Cr App 12/2010

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

BABY ALLIEU - APPELLANT

AND

THE STATE - RESPONDENT

CORAM:

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

THE HONOURABLE MRS JUSTICE N MATTURI-JONES
AG JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE S M MARGAI, JUDGE

COUNSEL:
MS SIMITIE LAVALY for the Appellant
MONFRD M SESAY ESQ for the State/Respondent

JUDGMENT DELIVERED THE 29th DAY OF JANUARY, 2019

BROWNE-MARKE, JSC

1. This is an appeal brought by the Appellant by way of Notice of Appeal dated 7th December, 2010. It is at pages 70 - 73 of the Record. The grounds of appeal are as follows:
   (1) That the Learned Trial Judge failed to record his summing-up or, to make arrangements for recording the same.
   (2) That the Learned Trial Judge failed to inform the accused of her right to appeal against conviction.
   (3) That the Learned Trial Judge in his direction to the jury, ignored and/or misconstrued the evidence relating to self-defence and/or provocation.

(4) That the Learned Trial Judge did not properly or at all consider the Appellant's case as put by her Counsel.

(5) That the mandatory death sentence for a conviction of murder is a breach of the accused's constitutional right to a fair trial.

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

2. The relief sought from this Court is that the conviction be overturned, and that the Appellant be acquitted and discharged.

3. At the hearing of the appeal, two grounds were substituted in place of the above ones: (i) That the Learned Trial Judge failed to put the accused in the charge of the jury contrary to section 187 of the Criminal Procedure Act, 1965. The second additional ground was a reworking of the original ground 3. It related to the non-direction, or, misdirection on the law relating to self-defence and to provocation.

4. The trial was held at the Kenema High Court presided over by The Hon Mr Justice M F Deen-Tarawally, then a High Court Judge, now a Justice of Appeal. The trial started on 21st September, 2010, and was concluded on 19th November, 2010 when the Appellant was found guilty of the offence of Murder with which she had been charged, and was thereupon sentenced to death. On 27th April, 2012, she was granted a partial pardon by the President, and her sentence was commuted to that of life imprisonment. According to Ms Lavaly, she was at the time, i.e. 2014 the only female prisoner serving life imprisonment. The appeal was delayed because of the absence of a written record of the Learned Trial Judge's summing-up as evidenced by Ms Lavaly's letter to the Registrar of this Court at page 1 of the Record. It was for this reason that this Court granted the Appellant leave to file her appeal out of time notwithstanding the express provisions of Section 64 of the Courts' Act, 1965 as amended, and Rule 39 of the Court of Appeal Rules, 1985. Compelling and credible evidence was shown to the Court that the Appeal had not been filed in time because the Appellant was completely unaware of her rights, the Correctional Service no longer having in its employ a welfare officer who would have assisted her in this regard, and she not being able to brief Counsel to act on her behalf after her conviction.

5. Though it has been abandoned, we are of the view that we must make a pronouncement on the original ground 1, i.e. that relating to the absence of a

written record of the summing-up is not tenable in view of the binding decision of the Supreme Court in SC Crim App 1/79 - THE STATE v BRIMA DABOR - judgment delivered 1st November, 1979. There, the Supreme Court laid down that the absence of a summing up does not by itself, nullify a conviction, nor does it render a guilty verdict unsafe and unsatisfactory. This ground therefore fails.

6. We are also of the view that we ought to deal with the original Ground 2, in view of the course taken for this appeal to reach this Court. As respects that ground, it is true that Section 212 of the Criminal Procedure Act,1965 as amended (hereafter, "CPA,1965") does state in imperative terms, the following: "*The Court shall inform every person condemned to death of the period within which, if he desires to appeal, his notice of appeal or of his application for leave to appeal must be given.*" A trial judge is enjoined to do this because a person convicted of a capital offence cannot, as of right, apply for an extension of time after the 21 day period for doing so stipulated in section 64 CPA, 1965, has elapsed. This is the literal meaning of the proviso to the said section 64 which reads as follows: "*Where a person convicted desires to appeal to the Court of Appeal, or, to obtain the leave of that Court to appeal, he shall give notice of appeal or, notice of his application for leave to appeal in such manner as may be directed by Rules of Court within 21 days of the date of conviction: PROVIDED that, except in the case of a conviction involving sentence of death, or, corporal punishment, the time within which notice of appeal or, notice of an application for leave to appeal may be given, may be extended at any time by the Court of Appeal, or, by the Court before whom the appellant was convicted.*" Rule 39 of the 1985 Rules of this Court are couched in nearly identical terms.
7. When the Appellant first appeared before us, it was in connection with her application for leave to appeal out of time. The Court was not originally inclined to grant the relief sought because it felt itself bound by the express terms of the law in question. It was then brought to this Court's attention that there were several other women in the same position: they had been convicted of Murder, but had failed to appeal within the 21 day period due to ignorance of the requirements of the Law. This Court felt that notwithstanding these express provisions, it was necessary, in the wider interests of justice, that appeals out of time should be allowed to all those

convicted of capital offences. The Appellant is a beneficiary of this Court's willingness to see that justice is done in appropriate cases. She cannot then turn this opportunity or lifeline into an offensive weapon directed at the Court below. As such, this ground fails also.

8. The new Ground 2 contends that no proper direction was given by the Learned Trial Judge on provocation and on self-defence, and that therefore, the conviction ought to be quashed as it would be unsupported by the evidence led at the trial, and would indicate that the Learned Trial Judge had not dealt adequately, or, at all, with the defence case. That being the case, the result would inevitably be a miscarriage of justice.

WHETHER JURY WAS EMPANELED AND ACCUSED PUT IN ITS CHARGE

9. As the contention of the Appellant is that the Appellant was not put in the charge of the jury as required by section 187 CPA, 1965, let us examine whether this was so, and the effect it has. The issue of the proper procedure to be followed in criminal cases has arisen in cases which were tried in the Provinces. In another appeal argued by Ms Lavalie, to wit, AIAH GBEKAY v THE STATE, the same issue arose. There, a fresh juror was added on, but the whole jury was not re-sworn. Additionally, the same jury continued to participate in the trial through several criminal sessions. That appeal will also be decided today.
10. I have gone through the whole of the Record, including the Committal proceedings at pages 1 - 35. Nowhere is it recorded by the Learned Trial Judge that a jury was ever empaneled. The case was first called up on 21st September, 2010. This is recorded on page 36 of the Record. The Learned Trial Judge minuted: "*Case called. T P M Sowa for the State present. Accused present. PW1 absent. C O MARTYN. Accd plea N/G T P M Sowa applies Accused remanded in custody. Subpoena to be served on witness. Ajd to 30/9/2010.*"
11. On page 37 of the Record, it is recorded that the case was called up on 13th October,2010. There is no mention of a jury being empaneled. Mr Sowa opened for the State, and what he said was recorded on page 38. At the bottom of page 38, it is recorded that PW1 Fatmata Vincent, began testifying. Her testimony ended at page 42 where it is also recorded that the case was adjourned to 18th October, 2010. There are no minutes for 18th

October, and so one is not sure whether the case was called up on that day. The next hearing date, as recorded on page 43 was 22nd October, 2010. PW2 James Massallay testified. He tendered the post-mortem report as exhibit "A". The Police Officer, DPC 2652 Joseph Yambasu also testified on that day. Another Police Officer, Alfred Michael Sandy, also testified that same day. There is no record of a jury being present. At page 51, it is recorded that Mr Sowa tendered in evidence the Committal Warrant as exhibit F, and closed the prosecution's case.

12. On the adjourned date, 25th October, 2010, the Learned Trial Judge has recorded that the accused elected to give evidence on oath, and also wished to call one witness. There is no record of the procedure in Section 194(2) CPA, 1965 being followed. Again, there is no mention of a jury being present. Right up to the end of that day's proceedings, as recorded on page 60, there is no mention of a jury. The only mention of a jury is at page 67 of the Record where it is recorded: "*Jurors retire at 11.49am to consider their verdict. Return at 12.08am. Forewoman: Unanimous verdict of guilty. Sentence.*"
13. Counsel for Respondent has conceded at page 4 of his written synopsis that it is true that the only record of a jury being present is at page 67; but he argues further that the absence of a record of a jury being empaneled does not vitiate the trial. He did not cite any authority to support his argument, but this Court does not believe that there is any. Further, even if this Court were to assume that there was indeed a jury, what were the names of the jurors empaneled? Was the right to challenge jurors about to be sworn, explained to the accused? Were such jurors sworn? These questions need answers before the Court could proceed to inquire into whether the accused was put in the charge of the jury. If there is no record of a jury being selected and being sworn, there is hardly likely to be a record of the accused being put in its charge.
14. Turning to the Law on this point, reference should first be made to section 143 CPA, 1965: "*Any person charged with a criminal offence at any session of the High Court shall: (a) if such criminal offence is punishable by death be tried by the court with a jury consisting of twelve men.*" Sections 144 and 145 deal with trials by Judge alone, but both sections make it clear that capital offences cannot be so tried. Sections 162 to 182 set out in detail how

jurors are empaneled, and how they are selected to participate in criminal trials. No part of the Record shows that a jury was indeed empaneled, that the right of the Appellant to challenge individual jurors was explained to her, and that she was put in their charge. The absence of any record of a jury being empaneled to try the Appellant, or, of the names of any juror so empaneled on record, this Court believes resulted in a miscarriage of justice within the terms of section 58(1) of the Courts' Act, 1965 in that the Appellant may have been deprived of the right to be tried by her peers. The Appellant therefore succeeds on this ground, not just because the Appellant was not put in charge of the jury, but also because of the issues canvassed in paragraphs 8 and 10 at pages 2 – 3 of Ms Lavalie's synopsis.

15. Notwithstanding the view we have taken of the absence of any record of a jury being empaneled, we think we ought to give some direction where self-defence and/or provocation are raised by an accused person at trial. Counsel for the Respondent conceded in his synopsis that the Learned Trial Judge failed to direct the jury adequately on these two points.

SELF DEFENCE

16. The Appellant was the only witness, just as the Appellant in WOOLMINGTON v DPP [1935] AC, 462, HL was, to the alleged murder. The Appellant, both in her statement to the Police, and in her evidence in Court, explained that she was being beaten by the accused with a rubber, and this was why she retreated to her room. The deceased chased her into her room, banged her head on the wall, and she then reached out for something to stop the beating, when her hand grabbed the knife. She stabbed him, and he went out of the room. She also fled the room. Now, the Learned Trial Judge's summing up was to the effect that the use of the knife was uncalled for and disproportionate to the attack on her. But there was evidence also to the effect that there had been a long-standing animosity between the Appellant and the deceased because she had struck up a relationship with one Ensah, and was carrying on with Ensah right under his nose. What sparked the confrontation that day between the Appellant and the deceased, was the use of abusive language by the Appellant after, according to her, she had discovered her coal missing. The deceased then began the attack on her, and she ran into her room to escape him. He followed her into the room. The

crucial question here for a jury, in these circumstances, would be, did the deceased follow the Appellant into the room to continue with his assault on her? There is no evidence that she offered any resistance to the deceased's assault while they were all outside. And what would a reasonable person in the Appellant's position think? Nobody had come to her assistance when she was under attack. The proper direction to the jury should have been to invite them to consider whether the Appellant was really fleeing her attacker, or, whether she ran into her room to inflict the fatal blow which killed the deceased. Now, if, for instance, the Appellant had fled into, let's say, a kitchen, and then grabbed a knife and had stabbed the deceased, there might be good reason to conclude that it was her intention to inflict at least grievous bodily harm on the deceased, as a kitchen is a place where one would expect to find knives. But, the evidence, which was uncontradicted was that she fled into her room. It was therefore incumbent on the Learned Trial Judge to give a careful direction to the jury on whether there was provocation sufficient to cause the Appellant to lose complete control of herself; or, whether, in the course of defending herself against the deceased's assault, she had to defend herself from further injury by grabbing hold of the knife, which according to her was on a nearby table. The Learned Trial Judge in the written record of his summing-up appeared to have placed a lot more emphasis on the *'proportionality'* of the weapon used to resist the assault, rather than on what a reasonable person would do, when after fleeing, she was chased into a place where she expected to find sanctuary by her attacker.

17. In PALMER v R[1971] AC 814, PC on appeal from Jamaica, LORD MORRIS, in delivering the opinion of the Board, had this to say: *"If there has been an attack so that defence is reasonably necessary, it will be recognized that a person defending himself cannot weigh to nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish, a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken."* More than 80 years ago, the same position had been taken by the West African Court of Appeal in R v IGWE 4 WACA 117. There, the Appellant had used the very machete which the deceased had attempted to use against him, to inflict multiple

wounds on the deceased. The Appellant there, had succeeded in disarming the deceased but had gone on to use the machete on the deceased. The Court held, at page 118 that: "*Upon this point, the accused in the heat of the moment may well have thought and indeed, not without reason, that he was engaged in a life and death fight with the deceased, if he could not kill the deceased, he would certainly be killed by the deceased. And it must be remembered that it was the deceased who started the deadly fight.*" The Appellant's appeal was therefore allowed. This Court therefore does not agree with Counsel for the Respondent in his argument at para 14(b) at page 9 of his synopsis that: "*In the present case, there is evidence of malice aforethought as the Appellant's act of running into her room from outside was to access the knife (not to retreat from her attacker, the deceased....*" The evidence is that the deceased followed her into a room which he well knew was occupied by her, but also by her male friend, with both whom he had had an altercation the previous day.

18. We are also guided by what TAMBIAH, JA had to say about the duty of a Judge in summing-up to the jury in a murder trial, where provocation and/or self -defence, is, or, are pleaded, in KARGBO v R [1968-69] ALR SL 354 at page 358: "*It must be observed that the evidence in this case shows that the appellant was attacked by the deceased. The appellant had fallen on the ground and during the struggle he used a machete which was lying close by. It was contended by Learned Crown Counsel that the appellant was in a position to retreat when he inflicted the injury and therefore the offence was one of murder. When a person defends himself he is not obliged to retreat. He can attack his assailant until he is out of danger.....It must also be borne in mind that when a person acts in self defence, one cannot weigh with golden scales the exact amount of force which he has to use in order to defend himself.....*" In that case, the appeal was allowed and the verdict reduced from murder to manslaughter as the facts disclosed that the appellant therein had used more force than was necessary for his defence, and this had resulted in the death of the deceased. But the learned trial judge had not given the jury therein the proper directions.
19. Regretfully, in the instant appeal, there is no clear evidence before us that a jury was really empaneled; much less that if so empaneled, it was properly directed.

20. For all these reasons, we hold that the appeal should be allowed and the conviction and sentence, quashed.

21. This Honourable Court allows the appeal of the Appellant against her conviction and sentence for Murder, quashes the said conviction and sentence, and directs that a verdict of not guilty be entered on the Record in its stead.

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

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THE HONOURABLE MR JUSTICE S M MARGAI, JUDGE