Cr. App. 10/2004

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

VANDI JOHNSON - APPELLANT

AND

THE STATE - RESPONDENT

CORAM:

HON. MR. JUSTICE JON KAMANDA - J.A. (Presiding)

HON. MRS. JUSTICE S. BASH-TAQI - J.A.

HON. MR. JUSTICE S.A. ADEMOSU - J.A.

E. KARGBO ESQ. FOR APPELLANT

S.A. BAH ESQ. PRINCIPAL STATE COUNSEL FOR THE RESPONDENT

Judgment delivered on the day of 2008

S.A. ADEMOSU J.A.

At the High Court Kenema presided now by Hamilton J.A. sitting with a jury on the 20th day of October 2003 the appellant was charged with the offence of murder of one Sorie Kamara. On the 13th of May 2004 he was found guilty by the unanimous verdict of the jury and sentenced to death. He has appealed against his conviction on the following grounds.

1. That there was no substantial evidence before the Court to support the charge against me.
2. The learned trial judge exercised power by passing sentence on me even though my case clearly indicates that I am innocent.
3. That the sentence is manifestly excessive.

Pursuant to the order of this Court Elvis Kargbo Esq. filed two grounds of appeal

The new and amended grounds of appeal as can be gleaned from the records are:

(a) That the judgment is unreasonable and cannot be supported having regard to the evidence.

(b) That the learned trial judge failed to put or direct the jury in his summing up the possible defence open to the appellant which is very vital in Criminal Law.

The case for the prosecution was that the appellant and Sorie Kamara (deceased) were together at Buima market, Tongo Fields on 21st July 2002. Whilst there a quarrel ensued between them culminating in a fight. Whilst they were fighting one Fatmata Kamara who was the sister of the

deceased went and informed one Mohamed Bangura about the fight. Mohamed Bangura and others rushed to the scene and separated them.

The prosecution's side alleged that after the separation of the two parties the appellant went his way and the deceased too went his own way. That the accused went and removed a fence stick with a nail on it and rushed at the deceased and hit him heavily on the head at the point where the nail was. The deceased collapsed and the appellant wanted to run but was apprehended with the stick and taken to the Police Station. The deceased was taken to Kenema government Hospital where he was admitted and died the following day. This was the version of the prosecution's case which was put to the jury:

At the trial the prosecution called four witnesses but only one was a witness of fact whilst one of the three others was the Doctor who performed the autopsy; One Dr. David Fatta Sesay was the doctor. In his testimony he said he found a deep laceration meaning a big wound caused by a sharp object which poisoned the blood. He explained that the may be caused by a nail.

One Mohamed Bangura was P.W. 1. He deposed that on the material day and time he was at where he was doing his business when the deceased's sister came and informed him about the fight. He said he went there and met the deceased and the accused fighting, and separated them. He further told the court that after the parties went their separate ways. The appellant collected a stick with which he hit the deceased on the head. That the stock had a nail on it and the deceased fell to the ground. The appellant was apprehended whilst he was trying to run away. The deceased became unconscious with blood flowing from the head. He was taken to Kenema Government Hospital where he later died. The witness could not tell where the appellant got the stick. The other two witnesses were Police Officers; one of them was the Exhibit Clerk who produced and tendered the stick with a nail, the other was the investigator who obtained caution statements from the appellant.

At the close of the prosecution's case the appellant relied on his statements to the Police and called no witnesses. The accused's statement on which he relied as far as relevant is briefly as follows:

"On the 21st of July year 2002 at about 2 p.m. I was at my brother Mohamed market table Labour market, Tongo field selling for him ready made shirt and trousers including watches. Whilst there I was playing a workman which I borrowed from one of my friend called Gibrilla. All of a sudden the deceased came and slapped me on my both jaw together with a comment (Borbor you de enjoy – o) meaning I am enjoying.

Added further saying I have many girl covers because I am now doing business for somebody which in fact he made me to eye fitted them. After which he steps forward to go to his market table wherein. I then remarked telling him that since he had taken in palm wine and behaved to me in such a manner he must do same thing to other people in the market. Immediately I told him this, he returned and gave me a hot slap on my right jaw in an attempt to blow me again I held him tightly pleading to him not to beat me again. Sooner I released him he left me telling me that I do not regard his position as Watch Seller Chairman eye fitting him so he is going to call his boys which he did. He returned with two people Mohamed Bounzing and Yarroh I was then collared (sic) by Mohamed Bounzing without asking me to explain what transpired between me and their brother (deceased). At this point there was a scornful (sic) with them three of them started beating me all over my body. Mohamed Bounzing took a stone hit me with it on right jaw as a result I sustain injury. The stone which fell near me I also took it sent it to Mohamed Bounzing but he escaped it so the stick hit on the head of Sorie Kamara (deceased). After which I saw blood oozing from his head where the stone landed. Because of that people came and held me took me to the Police Station both of us explained" See exhibit B dated 23/7/02. I shall now turn to the grounds of appeal.

Ground 1 In arguing this ground Mr. Kargbo referred to the evidence of Mohamed Bangura, the only eye witness. He drew the Court's attention to the records which show that there was no evidence of how the incident started. He referred also to the statement of the appellant in which he explained how the fight started. He expressed the view that the prosecution should rely on the statement of the accused to which there is no contrary evidence. He submitted that the evidence reveals provocation and self-defence. He argued that the issue of provocation should have been put to the jury. In support of this proposition, he cited the case of Koroma V Regina (1964-66) A.L.R. S.L. 542. In that case the appellant was convicted of murder by the Supreme Court (High Court) . The case arose out of a fight which handing to the appellant was provoked by the deceased. The prosecution called no eye-witness to the occurrence to give evidence but relied entirely for their case on an alleged confession made by the appellant to the police. The appeal was allowed and the conviction was quashed on the grounds that the trial judge did not direct the jury in the manner he ought to have done.

In this matter the records show that the learned trial judge simply read the statements made by the appellant to the Police. He inadvertently failed to direct the jury specifically to acquit the appellant if his explanation left them in doubt. The learned trial judge should have put the appellant's case adequately to the jury and draw their attention to the law which is that while the prosecution must prove the guilt of the prisoner there is no such burden laid on the prisoner to prove his innocence and

that he is not bound to satisfy them of his innocence. See Woolmington V. D.P.P. (1935) 25 Cr.App. R.72 at page 95.

As I have already stated the learned trial judge simply glossed over the appellant's statements which constituted his defence. For instance, the appellant said it was a stone he threw at Mohamed Bounzing who had stoned him on his right jaw that hit the deceased on the head. In his summing up the learned trial judge in referring to the stick with the nail, also said:

"The accused in using the stick to hit the deceased is a cruel act from which implied malice can be implied."

I think that by the foregoing passage the learned trial judge must have left the jury with the impression that the prosecution had satisfactory proved the essential ingredients of the offence of murder.

The question whether the prosecution had proved the elements of the offence charged was one of fact for the jury to determine and in my view the learned judge was therefore not justified in usurping that function. While a judge is entitled to express his own views and express then strongly he must go further and tell them that they are not bound to accept his own because the decision on facts is theirs. See R v O Donnel (1917) 12 Cr. App. R 219 at p.221.

It is now trite law that it is the duty of a trial judge to put specifically to the jury the essential aspect of the defence however weak or stupid that defence may be. See R v. Barima 1945) II WACA 49. It has been held in a long line of cases in which it has been consistently held that such an omission will be fatal. See R V. Mills (1955) 25 Cr. App. 138; R v. Murtagh (1955) 39 Cr. App. R.72.

The appellants' statements to the police on which his defence is based raised the issues of self-defence and provocation. The law is settled that where self-defence is raised the burden of proof is on the prosecution Chan Kan v. R. (1955) A.C. 206; R v Lobell (1957) I All E.R. 734 and R v Porritt (1961) 3 All E.R. 463. The onus is never upon the accused to establish this defence-Chan-Kan v. R (supra)

On the issue of provocation the law on this point was clearly stated by Lord Goddard in Kwaku Mensah V R. (1946) A.C. 83 at pages 91 – 92. He said inter alia:

"But if on the whole evidence there arises a question whether or not the offence might be manslaughter only on the ground of provocation as well as on any other ground the judge must put that question to the jury etc etc. In Koroma V. Regina (supra) an appeal against conviction for murder was

allowed because the trial judge omitted to put a defence of accident or misadventure to the jury. Held that this was a fatal error.

After a very careful consideration of the whole evidence. I am satisfied that there was sufficient material on which it might fairly be taken that there was provocation which was likely the appellant being beaten by three people was likely to deprive the appellant the power of self control in the circumstances in which he found himself. Consequently, I hold that the learned trial judge erred in dismissing the issue of provocation. As I have already started, the learned trial judge, failed to put the defence of the appellant fully and fairly to the jury.

For all the reasons I have stated above, I quashed the sentence of death, set aside the finding that the appellant is guilty of murder and substitute a finding of manslaughter. The appellant to a sentenced to 5 years imprisonment.

The conclusion I have reached above makes it unnecessary to consider other inconsequential points raised by counsel for the appellant.

HON. MR. JUSTICE S.A. ADEMOSU - J.A.

I agree .....HON. MRS. JUSTICE S. BASH-TAQI – J.A.

I agree.....HON. MR. JUSTICE JON. KAMANDA – J.A.