

Misc. APP. 5/2016

IN THE COURT OF APPEAL OF SIERRA LEONE
CRIMINAL JURISDICTION

MOHAMED M'BAKUI

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APPLICANT

Mohamed Mansaray

Correctional Services

Pademba Road, Freetown

AND

THE STATE

-

RESPONDENT

CORAM ;

THE HON MR. JUSTICE R. S. FYNN JA

RULING 9th January 2017

FYNN JA

1. The applicant who is facing trial in the court below has brought this application by Originating Notice of Motion. He seeks for the Court of Appeal to consider granting him bail which the court below has refused him. The state will have none of it and even before the application is properly made takes a preliminary objection advanced on three connected prongs.
2. Firstly the state argues that this court being a creature of statute can only do those things which the creating and enabling statutes have given it power to do. Developing this point the state submitted that S.129 of Act No. 6 of 1991 The Constitution of Sierra Leone limits the jurisdiction of this court to the hearing of appeals only.
3. Secondly and progressing from the first limb of its argument, the state submits that the process employed is one such that can only lend itself to a first instance process. Referring to the O1 R2 of the High Court Rules of 2007 the state argues that an "*Originating Notice of Motion means every notice of motion other than a notice of motion in an existing cause or matter*". Stressing that there being no cause or matter in existence before this court in which the application has been filed it therefore must

- necessarily be a first instance process. There is no substantive or pending cause before this court and this application is the start of a new cause or matter the state maintained.
4. Citing Section 67 (2) of the Courts Act, No.31 of 1965, counsel submitted further and thirdly that **even the relief sought: bail**, cannot properly be asked for in this court except after the completion of a trial below or whilst an appeal is pending before this court. Counsel submits that whilst a criminal trial is ongoing below this court lacks the jurisdiction to entertain an application for bail
 5. Concluding his submissions Counsel for the state referred to and relied on the dictum of A Renner-Thomas CJ in **People's Movement for Democratic Change v. Sierra Leone People's Party SC.Civ App 1/07 (unreported)** where the Hon. Chief Justice said inter alia
"Where a court has no jurisdiction to entertain a matter any proceedings and decision given thereon is a nullity no matter how well conducted the proceedings were. Judicial power is inextricably tied up with jurisdiction and justiciability. A court can only exercise power to entertain a matter where it has jurisdiction."
 6. In his response counsel for the applicant submit that counsel on the opposite side has been erroneously sweeping in his interpretation of the ambit S 129 of the Constitution. He argued that the constitution should be looked at as a whole. He maintained that the drafters of the constitution were aware of the existence of the Courts Act 1965 and the Court of Appeal Rules 1985. Counsel submitted that the latter two legislations must be read together with S.129 of the constitution. He stressed that the phrase *"or any other law"* in S 129 invites such a reading.
 7. Counsel submitted that the Court of Appeal can in fact be a court of first instance in some circumstances, suggesting that R 31 of the Court of Appeal rules does give this court the power *"....to have as full a jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the court as a court of first instance and may re hear the whole case..."*
 8. The applicant's counsel further argued that a bail application was of that kind which could be brought either in the court below or to this court. Citing R.10(2) of the Court of Appeal Rules counsel asserted that a bail application of this kind especially where it had first been made and refused as it has in this case can then be properly brought to this court.
 9. Counsel for the applicant argues passionately that bail involves the liberty of the accused and that this court must necessarily have jurisdiction to consider an application for bail otherwise a person wrongfully denied bail below may find that he has no remedy and may have to suffer unduly due to the wrongful refusal without recourse to a court higher up in the judicial hierarchy to review such a refusal.

10. My reading of S.129 of the constitution is that it confers appellate jurisdiction on this Court. The words "*or any other law*" should not be read in isolation. In full the court's jurisdiction under this section is as follows:
- i) "*.....to hear and determine.....**appeals** from any judgement decree or order of the High Court of Justice or any Justice thereof and*"
 - ii) "*Such other **appellate jurisdiction** as may be conferred upon it by this constitution or any other law.*"
11. It is my opinion that whilst the S.129 of the constitution opens a door for "*other law*" to confer further jurisdiction on this court, it certainly does not leave that door completely open. It is clear that the further jurisdiction which may be conferred on this court must necessarily be "*appellate*" in nature. The phrase "*such other appellate jurisdiction*" sets the guidelines upon which further jurisdiction may be conferred by other law on this court. That is to say jurisdiction may be conferred to hear appeals from sources other than "*the High Court of Justice or any Justice thereof*".
12. The "*other law*" which counsel for the applicant seeks to rely on for jurisdiction to bring this application is the Court of Appeal Rules of 1985 relying severally on R 31 and R10(1) and (2)
13. Beginning with R 10 (1) of the Court of Appeal rules which I now reproduce;
- "Where an appeal lies by leave only any person desiring to appeal shall apply to the court below or to the court by notice of motion within fourteen days from the date of the decision against which leave to appeal is sought unless the court below or the court enlarges the time"*
14. In my opinion for this rule to apply the following circumstances should be in existence:
- i) A person should be desirous of filing an appeal.
 - ii) The appeal which that person desires to file should not be one which is filed as of right. It should rather be an appeal which requires leave for its filing.
15. R 10(2) of the Court of Appeal Rules similarly deals with the question of asking for "leave" to file an appeal. Though the question of filing in the court below or before this court does arise in the said Rules 10 (1) & (2) it only does so within the context of seeking "leave to appeal". I do not find these rules helpful in the present instant. They are strictly limited in their reach to questions touching "leave to appeal". They have not relation to an application for bail. I have therefore found in them no jurisdiction to hear the present application.
16. Turning to R31 which gives the court general powers to do several things including
- "....full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the court as a court of first instance and may rehear*

the whole case or may remit it to the court below to be reheard or to be otherwise dealt with as the court may direct".

It is very important not to lose sight of the fact that though wide and far reaching, these powers are all given within the context of an appeal.

17. It must be kept in view constantly that the various things which the court is empowered to do under this rule are for the sole purpose of **"determining the real question in controversy in the appeal"**. In the absence of an appeal or an intended appeal can the court invoke these powers at all? I think not.
18. The expression *"as if the proceedings had been instituted and prosecuted in the court as a court of first instance"* in my opinion does not make the court a court of first instance. To my mind the expression is merely descriptive in nature, albeit with the aid of a comparism. The powers which the section confers on the court of appeal are being likened to those of the court of first instance.
19. It is my opinion that the ambit of R31 is such that in the hearing of an appeal this court will not be limited in any way, as it will enjoy all the powers which a court of first instance would have. However having such powers does not thereby make this a court of first instance. Those powers in my opinion are but additional characteristics to the court and they do not take away the fundamental character which the constitution has already provided for. This is that this is an appellate court.
20. It is my opinion that the papers before me which are filed as an originating process do not constitute an appeal. In the absence of an appeal or a process related to an intending appeal this court has no jurisdiction to act. It cannot be denied that Section 67 of the Courts Act 1965 does provide circumstances in which this court may enquire into the question of bail: after conviction and pending the determination of an appeal. I find that the present application is not of the kind envisaged by that section.
21. I have not found nor has counsel directed my attention to any provisions which allow for a bail application to be made in this court whilst a trial is ongoing below. Be it concurrently with or as an alternative to an application below.
22. Also I do not agree that the state of the law is such that a person who is wrongfully denied bail is shut out and has no remedy whatsoever. Properly clothed even this court can hear an application which alleges wrongful refusal of bail, which in any event is not the allegation in these papers.

I find therefore that this court lacks jurisdiction to hear this application.

The preliminary objection is therefore sustained and the application is struck off.

Reginald Sydney Fynn JA

2017