amendment of a petition and, although it is an inconvenient thing to do at that stage because fresh service is usually necessary, it could have been done at that stage. However, no application was made for leave to amend it and judgment was given.

An amendment would have been more inconvenient in this court but would not have been impossible, if sufficient grounds were disclosed. Yet, as Mr. Barlatt said, no formal application was made.

Mr. Marcus-Jones submitted that in the circumstances of what happened in the court below the party cited must be taken to have waived the "irregularity" but I see no reason to assume that.

So here is this almost later-than-last-minute informal application to amend the petition because of the initial failure to comply with what Mr. Barlatt submits is an obligatory rule. There is nothing before the court to show why it was not complied with and why an application to amend it could not have been made at some more reasonable time. I would not allow the amendment and consequently I would not make any judgment for payment of damages.

BANKOLE JONES, C.J. and DOVE-EDWIN, J.A. concurred.

Order accordingly.

JANNEH and SIX OTHERS *v.* COMMISSIONER OF POLICE

COURT OF APPEAL (Ames, P., Dove-Edwin, J.A. and Cole, J.): July 21st, 1965
(Cr. App. No. 3/65)

[1] Courts—Supreme Court—appeals—appeals against sentence—time for appeal—14 day limit under Courts (Appeals) Act, 1960, Part III: When an appeal has been taken from a magistrate's court to the Supreme Court and ultimately to the Court of Appeal, a sentence passed by the Supreme Court on the instructions of the Court of Appeal is a matter within Part III of the Courts (Appeals) Act, 1960, in respect of which an appeal must be lodged within 14 days unless the Court of Appeal grants more time (page 247, line 34—page 248, line 10).

[2] Criminal Procedure — appeals — appeals against sentence — original sentence stands on dismissal of appeal: If an appeal against sentence is dismissed, the original sentence still stands and no further sentence is required (page 248, lines 22–26).

[3] Criminal Procedure — appeals — appeals against sentence — time for appeal—14 day limit under Courts (Appeals) Act, 1960, Part III: See [1] above.

[4] Time—time for appeal—criminal appeals—appeals against sentence—14 day limit under Courts (Appeals) Act, 1960, Part III: See [1] above.

The appellants were charged in the Magistrate's Court, Port Loko, with riotous assembly and assault, assault occasioning actual bodily harm and causing malicious damage.

The appellants were convicted and each sentenced to 12 months' imprisonment on each count, the sentences to run concurrently. They were released on bail pending an appeal. On appeal, the Supreme Court held the proceedings to have been a nullity and quashed the convictions, discharging the appellants. The respondent appealed to the Court of Appeal, which set aside the decision of the Supreme Court and remitted the case to that court, directing that the appeal should be allowed on one count, but dismissed on the other two. The proceedings in the Court of Appeal are reported at 1964–66 ALR S.L. 205.

The appellants requested the Supreme Court to reduce the original sentence but the respondent objected on the ground that the order of the Court of Appeal was clear. There was no full argument in mitigation and the court sentenced the appellants to 12 months' imprisonment concurrently on the remaining two counts.

Nineteen days after these proceedings, the appellants applied for leave to appeal against the sentence of the Supreme Court in accordance with ss.19(c) and 23 of the Courts (Appeals) Act, 1960. The respondent submitted that since the appeal was a question of law only it should have been made within 14 days under s.15(2) of the Act; as there had been no application for extension of time, the appeal was not made in the proper form. The Court of Appeal accepted the respondent's submission and directed the proper applications to be filed.

The appeal against sentence was on the grounds that (a) the Supreme Court had no jurisdiction to pass sentence on the appellants and the sentences were therefore unlawful; and (b) the learned judge was wrong in law in refusing counsel permission to mitigate against sentence. A further plea *ad misericordiam* was addressed to the Court of Appeal.

Statute construed:

Courts (Appeals) Act, 1960 (No. 18 of 1960), s.7:

"(3) On an appeal against sentence, the Supreme Court may leave the sentence unaltered or pass such other sentence warranted in law

(whether more or less severe) in substitution for the sentence passed as the court thinks ought to have been passed."

s.15: "(2) An appeal shall lie to the court of appeal, but on questions of law only, against the decision of the Supreme Court in an appeal from, or on a case stated by, a magistrate in criminal proceedings:

. . .

Provided further that, unless the court of appeal grants more time, no appeal shall be entertained if it was not brought within fourteen days from the day on which the decision was given."

s.19: "A person convicted by or in the Supreme Court may appeal to the court of appeal—

. . .

(c) with the leave of the court of appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

s.23: "(1) Where a person convicted desires to appeal to the court of appeal, or to obtain the leave of that court of appeal, he shall give notice of appeal or notice of his application for leave to appeal . . . within twenty-one days of the date of conviction. . . ."

E. L. Luke for the appellants;
D. M. A. Macaulay, Sol.-Gen., for the respondent.

AMES, P.:

The seven appellants were before this court at our sittings in February and March of this year. They were then respondents in a prosecutor's appeal.

They had been convicted in the Magistrate's Court, Port Loko, of (a) riotous assembly and assault, (b) malicious damage contrary to s.51 of the Malicious Damage Act, 1861, and (c) assault occasioning actual bodily harm. They were sentenced to 12 months' imprisonment on each count concurrently. They appealed to the Supreme Court and there the learned judge held that the proceedings in the magistrate's court were a nullity, allowed the appeal, quashed the convictions and discharged the appellants. The prosecutor then made the appeal already mentioned in which the present appellants were the respondents. At the end of that appeal this court (then constituted differently) made the following order on March 8th (1964–66 ALR S.L. at 214):

"The decision appealed from is set aside and the appeal is remitted to the court below for determination according to the following directions:

(a) That the appeal of the respondents in that court be allowed

as far as it concerned count 2 and that the convictions and sentences on that count be set aside; and

(b) That their appeal be dismissed as far as it concerned counts 1 and 3."

There was then some argument as to the sentence and this court decided as follows:

"Assuming that we could give some direction to the court below as to sentence, we see no reason to do so. No question of principle is involved. The sentence was lawful. The magistrate heard, and no doubt considered, the plea for leniency made to him. He was well aware of all the circumstances of the riot which were disclosed by the evidence. There is nothing whatever to suggest that he used his discretion in any improper way. Moreover, the respondents specifically withdrew their appeal against sentence in the court below." [This passage was not reported in 1964–66 ALR S.L. 205]

The matter then went back to the Supreme Court for our order to be carried out. Mr. Livesey Luke, for the appellants, asked the Supreme Court to "consider the sentence" under s.7(3) of the Courts (Appeals) Act, 1960. He wanted to have the sentence reduced. Mr. Fewry, for the prosecution, objected, saying that the order of this court was clear. The learned judge then passed the following sentence on March 10th:

"In consequence of the directions of the Court of Appeal for Sierra Leone I sentence you to 12 months' imprisonment with regard to counts 1 and 3 to run concurrently, the sentence to run as from Monday, March 8th, 1965. I acquit and discharge you with regard to count 2."

That was the end of the proceeding in the court below and there had been no argument in mitigation. The appellants have been in custody since this court's order of March 8th. From the date of their conviction in the magistrate's court until March 8th they had been on bail.

The outcome was this "application for leave to appeal against the sentence of 12 months each passsed upon us by the Supreme Court judge. . . ." The application was dated March 29th, which was 19 days after the proceeding in the court below. Mr. Livesey Luke took it to be a matter within Part V of the Courts (Appeals) Act, 1960 (APPEALS IN CRIMINAL CASES TRIED IN THE SUPREME COURT AT FIRST INSTANCE), where an appeal against sentence requires the leave of this court, as in s.19 para. (c), and can be made within 21

days, as in s.23. Mr. Macaulay for the respondent submitted that it was a matter within Part III of the Act (APPEALS FROM DECISIONS OF THE SUPREME COURT IN APPEALS FROM . . . MAGISTRATES), in which case it must be "on questions of law only," as in s.15(2), and must be made within 14 days "unless the court of appeal grants more time," as in the second proviso thereto. Also, of course, if Mr. Macaulay is correct, the form of notice of application filed by the appellants is not the proper form and the proper form should have been accompanied by a notice of application for extension of time.

In our opinion Mr. Macaulay is correct. After the adjournment, when we came to that opinion, we directed that Mr. Luke should file the appropriate applications in order that the matter may be determined at these sittings and because the form of the proceedings before the learned judge was some excuse for his having filed an inappropriate one.

The grounds of appeal are as follows:

"(a) That the learned judge had no power or jurisdiction to pass sentence on the appellants and the sentences passed on each of them are therefore unlawful.

(b) That the learned judge was wrong in law in refusing counsel permission to mitigate against sentence."

As to the first, the order of this court setting aside the order of the Supreme Court restored the order of the magistrate's court, which had sentenced the appellants to 12 months' imprisonment. There was no need for the learned judge to pass (or to pronounce, as Mr. Macaulay would have it) sentence. The learned magistrate released the appellants on bail, so it appears, immediately after having sentenced them. It may be, therefore, that he did not issue a warrant, as he should have done under s.162 of the Criminal Procedure Act (*cap.* 39) with an endorsement on it of their release on bail. This may be the reason for what the learned judge did. If there was no warrant he was correct to issue one but any purported sentence was unnecessary and surplusage.

As to the second ground of appeal, the learned judge was correct. This court had considered the sentence when the appeal was before it previously. That meant that this court, as then constituted, declined to make any direction for the alteration of the sentence, as it could have done. In other words, it was to remain as it was. Mr. Luke has made another plea *ad misericordiam* to this court as now constituted but the question has already been determined for the reasons set out in the record and we reject his plea.

Mr. Luke said that the appellants have already served between three and four months of their sentence. They must now serve the remainder. This appeal is dismissed.

DOVE-EDWIN, J.A. and COLE, J. concurred.

Appeal dismissed.

SPAINE *v.* SPAINE

SUPREME COURT (Beoku-Betts, J.): July 30th, 1965
(Divorce Case No. 29/63)

[1] **Family Law—custody of children—discretion of court—factors to be considered in making order:** A court has a wide discretion in making a custody order and should take into consideration all the circumstances of the case, including the age and sex of the child, its health, the lives led by its respective parents and their prospects of remarriage, the upbringing of the child by a single parent, or by a step-parent if there is a remarriage, and the upbringing of children together (page 252, lines 8–11; page 252, line 36—page 253, line 3).

[2] **Family Law — custody of children — right of mother to custody — mother's adultery not absolute bar to custody:** The mere fact that a wife is proved to have committed adultery is not of itself a sufficient reason for denying her the custody of her young child, especially if the child is a girl; where the wife is unsuitable in other respects, such as by being unstable, custody may be denied her (page 251, lines 16–19; page 252, lines 19–27).

The applicant wife applied by motion to vary a custody order made in respect of the child of the former marriage between the applicant and her husband the respondent.

At the time of the dissolution of the marriage between the applicant and the respondent, the Supreme Court (Marke, J.) made an order giving the custody of the two infant sons of the marriage to the respondent. In doing so, the court took into consideration the facts that it was desirable for the two children to be brought up together rather than one by each parent and that the applicant had committed adultery and was apparently conducting an affair with a man by whom she had become pregnant. The court felt that the interests of the children would be best served by giving their custody to their