason that the absence of legal justification or excuse by way of self-defence is an element of both crimes, and the existence of malice aforethought is an element of murder. Consequently, when the issue of mistake of fact on the part of an accused is raised on a charge of either crime, it is not really raised by way of confession and avoidance but by way of a traverse of the implicit allegations in the charge that legal justification or excuse did not, and malice aforethought did exist. In such cases, therefore, *Woolmington*'s case, 1935, AC 426 applies, so that, while the accused who relies on mistake of fact as a defence has the burden of adducing or pointing to evidence as raising the issue, the prosecution, once the issue is raised, has the ultimate burden of proving beyond reasonable doubt that there was no mistake or, if there was, it was not reasonable. (Cf. *R v Mkize,*1951, 3 SA 28; Cross on Evidence, 2nd Ed. at 7, note 1, Turner, Russell on Crime, 11th Ed. Vol. 1, at 278; Glanville Williams, Criminal Law, 2nd. Ed. at 910.) Even in the case of such statutory offences as bigamy and assaulting a police officer in the execution of his duty, the *onus* in respect of a defence of mistake may have to be reconsidered with regard to the Privy Council's expressed distaste for implying *mens rea* into a statute only as permitting a defence which has to be established in favour of the accused instead of as an element of the offence which has to be proved against him. (*See*

Lim Chin Aik v Regina, 1963, 1 All ER 223, at 226. That expressed distaste, incidentally, supports the conclusion of Dixon, CJ, in his dissenting judgment in *R v Reynhandt, supra*, that knowledge that a police officer was such is an element of the offence of assaulting a police officer in the execution of his duty.)

It follows, in my judgment, that, if there were evidence before the Court that a particular appellant may have acted under a reasonable but mistaken belief as to the existence of facts which, had they existed, would have entitled him to an acquittal or to a finding of guilty of manslaughter only, that defence could only be rejected in respect of him if the evidence established beyond reasonable doubt one or both of the following negatives:

(a) that he did not act under such a belief;

(b) that, if he did act under such a belief, the belief was not reasonable.

In that statement, I have omitted reference to the word 'honestly'. It appears to me that the word adds nothing to the section. Either a belief is held or it is not held at any relevant time. If a person later falsely claims to have held a particular belief, his claim is false, and may be dishonest, but the falsity does not affect the fact that his belief was non-existent at the relevant time.

[6] The precise meaning of 'reasonable' in the Penal Code in relation to a belief or reaction is a question of some difficulty. Is it to be determined by the standards or beliefs and reactions of the ordinary man of the community to which the believer or actor belongs, or by some other test? It is significant that in section 183 of the Penal Code the Legislature specifically referred to the former standard, without use of the word 'reasonable', when it intended that standard to be applied in determining the existence of provocation. The Federal Supreme Court (Tredgold, CJ, Lewey, F.J., and Clayden, F.J.) took into consideration a similar feature in the corresponding section in the Nyasaland Penal Code when deciding in *Attorney-General for Nyasaland v Jackson,* 1957, R & N 443, that 'reasonable' as used expressly or impliedly in that Code meant something else than reasonable by reference to the standards of the accused's community. According to Tredgold, CJ, 'reasonable' is to be determined by the standards of the ordinary reasonable man which, in England, would be the standards of the ordinary man in the street. Who is the ordinary man in the street in this part of the world the learned Chief Justice did not say, but he made it plain that such a man is not the ordinary man in a relatively primitive village. According to Clayden, F.J., 'reasonable' is to be determined by the standards of the ordinary Englishman, as that is what the word meant at common law which was the basic law of Nyasaland, as it is here. Both judges held, on their respective bases, that a belief in witchcraft was not one which the law could recognise as reasonable. Lewey, F.J., agreed that a belief in witchcraft was unreasonable but on the ground that it was not capable of recognition in law as being reasonable. The actual decision in *Jackson*'s case was followed by the Northern Rhodesia Court of Appeal, constituted by the same members as is this Court for the present case, in *Muyakwi Paul v The Queen* (N.R.C.A. Case No. 2 of 1964). On the other hand, in *Greyson v Regina* 1961, R & N 337, the Federal Supreme Court took a different view of the meaning of 'reasonable' as used in a subsection of the Nyasaland Penal Code which is identical with subsection (2) of section 182 of the Zambia Penal Code. The subsections provide that force used under provocation must bear a reasonable relationship to the provocation received for the provocation to reduce murder to manslaughter. The Federal Supreme Court held, in effect, that 'reasonable', in that context, meant 'according to the reactions of an ordinary member of the accused's community', thereby equating the word with the express provision in the succeeding section of each code for determining whether provocation itself had occurred.

In my judgment, *Greyson*'s case should not be followed on this point by this Court. I say that notwithstanding that I had followed it at first instance recently. The significance of the different wording in sections 182 (2) and 183 of the Penal Code appears to me to be too marked to be disregarded. With regard to *Jackson*'s case and *Paul*'s case, while I agree that a belief in witchcraft cannot be regarded as a reasonable belief by the law of a modern country, I think that the basis upon which Claydon, F.J., placed his conclusion in *Jackson*'s case is untenable.

The word 'reasonable', which is dear to the common and statute law of England, means primarily 'according to reason' or 'which is supported by reason'. It may be used either subjectively, that is with reference to the reason of the actor, or objectively, with reference to the reason of someone other than the actor. It is in the latter sense that the word is usually used in English law: the reason with which a belief or act must accord is the reason of the law itself, and not of the particular believer or actor, though of course the two reasons may coincide. (See the analysis on the subject in the dissenting judgment Lord Atkin in *Liversidge v Anderson,* 1941, 3 All ER 338, at 530 *et seq*.: an analysis which is not affected by reason that it is in a dissenting judgment, particularly as Lord Atkin's dissent was really to the proposition that the word 'reasonable' was not necessarily used in its objective sense in emergency legislation.) A belief or act accords with the reason of the law if it is in accordance with a positive rule of law. Thus, an act done in accordance with a positive rule of law cannot become unreasonable by being done from an improper motive. (Cf. Hardie and *Lane Ltd v Chilton,* 1928, 2 KB 306 with *R v Denyer,* 1926, 2 KB 258.) On the other hand, a belief or act which is contrary to a positive rule of law cannot be reasonable. When assistance cannot be derived from a positive rule of law, the reason of the low is that a belief or act, in order to be reasonable or acceptable, must be one which a person of average knowledge, perception, judgment and self - control would have held or done in the particular circumstances.

It follows that whether a belief or act was reasonable is primarily a question of law: it being for the judge, as such, to determine whether it is answered by reference to any positive rule of law, and if it is not, whether there is evidence of such circumstances as render it likely that the average person mentioned would have held the belief or done the act. If the judge answers the last question in the affirmative it will be for the jury, or himself when he is also the tribunal of fact, to decide whether the average person would actually have held the belief or done the act. The division of the test of the average man into a question of law and a question of fact may not be of great practical importance when both have to be answered by judge who also has to act as the tribunal of fact, but recognition of the division conduces, I think, to clarity of thought on the subject. It shows that the first word - and the only word if the answer is in the negative - on the question whether a belief or act was reasonable rests with the law, that is, the judge, by reason that the latter has to decide whether the alleged belief or act is capable of being regarded, both in itself and on the evidence, as that of the average person.

The test of reasonableness according to the standards or norms of the average person is the one which has to be applied more frequently as it is rarely that a positive rule of law can be invoked as the test. In applying it in England, no great difficulty presents itself. The judge naturally tries to put himself into the position of the reasonable or average Englishman and asks himself whether such a person was likely to hold the particular belief or do the particular act in the alleged circumstances, with the *proviso* that if the particular belief or act appears to outrage his sense of reason he will reject it out of hand as contrary to law, and not leave the reasonableness of it to be determined as a question of fact. Accordingly, a modern English judge would have no difficulty in deciding, as a question of law, that a belief in witchcraft was in itself unreasonable, despite the contrary conclusion of his seventeenth century predecessors, including the great Hale, and would direct the jury accordingly (As to Hale's belief in witches and their powers, see Stephen, *History of Criminal Law,* Vol. 1, at 380.)

The common law, however, does not partake of that insularity which, rightly or wrongly, has been attributed so often to Englishmen. Its criterion is really not the average Englishman but the average member of a modern society who is to be regarded, so far as his knowledge, beliefs and share of the imperfections of human nature will permit, as acting in accordance with reason, including with self - control. This becomes apparent when the application of the criterion to British settled colonies is considered. The colonists of America, Canada, Australia and New Zealand took with them from England the concept of the 'reasonable man' as part of their heritage of the common law. They did not apply that concept, consciously or unconsciously, with regard to the reasonable or average Englishman but with regard to the reasonable or average member of their colony who would be, in fact, an amalgam of English, Irish, Scots and Welsh; and they have continued

so to apply it with the result that, in those countries, the concept has come to be applied with reference to the reasonable or average American, Canadian, Australian or New Zealander, I accordingly feel bound to reject the basis upon which Clayden, J, placed his decision in *Jackson*'s case. That basis is a confusion of the common law rule itself with the practical result of its application in the country where the common law originated.
That rejection does not warrant, however, the acceptance of the standard or norms of the average member of the particular part or section of a community to which an individual belongs as the test of the reasonableness of the individual's belief or other reaction to particular circumstances. Such an acceptance would not only open the door to the acceptance of beliefs, such as in witchcraft, which in the light of modern informed opinion are untenable, but it would lead to confusion in the administration of the law, and particularly of the criminal law. It would also be to ignore the distinction already referred to, in connection with *Jackson*'s case, as having been made in the Penal Code by the sole express reference to the standards of the ordinary member of the accused's community in respect of provocation. It would be also to ignore that the common law concept applies to the community at large and not to sub-communities. Thus, the reasonableness of the belief or other reaction of a person accused of a crime is not to be determined by the standards or reactions of the average member of the criminal class in the community. Further, if the standards of a particular primitive community were to be applied in a particular case it could result in what to the members of that community is reasonable or unreasonable being applied in that case, notwithstanding that it may be obviously unreasonable or reasonable to more educated and informed minds.

CHARLES J
It is true that the common law does admit of an apparent exception to not recognising the standards or norms of an individual's part or section of the community in its test of what is reasonable. That apparent exception is that whether a belief or act of a person with special qualifications or training was a reasonable application of his qualifications or training is to be determined according to the standards of the average person with similar qualifications or training. The exception, however, is probably more apparent than real and is certainly of a very limited scope. In the first place, it only applies to persons who may be expected to have higher standards than average in some particular sphere of human activity. In the second place, it only applies to such persons when the application of their special qualifications or training is in question, and not to them in the everyday affairs of life - in respect of the latter, they continue to be governed by the standards or norms of the average person in a modern society.
The conclusion to be drawn from those observations is this, I think: Whether a belief or act occurring in the course of the everyday affairs of life is or is not reasonable depends, for the purpose of the Penal Code, and apart from any positive rule of law governing the question, upon whether or not it was a belief or reaction which was likely to be held or suffered in the circumstances by a member of a modern society who has average modern knowledge, average perception, average intelligence, average judgment and average self - control, and who is to be presumed to be guided, so far as the imperfections of human nature permit, by reason in the light of such modern knowledge as has extended beyond the realm of the experts into the realm of judicial knowledge. Support for that conclusion is to be found in *R v Mbombella,* 1933, App. D. 269, 14 E. & E. Dig. 52 Case No. 141 and *R v Mkize,* sup. at 34. In the former case it was said that neither the race, the idiosyncrasies, the superstitions, nor the intelligence of the person accused enters into the question whether or not a mistaken belief as to fact was reasonable. Support is also to be found in the West African case of *R v Gadam,* 14 WACA 44, where, according to Hedges, *Introduction to the Criminal Law of Nigeria,* at 9, the West Africa Court of Appeal held that it would be a dangerous precedent to recognise a belief in witchcraft as reasonable notwithstanding the local prevalence of such a belief.
[7] It is on the basis of the conclusion which I have stated that I think that the actual decisions in *Jackson*'s case and *Paul*'s case were right: a belief in witchcraft is not one which the law of a modern society can recognise as being likely to be held by an average member of such society.

It remains to add, with respect to the learned trial judge, that, in my opinion, he erred - in favour of the appellants - when he directed himself that the reasonableness of a belief had to be determined with regard to the standards of the average member of their community.

In applying the foregoing to these appeals, it will be convenient first to consider whether the facts in which the appellants are alleged to have believed would have entitled them to a different verdict had those facts actually existed. Those facts are that the police had come to the village with the intention of expelling - forcibly, if necessary - the villagers from, and destroying, their village order to give effect to the order or threat, relating to the evacuation and destruction of Lumpa villages, which was implicit in the Government declaration mentioned earlier.

If the police had come for such a purpose, they would have been acting unlawfully. On the evidence, the Government order or threat was illegal, as was conceded by the learned State Advocate in answer to a question by me. It was not until three days after the tragedy that the Government brought into operation emergency powers under the Preservation of Public Security Ordinance (Cap. 265) - *see* G.N. 374, 375, 376 of 1964. Those powers may or may not have covered the order or its execution had either been subsequent to them, but no evidence of the existence of any suggested statutory authority for the issue of the order or its enforcement prior to the coming into operation of the emergency powers was adduced. Neither was any evidence adduced that Inspector Smith had received orders from his superiors to enforce the Government order or violently to attack the villagers. Consequently, on the assumption that the police patrol came to the village for the purpose of forcibly enforcing the Government order, the State cannot involve the rule that police subordinates are bound to obey such orders of their superiors as are not manifestly unlawful, even if that rule were applicable to such a case as this.

The criminal liability of a private citizen who kills an officer of the law while the latter is doing an unlawful act is governed by the rules relating to self-defence. According to those rules, a person is entitled to use force in order to prevent another from committing treason, a violent felony, or an assault or trespass not amounting to treason or felony, provided that the force used is no greater in degree than is reasonably necessary to prevent the commission of the unlawful act. If the unlawful actor is killed as a result of a use of force in those circumstances, the homicide is justifiable if his unlawful act was treason or a violent felony, and is excusable if his unlawful act was an assault or trespass not amounting to treason or a violent felony. The distinction between justifiable and excusable homicide is historical and only of particular importance in respect of the duty to retreat, to which reference will be made later. A person is not criminally liable for either justifiable and excusable homicide. (*See Halsbury,* 3rd ed. vol. 10, pages 721 - 2.)

If, on the trial of a charge of which self-defence may afford an answer, evidence is adduced suggesting that the accused may have acted in the circumstances mentioned as constituting self-defence, he must be deemed so to have acted unless the contrary is proved beyond reasonable doubt. (*Chan Kau v Regina,* 1955, 1 All ER 266; *Regina v Lobell,* 1957, 1 All ER 734.) Hence, when the evidence raises the issue of self-defence on a trial for murder or manslaughter, at least one of the following negatives must be established beyond reasonable doubt against the accused in order to resolve the issue in favour of the prosecution:

CHARLES J

(i) That the act which caused the deceased's death was not done while he was committing or attempting to commit a treason or a violent felony or an assault or trespass not amounting to treason or violent felony.

(ii) That the act which caused death was not done by the accused for the purpose of preventing the commission of such an unlawful act as is mentioned in (i).

(iii) That the act which caused death involved the use of force in excess of what was reasonably necessary to prevent the commission of such an unlawful act as is mentioned in (i).

If self-defence is negatived in relation to a charge of murder in respect of (iii), but not of (i) or (ii) as well, the accused is not guilty of murder but is guilty of manslaughter; the reason being that the intent to act in self-defence, which is inconsistent with having acted with malice aforethought, is not negatived. (*Jackson v Regina,* 1962, R & N 157, FSC, following *Howe v The Queen,* 1958, 100, CLR 448, H.C.)

Whether the degree of force was reasonably necessary has to be determined by the same criteria of reasonableness as are applicable to beliefs; that is, subject to such positive rules of law as are applicable, according to the likely reaction of an average member of a modern society in the suggested circumstances. The positive rules of law which govern the question may be stated thus:

(a) It is not reasonably necessary, in order to avoid an unlawful arrest by a known officer of the law, for a private citizen to use such force against the officer as to cause his death. An officer of the law is vested with a peculiar protection by the law and the reasonable course for a private citizen to adopt when threatened by an unlawful arrest by an officer of the law, who he knows to be such, is to submit to the arrest and seek redress from the law itself instead of resorting to violence. If violence is used in resisting the arrest, and the officer of the law is killed as the result, the user of the violence is guilty of manslaughter on the principle applied in *Jackson v Regina,* 1962, R & N.157. (See *Christie v Leachinsky,* 1947, 1 All ER 567, at 578 - 80 per Lord du Parcq; *Halsbury*, 3rd ed. vol. 10, at 708, para. 1359.)

(b) The peculiar protection which the law affords to a known officer of the law who is attempting to effect an unlawful arrest in circumstances not amounting to a violent felony does not extend to such an officer committing a violent felony. In the latter case, the officer of the law stands on the same footing as a private citizen, and, if he is killed in the course of resistance to a violent felony, the homicide may be found by the tribunal of fact to be justifiable. (*See* Stephen, *Digest of Criminal Law,* 8th ed. Article 309; *Halsbury,* 3rd ed. vol. 10, at 721; Stephen, *History of the Criminal Law,* vol. 1, at 493 - 4.)

(c) A person is bound to retreat before resorting to the use of force, in order to avoid an assault or trespass not amounting to a treason or violent felony, if the opportunity to retreat becomes available, but he is not bound so to do, and he is entitled to stand his ground, in the case of a treasonable act or a violent felony. (Halsbury, 3rd ed. vol. 10, at 722, para. 1384.)

Here, had any appellant joined in the common purpose of forcibly resisting the police because the latter had come, or he reasonably believed that they had come, to expel him and his co - villagers forcibly from their village and to destroy the village, the common purpose, in relation to him, would have been lawful as the actions of the police would have been violently felonious. Further, the homicide of Inspector Smith would have been, in respect of the appellants, justifiable.

The evidence as to the appellants' beliefs that they were being, or were about to be, subject to a violent attack by the police, consisted of their own evidence. None of them deposed expressly to having acted under the belief that the police had come to enforce the Government order for evacuation of Lumpa villages but each deposed to having acted on the belief that the police had come to make 'war' upon them. None deposed that the resistance had been planned, and some denied that such had been done, and all indicated that their beliefs were a reaction from the noise of gunfire, the sight of dead relatives who had obviously been shot by the police and a belief that the UNIP Government was using the police in order to destroy them.

In their statements, two appellants, the first and fourth, did not refer to having acted upon any belief as to the purpose of the police, while the others indicated that resistance had been organised in the event of the police coming to investigate the chasing away of the kapasu and the messengers. The third appellant also said that the fight was because the villagers did not want to leave their village; a statement indicative that the villagers were influenced by the Government declaration. Each statement is not evidence for or against anyone but its maker, of course.

The belief to which each of the appellants deposed as having acted upon, that the police had returned to the village for the purpose of making 'war' upon them, is substantially the same as the belief which was relied upon by their counsel as supporting the defence of mistake, but expressed less precisely. Before a proper finding that any appellant did not act on the belief could be made, not only did the contradictions or apparent contradictions between his evidence and his statements to the police and his manner and demeanour when giving evidence have to be considered, but also the possibility that he did act on the belief as presented by the following:

(i) The fact that the Government declaration with its order for evacuation and destruction of villages had been published to villagers.

(ii) The fact that Inspector Smith and his patrol had visited Chapaula Village only two days before to see if the village was being evacuated.

(iii) The fact that there had been violent friction for some time between the Lumpa sect and UNIP - a fact which is so notorious as to be a matter of judicial knowledge.

(iv) The fact that the Government has been formed from UNIP - a fact which is also so notorious as to be a matter of judicial knowledge.

(v) The evidence of the appellants that the friction between the Lumpa sect and UNIP had originated with the latter; an indication, at least, that the members of the Lumpa sect believed, rightly or wrongly, that to be the case.

(vi) The tendency for ordinary villagers to regard the police as the agents both of Government and the political party from which Government is drawn.

(vii) The facts that armed police, on approaching the village, had adopted, to the later knowledge of the villagers, the course of chasing a man into the bush, and the course of chasing a woman into the village, courses which, on the evidence, were unusual.

(viii) The failure of the police to re-group before entering the village, as appears from the fact that some ran into it.

(ix) The likelihood of items (i) to (vi) creating in relatively primitive minds a sense of persecution on which items (vii) and (viii) would operate to create a belief that the police had come as instruments of further persecution by enforcing the Government order for the evacuation of Lumpa villages.

(x) The fact that primitive minds when giving evidence often varnish the truth with lies or conceal it in the belief that lies will be more effective, so that care has to be taken in rejecting the possibility of some fact, be it the holding of a belief or something else, which the evidence indicates may have existed but to which they have not deposed.

Whether the learned judge considered all those matters before rejecting the defence of mistake of fact does not appear from his judgment. It may well be that he did not. But even if he had not done so, I think that his conclusion that none of the appellants could have acted under a reasonable mistake was correct. Assuming that the appellants did believe that the police had come to attack them and forcibly expel them from their village - and on the considerations which I have itemised, their primitive minds may well have led them to such a belief - the belief cannot be regarded as having a reasonable basis according to the test of reasonableness expressed earlier. While the average member of a modern society would recognise that the police have to act only on such orders of Government as are lawful, it is unlikely that he would have assumed, in the conditions then prevailing, that the police had been ordered to launch violent attacks against villages, or so to act without first giving the villagers an opportunity to test the validity of their orders, or were acting in the role of persecuting agents of a political faction. Neither is it likely that an average member of a modern society would assume that the chasing of a woman by the police into the village - unusual though it may be - was a prelude to a violent attack upon the village.

It follows, in my judgment, that the learned trial judge was right in his conclusion that the defence of mistake failed.

There remains, however, one other question which, although it was not raised by the appellants, necessarily arises out of the foregoing considerations. That question is whether the homicide of Inspector Smith was not murder but manslaughter by reason that it was provoked by the police chasing the woman into the village. That question has to be considered with reference to whether the chasing of the woman was an unlawful act - there being no evidence that it was lawful - which was likely to provoke an ordinary member of the appellants' community to stab Inspector Smith. (See Penal Code, section 183.) The learned trial judge found that the act of the police did not amount to provocation but he does not appear to have considered the question with reference to the likely reactions of an ordinary villager to the chasing of the woman.

Nonetheless, in my judgment, the chasing of the woman was not sufficient provocation in law to reduce the homicide to manslaughter. Section 182 (2) of the Penal Code requires the court to be satisfied that the act which causes death bears a reasonable relationship to the provocation. [8] As I have indicated, while provocation itself must be determined by reference to the reactions of an ordinary or average member of the accused's community, 'the reasonable relationship' of the force used to the provocation must be determined by reference to the reactions of the average member of a modern society; and *Greyson's* case to the contrary should not be followed. In my opinion the reactions of an average member of a modern society to a known police officer chasing a woman, while he was obviously acting as a police officer, would not be to stab him but at the most to stop him and ask him his business.

It follows from the foregoing that I have had to conclude that the appeals must be dismissed by reason:

(i) That, on the actual facts, Inspector Smith was murdered in circumstances which, in law, rendered each appellant a party to the crime.

(ii) That the belief, which was alleged in favour of each appellant, as to facts which rendered the killing of Inspector Smith legally justified was not a belief which the law regards as reasonable.

DENNISON J

(iii) That an act by Inspector Smith which could well have been provocative could not reduce the crime to manslaughter on that account, as the killing of Inspector Smith cannot be regarded by the law as being the result of an act which was reasonably proportionate to the possible provocation.

Judgment

Dennison J: I have had the advantage of reading the judgment of my brother Charles before it was delivered and because of his general comprehensive review of the evidence at the outset I will not attempt to review all the evidence again, reverting later to details of it in relation to what seemed to be salient points arising on the hearing of this appeal.

I would deal first with a number of what seemed to me to be relatively less weighty matters advanced in support of these appeals, going on later to the more substantial grounds of appeal.

In the former category was the ground advanced on behalf of the second appellant, Jacob Siwila, that the trial judge wrongly admitted into evidence a statement by that appellant and that in his ruling on the issue of admissibility 'he failed to consider if he had a discretion to exclude it after having ruled that it was a voluntary statement'. It was also said in this respect that a proper exercise of his discretion would have led to that statement being excluded. As I see it the problem before the learned judge did not go much beyond a relatively simple assessment of credibility and findings of fact. I cannot see that it was necessary to go further to consider the exercise of any discretion in relation to what would appear to have been a voluntary statement held to be such upon adequate evidence.

It was submitted on behalf of the third appellant, Simon Mpuku Simukoko, and the fourth appellant, Phillimon Siwila, that the learned judge 'erred in accepting as correct against the weight of the evidence of P.W.13, Samuel Chipeta, that the first shot was fired from a

muzzle loader gun and, by inference, by a villager'. If indeed what the learned judge had to say about this part of the evidence of Chipeta was a finding of fact it could scarcely be said to be supported by adequate evidence. It was submitted for these two appellants that the evil influence of such an error would result in the trial judge inferring that it was the villagers who fired the first shot in the engagement now under consideration. I would say in this regard that it is quite clear that the passage of which complaint is made does not lie in the record as a finding of fact. It is found in the course of a general review of the evidence. Immediately thereafter the learned judge continued his review of the prosecution evidence with mention of the medical evidence as to the wounds suffered by Inspector Smith. This view of the matter seems to me to be put beyond question when at a later stage the learned judge went on to say 'This was the whole of the evidence which was placed before the court by the prosecution upon which I find it necessary to comment in this judgment'.

DENNISON J

Also in the former category it was said on behalf of the appellants Ingison Mutambo and Jacob Siwila that the learned judge wrongly excluded evidence of P.W.13, Samuel Chipeta, as to instructions which two messengers had received from a Chief prior to his visiting Chapaula Village on the 20th July, 1964. On a similar aspect of the general debate as to hearsay evidence at the trial the fourth ground advanced on behalf of the appellants Alick Jonas and Patson Muwowo was that 'the learned judge was wrong in refusing to admit evidence in cross - examination as to the intentions of the authorities with regard to the villagers and their village'. It would be convenient to deal with both of these grounds at this stage. With regard to the evidence of the kapasu, Samuel Chipeta, he had said in evidence: 'On 20th July, 1964, I was sent by Chief Chibale to Chapaula Village. The Chief said his instructions had been given to messengers. My instructions were just to accompany the messengers. I was present when the instructions were given to the messengers.' Upon objection by the learned State Advocate that evidence as to the nature of the instructions was inadmissible the learned trial judge sustained the objection on the basis that, as he put it, 'What Chief Chibale said to these messengers is hearsay'. Whatever the merits of the arguments as to whether any report by the kapasu on this matter would have been hearsay it is, in my view, sufficient now to say that it would have been clearly irrelevant and therefore inadmissible in any event. What might well have been relevant would have been what the messengers and kapasu told the villagers but not what the Chief had told the messengers.

The other ground mentioned would appear to have related to an instance at the trial when a Superintendent Vaughan, the deceased's immediate superior, was being cross - examined by Mr Gardner in an endeavour to ascertain whether or not it was the intention of the police to destroy villages occupied by followers of Lenshina. It must be said in fairness to learned counsel that this ground was not strenuously advanced on this appeal. Whatever the merits of the learned trial judge's ruling that this witness should state only what he knew of his own knowledge and not what he heard from other people, that ruling cannot, in my view of it, have occasioned any miscarriage of justice because Mr Gardner got his answers by another approach when the same witness went on in further cross - examination to say: 'I was under an officer commanding the division. He is Senior Superintendent Monteith and he is the man who gave instructions to me. I had no specific instructions to burn villages. The instructions I had were to go and see if the Prime Minister's orders were being obeyed and then report back. Between the 20th and 24th July, 1964, we did not destroy any villages.'

It was a common complaint advanced on behalf of all the appellants that the learned trial judge had wrongfully excluded evidence as to events before the 20th and after the 24th July, the date on which Inspector Smith was killed. This aspect of the trial is now viewed to a great extent with hindsight and it is easy to be wise after the event. The record of the trial has been prepared from the manuscript notes of the trial judge which form of notes cannot normally be regarded as recording everything said at a trial. Allowing for that and for the absence of any need for defending counsel to reveal the nature of the defence any earlier than is usual I would have had greater sympathy with this complaint had the record

shown any attempt by learned counsel to impress upon the trial judge, as was emphasised before this court, the importance of admitting more evidence than he was prepared to allow for the purpose of supporting what was later to become apparent as the important defence of honest and reasonable but mistaken belief within the contemplation of section 11 of the Penal Code. This court allowed the appeal to be argued on the basis that there had been a ruling at the trial aimed at the exclusion of evidence as to events prior to the 20th July and after the 24th July, 1964. It is apparent from the form of questions asked and answers given in evidence that some such ruling had been given. See, as one example of many, the mention of those two dates in the extract from Superintendent Vaughan's evidence which has just been quoted. The judgment contains this passage:

' From the outset of this case I have declined to allow it to be turned into a commission of inquiry into the causes of the differences between the Lumpa Church followers and the members of the United National Independence Party and I have endeavoured to confine this inquiry to investigating the circumstances surrounding the death of Inspector Derek Smith.'

That was in general terms an approach which one can appreciate. It has been urged on this appeal that the limitation of evidence to events between the 20th and 24th July, both dates inclusive, hampered the defence in proving honest and reasonable beliefs of the appellants that, in summary, there had been a history of violent action between Lenshina followers and members of the United National Independence Party, that political party provided the Government in power last July, that Government controlled the police force and members of the police force arrived at Chapaula Village on the 24th July, 1964, to make war on the villagers, attacking them with firearms and killing some of them. As to events after the 24th July the trial court and this court know little of what transpired and I would say that evidence of such events was properly excluded. The evidence to be relevant had to be close in time or circumstance or both and evidence of events after the 24th July would have had to be related to the death of Inspector Smith very closely indeed to be relevant. As I see it his death introduced a new factor, a completely new circumstance. What happened thereafter could not properly be related to evidence of the state of mind of all or any of the appellants at the stages when Inspector Smith was fatally wounded.

As to evidence of events before the 20th July, or, indeed, any other date arbitrarily chosen at a stage prior to the 24th July, it would appear that the persistence of defending counsel brought in sufficient evidence as to events to complete for any court an adequate picture of the state of mind of these members of the Lumpa Church *vis-a-vis* the United National Independence Party. In addition to what was adduced in this respect by the efforts of learned counsel, it must surely be notorious and properly meriting judicial notice that there had existed, unhappily, a history of violent action between members of the UNIP and members of the sect to which the appellants belonged. [9] [10] Apart from personal experiences of the judges in the course of their duties one may note and apply to this country the view expressed in *R v Aspinall,* 13 Cox's CC, 563 at 571 - 'But judges are entitled and bound to take judicial notice of that which is the common knowledge of the great majority of mankind....' Although the learned trial Judge took a view of their evidence to be mentioned in a moment, there lies in the record also the evidence of the appellants themselves, which evidence was considered, and which sets out their views as to a threat from members of the UNIP and as to their beliefs that the police were making war upon them. There is nothing to show that this knowledge of earlier history, thus known to the trial court in various ways, was not adequately considered. With reference to a defence under the provisions of section 11 of the Penal Code the learned judge said:

' I have given my most careful consideration to this line of defence . . . and I am satisfied that the accused cannot honestly and reasonably have believed that the police party, led by Inspector Smith, dressed as they were in regulation police uniforms, had come to Chapaula Village for the purpose of attacking them and destroying their village.'

Having regard to these matters I would conclude that no miscarriage of justice resulted from any exclusion of evidence as to events after the 25th of July or prior to the 20th of July, 1964.

That mention of the view taken by the trial judge of the defence evidence at the trial leads on to mention of what he said in this regard and what was said of it on appeal. Having reviewed all the other evidence and mentioned his attention to the statements which were put in evidence the learned judge turned next to the evidence of the appellants, and said:

' Let me say at once that I was most unfavourably impressed by all the accused, and I do not believe a word of their evidence. I will go further and say that it is some time since I had the experience of observing such a set of clumsy yet determined liars. Accordingly, I completely reject the evidence of the accused and accept the evidence of the prosecution witnesses as to what took place on that fateful afternoon of the 24th July, 1964.'

In this instance I find it an unfortunate choice of words to say in such wide terms that not a word of the prisoners' evidence was to be believed and learned counsel were well entitled to argue upon its significance. There must have been some parts of their evidence which were not shewn beyond question to be untrue. On reading that passage as a whole I would be satisfied, however, that its general effect is to indicate what is sometimes expressed as the view that a trial court rejects that part of the defence evidence in which it is seen to conflict with the evidence for the prosecution. That effect in the passage quoted seems to me to be apparent in its concluding sentence, which shows a prior balancing of the evidence and the final conclusion that the evidence of the prosecution witnesses is to be preferred as to the evidence of 'what took place on that fateful afternoon of the 24th July, 1964'. The evidence of the appellants themselves lies in the record and this court may consider it in relation to the whole.

I would turn next to what appeared to me to be the more substantial matters raised on behalf of the appellants and would, in this category, consider first the lawful qualities or otherwise of the activities of the police patrol led by the late Inspector Smith, and in this respect I conclude that there was no such unlawful aspect to their activities as would merit serious consideration of the defences of, for example, provocation or self-defence. A complaint was based on the facts that Inspector Smith led his patrol in chasing a man who had been seen hiding in the bush near Chapaula Village and that when he entered the gap in the stockade which surrounded three sides of the village, Smith chased a woman for some distance. On the hearing of this appeal it was conceded by the learned State Advocate that there was no statutory authority extant on the 24th July last to warrant any use of force outside what is normally lawful on the part of police officers at times when special emergencies are not recognised by law. It was not until the 27th July, 1964, that the Governor notified a state of emergency and published in Government Notice No. 375 of 1964, the Preservation of Public Security Regulations, 1964, which were applied to the Northern Province and the Lundazi District of the Eastern Province. So none of the extraordinary powers conferred by those regulations were available as authority for any action taken by police or other public authorities prior to that last - mentioned date. According to the Superintendent Vaughan mentioned earlier: 'It was the intention of the Government to move the people from their villages' and this had been announced in a notice issued by some administrative authority conveying advice to local people in the district. This document was mentioned at the trial and one of its paragraphs was read at the request of defending counsel. The learned State Advocate agreed with me on this appeal that one could regard the document as a sort of circular of advice and information put out by the administration for the information of the local people. This Court called for a copy of it and had it available in its full text under the authority of section 17 *(a)* of the Federal Supreme Court Act, 1955, which applied to these appeal proceedings. Superintendent Vaughan went on, in cross - examination, to mention the general instructions to the police which have been quoted earlier in relation to the admissibility of hearsay evidence. He said, also, that Inspector Smith was an experienced police officer who had been in the Mobile Unit for three years, first of all as Second - in - Command of a platoon and later as a platoon Commander. I saw, on the evidence as a whole, no question of any unlawful activity on the part of the police up to the stage where Inspector Smith and members of his patrol saw the man hiding in the bush near the village. Nor do I find the subsequent chasing of this man to have been unlawful in the following circumstances. The kapasu, Samuel Chipeta, spoke of the party seeing 'a man hiding near an anthill in the bush'. Constable Nkata spoke of this man dropping his spears as he was

running away. A Constable Nundwe said: As we were going along I saw a man. He was sitting down hiding. This person saw us and started running away. We chased him. I went to the place where I had seen him first. There I found a spear, a piece of stick on which a cycle chain was attached.' These items were later put in evidence at the trial. According to the witness, Acting Assistant Superintendent Harris, mobile police were in the area in question 'because there had been disturbances in the villages where police had been attacked'. The third appellant, Simon Mpuku Simukoko, knew of the sentinel hidden outside the village and confirmed his running away. Under cross - examination he adopted an earlier statement made to the police as to the activities of this sentinel and his throwing away of his weapons. As to the woman, the only surviving eye - witness who was in a position to give evidence about her was Constable Nkata, P.W.10. He said 'When we got near the entrance to the village I saw a woman. She was running into the village from the entrance to the stockade. I was twenty yards from the entrance. When I saw this woman I saw Inspector Smith start running after this woman. He took off his hat at the entrance to the stockade and put it on the ground. I picked up his hat and followed him, running inside the stockade. At this time I could still see Inspector Smith since I was only a short distance behind him. After he had passed the stockade for a distance of about fifty to sixty yards I saw Inspector Smith had been struck with a spear.' Cross - examined by Mr Carruthers the same witness said 'Before the man threw the spear at Inspector Smith, Inspector Smith had not done anything against any villager. I think that when that woman saw us she ran away. I saw Inspector Smith run after her. The woman had done nothing wrong and she got inside the village. When Inspector Smith chased the woman it was near the village The police did not shoot before the spears were thrown.' It seems probable that this woman was not visible to members of the platoon further away from Inspector Smith than was Nkata and that the others could not see through the four - foot gap in the stockade until they reached it. Why Smith should have 'put' his hat on the ground remains a mystery. There is a deliberate quality about the word 'put' as distinguished, for example, from the word 'threw'. Constable Banda, P.W.11.,could see this incident of the hat and said of it: 'It was a stockade village. When Inspector Smith came up to the stockade entrance he took off his cap and put it on the ground, then went inside the stockade. It was a bush hat. Inspector Smith threw it down on the ground. P.W.10 (Nkata) also entered the stockade. I saw him. When P.W. 10 got to the entrance to the stockade he picked up Inspector Smith's hat, then I entered the stockade. When I went through the entrance to the stockade I saw Inspector Smith had reached the house where he was speared. I did not see the spear actually being thrown at him. I saw the spear sticking out of the small of his back.' By the time that witness had gone through the entrance to the stockade Inspector Smith had a spear in his back and a woman was advancing on Constable Nkata with a panga in her hand. There can, of course, be no suggestion from the evidence that she was the same woman as had been chased by Smith.

Why that first woman ran away remains a mystery. She could have been acting as sentry at the gate and run to give warning or run away with a sense of guilt or because of something which had been said. The truth of it cannot be determined for present purposes. On the face of the evidence I would say that Inspector Smith's action in this regard was lawful and see no clear evidence upon which a court could have a reasonable doubt upon it. There is open, to the contrary, an inference that if there was any aggressive intent on Smith's part towards that woman it is unlikely that, having first seen an armed sentinel run away, an experienced platoon commander would have entered the stockade area alone without re-grouping his patrol and disposing it tactically for a more cautious method of approach or at least asking Constable Nkata to cover him or help him in some way. As it was, Nkata did not even know 'the drill' for the visit to that village.

All in all, in this regard, the evidence does not seem to me to show that the police patrol had behaved in any unlawful manner such as would raise any reasonable doubt as to the legality of the manner in which Inspector Smith exercised his normal authority as a police officer. The shooting by other police officers developed generally after Smith had a spear in his back and Nkata had been attacked with a panga. For these and for additional reasons to be mentioned later as to pursuit of the police party, I would find that the defence of self-defence was not properly open to the appellants, nor was the defence of provocation,

which might have been raised in an attempt to reduce the finding to one of manslaughter. Viewing the evidence as a whole it appears that the first sign of violent physical attack was in the form of the attacks upon Inspector Smith with a spear and, later, upon Constable Nkata with a panga, mingled, possibly, at some stage which cannot be determined with a shot of undetermined origin.

To justify the conviction of each of the six appellants it was necessary that the evidence should have proved to the extent that a court could feel sure of it, their joint participation in prosecuting a common purpose within the terms of section 22 of the Penal Code.

One part of the evidence in this regard lies in the statements of the appellants put in evidence by the prosecution without objection, save in one instance, and in the telling use of those statements for the purpose of cross - examination. Nothing said by any one appellant, about others in the course of these extra - judicial statements may be regarded as evidence against those others. Assessing their statements on that basis with their own evidence and with the prosecution evidence of circumstances and the actions of the appellants on the afternoon in question I would find that a court could properly discern the necessary degree of proof of each of the appellants prosecuting a common purpose within the terms of that section.

The first appellant, Ingison Mutambo, made two statements which were recorded by the police and admitted in evidence. He said that as soon as he heard a shout of 'War, war' he collected a spear and an axe and went to where the firing was going on. He said, 'When I arrived where the firearms were being fired I found that Yonamu had already died on the ground, I saw a big crowd where a European Police Officer was, all those people who were at the European Police Officer were spearing him with their spears, and myself I cannot tell lies I also speared once with my spear on his back, he was already dead when I speared him on his back'. In his evidence he said that while mixing mud for his house he heard the sound of guns and shouts of 'War' and ran towards that area carrying a spear. He later thrust the spear into the deceased. Cross - examined by Mr Gardner he said 'I thought the police had something to do with UNIP. He was the only European I saw on that day. I regarded him as the leader of the African police. If I had not chased the police, I thought they would kill us all. I decided to kill their leader. As a result, all the rest ran away.' Cross - examined by Mr Carruthers he said 'I ran out armed. I heard there was war in the village. I carried a spear for my own protection. To protect myself from enemies. To protect myself from the police. If they see me carrying a weapon they might run away. Before I picked up the spear I heard people shout "There is war. The police are firing at us and killing us." When I stabbed Inspector Smith the body was not moving. Other people had stabbed him first.'

The second appellant, Jacob Siwila, made two statements which were recorded and admitted in evidence. In answer to the charge he began by saying 'I cannot deny; we killed him'. In his earlier statement he had explained preparations in Chapaula Village for 'a big fight with UNIP one day' and the later advice from their leader as to a possible visit by police including the advice 'if they do, don't be afraid, you must fight as hard as you can'. This appellant acting on his leaders' instructions went to his house and collected his spear. According to his statement, on an alarm as to the police arrival and a call to get ready he ran to where the police were, saw the European Police Officer speared, joined in the pursuit and subsequent further attacks and stuck a spear into Smith when he was already dead. In cross - examination at the trial he alleged variously that the statement had been forced from him or lured from him by promises of favour or contained what he never said. Cross - examined by Mr Gardner he said 'When I first saw those policemen there I thought they would kill us. I only saw one European Police Officer there. I thought he was the leader of the police. I attacked that European because I thought the police would kill me.' The third appellant, Simon Mpulu Simukoko, made two recorded statements, translations of which were in evidence as Exhibits S.2 and Z.2. In the latter he too told a story of martial preparations and the later instructions of their leader to go and fight the policemen who were coming to their village. Like others he ran and fetched a spear and an axe. He saw the European officer struck with a spear by a man who was then shot by that officer and later himself hit the European on the left thigh with an axe. In examination - in - chief he said 'At 1 p.m. on 24th July, 1964, I went to another gate

at the other side of the village. I mean at the southern side of the village. It was where the stockade was not completed. We were many who were there to build more stockade. I heard Lameck Simbeye shout. He shouted "Come here, policemen have come." We all went to where Lameck Simbeye was. He was on the eastern side of the village inside the village. He was inside the village, among the houses. When I arrived there he was close at that place. He said to us "You are here. The policemen have come." He did not say anything else to us when we got to him but we started running to where the policemen were.' He later said that when he heard a gunshot and a call from the village leader he ran to the leader carrying a spear and an axe. There were dead men on the ground and the policemen were running away. He struck the European with an axe when he was already dead. Cross - examined by the learned State Advocate he admitted parts of the statement which was translated as Exhibit Z.2 as being true but later alleged that the statement had been forced from him and went on to say variously that it was true and was not true. He was a member of a crowd carrying spears, chased the European and another police officer and struck the European on the right thigh with an axe. He also said 'I chased that European with the intention of killing him after I caught him. I wanted to kill him because he fired a gun in our village. I was very angry at the time.'

The fourth appellant, Phillimon Siwila, made two recorded statements of which translations were admitted in evidence as Exhibits T.2 and V.2. In the latter statement he said that he picked up his axe and left his house in response to a cry of 'Come out, some policemen have come in the village'. In the village firing guns near the gate were a European police officer and an African constable. He saw the people in the village running towards where the European was, carrying spears and axes. He said 'I also started running towards the gate where my friends were running. When I reached where the European was I saw a woman Namwipa Nachela axe the European in the shoulder. I then saw the European running towards the stream. Then the whole group started to chase the European. The European fell down because he tripped in the grass.' The combined effect of his two statements indicates that he agreed to having speared an African constable but not the European officer. In his evidence - in - chief he said that on a shout of 'Policemen have arrived' he heard a shot, picked up an axe and ran to the sound of the shots. The axe was only for his own protection. He saw policemen running out of the stockade. 'The whole crowd ran out of the stockade. I stopped running when I found the European had fallen. This was the first time I saw the European. I found him dead. There was a crowd of people there, Chapaula villagers. I struck that European with a fish spear on his right shoulder.' Cross - examined by the learned State Advocate he said 'No. The European police officer was alive when I first saw him. The European police officer was also firing a gun. It was a revolver he was firing. After this I did not see what the European was doing. He started running away. When the European ran away we chased him. We chased him because he killed our relatives. If we caught him we intended to kill him as we were angry. I was carrying an axe.' He went on to say 'I was armed with an axe when I chased that European. I first struck the European at a time I cannot remember. I only struck him once. When I struck that European he was lying face - downwards. I struck him with my axe. I struck him with a fish spear that morning. I remember saying that to Mr Smallwood. I forgot that I had struck him with a fish spear and I said I struck him with an axe. I struck him with a fish spear. I just got a fish spear from a friend. I got it from a deceased person. I got the fish spear from a dead friend, as we were running along. When I chased that European I was carrying both a fish spear and an axe. I attacked that European because it was a war.'

The fifth appellant, Alick Jonas, made two recorded statements, translations of which are in evidence as Exhibits N.2 and V.2. In the former, after being charged, he did not mention any preliminary preparations for war but described how the first attack in the village was by a villager on Inspector Smith and that it was then when a woman took up the panga. He went on 'Then Patson Silwimba speared this European on his back with a spear. The European started to run away. I and other people chased him and near the stream the European fell down. I then speared him with my spear but although I speared him he was already dead. Then it is not me who killed him, I speared him after he had already been killed by the spears of my friends, but I am not denying that I speared him.' In examination - in - chief he mentioned a call of 'There is war' from the village leader, how he joined in

the chase of the police and how he stabbed a dead European with a fish spear. In cross - examination by the learned State Advocate he maintained that the statement already referred to had been forced from him, that part of what he had then said was not true and that his statement after being charged only contained what he had heard from friends.
The sixth appellant, Patson Muwowo, made two recorded statements of which translations lie in the record as Exhibits O.2 and W.2. In the former, made after being charged, he mentioned no participation in any attack on the police and said that he had been shot and injured at an earlier stage of the shooting while sitting outside his house. In the statement made earlier he had described his attendance at a meeting and his joining in the general agreement as to some messengers that 'if they return and want to fight we shall fight with them'. He described the selection and posting of guards round the village and a shout between noon and 1 p.m. on the 24th July of 'The policemen are coming'. The villagers chased the policemen later and the statement went on 'We all then started chasing the European. Some were carrying axes and some spears. This European was with other African policemen who were also running towards the Nkanka stream. Whilst the European was running away Patson Silwimba speared the European in the back. The European fell to the ground. We reached where the European was and we all started spearing him with spears. I myself speared him with a fish spear. Everyone speared this European, not even one did not spear him. This European died.' In evidence led by his learned counsel he said that he knew of no preparations in the village on the 23rd July and was engaged in building a hut on the 24th when he heard gunshots. He said 'When I first saw the European policeman he was not inside the village. I saw him at the stream. The people chased the European to the stream. I myself went to the stream. There I found the European lying on the ground dead. I stabbed him with a fish spear. I was angry because he killed my relatives. When I first heard the police had come I thought they had come to kill us. I thought this because we were hated by UNIP. If the European had not been killed I think we would have all been killed.' In cross - examination by the learned State Advocate he said that when he heard the gunshots he carried his spear. The contents of his longer statement already referred to only came to his knowledge from what he had heard from other people. He further said in the same cross - examination: 'There was a crowd chasing the policemen when I arrived at the scene. I did not see the members of the crowd holding anything. They were chasing the policemen. I joined in the chase. If I caught the policeman, I intended to kill him. When I saw him, the European was lying at the stream. He was lying on his face. I struck him on the right forearm (witness indicates). I thought he was dead because he was not moving. This was the only reason I thought he was dead.' I would interpolate here that the equivocations of all the appellants under cross - examination no doubt justified their description by the learned trial judge as clumsy and determined liars.
On the prosecution side the local man, kapasu Samuel Chipeta had said in examination - in - chief: 'I turned round and then looked back towards the village and saw Inspector Smith coming running towards me. People were quite close to Inspector Smith, pursuing him, shouting "Jericho". Then I saw them plunge their spears into him and he fell on the ground. I do not know how Inspector Smith fell as there was long grass at the spot. When Inspector Smith fell to the ground there were people near him. These people were still thrusting their fish spears into him whilst he was lying on the ground. I could recognise some of the people I saw that day. I recognise the 2nd, 3rd, 4th, 5th, 6th and 7th accused. These six accused that day were thrusting spears at Inspector Smith at the place where he had fallen. I had also seen them chasing Inspector Smith and shouting " Jericho".' As to his mention of recognising the '3rd' accused in that context, the youth in question was convicted but is not an appellant. One might mention here incidentally that the identification of all the appellants as persons seen by prosecution witnesses to have inflicted injuries on the deceased has not been challenged on this appeal. Cross - examined by Mr Smallwood the same witness said: 'I have identified all the accused when they were chasing Inspector Smith. I knew all the villagers before. There was a big crowd chasing Inspector Smith. I could not identify the others as they are not here.' This evidence also indicates a common purpose and I would say that there is further proof of it and of a general state of readiness to fight in the evidence showing that, in what must have been

a short period while Inspector Smith ran from the gap in the stockade to the nearest huts, someone was already in ambush behind the bundles of grass stacked against the tree in question ready to spear him when he reached it. In my view the speed at which the villagers generally reacted and attacked Smith and Nkata must clearly show a prearranged plan to fight any police or messengers entering the village. Whether or not each of the appellants was, at the stage of the village being alerted, participating in the prosecution of a common purpose of which a probable consequence was the murder of Inspector Smith and it must be noted that the malice aforethought essential for proof of murder entails an intention to cause grievous harm as well as an intention to cause death, there was, in my judgment, ample proof of it as to each individual appellant by the stage when, armed with one or more deadly weapons, he was chasing the police party towards the stream and going further, willingly to inflict the injuries on the deceased or on his dead body.
As to wounds inflicted after an earlier mortal wound, in the appeal of *Chenjera,* 1960, R & N., 67, the Federal Supreme Court considered a case where the appellant had joined with a mother in a murderous assault on her child. On his own admission he knew that the mother's intention was to kill, and he further admitted that it was also his intention to kill. The injuries which caused the child's death had already been inflicted by the mother before the appellant joined in the physical assault while the child was still alive. The circumstances and the law involved there are to be distinguished from what applies in this appeal, but I would borrow with respect from what seemed to me to be appropriate comment for present purposes by Tredgold, C.J., beginning at 72 of that report:

' Suppose a situation in which an official is sent to explain an unpopular measure. A crowd gathers at first orderly. As he proceeds his listeners become more and more incensed. At length one of his hearers seizes a heavy stone and throws it at him. Immediately the thrower suffers a revulsion of feeling and refrains from further action but the crowd is roused and its members continue to pound the body with stones till the official is brutally done to death. Suppose, at the trial, the doctor says that the first stone may easily have caused a mortal wound. It is easy to imagine the bewilderment with which a verdict would be received by which the thrower of the first stone was convicted of murder and those who had ruthlessly pursued the attack were acquitted or convicted of some lesser crime. It is not putting it too high to say that, in the majority of cases arising from the spontaneous violence of a mob, it would be impossible for the Crown to prove that the victim had not received a mortal wound before an accused joined in the attack upon him. In the result, if this proof were required, a great number of people who were morally and legally guilty of murder would not receive the punishment they deserved. Conversely, it does not offend against a sense of justice that a man who joins in a murderous attack should be convicted of murder despite the fact that the person attacked had been wounded to death before he joined in.
The practical aspect may be tested in another way. Suppose that a jury was trying a group of people involved in a mob killing, and that they were directed that they could convict a number, who were in at the beginning, of murder, and a number, who only assisted after the victim was dead, as accessories after the fact to murder, but that there was an intermediate group, that had murderously assaulted the still living victim, and that these, on the medical evidence, could only properly he convicted of attempted murder; I venture to think that the situation would be regarded as so incomprehensible that a confused verdict might well result.'

[6] I would consider finally the matter of the important defence advanced in relation to section 11 of the Penal Code. The learned trial judge explained in his judgment that he had 'taken the view that in the circumstances of the case the expression "an ordinary person" shall mean an ordinary person of the community to which the accused belonged'. In my view that was not a correct approach to this matter. It is not entirely clear what original text was in contemplation in that reference to the expression 'an ordinary person'. It is not mentioned in section 11 but probably ensued from a consideration of section 183 of the Penal Code, in which there is the one and only express statutory provision of the criminal law of this country for the assessment of 'ordinary person' on that basis. It relates specifically to the measurement of wrongful acts or insults and the extent to which they may constitute provocation in murder cases. There is no comparable standard for assessing what is reasonable for the purposes of section 11 and the terms of section 18 of the Penal Code raise the strongest inference that the express and exceptional provisions of section 183 cannot be transported and read into section 11 in order to exclude the operation of the rule stated in that section. Section 18 provides:

' Subject to any express provisions in this Code or any other law in operation in the Territory, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Law.'

I think it is important to emphasise here that it is the 'principles' of English Law which have to be followed in that determination of criminal responsibility.
The importance of *Jackson's* case, 1957 R & N., 443, for present purposes is obvious. The appeal there was brought at the instance of the Attorney-General of Nyasaland, the accused man having been acquitted at his trial on the ground that, as he had killed a woman in the reasonable belief that his life was in peril as the result of her practising witchcraft against him, the killing was in self-defence and constituted excusable homicide. The terms of the section of the Penal Code of Nyasaland as to reasonable belief which were in issue there were the same as those of section 11 of the Penal Code of Zambia. In that case, Tredgold, CJ, said, at 448:

' The test of reasonableness is one that is constantly invoked in English law. In applying it, the standard is what would appear reasonable to the ordinary man in the street in England.'

In commenting further as to the measure of reasonableness he did not specifically import the Englishman into Nyasaland but said that 'bearing in mind that the law of England is still the law of England even when it is extended to Nyasaland', he could not see how, applying the proper test, any court could hold that a belief in witchcraft was reasonable so as to form the foundation for a defence that the law could recognise. On the same point Clayden, F.J., as he then was, said at 459:

' The English common law in regard to self-defence requires that the person acting in self-defence should have had an honest and reasonable belief that there was immediate danger. That belief in this case was dependent upon a belief in witchcraft. If the test whether a belief is reasonable is an objective test whether a reasonable man might have held that belief, the belief in witchcraft prevalent in an area in Nyasaland could not affect the question. For the English common law when it is applied in a Territory does not become altered because it is there applied. And there is no provision in the Code in regard to self-defence, as there is in regard to provocation, that " 'an ordinary person' shall mean an ordinary person of the community to which the accused belongs". And if the objective test based on beliefs of the reasonable man is applied, there can, I consider, be no doubt that a reasonable man would not believe that a curse of the kind under consideration would be effective to kill him.'

Later, at 461, in reference to the belief in question he said 'A reasonable man in England could not so think. That is the test which the Nyasaland Penal Code has laid down.' Still later at 461, he makes a reference suggesting that no reasonable person in England could have feared death in the circumstances apparent in that case.
One must hesitate respectfully in any comment on the views of jurists of the reputation of Tredgold, CJ, and Clayden, CJ, but having considered the views of my brother Charles I have wondered to what extent their mention of 'the man in the street in England' and a 'reasonable man in England' would have been modified had considerations now raised by Charles, J, been put before them. There can be no doubt but that the ordinary reasonable man, of the standards contemplated according to the principles of the English common law, is the person to be considered in relation to the mistaken belief of section 11, but, having regard to the way in which the English common law has emigrated, it seems to me unreasonable to import the ordinary reasonable Englishman as the norm for tests of reasonableness under the law of Zambia. In connection with this appeal I turned, without success from the point of view of pure judicial authority, to a series of articles dealing with the migration of the English common law in Vol. 76 L.Q.R, between pages 39 and 77. The articles were reproductions of talks by eminent jurists on the British Broadcasting Corporation system. In introducing them, Viscount Kilmuir, then Lord Chancellor, said:

DENNISON J

' Lastly, the common law has always relied largely on the ordinary citizen. There is the magistrate and the juror, who are not lawyers. And there is that familiar figure known to lawyers as "the reasonable man". He is the ordinary prudent person by whose standards civil liabilities are governed. Thus our lawyers and judges have a close relationship with people who are not experts practising some esoteric science. This has made them particularly aware of change in ordinary standards of conduct and thought, and a legal system which keeps in touch with those for whose service it exists is one they will hesitate to throw lightly away. Those are, in my opinion, the basic reasons why the common law has proved such a successful migrant. How it has happened you will hear from others.'

He concluded with the observation that as a result of the migration of the common law nearly one - third of the world's population are governed by laws which have the same basic principles and pointed out that all common lawyers at least speak a similar language whether the tongue they speak it in is English or Hindustani. The other speakers included Professor Goodhart and distinguished jurists from America, Australia, India, Israel (with the English common law inherited during the days of the Palestine mandate), the Republic of Ireland and Canada.

For local purposes there remains of course the firm tie of section 18 of our Penal Code but from that informal review of the way in which the common law of England has migrated and been adapted in its application in the countries of its adoption I move towards the conclusion that it would be an unjustifiable standard to bring the very Englishman from England into the legal considerations here for an assessment of reasonableness in Zambia and, for example, to put that traditional figure, well known to lawyers, the man in the Clapham omnibus, into Chapaula Village as the norm for assessment of the beliefs held by these appellants. I conclude that the standard here should be the ordinary reasonable resident of this country and that one should consider him, not necessarily as an Englishman but according to the principles of English law as to what constitutes a reasonable man. Save for the exceptional cases referred to by my brother Charles which involve attention to special qualifications or training in direct relation to criminal acts done by persons possessing such qualifications and save for the purposes of each individual case arising for consideration under express provisions such as those of section 183 of the Penal Code, as in England and in any other country adopting the common law one cannot consider for these purposes the cranks, the educated, the illiterate, the rich or the poor or any particular class. Without express statutory provision, which I hope would be rare, it would introduce a chaotic element into the criminal law to measure reasonableness on the standards of the very man in the dock or his like. One should look to a specimen typical of the ordinary reasonable man of this country, determined in accordance with the relevant principles of the English law as to reasonableness.

DENNISON J

The basis of assessment chosen by the learned judge in the instant case, namely the ordinary member of the community to which the appellants belonged, worked no prejudice to them. He used a lower standard than was justified and still found their beliefs unreasonable. Even on the higher standard which I believe should apply I have concluded that the beliefs advanced in evidence and argument on behalf of these appellants were not strewn to be reasonable beliefs within the contemplation of the terms of section 11 and that the finding of the learned trial judge on this aspect cannot be challenged.

On the preliminary subjective test as to whether or not each of the appellants mistakenly held the beliefs already mentioned the bulk of the relevant proof lies in their own evidence and statements, with possible inferences to be drawn from their prevarication under cross - examination and all in all it would be difficult to say on an assessment of the evidence adduced that the appellants did not hold the beliefs in question. The sum of their beliefs was that the police party would attack them and that they must therefore act in self-defence, although there was one incidental reference to a belief that the police would remove them from the village which they had put into such a state of defence. That they should hold such beliefs was a sad result of the times in which they lived over the year or two preceding the 24th July, 1964, but so far as the courts are concerned one may only look next to the objective test for the reasonable qualities of the beliefs which led to the fierce attack on Inspector Smith and his party.

On the earlier visit of the 22nd July, Inspector Smith and a patrol had visited the same village without any untoward result. They only spoke to about four villagers on that occasion and in this regard and with regard to the issuing of the administrative circular of advice, one cannot read too much significance into these two events inasmuch as there was little direct proof at the trial that any appellant knew of these or that his thoughts had been influenced by either. However, taking them at their best from the point of view of the appellants I cannot see that knowledge of these, either on their own or in combination with other aspects of any beliefs which were held, could have led a reasonable man to

believe that the police would attack villagers. As to the advice given on the earlier visit of the 22nd July, there lies in the record the evidence of Sergeant Moyo, P.W.14, who interpreted Inspector Smith's words to the villagers using the Tumbuka language. According to him he did little more than ask the villagers why they had not moved from the village. He contradicted the evidence of Constable Nkata suggesting that he had told the villagers that it would be bad for them if they did not move. I think that one must accept the evidence of the more senior officer who acted as interpreter and would say that even if Nkata were correct there was nothing in the words which he purported to remember which would lead a reasonable man to expect an attack, with uniformed police officers killing the villagers.
As to the informal circular of advice of which this court saw a copy it was not reproduced in the clearest of terms and its second paragraph, read or heard on its own, could have caused a certain amount of alarm as the general context was one of advice to Lumpa followers to leave their best defended villages, with Government transport to assist if available, and advice that 'people should be received peacefully and they are not supposed to be hindered. They should be assisted according to law.' There was other conciliatory advice and it was an unfortunate arrangement of the text that the second paragraph, being the first positive advice in the circular, should say: 'Lenshina's villages which are not authorised must be destroyed within one week'. Even if any appellant had heard of that circular or even of its second paragraph only and that knowledge is put with the total of his other relevant knowledge on which his beliefs were said to be based, I still cannot see that he held a reasonable belief as to an attack by uniformed police officers meriting a defence on the scale shewn in the evidence. One would see more reason in the behaviour of the villagers had there been, for example, an attempt at a parley or some preliminary shouted question to Inspector Smith when he entered the village area on his own, instead of a spear in his back from a position of ambush.
At the trial no appellant claimed to have seen the chasing of the armed sentinel or the woman so they could not claim to have had a direct mental reaction to those particular events, thereby intensifying their earlier fears. According to them and the evidence generally they reacted to some general alarm, be it shouts of 'War' or warning of the arrival of the police party, heard the sound of shooting, found two relatives dead on the ground and believed it necessary to join in the general pursuit of and attack on the already retreating police officers who included the deceased in their number. Assessing their beliefs on the basis already discussed I cannot conclude that even in the sum total of all the circumstances said to have contributed to the formation of their mistaken beliefs, these appellants committed the acts which comprised the offence under the influence of reasonable beliefs.
In my judgment, it follows that no defence was open to them under the terms of section 11 of the Penal Code and I too agreed that these appeals should be dismissed.

Judgment

Blagden CJ: The difficult question raised by these appeals is whether the appellants' defence that they were acting in self-defence under the honest and reasonable, but mistaken, belief that the police patrol led by the deceased, Inspector Smith, had come to attack them, should have succeeded in the Court below. Section 11 of the Penal Code (Cap. 6), provides that:

' A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.'

There follows a further provision which is not relevant here.
[5] No burden rested on the accused to establish their defence. The burden was on the prosecution to negative it. But it was, of course, for the accused to raise the defence in some way, either through evidence or argument, or both. Without this there would be nothing for the prosecution to negative.

The issue was raised here and two questions fell to be answered in respect of each appellant:

(1) Did he honestly believe that the patrol had come to attack them?

(2) If so, was that belief reasonable?

To negative the defence of mistaken belief it was for the prosecution to satisfy the court beyond reasonable doubt that either one or the other of these questions must be answered in the negative.

In putting forward the defence counsel for the accused sought mainly to adduce the necessary evidence through the cross - examination of the prosecution witnesses, by the evidence of the accused themselves, and through their statements to the police. At the close of the prosecution case the court was informed by the prosecutor that a certain Mr J W. Hannah was in England on retirement leave and accordingly it was impossible for him to give evidence. Mr Gardner then stated his opinion that the defence was prejudiced by the absence of this witness. No application was made by the defence to call any other witness and no point has been taken on this appeal about Mr Hannah's absence.

But it was strongly argued that the learned trial judge wrongfully excluded evidence relating to events both before and after 24th July.

What the defence wished to show was that on occasions prior to 24th July adherents of the Lumpa Church had suffered persecution from members of the United National Independence Party, which took the form of lethal violence and arson; and that on occasions subsequent to 24th July, 1964, the police had destroyed Lumpa settlements and killed and injured a number of the inhabitants. Evidence of these matters would support their claims that, with the United National Independence Party in office, and the police their servants, they had every reason to believe that they were liable to attack by the police on the orders of the Party.

An accused person is never obliged to disclose his defence until he embarks upon it. But here it would have been prudent to have done so at the first possible opportunity, and it would have made the trial judge's task easier in regard to the relevancy of the evidence which the accused wanted admitted. Perhaps the judge was so apprised; but the record does not say so. In any case, the judge was faced with a somewhat delicate situation. Whilst he had to give the accused every proper opportunity of putting forward their defence and adducing evidence in support of it, he could not allow the trial to develop into a full scale inquiry into the causes of the disaffection between members of the Lumpa Church and members of the United National Independence Party. In the result he admitted evidence of events occurring between 20th and 24th July, 1964, and ruled as inadmissible evidence touching events occurring before and after those dates. Despite his ruling, however, it is apparent from the record that evidence of matters belonging to periods outside those dates was introduced.

I think the judge was quite right to exclude evidence of what happened at Chapaula Village and elsewhere on 25th July, 1964, and thereafter. From such evidence as was let in it was clear that on that particular day the police had returned to the village, doubtless considerably reinforced, and had shot and killed a number of the villagers, captured others and destroyed the village. The accused presumably wished this evidence in to show that their alleged belief that the police had come to attack them on the 24th was reasonable in view of the fact that they did attack them on the 25th. But I am satisfied that the events of 25th July were not relevant. By that date, as a result of what the villagers themselves had done the day before, the situation was entirely changed. Police action on the 25th was therefore dictated by very different considerations.

As to events prior to 20th July, it may be that some of the evidence excluded was technically admissible in view of the nature of the accused's defence. We have been through the record carefully and noted each instance of exclusion; and taking into account all the evidence that was let in notwithstanding the judge's ruling, I cannot see that the accused were prejudiced in their defence or that any miscarriage of justice took place on account of any of the exclusions.

After citing the relevant part of section 11 of the Penal Code the learned trial judge dealt with the defence of mistaken belief in the following terms:

' I have given my most careful consideration to this line of defence and have taken the view that in the circumstances of the case the expression " an ordinary person " shall mean an ordinary person of the community to which the accused belonged and I am satisfied that the accused cannot honestly and reasonably have believed that the police party, led by Inspector Smith, dressed as they were in regulation police uniforms, had come to Chapaula Village for the purpose of attacking them and destroying their village.'

[6] The expression 'an ordinary person' does not occur in section 11. The judge was presumably testing the honesty and reasonableness of the accused's alleged mistaken belief by comparison with the reactions of an ordinary person placed in their position; and the conclusion he arrived at was that an ordinary person of the community to whom the accused belonged could not have honestly and reasonably believed that Inspector Smith's patrol had come to Chapaula Village to attack them and destroy their village.
I think that this test is open to the criticism that it unduly favoured the accused, but on this test the judge clearly came to the conclusion that the accused's belief was neither honest nor reasonable.

BLAGDEN CJ
I am quite satisfied that this is a finding which the evidence will support and I do not think, therefore, that the judge should be upset on it. He said, in the course of his judgment, as I have already related, that he had given the accused's defence of mistaken belief his 'most careful consideration'; my only concern arises from an earlier passage in his judgment in which he commented adversely on the evidence of the accused and said:

' . . . I do not believe a word of their evidence'. And
' . . . I completely reject the evidence of the accused . . .'.

This is somewhat extravagant language. Obviously the accused spoke some words of truth but quite clearly the judge was very much struck by their patent dishonesty in the box. Indeed, much of it is apparent from a study of the record. The judge had the advantage of seeing and hearing the accused give evidence and he had no hesitation in rejecting their story that they believed they were being attacked by the police. I think that finding should stand: and it disposes of the accused's claim that what they did was done under a mistaken belief. No question of the reasonableness of the belief arises because there was no belief.
I would, however, like to say something on the interpretation of the words 'honest and reasonable' as used in section 11 of the Penal Code in qualification of the expression 'mistaken belief'. I agree that the word 'honest' really adds nothing to the definition. A belief cannot be a belief unless it is honestly held. The word was clearly inserted by the Legislature here to emphasise that the defence under section 11 can only exist where the accused is acting under a genuine belief in the existence of a state of things, and not just a mere suspicion.
The word 'reasonable' presents much more difficulty. By what standards is the reasonableness to be gauged? The Legislature has given no indication. But in my view the reasonableness must clearly be judged by objective standards. I would adopt the judgment of Tredgold, CJ, in *Attorney-General for Nyasaland v Jackson,* 1957 R & N 443 when he said at 448:

' . . . to justify a killing in self-defence the belief in the reality of the danger must not only be genuine, it must be reasonable. The test of reasonableness in itself implies an objective standard. In considering whether a man's belief is genuine, the belief must obviously be examined subjectively. But to answer the question whether or not a belief is reasonable, the test must equally obviously be by an external standard.... It is the normal and the average that must be the guide.'

The Zambian Penal Code recognises this, at least by implication by making express provision in section 183, that for a special and limited purpose 'an ordinary person' shall mean an ordinary person of the community to which the accused belongs. There is a similar provision in the Nyasaland Penal Code with which the Court was concerned in *Jackson's* case. Dealing with it, Tredgold, CJ, said (at 448, 449):
BLAGDEN CJ
' Apart from such a provision the law would not recognise the existence of separate sections of reasonable persons. Each case must be referred to one norm, and this must be so or otherwise the test becomes meaningless.

Admittedly it is a somewhat difficult criterion to apply, and often involves unduly optimistic assumptions as to general standards of intelligence, but there are cases in which it is impossible to lay down a more specific rule and, in default of something more definite, the test of reasonableness has to be accepted. In such cases to recognise a varying standard of reasonableness would vitiate the whole purpose of the test, and the court has, to the best of its ability, to judge the mental attitude or reactions of the ordinary man of common sense. It cannot allow this standard to be varied in any way by the eccentricities of the particular individual who is on trial.'

But that does not determine the matter. How should one assess 'the ordinary man of common sense'? Clayden, F.J., in *Jackson's* case, equated him with the 'reasonable man in England' (see 461). He did so because the Nyasaland Penal Code, like the Zambian Penal Code, enacted that criminal responsibility for the use of force in self-defence should be determined according to the principles of English law.

But I can see two objections to this equation. In the first place, although on the facts of the appeals before us - as also in *Jackson's* case - the two defences of mistaken belief and self-defence are so interwoven as to be inseparable, nevertheless the reasonableness we are concerned with here is the reasonableness of the mistaken belief which is allegedly held, and not the reasonableness of the conduct in self-defence pursued in consequence thereof. There is no reference to the adoption of 'the principles of English Law' in section 11 of the Zambian Penal Code relating to mistake as there is in section 18 relating to self-defence. It was the same with the Nyasaland Penal Code. And these are not English Statutes.

In the second place, and in any case, it is surely axiomatic that when English laws or principles are applied in Zambia they are applied *mutatis mutandis*.

In my view the standard we must apply here is not the standard of the reasonable man in England but the standard of the reasonable man in Zambia. I do not apprehend that those standards, *qua* standards, will be so very different, but different considerations may well arise according to the circumstances.

A useful commentary on the meaning of 'reasonable' appears in 3 Stroud's Judicial Dictionary at 2462. It reads as follows:

' (1) It would be unreasonable to expect an exact definition of the word "reasonable". Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. But mankind must be satisfied with the reasonableness within reach; and in cases not covered by authority, the verdict of a jury (or the decision of a judge sitting as a jury) usually determines what is "reasonable" in each particular case; but frequently reasonableness "belongeth to the knowledge of the law, and therefore to be decided by the justices". (Co. Litt. 56b).'

We do not have the jury system here and so it is for the trial judge to decide. He should not apply a subjective standard, nor the standard of any particular sub-community to which the accused belongs. He should, in my view, apply the ordinary criterion of reasonableness of a modern civilised community of the standard that exists within Zambia today.

If he has properly applied such a test to the actions of the accused before him as disclosed by the evidence, the finding he comes to thereon should not be lightly set aside.

Here, as I have indicated earlier in my judgment, the judge applied a test which was rather more favourable to the accused. He found against them and I do not think that that finding can be disturbed. It was for these reasons that I concurred in dismissing these appeals.

Appeals dismissed