Crim. A. 44/52

KASSEM HUSSEIN DIAB

v.

ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Criminal Appeal.
[December 2, 1959]
Before: Smoira P., Silberg J., and Witkon J.

Statutes - Interpretation - Use of marginal note - Criminal Code Ordinance, 1936, *s. 53(a) - Nature of civil war - Distinction between civil commotion, civil war and international war - Arab and Jewish hostilities prior to termination of Mandate - Effect of termination of Mandate and invasion by Arab States.*

The appellant was charged and convicted under section 53(a) of the Criminal Code Ordinance, 1936[1)], with promoting civil war in that being a resident of Israel, he left the country, enlisted in an Arab "army" and served in it against Israel during the Arab-Israel War. The appellant contended that the acts with which he was charged did not constitute the offence described in the section which refers only to a civil war in the sense of a fight between residents within the State.

Held: That although the war in which the appellant had participated was not a civil war, and he was therefore not guilty of the offence charged., section 53(a) of the Criminal Code Ordinance, 1936, properly interpreted in the light of the marginal note to the section, which note may be used in interpreting mandatory legislation, created the offence of promoting civil war.

Israel case referred to:

(1) *Cr. A.* 53/49; *Weil v. Attorney-General,* 1950, 2 *P.E.* 438.

1) See infra p. 271.

English cases referred to :

(2) *E. v. Hare,* (1934) *1 K.B. 354.*

(3) *Attorney-General v. Great Eastern Railway Company,* (1879), 11 *Ch. D.* 449.

(4) *In re Woking Urban District Council (Basingstoke Canal) Act,* 1911, (1914) 1 Ch. 300.

(5) *Claydon v. Green; Green v. Claydon,* (1867-8), *L. R. 3 C.P.* 511.

(6) *In re Venour's Settled Estates, Venour v. Setton, (1875-6), 2 Ch. D. 522.*

(7) *Sutton v. Sutton,* (1883), 22 *Ch. D.* 511.

American cases referred to:

(8) *Brown v. Hiatt, 1 Dillon* 379.

(9) *Juando v. Taylor,* 13F**.** *Cas. No.* 7558. *Cit. in* 67 C.J. 337, *note* 16(b).

(10) *Underhill v. Hernandez,* 18 *S Ct.* 83; 168 *U.S.* 250, 42 *L. Ed. 456.*

(11) *The Amy Warwick, Fed. Cas. No.* 341, 64 *Fed. Digest 245-246.*

(12) *Salisbury Hubbard & Co. v. Harnden Express Co., 10 R.I.. 244 cit. in 67 C.J.*: 336, *note* 16(a).

(13) *Mayer v. Reed & Co., 37 Ga.* 482, cit. in 67 C.J. 337, *note 16(c).*

E. Toister, for the appellant.

Miriam Ben-Porat, Deputy State Attorney, for the respondent.

SILBERG J. The appellant was convicted by the Haifa District Court of an offence under section 58(a) of the Criminal Code Ordinance, 1936, and sentenced to seven years imprisonment. The act with which he was charged, put very shortly, is that at the end of 1948 or the beginning of 1949, while he was an Israel resident, he joined the Arab "Army of Rescue" (Kawkji's Army) as a soldier, at the time when it was stationed and active on Syrian and Lebanese soil, facing the northern frontier of the State of Israel. Counsel for the appellant contests the jurisdiction of the court below, but his main submission on the merits of the case is that the act with which his client is charged, even if it took place, is not an offence within the meaning of the section.

Why is that so ? Because the Mandatory legislator, who bequeathed the section to us, never intended to provide for such a case as this; in section 58(a) he provided only for a civil war, namely, a fight between neighbours, within the State, arising from religious,

communal or class hostility and the like, and not for war which comes from outside, in which the opposing sides are fighting each other, not for victories within the State, but for the conquest of the State itself.

2. That submission is well worthy of consideration, and the appellant's fate here depends upon the way it is decided. There arise, first of all, questions concerning the construction of statutes, and for the first time in this court we shall have also to consider, to the extent to which it concerns our case, the legal character of the Arab-Israel war.

3. First, let us consider the wording of the above-mentioned section 53(a). The section, in the original English, is as follows:

Promoting Civil War.

"53. Any person who :-

(a) Without lawful authority, carries on, or makes preparation for carrying on, or aids in or advises the carrying on of, or preparation for, any war or warlike undertaking with, for, by or against any section, race or body of persons in Palestine;

.....

is guilty of a felony and is liable to imprisonment for life."

In place of "Palestine" we must now read "Israel", by virtue of section 15 of the Law and Administration Ordinance, 1948.

In the margin of that subsection, there appear the words "Promoting Civil War" (the words that come after them relate to subsection (b).) The first question that calls for consideration (and it is a great pity that counsel for the parties did not deem it necessary to develop their argument on this point) is this: is it possible to rely on that marginal note, and how far can we surmise from it the meaning of the Statute? Only if and when we have answered that question affirmatively, do we have to examine the meaning of the term "civil war", in order to arrive at the further, and final question, namely, whether or not the present appellant's act amounted to aiding or taking part in a civil war.

4. Now this question - the question of the marginal note (or headings generally) as a source for interpreting the intention of the legislator - has been considered countless times in English case-law, and the rule is still a somewhat vague one. The principle laid down is that you cannot be guided by the marginal note; but that is only a formula, more honoured in tile breach than in the observance. On the one hand, it is clear that the note has no preferential status, and the words of the note, whether it be a heading, a sub-heading or a marginal note, cannot contradict or settle what is stated in tile statute itself, for why should we prefer the margin to the text ? On the other hand, there is apparently nothing to prevent relying on the marginal note in order to resolve an ambiguity appearing in the faulty drafting of the statute.

Authority for that - for both parts of the concept - may be found in the words of Avory J. in the case of *R. v. Hare* (2). There a woman was charged with committing an indecent act on a child of 12, by seducing him into having sexual intercourse with her, and she was brought to trial on a charge according to section 63 of the Offences against the Person Act, 1861. The defence argument was that the heading to sections 61-63 was "Unnatural Offences", a sign that it was intended to refer to sodomy, bestiality and the like, but not to an act of the kind mentioned above. The court rejected the argument, saying :-

> "Headings of sections and marginal notes form no part of a statute. They are not voted on or passed by Parliament, but are inserted after the Bill has become law."

Thus far the principle, and immediately comes its application :-

> "Headnotes cannot control the plain meaning of the words of the enactment, though they may, in some cases, be looked at in the light of preambles if there is any ambiguity in the meaning of the sections on which they can throw light."

(Avory J. in *Hare's* case (2), at pp. 355-356.)

Since in that case there was no ambiguity in the wording of the statute, it being written "Whosoever...", and that includes a woman, the court refused to restrict the criminal provision on account of the heading.

So we may refer to those headings and preambles in order to clarify the ambiguous meaning of the statute, and it may be that the intention of the words in the second passage above quoted was a little wider, it being : that it is permissible in general to make use of all those "accessories", whenever the wording of the statute is a little unclear, and its darkness needs to be dispersed by some extraneous light, by means of a source of construction that is not to be found, to the reader's regret, in the statute itself. If that is the intention of the words, then there is as a rule no great practical value in all those trappings since, generally speaking, the person construing a statute has no need for the heading, except in order to fill in what is lacking in the statute.

5. But there is yet a further ground for reducing the scope of Avory J.'s statement and that, too, is likely to restrict the application of the above-stated principle of construction, as will immediately become apparent. Why cannot we learn from the headings, and for what reason do they not constitute part of the statute? It is because those headings "are not voted on or passed" by the legislature. That is the one and only ground, and we find it given as the decisive reason in a number of other judgments. Baggallay L.J. said:-

> "I never knew an amendment set down or discussed upon the marginal note to a clause. The House of Commons never has anything to do with the amendment of the marginal note. I never knew a marginal note considered by the House of Commons."
>
> (Baggallay L. J., in *Attorney-General v. Great Eastern Railway Co.* (3), at p. 461.)

In another judgment, we read the following remarks of Phillimore L. J.:-

> "I am aware of the general rule of law as to marginal notes, at any rate in public general Acts of Parliament; but that rule is founded, as will be seen on reference to the cases, upon the principle that those

> notes are inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons. Where, however,..... the marginal notes are mentioned as already existing and established, it may well be that they do form a part of the Act of Parliament. I do not, however, decide the case upon this ground."
>
> (Phillimore L. J., in the *Woking Urban District Council (Basingstoke Canal) Act* case (4), at p. 899.

Willes J., in the case of *Claydon v. Green; Green v. Claydon,* 1911 (5), recounts the historical background to the matter, and tells us the following matters of interest, giving us a remarkable insight into the English love of tradition. These are his words, at pp. 521, 522:-

> "Something has been said about the marginal note to section 4... I wish to say a word upon that subject. It appears from Blackstone's Commentaries..., that, formerly, at one stage of the bill in parliament, it was ordered to be engrossed upon one or more rolls of parchment. That practice seems to have continued down to the session of 1849, when it was discontinued, without however any statute being passed to warrant it... Since that time, the only record of the proceedings of parliament, - the important proceedings of the highest tribunal of the kingdom, - is to be found in the copy printed by the Queen's printer. But I desire to record my conviction that this change in the mode of recording them cannot affect the rule which treated the title of the act, the marginal notes, and the punctuation, not as forming part of the act, but merely as temporanea espositio. The act, when passed, must be looked at just as if it were still entered upon a roll, which it may be again if parliament should be pleased so to order; in which case it (that is, the statute) would be without these appendages, which though useful as a guide to a hasty inquirer, ought not to be relied upon in construing an act of parliament."

It once happened that Jessel M. R. erred and thought that in his day marginal notes had already begun to appear in the Rolls of Parliament themselves, and for that reason he decided that they ought to be taken into account for the purposes of construing a statute. He said:-

> "...the marginal notes of Acts of Parliament now appear on the Rolls of Parliament, and consequently form part of the Acts;"
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> (See *In re Venour's Settled Estates, Venour v. Sellon* (6), at p. 525.)

But some years later he noticed his mistake and admitted it publicly from the Bench when he said:-

> "The *dictum* in that case (he is referring to the one cited above) is not strictly correct. I have since ascertained that the practice is so uncertain as to the marginal notes that it cannot be laid down that they are always on the Roll. But the title of the Act is always on the Roll" - thus he ends on a note of consolation.
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> (See *Sutton v. Sutton* (7), at p. 51a.)

6. We see, therefore, that the whole matter turns on the cardinal question whether or not those headings and "adornments" came to the notice, and obtained the affirmation, of the legislative body - whether or not they received its official stamp of authority. The traditional English view is that the Parliamentary legislator has nothing to do save with what his eyes perceive in the Rolls - that self-same archaic Roll, full of antiquity, that the reader must read rapidly without name or title, without marginal notes and without punctuation - and whatever is not included, or does not have to be included, in this species of document is outside the statute, a kind of unnecessary and irrelevant adjunct of "irresponsible" persons who have no part in the legislative activity of the legislator.

7. Hence, in my opinion, only one conclusion, short and simple, falls to be drawn: that all that discussion on the interpretative value of headings has no application whatsoever in the totally different world of the Palestinian legislator. Mandatory Palestine was not particular

in observing the separation of powers, and its legislator and administrator were fused together into one personality. Its statutes did not proceed from the chamber of a legislative body, and an electorate and its representatives had no hand in their making. They were composed behind closed doors by a group of professional experts, and were submitted for the signature of the High Commissioner. With the signature of the High Commissioner (after consultation with the "Advisory Council"), the document turned into a statute, and that was the sole official act of legislation. It is fairly safe to assume that the document put forward for signature was not devoid of marginal notes and headings, and so in any event that legislative signature also referred to the marginal notes of the statute. In the actual circumstances of the Mandatory regime there was no ground whatever for distinguishing between sections of the statute, considered and drafted by "responsible" persons, and adornments to the statute inserted, as it were, afterwards by "irresponsible" persons, for both of them were in fact drafted by those same expert officials *before* they all of them together received their official stamp of authority by the affixing of the High Commissioner's signature.

Consequently, it appears to me that whatever may be the content and scope of the English rule regarding headings, here in Israel, so far as Mandatory legislation is concerned, there is nothing to prevent our receiving "interpretative inspiration" from the wording of the headings in assisting us to determine the meaning of the statute, so long as they do not contradict what is expressly stated in the body of the statute. If there is any contradiction, express or even implied, between them, then without question the statute is to be preferred, since in that event it is clear that the heading - the summary - is erroneous, and it was for that reason, so it seems to me, that Cheshin J. refused to rely on the marginal note in *Weil v. Attorney-General* (1).

Support for this concept is to be found in an express provision in a statute. I have in mind the Trades and Industries (Regulation) (Amendment) Ordinance, 1939, Section 2 of that Ordinance alters the "Long Title" of the original Trades and Industries Ordinance, and makes it even longer by adding a number of words. Now, consider this matter carefully: if no value is to be attached to the heading, and we are not entitled to be guided by it, what would have induced the legislator to go to all that troubled The result is : here in Israel, as regards Mandatory legislation, there is value in the headings, and under certain conditions

they may help us, to a lesser or greater extent, to understand the correct meaning of a statute.

8. Bearing these matters in mind, I pass to the provisions of the section in question: section 53(a) of the Criminal Code Ordinance, 1936. Briefly put, its purpose is the imposing of punishment for the carrying on of, or aiding in, a war or warlike acts against a section of the population of Palestine (now Israel). Now if the language of the section itself is somewhat vague and it may be interpreted in different ways, with the help of the marginal note any doubt in the matter is dispelled; it tells us frankly and distinctly that the reference is to civil war. The question is, therefore, what is the precise meaning of that term, and in what way is it distinguishable from plain "war" - war in the ordinary meaning of the word ?

The answer - which is accepted also by English lawyers - is to be found not in English case-law, but rather in American case-law. In England, apparently, the courts have not yet had the opportunity of considering that question. This is hardly to be wondered at, seeing that, in modern times, the English people have very little experience indeed of such happenings and situations. Stroud, for example, in his Legal Dictionary (Second Ed., at p. 317), makes use of a definition taken from the famous American judgment in *Brown v. Hiatt* (8), and even Oppenheim, in his book on International Law (Sixth Ed., edited by Lauterpacht, at p. 173), adopts the definition found in American judgments, without expressly emphasizing the fact.

The definition is as follows:-

> "Civil war is when a party arises in a state which no longer obeys the sovereign, and is sufficiently strong to make head against him; or when, in a republic, the nation is divided into two opposite factions and both sides take up arms." *(Brown v. Hiatt* (8), at p. 379.)

According to Oppenheim:

> "In the proper sense of the term a civil war exists when two opposing parties within a State have recourse to arms for the purpose of obtaining

> power in the State, or when a large portion of the population of a State rises in arms against the legitimate Government."

In American case-law itself from which, as stated, the said definition has been taken, we find in addition to *Brown's* case (8) the following dicta on the question of when there is a civil war.

> "when a party is formed in a state, which no longer obeys the sovereign, and is of strength sufficient to make head against him."
>
> *(Juando v. Taylor* (9).)

And:-

> "Where the people of a country are divided into two hostile parties, who take up arms and oppose one another by military force."
>
> (Fuller C.J., in *Underhill v. Fernandez* (10).)

From a certain point of view American case-law regards the Civil War of the 19th century, the war between the North and the South, from 1861 to 1865, as an exception. The point is that in that war there were not two adversaries struggling within a single state framework, but that one of them, namely, the Southern States, sought to secede, and in fact seceded, from the body of the previous State which was common to both of them. To their way of thinking, the Confederate States were fighting a territorial war against another State, a foreign State. That, of course, was not the attitude and outlook of the States of the North. They regarded the Southerners as rebels against the realm, seeking to upset the primary arrangement and to establish for themselves in the State, though admittedly only in a part thereof, a government of their own, an illegitimate government. Since, as is well known, the campaign ended after a four years' struggle in the victory of the North and the return of the Confederate States to the bosom of their motherland, to the framework of the overall, common State, it is by the light of the "Northern outlook" alone that the character of the War as a whole is to be judged *ex post facto.* However, the fact that the Southern States themselves regarded the struggle in the light of a 'territorial' war, a war between

States, was full of important legal consequences as regards the Northern States as well : it bestowed upon those States the international rights given in ordinary war to each of the belligerent States. It follows that, eventually, the American Civil War assumed a two-fold aspect : both that of a genuine civil war, and also that of a war between States. Indeed, that is what was said in one of the judgments dealing with this subject :

> "In the war with the so-called Confederate States the rebels were at the same time belligerents and traitors, and subject to the liabilities of each; while the United States sustained the double character of belligerent and sovereign, and had the rights of both, their rights as belligerents were unimpaired by the fact that their enemies owed (them) allegiance." (*The Amy Warwick* case, (11), pp. 245, 246.)

We find the very same notion - the notion of the dual character of n civil war - expressed in another American judgment, though with a change of wording as well as a slight change in the reasoning. Here, there is a definite tendency to limit the technical juridical content of the term 'civil war' to the War of the American States in so far as it is thus not deprived of the description which it has attained in history. There the matter was set out in the following terms :

> "The term 'civil war' is sometimes and perhaps anciently more commonly used to denote a contest in arms between two great parties in the state for the control of the state, but without any design of separation. But the definition has been more extended in modern times. *Our civil war was also a territorial war.* The Southern party was for some years in absolute possession and control of a large territory, with a regularly organized government and courts. On the borders there were portions of territory where both parties claimed possession and both sides organised governments."
>
> *(Salisbury Hubbard & Co. v. Harden Express Co.* (12).) 1

It ought to be emphasized that this "modern" broadened notion of "civil war", and its being made to cover opponents, neither of whom wishes to live under the same roof, does

not cancel out the remaining marks of identification that the authorities have given to this notion, and its classic definition remains in force. It is worth noting also that not everyone admits to this broadening of the notion and that there are those who expressly say that the American Civil War "was not a civil war, in its legitimate sense... it was a war between states". (*Mayer v. Reed & Co.* (13).)

If we add up all those various definitions and endeavour to clothe them with a general, short and concise formula, we observe that "civil war" means the war of a citizen against the realm, or a war between citizen and citizen (through force of arms) for the purpose of obtaining power throughout the State or over a part of it. Emphasis is placed on the word "citizen", that is to say, it always concerns a citizen (more accurately, a group of citizens), struggling with the government or for the government of his State, and not of n State seeking to extend its government over the territory and citizens of a foreign State.

Such is the legal definition of the term, and such is the plain meaning of the name in ordinary language in the history books. The war of Pompey and Julius Caesar in the First Century B.C.E.; the Roman "Wars of Succession" to the title of Emperor in the Second and Third Centuries C.E., Cromwell's rebellion against the monarchy in the middle of the 17th Century, and the Bolsheviks' war against the Provisional Government and afterwards against the "White Russians" in the present century - all these are called "civil wars" by historians, and in all of them are to be found the qualities pertaining to this term in the legal definition quoted above. I have never come across this description in use to describe an external war between kings and States.

9. Now that we have arrived at a determination of the legal conception of a "civil war", let us examine whether it fits the details of the case before us. To that end, I must return once more to the facts, and fill in what I omitted in the short and concise description given at the outset of this judgment.

The present appellant was born in the village of Araba, which lies in the valley of Bet Netofa in Lower Galilee (that is the historical *Erev,* mentioned in the Jerusalem Talmud, Shabbath, "Kol Kitvei", and in other places). In the days of the Mandate he served for a certain period as a medical orderly in the Transjordanian Frontier Force, and with the approach of the end of the Mandate in March, 1948, he was demobilised and returned to

his birthplace. Here he participated, apparently, as a volunteer in the Arab "Army of Rescue" (Kawkji's Army) which was active in that vicinity both before and after the establishment of the State, until the capture of the village by the Israel Defence Forces in October, 1948, during Operation "Hiram". When the village was captured the appellant stayed on, and was registered along with the remainder of its inhabitants in the first registration of residents which was carried out a few weeks after the capture. From all those facts, the court below concluded, and rightly so, that in the decisive period, namely, the end of 1948, the appellant was an Israel resident, a permanent resident of the said village of Araba.

At the beginning of December, 1948, on a dark and wintry night, the appellant crossed the Israel-Lebanon frontier, enlisted in the Arab "Army of Rescue", and served in it for 6 months. This "Army of Rescue", so the court below found, was "an organised army, with an administration and a system of command", but no one seriously disputes the fact that, at that time, it operated within the framework, or at least under cover, of the Syrian Army, and that when in February, 1949, the appellant was seen in Lebanon by one of the witnesses, he was dressed in military uniform, and on his cap he wore the insignia of the Syrian Army. The appellant served in the Company of one Abou Ahmed from Tsipori, a well-known bandit leader from the days of the 1986 troubles in Palestine, and most of the soldiers in that Company were Palestinian Arabs. That Company carried on hostilities, operating on the sector of the Syrio-Lebanese Front opposite the northern border, and its object was, according to the evidence of one of the witnesses, "to attack the Jews". It is accordingly argued by the prosecution that the appellant aided in the war of the Arab "Army of Rescue" against the Jewish population of the State of Israel, and that that constitutes the offence dealt with in section 58(a) of the Code.

This argument is entirely erroneous and amounts, indirectly and unintentionally, to a diminution of the whole conception of the War of Independence. With all due respect to those who put it forward, it lacks a sense of proportion and blurs the clear line dividing the pre-war "disturbances" from the warlike struggle itself which commenced with the establishment of the State. The Arab-Israel War was not a "civil war" but a war between sovereign States on both sides, in which the aggressors, the seven Arab States, sought to destroy all that the Jews had created and erase the State of Israel from the map. This was a "territorial" war, a war between States, and it makes no difference that the aggressor-

invaders themselves did not recognise the political existence of the victim State. It was recognised immediately after its birth by powerful States, great nations of the earth, and became a living and actual reality on the political stage of the world. We never admitted that the Arab States came to help the Arabs of Palestine, or that the object of their war was to establish an independent Palestinian State within its former Mandatory borders, under the hegemony of the local Arabs. That, indeed, was the invaders' argument and ground for quarrel, as put forward by their spokesmen before the United Nations and in other forums, but the truth was very different. It may be that those few battalions that called themselves the "Army of Rescue" had their own particular ambitions, but they were not the ones who settled the aim of the war, and they were not the ones who had control of the manner in which it was waged. Their weight was too light and insignificant as against the weight of the armies of the seven States. It is not important, therefore, what the veteran bandit leader, Abou Ahmed from Tsipori, thought, or what the political aim of the men of his Company was. They served, willy-nilly, as tools in the hands of the invaders, and the latter's aims absorbed and swallowed up the aims of their unimportant assistants, the Arab "Army of Rescue. "

Briefly put, the Arab-Israel War was not a "civil war" within the meaning of section 53(a) of the Code, and so whoever participated in that War against Israel, even if he was an Israel resident, cannot be charged with an offence under that section.

10. I said, "He cannot be charged with an offence under that section". I did not say that he cannot be charged with any offence at all. I am inclined to think that if an Israel resident, owing allegiance to the State, takes part in a war against the State of Israel, he may be charged with treason and brought to trial under section 49(1) of the Criminal Code Ordinance. This section, in its Mandatory form, imposes the death sentence on "any person who levies war against His Majesty in order to intimidate or overawe the High Commissioner". In the place of His Majesty as the sovereign (and the enemy in a war), there now comes the State of Israel, and instead of the High Commissioner as the Governing Authority (and as the object in the war), there comes the Government of Israel. They are, on any reckoning, "modifications as may result from the establishment of the State and its authority", within the meaning of section 11 of the Law and Administration

Ordinance, 1948[1)], and they also alter the content of section 49(1), while preserving its essential nature, namely, the prohibition of war against the sovereign, with the object of deposing the Government of the State or of intimidating it. That being so, it seems to me prima facie that we may alter the wording of that section so that it will henceforth read : "Any person who levies war against the State of Israel in order to intimidate or overawe the Government of Israel is guilty of treason and is liable to the punishment of death." The outcome will be that if the act is done, as in the present case, by an Israel resident owing allegiance to the State and who does not, therefore, enjoy the defence or exemption deriving from the principles of International Law (namely, that in the absence of a duty of allegiance he cannot be guilty of treason - see Oppenheim (ibid. at p. 322 sup.), he may be charged with treason and tried according to section 49(1) of the Criminal Code Ordinance.

However - and this is the decisive point here - even if we accept that view, it will not alter the position of the present appellant in any way; for since in fact he was charged according to section 53(a), and not according to section 49(1), and the punishment to which an offender under section 49 is liable is more severe than the punishment to which an offender under 53 is liable (capital punishment in place of imprisonment), in accordance with section 52 of the Criminal Procedure (Trial upon Information) Ordinance [2)]), as amended in 1939, and having regard to the proviso to section 72(1)(b) of that Ordinance[3)] we cannot substitute for the conviction under section 53(a) a conviction under section 49(1), even if we are of opinion that the appellant is indeed guilty of an offence under that

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1) Law and Administration Ordinance, 1948, s 11:

Existing law. 11. The law which existed in Palestine on the 5th Iyar, 5708 (l4th May, 1948) shall remain in force, in so far as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities

2) Criminal Procedure (Trial upon Information) Ordinance, section 52:

Power to find guilty if attempt, etc., although accused not so charged

52. The court may find an accused person guilty of an attempt to commit an offence charged, or of being accessory after the fact, or may convict him of an offence not set out in the information and without amendment of the information notwithstanding that such offence is one within the jurisdiction of some other court to try upon information, or one which court be tried summarily:

Provided that such offence be covered by the evidence in the case and by findings of fact necessary to establish it and does not render the accused person liable to a greater punishment than does any charge in the information

3) Criminal Procedure (Trial upon Information) Ordinance, section 72(1)(b

Power of the court on an appeal

72(1). In determining an appeal the Court of Appeal may-

(b) amend the judgment of the Court of Criminal Assize or district court either as to the description of the offence proved or the article or section of the law applicable and may increase or reduce the punishment and, in general, give such judgment as in its opinion ought to have been given by the court below on the information and evidence before it, or

section. The final conclusion therefore, is that we have no alternative but to quash the conviction of the appellant and set him free (unless he is being held for some other offence).

In view of the conclusion which I have reached there is no need to express any opinion here on the remaining questions that arose in this appeal, including the submission that the lower court lacked jurisdiction which was pleaded by counsel for the appellant. For the same reason there is also no need to deal with the application to hear further argument on the question of jurisdiction that was submitted by the Deputy State Attorney.

I am accordingly of opinion that the appeal should be allowed, and the conviction and sentence set aside.

SMOIRA P: I agree.

WITKON J: I agree.

Appeal allowed, and conviction and sentence set aside.
Judgment given on December 2, 1959.