

CR APP 7/2000

IN THE COURT OF APPEAL OF SIERRA LEONE

**SOLUKU JERMILL BOCKARIE - APPELLANT**

AND

## THE STATE

- APPELLANT

- RESPONDENT

CORAM

Hon Mr Justice Bode Rhodes Vivour, JSC

Hon Mr Justice P.O. Hamilton, JA

Hon Mr Justice N.C. Browne-Marke, JA

Solicitors/ Counsel

**R A Caesar Esq for the Appellant**

### S A Bah Esq for the Respondent

JUDGMENT DELIVERED ON THURSDAY THE 17<sup>TH</sup> DAY OF APRIL, 2008

BROWNE-MARKE, J.A

## INTRODUCTION

1. This is an appeal brought by way of Notice of Appeal dated 6 September, 2000 by the Appellant, SOLUKU JERMILL BOCKARIE against his conviction and sentence for the offence of Larceny contrary to Section 17(2)(a) of the Larceny Act, 1916, by the High Court sitting in Freetown, The Hon Mr Justice S.A. ADEMOSU, presiding, on 30 August, 2000. The Notice contains five grounds of appeal. Later, another, three grounds were added; and in January this year, ground 9, was added on.

2. The grounds of appeal essentially relate to misdirections on the burden and standard of proof; failure to adequately consider the case presented by the Appellant; that the aggregate sum of money which the Appellant was convicted of stealing could not have been the property of the Government of Sierra Leone, in that it was money obtained from a Bank; that the Indictment was bad in law in that it did not charge the Appellant with stealing any particular sum of money between certain stated dates; and that the verdict was unreasonable and can not be supported having regard to the evidence.

## THE TRIAL

3. On 25 August, 1999 The Hon. Mr Justice L B O Nylander, High Court Judge, gave his consent in writing for the preferment of a one count Indictment for the offence of Larceny by Servant contrary to Section 17(1)(a) of the Larceny Act, 1916 against the Appellant. He also Ordered that the Accused be arrested

by Warrant. On 26 August, 1999 the Appellant appeared before the said Learned Judge; he was identified as the person named in the Indictment; and his date of trial was fixed for 17 September, 1999.

3. The Indictment read as follows:

STATEMENT OF OFFENCE:

LARCENY CONTRARY TO SECTION 17(2)(a) of the Larceny Act 1916.

PARTICULARS OF OFFENCE

SOLUKU BOCKARIE on a day unknown between 1<sup>st</sup> and 30<sup>th</sup> June, 1999 at Freetown in the Western Area of Sierra Leone, being Clerk or Servant to the Government of Sierra Leone stole the sum of Le294,433,411/00 from the said Government of Sierra Leone.

4. There is no indication in the Record, the number of witnesses listed at the back of the Indictment, but a perusal of pages 6-19 of the Record shows that there were about 10 additional witnesses, the respective summaries of whose evidence, appeared in these pages. The brevity of these summaries, (save for at least two, which were copies of statements obtained from these witnesses by the Police), apparently filed in pursuance of Section 188 of the Criminal Procedure Act, 1965 when contrasted with the length of evidence led from these same witnesses, provides considerable food for thought as to whether the prosecution quite knew what its case was at its commencement, or whether it merely wished to 'ambush' the Defence. This practice, or rather 'ambush tactic' though not unlawful, in my judgment, detracts from the cohesiveness and consistency of the prosecution's case and has the tendency to way-lay the prosecution.

5. Though the trial date was fixed for 17 September, 1999, the Record does not show that any proceedings were taken that day. The case was first mentioned for hearing on 21 September, 1999 before the Hon Mr Justice M O TAJU-DEEN, now deceased. No plea was taken on this date, nor on the 9 other adjourned dates, until 2 March, 2000 when the Appellant pleaded Not Guilty to the Indictment before the same Judge. The matter was again adjourned at the request of the prosecution to another date, and to other dates until 30 May, 2000 when the said Judge noted at the bottom of Page 25 of the Record, that he was 'disabling himself from this case as from now.' No reasons for so doing were given. The case was adjourned to 8 June, 2000.

6. On 8 October, 1999 the then Attorney-General & Minister of Justice filed an Application pursuant to Section 144(2) of the Criminal Procedure Act, 1965 for



the Appellant to be tried by Judge alone for the offence of Larceny contrary to Section 17(1)(a) of the Larceny Act, 1916, instead of by Judge and Jury.

7. On 8 June, 2000 the Appellant appeared before The Hon Mr Justice S A ADEMOSU, then High Court Judge. The charge was again read over to the Appellant, and he pleaded Not Guilty to the same. The prosecution began leading evidence on that day. 14 witnesses in all were called by the prosecution. The prosecution closed its case on 8 August, 2000. On 11 August, 2000 after his rights had been explained to him, the Appellant elected to rely on his statement to the Police. He had no witnesses. The matter was adjourned for addresses. The then DPP addressed the Court on behalf of the prosecution on 17 August, 2000; and the Appellant's Counsel, R A CAESAR esq on 21 August, 2000. Judgment was reserved for 30 August, 2000 on which date it was delivered.

### ISSUES

8. The first matter which has exercised my mind, is the charge in respect of which Mr Justice Nylander gave his consent on page 2 of the Record. The charge there is Section 17(1)(a) of the Larceny Act, 1916. The Application for trial by Judge alone, also refers to Section 17(1)(a) of the same Act. The Indictment filed, and which appears on page 1 refers to Section 17(2)(a). The Judgment at page 133, also refers to Section 17(2)(a). At page 35 of the Record, the DPP applied for the Indictment to be amended so that 17(1)(a) should be read as 17(2)(a). The Application was granted. But no consequential amendments were made, so that the Order for Trial by Judge Alone which governed the conduct of the trial applied only to a trial for an offence under Section 17(1)(a). The question which arises here is, could the Appellant be lawfully convicted of an offence in respect of which no consent was given by a Judge, and in respect of which he had not been committed for trial, notwithstanding Section 148 of the CPA 1965? Also could he lawfully be tried by Judge alone, notwithstanding the absence of an Order authorizing him to be so tried in respect of the amended charge? If the answer to these questions is no, then it would seem the trial was a nullity.

### THE CHARGE

9. Notwithstanding the query I have posed above, I propose to deal with the substance of the appeal. I shall start off with the charge. The charge refers to a lump sum of Le 294,433,411 /00 which the Appellant is alleged to have stolen on a day unknown between two days. As this is an aggregate amount, the question arises whether it is proper to charge the larceny of a lump sum in one count, or in other words, whether it is proper for the prosecution to bring a charge where there has been a general deficiency of monies. The subject

matter of the charge is the proceeds of the encashment of 35 cheques. On the evidence, it is clear that 24 of these cheques are dated 3 June, 1999 and the remaining 11, 4 June, 1999. Two of these cheques, GSL153945 - pages 263&264 of Volume II of the Record, and GSL153936 - pages 273&274 of the same volume, were encashed on 9 June, 1999 by PW5 FRANCIS JOHNNY TOMA; and the others were encashed by PW6 ALLIE KHADAR on 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 14<sup>th</sup>, 18<sup>th</sup>, and 23<sup>rd</sup> June, 1999 respectively - see pages 263 - 297 of the same volume. These cheques were drawn for specific amounts of money. Clearly, the offence of Larceny was committed on several days and not, as was canvassed by the Prosecution, and held by the Learned Trial Judge (LTJ) on a day unknown between two days. The substance of the prosecution's case, is not that the Appellant received these monies on a particular day, but on different days after the same had been collected by PW5 & PW6 respectively. The evidence led, was thus at variance with the charge.

10. Rule 3(1) of our Indictment Rules which are to be found in the 1<sup>st</sup> Schedule to the CPA, 1965, tells us that "*....where more than one offence is so charged....each offence shall be set out in the information or indictment in a separate paragraph called a count.*" Archbold 35<sup>th</sup> Edition tells us at *paragraph 1738* that "*It is not sufficient to prove a general deficiency of money; some specific sum must be proved to have been embezzled, in like manner as a larceny some article must be proved to have been stolen.*" In *paragraph 1738* it is stated further that "*Where the Indictment contains only one count, charging the receipt of a gross sum on a particular day, and it appears in evidence that the money was received in different sums on different days, the prosecutor will be put to his election and must confine himself to one sum and one day.*" But if it had been the duty of the employee to render an account and hand over all monies received on a certain day, he could be charged with embezzling the whole amount on the day he was due to render such an account. This was certainly not the case here. It is stated further, that where it is possible to trace the individual items and to prove an embezzlement of individual property or money, it is undesirable to include them in a count alleging a general deficiency. *R v TOMLIN [1954] Vol. 2 All ER 272, C.A.* is sufficient authority for this proposition of Law, though on the facts of that case, the individual amounts embezzled could not be traced. There PEARSON, J stated at page 274 para. A "*Where separate offences can be charged in separate counts the court regards as improper an "omnibus" count in an indictment charging an aggregate of offences over a long period.*" The Court approved the reasoning along the same lines of LYNKEY, J in *R v LAWSON [1952] Vol. I AllER 804* at page 808.



11. **BLACKSTONE'S CRIMINAL PRACTICE** 1992 Edition also deals extensively with this issue under the rubric of *Duplicity and Quasi-Duplicity*. At Paragraph D8.16 page 1134 the Editors state that "*if the evidence called at the trial in fact establishes more than one offence, then, subject to amendment of the indictment, if possible, the accused will be entitled to an acquittal, not because the count was bad, but because the prosecution have failed to prove him guilty of the precise offence charged in the count even though they may have proved him guilty of some other offence.*" In the instant case, the prosecution have alleged that a day unknown between two dates, the Appellant stole a specific amount of money, whilst the evidence led at the trial was to the effect that several amounts of money were stolen on different dates. It is not the case here as it was in **JEMMISON v PRIDDLE (1979) 69 Cr App R 83 at pp86-78** where **LORD WIDGERY** in the QBD Div Ct held that "... what it means is this, that it is legitimate to charge in a single information one activity even though the activity may involve more than one act." There the activity was shooting deer without a gaming licence, and the issue was whether the firing of several shots by the Appellant was one activity or several activities. The instant case appears to me to sound more of Quasi-Duplicity than Duplicity simpliciter. Once evidence had been led from PW5 & 6, it is my considered opinion that the prosecution should have been called upon, if that were possible at that stage, to sever the Indictment into several counts, reflecting the dates the several cheques were encashed.

#### POINT NOT CANVASSED

12. I have noted that this point was not canvassed by the Defence at the trial, and it may be argued that that being the case, the Appellant may not have suffered any injustice, and that this Court should apply the proviso. I would be most willing to do so where the circumstances so permit. But in order to do so, I should have to do considerable violence to our criminal jurisprudence, and I do not wish to embark on such a perilous course. It seems to me, that where the Court below went wrong, was in its focus on the Appellant's explanation of what he did with the proceeds of the cheques. It appears to me that the LTJ was put off by the allegations made by the Appellant in his statement to the police, and by Counsel in his cross-examination of the then Minister of Education, Dr Alpha Wurie, PW13, that some of the monies so received were passed on to him. In that statement, the Appellant had clearly admitted that the proceeds of the several cheques were indeed received by him, and that he disbursed the same in a particular manner. This was clearly criminal conduct of most reprehensible kind, coming as it did, so soon after the bloody rebel invasion of Freetown. But a Court of Law should not allow itself to be swayed by righteous indignation, but by sound principles of Law. The LTJ has considerable



experience in trying criminal cases, but he appears to have cast aside this reservoir of knowledge as a result of such indignation. His frequent references to the above allegation during his Judgment, provides evidence that his mind was greatly exercised by this apparent calumny, than by the propriety and efficacy of the prosecution's case.

#### BURDEN AND STANDARD OF PROOF

12. It led also to his summary dismissal of Defence Counsel's submissions on the burden and standard of proof. That the principle enshrined in **WOOLMINGTON**'s case applies to all criminal cases, is without doubt. It applies much more strongly, where the Judge is both Judge of Law and fact. The LTJ erroneously, in my view, confined that principle to cases of murder or manslaughter only at page 146 of the Record. The Sierra Leone cases confirming this principle are numerous, and I shall only cite those which have been reported: **HALL v R** [1964-66] ALR SL 189; **LABOR-JONES v R** [1964-66] ALR SL 471; **KOROMA v R** [1964-66] ALR SL 542; **BOB-JONES v R** [1967-68] ALR SL 267; **AMARA v R** [1968-69] ALR SL 220; **KARGBO v R** [1968-69] ALR SL 354; **SAHR BAMBAY Cr App 1/76 C.A** was unreported. All of these cases confirm that the legal burden of proof in a criminal case always rests on the prosecution, and that it never shifts; and that the burden lies on the prosecution to prove every element of the offence with which an accused person has been charged beyond a reasonable doubt. Could this Court hold that the prosecution in the Court below proved beyond a reasonable doubt that on a day unknown between the 1<sup>st</sup> and 30<sup>th</sup> day of June, 1999, the Appellant stole the aggregate sum of Le294,433,411 /00? I opine not. The evidence points in the opposite direction. There is credible evidence that the Appellant did, in his capacity as an employee of the Government of Sierra Leone, receive the various amounts of money exhibited at pages 263-297 of Volume II of the Record. But rather unfortunately, he is not charged with the larceny of these individual amounts. I consider this omission a grave error on the part of the prosecuting authorities, and I consider it also rather unfortunate that right up to the end of the case, the error was not brought home to them, and thus rectified.

#### ARGUMENTS OF COUNSEL

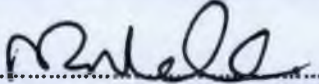
13. I have read through the written submissions filed and presented by Counsel for the Appellant and for the Respondent respectively. I note that Counsel for the Respondent, in that written submission, has not seriously contested the issues raised by the Appellant. Nor did Counsel who appeared in this Court on behalf of the State. The Appellant argued further, that the money stolen was not the property of the Government of Sierra Leone, but that of the Government's Bank, the Bank of Sierra Leone, in that the monies were on the

several dates, collected from the Bank by PW5 & PW6, and brought to the Appellant in his office. That may be true where the person accused has not reduced the money, nor the valuable security, into his employer's possession through his own hands, or the hands of a co-employee. Here, the evidence clearly shows that whenever the cheques were encashed, the proceeds thereof were handed over to the Appellant by these two witnesses, and the same was misappropriated by the Appellant. Such conduct amounts to stealing the Government of Sierra Leone's money within the meaning of Section 17(2)(a) of the Larceny Act, 1916. It proscribes stealing money "entrusted to, or received or taken into possession by ....a person by virtue of his employment." Counsel also relied on the old case of SOLOMON v R (1920-36) ALR SL 59. There, the money alleged to have been stolen was never reduced into the possession of the accused person's employer. The money was paid over by Genet, at the accused person's behest, to his wife, who then paid the same over to one Betts. Though Solomon's employer was the eventual loser, since he had to repay Genet the money he had paid over to Solomon's wife, the facts of the case had stronger affinity with the offences of obtaining money by false pretences and fraudulent conversion of property, rather than with Larceny. Mr Justice Purcell's direction to the jury on the intent to defraud at page 62 LL15-17 bears this out.

#### CONCLUSION

14. Had it not been for the view I have taken in paras 11-12 above, and had this Court the power to sever the Indictment into its several parts as the evidence led at the trial so demands, I should have had no hesitation in holding that the money stolen belonged to the Government of Sierra Leone.

15. In the result, I hold that the Indictment as it stands, is insupportable in law, and cannot ground a conviction for Larceny under the Larceny Act, 1916. I do not think this an appropriate case in which to apply the proviso. It follows that the Appellant's appeal is allowed. His conviction and sentence are SET ASIDE and an ACQUITTAL AND DISCHARGE substituted in their stead.

  
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Hon Mr Justice N. C. BROWNE-MARKE  
Justice of Appeal

17<sup>th</sup> April, 2008