CR. APP. 4/2010

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

ADRIAN J. FISHER	-	APPELLANT
AND		
THE STATE	-	RESPONDENT

CORAM:

HON. MR. JUSTICE E.E. ROBERTS	-	JSC
HON. MR. JUSTICE N.F. MATTURI-JONES	-	JA
HON. MR. JUSTICE A.S. FOFANAH	-	JA

ADVOCATES: E. SHEARS-MOSES AND E. SAFFA ABDULAI FOR THE APPELLANT

R.S. FYNN ESQ, FOR THE RESPONDENT

JUDGMENT DELIVERED THIS 28th DAY OF JULY, 2015

ROBERTS J.S.C.

Adrian Joscelyne Fisher the Appellant herein was a Judicial Officer employed as a Magistrate in June 2004. Upon his employment he started working in the Freetown Magistrate Court. In April 2008 he was posted to Bo as the Resident Magistrate. In September 2008 whilst he was still Magistrate in Bo, officers from the Anti -Corruption Commission (ACC) arrived at the Bo Magistrate Court with a search warrant pursuant to section 71 of the Anti -Corruption Act 2008 and proceeded to search the Court premises following which over 120 Court files were seized. The Appellant was invited to the Anti-Corruption Commission a few days later on allegations of abuse of office and abuse of position contrary to sections 42 and 44 of the 2008 Act. In December 2008 however the Anti-Corruption Commission introduced the allegation of Misappropriation of Public Funds contrary to section 12 of the Anti-Corruption Act 2000 (The 2000 Act). The

Appellant was subsequently charged in an indictment dated 9th February 2009 with 20 Counts of Misappropriation of Public Funds contrary to section 12 (1) of the 2000 Act. The gist of the allegation as contained in the various counts was that the Appellant misappropriated public funds by pronouncing a higher amount of fine in open Court but actually recording a lower sum in the Court file. That the Court clerk would then receive the higher amount of fine pronounced in Court and paid by or on behalf of the accused and pass on the amount and the file to the Appellant who would in turn return to him (the clerk) the amount recorded in the file with instruction to pay to the NRA, whilst retaining the balance. The Appellant was tried and on 14th June 2010 he was convicted on all 20 counts. He was then sentenced to a fine of Le 5million on each count to be paid within a fortnight and in default of payment 5 years imprisonment on each cout to run concurrently.

The Appellant then filed a Notice and Grounds of Appeal dated 30th June 2010 numbering 20 pages followed by additional grounds of appeal for which leave was sought and granted by the Court at the oral hearing of this appeal.

This Court gave directions pursuant to which the parties filed their respective synopsis of arguments. The Appellant 's synopsis of argument is dated 6th June 2014 and contained additional grounds of appeal in respect of which leave was sought and obtained. The Respondent's synopsis was filed on the 3rd March 2015. At the oral hearing of the Appeal the parties made submissions respectively.

I have decided to deal with the grounds of appeal under headings as can be gleamed from the written submission as well as the arguments of counsel at the oral hearing.

The first issue raised by the Appellant is that there were grave irregularities in the process leading to the preferment of the indictment as well as defects in the indictment itself and so the Court below had no jurisdiction to try the matter. Counsel for the Appellant submitted thatwhilst the Appellant was eventually charged under the 2000 Act, all the other processes leading to the indictment including the search warrants were issued under the 2008 Act. Counsel referred to Ex. "O" at page 455 of the Records which was issued and addressed to the Appellant under section 63 (1) of the 2008 Act. Counsel referred to section 141 (4) and section 89 of the 2008 Act and submitted that in view of the commencement of proceedings section 89 of the 2008 Act was already in force. Counsel

submitted that the transitional , repeal and saving provisions of section 141 of the 2008 Act provides for the commencement or continuation of investigation or prosecution under the 2000 Act.

Counsel also submitted that the indictment preferred against the Appellant (at page 11 of the Records) was signed by the Commissioner of the Anti-Corruption Commission . Counsel submitted that the authority for the Commissioner to sign the indictment was derived from the 2008 Act and that there was no such authority under the 2000 Act. Counsel submits that there was therefore no indictment before the Court.

Counsel for the Respondent in his synopsis and in oral arguments conceded that there had been an irregularity in the "joint use of the 2000 and 2008 Act", but submitted that there was no miscarriage of justice. Counsel submitted that in 2009 when the indictment was filed the Commissioner had authority to sign it. Counsel submitted that the Appellant had not been prejudiced

In dealing with the issues of the defective indictment (and the irregularities in the process leading to the preferment of same) I shall briefly examine the complaints of the Appellant in this regard

Counsel for the Appellant complained that the indictment filed was defective in that it was signed by the Commissioner of the Anti-Corruption Commission, submitting that whilst the indictment was filed under the 2000 Act it was the 2008 Act that gave the Commissioner authority to prefer the indictment. Counsel submitted that the Commissioner had no authority under the 2000 Act to prefer an indictment.

It is my view that there is no doubt that the Commissioner of the Anti-Corruption Commission has authority to sign and prefer an indictment under the current 2008 Act.

However in the instant case the issue is whether the Commissioner had authority to sign the indictment which was issued in respect of offences allegedly committed under the 2000 Act It is clear that it was the Constitution of Sierra Leone Amendment) Act No. 9 of 2008 that authorised the Commissioner of the Anti-Corruption Commission to "institute and undertake" criminal proceedings for offence under the 2000 Act.

Sections 1 and 2 of the Constitution of Sierra Leone (Amendment)Act No. 9 of 2008 provide as follows (with emphasis added).

1. *The Constitution of Sierra Leone 1991 is amended by the repeal and replacement of subsection (3) of section 64 thereof by the following subsection:*

   "(3) All offences prosecuted in the name of the Republic of Sierra Leone except offences involving corruption under the Anti-Corruption Act 2000, shall be at the suit of the Attorney General and Minister of Justice or some other person authorised by him in accordance with any law governing the same"

2. *The Constitution of Sierra Leone, 1991 is amended by the repeal and replacement of paragraph (a) of subsection 4 of section 66 thereof by the following paragraph: "(a) to institute and undertake criminal proceedings against any person before any Court in respect of any offence against the laws of Sierra Leone except any offence involving corruption under the Anti-Corruption Act 2000."*

It is clear from the above provisions that the Commissioner 's authority to prosecute was in relation to offences under the 2000 Act and I therefore need no further authority to hold that under the 2000 Act and even as at present the Commissioner of the Anti-Corruption Commission has power to sign and prefer an indictment.

I shall now deal with the irregularities in the process leading to the preferment of the indictment.

It is accepted by both counsel for the Appellant and the Respondent that the acts and activities of the Appellant for which the charges were preferred took place ' before the coming in to force of the 2008 Act. Investigations apparently started before the commencement of the 2008 Act but continued well after it had come into force. Section 141 (4) of the 2008 Act provides as follows:

> *All investigations, prosecutions and other legal proceedings, instituted or commenced under the repealed Act and which have not been concluded before the commencement of this Act, shall be continued and concluded in all respects as if that Act had not been repealed.*

I have seen and read Ex. O at page 455 of the Records dated 24th September 2004 which was issued by the Anti-corruption Commission and signed by the Commissioner. This document is addressed to the Appellant and states as follows:

To: Adrian Fisher

HS48 Hill station

Freetown

THE ANTI-CORRUPTION ACT 2008

ACC REF: DOC/IF/08/154

NOTICE UNDER SECTION 63 (1)

***WHEREAS** you are under investigation for an offence (s) under the Anti-Corruption Act No.12 of 2008 and*

***WHEREAS** the Commission has reason to believe that you are about to leave the jurisdiction of the Republic of Sierra Leone.*

*In exercise of the powers granted to the Commission by section 63 (1) of the Anti-Corruption Act 2008, I hereby serve you notice that you must surrender all travel documents held by you to the Commissioner forthwith **AND***

*You must enter into recognizance with **two** sureties who are owners of property in Sierra Leone, the value of which should be not less than Fifty Million Leones*

Dated 30th day of September 2008

(Sgd)

COMMISSIONER

From the said Ex. 'O' the Appellant was clearly informed that he was being investigated for alleged offence (s) under the 2008 Act and this was therefore a notice to him under the 2008Act. However when the Appellant was invited to the Anti-corruption Commission in December 2008 and while obtaining a statement from him he was

informed by the Investigating officer of the Anti-Corruption Commission (PW 2 Patrick Sandi) that the ACC was investigating an alleged offence of misappropriation of public funds contrary to section 12 of the Anti-Corruption Act 2000 (as amended). See page 249 – 250 of the Records.

And so clearly the Appellant was informed in September 2008 that he was being investigated for alleged offence under the 2008 Act and few months later he was informed by the same Anti-corruption Commission that he was being investigated for offences under the 2000 Act. In dealing with this issue the Learned Trial Judge had this to say at page 199 – 200 of the Records

> *The defence has also contended that at the time of his first interview the accused was told that he was under investigation for offences of Abuse of Office and Abuse of position, contrary to sections 42 and 44 of the Anti-Corruption Act 2008. The accused testified that he was served with a notice which was tendered as Exhibit O which shows that on the 26th September 2008, the Anti -Corruption Commission were clearly not investigating offences under the 2000 Act but rather offences under sections 42 and 44 of the 2008 Act. At a later interview he was then told that he was being interviewed for offences under the 2000 Act. In his testimony before the Court, PW 2 Patrick Sandy stated that he had started investigations into the Bo Magistrates Court in August 2008, (shortly after the Act was passed in Parliament) and most importantly at a time when the 2008 Act was not yet in force. It stands to reason that investigations can start off with one offence and expand to include others not originally envisaged. The offences took place during the currency of the 2000 Act and the accused therefore had to be charged under that Act. Section 141 (4) is quite clear on this and any investigation which started before the repeal of the 2000 Act should continue as if that Act had not been repealed.*

I am afraid I do not agree with the conclusion of the Learned Trial Judge above. Indeed the Learned Trial Judge herself had said that "The offence took place during the currency of 2000 Act and the accused therefore had to be charged under that Act." The question I would pose is: why then was Ex. "O" prepared as served by the ACC under the 2008 Act, and why was the investigation commenced under the 2008 Act? A further issue that I

wish to observe is that from the testimony of the PW 2 Patrick Sandi, the Anti-Corruption commission investigator, as well as the contents of Ex."O" (at page 445 of the Records) it is obvious that the commencement of the investigations, the issue and execution of search warrant and the seizure of the Court files Ex.B1 – B15, were all done pursuant toand under the 2008 Act. This the Commission had no reason to do as not only were the offences allegedly committed during the currency of the 2000 Act and the accused therefore had to be charged under that Act, the subsequent Act (2008 Act) itself in Section 141 (4) clearly mandates that investigations as in the instant case ought to proceed as if the 2000 Act had not been repealed.

Perhaps most refreshing, and notwithstanding the conclusion of the Learned Trial Judge on this issue as contained in her judgment particularly page 199 - 200 of the Records, Counsel for the Respondent has admitted before this Court in his written submissions as well as in oral arguments that there were " irregularities in the joint use of the 2000 Act and the 2008 Act" and I most certainly agree with counsel. Counsel however contended that the irregularities did not prejudice the Appellant. I am afraid I must vehemently disagree with this contention.

It is most clear that a good and perhaps most significant part of the investigation was done under the 2008 Act and this included the issue and execution of the search warrants, obtaining the Court files as well as the issue of Ex. 'O'. The Appellant was undoubtedly and expressly informed that he was being investigated under the 2008 Act only to be subsequently charged under another Act.

This is clearly an abuse of process and not only unjust but most undesirable. To have proceeded with the investigation as the Anti-corruption Commission did clearly undermined the fair trial of the Appellant. It is for these reasons that this Court would allow the appeal.

Having decided to allow the appeal I shall nonetheless very briefly address the other heads of complaints as contained in the Appellant's grounds of appeal. It is the Appellant's further contention that the Learned Trail Judge erred by wrongly admitting inadmissible evidence. Counsel for the Appellant submitted that the maker or authors of Ex. B1 – B15 (the Court files) are unknown and that the Learned Trial Judge wrongly admitted and placed undue reliance on the Exhibits as proof of the accurate portrayal of

the record of proceedings of the Court. I have carefully considered this submission and have also read the records and proceedings before the Learned Trial Judge. Indeed the Court files Ex. B1 – 15 were tendered by PW 2 Patrick Sandi, the Anti-corruption Commission investigator. However they were tendered as documents seized in the course of investigations, I therefore see them as part of the res gestae. Indeed they contained evidence which was surely read and considered by the Learned Trial Judge before convicting the Appellant. However they are not the only evidence relied on by the Learned Trial Judge. She also considered the evidence of witnesses who were shown these exhibits and who testified as to what transpired in the Magistrate Court in their presence, and they include the accused (who appeared before the Appellant in the Magistrate Court) and their relations who paid the fines. I therefore do not agree that the Learned Trial Judge wrongly admitted inadmissible evidence nor do I agree that there had therefore been a miscarriage of justice in this regard.

The Appellant also contended that the Learned Trial Judge failed to treat the evidence of PW 1(the Court Clerk) with caution as he was an accomplice. The Learned Trial Judge in this regard had this to say at page 203 – 204 of the Records

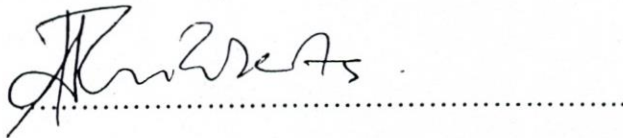
> *It has been suggested by the defence that PW 1 had an ulterior motive and was in fact responsible for the wilful acts complained of by the State. However, the prosecution's stance is that at no time was PW 1 considered or treated as an accomplice rather than the conduit pipe for the criminal acts of the accused.*
>
> *In law it has been held that caution must be attached to evidence of a witness who has an ulterior motive. In R. V. Beck, 74 Cr. App. R. 221, Ackner L.J. giving the judgment of the Court of Appeal, referred to "the obligation upon a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive …….. the strength of that advice varying according to the facts of the case.*
>
> *That would have been the case and indeed there would have been more credence to it had PW 1's testimony been the only evidence relied upon by the prosecution. The assertion of the defence ceases to have any credence when seen in the light of the evidence of the police prosecutor PW 3 and the evidence of those people who paid the fines, which last mentioned evidence illustrates a pattern of similar*

conduct in which the offences were executed. The propensity of the evidence taken together shows that there is no reason to treat the evidence of PW 1 with caution and that the State's assertion that he had at no time been thought of as an accomplice is correct.

It is my view that the Learned Trial Judge(sitting as Judge alone), having reviewed the evidence and having agreed with the prosecution that the witness PW 1 "had at no time been thought of as an accomplice" she was right in not treating his evidence with caution. I am satisfied that she averted her mind to it in her judgment did not think it necessary to treat him with caution.

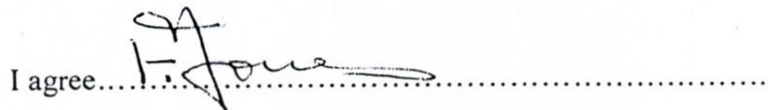
In the light of the above and having come to the conclusion earlier that there had been an abuse of process in that the bulk of the investigation, including the issue and execution of the search warrants, and Ex. "O"and the conduct of earlier investigation was done under the 2008 Act whilst the Appellant was later charged under the 2000 Act, I hold that this Appeal succeeds and is allowed. I therefore make the following orders:

1. That the conviction of the Appellant in the Court below is hereby quashed.
2. Any fines that may have been paid by the Appellant shall be refunded to him.



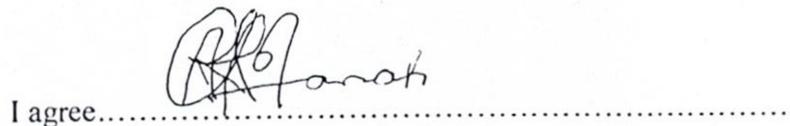
Hon. Justice E. E. Roberts JSC

I agree...



Hon. Justice N.F. Matturi-Jones - JA

I agree...



Hon. Justice A.S. Fofanah - JA