Reply.

Cr App 4/2011

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

AIAH M'BEKAY - 1ST APPELLANT
SIA M'BEKAY - 2ND APPELLANT

AND

THE STATE - RESPONDENT

CORAM:
THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT
THE HONOURABLE MR JUSTICE E E ROBERTS
JUSTICE OF THE SUPREME COURT
THE HONOURABLE MS JUSTICE V M SOLOMON
JUSTICE OF THE SUPREME COURT

COUNSEL:
MS SIMITIE LAVALY for the Appellants
MONFRED M SESAY ESQ (as he then was) for the Respondent. Also, at today's hearing, MS S J Y BARLATT, State Counsel, for the Respondent.

JUDGMENT DELIVERED THE 12th DAY OF FEBRUARY, 2019

BROWNE-MARKE, JSC

THE APPEAL

1. This is an appeal brought by the above-named Appellants against their respective conviction and sentences by way of Notice of Appeal filed on 10th February, 2011. The said Notice is at pages 62 - 63 of the Record. The grounds of appeal are as follows:
   (1) That the exhibits were never forensically tested to establish that they contained human remains or, were the particular remains of the alleged victim.

(2) That the Learned Trial Judge failed to order a 'voir dire' when the 1st accused disclaimed his confessional statement at the trial.

(3) That the jury failed to heed the Learned Trial Judge's admonition that the confessional statement of the 1st accused was not evidence to be used against the Appellants.

(4) That the Learned Trial Judge allowed hearsay evidence to be used against the Appellants.

(5) That the Learned Trial Judge failed to give equal weight to the evidence on both sides.

(6) That the whole trial was a miscarriage of justice.

2. At the hearing of the Appeal, Ms Lavaly sought the Leave of the Court to amend the grounds of appeal to read as follows:

(1) That after one juror was discharged and replaced, the jury was not re-sworn, nor, were the accused persons put in charge of the reconstituted jury, contrary to the sections 182(2) and 187 of the Criminal Procedure Act, 1965.

(2) That the trial in the Court below is a nullity due to the failure of the Trial Judge to discharge the jury at the end of the criminal sessions and to order a retrial.

(3) That there is insufficient evidence to uphold the conviction of the Appellants.

3. The relief sought from this Court is that the said respective convictions be overturned, and that the Appellants be acquitted and discharged. But, after the appeal had been filed, and before it was heard, the 2nd Appellant was pardoned by the President on 27th April, 2011. She did not thereafter pursue her appeal. The 1st Appellant, (now, the only Appellant), Aiah M'bekay's sentence was at the same time commuted to life imprisonment. The 1st accused at the trial, Sahr Sheku, was also found guilty and sentenced to death, but had his sentence commuted to life imprisonment as well. He has not appealed against both conviction and sentence. The 4th accused at the trial, Sahr Charles Mbekay, was acquitted and discharged.

THE TRIAL

4. The Trial of the Appellants and two others was presided over by The Hon Mrs Justice N MATTURI-JONES, then a High Court Judge, now, an acting

Justice of the Supreme Court. It went through several criminal sessions of the High and lasted from 24th June, 2008 to 21st July, 2009. That it lasted so long was due to the lack of logistics for the holding of criminal sessions, in Sefadu, Kono, Eastern Province.

5. The case presented by the prosecution was that the Appellant and three others captured and killed a young girl, Hannah Sorie, aged 4 years. The killing was done for ritual purposes. There was no direct evidence of the killing other than the out-of-Court confession made by the 1st accused Sahr, Sheku, to the Police. There was also evidence that when the scene of crime was visited by the Police during the investigations, Sahr Sheku repeated the allegations he had made in the presence of the Appellant. There was no evidence as to whether the Appellant said anything in response to the allegation.

THE TRIAL - NUMBER OF SESSIONS DURING WHICH IT LASTED

6. Going through the Court Record, I have found out that the Indictment was not included; nor was the Committal Warrant, duly signed by the Committing Magistrate, committing the case to the High Court for trial. It appears the latter was not tendered by prosecuting Counsel at the close of the prosecution's case during the trial. The prosecution closed its case on 27th June, 2008 as is shown in the Learned Trial Judge's minutes for that day at page 32 of the Record. Whether there was in fact a Committal Warrant at all, is unclear. The Committal Warrant vests the High Court with jurisdiction to try a criminal case. It is provided for in section 120 of the Criminal Procedure Act, 1965 as amended, (hereafter, "CPA, 1965"). Included in that Warrant is the statement made by the accused before committal as provided for in section 115 CPA, 1965. At trial, it is usually tendered at the end of the prosecution's case as stipulated in section 191(1) CPA, 1965.
7. Returning to the issue of the number of criminal sessions during which the Appellant was tried, the Law, as stated in *section 143(a) of the CPA 1965* as amended, is that where the offence charged carries the death penalty, as in this case, the person charged must be tried by Judge and jury. That trial could be postponed for any of the reasons stated in Section 142 of the *CPA, 1965,* and consequently, the recognisances entered into by the prosecution witnesses, could be respited. However, if the trial has not ended by the last

day of the particular session, the jury must be discharged by the trial Judge, or, should be taken as discharged, and the trial re-commenced at the next session. Further, if a fresh juror is added on to an existing panel, the whole jury should be re-sworn, or, the existing jury could be discharged, and a new jury empaneled. This is the combined effect of Sections, 142, 143, 148(4), (5) & (6), 162, 165, 182 et all of the CPA, 1965; and Rule 5 of the High Court (Sessions) Rules, 1965 - S.I. 73 of 1965 as amended.

8. First, Section 148(4) makes specific provision for what should happen when a criminal trial is postponed. It states; 148(4) ''*Where, before trial upon indictment or, at any stage of such trial, the Court is of the opinion that the postponement of the trial of the accused is expedient as a consequence of the exercise of any power of the Court under this Act, the Court shall make such order as to the postponement of the trial as appears necessary.*" Section 148(5)(a) states: "*Where an order of the Court is made under this section for a separate trial or for postponement of a trial - (a) if such order is made during a trial with a jury or, during a trial with assessors, the Court may order that the jury or, the assessors be discharged from giving a verdict or opinions, as the case may be, on the count or counts the trial of which is postponed, or, on the indictment as the case may be;" and (b) the procedure on the separate trial of a count shall be the same in all respects as if the count had been contained in a separate indictment, and the procedure on the postponed trial shall be the same in all respects [provided that the jury or assessors, if any, have been discharged], as if the trial had not commenced.....*" Section 148(6) states; ''*Any power of the Court under this section shall be, in addition to and not in derogation of any other power of the Court for the same or similar purposes.*"
9. Clearly, the trial in this case was postponed, and not adjourned in the accepted sense of that word. It follows that once such a postponement had been ordered by the Court, the jury which had been empaneled should have been discharged; or, as explained in a case which I shall deal with immediately below, taken as being discharged.
10. Section 162 CPA,1965 tells us that the same jurors are not expected to serve in two consecutive sessions. They are clearly exempted in the last two lines of Section 162 from so serving. Nevertheless, this Court is aware that this provision has been honoured more in the breach, than in compliance or

observance. The Supreme Court in Cr App 1/81 – SAMUEL LOMBA v THE STATE, the Judgment of BECCLES-DAVIES, JSC, makes it clear that at the end of one criminal session, the jury is supposed to be discharged, and if not formally so discharged, may be taken to have been discharged by operation of law. Sessions are governed by The High Court (Criminal Sessions) Rules, 1965 – S.I. 73 of 1965. Sessions in Freetown, Bo and Kenema – since 1976, start on the same day. The Makeni Sessions have been added on. But the Sessions in other Districts where the High Court sits, commence, or, should commence on the days stipulated in the Statutory Instrument. The closing date of each Session is not stipulated in any statute, but it is the practice that a Session should be closed before the next one commences. Usually, there is a whole week between two Sessions, but it is not unknown for a Session to be closed on a Friday, and then re-opened the following Monday, when jury trials have to be completed in the previous session.

11. What is also clear is that once, a juror has been added on to the panel for whatever reason, the whole jury has to be re-sworn, and the trial started anew. The necessity for the discharge of one or more jurors, and the addition of another one, or, more than one more, would usually occur, where an empaneled juror or jurors dies, or die. Sections 182(2) states: "*If either the prosecutor or accused shall refuse to give his assent, the Court may direct that a juror be added and the jury re-sworn, or, that the jury be discharged and a new jury empaneled, and in either of these cases the trial shall commence anew.*" It is necessary for the trial to start anew simply because, at the commencement of each trial, the accused standing trial, is put in the charge of the jury in the manner provided in section 187. The Court Registrar would normally read out the charge or charges, and then tell the sworn jury that their duty is to return a true verdict on the evidence led. The formula used was set out by BECCLES-DAVIES, JSC in LOMBA v THE STATE, a case to which I shall refer to anon. There, the Learned Justice stated it to be thus: "*Ladies and gentlemen of the jury, the accused is charged with the following offence(s) (here, indictment is read). Upon this Indictment, the prisoner has been arraigned; and upon his arraignment, he has pleaded not guilty to the charge. Your duty therefore, is to listen carefully to the evidence that shall be adduced and enquire whether he be*

guilty or not guilty, and give your verdict thereon." This is the charge, which, in my experience both at the Bar, and on the Bench, has always been given to the jury in all criminal trials in this country. The Learned Trial Judge noted in her minutes that this was done on the very first occasion. If, a new juror has been empaneled, thereby creating a new jury, the accused must, of necessity be put again in its charge again. If this is not done, any verdict returned by a jury which would now include a new juror, would be rendered a nullity. The accused would not have been put in the charge of that new juror. Further, in a murder trial, the jury has to be unanimous in its verdict, whether it be guilty, or, not guilty. This is the effect of the proviso to section 203(4) CPA, 1965. So, the fate of the accused could be determined by the vote of just one juror, and it matters that that juror has been empaneled in accordance with the law.

12. The case of LOMBA v THE STATE has been cited by both Counsel in argument, and it is necessary to refer to what it decided. The issue there was whether the Court of Appeal was right in its decision that, without a formal discharge of the jury in one trial which had not proceeded to verdict, a subsequent trial which went on to verdict and sentence thereby became a nullity. To that question, BECCLES-DAVIES, JSC's answer was this, at page 8 of the cyclostlyed copy of his judgment which has been made available to the Court by both Counsel: "*Returning to the present appeal, I would hold that the trial judge should have discharged the jury on 2nd July, 1979 before adjourning the indictment to the following sessions. Trial Judges should be well-advised when they find that they cannot, against the end of a session, complete cases (in which juries had been empaneled and accused persons put in their charge) to discharge the jury before adjourning to the following sessions, a note of such discharge being entered on the record. Now comes the crucial question: Does the failure of the Judge to formally discharge the jury in those circumstances render the trial a nullity? I do not think so. I have referred to the provisions of sections 162 and 165 of the Criminal Procedure Act, 1965. The jury, in consequence of those provisions were relieved of continuing with the trial at the immediately following sessions even if the vital witness had been traced. The point taken in this appeal is therefore untenable, because section 162 by necessary implication had operated to discharge the jury. Those persons who had formed the panel of*

the jury could not have been selected and summoned for service at the immediately succeeding sessions. A fresh jury would have had to be empaneled as was eventually done in this case. The Appellant's subsequent trial and subsequent conviction on 3rd December, 1979 were not a nullity. I would set aside the judgment of the Court of Appeal and substitute an order dismissing the appeal in the Court of Appeal and in this Court."

13. It is clear that that case was decided on the point that there was no necessity for a formal dismissal of a jury in the first and abortive trial, as the jury would be taken to be have been dismissed by the provisions of Sections 162 and 165 of the CPA, 1965. The Learned Justice had earlier in his judgment at page 4, pointed out the dangers of reading parts of a piece of legislation in isolation, rather than reading it as a whole. There, he said: *" The Court of Appeal placed reliance on section 181 of the Criminal Procedure Act, 1965 in support of its view that the trial which commenced on 5th February, 1979 was still pending. Section 181 provides: "If a trial is adjourned, the jurors shall be required to attend at the adjourned sitting until the conclusion of the trial." Reading that section in isolation would give the impression that when, once a jury are empaneled and the accused is put in their charge, the trial can be adjourned from session to session for further hearing with the same jury until their verdict. That however, is not correct; the statute has to be read as a whole in order to get the true intention of Parliament. There is a restriction imposed by the provisions of sections 162 and 165 of the same Act. They provide: "162. Whenever it shall be necessary to form a panel of jurors to serve at any session, the Sheriff in conjunction with an officer nominated by the Judge, shall cause the names of the jurors in the list, resident at and near the District, to be written on separate cards or pieces of paper equal in size and placed in ballot boxes to be kept for that purpose, and shall draw from the said boxes such number of names, as the Court may direct, of special jurors and common jurors to form a panel, and the cards or slips so drawn shall thereupon be locked up in separate boxes until the whole of the names of the jurors, <u>except those who may have served at the last preceding session,</u> shall be returned to the ballot boxes, and, when required, the names shall be re-drawn in manner aforesaid. "Section 165: "The Sheriff before the sitting of any Court whereat a jury shall be necessary, shall on receiving from the Court a*

precept issue summonses requiring the attendance thereat of the persons so drawn as aforesaid from the ballot box. And every such summons shall be personally served upon, or left at the usual or last known place of residence of the person so summoned, two clear days, or such other time as the Court may direct, before the day appointed for the sitting of the Court." A juror therefore, cannot serve at any session immediately succeeding that at which he previously served. His name would not appear at the formation of the panel for such subsequent sessions (s.162). No summons would consequently be issued to him under s.165 summoning him to attend such sessions. Where it is desired to adjourn a trial in which a jury have been empaneled, then such adjournments with the jury are to be done within the sessions for which they are summoned for service..... The adjournments permissible under section 181 are intended to occur within a single session and not from session to session. If the trial cannot be concluded within a session, then, the jury should be discharged by the trial judge, or, any other judge sitting in his stead."

14. That was a murder case which was tried in Bo. The first trial began on 21st February, 1979, and six witnesses were called before the sessions ended. At subsequent sessions commencing on 18th September, 1979, the appellant came up for trial again. His trial commenced on 2nd October, 1979. A fresh jury was empaneled and this time round, 8 witnesses were called to testify before the sessions ended. The trial was then adjourned a second time to the following sessions, i.e. the November sessions. At the third trial which commenced on 26th November, 1979, the appellant was again arraigned. His trial was completed, the jury therein returning a verdict of not guilty of murder, but guilty of manslaughter. He was sentenced to imprisonment for life. That case went to the Court of Appeal on the same point as was later raised in the Supreme Court, i.e. whether the third trial was a nullity because the jury in the first trial which had commenced on 21st February, 1979 had not been formally discharged by the trial judge. The Supreme Court, as I have stated above, held that this was not the case, as no formal discharge of the jury was necessary after the first trial was aborted, simply because by operation of law, the jury was taken to have been discharged as they were no longer eligible to serve in the subsequent sessions.

15. I have pointed out above that sections 162 and 165 of the CPA, 1965 are no longer strictly adhered to, as there have been problems in summoning jurors to serve. This does not however absolve the Court from re-empaneling a fresh jury at the commencement of a subsequent session of the High Court. Had that been done in this case, there would have been no irregularity in the proceedings. Counsel for the Respondent candidly admitted, as he had no alternative to do, that the trial progressed through more than a single session. He had no alternative, I suppose, as this was evident once one went through the Record.
16. He also contended that the decision in LOMBA that the subsequent trial was not a nullity, should apply in the circumstances of the present appeal. For the reasons I have set out above, it is clear, the circumstances surrounding the trial of the Appellant herein were different: one juror was added on without the Appellant being put in his charge; the trial continued through several sessions without a fresh jury being empaneled on each of such occasions. In the LOMBA case, a fresh jury was empaneled and sworn in at each subsequent session.
17. Another point which I have noted, but which has not been dealt with by Counsel on both sides, is what really transpired on 25th January, 2008. The minutes for that day are at page 24 of the Record. They show that 12 jurors were empaneled: "John Esse's" name appears as the 10th juror: but the initials, "*SOB*" sworn on the Bible, or, "*SOK*", sworn on the Koran, do not appear against his name. But in her minutes for 26th January, 2008, the Learned Trial Judge notes: "*One juror ill Regina Pengusaquie; she is replaced with John Esse SOB. No objection*". All of this is rather puzzling, assuming the Record is correct. *Regina Pengusaquie* does not appear in the list of 12 empaneled the previous day. John Esse appears, but, to all appearances, was not sworn. Then, on day 2, he is said to have replaced a lady whose name did not appear on the list the previous day.
18. This brings me to the point canvassed by Counsel for the Respondent that no objection was taken by Counsel for the Appellant at the trial to the addition of John Esse to the jury panel, and that it should be taken that the Appellant had waived his right to object to any irregularity attaching to the addition. This was a criminal trial, and failure on the part of an accused person to take objection to a wrong procedure does not absolve the Court

from following the correct procedure. Save where a confession is about to be tendered, and no objection is taken to its admissibility, a trial judge is bound to ensure that the trial proceeds in accordance with the law relating to evidence and to procedure. Irrespective of whether, for instance, objection is taken by an accused or, by his counsel, to admitting, for instance hearsay evidence, it will be the duty of the trial judge on all occasions to ensure that inadmissible evidence is excluded. Acquiescence by an accused in a wrong or irregular procedure, will not necessarily absolve a court from excluding inadmissible evidence.

19. Notwithstanding the conclusion I have reached that the trial which ended in a verdict of guilty was a nullity, as the charge brought against the Appellant was one of Murder, I believe it is perhaps just that some reference should be made to the strength of the evidence on which the Appellant was convicted. Reference should also be made to some other troubling defects in the Record. We also wish to provide assistance and direction for trial Courts.

THE EFFECT OF A CO-ACCUSED RETRACTING HIS CONFESSION

20. It is clear that there was no direct evidence linking the Appellant to the crime. The 1st Accused at the trial, Sahr Sheku, who was also pardoned, as stated above, did say in his statement to the Police, that the Appellant was present, and took part in the killing of the girl, Hannah Sorie, and that it was the Appellant who burnt the body. Sahr Sheku did not object to his statement being admitted into evidence at the trial, but he did testify on oath that he was innocent of the offence. In fact he said, as recorded on page 37 of the Record that when asked to use his sorcery skills to find the missing child, he had said to Chief Matturi who had summoned him, "*...Chief, your hand is in this. I said, 'why did you do this?' I said how many of you, and Chief Matturie said there are many of Tamba Matturie, Sahr YARJAH, Aiah Gbendo. I said, 'why did you do this?'. I said, I have been put in a dilemma. Matturie said 'I want you to help me. He said 4 people contested the chieftaincy. 3 of us have conspired to malign the other candidates. I said who?; he said Charles Mbekay (i.e. the 4th accused at the trial) was the candidate that we decided to malign. I said what has he done? He said we don't want him to win.*"

21. In other words, the 1st accused was there retracting or refuting his confession. In cross-examination by Mr Timothy Sowa, State Counsel, there was this exchange: "*You made statement when it was* (the word '*fresh*' is missing - no doubt, an ellipsis*) on your mind? I made a statement but I don't know what I said, they were out. You made a statement to the police? Yes. Your lawyer did not object to this and it is in evidence? Oongh (sic). Your statement is completely different? It is different altogether but there is a reason. What is the reason? They sent us to court. Magistrate Carew (now deceased) was here and Jonathan Sorie (i.e. the deceased child's father) testified. You said you rely on your statement? I agree to that. I rely on my statement.*"

22. Now, Sahr Sheku was not only retracting his confession, but was also giving a reason why it was untrue. Of course, it was open to the jury to disbelieve his testimony. However, the incriminating portions of his statement were not put to him in cross-examination by prosecuting Counsel so as to get him to confirm or, to deny them. He had not objected to his confession being admitted into evidence, and that kind of cross-examination would have been a permissible way for prosecuting counsel to proceed, so as to prove to the jury that the 1st accused was merely dissembling. Whatever incriminatory he would have said in the witness box against the Appellant, would have constituted admissible evidence, and would have supported a verdict of guilty provided the corroboration warning was given by the Judge to the jury.

23. The Appellant's refutation of the contents of his confession whilst in the witness box, required the prosecution to prove not only that the then 1st accused made it, but also that its contents were true. That it is desirable to have, outside the confession, some evidence, be it however slight, of circumstances which make it probable that the confession was true, was reinforced in the case of KULANGBANDA v R [1957 -60] ALR SL 306, WACA, by BAIRAMIAN, CJ (Sierra Leone) at page 307 of the Report. That notwithstanding, in the same judgment, BAIRAMIAN, CJ at LL22 - 24 concurs in the view expressed in R v SYKES 8 Cr App R, at page 233 that "*a confession properly proved in law needs no corroboration to found a conviction, although in practice there is invariably some corroboration.*" The caution adverted to by BAIRAMIAN, CJ, supra, that there must be some

evidence which would show that the confession was true, applies in the instant appeal due to the absence of the corpus delicti. No body was found. The items which were tendered as real evidence, to wit, quantity of ashes, blood stained leaves suspected to be human blood, candle wax and incense. None of these items were scientifically tested in order to ascertain whether any of them related to the victim. Understandably, our investigative mechanism has not attained such heights presently, and the Courts have to make do with what is presented by the prosecution. But the absence of the body, made it imperative that the prosecution was under a duty to lead evidence to prove the death of the girl, and that the Appellant was either the one, or one of those who murdered her. The Appellant's denial of being at home when the girl disappeared, whether true or not, did not amount to corroboration of the allegation made by 1st accused that Appellant killed her, or, took part in the killing. Both prosecuting counsel and the Learned Trial Judge were not stating the Law correctly in this respect. The circumstances in which an accused person's lies out of court could constitute corroboration, were absent in this particular case.

LACK OF SUPPORTING EVIDENCE

24. Secondly, apart from the confession of the 1st accused to the murder, there was no other evidence linking the Appellant to the murder. The Learned Trial Judge in her written summing up directed the jury, correctly, that what the 1st accused said in his written confession, implicating the Appellant was not evidence against the Appellant. But she went on to deal with the oral confession of the 1st accused at, what we used to call the 'site *visits*', i.e. taking suspects to the scene of crime, and getting them to make allegations against each other, colloquially referred to as 'verbals'. First point about that exercise is that its nature must be explained to each accused, and each accused should volunteer to participate. Each accused must be cautioned in a language he understands, before he utters anything, and what he says, would normally be taken down in writing in the Police Officer's notebook, so that he will be able to refresh his memory at the trial. Also, in order for such notes to be relied on by the Police witness at the trial, the notes should be read out to each speaker so that he could correct any errors or omissions. On occasion, an accused may be asked to sign the written version of what he has

said, so as to provide support as to the truthfulness and accuracy of the Officer's record. The case of THE STATE v GMT KAI-KAI and 17 others, (1987) HC, unreported, is instructive in this respect. The whole proceedings are available in print, and Counsel are urged to read through them. What was done by the Police in that case, was obviously not done in this case: no caution was administered, nor was the Appellant asked whether he had anything to say in answer to the allegation said to have been made by the 1st accused. And for the avoidance of doubt, it must be stated clearly that this exercise was not a locus in quo. A locus in quo can only be conducted by a Judge and a jury, if there is one, or by a Magistrate, and in the presence of an accused and of his lawyer or lawyers, and of prosecuting counsel.

ACCUSED MUST BE PUT TO THEIR ELECTION INDIVIDUALLY - SECTION 194 CPA, 1965

25. The third point is that the accused persons were not put to their election in the manner required by section 194 of the CPA, 1965. On page 32, the Learned Trial Judge merely recorded, inter alia: "*.....Case for prosecution. The defence. Our plea is unchanged. Each will testify from the box. These will be the witnesses.....*" The names of these witnesses are set out thereunder. There is no indication as to which of the four accused persons wished to call these witnesses, and this was a serious error. Witnesses called by one accused in a joint trial are liable to be cross-examined by counsel for the other co-accused. And then, the Learned Trial Judge notes: "*The defence witnesses to be subpoenaed. Mr Sowa objects to the 4th accused testifying (before) 1st. Objection overruled warning that we are all members of justice and we must be loyal to justice and to fair play.*"

26. Mr Sowa was of course, quite right in taking the objection. When it comes to the point during the trial where the accused are to be called upon to state his or their intentions, each accused is put to his election individually. He must state what he intends to do, and whether he would be calling witnesses. If he intends to call witnesses, he testifies first, and then calls these witnesses. It is the practice of the courts to keep witnesses out of Court before they testify so as to avoid collusion; and as the accused must be present at all times, he will be called to testify first, before his witnesses do so. The statutory provision applicable to the facts of this case, is Section

194(2) of the CPA, 1965 which states: "*Where the accused is defended by counsel who states that he intends to call witnesses as to the facts other than the accused, the Court shall call upon the accused's counsel to open his case and shall then require the accused, if he so desires, to make his own unsworn statement or give his evidence on oath, as the case may be, and thereafter to call his witnesses (including witnesses as to character). At the conclusion of the evidence for the defence, counsel for the accused may address the Court and counsel for the prosecution may reply.*"

27. The practice which has been followed in these Courts is that where there are more than one accused person, each accused person should be put to his election individually, and after he has elected his course of action, he should then close his case before the next accused person in line, is called upon to make his election. The same practice is adopted even where one Counsel is representing multiple accused persons. And in this last circumstance, if counsel calls a witness on behalf of one accused person, he cannot very well cross-examine the same witness on behalf of the other co-accused, as his role is one and indivisible.

28. The fourth, and perhaps the most important point is that the Record does not appear to contain the verdict of the jury. I have combed its pages, but I cannot find it anywhere. Since there is an appeal against conviction, it ought to be taken that there was a finding of guilt, but the verdict should form part of the Record.

29. According to page 42 of the Record, the last day of trial, prior to summing-up, appears to be 4th July, 2008. The minutes of the proceedings for that day continue onto page 44. The last entry is this: "*Ajd next session. Notices will be sent. Summing up.*" The summing-up appears at pages 45 to 61. The date at the bottom in the Learned Trial Judge's handwriting is 21/7/09. That is, a year and two weeks after the entries made on 4th July, 2008. It is not clear whether the written summing-up was one made after the summing-up had been delivered orally on 4th July, 2008: or, whether the actual summing-up was done orally on the later date, more than a year later. If no arrangements have been made for a summing-up to be taken down in writing, it is permissible for the trial judge to later submit notes of the direction he gave, and this would constitute the summing-up proper at a later date. The absence of a written or, transcribed summing-up does not invalidate the trial

- see Sup Ct Cr App 1/79 -THE STATE v DABOR (1979) - judgment delivered 1st November, 1979 by LIVESEY LUKE, Ag CJ. But the Appellant's Notice of Appeal filed on 10th February, 2011 - pages 62 - 64 of the Record - gives the end date of the trial as 21st July, 2009. That would mean that the jury were asked to return a verdict on evidence which had been given more than a year earlier. Further, the Record does not state whether all jurors were present on that last day, i.e. 21st July, 2009. All of these are matters which could affect the validity of a criminal trial.

30. Counsel on both sides argued their respective cases with much force, and we thank them for that. We agree with Counsel for the Respondent that the cases cited by Counsel for the Appellant are not really relevant to the ground of appeal they were supposed to support. We disagree with him however in his interpretation of Section 182(2) of the CPA, 1965 that this subsection only applies where both sides do not give their assent to the replacement of a juror, or, the reduction of the number of jurors. There is a clear misunderstanding here, of what section 182 purports to do. First, S.182(1) permits the reduction of the number of jurors below 12, where both sides consent. If both sides do not consent, then S.182(2) kicks in. It follows, that what the Learned Trial Judge should have done in the first place, was to have sought the consent of both prosecution and defence to continue with 11 jurors due to the absence of 1 juror. This was not done. The Learned Trial Judge should have been assisted by Counsel at the Bar in this regard. Once another juror was added on to the jury, it was necessary that the whole jury be resworn and the accused persons put in their charge as explained above. Over and above that, the jury should not have been permitted to carry on over successive criminal sessions.

31. The conclusion this Court has reached is that the trial was a nullity for failure to observe the provisions of Sections 162 - 165 and Section 182 and 187 of the CPA, 1965. There was a wrong decision on a point of law.

32. Section 58 of the Courts' Act, 1965 deals with the Court's powers when deciding a criminal appeal. S. 58(1) states: "*Subject and without prejudice to subsection (2), the Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable, or, cannot be supported, having regard to the evidence, or, that the judgment of the Court before whom the Appellant*

was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case, shall dismiss the appeal."

33. Section 58(2) of the Courts' Act as amended by S.1 of the Courts' Act (Amendment) Act, 1976 empowers this Court as follows: "*On appeal against conviction, the Court of Appeal, notwithstanding that they are of the of the opinion that the point raised in the appeal might be decided in favour of the Appellant, may – (a) either dismiss the appeal, or; (b) order the appellant to be retried by a Court of competent jurisdiction, if they consider that no substantial miscarriage of justice has actually occurred.* Section 58(3) is as follows: "*Subject to the special provisions of this Act, the Court of Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered."*

34. Due to the time which has lapsed between trial and this judgment, and the paucity of the evidence available even at the date of trial, we do not believe we should exercise the power conferred on this Court by section 58(2)(b) of the Courts' Act, 1965 as amended and proceed to order a retrial. We therefore allow the Appellant's appeal, and set aside and quash the verdict and sentence passed on the him, and enter and do hereby enter a verdict of acquittal in his favour.

35. The Order of this Court is as follows:

The Appellant's appeal against conviction and sentence for Murder is allowed. The verdict and sentence are hereby quashed and set aside.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE E E ROBERTS
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MS JUSTICE V M SOLOMON
JUSTICE OF THE SUPREME COURT