

Freetown  
Nov. 7,  
1961

[COURT OF APPEAL]

A. F. F. P. NEWNS AND ANOTHER . . . . . *Appellants*  
v.  
H. J. MACFOY AND OTHERS . . . . . *Respondents*

Ames Ag.P.  
Benka-Coker  
and Wischam  
C.JJ.

[Civil Appeal 3/61]

*Suit challenging validity of recognition of person as Tribal Headman—Recognition by acting Governor—Jurisdiction of court to review acting Governor's action—Whether person of different tribe can be recognised as Tribal Headman—Meaning of "any person" in section 2 (2) of Tribal Administration (Colony) Ordinance (Cap. 78, Laws of Sierra Leone, 1960).*

First appellant, who was acting Governor at the time, recognised the second appellant as Mende Tribal Headman for Bonthe, pursuant to section 2 (2) of the Tribal Administration (Colony) Ordinance, which provides: "The Governor may, in his discretion, recognise any person as the headman of any members of a tribe resident in or temporarily staying in Freetown who have previously had a recognised Tribal Headman." This Ordinance was extended to Bonthe by the Tribal Administration (Colony) (Bonthe, Sherbro) Order in Council (P.N. 13 of 1959).

Respondents commenced a suit challenging the validity of the acting Governor's action on the ground that second appellant was not a Mende. They argued that the words "any person" in section 2 (2) of the Tribal Administration (Colony) Ordinance meant any person belonging to the tribe for which the Governor is recognising a headman. The trial judge accepted this argument and held that a member of a different tribe could not lawfully be recognised as Tribal Headman. On appeal, the appellants argued, inter alia, that the power conferred upon the Governor by section 2 (2) of the Tribal Administration (Colony) Ordinance was an administrative power which could not be reviewed by the Supreme Court.

*Held*, dismissing the appeal (1) that the Supreme Court had jurisdiction to decide whether or not the acting Governor's action was within the power conferred on him; and

(2) that the words "any person" in section 2 (2) of the Tribal Administration (Colony) Ordinance mean any person of the tribe for which a headman is being recognised.

Case referred to: *Stuart v. Anderson and Morrison* [1941] 2 All E.R. 665.

*John H. Smythe* (Solicitor-General) for the appellants.

*Berthan Macaulay* for the respondents.

AMES AG. P. The appeal is from the decision of the Supreme Court in a suit taken by the respondents challenging the validity of the recognition last year under the provisions of section 2 (2) of the Tribal Administration (Colony) Ordinance, then Cap. 244 and now Cap. 78, by the first appellant, who was acting Governor at the time, of the second appellant as Mende Tribal Headman for Bonthe.

The second appellant is not a Mende. He is a Mandingo. He may not even be a Sierra Leonean. He may be a Guinean. It was agreed by counsel in the court below that the only issue for determination was whether a member

of another tribe can lawfully be so recognised. The learned judge held that he could not be, and gave declaratory judgment to that effect and also granted an injunction, which the respondents had sought.

Mr. Smythe, for the appellants, argued that the power conferred upon the Governor by section 2 (2) was an administrative power and that the Supreme Court had no jurisdiction to entertain the claim. He cited *Stuart v. Anderson and Morrison* [1941] 2 All E.R. 665, which was about the well-known Regulation 18b, and adopted a passage from Wade and Phillips. I do not agree with the argument. It misses the purpose of the suit. The claim did not require the court to inquire into the manner of the exercise of the Governor's power whether it had been exercised well or otherwise, but to declare whether or not what was done was within the power conferred upon him.

According to the decision of the learned judge and the contention of the respondents, the discretion to recognise a person under section 2 (2) must only be exercised in favour of a person of the tribe concerned.

This brings me back to the issue, namely, whether or not a person of a different tribe can be recognised under section 2 (2) as a tribal headman.

It reads as follows:

“2 (2) The Governor may, in his discretion, recognise any person as the Headman of any members of a tribe resident in or temporarily staying in Freetown, who have previously had a recognised Tribal Headman. This power shall be exercisable notwithstanding that no representation may have been made or that a representation may have been made in favour of some other person.”

The learned judge held that, when the subsection is read in the context of the whole Ordinance, “any person” means “any person belonging to the particular tribe for which an election for a tribal headman is being held.” The appellants contend that “any person” means literally “any person.” If it means literally any person, it follows that he could be of another tribe or not a citizen of Sierra Leone.

The learned judge referred to “an election.” There is no statutory requirement of an election: but there is nothing to prevent it. It has no bearing on the meaning of “any person,” because if the words mean what the learned judge held them to mean, a member of a different tribe could not be recognised, even if elected.

When one reads the Ordinance, as a whole at one reading, one ends (at all events, I did) with the impression that it was intended to, and does, put on a legal and satisfactory basis the efforts of members of a tribe, who are out of their homeland and living in the colony, to have some sort of tribal administration.

It is a prerequisite to the exercise of the Governor's power under section 2 (1) that there should be members of a tribe in Freetown and that they should have someone (a) whom they recognise as headman, and (b) who endeavours to enforce a system of tribal administration. The Governor cannot recognise any other sort of headman.

The proviso to section 2 (1) does not make an exception: it merely prohibits the exercise of the Governor's powers until certain steps have been taken, if it is a case of members of a tribe having a recognised headman for the first time. He must even on such a first occasion be one who “endeavours to

enforce” and so on as in the main part of the section, or else he cannot be recognised.

Under section 2 (2) the powers of the Governor can only be exercised where members of the tribe “have previously had a recognised Tribal Headman.” That is to say, a headman recognised under section 2 (1), and for some reason or other there is no longer any such headman.

This is one of Mr. Macaulay’s arguments for the respondents, namely, that the meaning of section 2 (2) is controlled by section 2 (1). I agree with it, notwithstanding that what is now 2 (1) was enacted in 1905, in very much the same wording as it now is (Ordinance 19 of 1905) and what is now section 2 (2) was not enacted until 1926 (Ordinance 14 of 1926).

Under 2 (1) and 2 (2) the recognition is as headman of the members of the tribe—headman of, not “headman for” or “headman over.” According to the Oxford Dictionary, which Mr. Macaulay quoted from, headman should be one of the group, class or what not, of which he is head: and to my mind the headman of members of a tribe certainly should be not only a member of the tribe but the head of them.

The power under both subsections of section 2 is a power of recognition, not of appointment, as it is in section 13. Recognition must mean the stamping of approval on a headman, not the creation of one.

I have said that the Ordinance appears to me to give legal effect to efforts at self-administration. It gives power to make rules, for various purposes, all of which can, I think, quite fairly be described as for the welfare of the members of the tribe. The rules apply to the members of the tribe (s. 5 (2)) but only to them and not to others. Contravention of them is an offence with a penalty (s. 5 (3) (a)). The tribal headman has to enforce the rules, and may institute prosecutions (ss. 5 (3) and 6).

If, say, a Mandingo is appointed headman of (in this case meaning “headman over”), say, the Mendes, does he become a Mende? I doubt it. If he does not, it follows that he has to enforce a system of rules which do not apply to him. They apply to all members of the tribe excepting only the headman.

Section 12 provides:

“12. No Tribal Headman shall exercise any jurisdiction, civil or criminal, of any nature whatsoever in respect of the members of his tribe. . . .”

What does “his tribe” mean? I would read it as “his own tribe.” If a man of another tribe can be appointed headman I should expect it to be not “his tribe” but “the tribe.” A headman will have “his house”; he may have “his sheep.” Can he have “his tribe”?

This section 12 was a new enactment (being then section 11) of Ordinance 48 of 1932 which repealed and re-enacted the former Tribal Administration Ordinance, No. 19 of 1905, and became, together with some amendments, the existing Chapter 78. It may be noted that the 1905 Ordinance also used the term “his tribe” in its section 11. It is now section 10 and “his tribe” is now “the tribe”—it being “. . . the Tribe Headman and every member of the tribe. . . .” This present section 10, unlike the present 12, suits a case where the headman is of a different tribe.

I should have mentioned section 3, which enables the Governor in cases of doubt to appoint a commission of inquiry to inquire and report “. . . what

person, according to the customs and desires of the members of the tribe concerned, is deemed suitable, by the majority of such members to be the headman of the members of such tribe. . . ." The report is then deemed to be "a representation other than by petition," and that takes the matter back into section 2 (1).

The phrase is "customs and desires," both of them and not either. I suppose the customs could include a custom of having a headman of another tribe. It would surprise me: but no doubt that is a matter the commissioner would inquire into.

It may be noted that in section 5 (3) "any person" cannot mean "any person" but can only mean "any member of the tribe." In section 6 (2) "a person" can only mean "a member of the tribe." In section 11 (1) "any person" means a person recognised as Tribal Headman. In section 11 (2) "any person" could mean "any person," I think. In section 13 "some person" is open to the same difference of opinion as that in this case about section 2 (2). In section 15, para. (a) "any person" is any person recognised as a Tribal Ruler under the previous enactments. It is perhaps relevant to refer to the previous enactments.

The long title of the first of them, No. 19 of 1905, was "An Ordinance to promote a system of Administration by Tribal Authority among the tribes settled in Freetown." The preamble was "whereas it is expedient to promote a system of Administration by Tribal Authority among the tribes settled in Freetown." Ordinance No. 12 of 1924 amended the long title by adding at the end "and other places in the Colony." This amended long title remains the long title of the present Ordinance today. If the appellant's interpretation were correct it would mean that the administration could be by an authority not among the tribes, instead of, as the preamble of the former Ordinance and the long title of the former and of the present Ordinance envisaged, "administration by tribal authority among the tribes."

"To promote" is not to create but to help forward, to further and such like.

Section 2 (1) of the No. 19 of 1905 read:

"2.—(1) Whenever it is represented to the Governor by petition or other means that any tribe in Freetown possesses a recognised Chief, Alimamy, or Headman, who, with other headmen or representatives of the sections of the tribe, endeavours to enforce a system of tribal administration for the well-being of members of the tribe resident in or temporarily staying in Freetown, it shall be lawful for the Governor, subject to the provisions of sections 2 and 3 hereof, to recognise such Chief, Alimamy, or Headman as the Tribal Ruler of such tribe for the purposes of this Ordinance."

The person recognised, were he Chief, Alimamy or Headman was recognised as the "Tribal Ruler of such tribe for the purpose of this Ordinance." He was not merely ruler of the tribe, but a Tribal Ruler of the tribe. A member of another tribe could possibly be a ruler of this one. Could he be a Tribal Ruler of it? I do not think the words could mean that. A Tribal Ruler must have some meaning beyond ruler.

The existing section 2 (1) has already been set out. Its substance and procedure have remained the same with two exceptions. (The present proviso to section 2 (1) was section 2 (2) and 2 (3) in the 1905 Ordinance.) The exceptions are that the "Chief" and "Alimamy" have been omitted, while the

C. A.  
1961

NEWS  
v.  
MACFOY.  
Ames Ag.P.

headman continues to be there: and he is now recognised not as a Tribal Ruler of the members of the tribe, but as the headman of them; here plain headman, although in every other section where he is mentioned he is styled "Tribal Headman."

Similarly in former section 2 (2), added by No. 14 of 1926, "any person" recognised was recognised as "tribal ruler of any tribe resident in Freetown," and not ruler. It now is recognised as "the headman of any members of a tribe resident in Freetown."

These changes were made by No. 48 of 1932, which repealed and re-enacted the earlier Ordinances.

One does not know why "Chief" and "Alimamy" were omitted and one cannot speculate; (otherwise one might think that chief was as inappropriate as headman is appropriate to various immigrants into the Colony from the tribal homeland, and that Alimamy is a religious office).

One notices that as long as the person recognised was the Tribal Ruler it was he "acting with the headmen or with the representatives of the sections of his tribe" who were the rule-making authority, and the rules had to be confirmed by the Governor, and they then became law. When the Tribal Ruler became Tribal Headman, the Governor in Council became the rule-making authority, although the Tribal Headman continues to have the duty of enforcing them.

In my opinion the present Ordinance is of the same mind as that which it repealed and re-enacted, namely, designed to improve and give legal force to a system of administration by the tribes resident in the Colony, who have endeavours to that end, on a tribal basis and for their own benefit.

I agree respectfully with the learned judge that "any person" in section 2 (2) is limited to any person of the tribe.

I would dismiss the appeal.

[COURT OF APPEAL]

Freetown  
Nov. 7,  
1961

HON. PARAMOUNT CHIEF T. S. M'BRIWA . . . . . *Appellant*

v.

TUBERVILLE AND OTHERS . . . . . *Respondents*

[Civ. App. 67/61]

*Tort—Action for assault, false imprisonment, malicious prosecution and conspiracy—Action against members of Native Court—Whether defendants were persons "engaged in the public service"—Whether judge correct in holding for defendants on ground not raised in statement of defence—Protectorate Ordinance (Cap. 60, Laws of Sierra Leone, 1960) ss. 4, 38—Native Courts Ordinance (Cap. 8) s. 1—Sierra Leone (Constitution) Order in Council, 1958 (P.N. No. 68 of 1958) s. 1 (5) (b)—Sierra Leone (Constitution) Order in Council, 1961 (P.N. 78 of 1961) s. 107 (3).*

The District Commissioner of Kono District instructed the President of the Gbense Native Court (first respondent) to issue a warrant for the arrest of the appellant, and that appellant be prosecuted for an offence contrary to section 15 of the Tribal Authorities Ordinance. Appellant was arrested on September 16, 1960, and taken before the Native Court, where he was charged

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Benka-Coker  
and Wischam  
C.JJ.