REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 459 OF 1974

MWANGI MUTHIORI...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT

Three charges were brought against the appellant, namely preparing to commit a felony contrary to Section 308(1) of the Penal Code as Count 1, being in possession of a firearm without a firearm certificate contrary to Section 4 of the Firearms Act as Count 2, and being in possession of ammunition contrary to the same section as count 3. The first charge related to an automatic pistol, six rounds of .22 ammunition, one round of .38 ammunition, four big stones and a pair of gloves. The second charge concerned the same automatic pistol, and the third charge related to the same .22 and .38 ammunition.

Upon the trial magistrate's findings, members of the police force in a Police patrol car saw a car stolen at gunpoint only a few hours before, travelling along the road to Nairobi. It was 4 am. They followed it and, shortly afterwards, the car which was being followed stopped and its three male occupants ran into the bush. The police stopped their car and followed the men. The appellant gave himself up, was searched, and the single round of ammunition was found in his pocket. The other two men were not caught. Following the appellant's arrest, but some ten or twelve hours later, the police returned to the scene of his arrest, and there they found the pistol and the other ammunition. None of the ammunition could be fired from the pistol. The stones were, all along, in the boot of the car.

The defence, which the magistrate rejected, was that the round of ammunition was not found upon the appellant, that he was not wearing the gloves, and that he was neither found in the bush nor was he ever in the car. He was simply on the main road waiting for a vehicle to come along to carry some charcoal for him, he being a charcoal dealer.

The magistrate's conclusions, which were depressingly inadequate, were as follows:

> "The question now is was the accused found in possession of the Pistol etc. in circumstances that indicate that he and others were so armed with intent to commit a felony? The answer is yes. I am aware that the felony intended has not been specified. However it must be theft or robbery as is common knowledge. Upon seeing a Police car following, the accused and others made off. This shows the conduct inconsistent with their innocence. Lastly it is clear that the accused possessed the pistol and the ammunitions without firearm certificate and contrary to the provisions of the Firearms Act."

This was not enough. It does not consider whether there was a joint possession of the articles or any of them, whether the items, or any of them, could be considered to be weapons, whether the articles not found upon the appellant's person could be said to have been found in his possession, and so on. Nor do we subscribe to the expression, "it must be theft or robbery, as is common knowledge" for the intentions of the appellant and his associates were not broadcast to the world at large, and, upon the evidence as a whole, the four large stones in the boot pointed to a projected breaking into a building for the purpose of theft rather than to simple theft or theft in its aggravated form of robbery. However, the magistrate's acceptance of evidence was correct. Did he correctly apply the law to it?

Under Section 308(1) the crime of preparing to commit a felony is committed by being "found armed

with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony." Under Section 308(2) it is committed by a person "who, when not at his place of abode, has with him any article for use in the course of or in connection with any burglary, theft or cheating", and it can otherwise be committed. The appellant, as will be recalled, was charged under Section 308(1). It was quite wrong for the gloves to have been included in the charge. How can they be described as a dangerous or offensive weapon? (The Court of Appeal in the recent, and as yet unreported case of *Ramadhani v Republic* when dealing with a charge under Section 308(2) said that a balaclava helmet could hardly be described as an article for use in the course of or in connection with a burglary). Nor can big stones, at all events without evidence to support it, be so described. They can be used, as we have said it was obviously the intention in this case that they would be used, as instruments of housebreaking, but as this Court made clear in *Mwaura and others v Republic* [1973] EA 373, a dangerous or offensive weapon is one intended solely for causing injury to the person and does not cover housebreaking tools. The gloves and the stones cannot support the charge. That leaves the pistol and the rounds of ammunition; but the rounds cannot support the charge either for it would be a grievous misuse of the English language to equate the word "ammunition" with the word "weapon". Nor were the 6 rounds and the pistol found in the possession of the appellant. In *Lumsden v Republic* 35 Cr App R 57, the court was called on to consider the words, "found by night ... in" which appear in Section 28 of the Larceny Act, 1916 and it confirmed that they must be given their ordinary meaning as was held in *Parkin v Republic* 34 Cr App R 1. Delivering the judgment of the court, Cassels J said, "If 'found in' means what it says, it does not necessarily mean that the person charged must be caught in or apprehended in ... the building ... Nor it does mean, and can only be taken to mean, that if a person is to be convicted of an offence against this section, there must be clear and unmistakable evidence that he has been, as the section says, found in the building."

In the instant case, the pistol and the 6 rounds of ammunition were not discovered until several hours later, and the appellant was not alone when he ran from the car. There is no reason to suppose that he alone was armed and possessed some ammunition. Indeed, if he alone had them, why were they not discovered at the place where he stood when he was arrested? One or other, or both of his companions may well have had or shared them. There was less than adequate evidence of a joint possession of them in the appeal. There was not, in the words of Cassels J, clear and unmistakable evidence that the appellant was found in possession of the pistol or the 6 rounds of ammunition. The conviction on count 1 cannot be sustained and we set it aside.

Nor were the two charges under Section 4 correctly framed, for each alleged in its particulars, though not in its statement, that the appellant was found in possession of the pistol and ammunition. Subject as therein mentioned, the section requires no more, where the charge is based on possession, than that the accused person shall be proved to have had a firearm or ammunition in his possession and that he had no required certificate for it at the time. He does not have to be found in possession of the articles. Can it be said, then, that the appellant was in possession of the pistol and the ammunition for the purpose of the section? These articles are not large, and we cannot say that they were proved to have been in the appellant's possession save for the round taken from his pocket. The facts in *Maina s/o Kimani v Republic* [1955] 22 EACA 360 though dissimilar, support this proposition. We cannot sustain the conviction concerning the pistol, or that part of the other charge in so far as it relates to the 6 rounds of ammunition. We therefore quash the conviction on count 2 and limit that on count 3 to the single round. But can we enter a substituted conviction on Count 1? In the *Mwaura* case the court was asked, but declined, to substitute a conviction under Section 308(2) for a charge under Section 308(1) because the former was not minor and cognate to the latter. Unfortunately the court's attention was not invited to the fact that Section 308 falls within Chapter XXIX of the Penal Code.

Section 187 of the Criminal Procedure Code provides that when a person is charged with any offence mentioned in Chapter XXIX of the Penal Code, and the court is of opinion that he is not guilty of that offence but that he is guilty of any other offence mentioned in that Chapter, he may be convicted of that other offence although he was not charged with it. It is true that it creates one crime known as preparation to commit a felony but subsections (1) and (2) define two distinct offences so that we are entitled to make the substituted conviction if the facts warrant it. In this case, they do. The appellant admits that he was not at his place of abode and the four large stones, upon the evidence as a whole, point to their use in a

projected breaking. At 4 o'clock in the morning the appellant and his companions, upon seeing a police car approaching, stopped their car and ran away. As they were in a stolen car it can be suggested that this factor alone supplies a reason for them taking to their heels. But the stones were in the boot of the car, and the appellant had been in the car with them. Upon all the evidence, and in particular upon that part of it which established that he and his companions left and ran from their vehicle as the police car approached, they must each have known what the car contained. (A similar inference was drawn on somewhat similar facts in the recent case of *DDP v Brooks* [1974] 2 WLR 899 at p 903 D and E). There was clear and unmistakable evidence that the appellant was found in the car and thus in possession of the stones which were in it, it mattering not that he was not identified until shortly thereafter. It is not simply a matter of inference.

Having set aside the conviction on count 1, we must set aside the sentence imposed in respect of it, and this we now do. But we substitute a conviction under Section 308(2) of the Penal Code and impose the `same sentence of imprisonment for it as that which the trial magistrate awarded, to be effective from the date of the original sentence. The sentence of corporal punishment is quashed. The conviction on count 2 having been quashed, the sentence awarded upon it is also set aside. The conviction on count 3 is, as we said, now restricted, but we sustain the concurrent sentence imposed in regard to it. This sentence was most lenient, but it would be no more than an academic exercise for us to resolve to increase it. Subject to what we have said, is the appeal dismissed.

Dated and Delivered at Nairobi this 15th day of November 1974.

E.TREVELYAN	**S.J.WICKS**
JUDGE	**CHIEF JUSTICE**