CURRENT ISSUES

CRIMINAL APPEALS

(Number of appeals — Parliament's intention, and how it was carried out — Cases where a second appeal does not lie — Construction of Art. 195 (3) of the Criminal Procedure Code — Powers of appellate court on appeal from conviction only; from sentence only; from conviction and sentence.)

INTRODUCTION

According to Article 182(2) of the Criminal Procedure Code of Ethiopia, two appeals lie in criminal cases. Thus, if an appeal is lodged with an Awradja Court from a judgment given by a Woreda Court in its original jurisdiction, a second appeal lies to the High Court from the judgment given by the Awradja Court in its appellate jurisdiction. This provision, however, is not as general as it may appear to be since Article 195(3) specifically states that, when the first appellate court confirms either the conviction or the sentence, a second appeal lies only so far as concerns that part of the judgment of first instance which was not confirmed by the first appellate court. These two provisions, if read together, mean that the second appeal provided for in Article 182(2) lies only on the conditions laid down in Article 195(3). This was made quite clear in the Draft Code which was first submitted to Parliament. Article 182(2) originally contained a general proviso to which Article 195(3) was designed to give effect, stipulating that a second appeal would not lie unless the first appellate court varied the judgment of the court of first instance. However, desirous not to impose restrictions on appeals according to the result of the first appeal, Parliament deleted this general proviso, overlooking the fact that such deletion was purposeless if sub-article (3) of Article 195 remained. For, whether or not the proviso was deleted, the rule of *specialia generalibus derogant* would still lead to the conclusion that there were restrictions on second appeals. Only the deletion of Article 195(3) would have warranted the contrary conclusion.

There can be no doubt, therefore, that a second appeal from a conviction *and* sentence does not necessarily lie in every case. But are there cases where a second appeal does not lie *at all*? It would seem so. Thus, since Article 195(3) prohibits a second appeal from a conviction, if the conviction recorded by a Woreda Court is maintained by an Awradja Court, or a second appeal from a sentence, if the sentence passed by a Woreda Court is maintained by an Awradja Court, it should logically follow that the right of appeal is exhausted when both the conviction and sentence are affirmed by the first appellate court. Needless to say, this conclusion defeats the purposes which Parliament had in view when deleting the aforementioned general proviso appearing in the original text of Article 182(2). In order to circumscribe the exact scope of the latter provision as it stands today, a choice must thus be made between the conflicting interpretations of Article 195(3).

On the one hand, it may be said that the words of the law are clear, so that there is no need to inquire into its history. When logical construction of a legal provision leads to a result which was not intended by Parliament, it is for the latter to amend the provision rather than for the courts to attempt the necessary amendment by investing this provision with some other interpretation than its logical meaning in order to produce the result intended by Parliament. If this view is taken, it entails that a first appeal may put an end

to the case regardless of the fact that Parliament did not desire to achieve this result. On the other hand, it might be submitted that Article 195(3) conflicts with Article 182(2) and since the scope of the restrictions laid down in the former provision is not perfectly clear, no greater restrictions on appeals should be imposed than are absolutely necessary. What is absolutely necessary, it may be alleged, is to prohibit unlimited appeals, which is what Article 182(2) does, but not to prohibit a second appeal altogether when the judgment given in the first instance is not varied by the first appellate court even though this may be implied in Article 195(3). If this view is taken, it means that there is no case where a second appeal does not lie, either as to part of the judgment, as in the cases mentioned in Article 182(2), or as to the whole judgment, as in the case not covered where the whole judgment is maintained. In support of this construction, it may be said that the Code does not expressly prohibit a second appeal when the judgment is not varied by the first court of appeal, as the words of Articles 182(2) and 195(3) are flexible enough to admit an interpretation effectuating Parliament's intention, which was that there should be at least two, but never more than two appeals.

All things considered, however, it would seem that the first interpretation should prevail, for one would set up a rather dangerous precedent if one were to disregard the natural and logical meaning of a legal provision on the ground that it states something else than what one would want it to state. Yet, it is obvious that, if this first interpretation is adopted, the scope of Article 182(2) becomes quite narrow, as will appear from an analysis of the various situations that may occur under Article 195.

ILLUSTRATIONS

For the purpose of the following remarks, it will be assumed that the accused, *A*, is convicted of theft under Article 630 of the Penal Code by an Awradja Court and sentenced to three years simple imprisonment.

1. *A* appeals from his conviction only. The High Court may either confirm the conviction, as is implied in Article 195(3), or acquit *A*, in accordance with Article 195(2)(c).

(a) The High Court may not, it seems, alter the conviction and find *A* guilty of, say, unlawful use of another person's property under Article 644 of the Penal Code even though one of the ingredients of theft is missing and the court is satisfied that *A* had no intention of obtaining an unlawful enrichment. In other words, it would appear that the rule laid down in Article 113(2) of the Criminal Procedure Code does not apply in such a case indicating that the appellate court may not convict the accused of an offence of lesser gravity, with which he might originally have been charged in the alternative, rather than the offence charged. Assuming however, for purposes of argument, that Article 113(2) would apply in this instance, one fails to see what kind of decision the High Court might make with respect to punishment. For, although Article 644 of the Penal Code carries one year simple imprisonment as a maximum penalty, the High Court would not be in a position to reduce the sentence of three years passed by the Awradja Court since the sentence was not in issue and Article 195(3) of the Criminal Procedure Code does not empower the appellate court, on an appeal from the conviction only, to vary the sentence passed by the Court having given the judgment from which the appeal lies.

(b) If the conviction is maintained by the High Court, there is no second appeal from the conviction under Article 195(3) of the Criminal Procedure Code. Since

the sentence was not in issue in the High Court, it seems that after the conviction has been confirmed by the High Court, *A* should not be entitled to appeal from the sentence passed by the Awradja Court.

(c) If *A* is acquitted by the High Court, the prosecutor may appeal to the Supreme Court from the acquittal, which Court may reverse the order of acquittal and re-try *A* or cause him to be re-tried, and *A* may then be sentenced "according to law" under Art. 195(2)(a) of the Criminal Procedure Code. There is nothing in the Code to prevent the court that is re-trying *A* from increasing the sentence passed by the Awradja Court and sentencing him to, say, five years rigorous imprisonment. Since the re-trying court may vary the nature or extent of punishment and is not bound as to the maximum by the original judgment of the Awradja Court, *A* is in the same position as though he had been sentenced by the Awradja Court to the penalty ordered by the second court of appeal and had not been authorized to appeal from the sentence. To avoid this, it may be held that when the sentence is not in direct issue, the second appellate court is expected to act as an umpire and decide which of either of the subordinate courts arrived at the proper decision with respect to guilt so that if the conviction recorded by either subordinate court is restored, the sentence passed by that court is automatically also restored. Yet, if the second appellate court were expected to do only that, it could hardly be regarded as being entitled to pass sentence "according to law". Furthermore, the view that the second appellate court must act as an umpire should logically apply when there are conflicting decisions, not only as to conviction, but also as to sentence. But this would be inconsistent with the provisions of Article 195(2)(d) under which the court of appeal may, on an appeal from the sentence, maintain, increase, or reduce the sentence; and not merely confirm the sentence passed by either subordinate court. To overcome the latter objection, it may be contended that the provisions of Article 195(2)(d) apply only on a first appeal. There is, however, no support in the law for this contention.

2. *A* appeals from his sentence only. According to Article 195(2)(d), the High Court may maintain, increase, or reduce the sentence.

(a) If the sentence is maintained, there is no second appeal from sentence under Article 195(3) of the Criminal Procedure Code. Further-more, it seems that neither the prosector nor the accused may appeal from the conviction since the conviction was not in issue in the High Court.

(b) If the sentence is varied either way, the prosecutor and the accused may make a second appeal and the Supreme Court will then be, under the law, in the same position as the High Court, *i.e.*, it may maintain, increase, or reduce the sentence passed by the High Court in its appellate jurisdiction. Howe ver, what has been said under the illustration in paragraph 1(c) above holds good here. There is nothing in the law to prevent the Supreme Court from increasing the term or modifying the nature of the sentence of the first appellate court, so long as this may be done under the Penal Code. Unfortunately, the law considers it immaterial whether the appeal, when lodged by the accused, operates to his benefit or his detriment. It seems that *reformatio in peium* should in such a case have been prohibited, if not so far as concerns the first appeal (the decision on which is not final when it differs from the decision given in first instance), at least so far as concerns the second and final appeal so that the second appellate court in such an instance be bound, maximum-wise, by the sentence of the first appellate court.

3. *A* appeals from his conviction and sentence. The High Court may either reverse the finding and sentence and acquit him, under Article 195(2)(b)(i) of the Criminal Pro-

cedure Code, or, with or without altering the finding, maintain, increase, or reduce the sentence under Article 195(2)(b)(ii) of the Criminal Procedure Code.

(a) If the High Court reverses the conviction and sentence and acquits *A*, the prosecutor may appeal from the acquittal. The position is then the same as in the illustration under paragraph 1(c) above and calls for the same observations.

(b) The High Court may alter the conviction and maintain the sentence. For instance, it is satisfied that the act is not one of abstraction but one of appropriation, and consequently, under Article 113(2) of the Criminal Procedure Code, finds *A* guilty of breach of trust under Article 641 of the Penal Code, which carries the same punishment as theft. Neither *A* nor the prosecutor may appeal from the sentence. *A* may appeal from the conviction with a view to being acquitted by the Supreme Court. The prosecutor may also appeal from the conviction though one fails to see why he should since the sentence may not be varied by the Supreme Court. More correctly, the sentence might be varied if one were to take the view that the prosecutor does not appeal on the ground that *A* was found guilty of breach of trust, Article 195(2) of the Criminal Procedure Code, but on the ground that he was found not guilty of theft, Article 195(2)(a) of the Code. This view is, it seems, unacceptable for it defeats the purposes of Article 195(3) of the Criminal Procedure Code.

(c) If the High Court alters the conviction (breach of trust instead of theft) and varies the sentence either way, an appeal lies from the conviction and sentence and the Supreme Court will be in the same position as the High Court. See the illustrations and comments under paragraphs 1(c) and 2(b) above.

(d) If the High Court maintains the conviction and sentence, it seems that a second appeal is excluded altogether.

(e) If the High Court maintains the conviction but varies the sentence either way, the position is the same as presented by the illustrations under paragraph 2(b) above and calls for the same observations.

CONCLUSION

These rules concerning criminal appeals may be found unsatisfactory. But, since they are clear, logical and consistent, any amendments which may seem desirable should be made by Parliament and not the courts.