[COURT OF APPEAL]

Freetown
July 11,
1961

MOHAMED BASH TAQUI . . . . . *Appellant*

v.

REGINA . . . . . *Respondent*

Ames P.
Bankole
Jones Ag.C.J.
Marke J.

[Cr. App. 8/61]

Criminal law—Trial—Whether defendant could be tried by judge alone—Courts Act (Cap. 7 of Laws of Sierra Leone) s. 14*—Jurors and Assessors Act (Cap. 38 of Laws of Sierra Leone) ss.* 39, 40, 41A.

On February 21, 1961, appellant was committed for trial in the Supreme Court. On March 10, an information was filed by the Crown charging him with three counts of inciting to commit a crime. At that time, section 14 of the Courts Act provided that any person charged with a criminal offence should be tried by the court with a jury unless he elected to be tried by the court with assessors or by a judge alone. On March 14 the Jurors and Assessors (Amendment) Ordinance, 1961, came into effect. This Act provided that in certain criminal cases the Attorney-General could apply to the Chief Justice by summons in chambers for the case to be tried by a judge alone. On March 23, the Attorney-General made an application under this Act for an order that appellant should be tried by a judge alone. Such an order was made, the trial took place and appellant was convicted on two counts. He appealed on the ground that the order was ultra vires, since appellant had been charged prior to the coming into operation of the Jurors and Assessors (Amendment) Ordinance, 1961.

Held, that the Jurors and Assessors (Amendment) Ordinance, 1961, applied to cases pending in the Supreme Court for trial at the date of its coming into effect, and, therefore, the Chief Justice had power to order appellant's trial by a judge alone.

Cases referred to: *Rex* v. *Wuseni* (1939) 5 W.A.C.A. 73; *The Colonial Sugar Refining Co. Ltd.* v. *Irving* [1905] A.C. 369; *Regina* v. *Holmes* (1960, C.C.A.) mentioned in [1961] Crim.L.R. 109; no report available; *Att.-Gen.* v. *Vernazza* [1960] A.C. 965.

Berthan Macaulay (with him *Manilius Garber*) for the appellant.

John H. Smythe, Solicitor-General, for the respondent.

AMES P. On February 21, 1961, the appellant was commited for trial in the Supreme Court. On March 10 information was filed by the Crown, charging him with three counts of inciting to commit a crime. Such a charge is not punishable by death.

On that date section 14 of the Courts Ordinance, as in the Courts (Amendment) Ordinance, 1960 (No. 2 of 1960) and sections 40 and 41 of the Jurors and Assessors Ordinance, then Cap. 114, provided the manner in which his trial was to be had.

It will be well to set out these sections, except some subsections of the former about joint charges and trials, which are not relevant to this appeal.

"14. (1) Any person charged with a criminal offence at any sessions of the Supreme Court held in the Colony shall—

(*a*) if such criminal offence is punishable by death, be tried by the court with a jury consisting of twelve men; and

(*b*) if such criminal offence is not punishable by death, be tried by the court with a jury consisting of twelve men, unless—

(i) such person shall have elected to be tried by the court with the aid of assessors in accordance with the provisions of section 40 of the Jurors and Assessors Ordinance; or

(ii) the court shall have ordered such person to be tried by the court with the aid of assessors in accordance with the provisions of section 41 of the Jurors and Assessors Ordinance; or

(iii) such person shall have elected to be tried by a judge alone in accordance with the provisions of subsection (3) of this section.

(2) In every such excepted case such person shall be tried either by the court with the aid of assessors under the provisions of the Jurors and Assessors Ordinance or by a judge alone under the provisions of subsection (3) of this section instead of being tried by the court with a jury.

(3) Any person or persons charged with any criminal offence not punishable by death may, at the time of being committed, or referred for trial by the Supreme Court in the Colony or at any time thereafter up to two clear days at least before the trial of such person or persons, elect to be tried by a judge alone and, if any person or persons elect as aforesaid, such person or persons shall be tried by a judge alone instead of being tried by a judge and jury; and in every such trial the judge shall record in writing his decision and the reasons for the same:

Provided that if any person or persons charged as aforesaid have already, pursuant to section 40 or 41 of the Jurors and Assessors Ordinance, become liable to be tried by the court with the aid of assessors, it shall no longer be open to such person or persons to elect to be tried by a judge alone.

(4) The provisions of subsection (3) shall not deprive a person of his right under section 40 of the Jurors and Assessors Ordinance to change his election, and a person who has elected to be tried by a judge alone may afterwards elect to be tried by the court with the aid of assessors provided he changes his election before the time allowed by that section has expired, otherwise his change of election shall have no effect; and in the case of persons who are charged jointly, if they have all elected in accordance with subsection (3) to be tried by a judge alone, they shall be so tried, unless they all change their election in accordance with the said section 40 before the time allowed by that section has expired.

(5) (not relevant)

(6) „ „

(7) „ „

(8) „ „

(9) Nothing in this section contained shall be deemed to confer any right upon the prosecution to elect that an accused person shall be tried by a judge alone."

It will be noticed that subsection (4) refers to an accused person's "right" and that subsection (9) also uses the word "right." This suggests that the section, in general, confers "rights" upon an accused person.

The two sections of the Jurors and Assessors Ordinance were on that date as follows:

"40. Any person or persons charged with any criminal offence not punishable by death may, at the time of being committed or referred for trial, or at any time thereafter up to three clear days at least before the trial of such person or persons, whether he or they had previously elected otherwise or not, elect to be tried by the court with the aid of assessors, and, if any person or persons shall elect as aforesaid, such person or persons shall be tried by the court with the aid of assessors instead of being tried by a judge and jury.

"41. The Attorney-General, whenever he is of opinion that a more fair and impartial trial of any person or persons charged with any criminal offence, who has or have been committed for trial, can be obtained by such person or persons being tried by the court with the aid of assessors instead of by a judge and jury, may make an application to the court for an order, which shall be made as of course, that any such person or persons shall be tried by the court with the aid of assessors instead of by a judge and jury."

Such was the situation on March 10, when the information was filed. (In the now current 1960 edition of the Laws, these sections 40 and 41 of Cap. 114, have become sections 39 and 40 of Cap. 38. Their wording remains the same.)

On March 14, which was before the actual trial in court had begun, the Jurors and Assessors (Amendment) Ordinance, 1961 (No. 1 of 1961), which had been passed by the House of Representatives on March 8, came into effect. It added a new section, numbered 41A to the Jurors and Assessors Ordinance, which read as follows:

"41A. (1) In any case where any person is charged with a criminal offence at any sessions of the Supreme Court held in the Colony and there is reason to believe that a fair trial cannot be obtained either with a judge and jury or with a judge and assessors, the Attorney-General may, except in the case of a capital offence, apply to the Chief Justice by summons in chambers for the case to be tried by the judge alone.

"(2) A copy of the summons shall be served on the accused and any solicitor who shall have appeared for him at least seven clear days before the date fixed for the hearing of the summons.

"(3) If at the hearing of the summons the Chief Justice is satisfied that there is good reason to believe that a fair and impartial trial cannot be had either with a judge and jury or with a judge and assessors, he may order that the case be tried by the judge alone and in any such case the accused shall no longer be entitled to elect to be tried by the court with the aid of assessors under the provisions of section 40 and any election he may already have made shall be of no effect."

The Ordinance also amended section 14 of the Courts Ordinance by adding a new alternative sub-paragraph to paragraph (*b*) of subsection (1) thereof, to

tally with this new provision of section 41A of the Jurors and Assessors Ordinance.

On March 23, the Attorney-General made an application under this new section for an order that the charges against the appellant should be tried by a judge alone.

The trial started on April 13 and ended on May 5 when the appellant was convicted on counts 1 and 3 and sentenced to 12 months on each count to run concurrently. Against that conviction he has made this appeal.

There is only one ground of appeal, which is as follows:

> "That the appellant having been charged before the Supreme Court prior to the coming into operation of the Jurors and Assessors (Amendment) Ordinance, 1961, No. 1 of 1961, the order of the Chief Justice for trial by judge alone, in respect of his trial was ultra vires; in consequence his trial by a judge alone was a nullity."

Put in other words, the question raised in this ground of appeal is this. Did this new section 41A apply to cases pending in the Supreme Court for trial at the date of its coming into effect so as to enable the Chief Justice to have made the order in the instant case which he did make or did it only apply to cases committed for trial after its coming into effect?

It is agreed and well settled that if the provision of section 41A is to be regarded as a procedural provision then it applied to all cases pending and so to this one. But if it is to be regarded (as Mr. Macaulay put it) as more than a matter of procedure and it touches a right in existence at the date of its passing, it ought not to be held to apply to a proceeding which had already commenced unless a clear intention to that effect was manifested either by express enactment or necessary intendment.

Mr. Smythe, Solicitor-General, opposing the appeal, argued that the section is procedural; that a person's rights as to trial are to be tried according to the law as to the mode of trial which is in force at the time of his trial, and that consequently his rights while awaiting trial can be altered.

Mr. Macaulay's contention, for the appellant, is that at the date of his committal for trial the appellant had a right to trial by jury, unless he elected under section 39 to be tried by assessors or judge alone or unless the Attorney-General obtained an order under section 40 for trial with assessors. Consequently this right, which Mr. Macaulay called a vested right, could not be taken away by the new section 41A.

He cited the case of *Wuseni* (5 W.A.C.A. 73) and the following passage from the judgment:

> "But trial by a judge assisted by assessors is essentially different from trial by a jury. *Lawrence* v. *The King* laid down that it is essential that the tribunal of fact should understand the principle that a criminal charge has to be established by the prosecution beyond reasonable doubt. In a jury case the jury is the tribunal of fact, but in a case with assessors, section 43 (3) of the Protectorate Courts' Jurisdiction Ordinance, 1932, provides that the decision shall be vested exclusively in the judge to whom of course the principle is well known."

He also cited the following passage from the judgment of the Privy Council in *The Colonial Sugar Refining Co.* v. *Irving* [1905] A.C. 369 at 372:

> "In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

He argued, by analogy, that a trial by jury is trial by one tribunal, a trial by the court with the aid of assessors is a trial by another tribunal, and a trial by judge alone is yet another tribunal; and that consequently the new section 41A, which enabled the trial to be transferred to a new tribunal, could not apply to pending cases unless it is expressed clearly that it should, or unless there is a "necessary intendment" that it should. We think the analogy is unsound. A trial in the Supreme Court with a jury is still a trial before the same tribunal if it is ordered to be with the aid of assessors, or by the judge alone. The extract from *Wuseni's* case does not establish the contrary proposition. If it did then every trial by jury would be a trial in two different tribunals at one and the same time, namely, the tribunal of fact which is the jury, and the tribunal of law, which is the judge.

Nevertheless, though the analogy may be unsound, the contention may be correct, and must be further considered.

We have already pointed out that section 14 uses the word "rights" (and so did Mr. Smythe in argument). The rights there conferred upon an accused person were never absolute rights. They always could be defeated by an order obtained by the Attorney-General under section 41, whenever he was of opinion that a more fair and impartial trial could be had by trial with the aid of assessors: and any such order had to be made "as of course." So if the accused had rights, the Attorney-General also may be said to have had a right (albeit in the singular) before the new section 41A was enacted.

Every person has a right to a fair trial.

In England since the days of the Norman Kings, it has been considered that was best secured by trial by jury. The same right exists in Sierra Leone. It is the right of both parties to a criminal trial to have the issue, the guilt or innocence of the accused, determined in a fair trial. It is inconceivable to us that the provision of section 39, enabling an accused person to elect to be tried by assessors, could have been enacted to lessen his right to a fair trial. It was to provide an alternative method if he thought that he would have a more fair or impartial trial by the court with the aid of assessors rather than by jury. Section 40 in its words shows that it was expressly enacted to that end.

Enactments about modes of trial are never enacted with any other intention than towards ensuring a fair and impartial trial. It must be that the provision of section 14 (3) of the Courts Ordinance (giving an accused person the right to elect to be tried by a judge alone) was also enacted to this same end. (It appears from the record of appeal that at one point the appellant did so elect, but later on withdrew the election.)

The provisions of the new section 41A are expressly stated to be to this same end.

Mr. Macaulay cited the recent case of Holmes (mentioned in [1961] Crim.L.R. 109: no report available), which decided that the right to apply for

leave to appeal to the House of Lords conferred by the Administration of Justice Act, 1960, upon convicted persons who had been unsuccessful in the Court of Criminal Appeal, did not apply to appeals heard and determined before the Act came into force—a decision which is not at all surprising, and not of much help in the instant appeal.

He cited the case *Att.-Gen.* v. *Vernazza* [1960] A.C. 965, as an example of an enactment having retrospective effect from its clear wording. Section 51 of the Supreme Court of Judicature (Amendment) Act, 1959, amended section 51 by adding a power to order " that any legal proceedings instituted by him in any court before the making of the order should not be continued without such leave." This was an example of an enactment which was expressly to have retrospective effect, so Mr. Macaulay submitted. The effect of the provision and the amendment was that the litigant could neither institute nor continue any proceedings instituted before the Act unless he satisfied the court that they were not vexatious.

The 1959 amendment to section 51 came into force after an order had been made in the Supreme Court and before an appeal against it came on for hearing in the Court of Appeal. At its hearing the Attorney-General asked the court to take advantage of the amendment and extend the order appealed from by Vernazza by making it apply to all legal proceedings in any court before the making of the order appealed from. The Court of Appeal held that it had no power to do so, and the matter went to the House of Lords.

Viscount Simonds in his opinion said (at p. 975):

> " By the amending Act, a new power was given to the court to enable it to deal with proceedings of which it was seised. The object was both to prevent an abuse of its process and to relieve possible victims of vexatious litigation. I would respectfully doubt whether this could in any view be strictly called retrospective legislation, but, if it has this characteristic in any degree, it is of a procedural nature and, as I think, amply covered by the authority of *Quilter* v. *Mapleson*. The cases of *In re A Debtor* (No. 490 of 1935) and *Colonial Sugar Refining Co. Ltd.* v. *Irving* are distinguishable. I do not find the former case in all respects easy to understand, but in both cases the distinction is drawn between enactments which provide new remedies and those which affect substantive rights. An enactment which enables the court to deny to a vexatious litigant the power further to prosecute proceedings without leave appears to me to fall within the former category. It would, I think, be wrong to say that a man was deprived of a vested or substantive right, if it was still left open to him to prosecute any claim which was not an abuse of process and for which there was a prima facie case."

Lord Denning said (at pp. 976–977):

> " Let me consider first the proceedings which Mr. Vernazza himself has already instituted against other litigants. If the effect of the new Act is to prevent him from continuing those proceedings to their ultimate conclusion, then it may be said to be a ' retrospective ' Act, at any rate in the sense in which Lord Blackburn once had occasion to use the word ' retrospective.' But whether this is a proper use of the word ' retrospective ' or not, it is of little moment, because the principles to be applied are not in doubt. If the new Act affects Mr. Vernazza's substantive rights, it will not be held to

apply to proceedings which have already commenced, unless a clear intention to that effect is manifested: see *Colonial Sugar Refining Co. Ltd.* v. *Irving*. But if the new Act affects matters of procedure only, then prima facie, it applies to all actions, pending as well as future: for, as Lord Blackburn said: 'Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.' See *Gardner* v. *Lucas*.

"The Court of Appeal seem to have thought that the new Act affects Mr. Vernazza's substantive right to carry on his pending proceedings; and that it ought not to be given a retrospective operation. I cannot, I am afraid, share this view. The new Act does not prevent Mr. Vernazza from continuing proceedings which it is proper for him to carry on. It only prevents him from continuing proceedings which are an abuse of the process of the court. If the proceedings are not an abuse and he has prima facie grounds for them, then he will be given leave to continue them. This is no interference with a substantive right."

Lord Morris of Borth-y-Gest said (at p. 980):

"In argument before your Lordships consideration was given to the question as to whether the amendment to section 51 which is effected by the Supreme Court of Judicature (Amendment) Act, 1959, is retrospective. The word 'retrospective' in this connection is perhaps not wholly apt. By the amendment a new power is given to the High Court, which, after May 14, 1959, it could exercise. It was a power which it did not previously possess. In the exercise of it an order could be made which would operate on 'any legal proceedings instituted . . . before the making of the order.' The reference to 'any legal proceedings' instituted before the making of an order is in wide terms. The words cover any legal proceedings instituted at any time previous to the making of a restraining order. The words cover legal proceedings instituted before the passing of the Act of 1959."

What right of the appellant was affected by the new section 41A? None that we can see. No one has a right to a trial which may be partial, or to object to an order made because there is reason to believe that a fair and impartial trial cannot be obtained by judge and jury or by judge with assessors. Section 41A does not prevent anyone from attempting to show that a trial with a judge and jury or with a judge and assessors would not be likely to be unfair or partial. If he succeeds in doing so an order would not be made. At the hearing of the summons the appellant attempted this but was unsuccessful.

Section 41A ends with the words "any election which he may already have made shall be of no effect." These words are wide enough to include an election before the section came into operation, had he made an election, and so give the Ordinance retrospective effect. It must then be likewise retrospective and apply to pending cases in which no election had been made.

So far we have been considering the argument put forward by the appellant: on the basis that the enactment is not merely procedural. On this basis the appeal fails.

Mr. Smythe argued that the section is procedural and so applies to pending proceedings. If that is correct the appeal would likewise fail: but it is no longer necessary to consider this aspect of the matter.

The appeal is dismissed.