Misc. App. 3/2010

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IN THE COURT OF APPEAL OF SIERRA LEONE

IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE SECTION 134 ACT NO.6 OF 1991 AND ORDER 52 OF THE HIGH COURT RULES CONSTITUTIONAL INSTRUMENT NO.8 OF 2007 AND OR 53 OF THE SUPREME COURT PRACTICE 1999

AND

IN THE MATTER OF THE INSPECTOR-GENERAL OF POLICE VS. SATRIA DWIPAYANA AND 14 OTHERS HAVING BEING CONVICTED BY THE MAGISTRATE COURT NO.1 ON A THREE COUNT CHARGE OF:- (1) UNLAWFUL ENTERING THE FISHING WATERS OF SIERRA LEONE CONTRARY TO SECTION 21(1) OF THE FISHERY (MANAGEMENT AND DEVELOPMENT) ACT 2008. (2) UNLAWFULLY USING A FOREIGN FISHING VESSEL FOR THE PURPOSE OF FISHING WITHIN THE FISHERY WATERS OF SIERRA LEONE CONTRARY TO SECTION 21(1) SUB-SECTION 21(1)(6) OF THE FISHERY (MANAGEMENT AND DEVELOPMENT) ACT 2008 AND (3) ILLEGALLY ENGAGING IN FISHING WITHIN THE FISHERY WATERS OF SIERRA LEONE CONTRARY TO SECTION 21 SUB-SECTION II OF THE FISHERY (MANAGEMENT DEVELOPMENT) ACT 2008 AS AMENDED BY LEAVE OF THE MAGISTRATE ON THE 17TH OF SEPTEMBER. 2009 PURSUANT TO SECTION 105 OF THE CRIMINAL PROCEDURE ACT NO.32 OF 1965

AND

IN THE MATTER OF THE JUDGMENT OF THE MAGISTRATE COURT NO.1 PRESIDED OVER BY HIS WORSHIP MAGISTRATE SETVEN CONTEH IN WHICH ALL 15 ACCUSED PERSONS WERE FOUND GUILTY OF THE OFFENCES AS CHARGED IN THE JUDGMENT DATED 3RD NOVEMBER. 2009 AND ACCORDINGLY SENTENCED EACH ACCUSED AS APPEARS IN THE CERTIFIED RECORD OF PROCEEDINGS FORMING PART OF THIS APPLICATION TO WIT ON THE 5TH OF NOVEMBER. 2009

AND

IN THE MATTER OF AN APPLICATION BY ORIGINATING NOTICE OF MOTION PURSUANT TO SECTION 134 OF THE CONSTITUTION OF SIERRA LEONE ACT NO. 6 OF 1991 AND ORDER 52 OF THE HIGH COURT RULES CONSTITUTIONAL INSTRUMENT NO. 8 OF 2007

AND ORDER 53 OF THE SUPREME COURT PRACTICE 1999 FOR AN APPLICATION BY THE APPLICANTS HEREIN ON NOTICE FOR AN ORDER OF CETIORARI AND MANDAMUS AND ANY OTHER CONSEQUENTIAL ORDER(S) AND DIRECTIONS TO ISSUE AGAINST HIS WORSHIP MAGISTRATE STEVEN CONTEH PRESIDING MAGISTRATE IN THE TRIAL OF THE CASE OF INSPECTOR-GENERAL OF POLICE AGAINST SATRIA DWIPAYANA AND 14 OTHERS AND THAT THE JUDGMENT AND SENTENCES FOLLOWING THEREUNDER RESPECTIVELY DATED THE 3RD AND 5TH OF NOVEMBER. 2009 TO BE REMOVED FROM THE SAID MAGISTRATE COURT INTO THE HIGH COURT AND THEREUPON TO BE QUASHED ON THE GROUNDS THAT THE TRIAL WAS NOT ONLY A TRAVERSTY OF JUSTICE BUT HIGHLY ILLEGAL IOF NOT IRREGULAR PROCEDURALLY IN THAT THE OFFENCES CHARGED ARE NON-EXISTENT IN THE LAWS OF SIERRA LEONE COUPLED WITH THE SPUROUS INCLUSION INTO THE JUDGMENT OF THE ATTORNEY-GENERAL'S CONSENT WHICH NEVER FORMED PART OF THE COURT'S PROCEEDINGS.

BETWEEN:

SATRIA DWIPAYANA & 14 OTHERS - APPLICANTS

AND

THE INSPECTOR-GENERAL OF POLICE - RESPONDENT

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CORAM:

HON. JUSTICE E.E. ROBERTS - J.A.
HON. JUSTICE A. SHOWERS - J.A.
HON. JUSTICE S.A. ADEMOSU - J.A.

C.F. MARGAI & ASSOCIATES FOR THE APPLICANTS
S.A. BAH ESQ. FOR THE RESPONDENT

JUDGMENT DELIVERED THIS 8th DAY OF JULY, 2010

ROBERTS, J.A.

The Appellants herein filed a Notice of Appeal dated 16th February 2010 against the decision/judgment of the Hon. Mr. Justice N.C. Browne-Marke J.A. dated 8th January 2010. This Notice of Appeal contained a single ground which reads:

"That the Learned Judged erred in law in refusing the Order of Certiorari on the basis that the applicants should have exhausted their statutory rights of appeal before seeking an Order for Certiorari."

At the hearing of the Appeal counsel for the Appellants sought and obtained leave of this Court to amend the said ground which as amended now read:

"The learned Judge erred in law in refusing the order of certiorari on the basis that the Applicants' appropriate remedy is an appeal."

BACKGROUND

The Appellants herein were charged in the Magistrates Court not for various offence under the Fishing (management and Development) Act 2008. The trial proceeded in the Magistrate's Court No. 1.The. Appellants were found guilty and sentenced accordingly. Counsel for the appellants filed an application in the High Court dated 12th November 2009 seeking leave to apply for an order of certiorari and mandamus to issue against the presiding Magistrate in the above action trial for the judgment and sentences following the said trial to be removed from the High Court and thereupon be quashed on the grounds inter alia that "the trial was not only a travesty of justice but highly illegal since the offences charged are nonexistent in the laws of Sierra Leone coupled with the spurious inclusion into the judgment of the Attorney General's consent which never formed part of the Court's proceedings".

This application was refused by a decision of the High Court dated 8th January 2010 and it is against this decision that the present appeal is brought by the Appellants.

The Appeal

Having read the grounds of appeal (as amended) as well as the respective synopses filed on behalf of the Appellants and Respondent, it is quite clearly that the issue in contention is not necessarily whether an applicant for judicial review must have exhausted their statutory right of appeal. Indeed the judge in his Ruling did not state categorically that the statutory right of appeal must have been exhausted. Nor did counsel for Appellants canvass that argument in his amended grounds or synopsis filed. However a disturbing statement by the learned judge which I hold to be an error is found in page 58 of the Records where the judge stated as follows:

"***It is quite clear that Judicial Review is a remedy which is available where there are no others, particularly in criminal cases. The obvious remedy is appeal....***" This statement in my view cannot be true. This statement by the judge clearly suggests that judicial review is not available were there are other remedies. It is my view that judicial review is available and may be granted even where there are other remedies available and to suggest otherwise is clearly an error and is a suggestion that's unsupportable in law. It is of course accepted that the courts are often reluctant to grant judicial review where other remedies such as appeal are readily available. In this regard it is important to state that I entertain no doubt that the grant or refusal of the orders of judicial review is entirely at the discretion of the Court, even though in some cases it may be granted as of right as the case may be.

In the Supreme Court Practice 1999 under Order 53 Rule 14 the third paragraph on page 906 I find the following passage to be very useful. It states:

> ***"Where, however, an inferior Court or tribunal has acted outside its jurisdiction or there has been a denial of natural justice, judicial review may be the appropriate remedy."***

The above passage is a clear illustration of the point that there are circumstances where even though an avenue for appeal exists, judicial review may be the appropriate remedy. For the above reasons the appeal here must succeed.

THE JUDGMENT/ DECISION OF THE MAGISTRATE

I must state that I find a lot of similarities and relationship between this appeal and Misc. App. 1/2010. The issues, the charges, counsel representing the parties, the Magistrate and so on. In the present appeal as in the other appeal (Misc. App. 1/2010), Counsel for the

Appellants is again urging this Court not to remit the matter to the High Court but to consider and grant the order of certiorari applied for in the Court below.

In the light of the above considerations and also taking into account the provisions of Section 129 (3) of the Constitution of Sierra Leone as well as Rule 32 of the Court of Appeal Rules 1985, this is Court as prepared to and will consider the application for judicial review. In this regard I have had the opportunity of perusing the entire Records before us which contains the Originating Notice of Motion dated 12th November 2009 and all its accompanying documents I have also read the record of proceedings in the Magistrate Court.

It was argued in the Magistrate Court among other things that since all the accused persons were foreigners the prosecution were to obtain and produce during the trial before the Magistrate the Attorney General's consent and certificate in writing as required by Section 53(1) of the Criminal Procedure Act No. 32 of 1965. This was not done. The existence and production of the consent and certificate of the Attorney General is of grave significance. It must in my view in fact be in existence before the institution of the criminal proceedings against the Appellants.

At the trial counsel for the Appellants raised this appoint of the non-existence of the Attorney General's consent and certificate as required by section 53(1) of the Criminal Procedure Act 1965 (See page 16 -17 of the Record i.e. the Address by Defence in the Magistrate Court). It has been held that the Prosecution ought to have called evidence to show that to such consent and certificate indeed existed to initiate the proceedings.

Similar issues were considered in the Case of Lansana and 15 Ors V. R 1970-71 ALR SL 186. In this case a quite similar provision for a fiat was being considered and it was indeed held that where the consent of some authority is required for a prosecution and that consent is not shown to have been given the trial is a nullity. It was further emphasised in this case that the Authority (in this case the Attorney General) must have known the facts constituting the offences so as to decide whether or not to grant his consent and that the consent must state the specific offences to which consent is given. It has also held that by the authority conducting the trial (in this case the DPP) does not validate the nullity. (See pages 238 – 239 of the Judgment) In the present case no attempt was made to produce the consent or certificate of the Attorney General at trial and the issue was rather curiously dealt with by the Magistrate only in his Judgment. In the said judgment (at page 33 of the Records) the Magistrate stated as follows:

"I have averted my mind to the provisions of Section 53(1), 53(2) (a) and 53(2)(b) and I hold that there has been compliance with this section."

I find the above a most unsatisfactory way of dealing with such a grave issue and would venture to say that had the Magistrate seriously considered the issue in the light of especially the decision in the Lansana V. R case the outcome would most definitely have been different.

In the light of the grave irregularity (which have been held in the Lansana case to be a nullity) and the fact that this allegation and argument were not opposed or challenged by the state Respondent in the High Court proceedings or in this Court I am left with no alternative but to quash the proceeding as well as the decision of the Magistrate dated 3rd November 2009. That decision/judgment cannot and ought not to stand in the light of the grave irregularities as earlier mentioned. Having come to this conclusion I do not think it absolutely necessary to deal with the other complaints raised by the Appellants in their application as I believe my decision would arrive at the same result and ultimately address the complaint of the Appellants.

It is therefore ordered as follows:

1. That the trial in the Magistrate Court leading to the Judgment as well as the Judgment and sentence of the Magistrate dated and made on the 3rd November 2009 are hereby quashed.
2. That the Appellants be released from custody/detention immediately.
3. That the vessel arrested or detained property of the Appellants be returned to them immediately.
4. That all travel and other documents seized or obtained from the Appellants be returned to them immediately.

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Hon. Mr. Justice E.E. Roberts J.A.

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Hon. Mrs. Justice A. Showers J.A.

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Hon. Mr. Justice S.A. Ademosu J.A.