down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed'. Applying that canon to the present case, I think that this provision in this statute would be rendered nugatory if the contention raised on behalf of this respondent were held to prevail. That contention was this, that as the respondent did not himself manage a refreshment house and had no personal knowledge that prostitutes met together and remained therein, and had not been negligent in failing to notice these facts, and had not wilfully closed his eyes to them, he could not in law be held responsible. . . . This seems to me to be a case where the proprietor, the keeper of the house, had delegated his duty to a manager, so far as the conduct of the house was concerned. He had transferred to the manager the exercise of discretion in the conduct of the business, and it seems that the only reasonable conclusion is, regard being had to the purpose of this Act, that the knowledge of the manager was the knowledge of the keeper of the house."

In *Linnett* v. *Commissioner of Metropolitan Police*, (13) [1946] K.B. 290, LORD GODDARD, C.J., at p. 294 stated:

"There are many cases under the Licensing Acts, the Food and Drugs Acts and other Acts in which convictions have been upheld of persons knowingly permitting certain acts, without any actual knowledge by them, the acts having been knowingly committed by a servant or manager and that knowledge having been imputed to the master or principal. The principal on the line in these decisions does not depend upon the legal relationship existing between the master and servant or between principal and agent; it depends on the fact that the person who is responsible in law, as for example a licensee under the Licensing Acts, has chosen to delegate his duties, powers and authority to another."

The same reasoning can, I think, be applied to this instant case. However, if the earlier ruling of the court is right, that in such a case of causing knowledge need not be established, the husband and manager would be liable for causing even without any evidence express or implied, of knowledge on his part of the defects.

The fourth ground of appeal as set out in the memorandum of appeal is:

"That the learned resident magistrate should have held that there is no evidence to support the conviction."

The evidence was certainly there and the whole case—and, I may add, the appeal—really turned on the legal construction to be put on the term "cause".

The fifth ground of appeal as set out in the memorandum of appeal is:

"In the alternative, the sentence is excessive."

In assessing the penalties and passing sentence, the learned magistrate fully directed himself on the offences, and I see no reason to hold that he was wrong in principle in such direction, nor are the sentences so excessive as to warrant any interference by this court.

The appeal is accordingly dismissed.

Appeal dismissed.

Advocates: *M. S. Chaddah*, Dar-es-Salaam (for the appellant); *The Attorney-General*, Tanganyika (for the respondent).

MEHAR SINGH BANSEL *v.* R.

[COURT OF APPEAL AT NAIROBI (Forbes, Ag. P., Windham, J.A., and Sir Owen Corrie, Ag. J.A.), September 21, 22, 23 and October 13, 1959.]

CRIMINAL APPEAL No. 115 OF 1959.

(Appeal from H.M. Supreme Court of Kenya—Mayers, J.)

Criminal law — Trial — Irregularity — Assessors asked specific questions but opinions not taken on case generally—Whether irregularity fatal or accused prejudiced—Criminal Procedure Code (*Cap.* 27), *s.* 318, *s.* 381 (*K.*).

The appellant, a surgeon, was convicted of manslaughter and appealed on grounds of alleged misdirection in the summing-up and the irregular procedure of the trial judge in formulating specific questions for the opinion of the assessors instead of taking their opinions on the case generally which it was submitted was contrary to s. 318 of the Criminal Procedure Code and to natural justice.

Held: (i) there had been minor but no material misdirections which would justify any interference with the conviction.

(ii) section 318 of the Criminal Procedure Code is mandatory in requiring the trial judge to take the opinions of the assessors generally on the case as a whole but there is no objection to specific questions being put to the assessors either before or after a general opinion on the case has been obtained.

(iii) the irregularity did not cause any prejudice to the accused and was curable under s. 381 of the Criminal Procedure Code.

Appeal dismissed.

[**Editorial Note:** An application was subsequently made to the Privy Council for special leave to appeal in order to pursue the procedural point taken in this appeal. After hearing counsel, the application was refused.]

Cases referred to:

(1) *R.* v. *O'Donnell*, 12 Cr. App. R. 219.
(2) *R.* v. *Gusambizi Wesonga* (1948), 15 E.A.C.A. 65.
(3) *Washington s/o Odindo* v. *R.* (1954), 21 E.A.C.A. 392.
(4) *Mohamed Bachu* v. *R.* (1956), 23 E.A.C.A. 399.
(5) *R.* v. *Bourne*, [1939] 1 K.B. 687; [1938] 3 All E.R. 615.
(6) *Brown and Others* v. *R.*, [1957] E.A. 371 (C.A.).
(7) *Habib Kara Vesta and Others* v. *R.* (1934), E.A.C.A. 191.
(8) *Miligwa and Another* v. *R.* (1953), E.A.C.A. 255.
(9) *Joseph* v. *R.*, [1948] A.C. 215.
(10) *Bharat* v. *R.*, [1959] 3 W.L.R. 406.

J. T. Molony, Q.C. (of the English bar) and *F. R. Stephen* for the appellant.
J. P. Webber and *A. R. Hancox* (Crown Counsel, Kenya) for the respondent.

October 13. FORBES, Ag. P., read the following judgment of the court: The appellant was convicted by the Supreme Court of Kenya on July 10, 1959, of the offence of manslaughter contrary to s. 198 of the Penal Code and was sentenced to serve a term of imprisonment of thirty months. He has appealed to this court against his conviction.

The appellant is a Fellow of the Royal College of Surgeons who was in private practice in Nairobi at the material time. The charge of manslaughter

on which the appellant was tried arose out of the death in his surgery on February 24, 1959, of a young Sikh woman named Pavanjit Kaur, the wife of Gurdip Singh, after an operation performed on her by the appellant for the termination of her pregnancy. The following extract from the judgment of the learned trial judge summarises the case for the Crown and the case for the defence, and sets out the principal circumstances surrounding the death of the deceased:

"Quite shortly, the case for the Crown is that the deceased died by reason of injuries inflicted upon her by the accused in the course of an illegal operation, that is to say an operation having as its object the termination of her pregnancy, otherwise than in a bona fide belief by the accused that the termination of that pregnancy was necessary for the preservation of the life of the deceased or to save her from serious prejudice to her health.

"Alternatively, the Crown alleges that even if the operation admittedly performed by the accused with a view to terminating the pregnancy of the deceased, was performed in the honest belief that it was necessary for the purpose of saving her life, or of preserving her from serious injury to her health, nevertheless in arriving at his diagnosis as to her condition, in the nature and manner of the operation performed by him and in inflicting, as the Crown alleges, two wounds, of which again as the Crown alleges she died, (he) was criminally negligent.

. . . . . .

"In equally brief outline, the case for the defence is that the operation performed by the accused was performed in the honest belief that it was necessary for the preservation of the life of the deceased in as much as she was bleeding from the vagina consequent upon a state of inevitable abortion and might have bled to death had not resort been had to surgical intervention to empty her uterus of the products of conception; that this diagnosis was arrived at after an adequate examination and was, in fact, correct; that at least one and possibly both of the wounds which are alleged by the Crown to have been the cause of death were not occasioned by the accused; that the operation was conducted in a proper manner; and that the cause of death alleged by the Crown, shock and haemorrhage from these wounds, may not, in fact, have been the true cause of death.

"The deceased was at the time of her death about twenty-two years of age, living with her husband at a flat in Jackson Road about a mile and a half from the house of her parents in Desai Road. In July, 1958, she had a son, who was at the time of her death about seven months of age. Towards the end of December, 1958, not having had a menstrual flow since October, she consulted a Dr. Haq, who expressed the opinion that she was probably pregnant. Some weeks later she informed her mother of her pregnancy. Shortly before February 24, she had some altercation with her husband, the cause of which was not before the court, and in the course of which she is alleged—with what justification I have yet to hear—to have been beaten by her husband. The relevance of this incident to these proceedings is that it is contended for the defence that it may have led to her attempting to terminate her own pregnancy, or may, as a result of emotional stresses, have occasioned the inception of a miscarriage.

"On the morning of February 24 she was seen by a neighbour, one Avtar Singh, sitting on the floor cleaning her husband's shoes. Avtar Singh did not notice anything wrong with her, but that may not be of any significance as, although he spoke to her husband he did not say anything to the deceased and therefore is, in my view, not likely to have really noticed how she was looking. The defence elicited from Avtar Singh in cross-

examination that Indian women sit on the ground when in mourning or when feeling ill. I doubt, however, whether it would be proper to draw the inference that the deceased must have been feeling ill from her sitting on the ground, in view of the fact that she was cleaning her husband's shoes. Be that as it may, about 9 a.m. she arrived at her mother's house with her baby, mentioned to her mother that she was going to a photographer in Nairobi to inspect a proof of a photograph and left her baby at her mother's. There was no evidence as to how she travelled from her home to that of her mother, but there was evidence that the nearest bus stop was about 400 yards away. Her mother testified that she appeared to be in normal health and was quite positive that the trousers that she was wearing were not bloodstained. These trousers, which were tendered in evidence and were in fact when so tendered heavily bloodstained in front and in the vicinity of the fork. The accused maintains that when the deceased removed the trousers in the surgery for the purpose of his examining her, he observed that the trousers were soaked in blood and the anaesthetist who was present at the operation performed by the accused on the deceased also claims to have seen blood on the trousers when they were lying on the floor. The mother was, however, quite positive that she could not have failed to observe the bloodstains when the deceased was at her house, had they then been present. I have no doubt at all that had the trousers been bloodstained to anything like the extent to which they now are the mother would have noticed them, but that does not dispose of the possibility that they may have been bloodstained by the time that the deceased arrived at the accused's surgery, as there is medical evidence that assuming the vaginal wound, to which reference will be made hereafter, to have been inflicted before the deceased arrived at the accused's surgery, a blood clot might have formed which stopped bleeding pro tem but which was dislodged in the course of walking, with the result that the bleeding started again. Within a very short distance of her mother's house the deceased was seen and spoken to by a contractor, who was called on behalf of the Crown. Some 20 to 25 minutes later this witness again saw the deceased on a footpath leading to Grogan Road. When seen on the second occasion she was walking normally. Shortly after 10 a.m., probably between 10.20 and 10.30 a.m., the deceased arrived with her husband at the accused's surgery. According to the statement subsequently made by the accused to the police the deceased's husband told him that his wife was pregnant, had been bleeding from her vagina since the night before and complained of pain. The accused then proceeded to examine the deceased per vaginam. As a result of his examination he found the os dilated, blood in the vagina and a membranous portion protruding. On these signs he diagnosed a condition of inevitable abortion and decided that as the deceased was—I quote—'a bit shocked' and was bleeding it was necessary to operate. He therefore telephoned to a Dr. Sohanpal, who lived nearby, and asked him to assist in administering the anaesthetic. Within half an hour Dr. Sohanpal, who was called for the Crown, arrived. According to Dr. Sohanpal the deceased confirmed to him the fact that she had been bleeding from the night before and after satisfying himself as to her fitness to undergo anaesthesia he administered the anaesthetic to her and the accused operated.

"The operation performed was, according to the accused's police statement, a D. & C.—that is to say, a dilatation and curettage. This operation involves the dilation of the os and the removal from the womb of its contents by the use of an instrument known as the curette.

"Prior to the operation the pulse rate and blood pressure of the deceased

were 80 and 110 respectively, which, according to all the medical witnesses, either for the Crown or for the defence were not markedly abnormal in the case of a pregnant woman of the deceased's age.

"The accused, having completed the operation as he thought, successfully, and without incident, when the deceased recovered from the anaesthetic the anaesthetist left. Shortly after 1 o'clock the accused went home for lunch, leaving the deceased alone with her husband in the surgery. On his return about 2.30 p.m. he sent the deceased's husband to collect clothes for her because of the blood-stained condition of her trousers already referred to. About 4 o'clock, when an attempt was being made to dress her, she collapsed and despite efforts to resuscitate her died about 4.30 p.m. From then until about 7 p.m. the body remained in the accused's surgery, nothing being done in the interval by either the accused or the husband of the deceased, except to make attempts, at first unsuccessfully, to communicate with a Mr. Kartar Singh, a relative of the deceased's, with a view to removing the body of the deceased. Mr. Kartar Singh finally arrived at about 7 p.m. and it was suggested to him by the accused that he should stop on the way to the deceased's flat at Eastleigh Police Station with a view to reporting the death. Kartar Singh, however, first took the body to the deceased's flat before making the report to the police. Subsequently the body was removed to the mortuary by the police and a post-mortem was performed by Dr. Rogoff, the police pathologist. At that examination Dr. Rogoff found that the deceased had suffered four wounds. The first, a small perforating wound about ½ in. in diameter in the front of the vagina, about ½ in. below and in front of the mouth of the womb. This wound extended upwards through the left broad ligament into the peritoneal cavity in front of the mid line of the uterus. Secondly, a perforation through the wall of the uterus coming 1 in. above the mouth of the uterus, in a groove through the left broad ligament into the peritoneal cavity 1 in. below the fallopian tubes. The third wound was a series of indentations on to the lip of the cervix of a kind typical of the marks produced by surgical forceps. Fourthly, a tearing of the cervix indicative of the act produced by artificial dilation of the undilated mouth of the womb.

"The third and fourth of these wounds, while of some significance in relation to the performance of the operation, are not to be regarded as of any importance in themselves.

"Dr. Rogoff also found in the peritoneal cavity a quantity of free blood which he estimated at 1 to 1½ pints and in the tissues an accumulation of blood, the quantity of which he estimated at from 1 to 3 pints, extending from the left of the womb to the back of the left kidney. Dr. Rogoff found no other abnormalities capable in his opinion of causing death and therefore diagnosed as the causes of death shock and haemorrhage from the uterus and the vaginal wounds.

"Owing to these wounds having followed substantially the same track and to them having damaged other vessels in the broad ligament, he was unable to express any opinion as to which of those wounds had occasioned the most bleeding. He considered that both vaginal wound and the uterine wound were capable of having been inflicted with an instrument, tendered in evidence, known as the curette, which was subsequently delivered to the police by the accused as one of the instruments used by him in the operation. Dr. Rogoff, however, was of opinion that the wounds had been inflicted within an interval of about half an hour of each other, and that the maximum period of infliction before death was eight hours and the probable period up to about six hours before death. His view that the wounds were inflicted within half an hour of each other

was based on his subsequent discovery that in neither wound were there signs of healing processes having commenced. Inside the womb he found small portions of placental tissue and the head of the foetus.

"Subsequently, the police having been notified of the death of the deceased, efforts were made to contact the accused, at first unsuccessfully, as he had gone out; and ultimately at about 2 a.m. on February 25—i.e., within twelve hours of the death of the deceased—he made a statement to the police at police headquarters. In that statement, which was tendered in evidence, he described the circumstances in which he was consulted by the deceased, already set out, and the operation performed by him, and specifically stated that the only instruments used were dilators and a curette. He further said that the shock which he regarded as the probable cause of death might have been attributable either to the operation itself, or to the haemorrhage, and that the operation was not a dangerous one. In his view, had he not performed the operation when he did the patient might have died. He considered that her condition was such that he did not consider it safe to waste time by seeking another opinion. Had she been taken to hospital he considered that in all probability the same operation would have been performed there."

In convicting the appellant, the learned trial judge said, at the conclusion of his judgment:

"For these reasons it seems to me impossible to hold otherwise than as has been held by the assessors in this case, that this operation was performed by the accused for some purpose other than the termination with a view to saving the life or preventing from prejudicing the health of the deceased, and that not only was it an illegal operation in that sense of the term, but that it was also an operation which was performed with the grossest of negligence, of such a degree as to indicate a reckless disregard for the life and safety of his patient.

"I therefore find the accused guilty."

As mentioned by the learned trial judge, the trial was one held with the assistance of assessors. The relevant provisions of the Criminal Procedure Code relating to trials with assessors are contained in s. 318. We will have occasion to refer to the terms of this section later.

A very considerable body of evidence was given in the course of the hearing, a great deal of it being expert evidence of medical witnesses called by the prosecution and by the defence. The hearing of the evidence took some two weeks. Counsel for the appellant and counsel for the Crown then addressed the court, after which the learned trial judge summed up at length to the assessors. This summing-up, which is set out in full in the record, extends to some 105 pages of typescript, and is on the whole, a careful and painstaking review of the relevant law and evidence. It is, nevertheless, the subject of complaint in the appellant's memorandum of appeal. At the conclusion of the summing-up the assessors retired, and, on their return, the learned judge proceeded to put certain questions to them. The procedure followed at this stage of the trial is the subject of one of the grounds of appeal, and we will revert to it later.

The memorandum of appeal as originally drawn set out five grounds of appeal. Grounds 4 and 5 were in the nature of general complaints and no specific arguments were addressed to the court on them. Grounds 1 and 2, which attacked the form of the information and the choice of assessors, were rightly abandoned, but in lieu a further ground, numbered 2a, was added with the leave of the court. This is the ground which concerns the procedure followed in obtaining the opinions of the assessors. Ground 3 of the memorandum of appeal alleges that "the learned judge misdirected himself and/or the assessors" and sets out in paras. (*a*) to (*r*) inclusive the particular matters

complained of as misdirections. These all relate to matters of fact, and it is convenient to deal with this ground of appeal first.

The alleged misdirections are concerned principally with passages in the summing-up to the assessors. Counsel for the appellant stated that he was not making a general attack on the summing-up, which, he conceded, was painstaking and in large measure fair and full. He submitted, however, that in certain directions the summing-up and the learned judge's comprehension of the evidence were ill-balanced and failed to take account of important matters of defence.

The first three matters complained of in para. 3 of the memorandum of appeal, that is, in sub-paras. (*a*), (*b*) and (*c*), can conveniently be considered together, and were so treated by counsel for the appellant. They relate to the second part of the Crown case namely, that the appellant was criminally negligent in the making of his diagnosis and conduct of the operation, and they allege misdirections on the part of the learned judge:

"(*a*) in failing to appreciate the significance of or to refer to the admission made by Dr. Candler (P.W. 19) at p. 228 that in the treatment of abortion there are different schools of medical thought; that whereas Dr. Candler, Mr. Ormerod (P.W. 17) and Mr. Duff (D.W. 3) adhered to the 'conservative' school, Dr. Yusuf Ali Eraj (D.W. 6) adhered to the surgical school, and as Dr. Candler admitted at p. 228, the treatment is a matter of opinion.

(*b*) in his summary treatment (at p. 581) of the evidence of Dr. Yusuf Ali Eraj (D.W. 6) a consultant having the same qualifications as Dr. Candler.

(*c*) in failing adequately to deal with the evidence of Dr. Yusuf Ali Eraj who alone of the medical witnesses (other than the appellant) related his medical experience and knowledge to the circumstances of the Asian community in Kenya."

Four gynaecologists gave evidence during the case. For the Crown, Mr. Ormerod and Dr. Candler were called, and for the defence, Mr. Duff and Dr. Eraj. The expert evidence given by Dr. Eraj was to a large extent in conflict with that of Mr. Ormerod, Dr. Candler, and Mr. Duff. The learned judge very clearly preferred the evidence of the latter three when there was a conflict. The following passages from the summing-up contain the references to the evidence of Dr. Eraj. The first is in relation to the question whether the diagnosis made by the appellant prior to the operation on the deceased was so wrong as to amount in itself to gross negligence, and is as follows:

"Now, I do not think, gentlemen, that it is necessary for me to say very much more about the diagnosis to the operation, although I will have to refer to it a little later in relation to the operation itself. But you will remember that in addition to the views of Dr. Candler and of Mr. Ormerod, that the material revealed by the case notes was not such as warranted a diagnosis of an inevitable abortion and in spite of the answers of Mr. Duff to which I have already called your attention, that in spite of those things another medical witness, Dr. Eraj, he would seem to have wholly endorsed the findings of the accused. He seems to think that the material was sufficient to warrant a diagnosis of inevitable abortion. All that I would say about that medical witness, gentlemen, is that you have seen him in the witness box."

The second reference relates to the question whether the use of a curette was a matter for criticism. It reads as follows:

"Mr. Ormerod, Dr. Candler and Mr. Duff alike would seem to regard the use of a curette on a woman who was sixteen-weeks pregnant as a matter of grave danger, by reason of the likelihood that in scraping the womb, as Dr. Candler put it 'You might in taking away the placenta take a bit of the womb itself, and by reason of (it cause) excessive haemorrhage'.

"Dr. Eraj whom I have already mentioned and whom I have no doubt you will remember, he seems to regard the use of the curette as a most normal procedure to be adopted in cases of this nature. He would also seem to regard the use of a curette as being not a particularly dangerous matter as it is usually entrusted to the least experienced member of the gynaecological team in any hospital, if he is considered fit by his superiors to do any operation at all at that stage.

"You have these contrasting views. The accused says he used a curette. He has said so all along. It is recorded in his case notes. He said so in his statement to the police on the night of the operation and he has never wavered at any stage as to that. Passages were cited from a textbook which would also suggest the use of a curette was permissible.

"It may very well be therefore from that evidence you will feel that whether the use of a curette is the best method or not, it is not a method which in itself could be regarded as so dangerous as to amount to gross negligence on the part of the accused, but remember even the defence, or one of the defence expert gynaecologists, Mr. Duff, would apparently never use a curette."

There follows a further review of the relevant evidence, and the learned judge then says:

"So now the separation was done with a curette on his own showing and that, according to the prosecution witnesses at any rate, would be a very dangerous step. That would be a view apparently shared by Mr. Duff who would not go in that way at all. None the less it commends itself to Dr. Eraj as being a normal practice."

Finally, towards the end of his summing-up the learned judge said:

"Next, gentlemen, you will consider this. Was the diagnosis of inevitable abortion warranted on the material before the accused. You have heard the evidence, I have summarised it to you. You will consider whether in view of the evidence before you the making of that diagnosis was or was not in itself gross negligence. If you adopt the view of Dr. Eraj, the view that the material before the accused warranted the diagnosis, well then you obviously cannot say there was negligence in making it. If you adopt the view that the accused was mistaken in thinking—honestly mistaken in thinking—this is a case of inevitable abortion you will ask yourselves: Was that a mistake, not only an honest mistake, but a mistake which no one could make unless they had been grossly negligent?

"Whatever your conclusion as to that gentlemen, you will go on to ask yourselves, was the operation performed in such a manner as to indicate gross negligence? You have the account of the accused of exactly what he did. You have the evidence of Dr. Eraj that to perform an operation of this nature is not a particularly difficult task and that the operation was thoroughly justified. Against that you have other evidence, including parts of Mr. Duff's evidence, which would suggest that even if the diagnosis of inevitable abortion was right none the less the proper treatment would have been not to have operated in the accused's surgery, but to have transported the patient to hospital and not even to have operated immediately, but to wait to see if the bleeding could be controlled in another manner.

"You have further evidence from the Crown medical witnesses that the proper method of clearing the placenta from the uterus wall would have been by using the finger and then the forceps, and you have the evidence of Dr. Eraj that the curette is used as a matter of course in every case. You have Mr. Duff's evidence that he would use his finger, if he used anything, but he would not have gone in that way at all, but would go in with another form of operation. You will consider whether the technique in using a curette was or was not indicative of gross negligence of the nature to which I have already referred."

It was conceded by counsel for the appellant that this latter passage was not in itself open to complaint, but he contended that the opening reference to Dr. Eraj was in such contemptuous terms as to preclude the assessors from giving serious consideration to his evidence; that such treatment was not warranted in view of Dr. Eraj's qualifications and was not justified on the face of the record; that the learned judge gave no reasons for his attitude to Dr. Eraj; and that Dr. Eraj was, like the appellant, a doctor in general practice who knew the conditions of general practice among Asians in Kenya, whereas the other three medical witnesses were specialists who would apply a higher standard of skill and care than was to be expected from a doctor in general practice. We have not had the advantage of seeing Dr. Eraj in the witness box, but he clearly impressed the learned judge very unfavourably, and the learned judge indicated his view to the assessors. However, he left it to the assessors to form their own conclusion as to the credibility of the witness, and took pains to draw attention to Dr. Eraj's evidence where it was in conflict with that of the other three medical witnesses, again leaving it to the assessors to reach their own conclusion as to which evidence they would accept. In a summing-up to a jury a judge is entitled to express his view of the facts provided he leaves the issues of fact to the jury (Criminal Procedure Code, s. 302 (2): *R.* v. *O'Donnell* (1), 12 Cr. App. R. 219). He must, at least, be entitled to do the same in a summing-up to assessors. We see no reason why a trial judge should not draw the attention of assessors to a witness's demeanour, which is a material factor in assessing the value of the witness's evidence. We do not think there is any material misdirection in the passages set out above.

In a trial with assessors the final decision on the facts, of course, rests with the judge. In the instant case the learned judge in his judgment says:

"The views of Dr. Candler, Mr. Ormerod and Mr. Duff above referred to, despite the opinion of Dr. Eraj to the contrary, leave me in no doubt at all that a D. & C. should not be performed in relation to any four months pregnancy except in the direst of emergencies; and that such an operation should not be so performed except in the direst of such emergencies elsewhere than in a hospital.

It is evident that, apart from any question of demeanour, the learned judge preferred, as he was entitled to do, to rely on the evidence of Dr. Candler, Mr. Ormerod and Mr. Duff rather than on that of Dr. Eraj. The conflict in the medical evidence appears on the face of the record and we certainly cannot say the learned judge was wrong in rejecting Dr. Eraj's version. It is clear that he did not overlook it.

It may be that the standard of skill to be expected in a doctor in general practice is not as high as that to be expected in a specialist, though we doubt whether it can be said that different standards of care should apply. In any case, we are satisfied that the learned judge's direction in the following passage from the summing-up as to the standard of care to be expected in a doctor was unexceptionable. He said:

"Now, on that evidence it may be that you will conclude that he, accused,

arrived at his diagnosis that this was a case of inevitable abortion on a matter which was not adequate to warrant that conclusion. You will, however, remember this, the accused is not omniscient. The law does not impose upon medical men the intolerable burden of being right on every occasion. The obligation upon the accused, the obligation upon every medical practitioner who undertakes the care of a patient is an obligation to do his best for that patient, to arrive at an honest opinion as to the cause of the patient's complaint, whatever it may be, to form an honest opinion as to the appropriate treatment; but it is not an obligation to be right every time either in his diagnosis or in the treatment which he adopts. So long as a medical man acts honestly in the sense that he does not perform an operation because he wants to earn a fee or he does not say that a condition is other than what he really believes it to be for some other purpose, or that he does not adopt some treatment because it happens to be the one that he thinks more convenient although he thinks that it is not the right treatment for the disease, all that is required of him is to exercise prudence and care of an average standard. He may be wrong. Doctors are not the only people who are sometimes wrong in the opinions that they form about the most important things. It would be intolerable if they had to bear the burden of saying to themselves every time they examined a patient: Now, if I do not come to the right conclusion about this I am liable to at least an action for damages and possibly to find myself standing where the accused is standing now. What you have got to say is this: even if we feel certain that the accused's diagnosis of this as a case of inevitable abortion is wrong, are we entitled to say that it is so wrong as to indicate that he did not honestly form that opinion; or that if he honestly formed that opinion that it was an opinion which he could not properly have arrived at had he used the ordinary degree of care that one expects a doctor to exercise?

"And, as I have said, this being a criminal case, you must bear in mind that the standard of negligence which is necessary to warrant conviction of the accused must be a standard of negligence which is so gross as to go beyond the mere realm of compensation and to amount to a crime against the State because it showed a reckless disregard of human life. In other words, gentlemen, if the accused's diagnosis was wrong you can only say that that fact renders him guilty of the offence with which he is charged, that is assuming because of that wrong diagnosis he did other things that he ought not to have done which resulted in the death of the deceased, if you are certain that the reason that the diagnosis was wrong was that he was completely reckless in the way in which he obtained the material on which he based that diagnosis."

As we have said, we do not think that the learned judge's treatment in the summing-up of Dr. Eraj's evidence amounts to a misdirection. In any case it relates only to the "negligence" aspect of the Crown case, and does not affect the finding that the appellant was in fact performing an illegal operation.

Counsel for the appellant did not press the complaints set out in sub-paras. (*d*), (*e*) and (*f*) of para. 3 of the memorandum of appeal, and it is sufficient to say that we do not think there is any substance in them.

Counsel for the appellant next argued paras. 3 (*g*), (*k*) and (*l*) of the memorandum as a group, and we deal with them together also. Paragraph 3 (*m*) also falls into this group. The misdirections alleged in these paragraphs are:

"(*g*) in failing when commenting at p. 586 on the evidence of Dr. Sohanpal (P.W. 7) to refer to the evidence (recorded at p. 60) of this witness that he concurred in the diagnosis of the appellant.

(*k*) in failing to appreciate that the curette produced in evidence was neither a sharp nor a pointed instrument nor capable of causing a stabbing wound six inches long from and through the vaginal wall to and through the peritoneum.

(*l*) in failing to appreciate that because the appellant admitted using a curette it was not therefore any more likely that the vaginal wound was caused by a curette.

(*m*) in suggesting to the assessors that they were entitled to assume that the appellant had in his surgery some instrument likely to cause the vaginal wound."

The passage in the summing-up which is the subject of the complaint in para. (*g*) is as follows:

"And the only other thing that I would say about the diagnosis at this stage is this: that diagnosis, we were told in evidence by the accused, was concurred in by Dr. Sohanpal. Dr. Sohanpal may have concurred in that diagnosis, but he has not said so, and the accused did not say so in his original statement to the police. What the accused said in his statement to the police was, when Dr. Sohanpal came he told Dr. Sohanpal what he had found; and explained the operation which he was proposing to do and Dr. Sohanpal appeared to understand what was going to be done. You may think, gentlemen, that that represents what one would expect to happen. You may think that a surgeon who is about to perform an operation will of necessity tell his anaesthetist what he is going to do and why he is going to do it, but you may think to yourselves he is not so likely to say to the anaesthetist: these are the conditions that I found. What do you think of it? Do you think this is an inevitable abortion or is it something else? But, as I say, in the box the accused's story was that 'Dr. Sohanpal had agreed with my diagnosis'. Sohanpal himself says as to this. Dr. Sohanpal tells us that he did not examine the lady's genital organs. He did not examine her at all below the waist. He told us earlier that the deceased had told him she was bleeding. And he says this, he relates how he arrived at Dr. Bansel's surgery and he says (p. 51 of shorthand note) 'He told me the lady had been bleeding from her private parts and he wanted to operate on her to stop it bleeding.

'Q. Did he say anything else about the lady's condition?
'A. He said she was bleeding and he wanted to stop the bleeding.
'Q. You said that. Did he say anything else about her condition?
'A. He said he had examined her already and she was bleeding from the uterus. The uterus was dilated.
'Q. Did he mention his own diagnosis in the lady's case?
'A. Yes.
'Q. What did he say?
'A. He said probably she had an abortion.
'Q. A case of abortion?
'A. Yes.
'Q. Did Dr. Bansel tell you anything more about what he wanted you to do than he had told you on the telephone?
'A. Yes, he said he wanted to operate on the uterus to stop the bleeding.
'Q. Did he say what he wanted you to do?
'A. He wanted me to give an anaesthetic.'

"That does not suggest that Dr. Sohanpal was ever consulted by the accused as to whether the symptoms were such as, in fact, to suggest inevitable abortion, or threatened abortion, or anything else. It does not even refer to Dr. Sohanpal's having been told that there was any pain. And you may therefore think that Dr. Sohanpal could not have agreed with the diagnosis or with the treatment. I am not suggesting for a moment, gentlemen, that Dr. Sohanpal thought that they were wrong, but you cannot agree about something unless you have been asked about it and he certainly had not got the material, so far as the evidence goes, before him which would enable him to arrive at any conclusion as regards the bleeding and the treatment. It was not Dr. Sohanpal's business, as the anaesthetist, to make any examination of a patient in relation to whom a surgeon had formed a certain conclusion and his business was to find out what was necessary to be known, I suppose, for the purpose of determining what anaesthetic he should use and how he should use it. It was not part of his job to agree as to the diagnosis or otherwise."

The particular complaint is that in saying "Dr. Sohanpal may have concurred in that diagnosis, but he has not said so" the learned judge overlooked the following questions and answers of Dr. Sohanpal in cross-examination:

"Q. Now doctor you arrived at the surgery of Dr. Bansel and you found him in the process of taking out his instruments and sterilising them?
"A. Yes.
"Q. And he gave you the case history and his diagnosis?
"A. Yes.
"Q. And he told you that he found that the os was dilated already and there was membrane protruding from it?
"A. Yes.
"Q. Now from what he told you, do you agree with him that it was a case of inevitable abortion?
"A. I think it was right.
"Q. And when he told you that he intended to evacuate the uterus you agreed that was the correct procedure?
"A. I thought that was the correct procedure."

It is by no means clear to us that by those answers Dr. Sohanpal meant that he had been consulted by the appellant and had concurred in the diagnosis and proposed treatment. He certainly had not suggested anything of the sort in examination-in-chief. We are inclined to the view that the learned judge's direction was correct. In any event we do not think that, if misdirection it was, it was of any significance. It is clear, as the learned judge was at pains to point out, that Dr. Sohanpal had not examined the patient below the waist and was in no position to form an independent opinion. If he did concur, he concurred on the information given by the appellant. In the judgment the learned judge merely says:

"He therefore telephoned to a Dr. Sohanpal, who lived nearby, and asked him to assist in administering the anaesthetic. Within half an hour Dr. Sohanpal, who was called for the Crown, arrived. According to Dr. Sohanpal the deceased confirmed to him the fact that she had been bleeding from the night before and after satisfying himself as to her fitness to undergo anaesthesia he administered the anaesthetic to her and the accused operated."

This, really, is the essence of this part of Dr. Sohanpal's evidence. We do not think any material misdirection occurred.

As to paras. 3 (*k*), (*l*) and (*m*) which relate to the question whether the curette could have been the instrument which inflicted the fatal injuries, or whether some other instrument might have been used by the appellant, a substantial part of the evidence in the case was concerned with the question whether it was possible or probable for the curette to have inflicted the vaginal

wound. There was considerable conflict on the point, and the learned judge deals with this evidence at length both in the summing-up and judgment. Counsel for the appellant argued that on the evidence the curette was the only weapon with which the injury could have been inflicted if it was inflicted by the appellant, and that, from a view of the instrument itself, which was before us, it was absolutely incredible that the wound could have been inflicted with it. And he drew attention to an undoubted misdirection in the learned judge's judgment where he says:

> "Mr. Ormerod and Dr. Candler alike thought that the vaginal wound could have been made by a curette, by its use in a thrusting motion in such a manner that the serrated edge which it contains was the forward part of the thrust."

Mr. Ormerod and Dr. Candler did indeed think that the wound could have been made by the particular curette which was in evidence although it certainly had no serrated edge which could be "the forward point of the thrust". However, it does not seem to us that any of this is material in view of the learned judge's finding in relation to the curette. It was no part of the Crown case that the vaginal wound had in fact been inflicted by the curette, and the learned judge finds that the probability is that it was not caused by the curette. Dr. Teare had given evidence for the defence as to experiments he had performed to show the improbability of the wound having been caused by the curette, and the learned judge says:

> "While I am inclined to the view that Dr. Teare's evidence in this regard is more likely to be accurate than that of Mr. Ormerod and Dr. Candler, by reason of his having performed actual experiments with a curette, it must not be lost to sight that the only evidence that a curette was, in fact, the instrument used is derived from the accused inasmuch as Dr. Sohanpal who was called on behalf of the Crown, while saying that he saw a curette on the table before the operation was none the less precluded by his duties and his position as anaesthetist from seeing what instrument was, in fact, used."

Counsel for the appellant argued that it was unreasonable to find that any instrument other than the curette might have been used by the appellant in view of Dr. Sohanpal's evidence, but in the passage cited the learned judge correctly sets out the effect of Dr. Sohanpal's evidence. There was certainly evidence on which the learned judge could find that the appellant could have inflicted the wound with some instrument other than the curette.

Counsel for the appellant did not press para. 3 (*h*) of the memorandum of appeal.

Paragraphs 3 (*i*) and 3 (j) of the memorandum relate to the evidence of the condition of the deceased immediately before her visit to the appellant's surgery. This, and the evidence of the condition the deceased was in when she was at the surgery before the operation, were treated by the learned judge, in our view correctly, as the vital evidence in the case. Paragraphs (*i*) and (*j*) allege misdirections:

> "(*i*) in failing to give any direction at p. 542 and p. 559, or at all, that although the mother (P.W. 4) of the deceased had said that her daughter was in normal health and looked well on the morning of February 24, the witness was 'busy at the water tap' when her daughter called and, accordingly, unable to assess the condition of her daughter.
>
> (*j*) in failing when directing the assessors as to the evidence of Avtar Singh Virdee (P.W. 3) to mention his statement in evidence that

> when he saw the deceased polishing her husband's shoes at 7 a.m. on February 24, 1959. she was seen to rest her head in her hand (p. 27)."

As regards the evidence of the deceased's mother, counsel for the appellant argued that a possible interpretation of her evidence was that she had never seen the deceased at all when the deceased visited her house immediately before going to the appellant's surgery. With respect, we are quite unable to put this interpretation on the mother's evidence as recorded. This evidence was given through an interpreter, but it is quite clear the mother intended to convey that she had seen the deceased. The following questions and answers alone make this clear:

> "Q. Were they [i.e. the trousers the deceased was wearing] in any way stained with blood when she was in your house on the morning of the 24th?
> "A. No, Sir.
> "Q. If they had been so stained in front and between the legs would you have been able to say so?
> "A. Yes, I should have seen."

Counsel for the appellant complained that the learned judge in the summing-up gave the impression that mother and daughter were in each others company, while on a fair reading of the mother's evidence the opportunity for seeing the condition of the deceased and the deceased's clothes was almost non-existent. It is true that the learned judge does not mention that the mother said she was at the water tap when the deceased arrived, but he does point out that the deceased was

> "not there for very long, but she was there for long enough to say she was going to see the print of the picture taken the day before, or words to that effect."

The mother was clear in her evidence that the deceased during her visit was "cheerful as usual", that she made no complaint about her health, and that her clothes were not then bloodstained. This the learned judge correctly put to the assessors. We do not think that his failure to mention the water tap amounted to a material misdirection.

Paragraph 3 (*j*) of the memorandum of appeal relates to evidence given by Avtar Singh Virdee of seeing the deceased sitting on the floor cleaning her husband's shoes on the morning of her visit to the deceased's surgery. Counsel for the appellant conceded that the summing-up of this witness's evidence was fair as far as it went, but he complained that no mention was made of a reply, or rather a demonstration, given by the witness. This was in re-examination, and the relevant part of the record reads as follows:

> "Q. You have been asked one or two questions about how Pavanjit was sitting on the floor in the flat when you saw her in the morning. Will you describe yourself how she was sitting?
> "A. When she was polishing the shoes—I can't remember exactly—she sat once or twice as if she—something like this (demonstrates with head on hand)."

There is nothing to indicate just what position the witness demonstrated, but it can hardly have been of much significance as the point was not pursued either by counsel for the Crown or by the learned judge. The learned judge in his judgment drew no particular conclusion one way or the other from this witness's evidence of the shoe-cleaning incident. Though he does not specifically mention the demonstration, we have no reason to believe that he overlooked it or that it was such that it would have affected his assessment of this part of

the evidence.

Paragraphs 3 (*n*), (*o*) and (*p*) of the memorandum of appeal form the next group of complaints which can be dealt with together. They concern the conduct of the appellant after the death of the deceased. and allege that the learned judge misdirected the assessors:

> "(*n*) in his direction to the assessors as to how they could assess the credibility of the appellant.
>
> (*o*) in view of the appellant's refusal to sign a death certificate and of the number of persons who were aware on February 24, 1959, of the operation performed by the appellant, that the assessors were entitled to consider whether the conduct of the appellant showed a desire to conceal the death of the patient.
>
> (*p*) in his direction to the assessors at p. 621 and p. 622 as to the message left by the appellant as to his whereabouts during the evening of February 24, 1959."

A considerable amount of evidence was given in relation to the events during the afternoon and evening following the death of the deceased and the conduct of the appellant during that period, and the learned judge deals with this evidence at some length in the summing-up. The Crown suggestion was that the delay in the removal of the body of deceased and the delay in informing the police of the death of the deceased was not consistent with an innocent mind in the appellant. So far as the removal of the body of the deceased was concerned, it does not seem to us that the learned judge's direction to the assessors is open to complaint by the appellant. He says at one stage:

> "Perhaps the delay in relation to the removal of the body will not be regarded by you as a matter of major significance."

Later, after drawing to their attention an item of evidence which might have some significance, he says:

> "On the other hand you will remember the deceased's husband and the accused were no doubt both very naturally in a state of considerable distress and when people are distressed they do not always do exactly the right thing which they would have done if they had been free from emotional tension."

Finally, the learned judge in his judgment does not draw any inference adverse to the appellant from the delay in the removal of the body.

The learned judge in the summing-up deals with the delay in reporting the death to the police as follows:

> "The accused made no effort himself to report the death to the police. He has explained that when he was giving his evidence and he says that he had known a case where some death had been reported to the police and there had been a considerable delay in the obtaining of the appropriate death certificate.
>
> "He says that he himself has had experience of having his surgery broken into and that it had been two days after he made the report, before the police came to take his statement.
>
> "Well now, gentlemen, is that the sort of reason which is going to influence a responsible man like the accused, a man in a responsible position, for not reporting the death of his patient in his surgery promptly. He need only have gone into the actual surgery itself, where there is a telephone as distinct from the waiting room where there is a telephone and merely telephoned the police and said this: 'This is Dr. Bansel speaking, so and so has just died in my surgery after the performance of an operation.'

> Instead of that he asks Gurdip Singh [this should read 'Kartar Singh'] and Jaswant Singh three hours later to report the matter when they are on their way to the deceased's flat with the body.
>
> "Now gentlemen, it will be for you to consider whether conduct of that nature is or is not a matter which affords some indication as to possibly the motive with which the operation was performed and possibly some information as to the manner in which the operation was performed. If the accused were, as he says that he was, quite convinced at the time of the death that he had not done anything wrong because he says: 'Had I made those other wounds I would have known it and I did not know it', if he had done nothing wrong and had no reason to believe he had done anything wrong in the operation, gentlemen, you will ask yourselves would it not have been perfectly natural for him in his desire to help the husband of the deceased to make the necessary arrangements for the removal of the body and perhaps in his own interest because after all this is his surgery and he is in practice as a surgeon. It might not be wholly convenient to have a dead body of a patient lying in the surgery for any longer than was possible. Suppose another patient comes to see him or something of that sort.
>
> "As I say you have to consider whether the failure to report the matter, the failure to take any more active step than telephoning a message to Mr. Kartar Singh to cummunicate with him at the surgery was indicative of a desire on the part of the accused to conceal what had happened or whether they are due possibly to the state of his emotional distress and possibly to his fear that the police might not pay attention to any report he made because when he had reported his surgery broken into they had taken two days to come and take a statement from him. I should think the latter argument is not the one you will favour because I should have thought that a surgeon would realise that however neglectful the police may have been in pursuing enquiries into a breaking they were not likely to treat a case of sudden death in a doctor's surgery in so carefree a manner, but that is a matter which you must consider and weigh."

The essence of the objection to this part of the summing-up is that it failed to put to the assessors an interpretation of the appellant's inaction which was consistent with his innocence; namely that the appellant did not sign a death certificate; that had he desired to conceal the death from the police he would have signed a death certificate; that since he did not sign the death certificate he knew the matter must come to the knowledge of the police and be the subject of an investigation; and that in the circumstances the delay in informing the police could be of no significance. There is some force in this argument, though it does not constitute a complete answer to the delay in reporting to the police. It could be inferred from the delay that the appellant, though realising that the matter must eventually be investigated, yet wished to delay the commencement of the investigation as long as possible. This, in fact, seems to be the view the learned judge himself takes of the matter. He says in his judgment:

> "The failure of the accused to make any attempt to notify the police of what had happened in his surgery for a period of over two hours after it had happened seems likewise to me to be indicative of an attempt to conceal what had been going on there that afternoon for as long as possible."

It may be that the learned judge over-stressed the matter to the assessors and that he should have drawn attention to the non-signature of a death certificate. We cannot say, however, that the inference drawn by the learned judge himself is wrong, and, in any case, it is clearly not a matter relied on by

the learned judge to any extent. We are satisfied that there has not been such a misdirection as would justify us in interfering with the conviction.

Again, as regards the message regarding his whereabouts alleged to have been left by the appellant at his house on the evening of the day of the deceased's death, it may be that in the summing-up the learned judge has given the matter more attention than it merited, and that no inference adverse to the appellant is to be drawn from the incident. The learned judge deals with the matter as follows:

> "You have to consider whether you think that he ever left a message as to where he could be found. If he did not leave such a message the fact that he did not leave it does not mean that he has committed the offence with which he was charged. It may merely mean this, that having had a very harassing day, when he was going off to attend the affairs of the community he did not think to himself—'I must leave my exact reference, the exact place where I can be found.' The significance in it is this gentlemen, if you believe that he did not leave a message why then has he told us here that he did leave such a message. Again I would remind you of what I said this morning. People who are faced with a charge in relation to an offence which they have not committed sometimes very reprehensibly in their own interests almost always disastrously try to lie their way out of a difficult situation. You may ask yourselves this, assuming we do not believe that the accused left any reference as to his whereabouts with his wife or son, has he lied about it because he thinks failure to leave that message would be regarded as some evidence that he had committed the crime with which he is charged, or has he lied about it for some ulterior motive. It will be a matter which you must consider."

Counsel for the appellant pointed out that there was no police evidence to the effect that the police had been told that the appellant had not left a message as to his whereabouts. The police officer—Inspector Corrigan—who first visited the house of the appellant on the night in question merely stated in examination-in-chief that on the occasion of that visit the appellant was not there, and the matter was not pursued either in examination-in-chief or in cross-examination. In these circumstances we think that the latter part of the learned judge's direction to the assessors set out above amounts to a misdirection in that there was insufficient evidence on which they could find that the appellant had lied in asserting that he had left a message as to his whereabouts. However, in the passage set out the learned judge indicated his own view that there was little assistance to be derived from this aspect of the matter, even on a view that the appellant had lied, and in fact the only reference to it in the judgment is in the following terms:

> "Subsequently, the police having been notified of the death of the deceased, efforts were made to contact the accused, at first unsuccessfully, as he had gone out; and ultimately at about 2 a.m. on February 25, i.e. within twelve hours of the death of the deceased—he made a statement to the police at police headquarters."

We are satisfied that the misdirection, which in any case concerns a very minor aspect of the case, played no part in the learned judge's own decision as to the guilt or innocence of the appellant.

The final matter relied on by counsel for the appellant under para. 3 of the memorandum of appeal is that raised in sub-para. (*q*), namely that the learned judge gave no direction as to the impossibility of assessing the amount of bleeding attributable to each wound. This is linked with a general submission that on the probabilities it was extremely unlikely that the appellant was responsible for the vaginal wound. Had there been a finding to this effect,

the failure to give a direction as to the bleeding attributable to each wound might have been material. In fact both the assessors and the learned judge found that both wounds were caused by the appellant, and we are satisfied that there was ample evidence on which they could so find. In the circumstances the amount of bleeding attributable to each wound is of little or no consequence.

We turn now to the procedural point taken by counsel for the appellant, that is, ground 2a of the memorandum of appeal, which reads:

> "2 a. That the failure of the learned judge to elicit the opinion of each of the assessors generally on the case, and his formulation of specific questions for their opinion, done without reference to counsel for the defence, was contrary to s. 318 of the Criminal Procedure Code and the principles of natural justice, and vitiated the trial."

In support of his contention on this point counsel for the appellant referred to s. 309 of the Indian Code of Criminal Procedure and Indian cases decided on that section. The terms of s. 309 of the Indian Code of Criminal Procedure are, however, different from those of s. 318 of the Criminal Procedure Code. Section 318 of the Criminal Procedure Code (or the corresponding provision in other East African Codes) has been the subject of comment in this court, and we prefer to be guided by the cases on the particular section which we have to consider. Section 318 reads as follows:

> "318. (1) When, in a case tried with assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.
>
> "(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.
>
> "(3) If the accused person is convicted, the judge shall pass sentence on him according to law.
>
> "(4) Nothing in this section shall be read as prohibiting the assessors, or any of them, from retiring to consider their opinions if they so wish; or, during any such retirement or at any time during the trial, from consultation with one another."

It is clear that there is a mandatory requirement to obtain the opinions of the assessors generally on the case as a whole, and this court has so held in the past. The following is the relevant portion of the record which sets out what occurred in the instant case:

> "ASSESSORS RETIRE—4.35 p.m.
>
> "4.50 p.m. July 9, 1959. Assessors return.
>
> "Judge: Now, gentlemen, I propose to ask you a series of questions. It will be necessary for each of you to answer those questions separately. It will, however, save trouble if instead of having to repeat each question three times I merely ask the question and then call on you by your numbers, Assessor No. 1, 2 and 3, for your answers.
>
> "The first question is this: was the operation performed by the accused on the deceased performed by him in the honest belief that it was necessary to terminate her pregnancy for the purpose of saving her life, or for the purpose of preserving her from grave prejudice to her health?
>
> "Assessor No. 1: The operation was illegal.
>
> "Assessor No. 2: (Likewise).
>
> "Assessor No. 3: Illegal.
>
> "Judge: Now the second question: Was the vaginal wound suffered by the deceased inflicted by the accused?

"Assessor No. 1: The wounds were inflicted by the accused, both wounds.

"Assessor No. : (Likewise).

"Assessor No. 3: (Likewise).

"Judge: Were both or was either of the wounds inflicted upon the deceased inflicted by reason of such gross negligence as to go beyond the realms of compensation between subject and subject and as to amount to a crime meriting punishment by the State by reason of being indicative of a reckless disregard of human life?

"Assessor No. 1: Gross negligence.

"Assessor No. 2: (Likewise).

"Assessor No. 3: (Likewise).

"Judge: Do you desire me to put any further questions to the assessors?

"Mr. Mangat: No, my lord.

"Mr. Marnan: No, my lord.

"Judge: Very well.

"Now, gentlemen, it will be necessary for me to ask you to attend again tomorrow, so that I may deliver my judgment in the light of the opinions, which you have today recorded. But I will not say 10 o'clock, because I shall have to write a fairly extensive judgment, so I shall say 2.30 p.m. tomorrow.

"5.00 p.m. July 9, 1959, adjourned."

It is evident that the learned judge failed to take the opinions of the assessors as to the guilt or innocence of the appellant on the case as a whole, and there has therefore been an apparent failure to comply with provisions of s. 318 of the Criminal Procedure Code. We will consider the effect of this failure later. Counsel for the appellant went further, and contended that in any event a judge must not ask questions of the assessors until after he has obtained their opinions on the case as a whole. This contention is based on certain Indian decisions, which relate to s. 309 of the Indian Code of Criminal Procedure. It is not supported by the dicta in cases heard by this court. The first of such cases to which our attention was drawn was *R.* v. *Gusambizi Wesonga* (2) (1948), 15 E.A.C.A. 65. At p. 68 of the report on that case it was said:

"We also note that at the end of his summing-up the learned judge put three questions to the assessors in order that he might have their opinions on the lawfulness by native law and custom of the entry into the house. We can see no objection to a judge requiring assessors to answer specific questions after his summing-up provided that he is careful to tell them that they should state opinion generally on the whole of the evidence, for this seems to be required by the terms of s. 277 of the Uganda Criminal Procedure Code.

"Both these points we are aware involve the much larger one as to what are the precise functions or the exact status of assessors in a criminal trial. The legislatures of all the East African Territories have been vague, perhaps intentionally so, in defining or setting out their functions, and until they are so defined it would be unsafe and impossible for the court to set them out in comprehensive certainty. All that can be said is that in the examination of the actual exercise by assessors of any function this court will always apply the test of what is fair to an accused person and will keep in mind the principles of natural justice."

The next case in which the matter arose was *Washington s/o Odindo* v. *R.* (3) (1954), 21 E.A.C.A. 392 where, at p. 393, the court said:

"He [i.e. the learned trial judge] has recorded a series of specific questions which he put to them [i.e. the assessors] and the answers received . . .

There is, of course, no objection to a judge putting specific questions to the assessors after the addresses have been concluded but when he does so we should have thought that they should at least be reminded of the salient points in the evidence before being required to answer them. It has also been laid down by this court that where the opinion of the assessors is taken in the form of answers to specific questions, they must also be asked to state their opinion on the case as a whole and on the general issue as to the guilt or innocence of the accused."

Finally the matter was again considered, though from a somewhat different aspect, in *Mohamed Bachu* v. *R.* (4) (1956), 23 E.A.C.A. 399. The relevant passage in the judgment in that case (at p. 400) commences as follows:

"The one matter of any substance argued on this appeal was a submission that the trial must be held to be a nullity because the learned trial judge did not obtain specific opinions from the assessors as to whether the evidence showed sufficient provocation to cause an ordinary person of the appellant's community to lose his power of self-control and to induce him to stab the deceased.

"It was conceded that upon the evidence in the case the learned trial judge could have found as he did, whatever answers the assessors might have given if they had been specifically required to give their opinions as to whether there had been provocation, but it was contended that if these opinions had been obtained and if they were favourable to the appellant the learned trial judge might have reached a different conclusion.

"It was further contended that in any case the judge was bound to ascertain the opinions of the assessors on every aspect of the case, failure so to do not being a trial with the aid of assessors as regards that aspect, and consequently not in compliance with s. 258 of the Kenya Criminal Procedure Code which provides that subject to the provisions of Part VII all trials before the Supreme Court shall be with the aid of assessors: s. 293 and s. 294 of the Code were also invoked, the point being that both these sections refer to 'a trial with the aid of assessors.'

"In our opinion none of these sections indicate how the aid of the assessors is to be obtained by the court. The only section of the Kenya Criminal Procedure Code which contains mandatory provisions in that regard is s. 318 and it was complied with."

The judgment then sets out s. 318 of the Kenya Criminal Procedure Code, and proceeds:

"That section does not require the court to obtain specific opinions from the assessors on every question that arises in a case. We know of no authority for such a proposition."

The passage from the judgment in *R.* v. *Gusambizi Wesonga* (2) which is set out above is then cited, and the relevant part of the judgment in *Mohamed Bachu* (4) concludes:

"We can well imagine cases in which it would be proper and indeed advisable for the trial judge to obtain a specific opinion from the assessors on a certain point in addition to their opinions on the case as a whole. In fact it is often done, but the Kenya Criminal Procedure Code does not specifically require it to be done in all cases and the interference by this court solely on the ground that the court had not required an opinion from the assessors upon a particular point as well as upon the case as a whole could only be justified if it were shown that it was unfair to the accused or contrary to the principles of natural justice.

"The application of this test to the present case does not justify

interference with the learned trial judge's findings."

We think it is clear from the passages cited, particularly that from the judgment in *R.* v. *Gusambizi Wesonga* (2), that this court in the past has seen no objection to specific questions being put to assessors either before or after a general opinion on the case has been obtained, provided, of course, that a general opinion is obtained. We see no reason to differ from that view.

It remains to consider the effect of a failure to obtain a general opinion. It is to be noted that in neither *R.* v. *Gusambizi Wesonga* (2) nor *Washington s/o Odindo* v. *R.* (3) did the failure to obtain a general opinion result in the trial being declared a nullity. We think it follows that the court must have treated such a failure as an irregularity curable under s. 381 of the Criminal Procedure Code, and, once again, we see no reason to differ from this view. We think the test to be applied in each case is that set out in *R.* v. *Gusambizi Wesonga* (2). We accordingly proceed to consider whether any prejudice to the appellant resulted in the instant case or whether there has been any contravention of principles of natural justice.

Counsel for the appellant argued that the questions put to the assessors were inapt; that the first question put to the assessors was the kind of question which arises in a case such as that of *R.* v. *Bourne* (5), [1939] 1 K.B. 687, but that no such issue arose in the instant case; that the whole question was whether the appellant believed an abortion had already commenced when he started to operate; that the appellant was not here terminating a pregnancy—he was clearing up after some other cause had terminated the pregnancy; that the assessors were therefore misled by the form of the question; and that the third question invited an opinion on negligence in reference to both wounds although the Crown had withdrawn the suggestion of negligence in relation to the uterine wound.

With respect, we are unable to agree that the questions are inapt. The first branch of the Crown case was that this was an illegal operation, and that contention was pressed throughout. The learned judge carefully, and in our view correctly, directed the assessors on what constituted an illegal operation. He said:

> "The case for the Crown as I understand it is primarily that the accused occasioned the death of the deceased by performing upon her what is called an illegal operation.
>
> "An illegal operation is an operation which is intended to terminate pregnancy for some reason other than what can, perhaps be best called a good medical reason and the only good medical reason in the eyes of the law for the termination of pregnancy, is the genuine belief that the operation is necessary for the purpose of saving the patient's life or preventing severe prejudice to her health."

The question whether or not the operation was an illegal one was certainly in issue, and there was ample evidence on which the assessors and the court could reach the conclusion that it was an illegal operation. As we have mentioned before, the vital evidence in this regard was that of the deceased's condition immediately before going to the appellant's surgery, and her apparent condition at the surgery. In the light of the learned judge's direction to the assessors we think the question was apt and proper, and the assessors' reply shows that it was not misunderstood.

As to the third question, we think this must be considered in the light of the assessors' answer to the second question, namely, that both wounds had been inflicted by the appellant. It is true that in his closing address counsel for the Crown had accepted that the uterine wound could have been caused without negligence though he did not accept that the subsequent treatment did not constitute gross negligence. In view of the assessors' previous answer,

however, it was immaterial which wound had been inflicted by reason of gross negligence if one or other had been so inflicted. Had the learned judge disagreed with the assessors on the question whether the appellant had inflicted both wounds, he might have sought an opinion in relation to the uterine wound. On the opinions expressed by the assessors, however, with which the learned judge agreed, it was unnecessary to consider the uterine wound in isolation.

We are accordingly of opinion, as we have already said, that the questions asked were not inapt. We are further of opinion that the assessors' replies in fact fully disclosed their opinions on the case as a whole. It is true they were not specifically asked to state whether they thought the appellant was guilty or not guilty, and that they should have been so asked. It is clear, however, that such a question would in the circumstances have been a mere formality. No reply other than "guilty" was possible on the opinions they had already expressed. We are satisfied that the appellant suffered no prejudice from the failure to obtain from the assessors general opinions on the case, and that, in fact, such general opinions were apparent from the specific answers given. We think that in the circumstances of this case the failure to obtain general opinions amounted to no more than a formal irregularity and that it is one curable under s. 381 of the Criminal Procedure Code, the material part of which reads:

> "381. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account:
>
> (*a*) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code;
>
> . . . . . .
>
> unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice:"

We are not prepared to interfere with the conviction on this ground.

We have dealt specifically with the principal matters of fact argued by counsel for the appellant. He touched on various other matters, but, as we understood it, did not rely on them. In any case we are satisfied that there was no substance in them. This was a long and difficult trial with a vast mass of evidence, much of it of a technical nature. We are satisfied that the learned judge's summing-up as a whole was perfectly fair to the appellant. As was remarked by this court in *Brown and Others* v. *R.* (6), [1957] E.A. 371 (C.A.) at p. 378:

> "In a long summing-up, such as this was, the ingenuity of counsel will nearly always be able to suggest that something should have been said which wasn't said, or something said which should have been left unsaid or said differently."

This was not a jury trial but was a trial with assessors. At one stage, if we understood him correctly, counsel for the appellant suggested that, whatever may have been the original function of assessors, today it approximated to that of a jury, though, of course, the judge could still over-rule them. We do not subscribe to this view. The position is correctly stated in *Habib Kara Vesta and Others* v. *R.* (7) (1934), 1 E.A.C.A. 191, cited with approval in *Miligwa and Another* v. *R.* (8) (1953), 20 E.A.C.A. 255, as follows:

> "(The section) . . . confers an absolute power on the judge to give effect to his own views. The most he is directed to do is to require each assessor to state his opinion which logically means he must consider that opinion . . . 'The assessors are not, as the jury, judges of fact so as to bind the judge.

It is the latter who must decide the case on the facts as well as the law but he will of course have regard to their opinion, even though it is not binding on him'. We have dealt thus with what seems to us quite obvious because we think it as well to indicate that no argument in future directed to persuading us to diminish or in any way to qualify that absolute power of a judge to give effect to his own views should receive any attention from this court."

See also *Joseph* v. *R.* (9), [1948] A.C. 215. Most of the objections raised have related to the summing-up to the assessors. So far as the learned judge's judgment is concerned, we are satisfied that it contains no material misdirection. The learned judge states clearly the evidence which he accepts and on which he relies, and such evidence fully supports his conclusions. Notwithstanding this, had we thought that the summing-up contained material misdirections we might have reached the conclusion that the learned judge had thereby disabled the assessors from giving him the aid which they should have given, and thus disabled himself from taking their opinions into account—*Bharat* v. *R.* (10), [1959] 3 W.L.R. 406. We are, however, satisfied that none of the alleged misdirections was such as to disable the assessors from giving a proper opinion on the case.

For these reasons we dismiss the appeal.

Appeal dismissed.

Advocates: *Stephen & Roche*, Nairobi (for the appellant); *The Attorney-General*, Kenya (for the respondent).

HARNAM DASS *v.* JOHN CORBIN AND ANOTHER

[COURT OF APPEAL AT NAIROBI (Forbes, Ag. P., Windham, J.A., and Sir Owen Corrie, Ag. J.A.), September 25, October 20, 1959.]

CIVIL APPEAL NO. 22 OF 1959.

(Appeal from H.M. Supreme Court of Kenya—Connell, J.)

Damages—Assessment—Sum paid into court—Judgment awarding damages containing references to sum paid into court—Whether award of damages influenced by payment into court.

The appellant sued the defendants for damages for personal injuries. The defendants in their defence admitted liability and paid into court the special damages claimed with an additional sum of Shs. 10,000/– which they pleaded was sufficient to satisfy the plaintiff's claim for pain and injury. In the course of his judgment the trial judge, after commenting that when appellate courts increase awards of damages they rarely award less than double the amount given by the trial judge, went on to hold that it would be wrong to double the sum paid into court which was not in his view an illiberal estimate and he therefore adopted it. On appeal the only question argued was whether the trial judge had misdirected himself in his approach to the assessment of damages.

Held: (i) the trial judge had wrongly equated himself to a court of appeal; if the matter was being considered by an appellate court the principles he had applied would have been correct but the assessment of damages by a trial judge must be based exclusively on the evidence and neither coloured nor fettered by knowledge of what had been paid into court.

(ii) it was impossible to avoid the suspicion that the trial judge might have considered assessing the damages at a sum higher than Shs. 10,000/– but less than Shs. 20,000/– but had wrongly considered himself precluded from doing so upon the false analogy he had referred to.

Appeal allowed. Order that the case be remitted to the trial judge again to assess the damages unfettered by the sum paid into court.

[Editorial Note: The damages were subsequently assessed by the trial judge at Shs. 12,000/–.]

Cases referred to:

(1) *Flint* v. *Lovell*, [1935] 1 K.B. 354.
(2) *Owen* v. *Sykes*, [1936] 1 K.B. 192.
(3) *Kungo s/o Marumba and Another* v. *Clark* (1952), 19 E.A.C.A. 60.
(4) *Davies* v. *Powell Duffryn Associated Collieries Ltd.*, [1942] 1 All E.R. 657.
(5) *Harrison* v. *Liverpool Corporation*, [1943] 2 All E.R. 449.

Mrs. L. Kean for the appellant.
F. R. Stephen for the first respondent.
S. M. Akram for the second respondent.

October 20. The following judgments were read by direction of the court:

WINDHAM, J.A.: The appellant was a patient in the second respondent's nursing home in Nairobi, where the first respondent, a qualified surgeon, performed an operation on his bladder on March 29, 1956. As a result of the admitted leaving of five gauze swabs in the appellant's body at the operation, which necessitated, among other things, a further operation to remove two of the swabs (the remaining three having earlier emerged from the wound by themselves), the appellant sued the respondents for damages for negligence. He claimed Shs. 5,060/– as special damages, and general damages for pain and injury suffered. In their statement of defence the respondents admitted liability, admitted and paid into court the Shs. 5,060/– claimed for special damages, while in respect of general damages they paid into court Shs. 10,000/–, which they pleaded was "enough to satisfy the plaintiff's claim for pain and injury".

Thus the case went to trial upon the single issue of the quantum of general damages, the agreed wording of the issue being—

"the amount of general damages comprising pain and suffering and any permanent damage proved as a result of leaving in of the swabs".

After hearing a considerable body of evidence on this issue the learned trial judge found that there had been both pain and suffering and also some permanent damage. He then proceeded to award, as general damages, the sum of Shs. 10,000/–, which was the sum paid by the respondents into court to satisfy them.

The appellant appeals to this court to re-assess, or to order a re-assessment of, the general damages awarded by the learned trial judge. His grounds for appealing are not that the figure awarded, Shs. 10,000/–, is manifestly too low, but that the learned judge, in arriving at it, did not exercise his discretion freely and base his decision purely on the evidence before him, but wrongly felt himself to be fettered, and his discretion to be limited, by the fact that the respondents had paid Shs. 10,000/– into court. It is conceded for the respondents, on the authority of such decisions as *Flint* v. *Lovell* (1), [1935]