THE PROVISIONAL MILITARY GOVERNMENT OF SOCIALIST ETHIOPIA
SUPREME COURT,
ADDIS ABABA

Criminal Appeal No.1515'71
Hedar 6, 1972 (Eth.Cal.) (November 16,1979 Greg. cal.)

Judges: 1.
2.
3.

Appellants: ..... 1. T.A.
2. B.H.

— v —

Respondent: ..... Public Prosecutor

The Public Prosecutor has submitted his reply in his application dated 13 Tekemt 1972. The court, after a careful consideration of the case, gives the following judgement.

JUDGEMENT

The appellants were charged with attempted fraudulant misrepresentation contrary to Article (32 (1) (a) /27(1) /656(a) of the Penal Code of Ethiopia before the High Court in Asella in that, together with other three co-offenders who were not apprehended, they went from Addis Ababa to Asella city after agreeing to commit the crime of fraudulent misrepresentation; that they met a merchant, Ato Tesfaye Abebe by name, in Kebele 05 and, having decided to defraud the merchant, one of the co-offenders who was not apprehended and whose name is not known asked him whether he had heard that the Government gave money to poor farmers and merchants, and took him to the first appellant; that the first appellant took him to the second appellant, having told him that he would show him the place where he might collect the money; and that the second appellant, in furtherance of their criminal plan, told the merchant that he would show him the place where the money was given at 3:00 p.m. The court of first instance having considered the evidence presented by the Public Prosecutor, and noting that the accused were not able to produce defence evidence to rebut the evidence presented by the Public Prosecutor and the confession they made at the police station admitting their crime, found the appellants guilty of the offence as charged, and sentenced the first appellant to five years' rigorous imprisonment and a fine

of Birr 50, and the second appellant to two years' imprisonment. This appeal is lodged against this judgement.

The appellants, in their memorandum of appeal written on 2 Hamle 1971, have set forth their grounds of appeal in detail. The Public Prosecutor, in his application dated 13 Tikemt 1972, has given his reply.

In their memorandum of appeal the appellants argued that Prosecution witness No. 1 was a hostile witness and the confession they gave to the police was obtained by force. The testimony of other prosecution witnesses can at best be taken as circumstantial evidence that is not conclusive and not as direct evidence. Hence, the evidence being unreliable and insufficient, the appellants requested that the High Court's judgement be quashed and that they be acquitted.

The Public Prosecutor, on his part, in his written reply, argued that there was no reason why the evidence presented should not be sufficient and reliable to show that the appellants committed the acts they were accused of. The evidence was not doubtful. They themselves had admitted that they had committed the crime. That they gave their confession willingly and voluntarily was proved by the testimony given by the revolution defence squads who took them to the Police station. The appellants did not produce any evidence to show that their confession was obtained by force. Thus, the fact that they committed the acts that they were charged with having committed cannot be open to doubt. They committed the acts. However, when we consider the law, apart from the fact that the injured party went to the place where it was alleged that money was being given, and apart from the fact that, after taking an appointment from them, he had the appellants arrested, the evidence does not clearly show that the appellants, intending to commit an offence against the injured party's rights in property, attempted to make him act in a manner prejudicial to his propetty either by commission or omission. Hence, rather than stating that the facts establish the legal conclusion that the appellants fraudulently attempted to commit an offence against propety, it will be in accordance with the law to conclude that, intending to defraud the injured party to commit acts prejudicial to his rights in property and to create the conditions for its commission, they completed the first stage for the commission of the offence, i.e. preparatory acts. Accordingly, the Public Prosecutor, strongly arguing that the appellants' acts do not warrant their conviction under the Article under which they were found guilty, asked the court to give a fair judgement by taking into consideration the criminal intention of the appellants and the possible consequences thereof.

We, on our part, have examined the case. We have related the facts to the law. Our examination of the case in the light of the law shows that the appellants, thinking that the public in the town of Asella is naive and can be cheated very easily, went from Addis Ababa to Asella intending to obtain an unlawful enrichment by defrauding whomever they met in the town, by stating that the Government gave money to the needy; that the co-offender not yet apprehended met the private complainant and asked him whether he knew a certain person;

that, having received a negative answer, the co-offender not yet apprehended asked the private complainant what his job was, to which he answered that he was a trader; that he further asked him whether he had heard certain news, to which the private complainant replied that he had not heard, and in turn asked what the news was; that the co-offender who was not apprehended told him that the Government gave money to poor framers and merchants, and to any other person who was needy, and thereafter took him to the first appellant who was standing a few steps away from them; that the first appellant then told them that he would show them the place where the Government gave money, and took them to the second appellant who was waiting for them near the Government treasury office; that after their arrival they met the second appellant there, and, with a view to making things seem true, the second appellant immediately asked the first appellant why he had come again, since he had already taken money in the morning, to which the second appellant answered that it was true he took money in the morning and that the reason why he came now was to show the others the place; that at this juncture the second appellant told them that they should come back at 3:00 p.m. so that they might receive the money; that after this the private complainant went to members of the revolution defence squad, and notified the matter to them; and that thereafter the present appellants were apprehended and taken to the police station. Upon their arrival at the police station, they admitted their acts without any coercion, and requested that they should be pardoned on the ground that their acts did not bring about damage to property. The High Court's judgement is based on the above-stated facts which the public prosecutor proved beyond any reasonable doubt. Since the appellants neither produced nor asked for the production of any evidence to rebut the sufficiency and reliability of the evidence presented by the public prosecutor, there is no reason why we should not accept the evidence presented to the High Court as credible. We have accepted it as credible. Under the law the provisions cited as relevant for the above-mentioned acts are Articles 27(1) and 656(a) of the Penal Code. These provisions read as follows:

Art. 27(1) "Whoever intentionally begins to commit an offence and does not pursue or is unable to pursue his criminal activity to its end, or who pursues his criminal activity to its end without achieving the result necessary for the completion of the offence shall be guilty of an attempt.

"The offence is deemed to be begun when the act performed clearly aims by way of direct consequence, at its commission".

Art.656(a) "Whosoever, with intent to obtain or to procure to a third person an unlawful enrichment,* fraudulently causes a person to act in a a manner prejudicial to his rights in property, or those of a third person, whether such acts are of commission or omission, either

*The word "enrichment" does not appear in the English version of art. 656 of the Penal Code (Commentator).

> by misleading statements, or by misrepresenting his status or situation, or by concealing facts which he had a duty to reveal ... is punishable with simple imprisonment or, according to the gravity of the case, with rigorous imprisonment not exceeding five years and fine".

It is provided in Articles 27(3) and 30 of the Penal Code that basically, in an attempt to commit an offence, the penalty for an attempted offence is the same penalty attached to the offence which the offender intended to commit, without prejudice to the case where, if the acts committed constitute a separate offence, the penalty attached thereto is applicable. In the case at hand the reason why Art.27(1) is cited together with Art. 656(a) must be on the assumption that the penalty specified in the latter provision should be applicable to the appellants, since the offence attempted by the Appellants is fraud, and since offences involving fraud are covered by Art.656(a) of the Penal Code.

The provision already cited above and provided in Art.656(a) of the Penal Code is applicable when the injured party, being defrauded, acts in a manner prejudicial to his rights in property or those of a third person, whether such acts are of commission or omission. In this particular case, except for the fact that the injured party went to the place where the Government was supposed to have been giving money to the needy either after he was misled, or without being misled but intending to have the appellants apprehended; the appellants did not cause him to act in a manner prejudicial to his or to a third party's rights in property either by commission or by omission. Nor did they attempt to make him so act. As it is commonly known the offence referred to as "Kutch Belu"** is committed when offenders having found a naive person, convince him by telling him that the Government gives either money or clothes or food to the needy, and when the naive person, believing this as true, asks them to show him the place so that he may also be given supplies. At this juncture, the offenders tell him to put away his clothes and other property and come back, since he must appear needy to get the money. They further tell him that he can leave his clothes and other property with them as well. The naive person must believe the offenders and leave his clothes and other property with them, and they must disappear with his clothes and property.

In the case under consideration, apart from the facts that the third co-offender who was not apprehended took the injured party to the first appellant after asking him whether he had heard the news that the Government was geving out money; that the first appellant, after telling them that he would show them the place where money was supposedly being given, took them to the second appellant; that after they took, him the second appellant, without being asked anything, told them that money would be given at 3:00 p.m. and then they parted; and that thereafter the injured party had them apprehended before 3:00 p.m., they

**Leterally meaning "sit down" (commentator).

did not ask him to commit any act that was prejudicial to his rights in property. Perhaps we may assume that, had the injured party kept his appointment instead of having them apprehended, they might have asked him to act in the manner mentioned above. However, it can also be said that as the injured party informed them that he was a merchant, they might have thought that it was not easy to deceive a merchant, and gave him the pppointment, having decided not to be present at the appointed time.

Thus since the inferences that can be drawn from the acts performed by the appellants are more than one, we are convinced that, from the circumstances, it cannot be concluded that the fraudulent acts performed by the appellants clearly aimed, by way of direct consequence, at the commission of the crime of fraudulent misrepresentation. It is with this understanding that the public prosecutor of the Supreme Court said that the acts committed were acts of preparation rather than of attempt. In our opinion, although the acts performed do not constitute attempt, we cannot conclude that the acts constitute only preparation and that the appellants did not commit any offence. Even taking the appellants' acts as mere preparation to commit an offence, we cannot let them go free.

Intending to commit an offence of fraudulent misrepresentation by deceiving certain of the dwellers in the city of Asella who, according to them, are naive, the appellants left Addis Abeba for Assela, met the private complainant with this motive in mind and made their conspiracy public. Their conspiracy did not remain a mere agreement. In other words, they commenced to implement their criminal conspiracy. That such a consipracy constitutes a separate offence by itself and is punishable is provided by law. We have found that the relevant provision is Art. 472(a) of the Penal Code. The Amharic version of the Article is not similar to the French and English versions. However, since this discrepancy is due only to an error in translation, the correct version of this Article as provided in the English and French versions reads as follows:

> Art.472(1) "Whosoever conspires with one or more persons for the purpose of preparing or committing serious offences against public security or health, the person or property, or persuades another to join such conspiracy, is punishable, provided that the conspiracy materialises, with simple imprisonment for not less than three months and fine.
>
> "For the purpose of this Article ,serious offences are offences which are punishable with rigorous imprisonment for five years or more."

In the case at hand, since the offence that the appellants conspired to commit, as can be concluded from their acts, is, as prescribed in Art. 656 of the Penal Code, punishable with rigorous imprisonment not exceeding five years and fine depending on the gravity of the offence, Art. 472(1) of the Penal Code is applicable. Therefore, this court rules that it is under Art. 472(1) of the Penal Code that the appellants should be found guilty and be punished accordingly and not

under Art. 27/656(a) as cited in the charge and as they were found guilty and convicted by the High Court, and finds them gulty under Art. 472(1) of the Penal Code.

As far as sentencing is concerned, we have seen that the first appellant was sentenced on the basis of the rules governing aggravation due to his prior convictions. We have also noticed that the High Court concluded that the first appellant is a person who has made criminal activity his profession. However, the previous offence of which the first appellant was found guilty and for which he was sentenced for fifteen years imprisonment was homicide. On the other hand, the present offence of which he is found guilty is a different offence, which has no similarity with the former one. Thus, it cannot be said that he has made criminal activity his profession. Rather, it would be proper to say that, since he has previously been found guilty and penalized, his antecedents show that he is a dangerous person. This is prescribed by Art. 81(1)(c) of the Penal Code. Apart from stating that the first appellant did not finish the former sentence passed upon him but was released on probation after serving two-thirds of his sentence, the High Court did not ascertain whether the first appellant committed this offence within the probation period nor render its decision in accordance with Art. 204(2) of the Penal Code. If the first appellant committed the present offence while he was on probation, it would be evident that the suspension of the former penalty has to be cancelled and sentencing would have to be determined in accordance with Art. 193 of the Penal Code, as specified in Article 204(3) of the Penal Code. However, the High Court does not seem to have realized this. As indicated in the High Court's judgement, the first appellant, after serving two-thirds of his prison term, was released on two years' probation period in 1967(Ethiopian Calendar). He committed this offence in 1971 (E.C.) Therefore, Art. 204(2)(3) of the Penal Code does not apply to this case. The sentence has to be assessed in consideration of the present offence only. The appellant's antecedents are to be taken only for purposes of aggravation.

Art. 472(1) of the Penal Code, under which the appellant is found guilty, provides a punishment of simple imprisonment for not less than three months, and fine. This provision, read together with Arts.105 and 88 of the Penal Code, provides a punishment of simple imprisonment ranging from three months to three years, and a fine ranging from one Birr to five thousand Birr. The appellant's antecedents show his dangerous disposition. Thus the penalty to be imposed can be severe. However, as specified in Art. 188 of the Penal Code, it cannot exceed the maximum limit prescribed by Art. 472(1) of the Penal Code.

Although the first appellant may be considered as an incorrigible offender, he did not cause any damage in the present offence. Taking these circumstances into account, our consideration of the case convinces us that if the first appellant were to be sentenced to two years' imprisonment and a fine of Birr 50, it would be proportional to his act, would be reformative enough as far as he is concerned, and would also have a serious deterrent effect on others.

Since no evidence has been presented to show that the second appellant was previously punished for an offence, it cannot be said that he is a dangerous criminal. In the present offence, he did not cause any damage to property. Taking these circumstances into account our consideration of the case convinces as that if the second appellant were to be sentenced to one year's imprisonment and a fine of Birr 50, it would be proportional to his act, would be reformative enough as far as he is concerned, and would also have a serious deterrent effect on others.

For all the above reasons, having rejected the provisions under which the High Court found the appellants guilty, we find the appellants guilty under Art. 472(1) and sentence the first appellant, T.A., to two years' imprisonment and a fine of Birr 50, and the second appellant, B.H., to one year's imprisonment and a fine of Birr 50. It is ordered that the High Court collect the fine in accordance with Articles 91-96 of the Penal Code; that it be written to the prison administration so that the sentence imposed on the first appellant be executed starting from 12 Hedar 1971; that, since the second appellant, having been in prison since 12 Hedar 1971, has served the sentence imposed upon him, a copy of this judgement be immediately sent to the prison administration so that he may be released from imprisonment; and that the fine imposed by the court, being collectable only in accordance with the law, the appellants' period of imprisonment may not be extended on the ground that they did not pay the fine. We hereby close the file.

CRIMINAL ATTEMPT AND INCIDENTAL ISSUES: A CASE COMMENT ON CRIMINAL APPEAL NO. 1515/71

By Yoseph Gebre Egziabher*

Criminal Appeal No.1515/71 reported in this issue of the journal raises one of the complex and controversial issues in Penal Law, i.e. When is a crime attempted? Is the "beginning of execution" of a crime provided under Article 27(1),[1] second proviso, clear and therefore a sufficient test to distinguish between preparation and attempt?

It is common to divide attempted offences into "incomplete attempts" and "complete attempts" [2]

Where, having performed certain acts necessary for the completion of the offence, the offender stops short of taking the "decisive act" that would normally have brought about the intended result, either because he decides himself not to pursue his "criminal activity to its end" by deciding not to perform the "decisive act" or because circumstances beyond his control prevent him from performing the "decisive act", the attempt is an "incomplete attempt"

This would be the case where, for example, having decided to kill B, A goes to B's house with his revolver loaded and knocks at B's gate; the gate is opened for him, he goes straight to B's bedroom and aims his revolver at B; however, realizing that B is with his child, A changes his mind and leaves B with his child, because of considerateness for the child. The "decisive act" in this case would have been A's going to B's house with a loaded revolver and aiming at B.

This would be the "decisive act", since, in the normal course of things, people do not stop short of committing the crime of homicide once they aim at their victim, being at a close range to their victim.

The situation is different where, having performed all acts necessary to bring about the intended result, the offender fails to achieve his criminal goal due to circumstances beyond his control. This is the so-called "complete attempt" This would be the case where having decided to kill B, A goes to B's house and shoots at him but misses him.

One may include under the category of "complete attempts" the situation where, having performed all the acts necessary to bring about the intended result, the offender prevents the result from taking place by performing certain other

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1. For a full text of Art.27(1), see the case Criminal Appeal No. 1515/71.
2. Graven, *An Introduction to Ethiopian Penal Law* (Faculty of Law, Addis Ababa University in association with Oxford University Press, Addis Ababa-Nairobi 1965), p.27.

acts.[3] However, the term "complete attempt" seems to be a misnomer in such circumstances, since the offender has done every thing that needs to be done and has done it successfully. In other words, the offender has passed the stage of attempt and completed his criminal activity.[4] If the criminal activity is completed, one cannot logically say there is merely an attempt.

However, this division of attempted offences into complete and incomplete offences helps very little in the demarcation between preparation and attempt.[5] Where one has to deal with complete attempts, it will be clear that an offender who has committed a complete attempt has definitely passed the stage of preparation. Thus, if A were to shoot at B but miss him, this would be a clear case of attempt. Whether it is an attempted homicide or an attempted bodily injury may not be easy to determine from A's act of shooting at B; but that A had attempted to commit an offence, it seems, would be a clear case.

When one considers incomplete attempts, however, it becomes very difficult to delineate "the beginning of execution" and thus provide a clear distinction between incommlete attempts and preparation. However, it becomes necessary to distinguish between preparation and incomplete attempts, since preparation to commit an offence is not, generally speaking,[6] punishable unless the preparation itself constitutes an independent offence.[7]

To illustrate the simplicity and difficulty that one faces in classifying whether a given case is a case of preparation or attempt, let us take the following examples. A buys a revolver with the intention to kill B. Let us assume that A does not obtain the necessary license to keep the revolver in his possession. This would be a clear case of preparation as for as A's intent to kill B is concerned, but a complete offence as far as Art. 763, Control of Arms and Amunition, of the Penal Code is concerned; and this is in line with Art 26 (a), since possessing a revolver without the necessary license constitutes, in itself, an offence defined by law. We would agree that this is a clear case of an act of preparation as far as A's intention to kill be is concerned, since A's act of buying the revolver is an act intended to procure the means for the commission of the crime of homicide.

3. The example given by Graven (*ibid*) is the case where "after B has drunk the coffee in which A had put some arsenic, A gives him an antidote so that he should not die." However, classifying cases of this kind as "complete attempt" could be misleading. What we see here is a case of "active repentance", and an undoing of a complete offence that would otherwise have definitely brought about the result in the normal course of things.
4. P.C.Art.28(3).
5. Art. 26 *Preparatory Acts*: Acts which are merely designed to prepare or make possible an offence by procuring the means or creating the conditions for its commission are not punishable unless:
   (a) in themselves they constitute an offence defined by law; or
   (b) they are expressly constituted a special offence by law by reason of their gravity or the general danger they entail.
6. See P.C. Art.26(b), foot note 5 above.
7. See P.C. Art.26(a), foot note 5 above.

When we take the borderline cases, on the other hand, it becomes clear how difficult and controversial it becomes to classify a given case as a case of preparation or attempt. This would be the case where, with the intention to kill B with premeditation, A goes to B's house with a loaded revolver, knocks at B's gate; the gate is opened and goes straight to B's bedroom having been told by the person who opened the gate that B is in his bedroom; and seeing that B is with his child changes his mind and leaves B with his child out of considerateness for the child.

Different theories have been suggested by jurists to distinguish preparation from attempts (incomplete) and to define "the beginning of execution"[8] For our purpose, however, suffice it to say that from the structure of our Penal Code, a Code that penalizes impossible offences,[9] a person who attempts an offence is subjected to punishment mainly because of the manifestation of his dangerousness to society.[10]

"The beginning of execution." must thus rest more on the manifestation of the person's dangerousness than on the imminence of the danger that could materialize from the acts of the offender. The materialization of the danger should be taken into consideration only to the extent that it helps to decide the determination of the offender to commit the crime.

However, we have not said much in the way of defining "the beginning of execution" Indeed we cannot say much, except to indicate a very broad and general guideline in cases where we try to deal with human nature, since "the beginning of execution" or "the point of no return', (i.e. the "decisive act" after the performance of which one could conclusively say the person will not under the normal course of things quit but will commit the offence) may vary according to the character and antecedents of the person. Hence, where we have to deal with "incomplete attempts", we have to agree that whether or not a person attempted to commit an offence is something that has to be decided on a case-to-case basis, and is not something for which, to the extent that human behaviour can be forecast, we can lay down a formula that can be applicable to each and every case like litums paper.[11]

Analysis of the case, criminal Appeal No. 1515/71, shows that the court has found the following facts established:

a) that the appellants, together with other three persons went from Addis Ababa to Asella, Arsi Administrative Region, in order to defraud citizens in Asella;

8. See Graven, cited at footnote 2 above, p.71.
9. *Ibid.*, and P.C. Art. 29.
10. That this is also the reason why a person who commits an attempt is liable to punishment under common law, see Turner (ed.), *Kenney's outlines of Criminal Law* (Cambridge At the University Press, 1952), pp.79-83.
11. See Graven, cited above at note 2,p.73; Andeneas, *The General Part of the Criminal Law of Norway* (Sweet & Maxwell Limited London, New York University, New York, 1965), Vol. 3, pp. 88-290.

b) that in Asella city, Kebele 05 (a local self administrative unit) they met a merchant;

c) that one of the three persons who was not apprehended informed the merchant that the state gives money to poor framers, merchants and to other needy people and took him to the first appellant;

d) that the person who was not apprehended and the first appellant took the merchant to the second appellant;

e) that the second appellant asked the first appellant why he came to him since he had already been given money in the morning;

f) that the first appellant stated to the second appellant that it was true that he took money in the morning, and that the reason why he went to him was not to take money again, but to show the merchant and the person who was not apprehended the place where they could get the money;

g) that the second appellant told the merchant and the person who was not apprehended that they should come at 3:00 p.m. to collect the money;

h) that afterwards the merchant informed revolutionary defence squads on duty of the incident as a result of which action the two appellants were arrested; and

i) that the two appellants voluntarily confessed to the police and requested that, since their acts did not bring about any proscribed result, they should be excused.

From these facts that the court considers as established, what legal conclusion should be drawn? Should the conclusion be that there was no attempted fraudulent misrepresentation but preparation, and hence conspiracy, or should the conclusion be that the facts established prove that "the act performed clearly aims, by way of direct consequence" at the commission of fraudulent misrepresentation and hence there was attempted fraudulent misrepresentation and conspiracy contrary to Articles 27/656 (a) and 472 of the Penal Code concurrently?[12]

The fact that the appellants, together with the three persons who were not apprehended, went from Addis Ababa to Asella with the determination to defraud people in Assella by itself cannot, it seems, amount to attempt. This is a clear case of preparation for the commission of an offence; hence, leaving aside procedural requirements for the moment, if the appellants had not proceeded further and committed additional acts, they could have been found guilty under Article 472 of the Penal Code only.

However, the appellants went further and approached a person who told them that he was a merchant; nor did they stop there they tried their best to

12. See P.C. Art.472(3) wherein it is provided that conspiracy to commit an offence and commission of the offence are not to be merged by the principle of "unity of guilt and offence."

convince him wrongly by uttering false statements to the effect that the government gives money to poor merchants and farmers. They went still further; one of them, by posing as a government official, tried to mislead the merchant and to make him believe that the government gives money to poor merchants and farmers and that he could get the money if he came to a certain place at 3:00 p.m. Should we conclude, as the court did, that the appellants' acts do not clearly aim, by way of direct consequence, at the commission of fraudulent misrepresentation?

As has already been mentioned above, offences impossible of completion are liable to punishment if attempted. Thus, a person who shoots a dead person under the impression that he is alive is subject to punishment.[13] However, in such circumstances, there is no danger that could result from the shooting. If such a person is to be punished, he is punished not because of the danger that his act would bring about but because of the fact that he has manifested his dangerousness. Thus in deciding whether or not there was "a beginning of execution" and hence attempt, the stress should be more on the manifestation of the dangerous disposition of the accused and not literally on the beginning of the commission of the crime.

However, the court seems to express the opinion that unless the commission of the offence is literally begun, there cannot be an attempted offence. That the court seems to express this opinion can be inferred from its statement, which reads, "in this particular case, except for the fact that the injured party went to the place where the Government was supposed to have been giving money to the needy either because he was misled or without being misled but intending to have the appellants apprehended; the appellants did not make him perform any act that was prejudicial to his or to a third party's rights in property either by commission or by omission. Nor did they attempt to make him so act...

"In the case under consideration apart from the facts that the third co-offender who was not apprehended took the injured party to the first appellant after asking him whether he heard that the Government was giving out money; that, after telling them that he will show them the place where money was supposedly being given, the first appellant took them to the second appellant; that after they took him there, the second appellant, without being asked anything, told them that money would be given out at 3:00 p.m., and they parted; and that thereafter the injured party had them arrested before 3:00 p.m., they did not ask him to commit any act that was prejudicial to his rights in property..."

This conception of "the beginning of execution," however, is too narrow, and goes contrary to the policy considerations that must have prompted the legislature to provide that attempted offences should be liable to punishment, for the following reasons:

As the term itself implies attempted offence means that the offence has not materialized. When the law provides that attempted offences are liable to punishment, the main policy consideration seems to be to protect society from dangerous

13. See Art.29 and comments on this in Graven, cited at footnote 2 above, pp. 87-91.

persons, persons who have manifested their determined intention to bring about harm to society by the proximity of their acts to the final act or acts necessary to bring about the proscribed harm. If the line of demarcation between preparation and attempt is drawn such that certain acts that violate some of the elements of the offence must necessarily be performed before one can say there is attempt, the machinary of justice may step in too late.[14]

Moreover, as has already been pointed out, this conception of the beginning of execution assumes that there cannot be attempted offences in cases where the complete offence "does not imply a combination of acts or is not aggravated by reason of legally defined circumstances preceding the doing of the act" [15].

To illustrate this, let us take the case of theft as an example. Theft is abstraction of a movable, the property of another.[16] Thus, as far as this offence is concerned, there cannot be attempt except in cases where the offender is caught red-handed and prevented, beyond his control, from carrying away the property, or where he changes his mind after he gets hold of the property and leaves it to its owner. The latter case is very unlikely to happen in reality. However, in the case of robbery which is intent to commit theft or theft plus violence,[17] we can conceive attempt in all its forms, i.e. incomplete or complete, in a realistic way. This is true for the simple reason that when we take the definition of robbery as theft plus violence, more than one act must be completed in order for robbery to be a complete offence. There must be abstraction of property of another, and use of force, or threat of its use, to prevent any resistance against the intention to abstract or the abstraction. However, as illustrated above, all offences are not offences that call for more than one act for their completion, as an examination of the special part of the Penal Code reveals. Thus, to conceive of the "beginning of execution" as an act that must violate at least one of the acts proscribed by the special part of the Penal Code that defines the offence would be obviously to derogate the beginning of the offence as is comprehensively defined in the second proviso of Art.27(1) of the Penal Code; this definition is intended to be completely comprehensive and thus to provide for attempt, regardless of whether the special part of the Penal Code that lays down the elements that constitute an offence call for one act or more than one act for its violation.

On the other hand, however, even if we take the conception of "the begginning of execution" as the court did, the court seems to have erred in its finding. The court states: "... perhaps we may assume that, had the injured party kept his appointment instead of having them apprehended, they might have asked him to act in the manner mentioned above. However, it can also be said that as the injured party informed them that he was a merchant, they might have thought that it was not easy to deceive a merchant, and gave him the appointment, having decided not to be present at the appointed time.

"Thus, since inferences that can be drawn from the acts performed by the

14. Williams, Police Control of Intending Criminals', *The Criminal Law Review* (1955), pp.66-70.
15. Graven, cited above at note 2, p.71.
16. See P.C. Art. 630.
17. See P.C. Art 636.Note, however, that only intention to commit theft is enough.

appellants are more than one, we are convinced that, from the circumstances, it cannot be concluded that the fraudulent acts performed by the appellants clearly aimed, by way of direct consequence, at the commission of the crime of fraudulant misrepresentation ..."

Even if we take the second alternative posed as possible by the court, it is clear that the appellants tried to see whether or not the injured party might be misled. The person who was not apprehended and the first appellant tried to feed the injured party with "misleading statements," in the words of Art. 656 of the Penal Code. The second appellant in collaboration with the other two, posed as a government official "by misrepresenting his status" (Article 656). This clearly shows that the commission of the offence had begun since elements of Article 656 have been violated. Thus, even if we take the second alternative, the conclusion that should have been drawn seems to be that the appellants were unable to pursue their criminal activity because they were convinced that they could not deceive their victim. Had they been convinced otherwise, they would not have given their victim another appointment. Their criminal activity must have been foiled because of their conviction that they could not deceive the injured party.

Thus, even if we take the court's narrow conception of "the beginning of execution", the court should have arrived at the conclusion that there was attempted fraudulent misrepresentation.

Another interesting issue that the court dealt with in this case is the question of discrepancy between the different versions of the Penal Code. The court correctly pointed out that in the Amharic version of Article 472(1) of the Penal Code, a sentence which in the English and French versions reads, "For the Purpose of this Article, 'serious offences' are offences which are punishable with rigorous imprisonment for five years or more" is left out. The Amharic version of Art.472 (1) thus is not limited to "serious offences" This being the case, can one boldly assert, as the court did, that "this is a result of an error in translation, and the law is as it is provided in the English and French versions of the Code"?

It is a fact that the legislative body that promulgated the Penal Code discussed and approved it in the Amharic language. It is also true that Amharic is the official language of our country. Since law, especially Penal Law, is municipal law, one should take the Amharic version of the Penal Code as the law of the country, in the absence of authority to the contrary. The court did not cite as authority any minutes of the codification commission or the legislative body to show that the discrepancy between the Amharic version of Article 472(1) and the French and English versions was simply due to error in translation and not a deliberate exclusion of the requirement that the offence be "serious" In the absence of such authority, it seems more logical to conclude that the legislature deliberately excluded the requirement of a "serious" offence.[18]

18. This is not in any way to imply that, where the Amharic version of the Code is ambigous, courts should not refer to the other versions of the Code. Consulting the French version of the Penal Code in cases where the Amharic version is ambigous is, in the commentator's opinion, a commendable approach that should be continued.

Even if one were to agree with the court that the Amharic version of Article 472(1) of the Penal Code is erroneously translated, it is irrelevant to raise this point to arrive at a proper finding, since the appellants would be liable to punishment under Article 472(1), whether we accept the Amharic version or the English and French versions; this point would have been relevant only if the maximum penalty provided under Article 656 of the Penal Code were below five years' rigorous imprisonment. Thus the court raised and decided upon an issue that was not material for the decision of the case.

Other points raised and discussed by the court are contained in Articles 204(2), 204(3) and 193 of the Penal Code in relation to sentencing the first appellant. It is true that, as the Supreme Court pointed out, the High Court did not ascertain whether or not the first appellant committed the present offence during his period of probation. It is also true under the law that if a person on probation committed an offence during this period, the penalty pronounced for the fresh offence must be added to the previous penalty that was suspended in accordance with Art. 193 of the Penal Code.[19]

However, as the Supreme Court found out, the first appellant did not commit the offence of conspiracy during his period of probation. This being the case, it is immaterial and irrelevant to raise this issue, since it does not in any way help to decide on the sentence that ought to have been imposed on the first appellant.

Another point that one observes is that the court found the appellants guilty of an offence with which they were not charged. As the case shows, the appellants were charged with attempted fraudulent misrepresentation, but were found guilty, on appeal, of conspiracy as defined in Article 472 (1) of the Penal Code.

Although it is a basic principle of the criminal process that a person cannot be found guilty of an offence with which he was not charged,[20] the appellate court did not give a legal justification as to why this principle (aimed at enabling a person accused to defend himself and thereby achieving the aims of justice) was not followed in this case.

The aim of this comment is not in any way to imply that the court was not aware that a defence to attempted fraudulent misrepresentation necessarily implies a defence to conspiracy to commit this offence. Rather, the aim is that the court should have tried to justify its finding under our criminal procedure, since our criminal procedure, like any other procedure, is intended to complement the criminal law by providing procedural justice. The court should have done this especially in light of Article 472(3), which provides that conspiracy and offences against property are to be dealt with concurrently, thus implying that "unity of guilt and penalty" does not operate. This in turn implies that Article 113[21] of our Criminal Procedure Code may not apply and hence there should have been concurrent charges to begin with.

19. P.C.Art.204(3), second Proviso.
20. See Cr. Pro.C. Art. 108(1).
21. Art.113 - where it is doubtful what offence has been committed.

CONCLUSION

(1) Although one cannot lay down a general criterion that would enable to differentiate attempts from preparation, whether or not there was attempt can be decided on a case-to-case basis. In this case, even if we take the narrowest conception of attempt contrary to our Penal Code, it seems that the court should have found both attempted fraudulent misrepresentation as defined in Article 27/656 (a) and conspiracy as defined in Article 472(1).

(2) The court's conclusion that the English and French versions of Article 472(1) state the law and not the Amharic version seems to be unwarranted in the absence of authority that the term "serious" was not deliberately left out in the Amharic version of Article 472(1) of the Penal Code in order to establish that this Article may apply to any conspiracy to commit any offence.

(3) The court's reference to Articles 204 and 193 of the Penal Code seems to be irrelevant, since these Articles were not relevant in determining sentence on the first appellant.

(4) The court's finding the appellants guilty of an offence on which they were not apparently charged seems, in the absence of legal justification, to go contrary to a basic principle laid down in our criminal Procedure Code.

(1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed the offence which appears the more probable to have been committed and he may be charged in the alternative with having committed all other offences which the facts which can be proved might constitute.

(2) Where the evidence shows that the accused committed an offence with which he might have been charged in the alternative and the offence is within the jurisdiction of the court, he may be convicted of such offence notwithstanding that he was not charged with it, where such offence is of lesser gravity than the offence charged.

(3) Nothing in this Article shall prevent the court from applying the provisions of Art. 6 and 9 Penal Code.

በጎብረተ ሰብአዊት ኢትዮጵያ
ጊዜያዊ ወታደራዊ መንግሥት ፡
ጠቅላይ ፍርድ ቤት
አዲስ አበባ

የወንጀል ይግባኝ መ. ቁ. 1515/71
ጎንደር 6 ቀን 1972 ዓ. ም.

ዳኞች ፡— 1.
2.
3.

ይግባኝ ባዮች 1. ቶ.አ. አልቀረበም
2. ቤ. ኃ. አልቀረበም

መልስ ሰጭ ፡— ዐቃቤ ሕግ አቶ ብዙዓለም መርሻ ቀርበዋል
ዐቃቤ ሕግ ጥቅምት 13 ቀን 1972 ዓ. ም. በተጻፈ

ማመልከቻ መልስ ሰጥቷል ። ጉዳዩን መርምረን የሚከተለውን ፈርደናል ።

ፍ ር ድ

ይግባኝ ባዮች ጎንደር 12 ቀን 1971 ዓ ም ከቀኑ በግምት 8 ሰዓት ሲሆን በጭላሎ አውራጃ በአሰላ ከተማ የማታለል ወንጀል ለመፈጸም ተስማምተው ካልተያዙ 3 ግብረ አበሮቻቸው ጋር ከአዲስ አበባ ወደ አሰላ ከተማ ሄደው በ05 ቀበሌ ውስጥ አቶ ተስፋዬ አበበ የተባለውን ነጋዴ ለማታለል አስበው ያልተያዘው ስሙ ያልታወቀ ሰው መንግሥት ለድሀ ገበሬና ነጋዴ ገንዘብ ይሰጣል አልሰማ ህም ? በማለት ጠይቆ ወደአንደኛው ይግባኝ ባይ ዘንድ ወስዶት ከአገናኘው በኋላ አንደኛው ይግባኝ ባይ ደግሞ ከሁለተኛ ይግባኝ ባይ ጋር ገንዘብ ትወስዳ ለህ በማለት አገናኝቶት ሁለተኛውም ይግባኝ ባይ ይህንኑ የማታለል ዘዴአቸ ውን በመቀጠል በዘጠኝ ሰዓት ና ቦታውን አሳይሃለሁ ብሎ የማይደረገውን ይደ ረጋል ፡ የማይሆነውን ይሆናል በማለት ለማታለል በመሞከራቸው በወንጀለኛ መቅጫ ሕግ ቁጥር 32 (1) ሀ/2 7(1) /656 (ሀ) መሠረት ጥፋተኞች ሆነው ሊቀጡ ይገባል ተብለው አርሲ ክፍለ ሐገር አሰላ ከተማ ካስቻለው ከፍተኛ ፍርድ ቤት በተከሰሱበት ወንጀል ክሱን በመጀመሪያ ደረጃ የሰማው ይኸው ከፍተኛ ፍርድ ቤት ዐቃቤ ሕጉ እንደክሱ አቀራረብ ያሰማውን ማስረጃ በመመልከትና ይግባኝ ባዮች፡ በዐቃቤ ሕጉ በኩል የተሰማባቸውን ማስረጃ ለማፍረስ መከላከያ ማስረጃ ለማቅረብ አለመቻላቸውን በመገንዘብ በዐቃቤ ሕጉ ማስረጃ እና እነሱም በፖሊስ ጣቢያ ወንጀሉን በማመን የሰጡትን ቃል መሠረት በማድረግ ይግባኝ ባዮችን በተከሰሱበት ወንጀል በክሱ ላይ በተጠቀሰባቸው ድንጋጌ ጥፋተኞች አድርጎ እንደኛው ይግባኝ ባይ በአምስት ዓመት ጽኑ እሥራትና በአምሳ ብር መቀጫ እን ዲቀጣ ፡ ሁለተኛው ይግባኝ ባይ በሁለት ዓመት እሥራት እንዲቀጣ ፈርዶባቸ ዋል ። ይግባኙ የቀረበው ይህንኑ ፍርድ ለማስለወጥ ነው ።

ይግባኝ ባዮች ይግባኝ ያሉበትን ምክንያት ሐምሌ 2 ቀን 1971 ዓ. ም. በተ ጻፈ የይግባኝ ማመልከቻ ዘርዝረዋል ። ዐቃቤ ሕጉም ጥቅምት 13 ቀን 1972 ዓ. ም. በተጻፈ ማመልከቻ ለይግባኙ መልስ ሰጥቷል ።

ይግባኝ ባዮች በይግባኝ ማመልከቻቸው ላይ አንደኛው የዐቃቤ ሕግ ምስክር ጠላት ምስክር ነው ። በፖሊስ ጣቢያ የሰጠነው ቃል ሳንወድ በግድ የሰጠነው ነው ። ሌሎች የዐቃቤ ሕግ ምስክሮች የደረጃ ምስክሮች እንጂ የዐይን ምስክሮች አይደሉም ። ስለዚህም ማስረጃው በቂና አስተማማኝ ስላልሆነ የከፍተኛው ፍርድ ቤት የሰጠው ፍርድ ተሰርዞ በነጻ ልንሰናበት ይገባል ሲሉ ተከራክረዋል ።

ዐቃቤ ሕጉ በበኩሉ በጻፈው መልስ ይግባኝ ባዮች ድርጊቱን ለመፈጸማቸው የተሰማው ማስረጃ በቂና አስተማማኝ የማይሆንበት ምክንያት አይኖርም ። ማስ ረጃው አጠራጣሪ አይደለም ። ወንጀሉን ለመፈጸማቸው ራሳቸው አምነዋል ። የእ ምነት ቃላቸውን የሰጡት ደግሞ ወደውና ፈቅደው ለመሆኑ ፖሊስ ጣቢያ ድረስ ይዘዋቸው የሄዱት የጥበቃ ጓዶች መስክረውባቸዋል ። እንደሚሉት ሁሉ በግዳጅ የሰጡት ቃል ለመሆኑ ያቀረቡት ማስረጃ የለም ። ስለዚህም ድርጊቱን በመፈጸማ ቸው ረገድ ያለው ነጥብ አከራካሪ ሊሆን አይችም ። ድርጊቱን ፈጽመውታል ። በሕጉ ረገድ ግን የግል ተበዳዩ የማያጠግብ ተስፋ ተነግሮት ጊዜውንና ጉልበቱን ሰውቶ ገንዘብ ይገኝበታል ወደተባለው ሥፍራ ሂዶ ቀጠሮ ከተሰጠው በኋላ ተከታታይ ፈልጎ እንዲያዙ ከማድረጉ በቀር በግል ተበዳዩ ንብረት ላይ ወንጀል ለመሥራት በማሰብ የግል ተበዳዩን የሀብት ጥቅም በሚጎዳ አኳኋን በማድረግም ሆነ ባለማድረግ ለማሠራት መሞከራቸው በስውር ካልሆነ በቀር በጉልህ አይታ ይም ። ይህም ይግባኝ ባዮች በንብረት መብቶች ላይ የማታለል ወንጀል ለመፈጸም ሞክረዋል የሚለውን እውነት ነገር ከማቋቋም ይልቅ የግል ተበዳዩ በግል ሀብቱ ጥቅም ላይ ጉዳት እንዲያደርስ የአፈጻጸሙ ሁኔታዎች እንዲከናወኑ ለማድረግ የወንጀል አፈጻጸምን የመጀመሪያ ደረጃ ማለትም የመሰናዳት ተግባሮችን ፈጽ መዋል ማለቱ ሳይቀል አይቀርም ። ስለሆነም የይግባኝ ባዮች አድራጎት ጥፋተኛ በተሰኙበት አንቀጽ የማይሸፈን መሆኑን ዐቃቤ ሕግ አጥብቆ እየተከራከረ የይግ ግባኝ ባዮችን ዝንባሌና አዝማሚያ እና ሊከተል የሚችለውን ጥፋት አስተውሎ ሕጋዊና ፍትሐዊ ውሣኔ እንዲሰጥ ዐቃቤ ሕግ ይግባኝ ሰሚውን ፍርድ ቤት ይጠ ይቃል ሲል ተከራክሯል ።

በበኩላችንም ነገሩን መርምረነዋል ። ከሕግም ጋር አገናዝበን ተመልክተነ ዋል ። ነገሩን እንደመረመርነውና ከሕግም ጋር አገናዝበን እንደተመለከትነው ይግባኝ ባዮች መንግሥት ለተቸገረ ሰው ገንዘብ ይሰጣል በማለት ያገኙትን እታ ለለው ሕገወጥ ብልጽግናን ለማግኘት አቅደውና ተስማምተው የአሰላ ከተማ ሕዝብ ሞኝ ነውና ይታለላል ብለው ከአዲስ አበባ ከተማ ተነስተው ወደ አሰላ ከተማ መሄዳቸውን ፣ እስከዛሬ ድረስ ያልተያዘው የይግባኝ ባዮች ግብረ አበር የግል ተበዳዩን እንዳገኘው እዚህ ከተማ ሰው ታውቃለህ ወይ? ብሎ ጠይቆት አላውቅም የሚል መልስ እንደሰጠው ሥራህ ምንድር ነው? ብሎ ጠይቆት ነጋዴ ነኝ የሚል መልስ እንደሰጠው አንድ ወሬ ሰምተሃል ወይ? ብሎ የጠየቀው መሆኑን ፣ አልሰ ማውም ፣ ወሬው ምንድር ነው? ብሎ መልሶ ቢጠይቀው መንግሥት ለድህ ገበሬና ነጋዴ ለተቸገረ ሰው ሁሉ ገንዘብ ይሰጣል ብሎ ፈንጠር ብሎ ቆሞ ወደነበረው ወደ አንደኛው ይግባኝ ባይ እንደወሰደው ፣ አንደኛው ይግባኝ ባይ መንግሥት ለተቸገረ ሰው ገንዘብ የሚሰጥበትን ሥፍራ እኔ አሳያችኋለሁ ብሎ በሹሮንድ ጽሕፈት ቤት አካባቢ ይጠባበቅ ወደነበረው ወደ ሁለተኛው ይግባኝ ባይ ግብረ አበራቸው ዘንድ ይዘውት መሄዳቸውን ፣ እንደሄዱም ሁለተኛውን ይግባኝ ባይ አግኝተውት ሁለተኛው ይግባኝ ባይ ደግሞ ተሸቀዳድሞ አንደኛውን ይግባኝ ባይ አንተ ጠዋት ወስደህ የለም ወይ ? እንደገና ለምን መጣህ? ብሎ ነገሩን እውነት ለማስመሰል መሆኑ ነው ቢጠይቀው እኔማ ተሰጥቶኛል ፣ ለነርሱ ሥፍራውን ላሳይ ብዬ ነው

ጌታዬ ብሎ የመለሰለት መሆኑን ፥ በዚህን ጊዜ ሁለተኛው ይግባኝ ባይ እናንተ የምታገኙት ማለትም የሚሰጣችሁ በዘጠኝ ሰዓት ነው ፥ በዘጠኝ ሰዓት ተመለሱ ብሎአቸው እንደተለያዩ የግል ተበዳዩ ለጥበቃ ጓዶች ጠቁሞ በክትትል የዛሬዎቹ ይግባኝ ባዮች ብቻ ሊያዙ መቻላቸውን ፥ ተይዘው ወዲያውኑ ፖሊስ ጣቢያ እንደ ደረሱ አላንዳች ማዳጅ ድርጊቱን አምነው በሰው ንብረት ላይ ያደረሱት በደልና ውጤት ያገኘ ድርጊት ስለሌለ መንግሥት ይቅርታ እንዲያደርግላቸው መማጸና ቸውን ዐቃቤ ሕጉ በማያጠራጥር አኳኋን ያስረዳውን ማስረጃ የከፍተኛው ፍርድ ቤት መቀበሉንና በዚሁ መሠረት ይግባኝ የተባለበትን ፍርድ መስጠቱን ተረድ ተናል ። በፍሬ ነገሩ ረገድ ላለው ክርክር የቀረበውን ማስረጃ ብቁነትና አስተማማ ኝነት ሊያፈርስ የሚችል ተቃራኒ ማስረጃ በይግባኝ ባዮች በኩል ባለመቅረቡና ሊቀርብም የሚችል ማስረጃ እለና ይቅረብ ተብሎ የተጠቆመ ባለመኖሩ ለከፍ ተኛው ፍርድ ቤት የቀረበውን ማስረጃ እምነን የማንቀበልበት ምክንያት አይኖ ረንም ። አምነን ተቀብለነዋል ።

በሕጉ ረገድ ከላይ የተጠቀሰውን ድርጊት ይሸፍናል ተብሎ የተጠቀሰው በወንጀለኛ መቅጫ ሕግ ቁጥር 27 (1)እና 656 (ሀ) የተጻፈው ነው ። እነዚህም እን ደሚከተለው ይነበባሉ ።

> አንቀጽ 27 (1) « ማንም ሰው አስቦ ወንጀልን ለመሥራት ጀምሮ የወንጀሉን ተግባር እስከመጨረሻው ያልተከታተለ ወይም ለመከታ ተል ያልቻለ ወይም የወንጀሉ ሥራ አፈጻጸም ሥራውን እስከ መጨረ ሻው ተከታትሎ አስፈላጊ የሆነውን ውጤት ያላገኘ ቢሆንም በመሞ ከሩ ብቻ ጥፋተኛ ይሆናል ።
> «የወንጀሉ ሥራ እንደተጀመረ ያህል የሚቆጠረው የተፈጸመው ተግባር በማያጠራጥር ሁኔታና በቀጥታ ወንጀሉን ለመፈጸም ወደ ታሰበበት ግብ ለማድረስ የተሠራ በሆነበት ጊዜ ነው » ሲል ፤
>
> አንቀጽ 656/ሀ/ « ማንም ሰው ሕገ ወጥ የሆነ ብልጽግናን ለራሱ ለማግኘት ወይም ለሌላ ሰው ለማስገኘት ሲል አጭበርብሮ የራ ሱን ወይም የሌላውን ሰው የሀብት ጥቅም በማድረግም ሆነ ባለማድ ረግ በሚጎዳ አኳኋን አንዱን ሰው ለማሠራት በማቀድ ፥ እውነቱን ወደ ሐሰት በመለወጥም ሆነ ሐሰተኛውን ነገር እውነት አስመስሎ በማረጋገጥ ያልሆነውን እኔ ነኝ ብሎ ወይም በማታለል ዘዴ ተበዳዱዩን ወደ ስህ ተት በመምራት ወይም ደግሞ እርግጠኛውን ነገር እንዳይገለጽ በተን ኰል ብሙሽፈን ቅን ልቡናንና የልማዳዊ ደንብ ሥርዓት እንዳይደበቅ የሚከለክለውን ነገር የሰወረ እንደሆነ በእሥራት ወይም እንደነገሩ ሁ ኔታ እስከ አምስት ዓመት ሊደርስ በሚችል ጽኑ እሥራትና በገንዘብ መቀጮ ይቀጣል » ይላል ።

ወንጀሉን ለመሥራት የተደረጉት የሙከራ ተግባሮች ራሳቸውን የቻሉ ወንጀሎች ሆነው የተገኙ ሲሆኑ ለእነዚሁ ወንጀሎች የተወሰኑት ቅጣቶች የሚፈጸሙ ካልሆነ በቀር በመሠረቱ ሙከራ የሚያስቀጣው በመደቡ ለመፈጸም ለተፈለገው ወንጀል የተወሰነው ቅጣት እንዲሚፈጸም በማድረግ እንደሆነ በወንጀለኛ መቅጫ ሕግ በቁጥር 27/3/እና 30 የተጻፉት ድንጋጌዎች ያስረዳሉ ። በያዝነውጉዳይ ይገባኝ ባዮች ፈጽመውታል የተባለውን ድርጊት ይሸፍናሉ ተብለው ከተጠቀሱት ድንጋጌዎች መካከል በወንጀለኛ መቅጫ ሕግ ቁጥር 27/1/ የተጻፈው በዚሁ ሕግ በቁጥር 656 (ሀ) ከተጻፈው ጋር ተጠቅሶ የቀረበው ይግባኝ ባዮች ለመፈጸም የሞከሩት ወንጀል

ማታለልን የሚመለከት በመሆኑ በማታለል ለተመሠረተ ውንጀል በወንጀለኛ መቅጫ ሕግ ቁጥር 656 (ሀ) የተመደበው ቅጣት በይግባኝ ባዮች ላይ ተፈጻሚ ይሆ ናል በሚል አስተሳሰብ ነው ።

ከፍ ብለን የጠቀስነውና በወንጀለኛ መቅጫ ሕግ ቁጥር 656 (ሀ) የተጻፈው ድንጋጌ ለአንድ ድርጊት ተፈጻሚ የሚሆነው ተበዳዩ ተታልሎ በማድረግም ሆነ ባለማድረግ በራሱ ወይም በሌላ ሰው ንብረት ላይ ጉዳትን የሚያስከትል ተግባር ፈጸሞ ሲገኝ ነው ። በያዝነው ጉዳይ የግል ተበዳዩ ለተቸገረ ሰው መንግሥት ገን ዘብ ይሰጣል ወደተባለበት ሥፍራ ተታልሎም ይሁን ሳይታለል ይግባኝ ባዮችን ለማስያዝ እንዲረዳው ሲል ከመሄዱ በቀር የራሱን ንብረት ወይም የሌላ ሰው የሆ ነውን ንብረት በሚጎዳ አኳኋን በማድረግም ሆነ ባለማድረግ እንድም ዓይነት ድር ጊት እንዲፈጽም አላደረጉትም ። አልሞከሩትም ። እንደሚሰማው ሁሉ « ቁጭ በሉ » በሚል መጠሪያ የታወቀው የወንጀል ሥራ የሚፈጸመው ወንጀል ሠሪ ዎች አንዱን ሞኝና ተላላ ሰው ሲያገኙ መንግሥት ለድሀ ገንዘብ ወይም ልብስ ወይም ሞግብ ይሰጣል ብለው ካሳመኑት በኋላ ተታላዩ እውነት መስሎት እንግ ዲያውስ የሚሰጥበትን ሥፍራ አሳዩኝ እኔም ማግኘት አለብኝ በሚልበት ወቅት የለበስከውን ልብስና የያዝከውን ንብረት አስቀምጠህ ና ድሃ መሰለህ ካልታየህ በቀር አይሰጥህምና ንብረተህን ፡ ልብስህን ማንኛውንም ነገር እኛ ዘንድ አስቀምጥ በለው እንዲሰጣቸው አሳምነው ሰጥቶአቸው ይዘውበት ሲጠፉ ነው ። በያዝነው ጉዳይ ያልተያዘው ሶስተኛው ግብረ አበር የግል ተበዳዩን መንግሥት ለተቸገረ ሰው ገንዘብ እንደሚሰጥ አልሰማህም ወይ? ብሎት ወደ አንደኛው ይግባኝ ባይ ፡ አንደኛው ይግባኝ ባይም ኑ የሚሰጥበትን ሥፍራ አሳያችኋለሁ ብሎ ሁለተኛው ይግባኝ ባይ ወደሚገኝበት የወሰዱትና እንደወሰዱትም ምንም ነገር ሳይጠይቁት ገንዘብ የሚሰጠው በዘጠኝ ሰዓት ነው ብሎ ሁለተኛው ይግባኝ ባይ ተናግሮ ከመለ ያየታቸውና የተቆረጠውም ሰዓት ሳይደርስ የግል ተበዳይ ነኝ ባይ ያስያዛቸው ከመ ሆኑ በቀር በንብረቱ ላይ ጉዳት በሚያደርስ አኳኋን አንድ ድርጊት እንዲፈጽም አልጠየቁትም ።

ምናባት የግል ተበዳይ ይግባኝ ባዮችን ሳያስይዛቸው ቀጠሮውን አክብሮ ቢገኝ ኖሮ በተጠቀሰው ዓይነት እንዲፈጽም ይጠይቁት ነበር ይሆናል የሚል ግምት እናሳድር ይሆናል ። በእንጻሩ ደግሞ የግል ተበዳዩ ነጋዴ መሆኑን ስለገለጸላቸው ነጋዴ የሆነ ሰው በቀላሉ አይታለልም በሚል አስተሳሰብ በቀጠሮው ላይገኙ ቆርጠው በቀጠሮ እንደሚገናኙ አድርገው አሰናብተውታል ሊባል ይቻላል ። እንደዚህ ዓይነቱ የተለ ያየ አስተያየት ሊያሰጥ የሚችል ሁኔታ በመኖሩ ይግባኝ ባዮች የፈጸሙት ተግባር በማያጠራጥር ሁኔታና በቀጥታ የማታለል ወንጀል ለመፈጸም ወደአሰቡበት ግብ ለመድረስ የፈጸሙት ተግባር ነው ብሎ መደምደም አይቻልም ብለን እናምንበታለን። የጠቅላይ ፍ/ቤት ዐቃቤ ሕግም የተፈጸመው ተግባር መሰናዳትን የሚመለከት ነው እንጂ ሙከራን የሚመለከት አይደለም ያለውም በዚሁ አስተሳሰብ ነው ። በኛ አስተ ያየት ጉዳዩ ወደ ሙከራ ደረጃ እይድረስ እንጂ በመሰናዳት ላይ ብቻ የተወሰነ ወይም የተቀጨ አይደለም ። ስለሆነም ይግባኝ ባዮች የፈጸሙትን ወንጀል ለመሥራት በማሰብ የመሰናዳት ተግባር ነው ብለን በነጻ እንለቃቸውም ። ይግባኝ ባዮች የማ ታለል ወንጀል ለመሥራት አስበው የአስላ ከተማ ሕዝብ ሞኝ ነውና በአፈጮሌ ነት የማይደረገው ይደረጋል ብለን ወንጀል እንሰራ ብለው ተስማምተው ስምምነ ታቸው በወሬ ተነግሮ ብቻ ሳይቀር ከአዲስ አበባ አስላ ድረስ ሄደው ተግባርም ላይ ለማዋል የግል ተበዳይን አግኝተው የማታለሉን ዘዴ ይፋ እውጥተውታል ። በሌላ አነጋገር ወንጀል ለመሥራት ያደረጉትን ስምምነት ሥራ ላይ ለማዋል በተ

ግባር ጀምረውታል ። እንደዚህ ዓይነቱ ስምምነት ራሱ እንደሚያስቀጣ በሕገ ተደ ንግጓል ። ለዚህም አግባብነት ያለው በወንጀለኛ መቅጫ ሕግ ቁጥር 472 ንኡስ ቁጥር (1)የተጻፈው ሆኖ አግኝተነዋል ። በዚህ ቁጥር በአማርኛው ቅጅ የተጻፈው በፈረንሳይኛና በእንግሊዝኛ ቅጅ እንደተጻፈው ዐይነት እንዳልተጻፈና ይህም በት ርጉም ስህተት ምክንያት የተፈጠረ ስህተት እንጂ ድንጋጌው ልክ በእንግሊዝኛው እና በፈረንሳይኛው እንደተጻፈው ስለሆነ የዚህ ቁጥር ትክክለኛው ድንጋጌ እንደሚ ከተለው ይነበባል ፤

> 472(1) « በሕዝብ ጸጥታ ፣ ሕይወት ወይም በሰው ወይም በንብረት ከፍ ያለ ወንጀል ለመሥራት ወይም ለማዘጋጀት ካንድ ሌላ ወይም ቁጥራ ቸው ካንድ ከበለጠ ሌሎች ጋር ያደመ ወይም ሌላውን ከአድማው እን ዲገባ ያደረገ ፣ አድማው በተግባር ላይ ከዋለ (በተግባር ከተገለጸ) ከሰ ስት ወር በማያንስ እስራትና በገንዘብ መቀጮ ይቀጣል።።
>
> « በዚህ የሕግ ቁጥር ውስጥ ከፍ ያለ ወንጀል የሚባለው በአምስት ወይም ከአምስት ዓመት በላይ በሆነ ጽኑ እሥራት የሚያስቀጣ ወን ጀል ነው ። »

በያዝነው ጉዳይ ይግባኝ ባዮች ለመሥራት የተስማሙበትና በተግባርም የገለጹት ወንጀል በወንጀለኛ መቅጫ ሕግ ቁጥር 656 እንደተገለጸው ሁሉ እንደነገሩ ክብ ደት እስከ አምስት ዓመት ሊደርስ በሚችል ጽኑ እሥራትና በገንዘብ መቀጮ የሚ ያስቀጣ ስለሆነ ድርጊታቸው በወንጀለኛ መቅጫ ሕግ ቁጥር 472 (1) የተሸፈነ ይሆናል ። ስለዚህ ይግባኝ ባዮች ጥፋተኛ መባልና መቀጣትም የሚገባቸው በክሱ ላይ በተጠቀሰባቸውና በከፍተኛውም ፍርድ ቤት ጥፋተኞች ሆነው በተገኙበትና በተቀጡበት የወንጀለኛ መቅጫ ሕግ ቁጥር 27/656 መሰረት ሳይሆን በዚሁ ሕግ በቁጥር 472(1) በተደነገገው ነው ብለናል ።

በቅጣቱ ረገድ እንደኛው ይግባኝ ባይ ከዚህ ቀደም አጥፍቶ በመገኘቱ ጠቅ ላላ የቅጣት ማክበጃ ሕግ ተፈጻሚ ሆኖበት እንደተቀጣ ተመልክተናል ። የከፍተ ኛው ፍርድ ቤት ጥፋትን ሞያ አድርጎ ይዟል ሲል እንደተቸም ተመልክተናል ። አንደ ኛ ይግባኝ ባይ ቀደም ሲል ጥፋተኛ ሆኖ በ15 ዓመት እንዲቀጣ የተፈረደበት በሰው መግደል ወንጀል ነው ። አሁን ጥፋተኛ ሆኖ የተገኘው ደግሞ በሌላ ተመሳሳይነት በሌ ለው ወንጀል ነው ። ስለሆነም አንደኛ ይግባኝ ባይ ጥፋትን ሞያ አድርጎ ይዟል ማለት አይቻልም ። ጥፋትን ሞያ አድርጎ ይዟል ከማለት ይልቅ ቀደም ሲል ወንጀል ሠርቶ የተቀጣ በመሆኑ የወትሮ ታሪኩ አደገኛነቱን ይገልጽበታል ማለቱ ለነገሩ አግባብነት ይኖረዋል ። ይህም በወንጀለኛ መቅጫ ሕግ ቁጥር 81(1)(ሐ)ተገልጿል። አንደኛ ይግባኝ ባይ ወትሮ የተቀጣውን የእሥራት ዘመን በሙሉ አልፈጸመውም ፣ ሁለት ሶስተኛውን ከፈጸመ በኋላ ዓመሉን ለመፈተን ሲባል በሁለት ዓመት የጊዜ ገደብ ተለቋል ሲል የከፍተኛው ፍርድ ቤት በፍርዱ ላይ ሲገልጽ አንደኛው ይግ ባኝ ባይ ይህን ወንጀል ሆነ ብሎ የፈጸመው በተወሰነው የጊዜ ገደብ ውስጥ መሆን አለመሆኑን አጣርቶ በወንጀለኛ መቅጫ ሕግ ቁጥር 204(2) በተደነገገው መሠ ረት የሰጠው ውሣኔ የለም ። አንደኛው ይግባኝ ባይ ይህን ወንጀል የፈጸመው ቀ ድሞ በገደብ ለቆየለት እሥራት በተሰጠው የጊዜ ገደብ ውስጥ ከሆነ በገደብ ተን ጠልጥሎ የነበረውን የእሥራት ተመን እላንዳች ርኅራሄ መፈጸም እንደሚገባው የታወቀ በመሆኑ አሁን እንደገና በፈጸመው ወንጀል ሲቀጣ የቅጣት አወሳሰኑ በወንጀለኛ መቅጫ ሕግ ቁ.204(3) በተደነገገው እንደተመለከተው በዚሁ ሕግ በቁጥር 193 መሠረት መወሰን እንዳለበት ግልጽ ነው ። የከፍተኛው ፍርድ ቤት ይህን ሁሉ የተገነዘበው አይመስልም ። በከፍተኛው ፍርድ ቤት የፍርድ ሐተታ

ላይ እንደተገለጸው ከሆነ አንደኛ ይግባኝ ባይ በወትሮ ጥፋቱ ከተቀጣ በኋላ ሁለት ሶስተኛውን እንደፈጸመ በአመክሮ የተለቀቀው በሁለት ዓመት የጊዜ ገደብ ነው ። የተለቀቀው በ1967 ዓ.ም. ሲሆን ይህን ወንጀል የፈጸመው በ1971 ዓ.ም.ነው ስለሆነም በወንጀለኛ መቅጫ ሕግ በቁጥር 204(2)(3) የተጻፈው ተፈጻሚ ላይሆን በት ነው ። የቅጣቱ አወሳሰን አሁን በፈጸመው ወንጀል አንጻር ብቻ ሊታይ ነው ማለት ነው ። የወትሮ ታሪኩ ማክበጃ ብቻ ይሆናል ማለት ነው ።

ይግባኝ ባይ በዚህ ፍርድ ቤት ፍርድ መሠረት ጥፋተኛ ሆኖ የተገኘበት የወን ጀለኛ መቅጫ ሕግ ቁጥር 472 (1) ከሶስት ወር በማያንስ እሥራትና በገንዘብ መ ቀጫ ያስቀጣል ። ይህ ድንጋጌ በቁጥር 105 እና 88 ከተጻፉት የወንጀለኛ መቅጫ ሕግ ድንጋጌዎች ጋር ሲነበብ ከሶስት ወር እስከ ሶስት ዓመት ሊደርስ በሚችል እሥራት እና ከአንድ እስከ አምስት ሺህ ብር ሊደርስ በሚችል መቀጮ ያስቀጣል ማለት ነው ። የይግባኝ ባይ የወትሮ ታሪክ አደገኛነቱን ስለሚገልጽ ቅጣቱ የሚከ ብድበት መሆኑ ቢታወቅም የቅጣቱ መጠን በወንጀለኛ መቅጫ ሕግ ቁጥር 188 እንደተገለጸው ሁሉ በቁጥር 472(1) ከተወሰነው ከፍተኛ ቅጣት ማለፍ አይችል ምና ቅጣቱ መወሰን የሚገባው በዚሁ ክልል ወይም እስከመጨረሻው ድረስ ብቻ ይሆናል ማለት ነው ።

አንደኛ ይግባኝ ባይ በወትሮ ቅጣት ያልታረመ አደገኛ ወንጀለኛ ነው ቢባ ልም ባሁኑ ወንጀል ያደረሰው ጉዳት የለም ። እነዚህን ሁኔታዎች ሁሉ በማመዛ ዘን ነገሩን ስንመለከተው አንደኛው ይግባኝ ባይ በሁለት ዓመት እሥራትና በ50 ብር (አምሳ ብር) መቀጮ እንዲቀጣ ቢደረግ ቅጣቱ ለድርጊቱ ተመጣጣኝ እና ማረሚያ እንዲሁም ለሌላው ብርቱ ማስጠንቀቂያ ይሆናል ብለን እናምንበታለን ።

ሁለተኛው ይግባኝ ባይ ከዚህ ቀደም አጥፍቶ የተቀጣ ስለመሆኑ የቀረበ ማስ ረጃ ስለሌለ አደገኛ ወንጀለኛ ነው ብሎ መደምደም አይቻልም ። ባሁኑ ወንጀል በንብረት ላይ ያደረሰው ጉዳት የለም ። ስለዚህ ጥፋተኛ ሆኖ በተገኘበት ድንጋጌ በተወሰነው መሠረት በአንድ ዓመት እሥራትና በ50 ብር (አምሳ ብር) መቀጮ ቢቀጣ ቅጣቱ ለድርጊቱ ተመጣጣኝና ማረሚያ እንዲሁም ለሌላው ብርቱ ማስጠ ንቀቂያ ይሆናል ብለን እናምንበታለን ።

ከላይ በዝርዝር በተገለጡት ምክንያቶች ሁሉ የከፍተኛው ፍርድ ቤት ይግባኝ ባዮችን ጥፋተኛ ያደረገበትን ድንጋጌ ሠርዘን ይግባኝ ባዮችን በወንጀለኛ መቅጫ ሕግ ቁጥር 472(1) ጥፋተኞች አድርገን በዚሁ ድንጋጌ መሠረት አንደኛ ይግባኝ ባይ ቶ. አ. በሁለት ዓመት እሥራትና በ50 ብር መቀጫ እንዲቀጣ ፣ ሁለተኛው ይግባኝ ባይ በ. ኃ. በአንድ ዓመት እሥራትና በ50 ብር መቀጫ እንዲቀጣ የከፍተ ኛው ፍርድ ቤት የወሰነውን ቅጣት ዝቅ በማድረግ ፈርደናል ።

የገንዘቡን መቀጮ የከፍተኛው ፍርድ ቤት በወንጀለኛ መቅጫ ሕግ ከቁጥር 91 እስከ 96 የተጻፉትን በቅደም ተከተል ተፈጻሚ በማድረግ ገቢ እንዲያደርግ ፣ አን ደኛው ይግባኝ ባይ ከጎዳር 12 ቀን 1971 ዓ. ም. ጀምሮ በሁለት ዓመት እሥራት እንዲቀጣ የተወሰነበትን እንዲያስፈጽም ለወህኒ ቤቱ እንዲጻፍ ፣ ሁለተኛው ይግ ባኝ ባይ ከጎዳር 12 ቀን 1971 ዓ. ም. ጀምሮ እስከዛሬ ድረስ በወህኒ ቤት በመቆየቱ በዚህ ፍርድ ቤት የተወሰነበትን የአንድ ዓመት የእሥራት ዘመን ፈጽሞታልና የዚህ ፍርድ ትክክል ግልባጭ ባስቸኳይ ተልኮ ከወህኒ ቤቱ እንዲፈታ ፣ የገንዘቡ መቀጮ በሕጉ መሠረት ገቢ የሚደረግ እንጂ በቀጥታ ወደ እሥራት መለወጥ የማ ይቻል በመሆኑ ገንዘቡ ገቢ ካልተደረገ ተብሎ የመፈቻቸው ጊዜ እንዳይራዘም ብለን መዝገቡን ዘግተናል ። ይጸፍ ።