26

Cr. App.32/2004

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

PAUL KAMARA - APPELLANT

AND

THE STATE - RESPONDENT

CORAM:
Hon. Justice Sir John Muria JA (Presiding)
Hon. Justice A.N.B. Stronge JA
Hon. Justice J. Kamanda JA

HEARING: 23rd and 29th November 2005
JUDGMENT: 29th November 2005 (Reasons Reserved)

Advocates:
J.B. Jenkins-Johnston Esq. for Appellant
O.V. Robbin-Mason Esq. and A.S. Sesay Esq. for Respondent

REASONS FOR JUDGMENT

Delivered this 14th day of June 2006

MURIA JA (Now JSC): On 29th November, 2005 this Court allowed the appellant's appeal and quashed his sentence. We said that we would give our reasons for our decision. This we now do so. This case extends beyond the interest of the appellant and the respondent. It concerns the principle of freedom of the press which is one of the freedoms enshrined under the

27

Constitution of Sierra Leone. This appeal, however, is determined on the facts of the present case and law applicable to those facts.

Brief Background

The brief background to this case is that appellant, Paul Kamara, is the Editor of the newspaper FOR DI PEOPLE. On 3rd October 2003, respectively, the newspaper published the following statements about His Excellency the President of Sierra Leone.

> "KABBA IS A TRUE CONVICT
> ..... Therefore, President Kabba is a convict who has refused with impunity to appeal his conviction....."

> "BETWEEN CONSTITUTIONALITY AND A CONVICT PRESIDENT KABBA
>
> As far as FDP is concerned Kabbah should not be a President In the first place. The man never appealed the Beoku-Betts Commission of Inquiry and the simple definition of the term 'CONVICT' is an individual that has been found guilty of a crime or an offence....."

Following he publication of those statements in the FOR DI PEOPLE Newspaper, the appellant was charged with Seditious Libel for which he was tried, convicted and sentenced to two years imprisonment by the High Court of Sierra Leone.

The High Court decision

I set out the two counts of Seditious Libel, contrary to Section 33(1)(c) of the Public Order Act No.46 of 1965 as amended in order to appreciate the nature of the offences with which the appellant was charged.

28

"COUNT 1

STATEMENT OF OFFENCE:

SEDITIOUS LIBEL CONTRARY TO SECTION 33(1)(c) of the Public Order Act No.46 of 1965 as amended.

PARTICULARS OF OFFENCE:

PAUL KAMARA on the 3rd day of October 2003 at Freetown in the Western Area of Sierra Leone seditiously published a certain seditious libel concerning His Excellency the President of Sierra Leone Alhaji Dr. Ahmad Tejan Kabba containing inter alia the following seditious matters in the 3rd of October 2003 Edition of "FOR DI PEOPLE" Newspaper in an article captioned:- KABBA IS A TRUE CONVICT!" to wit ".....Therefore, President Kabbah is a convict who has refused with impunity, to appeal his conviction....."

"COUNT II

STATEMENT OF OFFENCE:

SEDITIOUS LIBEL CONTRARY TO SECTION 33(1)(c) of the Public Order Act No.46 of 1965 as amended

PARTICULARS OF OFFENCE:

PAUL KAMARA on the 7th day of October 2003 at Freetown in the Western Area of the Republic of Sierra Leone seditiously published a certain seditious libel concerning His Excellency the President of thr Republic of Sierra Leone Alhaji Dr. Ahmad Tejan Kabba containing inter alia the following seditious matters in the 7th of October 2003 Edition of "FOR DI PEOPLE"

29

Newspaper in an article captioned BETWEEN CONSTITUTIONALITY AND A CONVICT PRESIDENT" KABBA " to wit:-

"As far as FDP is concerned Kabbah should not be should not be a president in the first place. The man never appealed the Beoku-Betts Commission of Inquiry and the simple definition of the term "CONVICT", is an individual that has been found guilty of a crime or an offence ....."

As I have said earlier, following a trial the appellant was convicted and sentenced to two (2) years imprisonment.

It will be observed that before finding the appellant guilty and sentencing him, the learned trial Judge, in his Judgment, set out what Counsel for appellant called the "lofty goals" to be taken into consideration. His Lordship set these out at pages 139 to 140 as follows:-

> "Having carefully considered the submissions made by Defence Counsel and Prosecuting Counsel in their final address except Counsel for the 2nd accused who is absent from the jurisdiction and I should now consider whether Prosecution have prove (sic) their case against each accused person beyond reasonable doubt – to my satisfaction in my capacity as Judge and Jury. Like in all criminal proceedings the prosecution in the present proceedings has the burden to prove the charges as laid in the indictment. The accused persons are under no obligation to put a defence.
>
> There are four counts in this indictment. Counts 1 & 2 charge the 1st accused with publishing a seditious libel concerning His Excellency the

President. Counts 3 and 4 charge the 2nd, 3rd and 4th accused with the offence of printing a Seditious Libel concerning His Excellency the President.

My duty now is to see whether the evidence laid by the prosecution has established the ingredients and to see whether each accused has committed the Offence as alleged in each count."

The complaints by the appellant is that having set out the criteria to be taken into consideration before determining the guilt or the innocence of the Appellant, the learned trial Judge failed to do what he reminded himself necessary to be done.

Grounds of Appeal

There were 12 grounds of appeal originally filed on behalf of the appellant. However, having been granted leave to file amended grounds of appeal, Mr. Jenkins-Johnston (who did not file the original Notice of Appeal) filed only two grounds of appeal. The Court is now concerned with only those two grounds of appeal. I set them out here:

Ground 1.

The learned trial judge erred in law, and was totally wrong to have pronounced the Appellant as being guilty of the offences of Seditious Libel as charged, the prosecution having failed to establish by evidence or otherwise that the publications complained of were; (a) Seditious Publications, and (b) were published by the appellant with a seditious intention.

Ground 2.

That the Judgment was against the weight of the evidence.

This appeal is being determined on those two grounds of appeal.

The issues and arguments

In the light of the now limited grounds of appeal, the issues are equally narrowed. Hence the central issue to be determined is in essence as follows:- Have the elements of the offence of seditious libel been established? Essentially two questions are raised and must be answered. Firstly, whether the two articles complained of constituted seditious publications and secondly, if they were, whether they were so published with a seditious intention. These two requirements must be established if the offence of seditious libel is to be made out. Without having to look elsewhere for authorities on the point, the case of *Regina v Lamin and Taqi* [1964-66] ALR S.L. 346 is the authority in point, a case decided by the then Supreme Court of Sierra Leone. The other cases referred to by Counsel for the appellant are *Wallace-Johnson -v- The King* [1940] 1 W.W.R 365 (P.C.) (Gold Coast); [1940] AC 231; *R v Burns* (1886) 16 Cox CC 355; *R v Sullivan, R v Piggot* (1868) 11 Cox CC 44 (IR). Each of these cases was decided according to its own circumstances. However, the two requirements or elements of the offence of seditious libel were central to the decisions in all of those cases referred to.

It is important to note that, although *Wallace Johnson -v- The King* was referred to in *Regina v Lamin and Taqi,* the Supreme Court in *R v Lamin and Taqi,* did not express any view as to whether *Wallace-Johnson -v- The King* should apply or not in that case. In contrast, when one reads the decision in *R v Lamin and Taqi* with those of *R v Burns; R v. Sullivan and R v Piggot,* it is obvious that the reasoning of the Court in *R v Lamin and Taqi* followed closely those of *R v Burns; R v Sullivan and R v. Piggot.* We can only presume that the Court in *R v Lamin and Taqi* viewed the decision in *Wallace-Johnson -v- The King* turned on a very

narrow point, namely whether it was necessary for the prosecution to bring evidence to show incitement to violence before seditious intention could be proved, and thus it was not an issue for consideration in the *R v Lamin and Taqi* case. We, however, expressed the view that, like the then Gold Coast Colony (now Ghana), Sierra Leone incorporates the law of seditious libel in a statute. In the then Gold Coast, it was in the Criminal Code, and in Sierra Leone, it was in the Sedition Act (Cap.29) and now in the Public Order Act, 1965. The Courts, in dealing with such an offence, must first turn to the statute which sets out the law of seditious libel. Only where the language used in the statute is unclear and ambiguous should the Court seek assistance from any expositions, however authoritative, of the common law. The Privy Council in *Wallace Johnson -v- The King* succinctly pointed this out in response to the submission by Counsel for the appellant relying on a number of English and Scottish Courts including *R v Burns* (above), at pp.239 -240:

> "Their Lordships throw no doubt upon the authority of these decisions, and if this was a case arising in this country, they would feel it their duty to examine the decisions in order to test the submissions on behalf of the appellant. The present case, however, arose in the Gold Coast Colony, and the law applicable is contained in the Criminal Code of the Colony. It was contended that the intention of the Code was to reproduce the law of sedition as expounded in the cases to which their Lordships' attention was called. Undoubtedly the language of the section under which the appellant was charged lends some colour to this suggestion. There is a close correspondence at some points between the terms of the section in the Code and the statement of the English law on sedition by Stephen J. in the Digest of Criminal Law, 7th ed., arts. 123-126, quoted with approval by Cave J. in his summing up on *Reg. v Burns and others*. The fact remains, however, that it is in the Criminal Code of the Gold Coast Colony, and not in English or Scottish cases, that the law of sedition for the Colony is to be found. The Code was no doubt designed to suit the

33

circumstances of the people of the Colony. The elaborate structure of s. 330 suggests that it was intended to contain, as far as possible, full and statement of the law of sedition in the Colony. It must therefore be construed in its application to the facts of this case free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England or of Scotland."

We set out the above extract at length because we feel that similar approach should be taken by the Courts in Sierra Leone when dealing with offences created by statutes, such as the one with which we are dealing here.

Having said that, we return to the case before us to consider the two issues raised by the appellant. We bear in mind, of course that our function is that of an appellate one and that we defer to the learned trial judge the benefit of being a judge at first instance. Be that as it may, the salutary principle remains that a finding of guilt of an accused person by the trial judge must be supported by evidence adduced before the Court, establishing the elements of the offence beyond reasonable doubt.

Whether there was a seditious publication?

There is no question here that the two articles complained of were published on 3rd October 2003 and 7th October 2003 respectively, in the FOR DI PEOPLE NEWSPAPER of which the appellant was the Editor. The first issue for determination is whether the publication was seditious and secondly whether it was done so with a seditious intention. These are the criminal intent and the criminal act in the offence, and they must be established before the offence is made out. See *R. v Sullivan* (above).

Our reading of the record shows that the learned trial Judge, while properly directing himself as to the need of proof of the ingredients of the offence and that it was the accused who committed the offence, failed to make any finding at all on issues raised as required by law in a criminal trial. There was no finding that the elements of the offence were proved beyond reasonable doubt or at all. The learned trial Judge had simply repeated evidence and submissions of Counsel for the prosecution and defence. Having done so, the learned trial Judge did not make any express finding that, on the evidence, each of the elements of the offence had been proved. His Lordship simply concluded that the appellant was guilty on both counts. We view such treatment of the evidence, in a serious case such as the present one, as very unsatisfactory, particularly where a trial judge is sitting alone. The purpose of reviewing, not necessarily rehearsing the evidence, is to ascertain whether or not the evidence adduced prove each of the elements of the offence. A ton of evidence may be adduced at the trial, and which may not necessarily establish proof of the elements of the offence. Conversely, brief evidence may be adduced and may be sufficient to prove the ingredients of the offence. As we have found, the learned trial Judge had failed to ascertain whether or not the elements of the offence had been proved on the evidence before the Court. This is an error of law and is fatal to the conviction of the appellant.

The error became obvious also because the learned trial judge proceeded to determine the issue of whether or not His Excellency President Kabbah was a true convict, instead of concentrating on the elements of the offence. With respect, the issue of whether His Excellency was a true convict, was not an element of the offence that was required to be established. The learned trial Judge clearly misdirected himself in law by directing himself to the issue of the truth or the untruth of the statement referring to the President as a true convict. Even the accused cannot plead the truth of the statement that he makes as a defence: *R v Aldred* (1909) 74 JP 55; 22 Cox CC 1). In any case, the authorities are clear that in dealing with the article in sed itious libel cases, the

35

Judge or jury should not merely look at the objectionable sentence or word in particular, but the whole article: *R v Burns (above), R v Lamin and Taqi (above); R v Sullivan (above).*

Consequently, the learned Trial Judge failed to make any finding that the essential elements of the offence were established as required by law and could not have come to the conclusion that the offences with which the appellant was charged were proved against him. Publications of remarks or innuendoes may be capable of satisfying the definitions of seditious libel. However, in a charge of seditious libel the prosecution must prove the required intention, namely seditious intention which must be established on the facts.

This Court cannot accept the submission by Counsel for the respondent that there was no necessity for the learned trial Judge to make specific finding as to proof of each of the elements of the offence. Not only that such an approach would be contrary to our notion of the law and practice of criminal law, but that it will set a dangerous precedent contrary to our sense of justice.

We do not lose sight of the fact that those who disseminate information through media publication, whether by print or broadcast, cannot shelter behind the principles of freedom of expression where such publication interferes or threatens the rights of others. This is demonstrated by the South African cases of *Khumalo and Others v Holomisa* (14 June 2002) CCT 53/01 CC where it was held that the common law on defamation provides a justifiable limit to the right of freedom of expression, and *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (3) S.A. 409 CC where it was pointed out that the right to freedom of expression is also limited by the rights of others, and that these conflicting rights have to be balanced. The House of Lords had recently reiterated the need to balance these conflicting rights also in the case of the celebrated famous model, Naomi Campbell and the '*Mirror*' newspaper: *Campbell v MGN Limited* [2004] UKHL 22. In that case, Lord Hope

of Craighead, commenting on the competing right of free speech and individual right to privacy, under Articles 8 and 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* said,

> "The context for this exercise is provided by articles 8 and 10 of the Convention. The rights guaranteed by these articles are qualified rights. Article 8(1) protects the right to respect for private life, but recognition is given in article 8(2) to the protection of the rights and freedoms of others. Article 10(1) protects the right to freedom of expression, but article 10(2) recognises the need to protect the rights and freedoms of others. The effect of these provisions is that the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life.
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> There is nothing new about this, as the need for this kind of balancing exercise was already part of English law: *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109, per Lord Goff of Chieveley. But account must now be taken of the guidance which has been given by the European Court on the application of these articles."

In our own jurisdiction the provision and the extent of the right to freedom of expression can be found in section 25 of the Constitution of Sierra Leone which clearly provides that:

> "25. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purpose of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, freedom from interference with his correspondence, freedom to own, establish and

operate any medium for the dissemination of information, ideas and opinions, and academic freedom in institutions of learning:

Provided that no person other than the Government or any person or body authorized by the President shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) which is reasonably required -

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the telephony, telegraphy, telecommunications, posts, wireless broadcasting, television, public exhibitions or public entertainment; or

(b) which imposes restrictions on public officers or members of a defence force;

> and except in so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society.

Thus freedom of expression is not a limitless right. However, the baseline is that the Constitution guarantees protection to the right of freedom of expression or freedom of the press. That is the starting point in considering the right to freedom of expression. The consideration of any limitation on that right follows thereafter. It is therefore incumbent on the Courts, in a case such as the present one, to be guided by the spirit of the Constitution in considering the case against the accused, taking into account the nature of the publication together with the surrounding circumstances of the case as a whole. The Court should not allow itself to be solely influenced by the objectionable language used in the passage complained of. See *R v Lamin and Taqi* (above).

One of the classic demonstrations of this was the 1962 New Orleans case of *Garrison v Louisiana,* 379 U.S. 64 (1964) where Garrison sought the Fiat of the criminal judges to bring proceedings against the French Quarter of New Orleans. The eight criminal judges refused to give their approval. At a press conference Garrison accused the judges of laziness and inefficiency and of hampering his efforts to enforce the vice laws, adding that the judges' refusal raised *"interesting questions about the racketeer influences on our eight vacation-minded judges."* Garrison was charged with criminal defamation in violation of the Louisiana Criminal Defamation Statute, which in the context of criticism of official conduct *includes punishment for true statements made with "actual malice" in the sense* of ill-will as well as false statements if made with ill-will or without reasonable belief that they were true. He was convicted, sentenced to a fine of $1000 and four months in prison. The state appeal court affirmed the conviction, holding that the statute did not unconstitutionally abridge the appellant's rights of free expression. The Court went on to hold that ". . . the use of the words `racketeer

influences' when applied to anyone suggests and imputes that he has been influenced to practice fraud, deceit, trickery, cheating, and dishonesty." The Supreme Court of the United States overturned the conviction and said that public officials cannot collect for public criticism unless a statement is made with actual malice. Justice Black's comment is most telling when he said that:

> "Indeed, 'malicious,' 'seditious,' and other such evil-sounding words often have been invoked to punish people for expressing their views on public affairs. Fining men or sending them to jail for criticizing public officials not only jeopardizes the free, open public discussion which our Constitution guarantees, but can wholly stifle it. I would hold now and not wait to hold later,...that under our Constitution there is absolutely no place in this country for the old, discredited English Star Chamber law of seditious criminal libel."

That libertarian stand found in the United States is unique to that country where the importance of free media under the First Amendment has been accorded presumptive priority. See *Douglas v Hello! Ltd* [2001] 1 QB 967, 1004. We must, of course, bear in mind the state of our own circumstances and the public mind of the people in Sierra Leone in this area of the law. We can do no better than to choose according to our intuition and hopes as relevantly determined by our circumstances, bearing in mind that seditious libel is still part of the law of Sierra Leone.

In the present case, considering the circumstances and manner in which the appellant's case had been dealt by the trial judge, we are satisfied that the errors of law raised in the grounds of appeal have been sufficiently established. Consequently, as we had announced on 29th November 2005, the appeal must be allowed and for the reasons that we have now published.

40

Order of the Court:

Appeal allowed.

Convictions and sentences quashed.

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Stronge J.A.: I agree

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Kamanda J.A: I agree