Provisional Military Government of Socialist Ethiopia
PANEL DIVISION OF THE SUPREME COURT

Criminal Appeal No. 1569/74
Hamle 30, 1977

Judges: Ato Assefa Liben
Ato Abebe Workie
Kegnazmach Endalew Mengesha
Ato Alemayehu Haile
Ato Dessalegn Alemu

Appellant: Diriba Abolte (from prison under escort) appeared.

Respondant: Public Prosecutor Mohammed Siraj (Head of the Prosecution Section of the Supreme Court and Panel Division) appeared.

Re: Concurrent offences and concurrent sentences.

DECISION

Diriba Abolte was charged for having committed two different offences. After hearing both charges under two separate files, the High Court sentenced him to

1. fifteen years' rigorous imprisonment (in criminal file No.27/72) for committing plunder and acting as a co-offender in the murder of Eshete Woldeyes, contrary to Articles 32/522 (1) (a) of the Penal Code;

2. death (in criminal file no. 341/72) for killing Private Yigezu Tekle and committing plunder contrary to Articles 32 (1) (a) / 522 (1) (a); 668 of the Penal Code.

Diriba Abolte lodged separate appeals against these two judgements; and,

1. for acting as a co-offender in the murder of Eshete Woldeyes and committing an act of plunder, the Supreme Court mitigated the penalty in criminal appeal no. 1067/73, and sentenced him to ten years' rigorous imprisonment as of the date of his arrest;

2. for murdering Private Yigezu Tekle and committing an act of plunder the Supreme Court commuted the death sentence to ten years' rigorous, imprisonment in criminal appeal no. 1569/74.

Diriba Abolte has now appeared in consequence of the petition he submitted on 21/10/76 (E.C.), stating as follows:

Though the judgement passed on me states that my term of imprisonment shall commence to run as of the date of my arrest, there is no reference in criminal

appeal no. 1569/74 to the actual date of my arrest. And, on account of this omission, the Prison Administration has put me in trouble. Thus, since there is evidence in the other file (criminal appeal no. 1067/73) which proves the fact that I was arrested on 15/11/71 (E.C.), I submit that it be communicated to the Prison Administration through a letter upon confirmation.

The Public Prosecutor was ordered to give a reply to Diriba Anbolte's application, and he made the following submission:

-Although Diriba has stated that he was arrested on 15/11/71 (E.C.),in criminal file no. 27/72 the High Court has mentioned 5/1/71 (E.C.)as the date on which his arrest took place. Neither of the files of the Supreme Court mentioned this fact. Hence, let the police officer who investigated the case be ordered to produce evidence that settles this question;

-The death sentence was pronounced by the High Court after the Public Prosecutor had submitted a record which shows that the accused was sentenced to fifteen years' rigorous imprisonment. Thus, it looks as if the High Court imposed the death sentence on the appellant on the grounds of the said record;

It was after separately reviewing the appeal lodged against the fifteen years' imprisonment judgement that the Supreme Court reduced the sentence to ten years (rigorous imprisonment);

-Likewise, it was by separately reviewing the appeal lodged against the death sentence that the Supreme Court commuted the death sentence ot ten years' (rigorous imprisonment);

-And, it was owing to the fact that the two files were not presented jointly even at the Supreme Court level that the separate sentences were pronounced.

Having thus explained the matter, the Public Prosecutor asked the Court to add up the two ten-year imprisonment sentences and punish Diriba Abolte with twenty years' rigorous imprisonment. In support of his request, the Public Prosecutor submitted the following legal arguments:

-Although there is no provision directly applicable to the issue, the provision which is of nearest pertinence is Article 191 of the Penal Code. This provision applies when concurrent offences are committed, and the offender is punished for only one of the offences, and later it is discovered that he also had committed other offences.

-When concurrent offences are committed, the sentence has to be assessed in accordance with the provision of Article 189(1). This article is also applicable to this kind of situation. The bases for the assessment of the sentence in such cases is the maximum penalty provided by the law for the most serious offence, and not the one determined by the court for such offence;

-Had the judgement rendered by the other division of the Supreme Court been presented to the Panel Division, since the offence reviewed by the other Division entails a higher penalty, i.e. the death penalty, the Panel Division would have

applied Articles 191 and 189 of the Penal Code and, since the sum of the two sentences is below the death penalty, it would have imposed twenty years' imprisonment by adding the ten-year imperisonment sentence imposed by itself to the ten-year imprisonment sentence imposed by the other Division:

-If there is no other alternative provided by law and, as I have explained, if, had the judgement of the other Division been presented to it, the Panel Division would have imposed twenty years' imprisonment by adding up the two ten-year imprisonment sentences, there is no reason why the two sentences should not be added up if such fact is discovered later. The adding-up of sentences imposed for different offences is a matter of mathematical calculation, and cannot be viewed as an imposition of a new penalty:

- Besides, considering the fact that the appellant acted as a co-offender in the murder and plunder when anti-revolutionaries raided and plundered the town of Kachise, the imposition of twenty years' imprisonment may probably be too little but will not be too much, not only in the eyes of the law but also in the light of a moral judgement.

The Public Prosecutor then requested that a letter be written to the Prison Administration after verification of the date of appellant's arrest, also indicating the penalty that he shall serve: i.e. twenty years' rigorous imprisonment.

Since his request for a date clarification letter had first been made in an ordinary way, Diriba Abolte was offered the opportunity of presenting his objections to the Public Prosecutor's legal contentions. His objection was that the High Court tried the case separately, but the Supreme Court gave its judgment after it considered both files; and that the fact that the High Court sentenced him to fifteen years' imprisonment first, and later on condemned him to death in the second file, shows that, since the two sentences cannot be executed separately, the decision was made with a view to consolidating the penalties; hence, pursuant to this decision, he was sentenced by the Panel Division of the Supreme Court, to serve a total rerm of ten years' imprisonment only.

The decisions rendered against Diriba Ablote on the two files give rise to the issue of whether the penalty was fixed according to the principle of concurrence, as Diriba maintains it to be, or whether they were fixed separately.

From the first (sic) decision of the High Court, we learn that a request had been made by the Public Prosecutor of the High Court for consideration of the first decision of the High Court as an aggravating ciroumstance. However, since the two offences were committed on the same day within an interval of two hours, and the two charges relating to these criminal acts were filed after Diriba Abolte was arrested on 11 Hamle 1971, it was not possible to invoke one of the decisions for the purpose of aggravating the sentence to be imposed for the other one. Nevertheless, the Court had passed the death sentence for the second charge roithout explaining whether its judgement was swayed either by the first sentence w by the concurrent nature of the offences.

The Supreme Court sentenced the appellant to ten years' rigorous imperisonment after hearing the appeal lodged against the first charge. Owing to a lack of proper disclosure of the existence of a decision given by another division of the Supreme Court, the Panel Division passed a separate sentence of ten years' imprisonment, after hearing the appeal lodged against the second charge. These being the circumstances in which the decisions were given, we do not accept Diriba Abolte's allegation which states that the Panel Division sentenced him to ten years' imprisonment for the second charge after considering the first ten-year imprisonment sentence passed by the other Division.

We find it appropriate to know what the Prison Administration shall do if it is notified only of the fact that the decisions passed by both courts were rendered separately, and that the two criminal acts were committed on the same day. Lieutenant Abera-Mengiste, head of the Prison Administration Section, answered the question forwarded by the court on the above point as follows:

"We shall make him serve twenty years of rigorous imprisonment by adding up the two ten-year decisions given in the two files; and he shall also be considered as a recidivist and shall not be put on probation."

As has already been indicated above, Diriba's case involves the question of not only making known the date on which his term of imprisonment has begun to run for the second offence, but also of determining the total length of the sentence that he has to serve for the two files (*sic*).

As the criminal acts referred to in the two files were committed on one and the same day, and Diriba Abolte was charged and convicted for the second offence after he had already been arrested and detained for the first offence, this situation calls for examination of the following issues : Should he serve only one ten-year sentence for both files (*sic*) instead of two sentences, each of ten years? Or should the two sentences be added up and he be punished with twenty years' of imprisonment? Or, is there a third choice? If our law has no answer to these questions, would it amount to imposing a new sentence previously undecided, should the court make a ruling based on any of these alternatives?

If a court, without being made aware of the fact that someone is a convicted prisoner, tries such a person for a different offence and passes judgement against him, how should the sentence be executed? Our penal law does not answer this question. However, the Court cannot refrain from considering the issue on the mere grounds that there is no law that deals with this question.

On the other hand, we cannot brush aside the question by saying that matters of executing sentences are within the jurisdiction of the Prison Administration, for the Prison Administration is empowered to execute only what is decided by a court. Furthermore, since the reply the Prison Administration gave to the question forwarded by the Court as to what it would do if confronted with this case has no regal basis, the Court thinks that it is appropriate to entertain the case, and to issue directives concerning the execution of the sentences as it sees fit.

The criminal acts that Diriba Abolte committed on one and the same day within an interval of two hours constitute the grounds on which the two sentences were pronounced. Two different charges could have been framed against him for these acts; and, had the Public Prosecutor received the facts at one and the same time, he would have prepared concurrent charges against Diriba Abolte and the sentence would have been assessed pursuant to Article 189 of the Penal Code. Should the Public Prosecutor, due to lack of awareness of the situation, frame different charges for the two offences at different times, and a decision be made on one of the charges ahead of the other, the court which conducts a hearing on the second charge shall determine the second sentence in accordance with Article 191 of the Penal Code, if it is notified of the first decision. As enunciated by Article 191, the punishment to be imposed in such instances shall be determined in accordance with the principles set out in Article 189 of the Penal Code. The grounds for determining a penalty pursuant to Articles 189 and 191 are such acts as Diriba Abolte was said to have committed. The only reason that precluded the direct application of these Articles to Diriba Abolte's case was that he was not charged concurrently with the offences in the first instance; and, even after he was charged separately the existence of this fact was not duly disclosed - in this way precluding the possibiliy of determining the second sentence having regard to the first sentence. The Court is thus left with no other alternative than to give directives applicable to such situations. As has previously been mentioned, the provisions that have close relevance to Diriba Abolte's case are Articles 189 and 191 of the Penal Code. Accordingly, we hold that the directives to be issued must be drawn up by interpreting these articles.

It has already been said that the penalty applicable to the situation described under Article 191 shall be determined in pursuance of the principles laid down in Article 189. Of the two offences Diriba Abolte is said to have committed, the more serious one is that act he is said to have committed contrary to Article 522 of the Penal Code, which is referred to in criminal file no. 1067/73. In criminal appeal no. 1569/74, he was convicted for violating Article 3(2) of the Special Penal Code Proclamation No. 8/74; the peanlty prescribed for this offence is less severe than the death penalty prescribed for the first offence.

It was the Sixth Division of the Supreme Court that heard the appeal lodged against the charge framed under Article 522, and imposed a sentence of ten years' imprisonment. If we take this sentence of ten years' imprisonment as the basic penalty provided for the most serious offence, had the case which was heard by the Panel Division been presented to the Sixth Division, the penalty would have been determined taking into account this ten years' imprisonment judgement as the basis, and, in the language of Article 189 (1) (b), the court would have" imposed a penalty exceeding by up to one-half of the basic penalty". Mathematically speaking, the penalty that Diriba Abolte deserves will thus become fiteen years' imprisonment. One of the restrictions on determining the highest penalty for concurrent offences is that part of Article 189 (1) (b) which we quoted Above. Accordingly, we have rejected the request made by the Public Prosecutor for an imposition of twenty years' imprisonment, contrary to the said restriction.

We have delivered this explanation of the judgement, holding that Addis Ababa Prison Administration shall execute the judgements given against Diriba Abolte in both files by making him serve fifteen years' rigorous imprisonment, as we explained above. Since the two sentences have been imposed by reason of the commission of concurrent offences on one and the same day, we have not sustained the Prison Administration's opinion which states that Diriba Abolte shall be considered as a recidivist who committed another offence while serving a sentence or after fully serving a sentence for a previous offence, and thus shall not be put on probation. We hold that the question of putting him on probation should be considered as in any other case, taking into account the behaviour that the prisoner shows while in prison and the fulfilment of other criteria.

We order that a copy of the decision be sent to the Addis Ababa Prison so that it shall execute the sentence in accordance with this decision.

This decision is given by the Panel Division by majority today, the 30th of Hamle, 1977 E.C.

Dissenting Opinion of the Minority

We, Abebe Werke and Dessalegn Alemu, the judges mentioned in the second and fifth lines, have not agreed with the decision given by the majority concerning the interpretation of the law and the length of the sentence Diriba Abolte must serve. In our opinion the decision that should have been given is the following:

Diriba Abolte was charged with two different offences. For one of the offences the High Court sentenced him to death and for the other one it sentenced him to fifteen years' rigorous imprisonment. On appeal, the Supreme Court commuted the death sentence to ten years' rigorous imprisonment and reduced the fifteen years' imprisonment sentence to ten years' rigorous imprisonment. Both of the sentences were to commence running as of the date of his arrest.

When the sentences were imposed against Diriba Abolte by both courts for the two offences, nothing was said about aggravation or consolidation of the penalties. When it was decided that Diriba Abolte be imprisoned for ten years, the sentence was to commence running as of the date of his arrest. However, the date on which he was arrested has not been specified in one of the judgements. Thus, the present argument arose when Diriba Abolte petitioned the court to refer to the other file and notify the date of his arrest to the Prison Administration.

Though the file shows that the date on which he was arrested was 11 Hamle 1971, the Public Prosecutor was ordered to state his opinions because of the fact that Diriba Abolte was charged with two offences.

In his reply the Public Prosecutor stated that the issue raised by this case was not one of stating the date of appellant's arrest, but rather it was one of adding up the two sentences. Consequently, he requested the court to add up the sentences.

The Public Prosecutor further stated "... though there is no provision which directly applies to this case, Article 191 of the Penal Code, which has close relevance to this case, should be referred to, and decision be given in accordance with Art. 189."

As clearly pointed out by the Public Prosecutor, there is no provision in the Penal Code which covers this situation. The Ethiopian Penal Code was not drafted in such a way as to cover this situation. This Court was not able to find relevant cases decided previously on similar issues. Though previous judgements are not binding, they might have been helpful for purposes of research, if there were any. We have also consulted some codes of other countries, but we were not able to find a provision that deals with this issue. Article 5 of the French Penal Code, which is the basis for the interpretation of this concept, provides that, unless it is clearly stated in the judgement, sentences shall run concurrently and not consecutively. Articles 50-53 of the Penal Code of the Republic of China, and Sections 35 and 36 of the Federal Criminal Law of the Soviet Union, provide that, where another offence is committed before a sentence imposed in a prior judgement is fully served, the sentence to be imposed later shall be added to the previous sentence; but in such a case the penalty shall not exceed a specified period. However, Article 53 of the Penal Code of the Republic of China clearly provides that, where an accused is sentenced for more than one offence, the penalty shall be consolidated in accordance with Article 51 of the same Penal Code. Furthermore, the method of consolidating the sentences shall be assessed by the same method as the method of assessing the penalty when they are decided simultaneously, or as if the first judgement was known when the second judgement is given.

We have no similar provision under Ethiopian law. On the other hand, as can be seen from some works of research, unless it is clearly stated in the judgement that one sentence shall commence to run before (sic) the other sentence is fully served, the sentences shall ran concurrently - see Columbia Law Review, vol. 25/1925, pp. 671-672. This may not be difficult, particularly when the offences are tried together; or even if they are not tried together, if the court which decides the second offence is aware of the first judgement. The Ethiopian law follows this principle, too. However, under Ethiopian law, as in others, a problem arises when two decisions are given at different times due to unawareness of the existence of the first judgement, and the court is requested to give an explanation about the execution of the sentences.

Research work conducted on the question of consolidation or non-consolidation of sentences shows that the issue is resolved differently by different courts, or even by different divisions of the same court, However, all of them agree that, unless it is clearly stated in the judgement that the sentences shall run consecutively they shall run concurrently. The research contained in *Criminal Law Review* (1958) p. 174, supports this view, too. This view is also supported by another work of research contained in the 1962 issue of the same Journal (pp. 490-91).

Thus, when we come to the Ethiopian Law, and consider Diriba Abolte's petition on the one hand, and the objection and request made by the Public

Prosecutor on the other, we fully agree with the statement of the Public Prosecutor which says"... There is no law which covers this situation." However, the Public Prosecutor has stated that the provision which has close relevance to the case is Article 191 of the Penal Code. He said that this article provides that the offender shall not be punished more severely than if all the offences had been tried together. For the determination of the sentence, it refers the matter to Article 189 of the Penal Code. Thus, he asked that, even though the two charges were not joined, since Diriba Abolte committed the offences on one and the same day within an interval of two hours, the court should assess the penalty pursuant to Article 189 of the Penal Code, and impose twenty years of rigorous imprisonment. One cannot agree with this contention, for it raises many other questions.

What Article 191 provides for is that, where, after an accused has been convicted and sentenced for an offence, it is discovered that he has also committed another offence, the new sentence shall be assessed in a manner such that the offender will not be punished more severely than if all the offences have been tried together. In such a situation, Article 191 refers the matter to Article 189 (1) of the Penal Code for the assessment of the sentence. Article 189 (1) states that in such a situation we should follow the rules of aggravation. In addition to this, Article 189 (1) provides that whenever such a situation arises, the penalty should be aggravated. The manner of aggravating is that (1) the penalty for the most serious offence shall be imposed first, and (2) if the court thinks it fit, it may increase the penalty by up to one-half of the penalty provided for the most serious offence.

The Public Prosecutor has said that, when the law says the penalty provided for the most serious offence, it is referring to the maximum penalty fixed by the law, and not to the one determined by the court. However, the minority has refrained from expressing its view on this point.

When the judgement passed by the High Court against Diriba Abolte was altered in criminal appeal no. 1569/74, it was said that Diribe Abolte shall be punished with "ten years' rigorous imprisonment as of the date of his arrest." Likewise, when the judgement given by the High Court was altred in criminal file no. 1067/73, it was said that he shall be punished "with ten-years' rigorous imprisonment as of the date of his arrest." So long as the two judgements are of this status, it would be difficult to come to a conclusion based on unfulfilled hypotheses, and to say that, had one of the judgements been known, the penalty would have been more severe. The two judgements were given by the Supreme Court. In default of a provision that says such action should be taken if it is discovered later that two final judgements are given in different files, we fail to see a reason for annuling the two sentences and imposing another one. In order to add up and aggravate the penalty pursuant to Article 189 of the Penal Code, there should be a clear provision similar to that in Article 191. If there is no provision similar to Article 191, and if we judges of our own discretion apply the principle laid down under Article 189, it would amount to applying a provision similar to Article 191 as if it exists. And thus, it will amount to annulling the previous judgement, and replac-

ing it with another judgement, since the date on which the penalty shall commence to run has been determined.

What the Public Prosecutor argues is that, had the Court known of the existence of another decision when it imposed the second sentence, the Court would have merely added up the sentences; and this would not amount to imposing a new penalty. However, we do not agree with this opinion. Even if the penalty determined for the first offence is known, this Division cannot know what penalty the court would have imposed for the second offence. And if it cannot know the penalty what it will impose will be different from those given in the two decisions. And this will amount to imposing a new penalty. On the other hand, as the Division is an appellate one, it is not possible to know whether or not it would have returned the file to the High Court to assess the penalty again. Therefore, since what the Courts would have done is not clear, we the judges who have expressed the minority opinion have not accepted the Public Prosecutor's argument. In our opinion, accepting the public prosecutor's argument is the same as giving a new judgement and imposing a new penalty. And since this would amount to violating the principle of double jeopardy, or *autrefois convict* and *autrefois acquit*, which are contained in Articles 2, 3, and 60-63 of the Ethiopian Penal Code, we have chosen not to agree with the majority opinion.

If two or more offences are committed by one person, and, if, by mere chance, the charges are tried and decided at different times, and if the reason for rendering such decisions is the Public Prosecuter's failure to disclose to the court the existence of the other decision, or if by mistake the court ignored this fact after it was disclosed to it and determined a different and separate penalty for the second offence, so long as the two decisions have specified the date on which the sentences shall commence running, we do not see any grounds for altering the sentences, other than ordering their execution in accordance with the decisions. We are of the opinion that, other than agreeing that the sentences shall be served concurrently, the penalty cannot be altered to twenty years in acceptance of the Public Prosecutor's argument.

The officer we called from the Addis Ababa Prison Administration, has told us that, if the Administration receives two decisions, they will execute them by adding the terms of imprisonment and they will also consider the prisoner as a recidivist and, consequently, theywill not put him on probation.

Commenting on this, Diriba Abolte has said that a prison administration cannot be asked to give a legal opinion, since its duty is to merely execute what is decided by courts. The minority finds it difficult to accept the opinion expressed by the representative of the Addis Ababa Prison Administration. Where there is a clear law, we do not think that one can give such a ready-made opinion. The question of putting the prisoner on probation is also an issue that cannot be ignored. We are of the opinion that the prisoner should be put on probation when he fulfils other conditions.

For all these reasons, we have not agreed with the decision of fifteen years' imprisonment passed by the majority, and thus have expressed our minority opinion.

Thus, we hold that, since Diriba Abolte was arrested on 11 Hamle 1971 for both charges, only this fact should have been communicated to the Prison Administration to execute the sentences pursuant to the above opinion. We think that it will be useful if the current Law Revision Committee is notified of the deficiency of the law on this point.

Assessment of Sentence in Cases of Concurrent Offences Entailing Loss of Liberty:

A Case Comment on Criminal Appeal No 1569/74

By Negatu Tesfaye *

In criminal appeal no. 1569/74, reported in this issue of the Journal, the court was faced with the question of concurrent offences: and the issues raised were

(1) How should sentences be computed in cases of concurrent offences?

(2) Where an offender is convicted for having committed concurrent offences and has been sentenced to separate fixed terms of imprisonment by different courts or different divisions of the same court, how should the sentences be executed?

(3) Would it amount to an imposition of a new penalty should a court aggravate the sentences passed in the situation stated under (2) after execution of the sentences has begun?

"Concurrence", as defined in Article 82 (1) (a) of our Penal Code, are of two types: material and notional.

Material concurrence exists when an offender successively [1] commits several offences. Whether the successive offences are of the same or different nature and whether they are committed against the same person or different persons does not make any difference. Thus, if D rapes Y and subsequently takes her gold necklace by force, he commits concurrent offences of different nature against the same person (i.e. Y) in violation of articles 589 and 636 of the Penal Code. Similarly, if D assaults A and performs sexual intercourse with B's wife, he commits concurrent offences of different nature (i.e. assault and adultery) against different persons (i.e. A and B) in violation of Articles 544 and 618 of the Penal Code, respectively.

In cases of material concurrence it is also possible that the successive acts done may all contravene the same criminal provision. Such will be the case if, for example, D repeatedly [2] steals goods from P, or performs sexual intercourse with A's and B's wives. In both cases the successive acts done contravene the same criminal provision (i.e. Art. 630 in the former case, and Art. 618 in the latter). In the former case the concurrent offences are committed against the same person (i.e. P), while in the latter case they are committed against different persons (i.e. A and B). [3]

Concurrence also exists when an offender violates several criminal provisions by only performing a single act. This kind of concurrence is known as "notional concurrence".

In case of notional concurrence, the offender's single act simultaneously contravenes several criminal provisions. This is the case if D, with intent to kill A, sets

fire to A's house in the middle of the night while A is deep asleep and, as the result of the fire, A and A's girl friend, who is asleep with A and of which fact D is not aware, suffer serious bodily injuries. In this case, D has performed only one act, but this single act simultaneously contravenes two different criminal provisions i.e. Article 488 and 27/522 of the Penal Code.

If a person commits concurrent offences as explained above, how should he be charged and sentenced?

The Criminal Procedure Code provides that, where the police investigation file discloses that an accused has committed concurrent offences, the public prosecutor must prepare a single charge containing different counts, and each offence so charged must be described separately.[4] And, unless it is likely that the accused will be embarrassed in his defence (in which case the court shall order the charges to be tried separately), all the charges will be tried together.[5]

If all the charges are tried together, it may not be difficult for the court to assess a sentence for the concurrent offences, provided the acucsed is convicted on all or some of the counts. However a problem may arise if the charges are tried separately by different courts or even by different divisions of the same court. This is because our Criminal Procedure Code does not say anything as to which court or division will assess the final penalty in such situations.[6]

Generally speaking, in the case of concurrent offences where more than one penalties are prescribed, different methods are used to assess sentences. These are cumulation, absorption, and aggravation.

Under some laws,[7] the court has power to impose cumulative sentences on conviction of several offences charged separately or on separate counts of the same charge. In such a case the imprisonment for one offence commences at the termination of imprisonment for another. Under such a system, if an accused is convicted, say for theft, arson, rape, common wilful injury, and robbery, and sentenced to a fixed term of imprisonment for each offence, e.g. three years for theft, eight years for arson, seven years for rape, two years for common wilful injury, and ten years for robbery, he will serve a cumulative sentence of thirty years of imprisonment.

On the other hand, there are some laws which provide for « absorption »[8] According to this method, the sentence imposed for the most serious offence absorbes the penalties to be imposed for the less serious offences. In our example above, assuming robbery is the most serious offence (it is the most serious under our law) of all the offences that the accused committed, the penalty imposed for robbery, i.e. ten years imprisonment, absorbes the penalties to be imposed for the other lese serious offences.

However, these two sentence-calculating methods seem to have short-comings. In the case of cumulation, in which one sentence of imprisonment commences at the termination of another, the rehabilitative purpose of punishment is defeated. Since the accused will be imprisoned [9] for a longer period than that

which is necessary, this frustrates any plan of treatment for rehabilitation. Such exceptional length of cumulated sentences led one writer to declare them "inhumane" not because they are "underserved or unjust", but because they do not conform to "contemporary standards of humanity". [10] Indeed, it will be unrealistic to say that a person found guilty of any crime be imprisoned for one hundred years.

Absorption does not seem to be a sound approach either. This method cannot satisfy the preventive and retributive purposes of punishment, which still play a significant role in criminal law, eventhough these concepts do not appear to conform to "contemporary standards of humanity". Absorption usually results in lighter sentences, for one or more offences will, in effect, be left unpunished. And, considering the dangerous criminal disposition of the offender, this may not be effective to prevent him from committing other similar crimes in the future. Moreover, society's sense of justice may not be satisfied, for the offender will be seen to have been sentenced without receiving his deserts. Even when considered in the light of the rehabilitative purpose of punishment (which is the most important one), such a short time of imprisonment may not be adequate to provide the offender with the necessary reformative instruction, should longer periods than usual be required.

The third method, which to some degree seems a compromise of the two, is aggravation. Under this method of sentence computation, instead of piling up prison terms or completely disregrading punishments prescribed for certain offences, the penalty provided by law for the most serious offence will be imposed first, and then, in appropriate cases, aggravated. However, there are restrictions on the extent of aggravation. The restrictions that the court shall usually be bound by are two.

The first one is that the court may not exceed by more than one-half the "basic penalty" prescribed for the most serious offence. This means that if, for instance, the basic penalty prescribed for the most serious offence is seven years' imprisonment, the court cannot, in aggravating the penalty for the concurrent offences, exceed this penalty by more than one-half, i.e. by three-and-a-half years.

The second one is that, the court may not, when exceeding the basic penalty by one-half, go beyond the general maximum fixed by law for the kind of penalty applied. In the above example, if the general maximum for the kind of penalty is ten year, the court may not go beyond this limit. Thus, it may only exceed the basic penalty by three and not by three-and-a-half years.

In the history of our criminal law, the cumulation and absorption methods were used during the period when the 1930 Penal Code was in force. [11] Under the 1958 Penal Code (which is still in force), absorption is completely dropped out, and in its stead the aggravation method has been adopted for assessing a sentence for serious concurrent offences. However, the cumulation method is still retained for assessing a sentence for concurrent petty offences. [12]

As regards aggravation of penalties entailing loss of liberty, Article 189 of the Ethiopian Penal Code provides as follows:

(1) In case of material [13] concurrence of offences (Art.82(a)), the court shall determine the penalty on the bases of the general rules, set out hereafter, taking into account, for the assessment of the sentence, the degree of guilt of the offender;

(a) Where capital punishment is provided for one of the concurrent offences, this penalty shall override any other penalties entailing loss of liberty:

(b) In case of several penalties entailing loss of liberty being concurrently applicable, the court shall pass an aggregate sentence as follows: It shall impose the penalty deserved for the most serious offence and shall increase its length taking into account the provisions of the law or the concurrent offences; it may, if it thinks fit, impose a penalty exceeding by half the basic penalty, without, however, being able to go beyond the general maximum fixed by law for the kind of penalty applied.

Pursuant to sub-art. (1) of this Article, if an accused is convicted of having committed concurrent offences, and capital [14] punishment is provided for one of the concurren offences, the court may, if, taking the degree of guilt of the accused, it is of the opinion that he deserves capital punishment, impose this penalty which shall override any other penalties entailing loss of liberty.

Thus, if D rapes Y and subsequently murders her in cold blood, he will be charged under Articles 589 and 522 of the Penal Code concurrently. Since one of the concurrent offences committed by D, i.e., homicide in the first degree, entails capital punishment, the court may, if it thinks that he deserves such punishment, pass this penalty against D which shall override the penalty prescribed for the rape. [15] In the cases falling under Art. 189(1) (a), our courts may not have difficulties in assessing penalties. But a problem arises when they assess the penalty under Art. 189 (1) (b); and the problem seems to be connected with the meaning of the term "basic penalty".

Pursuant to Article 189 (1) (b), where several penalties entailing loss of liberty are concurrently applicable, the court "shall impose the penalty deserved for the most serious offence and shall increase its length taking into account ....the concurrent offences". To increase the length of the sentences, "the court can, if it thinks fit, impose a penalty exceeding by half the *basic penalty*, without, however, being able to go beyond the general meximum fixed by law fort he kind of penalty" [16] (emphasis supplied).

The term "basic penalty" has been translated into Amharic to mean the "maximum penalty prescribed for the most serious offence". In the English version, this term seems to be ambiguous. However, in view of the Amharic version and of the sources of this Article, [17] there is no doubt that the words refer to the maximum penalty prescribed by law for the most serious offence and not to the one fixed by the court. The Amharic version, which must prevail over the English and French

versions, clears the ambiguity by stating it as the "maximum penalty prescribed for the most serious offence." It is obvious that it is the law which prescribes the maximum and the minimum penalties whithin which range the court is at liberty to fix the penalty. In the case of homicide in the second degree, for instance, the penalty prescribed by law is from five to twenty years' rigorous imprisonment. While the minimum penalty for this offence is five years' rigorous impriosonment, the maximum is twenty years. The court does not have the power to determine a minimum and maximum penalty for an offence. These are fixed by the law.

In Criminal appeal no. 1569/74 the majority [18] held that the basic penalty is the penalty that the court fixes for the most serious offence. However, such holding is erroneous, particularly in view of the clear provision of the Amharic version, which the court was supposed to follow.

In the case of concurrent offences, if the court thinks that the length of the sentence must be increased beyond the maximum period provided for the most serious offence, it may do so, provided that such increase does not exceed it by more than one-half and does not go beyond the general maximum fixed by law for the kind of penalty applied.

Let us illustrate this with an example. Suppose D is charged with arson (Art. 488), robbery (Art. 636), and homicide in the second degree (Art. 523), and is convicted of the first two offences. Of the two offences D is convicted of, robbery is the most serious. [19] Thus, in assessing the sentence for the concurrent offences, the court considers only robbery, and fixes a hypothetical penalty for this offence in the same way as it would do if D was convicted only of this offence and then increases its length, taking into account the other offence. If the court decides that D must be punished with ten years' rigorous imprisonment for the robbery, it may then increase its length, taking into consideration the other offence. In increasing the length of the sentence, the court may simply confine itself to imposing the maximum penalty prescribed for robbery, i.e. fifteen years' rigorous imprisonment, or exceed it by adding to the ten years up to one-half of this basic penalty, i.e. seven and a half years; and sentence D to seventeen and a half years' of rigorous imprisonment. If, however, the court thinks that D deserves the maximum penalty prescribed for robbery in the first place, then, by taking into account the other offence (i.e. arson) it can increase its length by exceeding this maximum penalty by up to one-half and finally sentence D to twenty-two-and-a-half-years' rigorous imprisonment. However, the court cannot, at any rate, go beyond this limit.

If, in the above example, D is convicted of all the offences he is charged with, the court first fixes the penalty for the homicide and then increases its length, taking into consideration the other concurrent offences (i.e. arson and robbery). However, in this particular hypothetical situation, the court cannot exceed the basic penalty by half. If it does, it will go beyond the general maximum fixed by law for this kind of penalty, i.e. twenty-five years. [20] Hence, since the court is prohibited from going beyond this general maximum, it can only exceed the basic

penalty by five years', and sentence D to twenty-five years' rigorous imprisonment.

This holds true where the accused is charged and tried by the same court for all the concurrent offences. But there may be instances where separate charges could be prepared and filed to different courts or different divisions of the same court.

This may be done by mistake or pursuant to article 116 (2) of the Criminal Procedure Code. Hence, a problem may arise when executing the sentences, where each court or division may convict the accused and assess a separate sentence for each offence.

If the case is one of retrospective concurrence (i.e. where an offence committed concurrently with one or several other offences is discovered after the said offences have been tried), the court assesses sentence in accordance with the provisions of article 189 of the Penal Code, so that the offender may not be punished more severely than if all the offences had been tried together. [21] In such a case, the new sentence shall be assessed having regard to the sentence already imposed, and shall run concurrently with the sentence already passed. [22] In other words, the new sentence is deemed to have started running as of the date the previous sentence started to run. If, for instance, D was convicted for committing fraudulent misrepresentation in violation of Article 656 of the Penal Code and sentenced to two years' simple imprisonment, and later it is discovered that he had also committed another fraudulent misrepresentation prior to his conviction, the court shall assess an aggregate sentence equal to that it would have imposed had both offences been tried together. If the court would have imposed three years' rigorous imprisonment for both offences, had it known of such facts, it now pronounces such sentence, and this new sentence shall be deemed to have started running as of the date the previous two years' sentence had started running.

However, difficulty of execution of the sentences may arise when an offender is tried, convicted, and sentenced to separate fixed terms of imprisonment by different courts or different divisions of the same court. How should such sentences be executed? Should they run concurrently or consecutively? Or should the court, in such a situation, fix an aggregate penalty, taking into account all the concurrent offences, and having regard to the sentences already imposed? If it should, would it amount to an imposition of a new penalty that was not passed previously, and to violation of the principle of double jeopardy or *autrefois acquit* and *autrefois convict*?

With regard to these questions, the common law position is that, unless the courts ordered that the sentences should run consecutively, they would run concurrently. Once the separate sentences have become final, it seems that it is of no relevance whether or not the courts were aware of the concurrent nature of the offences at the time of sentencing.

On the other hand, there are some laws which provide that, if such a situation arises, a new sentence that takes the concurrent offences into account shallbe fixed in the same manner as in the case of retrospective concurrence. [23]

However, there are many laws, including ours, which do not provide clear solutions for such questions. And, in default of such clear legal provisions, it would be appropriate to fill this loophole with analogical judicial interpretation.

Chapter 34, section 10, paragraph two of the Swedish Penal Code, and Article 53 of the Penal Code of the Republic of China, provide that where separate final sentences are imposed by courts for concurrent offences, a new sentence that will take into account the concurrent offences shall be determined in the same manner as in the case of retrospective concurrence, i.e. as in the case where all the concurrent offences are tried together. These two penal provisions do not exempt the offender from serving an aggravated sentence. Neither do they expose him to a more severe penalty than that which he would have received had all the offences been tried together.

There does not seem to exist any satisfactory justification for exempting the offender from serving an aggravated sentence in such a situation. Had all the concurrent offences been tried together, the offender would have received an aggravated sentence. Similarly, had one of the concurrent offences been discovered after the offender has been convicted and sentenced for the other offence (s), [24] a new sentence would have been assessed, having regard to the sentence already imposed, so that the offender might not be punished more severely than if all the offences had been tried together. If this is the position of the law, why should there be a distinction between retrospective concurrence on the one hand, and, on the other hand, a situation where separate final sentences are imposed by mistake or due to unawareness of the commission of the concurrent offences?

This commentator does not see any justifiable distinction between the two situations that would warrant a less or more severe penalty than that which the offender would have served, had all the offences been tried together. Thus, it is submitted that our courts should assess a new sentence having regard to the sentence (s) already imposed, and the new sentence should be deemed to have started running as of the date the previous sentence (s) had started running.

Therefore, as regards this issue, which was raised in criminal appeal no. 1569/74, the majority opinion was correct in holding that Article 191 of the Penal Code should apply by analogy.

On the other hand, the minority considered the fixing of a new sentence as violative of the principle of double jeopardy or *autrefois acquit* and *autrefois convict*. However, the minority opinion did not elaborate in what respect such a determination of a new sentence which would take all the concurrent offences into account, would violate such a principle.

The principle of double jeopardy or *autrefois acquit* and *autrefois convict* applies in a situation where a person is to be charged and tried for the same offence of which he had already been convicted or previously acquitted. But this is not the issue in the hypothetical situations we raised hereinabove (nor was it an issue even in criminal appeal no. 1569/74). In these situations, the trial and conviction had

already taken place. It is true that separate sentences had been determined for each of the concurrent offences. But the question is how should such sentences be executed?

Our penal law does not provide for either cumulation or absorption of penalties. What it provides is that, in cases of concurrent offences, whether tried together or separately, there shall only be one aggregate penalty for all of them. Thus, if, for any reason, the courts were unaware of the concurrent nature of the offences and passed separate sentences for each offence, it seems reasonable and appropriate to assess a new sentence that would take into account all the concurrent offences, so that the offender will not be punished less or more severely than if all the concurrent offences had been tried together. And the court which should have power to determine the new sentence should be the one which tried the most serious offence.

However, in criminal appeal no 1569/74, the issue "How should the two ten years' sentences be executed?" was not one that could have been solved by fixing a new sentence, for the issue was not one of aggravation. This commentator is of the opinion that both the majority and the minority have erred in treating this question as aggravation.

In the High Court, two separate charges (i.e. criminal file nos. 27/72 and 341/72) were brought against the appellant. In criminal file no. 27/72, [25] the appellant was charged under Penal Code Articles 32/522 (1) (a), and was convicted and sentenced to fifteen years' rigorous imprisonment, although, on this charge, he could have been sentenced to life imprisonment or death. In criminal file no. 341/72, [26] he was charged under Penal Code Articles 32(1)(a)/668/522 (1) (a), [27] and was convicted and sentenced to death. The two charges show that the appellant committed both offences on one and the same day within an interval of two hours.

In criminal file no. 341/72, the conviction and sentence took place after the appellant had been sentenced to fifteen years' rigorous imprisonment on a separate charge (criminal file no, 27/72). Just after conviction but before sentence, the public prosecutor disclosed to the court that the appellant had also committed another offence for which he was sentenced to fifteen years' rigorous imprisonment, and asked the court to impose the maximum penalty provided by law for the second offence. This fact shows that the High Court was aware of the concurrent nature of the two offences [28] at the time when it passed sentence for the second offence (criminal file no. 341/72), which means that the new sentence was determined in accordance with the provisions of Article 191 cum Article 189(1)(a) of the Penal Code.

Thus, although the High Court did not say anything as to whether it considered the other offence as an aggravating circumstance when it imposed capital punishment, it would be reasonable to assume that it did. Moreover, even if we assume that the Court did not take the earlier conviction and sentence into consideration, it would not have made any difference whatsoever, for the court was of the opinion that the accused deserved capital punishment for the second offence. Therefore, as

the appellant argued before the Supreme Court with respect to criminal appeal no, 1569/74, since the two sentences imposed by the High Court could not be executed together (i.e. the offender could not be imprisoned for fifteen years first and then be put to death), the latter sentence, i.e. the death sentence, would have overridden the earlier one, had it been affirmed by the Supreme Court.

However, since the conviction and sentence took place at different [29] times on the two charges, the appellant was forced to lodge separate appeals against both judgments of the High Court. While the trial was pending before the High Court on criminal file no. 341/72, the Sixth Division of the Supreme Court was reviewing criminal appeal no. 1067/73, which was an appeal lodged against the judgment given on criminal file no 27/72. After due consideration of the file, the Supreme Court affirmed the conviction under Penal Code Article 522, but further [30] mitigated the sentence from fifteen years' to ten years' rigorous imprisonment. This Division was not aware of the commission of the other offence when it gave judgment on criminal appeal no. 1067/73. [31]

After the Sixth Division gave its judgment on criminal appeal no. 1067/73, the Panel Division of the Supreme Court reviewed criminal appeal no. 1569/74, [32] altered the conviction from Penal Code Article 522 to Article 3(2) [33] of the Special Penal Code Proclamation no. 8/74, and sentenced the appellant to ten years' rigorous imprisonment in accordance with the provisions of Articles 113(2) and 195(2) (b) (ii) of the Criminal Procedure Code.

Thus, in view of the above facts, one can reasonably assume that the Panel Division knew, or at least should have known, that the issue in criminal appeal no. 1569/74 was one of retrospective concurrence. However, although the file shows that the appellant was convicted and sentenced for another offence committed on the same day within an interval of a couple of hours, the Court said that it had not been "duly" informed of this fact. This statement cannot be justified in view of the fact that the Appellate Court should have inquired as to what conviction and sentence was being referred to by the statement. [34]

Even assuming that this fact was "duly" told to the Panel, and that it was aware of the conviction and sentence passed by the Sixth Division, how should have it assessed the sentence in criminal appeal no. 1569/74?

In criminal appeal no. 1067/73 the appellant was convicted for homicide in the first degree under Article 522. The penalty prescribed by the law for this offence is either life-imprisonment or death. These penalties cannot be aggravated. [35] Instead, where the law provides one of such punishments for one of the concurrent offences, they shall override any other penalties entailing loss of liberty which are (or may be) imposed for the concurrent offences.

In criminal appeal no. 1067/73, although the appellant was convicted under Article 522, he received a mitigated sentence of ten years' rigorous imprisonment instead of life-imprisonment or death. This reduction was made in accordance with the provisions of Articles 79 and 184(b) of the Penal Code. In other words,

the court first sentenced the appellant to life-imprisonment and then, taking into consideration the extenuating circumstances stated in Article 79, it mitigated the penalty in accordance with the provisions of Article 184 (b). After this was done, the Panel Division reviewed criminal appeal no.1569/74 and, after consideration of the file, altered the conviction from Penal Code Article 522 to Article 3 (2) of the Special Penal Code Proclamation No. 8/74, and sentenced the appellant to ten years' of rigorous imprisonment.

In view of this situation, had the Panel been aware of the conviction and sentence passed on criminal appeal no. 1067/73, what should have it done ?Could it have imposed the maximum penalty for the offence, i.e. fifteen years' rigorous imprisonment, and order that the sentences run concurrently, or could it have aggravated the penalty in accordance with the provisions of Article 191 cum Article 189? The commentator is of the opinion that the court could have done neither. It could have not done the former for the simple reason that the law does not authorise it to do so. Neither could it have done the latter, for the penalty prescribed for one of the concurrent offences is of the kind stated under Article 189 (1) (a), which shall override any other penalties entailing loss of liberty. In such a situation we cannot talk of aggravation. Thus, in cases of concurrent offences where the law provides either life-imprisonment or capital punishment for one of them, the other concurrent offencess may have bearing only on the extent of mitigation. Hence, although criminal appeal no.1569/74 was irrelevant to the determination of the sentence in criminal appeal no. 1067/73, it might have been relevant to determine the extent of reduction of the sentence. It seems that, had the Sixth Division been aware of the Commission of the second offence, it would probably not have gone to the lowest limit in reducing the penalty. However, we have also to bear in mind that even the existence of such an aggravating circumstance might not have prevented the court from considering extenuating circumstances and reducing the penalty to the lowest limit provided by Article 184.

Therefore, in this particular case, the court should have held that the penalty imposed for homicide in the first degree under Article 522 overrides the penalty imposed for the armed uprising under Article 3 (2) of proclamation no.8/74, instead of increasing the penalty in accordance with the provisions of Article 189 (1) (b), which was not applicable to this case.

CONCLUSION

In the case of concurrent offences entailing loss of liberty, the penalty should be assessed in accordance with the provisions of Penal Code Article 189 (1) (a-b). Where the law provides life-imprisonment or death for one of the concurrent offences the accused is charged with, these penalties should override the other penalties entailing loss of liberty. In other cases, the penalty has to be assessed in accordance with the provisions of sub-article (1) (b) of Article 189.

This commentator is of the opinion that, in this particular case, the court erred in holding that the "basic penalty" is the penalty that the court fixes for the most

serious offence, instead of the maximum one provided by law for such offence. Such a conclusion, this commentator thinks, is unwarranted in view of the Amharic version, which the court was supposed to apply to this case. It also erred in holding that Article 189 (1) (b) is the one which applies to this case for the assessment of the penalty.

However, it must be clear by now that, since one of the concurrent offences, i.e. the one charged in criminal appeal no, 1067/73, entails a minimum of life imprisonment, the penalty would have been assessed pursuant to Article 189(1) (a), had the two charges been tried together. And, even if the two charges were tried separately, the same provision would have been applied for the assessment of the penalty, by virtue of Article 191 of the Penal Code. However, in the latter case, the court could have not done anything other than convict the appellant under Article 3 (2) of the Special Penal Code.

It is clear that Article 191 does not fully cover the situation raised by the two decisions. Although the problem raised by this case could have been solved by holding that the penalty imposed for the homicide in the first degree under Article 522 would override the penalty imposed for the armed uprising, the court was misled by the analogical situation described under Article 191 of the Penal Code.

Thus, in order to avoid such types of ambiguity, it would be appropriate to include some provision in the Penal and Criminal Procedure Codes in order to govern the situation raised by this case.

This conmentator hopes that the Committee authorised to revise the Penal and Criminal Procedure Codes will consider the situation, and include a provision to bridge this gap, for example, a clause similar to paragraph two of Chapter 34, Section 10 of the Swedish Penal Code.

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1. In a case of material concurrence, there should necessarily be successive (i.e. several) acts. If the act is only one and violates only one criminal provision, despite the fact that the act was committed against several persons (e.g.T steals A's ox, B's cow and C's horse from the field where they were grazing), the offender will be tried only for one offence.

2. The several thefts committed by D against P must have been performed with renewed criminal intension, as stated in Article 61 of the Penal Code. If, however, D's repeated acts of stealing goods from P were performed with the "same initial criminal intention... and aimed at achieving the same purpose", i.e. unlawful enrichment (as for example D might have intended to take, say, five sacks of wheat from P's barn, and on five occasions he took five sacks of wheat from P's barn), they will not be considered as concurrent offences, but constitute only one offence. See Art. 60(2) of the Penal Code.

3. But note that, in both cases, the successive offences must have been committed before the offender was convicted and sentenced for any one of them. If the offender was convicted and sentenced for the first offence prior to the commission of the next offence, the case will not be concurrence but recidivism. Residivism exists when conviction and sentence separate the commision of two offences.

4. Crim. Proc. C. Art. 116(1).

5. Criminal Proc. C. Art. 116(2). If the offences are committed at different times and have no connection, it seems appropriate to order separate trials, so that the accused may not encounter difficulties in his defence. Incidentally, note the difference between the Amharic and the English versions of this sub-article. According to the Amharic version, it is mandatory to try concurrent offences together, but in the English version it is optional.

6. Even when the concurrent offences are tried consecutively rather than in a single trial, how should the accused be sentenced? Should all sentencing be deferred until the last trial is concluded? the Criminal Procedure Code does not answer these questions. Thus, in view of the sentence assessment method provided by law (i.e. Pen. C. Art. 189), it seems reasonable to defer sentencing until the last trial is concluded. And the court which must have sentencing power should be the one which tries the most serious offence.

7. For example, under the common law when an offender is convicted for concurrent offences the judge can order a cumulative penalty by adding up the sentences imposed for each offence. However, multiple sentences are construed as running concurrently, unless the sentencing judge has stated otherwise. Also, when the offences arise out of the same transaction (i.e. committed on the same occasion or as part of a single enterprise), the sentences shall run concurrently and not consecutively. See Sol Rubin, *The Law of Criminal Correction*, (St. Paul, Minn. West Publishing Co., 1963), p. 415; and Sir Rupert Cross, *The English Sentencing System* (London, Butterworths, 1981), p.100.

8. See, for example, Section 35 of *The Federal Criminal Law of the Soviet Union*.

9. This is, however, without prejudice to releasing the accused on parole, a practice which is widely followed in the common-law countries.

10. See Cross, cited above at note 8, p. 102.

11. Article 42 of the 1930 Penal Code of Ethiopia provides: "If a man who has committed crime of many different kinds be accused at one time of all the crimes he has committed, though according to the law a case shall be taken against him for each separate crime, from these crimes of which he is accused he shall be punished for the chief one as laid down by the law and not for each separate offence.... The punishment of those who break an unimportant law shal be assessed by adding up the penalty for each offence, but the period of the punishment shal not exceed two years".

12. See Pen C. Art. 725. The reason why the cumulation method is retained for such offences seems to be that, since the maximum penalty provided by law is arrest for three months (See Pen. C. Art. 703(1)), this will not be too long even when cumulated.

13. In case of national concurrence aggravation of the penalty is discretionary and may be ordered only "where the offender's deliberate and calculated disregard for the law justifies aggravation". However, note that in cases expressly provided by law (Art. 63 (2)), aggravation is mandatory. See Pen. C. Art. 192.

14. Logically speaking, this should also include life imprisonment.

15. Some persons may think that this is absorption. However, they have to bear in mind that, in case of life imprisonment and capital punishment, we do not talk of either cumulation nor absorption, nor even of aggravation, for that matter, for the simple reason that a person cannot either be imprisoned beyond his lifetime nor be executed more than once.

16. The Amharic version says "by up to one-half" instead of "by half". The practical effect of such wording in the two versions of the Code is that, if the English version is applied, the basic penalty will necessarily always be increased by half, in a case where increase of the length of the sentence is judged applicable. But if the Amharic version is applied, an increase of the basic penalty by half need not necessarily be applied, for the Amharic version states that the court may exceed by "up to one half", it may be increased by less than one-half.

17. See Article 68 (1) of the Swiss Penal Code and Phillippe Graven, *An Introduction to Ethiopian Penal Law*, (Addis Ababa, Faculty of Law, H.S.I.U., 1965), p. 258.

18. The minority did not say anything on this point. On the other hand, the public prosecutor was correct in arguing that the basic penalty is the maximum penalty provided by law for the most serious offence, and not the penalty fixed by the court. However, he erred in asking the court to cumulate the sentences.

19. The maximum penalty provided by law for this offence is fifteen years' rigorous imprisonment while it is ten years' rigorous imprisonment for arson.

20. According to Pen. C. Art. 107, "rigorous imprisonment" normally extends from one to twenty five years.

21. See Pen. C. Ast. 191(1).

22. Pen. C. Art. 191 (2).

23. See, for example, Art. 53 of the Penal Code of the Republic of China and chapter 34, section 10, paragraph two of the Swedish Penal Code.

24. However, note that if the offender is convicted for some of the concurrent offences and sentenced in accordance with the provisions of Pen. C. Art. 189 (1) (b), the court may not impose a new sentence if another offence committed concurrently with the other offences is discovered later, unless the later offence is the most serious one.

25. This file was opened on 13 Tekimt 1972.

26. This file was opened on 11 Sene 1973, which confirms the assumption that this offence was discovered later, after the trial had already started on criminal file no. 27/72.

27. Note that the public prosecutor erred in citing these articles against the accused. Considering the facts of the case, he should at least have cited article 637(2) of the Penal Code instead of these Articles, particularly, as the High Court pointed out in its judgement it was obvious that Article 668 had no application to this case at all.

28. Incidentally, when the two charges were tried and decided, the presiding judge was the same person.

29. While criminal file no. 27/72 was decided on 10 Hedar 1973, criminal file no. 341/72 was decided on 27 Meskerem 1974, after almost a year.

30. This was a further reduction of the penalty, because it was by way of mitigation that the High Court reduced the punishment from life to fifteen years' rigorous imprisonment in the frist place.

31. This appeal was decided on 23 Sene 1974.

32. This was an appeal lodged against the High Court's judgement given on criminal file no. 341/72

33. This Special Penal Code Article provides for rigorous imprisonment not exceeding fifteen year for voluntarily taking part in an armed uprising against the Goverament.

34. The statement submitted to the court by the Public Prosecutor states as follows:
"The second accused, Diriba Abolte, had previously been convicted by this same Court in criminal file no. 27/72 and sentenced to fifteen years' rigorous imprisonment for killing Eshete Woldeyes together with his accomplice on the same day he committed this offence, i.e. on 13 Ter 1969 within an interval of hours, i.e. at 6:00 p.m. Hence, since he is a recidivist (*sic*) the public prosecutor asks the court to refer to this file, and impose the maximum penalty prescribed by law for the offence he is now convicted".

35. One may say that life-imprisonment can be aggravated by altering it to death. However, w have to bear in mind that this cannot be done under Article 189 of the Penal Code. Purusan to sub-article (1)(a) of this provision, the court can impose capital punishment only if the law provides such punishment for one of the concurrent offences. Even if the law provides alternative penalties, such as life-imprisonment or death, for the most serious concurrent offence, the court need not necessarily pronounce the death sentence on the mere grounds that the accused is convicted of having committed concurrent offences. In such a case, it is also possible to pronounce life-imprisonment instead of death. And, once such a sentence is pronounced, it cannot be altred to death unless, of course, the convicted person committed another offence punishable by death, or unless it is later discovered that he had also committed another offence punishable by death, prior to his conviction.

We have also to note that in criminal appeal no. 1067/73, the appellant had been convicted Article 522 of the Penal Code, whose violation entails either life imprisonment or death. But in under criminal appeal no. 1569/74, he was convicted under Article 3(2) of the Special Penal Cod ewhich entails rigorous imprisonment not exceeding fifteen years. This means that neither the Sixth nor the Panel Division of the Supreme Court was empowered to alter the sentencefixed under Article 522, when it later convicted the appellant under Article 3(2) of the Special Penal Code Proc. No. 8/74.