KAMARA v THE STATE

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COURT OF APPEAL FOR SIERRA LEONE, Criminal Appeal 5 of 1976, Hon Mr Justice Ken E O During JA, Hon Mr Justice S C E Warne JA, Hon Mr Justice Constant S Davies JA, 22 October 1976

[1] Criminal Law and Procedure – Incomplete trial – Adjournment – Failure to discharge jury – Conviction in subsequent trial before new jury was a nullity – Whether Court of Appeal should exercise discretion to order retrial or to quash conviction and discharge accused – Courts Act 1965 s 59(5)

The appellant was charged with murder on 18 August 1974. On 13 May 1975 the appellant appeared before the High Court presided over by Kutubu J and pleaded not guilty to the charge. Jurors were empanelled and the appellant put in the charge of the jury. On 28 May 1975 the case was adjourned to the next sessions to be held at Port Loko and an order was made for the accused to remain in custody. The jury was not discharged. Subsequently, following several further adjournments of the trial, the appellant was arraigned before the High Court on 13 January 1976. New jurors were empanelled and the appellant was put in their charge. On 19 January 1976 the appellant was convicted on a charge of murder and sentenced to death by hanging. The appellant appealed against conviction.

The State argued that failure to discharge the jury after the appellant had first been arraigned and put in their charge was that the subsequent proceedings were a nullity and that the Court of Appeal had no power in such circumstances to discharge the appellant and under s 59(5) of the Courts Act 1965 had no alternative but to send the case back to the High Court for retrial. The appellant argued that the trial was a nullity but maintained that the Court of Appeal was not bound to order a re-trial and submitted that the court could order a verdict of acquittal to be entered and quash the conviction.

Held, per During JA, ordering that the appellant's conviction be set aside and that the appellant be tried by court of competent jurisdiction:

1. When a prisoner has been given into the charge of the jury and where the jury has not subsequently been discharged a verdict must be given and the prisoner so put in charge can only be either convicted or discharged by the jury. The jury into whose charge Kutubu J gave the accused gave no verdict and was not discharged. When Kutubu J adjourned the case against the appellant to the next sessions of the court and ordered the appellant to be kept in custody he should there and then have discharged the jury as they had not given a verdict. It was Kutubu J who put the accused in the charge of the jury and who should have in circumstances discharged the jury and not the judge before whom the appellant was subsequently arraigned. As a result the trial was void ab initio. *R v Hancock* (1932) 23 Cr App R 16; *R v Heyes* (1950) 34 Cr App R 161 applied.
2. As the proceedings in the High Court amounted to a nullity and there was an indictment against the appellant on which there had been no trial, s 59(5) of the Courts Act 1965 gave the court power to exercise its discretion to make an order that the appellant be tried by court of competent jurisdiction. There was no provision in the Courts Act which gave the court power to discharge the appellant where, as in this case, there was an indictment against the appellant and the appellant had in fact not been tried.

Cases referred to

R v Albert Michael McDonnell (1927) 20 Cr App Rep 163
R v Carlo Oliver (1942) 28 Cr App R 173

R v Conteh [1967-68] ALR (SL) 141
R v Hancock (1932) 23 Cr App R 16
R v Heyes (1950) 34 Cr App R 161
State v Borbor Swarray (unreported, Criminal Appeal 27/74, 27 May 1976).

Legislation referred to
Courts Act No 31 of 1965 s 59(5), (6)
Court of Appeal Rules r 52(b)

Appeal
This was an appeal by Dauda Kamara against conviction by the High Court on 19 January 1976 on a charge of murder and sentence to death. The facts appear sufficiently in the following judgment.

Miss C Mahota Demby for the appellant.
Mr M S Turay, Solicitor General, for the State.

KEN DURING JA: The appellant was on the 19th January 1976 convicted on a charge of murder and sentenced to death by hanging at the sessions of the High Court at Port Loko. Against such conviction the appellant has appealed to this court.

The appellant was charged with having committed the offence on the 18th of August 1974. The prosecution alleged that he murdered one Fakoi Kamara whose body was not traced. He was committed for trial upon information before the High Court in Port Loko at sessions to be held on the 29th of April 1975 by the committing magistrate sitting in the Magistrate Court in Port Loko. An indictment was filed and served on the appellant who appeared at the sessions of the High Court on the 29th of April 1975. On the 13th of May 1975 the appellant appeared before the Court which was presided over by Kutubu J and pleaded not guilty to the charge of murder. Jurors were empanelled and the appellant put in charge of the jury. The prosecution proceeded to open its case against the appellant and three prosecution witnesses testified for the State. On the 28th of May 1975 the case was adjourned to the next sessions to be held at Port Loko. An order was made for the accused to remain in custody. The jury was not discharged. On the 16th of September 1975 the accused was arraigned again before Okoro Idogu J at the High Court sessions of the High Court sitting at Port Loko and the appellant pleaded not guilty. On the 1st of October 1975 the court adjourned the case to be heard at the next session commencing in November 1975. Jurors were not empanelled. The appellant was again on the 18th of November 1975 arraigned before the court sitting at Port Loko and he pleaded not guilty. Jurors were empanelled and evidence was led by the prosecution. On the 27th of November 1975 on the application of the prosecution the case was again adjourned to the next session commencing in January, 1976 and the jury was accordingly discharged. The appellant was arraigned before the court on the 13th of January 1976. He then pleaded not guilty. Jurors were empanelled and the appellant was put in their charge. At this hearing before us on the 21st of September 1976 we asked the learned Solicitor-General to address us on whether the proceedings in the court below were void. In reply the learned Solicitor-General stated that the trial was a nullity and that this court is bound to send the case back for a retrial. He referred us to section 59(5) of the Courts Act No 31 of 1965 which reads as follows:

> "Where the Court of Appeal is of the opinion that the proceedings in the trial Court were a nullity, either through went of jurisdiction or otherwise, the Court may order the appellant to be tried by a Court of competent jurisdiction."

The learned Solicitor-General argued that the word "may" in the section should be constructed to mean "must." He argued that the result of failure to discharge the jury after the appellant had first been arraigned and put in their charge was that the subsequent proceedings were a nullity and that this court has no power in such circumstances to discharge the appellant and has no alternative but to send the case back to the court below for retrial. He referred to the case of *R v Conteh* [1967-68] ALR (SL) 141 at 144 and also the case of *State v Borbor Swarray* (unreported, Criminal Appeal 27/74, 27 May 1976).

Section 59(6) which makes provision for retrial reads as follows:

"Where an Appeal against conviction is allowed by the Court of Appeal by reason only of evidence received or available to be received by that Court, under section 65, and it appears to the Court that the interest of justice so required, the Court may instead of directing the entry of Judgement and verdict of acquittal, order the appellant to be retried: Provided always that this power shall only be exercised where it appears that the non-availability of such evidence has been due to gross negligence or the wilful withholding of the same of the trial of the Accused."

The section is the only provision in the Act which empowers this Court to order a retrial.

Miss Demby on behalf of the appellant argued that in the circumstances the trial was a nullity but maintained that this court is not bound to order a re-trial and submitted that the court could order a verdict of acquittal to be entered and quash the conviction.

We adjourned this matter to the 28th of September 1976 to enable counsel on either side to address us on the points raised.

When this matter came up for further hearing the Solicitor-General maintained his argument that this court could not discharge the accused in the circumstances. He again referred to *R v Conteh* supra but agreed that the authorities show clearly that this court is not bound to order a retrial or a trial but could quash the conviction *simpliciter*. He also agreed that this court could grant bail to the appellant under rule 52(b) of the Court of Appeal Rules. He submitted this was a proper case where this court should in its discretion order a retrial.

Miss Demby for the appellant argued that the court could in such circumstances order that the appellant be acquitted and discharged or can order that the conviction be quashed *simpliciter*. She later conceded that this court could order that the appellant be sent for trial. She indicated that if this court is disposed to send the case for trial or the conviction is quashed *simpliciter* she would respectfully in all the circumstances apply for bail as the appellant has been in custody for quite a long time.

After a prisoner has been given into the charge of the jury and if the jury was not subsequently discharged a verdict must be given and the prisoner so put in charge can only be either convicted or discharged by the jury: *R v Hancock* (1932) 23 Cr App R 16; *R v Heyes* (1950) 34 Cr App R 161. The jury into whose charge Kutubu J gave the accused gave no verdict and was not discharged. When Kutubu J adjourned the case against the appellant to the next sessions of the court and ordered the appellant to be kept in custody he should there and then have discharged the jury as they had not given a verdict. It was Kutubu J who put the accused in the charge of the jury and who should have in circumstances discharged the jury and not the judge before whom the appellant was subsequently arraigned. This was an unfortunate mistake and in our view the trial was void ab initio.

What then is the proper course this court ought to take in the circumstances of this case to remedy the unfortunate mistake?

Section 59(5) of the Courts Act No 31 of 1965 gives this court power in its discretion to make an order that an appellant be tried by court of competent jurisdiction where the court is of

the opinion that the proceedings in the trial court were a nullity either through want of jurisdiction or otherwise. The proceedings in the court below amounting to nullity, this court could use its discretion and order that the appellant be tried by a court of competent jurisdiction and treat the verdict and sentence as a nullity. There is an indictment against the appellant on which there has been no trial.

What this court could order in the instant case is that the verdict and sentence be set aside and be treated as a nullity and not a retrial that is, an order in the nature of a *venire de novo*, to plead to the indictment and be tried thereon according to law.

Instead of setting aside the verdict and sentence and making an order that the appellant be tried by a competent authority, this court could for reasons which it thinks proper merely quash the conviction; see *R v Carlo Oliver* (1942) 28 Cr App R 173; *R v Albert Michael McDonnell* (1927) 20 Cr App Rep 163; *R v Heyes* (1950) 34 Cr App R 161. If this court does not exercise its discretion under section 59(5) of the Courts Act, there being in fact no trial, as the proceedings in the court below were void ab initio, the conviction in any event must be set aside, in effect quashed. We find no provision in the Courts Act which gives this court power to discharge the appellant where as in this case there is an indictment against the appellant and the appellant has in fact not been tried.

We have carefully considered the arguments of counsel on either side as to exercise or non-exercise of this court's discretion to order that the appellant be tried by a competent authority and have arrived at the decision that the appellant be tried by a competent authority and that the appellant be admitted to bail. The order of the court is as follows:

> "Upon consideration being had by this court, as duly constituted for the hearing of appeals under the Courts Act No 31 of 1965, of the appeal of the above named appellant against conviction, the court doth finally determine the same, and doth order that the conviction and judgement on the indictment whereon the appellant was convicted be set aside and annulled and the appellant do appear at the next sessions of the High Court held at Port Loko there to take his trial according to law upon the said indictment.
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> This Court admits the appellant to bail in his own recognisance for Le5,000 and two sureties in the sum of Le5.000 each, such surety to be owner of house or property valued not less than Le5,000 to be approved by the Master and Registrar of the High Court."

Reported by Anthony P Kinnear and Victoria Jamina