KHAZALI & ORS v THE STATE

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COURT OF APPEAL FOR SIERRA LEONE, Criminal Appeal 4 of 1973, Hon Mr Justice C A Harding PJ, Hon Mr Justice O B R Tejan JA, Hon Mr Justice S Beccles-Davies JA, 21 May 1974

[1] Criminal Law and Procedure – Evidence – No case – Whether defendants precluded from making no case submission

[2] Criminal Law and Procedure – Evidence – Inconsistent statements – Whether judge should have directed jury that evidence of witness unreliable because of prior inconsistent statements – Witness not hostile and explained to jury reasons for inconsistent statements – Strictly up to jury to accept or reject evidence of witness

[3] Criminal Law and Procedure – Evidence – Accomplice – Corroboration evidence – Duty of judge to warn jury that it was dangerous to convict on uncorroborated evidence of an accomplice – Whether corroborative evidence existed – Where evidence consisted entirely of uncorroborated evidence of accomplice case should be left to jury after administering necessary caution unless statute required otherwise

[4] Criminal Law and Procedure – Evidence – Accomplice – Duty of judge to provide jury with broad indication of type of evidence presented at trial which could be treated as corroboration

[5] Courts – Bias – Whether judges disqualified on basis of bias because they had heard appeal in a related matter – Real likelihood of bias must be shown

The facts of this case were that the four appellants entered into an agreement with one Sunday Kargbo to sell his (Kargbo's) wife to the first appellant. Subsequently Sunday Kargbo took his wife to a village, where she and her child were murdered by the second to fourth appellants and another person, while her husband and the first appellant stood by.

In a separate trial, Sunday Kargbo and four others were convicted in December 1972 at the Port Loko High Court by Marcus Cole J of the murder of the deceased. The Court of Appeal allowed the appeal of two out of the five men who had been convicted and ordered their acquittal and discharge, but the appeal of the other three including Sunday Kargbo was dismissed.

The four appellants in this case were tried in the Freetown High Court in November 1973 on a two–count indictment charging them with dealing in person contrary to section 7(1) of the Provinces Act (Cap 60), and murder of the deceased. Each of the appellants denied all knowledge of the offences and the first three appellants claimed that they were nowhere in the vicinity of the crime at the time it was committed. The main witness in the trial against the appellants was Sunday Kargbo (PW9). On the first count the first three appellants were convicted and each sentenced to 5 years imprisonment, while the fourth appellant was acquitted. On the second count, each appellant was convicted of murder and sentenced to death.

The appellants appealed against their convictions on eight grounds relating to the conduct of the trial. The main issues were: (i) whether the judge had refused to hear a submission of no case to answer for the appellants at the close of the prosecution's case; (ii) whether the judge failed to direct the jury that PW9's evidence should be regarded as unreliable on the basis that he had made several previous inconsistent statements; (iii) whether the judge should have directed that it was desirable for the jury to look for corroboration of PW9's evidence before

convicting because, as the only material witness, he may have had his own purpose to serve in giving evidence; (iv) because PW9 was the only witness who gave evidence incriminating the appellants and was himself an accomplice, whether the judge's direction to the jury on the law relating to accomplices was defective. In relation to the last issue, it was argued that the judge left it open to the jury to convict on the evidence of a self-confessed accomplice without adequate corroboration, that the judge failed to direct the jury that there was no evidence of corroboration of the evidence of PW9 implicating the appellants and that the judge failed to sufficiently direct the jury as to the type or nature of evidence given at the trial which could amount to corroboration.

Held, per Harding PJ, dismissing the appeals of the first, second and third appellants and allowing the appeal of the fourth appellant and quashing his conviction:

1. Counsel for the appellants were not in any way precluded from making the submission of "no case" at the close of the prosecution's case, but as the trial judge had intimated the way in which he thought about this issue, they must have advised themselves to abandon making such a submission. If counsel had been serious about their intention to make a no case submission they could have pressed on with their application. It could not be said that counsel were deprived of the right to make such a submission. *R v Abbott* [1955] 2 QB 497; (1955) 39 Cr App R 141 and *S P Stevens v R* (unreported, SLR Vol 1 p 20) distinguished.

2. In the present case, PW9 was not a hostile witness and had of his own accord stated that that he had previously made statements inconsistent with his evidence and he stated on oath his reasons for doing so. The jury heard the statements and listened to the witness give evidence and it was strictly up to them to decide whether they accepted or rejected his story. The contention that the trial judge should have directed them that they should regard his evidence as unreliable was misconceived. *R v Chapman* [1973] 2 All ER 624 followed; *R v Golder* [1960] 3 All ER 457; (1960) 1 WLR 1169 distinguished.

3. It was desirable that, in cases where a person may be regarded as having some purpose of his own to serve, the judge should give the jury a warning against convicting on uncorroborated evidence. In the present case, the judge did administer such a warning. He told the jury that PW9, by confessing to participation in the crime had held himself out to be an accomplice, and warned them that although there was nothing to stop them convicting on PW9's evidence it was his duty to warn them that it was dangerous to convict on such evidence unless it was corroborated. *R v Prater* [1960] 1 All ER 298; (1960) 44 Cr App R 83 and *Davies v DPP* [1954] 1 All ER 507 applied.

4. The argument that the judge was under a duty to direct the jury that there was no independent evidence corroborating that of the accomplice, PW9, and that this resulted in the loss by the appellants of a protection afforded them by law was based on two false premises. First, it presupposed that there was no corroborative evidence, which was not the case. Taking into account the totality of evidence before the court, there was, as far as the first appellant was concerned, strong circumstantial evidence from other independent witnesses of PW9's story which implicated the first appellant in the commission of the crime. Second, in the absence of any statutory provision expressly requiring corroboration, where the evidence adduced by the prosecution consisted of uncorroborated evidence of an accomplice, the judge should leave the case to the jury to convict or not after giving them the necessary caution. *R v Baskerville* (1916) 12 Cr App Rep 81 and *R v Anslow* (1962) Crim LR 101 referred to.

5. It was not sufficient for the judge to merely direct the jury on the law of the case. The jury was entitled to receive from the judge a broad indication of the evidence which, if they accepted it, they could treat as corroboration. However, in the present case, the judge's failure to indicate to the jury the type or nature of evidence given at the trial that could amount to corroboration did not amount to a misdirection so as to render the conviction of the first, second and third appellants invalid. *R v Goddard* (1921) 16 Cr App Rep 156 applied.

6. As regards the fourth appellant, who was accused of cutting the throat of the deceased and convicted at the trial, it would be a miscarriage of justice to sustain his conviction as another person in a separate trial had been convicted of the same act. Therefore the appeal of the fourth appellant was allowed and his conviction quashed.

Per curiam

7. Section 65 of the Constitution, which provided the Attorney General with power to discontinue at any stage criminal proceedings before judgment is delivered, did not apply to the situation where there is an appeal against the State from a decision given in favour of the State.

8. There was no ground to disqualify Tejan JA and Beccles Davies JA on the basis of bias because they had heard the appeal of Sunday Kargbo and four others. In order to disqualify them, a real likelihood of bias must be shown. Nor was there any basis to disqualify them under the Constitution or Courts Act. *R vCamborne Justices, ex p Pearce* [1954] 2 All ER 850 applied.

Cases referred to

Davies v DPP [1954] 1 All ER 507
Hornall v Newberger Products Ltd [1956] 3 All ER 970
R v Abbott [1955] 2 QB 497; (1955) 39 Cr App R 141
R v Anslow (1962) Crim LR 101
R v Baskerville (1916) 12 Cr App Rep 81
R v Camborne Justices, ex p Pearce [1954] 2 All ER 850
R v Chapman [1973] 2 All ER 624
R v Finch (1916) 12 Cr App Rep 77
R v Goddard (1921) 16 Cr App Rep 156
R v Golder [1960] 3 All ER 457; (1960) 1 WLR 1169
R v Harris (1927) 20 Cr App R 86
R v Majekodummi 14 WACA
R v Pipe (1967) 51 Cr App R 17
R v Prater [1960] 1 All ER 298; (1960) 44 Cr App R 83
R v Russell 52 Cr App Rep 147
R v Sussex JJ; ex parte McCarthy [1924] 1 KB 256
SP Stevens v R (unreported, SLR Vol 1 p 20)

Legislation referred to

Constitution (Act No 6 of 1971) ss 65(5), 66(7), 95(1)
Constitution (Consequential Provisions) Act 1971 s4(1)
Courts Act 1965 (Act No 31 of 1965) s38
Criminal Procedure (Amendment) (No 3) Act 1973 s1
Interpretation Act No 8 of 1971 s18(1)(d)
Provinces Act (Cap 60) s7(1)
Sierra Leone (Constitution) Order in Council 1961

Appeal

This was an appeal by Alimamy Khazali and three others against convictions for sale of a person (the first appellant's wife) contrary to s 7(1) of the Provinces Act (Cap 60) and for murder of the same person. The facts appear sufficiently in the following judgment.

Mr Berthan Macaulay QC and Mrs S Bash-Taqi for the first appellant.
Mr B M Conteh for the second and third appellants.
Mrs S Bash-Taqi for the fourth appellant.
Mr T S Johnson for the State.

HARDING PJ: The four appellants were tried in the Freetown High Court in November 1973 on a two-count indictment charging them with (1) Dealing in person, to wit, the sale of one Marie Dumbuya, contrary to section 7(1) of the Provinces Act (Cap 60), and (2) Murder of the said Marie Dumbuya. On count one the first three appellants were unanimously found guilty by the jury and they were thereupon convicted and each sentenced to 5 years imprisonment by Okoro Idogu J, whilst the fourth appellant was acquitted and discharged; on count two, each was convicted of the capital offence and the learned trial judge sentenced each to death by a firing squad. Against their said convictions they have appealed to this court on eight grounds (leading counsel for the first appellant having conceded that two out of the ten grounds filed had no substance). For the sake of convenience I have renumbered the grounds as follows:

1. That the learned trial judge admitted evidence which was inadmissible.
2. That the learned trial judge was wrong in law in refusing to hear submission of no case for the appellants at the close of the prosecution's case.
3. That the learned trial judge failed to put the case for the defence adequately to the jury.
4. That the verdict was unreasonable and cannot be supported having regard to the evidence.
5. That the learned trial judge's direction to the jury on the law relating to accomplices was so defective as to deprive the appellants of the protection of law to which they were entitled in that: (a) He contradicted himself in describing to the jury what Sunday Kargbo's (PW9) position was in law, thereby leaving it open to the jury to convict on the evidence on oath of a self-confessed accomplice; (b) He totally failed to direct the jury that there was absolutely no evidence of corroboration of the evidence of Sunday Kargbo (PW9) implicating the appellant; (c) Assuming that there was such evidence capable of amounting to corroboration, he totally failed to indicate the type or nature of the evidence actually given in the trial which, if believed, could amount to corroboration.
6. The learned trial judge failed to direct the jury that where as here, the only material witness may well have a purpose of his own to serve, it was desirable for the jury to look for corroboration in deciding the issue of the guilt of innocence of the accused.
7. The learned trial judge failed to direct the jury that where as here, the material witness for the prosecution has made several previous inconsistent statements, his evidence should be regarded as unreliable, and they should look to the rest of the evidence in trial, if there is any such, which proves the guilt or otherwise of the accused.
8. The discrepancies in the evidence for the prosecution, and the contradictions, especially those which showed that the material witness's memory improved with the passage of time, made it essential that the judge should have drawn attention to these

facts which he failed to do, and warn the jury of the danger of convicting on such evidence.

The trial giving rise to the instant appeal was a sequel to another trial involving one Sunday Kargbo (PW9) and four others who were convicted in December 1972 at the Port Loko High Court by Marcus Cole J of the murder of the very same deceased, Marie Dumbuya. It is worthwhile mentioning at this stage that an appeal in that case was heard by this Court (coram O B R Tejan, A V A Macauley and S B Davies JJA) and on 15th February 1974, it allowed the appeal of two out of the five men who had been convicted and ordered their acquittal and discharge, but the appeal of the other three (and this includes PW9 Sunday Kargbo) was dismissed.

The facts of the case in a nutshell are that pursuant to discussions held with Sunday Kargbo, the husband of the deceased, at Lumley Village and at Sendugu, Sanda Magbolonto Chiefdom at which the first appellant, and second and third appellants (who are brothers of the deceased) participated, a deal was arranged whereby the deceased was to be sold to the first appellant because it was alleged that the deceased was a "bother" to her relations. In pursuance of this arrangement the first appellant at the last of such meetings which was held one night outside a certain house at Lumley Village, produced from a handbag a wad of notes which he handed over to the second appellant who counted out Le38.00 out of it and gave it to Sunday Kargbo who was thereupon told by first appellant that it was a deposit for Marie, the deceased. After this Sunday Kargbo and the deceased returned to their village at Kadelay in Sanda Magbolonto Chiefdom where they harvested their rice.

Thereafter, on Friday – the prosecution alleges this to be the 14th of April 1972 – consequent on the receipt of a message from the second appellant, Sunday Kargbo set off with the deceased Marie Dumbuya and their child Abu, whom he carried in his arms, from Kadelay village for Magbetti village. On arrival at the common boundary between Kadelay and Magbetti villages they came across six persons, four of whom were the appellants. The deceased who at the time was walking ahead was then taken into nearby grass off the road where she was cruelly slain. According to Sunday Kargbo, the only eye-witness who testified on behalf of the prosecution, the deceased was put on the ground by the second, third and fourth appellants and one Issa, and the fourth appellant then cut her throat with a knife. While all this was happening, the first appellant was standing by beside Sunday Kargbo. Certain parts of the body were removed and placed in a plastic container. (The child Abu was also killed and certain parts from his body were removed as well, but this is the subject of another charge). After the slayings Sunday Kargbo was told to bury the remains and then go to Freetown to collect the balance of his money but he informed them that he was having a sore foot and could not travel. They proceeded to Sendugu where first appellant's red motorcar was seen parked near to the Court Clerk's house. After a while first, second and fourth appellants boarded the first appellant's car and drove off taking away with them the plastic container and contents.

The disappearance of the deceased was reported to the Officer in charge of Port Loko Police Station on 1 May 1972 and police investigations were mounted which resulted in the subsequent trial and conviction of some of them. It was as a result of certain disclosures made at that trial that lead to the arrest and prosecution of the appellants in this appeal.

Leading counsel for the first appellant in his usual adroit manner ably argued the eight grounds of appeal and counsel for the second and third appellants and for the fourth appellant felt they could do no better but simply to adopt all his arguments seriatim in favour of their respective clients. I propose dealing with the grounds of appeal as they are numbered supra.

Ground 1 – wrongful admission of evidence.

Learned counsel for the first appellant referred the court to the exhortation by Mr T S Johnson, leading counsel for the prosecution, of Sunday Kargbo PW9 to tell the truth as to what happened in his village before his wife, the deceased, went missing and to begin from the beginning, and prefaced his submission in support of this ground of appeal by saying that the degree of latitude permitted the witness to ramble by such an exhortation was calculated to produce hearsay evidence. Mr T S Johnson counted this by pointing out that it was Mr A B Yillah, counsel for the first appellant in the court below who had requested that the court interpreter be instructed "to interpret everything, absolutely everything that the witness says." The court's attention was directed to five passages in the record: two of those (p 41 lines 26 – 28, p 42 lines 1 – 4 et seq and p 52 lines 27 – 31) cannot be said to be hearsay evidence as far as the second appellant is concerned; another (p 56 lines 11 – 14) was merely an account by the witness of what actually transpired whilst he was in cells and it cannot be said looking at the context in which it occurs, that it was so prejudicial to the first appellant that it should have been shut out. The final passage complained of was p 54 lines 10 – 14, in which the trial judge stated "witness rambles on mainly about hearsay from others"; the fact that such hearsay evidence was not recorded makes the complaint unworthy of merit.

Ground 2 – refusal of the trial judge to hear a submission of "no case" for the appellants at the close of the prosecution's case.

Counsel submitted that the trial judge appeared to have made up his mind to shut out any submission of "no case" being made on behalf of the appellants and he contended that such a submission being part of the case for the defence the trial judge was wrong in law to make such a refusal. He relied on two cases (a) *R v Abbott* [1955] 2 QB 497; (1955) 39 Cr App R 141 and (b) *SP Stevens v R* (unreported, SLR Vol 1 p 20); these two cases I must say at once are not on all fours with the present one for in each of them a "no case" submission was made which was wrongly overruled by the trial judge. In the present case counsel for the second and third appellants had sought an adjournment at the close of the case for the prosecution "for the defence to prepare its case" when the trial judge spoke of delay and stated that he "will first put counsel (accused) to their elections." Mrs Taqi, counsel then appearing for first and fourth appellants, still hoping for an adjournment, therefore stated that she "had thought to make a no case submission" whereupon the learned trial Judge said:

> "I would have thought that the case having proceeded as it has you would have by now prepared yourself for such submission if you had intended to make it. In any case I have spoken of putting the accused to their elections which should indicate to you my view that a prima facie case has been established."

Nothing was further said except that each appellant elected to give sworn evidence and each also (except the fourth) stated that he would be calling witnesses. Mrs Taqi thereupon applied successfully for an adjournment till the next day to enable her fully to present the case for the defence of first appellant. On the following morning Mr Yillah, leading counsel for the first appellant appeared and after making an unsuccessful application to have certain witnesses for the prosecution recalled for further cross-examination, then stated:

> "I intend to make a legal submission on behalf of the first accused of no case."

Excerpts of the trial judge's observations to Mrs Taqi, supra, were then read for his benefit whereupon he requested an adjournment (which was granted) to enable him to have an interview with the first appellant. After this, he informed the court that the first appellant will make an un-sworn statement from the dock in addition to his statement to police already tendered in evidence and that no witnesses will be called. This was confirmed by the first appellant. The same procedure was adopted in respect of the second and third appellants whilst it was stated that the fourth appellant will rely only on his statement to police. Counsel were not in any way precluded from making the submission of "no case", but the learned trial judge

having intimated the way his mind was working – no one can complain about this – they must have advised themselves hence they decided to abandon making such a submission. If they (Mr Yillah for first appellant and Mrs Taqi for 4th appellant) were really serious about their intention they could have pressed on with their application. As far the second and third appellants are concerned no such application (or intimation of same) was made on their behalf by counsel. It cannot be said that Counsel were deprived of the right to make such a submission.

Grounds 3, 4 and 8.

I shall now deal with ground 3, 4 and 8 together *viz*, that the case for the defence was not adequately put to the jury, that the verdict was unreasonable and cannot be supported having regard to the evidence, and the discrepancies and contradictions in the evidence for the prosecution made it essential that the trial judge should have drawn attention to those facts and warned the jury of the danger of convicting on such evidence.

The appellants' defence consisted in denial of all knowledge of the offences and in addition the first three appellants stated that at the material time of the murder they were nowhere near the vicinity of the crime, each appellant rested his defence on the statements each had made to the police and in addition the first three made unworn statements from the dock. In dealing with the defence case the trial judge summed up to jury as follows:

> "Part of the evidence you have heard had been contained in the statements of the first, second and third accused from the dock. They each elected to give unsworn evidence which consequently was not subject to cross examination. Such unsworn evidence was stated to be in addition to their statements made to the police during the investigations and on such total statements the first, second and third accused elected to rely in their defence, the fourth accused relying on and making no addition to his statement to the police during investigations. In spite of the fact that such evidence was not subjected to cross-examination you must take it into consideration in deciding whether or not the prosecution have proved their case, attending such weight as you think fit to each."

Further he went on:

> "In his defence each accused has elected to rely on his statement made to the police which statements I here pass to you. In the case of the first, second third accused, each has elected to add to it by unsworn evidence from the dock. I now read you such additions. In respect of the written statement of the first accused I direct that you ignore all references in such statement as more denial by first accused of the allegation against him, and add to such denial his unsworn evidence from the dock. On the point of the first accused not having said in his statement to the Police or prior to the trial what he said in his unsworn evidence from the dock about his activates on the 4th April 1972 it is my duty to tell you that the accused is under no duty to disclose his defence, he had an absolute right not to disclose his defence and it is not to be held against him that he did so. If for any reason you are of the opinion that any of the accused has given untruthful evidence, I have to tell you that a case in which an accused gives no evidence is not different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. If however, upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which you can properly take into account as strengthening the inference of guilt. What strength it adds depends, of course, on all the circumstances and especially on whether there are reasons other than guilt that might account for his truthfulness. Far and above everything else, you are the Judges of fact and it is for you to determine what weight to attach to any evidence that you have heard in this court during this trial. Your duty is to consider the evidence heard during this court and within this court only. It is

essential that you do not advert your minds to positions and personalities. It is the individual who commits offence not the position. Your duty is to regard the evidence weigh it, draw what inferences you reasonably may consider and decide to accept and being satisfied one way or the other, come to your verdict and deliver such verdict."

Addressing the jury further on the burden of proof the trial judge stated:

"It is the duty of the prosecution to prove its case, and this means proving every ingredient.

On Count 1: satisfy yourself that the prosecution has proved that there indeed was a deal for the sale of Marie Dumbuya, that the accused or any of them were parties or party to such deal and that such deal was transacted.

On Count 2: there is no dispute that each of the accused is of sound memory and direction; there is no dispute that Marie Dumbuya was a reasonable creature in being; there is no dispute that she is dead and that she met her death by violence and it is safe to presume on the evidence that such violence was inflicted upon her unlawfully. It has been shown that the second and third accused indisputably were the brothers Marie Dumbuya and it is acknowledged that first and fourth accused are nephew and uncle. Are you satisfied on the evidence that the accused or any of them had anything to do with the unlawful act that caused death to Marie Dumbuya? I will again read out to you the three ways in which a person may be concerned in the commission of a felony (READ). Are you satisfied on the evidence, provided such participation had been proved to your satisfaction, that such participation was with the necessary malice? I will read again to you the meaning of malice (READ). Again I report that it is not for the defence to make answer or prove innocence.

Apart from considering the evidence as regards the accused acting in concert, you must also consider the evidence against each accused, as acting separately. If you are not satisfied that the prosecution has proved its case against the accused or any of them you must return a verdict of acquittal for such as you consider the case has not been proved against. If you accept the explanation of any of accused you should acquit him, it is not for him to prove his explanation. If you are not sure whether the explanation of any accused is true or false you should acquit him. If upon review of all the evidence you are left in reasonable doubt, even if you do not accept the explanation of the accused, again you must acquit. For you to return a verdict of guilty in respect of either count, you must be satisfied by the evidence so that you feel sure that the prosecution has established the guilt of the accused".

Counsel for the appellants have furthermore in their arguments before this court referred to certain discrepancies and contradictions in the evidence for the prosecution and submitted that it was essential for the trial judge to have drawn the attention of the jury to these facts and to have warned them of danger of convicting on such evidence. The case of *R v Majekodummi* 14 WACA was cited as well as that of *Hornall v Newberger Products Ltd* [1956] 3 All ER 970. In the former case in allowing the appeal the court took the view that the conflict and discrepancies in the evidence of prosecution was such that a verdict of guilty could not be justified. The facts were peculiar to that case. The statement which the witness Sunday Kargbo had originally made to the police in which he did not mention the names of any of the appellants – embodied in the records of another case in which he and four others were charged with the murder of the deceased – was cited as one of the instances where there was a contradiction as against the evidence which he had given in the court below, but the witness has explained on oath to the jury the reason why he had given different stories at different times. It was all a question of credibility and it was up to them as judges of the facts, having listened to all the evidence and having had the opportunity of watching the witness's

demeanour to say whether or not they believe him and all the other witnesses for the prosecution. It was counsel for the first appellant in the court below who requested that the records of both the Preliminary Investigation and Trial of Sunday Kargbo and others be tendered because "they would throw light on the death of Marie Dumbuya". As far as the actual evidence adduced in court is concerned – barring that of Isatu Dumbuya, the sister of second and third appellants who understandably has some bias – there was hardly any discrepancy. However, particular reference must be made to the contention that the prosecution never established that the capital offence was committed on Friday 14th April 1972 as laid on the second count of the indictment. There is positive evidence from Sunday Kargbo that the incident occurred on a Friday and there is also evidence from deputy superintendent of police of the then o/c Port Loko police district (who in the normal course of his duty would have recorded the report} that on 1st May 1972, paramount chief Sanda Kabai reported to him that on 30th April 1972 that Sunday Kargbo had reported to him that his wife, ie the deceased, was missing for 17 days. Bearing in mind the mentality of an individual like Sunday Kargbo who can only recall that it was on a Friday the incident took place, one can reasonably be assured that he included both the day that the deceased was killed and that on which he made the report in his reckoning, in which case the date falls exactly on Friday 14th April, 1972. There seems to be no difficulty here.

Ground 7

In Ground 7 it was also contended that inasmuch as the material witness for the prosecution, Sunday Kargbo has made several previous inconsistent statements, the trial judge should have directed the jury that such evidence was unreliable and that they should look to the rest of the evidence, if there was any such, which proves the guilt or otherwise of the appellants. Counsel relied on the case of *R v Harris* (1927) 20 Cr App R 86 and that of *R v Golder* [1960] 3 All ER 457. In the latter case, it was held that when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence on which they can act. The relevant witness in the two cases cited above was a hostile witness, quite unlike the one in the present case. Here the witness of his own accord stated that he had previously made statements inconsistent with his evidence and he stated on oath his reasons for so doing. The jury heard the statements and also listened to the witness give evidence and it was strictly up to them as to whether they accepted or rejected his story. The contention that the trial judge should have directed them that they should regard the evidence as unreliable is in our view misconceived. The same point was taken by counsel for the appellants in the case of *R v Chapman* [1973] 2 All ER 624 but as was pointed out by Roskill LJ (at p 631) that whereas in *Golder's* case (supra) the relevant witness was a hostile one in *Chapman's* case he was not.

Ground 6

In Ground 6 counsel submitted that where, as was in the instant case, the only material witness, ie Sunday Kargbo, may well have a purpose of his own to serve, it was desirable that the trial judge should warn the jury of the danger of convicting on that witness's evidence unless it is corroborated. He relied on two cases: *R v Prater* [1960] 1 All ER 298 and (ii) *R v Russell* 52 Cr App Rep 147. He prefaced his arguments by referring to a dialogue during the course of the trial between leading counsel for the prosecution and PW9 Sunday Kargbo in which counsel had told the witness "You will not be killed if you give your evidence of the truth".

Next he referred to Section 65 of the Constitution, Act No.6 of 1971 – the powers conferred on the Attorney-General to institute and undertake criminal proceedings and to

discontinue at any stage before judgment is delivered such criminal proceedings – and contended that under sub-section 5, the powers extend to proceedings before the Appeal Court as well. He submitted that inasmuch as the witness's appeal for his conviction for murder was still pending, it was tantamount to an inducement being held out to him and not only was it improper for him to be called as a witness for the prosecution but also the jury should be warned against convicting on the uncorroborated evidence of such a witness. Counsel for the respondent in reply referred this court to the discourse proceeding the dialogue in which the witness had complained of intimidation by the "officers who guard him" and to his appeal to the trial judge for an assurance to be given to the witness that he has nothing to be afraid of, and urged us to accept that what was told to the witness was not said as a premise of favour but was said in order to reassure him that there is nothing to fear whatever". In the light of the context in which the statement complained of was made we accept that it was no inducement being held out to the witness (who at the time had already been convicted and sentenced) but that it was a reassurance to him that he had nothing to fear from threats which he alleged were being put out to him.

As far as section 65 of the Constitution is concerned, on a proper construction of the provisions of this section they do not apply to the case where there is an appeal against the State (represented by the Attorney-General) from a decision given in favour of the State.

In *R v Prater* (supra) Edmund Davies J stated (at page 300): "This Court (ie, the Court of Criminal Appeal) in the circumstances of the present appeal, is content to found itself on the view which it expresses that it is desirable that, in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given." We know as a fact that the trial judge did administer the warning in the case before us. In the case of *R v Pipe* (1967) 51 Cr App R 17 which was also cited before us the conviction was quashed because the case against the accomplice witness had not yet been disposed of before he was called as a witness.

Ground 5

I now come to Ground 5 which was by far the most important ground argued. It was submitted that the only witness who gave evidence incriminating the appellants was Sunday Kargbo (PW9) who was himself an accomplice and that the trial judge's direction to the jury on the law relating to accomplices was so defective as to deprive the appellants of the prosecution of the law to which they were entitled. It was contended in 5(a) that the trial judge contradicted himself in describing to the jury what Sunday Kargbo's position was in law, thereby leaving it open to the jury to convict on the evidence of a self-confessed accomplice without looking for corroboration.

In dealing with the question of accomplice the trial judge had this to say:

> "Before I come to deal with the evidence there is a warning I am in law bound to administer to you in respect of the evidence of witness Sunday Kargbo PW9, who has held himself out to have been an accomplice of these four accused who stand charged. There is nothing to stop you convicting on Sunday Kargbo's evidence but it is my duty to warn you that it is dangerous to convict on such a witness's evidence unless such evidence is corroborated. Corroborative evidence is independent evidence which affects the accused by connecting or tending to connect his with the crime, that is evidence which confirms in some material particular not only that the crime has been committed it. It need not be direct evidence. It is sufficient if it is merely circumstantial evidence of the accused's connection with the crime and it need not relate to everything".

He then referred to certain Exhibits tended in evidence and commented as follows:

"Exhibits "A", "D", "G", and "H", were tendered by the defence, the last two Exhibits relate to the trial of Sunday Kargbo and 4 others for murder at which trial all five were convicted of the murder of Marie Dumbuya. Now, ordinarily, evidence of one offence is inadmissible on the trial of an accused for another offence. Where however on cross-examination of the witnesses for the prosecution evidence is given that persons previously convicted of an offence, which is now charged by the prosecution to have been committed by the prisoners at the bar were in fact the guilty parties and that the prisoners at the bar were not, the evidence of such convicted person is admissible; for if the convicts were the guilty parties the prisoners at the bar could not be. On this principle learned counsel for the defence depended in the tendering of Exhibits "G" and "H".

"If you believe and find Sunday Kargbo to have been an accomplice of the four accused in the dock, then my warning to you about accepting Sunday Kargbo's evidence without corroboration stands; if you find Sunday Kargbo not to be such an accomplice as he held himself out to be, then you must consider whether or out the evidence of the conviction of Sunday Kargbo and the four others with him for the murder of Marie Dumbuya sufficiently shows these four accused in the dock not to be guilty of the murder of the said Marie Dumbuya."

Leading counsel for the first appellant severely criticised this passage that it was a contradiction, and submitted that the trial judge was saying in one breath that Sunday Kargbo held himself out to be an accomplice and at the same time leaving to the jury whether or not they found him to be an accomplice. It was the duty of the trial judge to direct the jury whether or not a witness should be treated as an accomplice and that by abdicating his duty he deprived the appellant of the safeguard and protection of the law. He referred to the leading case of *Davies v DPP* [1954] 1 All ER 507 on the law relating to accomplices but this case merely lays down (i) the rule of law that it is the duty of the trial judge to warn the jury that, although they may convict on the evidence of an accomplice, it is dangerous to do so unless it is corroborated; (ii) defines who is an accomplice and (iii) establishes that where it is not clearly established that the witness was a participant in the crime, but there is evidence on which a reasonable jury could find that he was, the issue of "*accomplice vel non*" is for the jury, and the judge should direct them that, if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated.

Looking at the entire sequence in which the passage occurs the reference could only be taken to mean that the trial judge was putting the case for the defence. He had earlier on told the jury that he was in law bound to administer to them in respect of the evidence of the witness Sunday Kargbo who by confessing to a participation in the crime had held himself out to be an accomplice and warned them that although there was nothing to stop them convicting on Sunday Kargbo's evidence it was his duty to warn them that it is dangerous to convict on such evidence unless it was corroborated. Learned counsel for the respondent in replying submitted that in the first place the prosecution's case did not rest entirely on Sunday Kargbo's evidence alone and that the trial judge gave due and adequate warning to the jury and that the remarks: "if you find Sunday Kargbo not to be such an accomplice as he held himself out to be, then you must consider whether or not the evidence of the conviction of Sunday Kargbo and the four others with for the murder of Marie Dumbuya sufficiently shows these four accused in the dock not to be guilty of the murder of the said Marie Dumbuya" allude to the case for the defence *viz*, that if the jury rejected the prosecution's story that Sunday Kargbo was not such an accomplice as he held himself out to be then they should consider whether the evidence of the conviction of Sunday Kargbo and the four others with him shows the appellants not to be guilty – "for if the convicts were the guilty parties the prisoners at the bar could not be."

Ground 5(b) alleges that the trial judge failed to direct the jury that there was absolutely no evidence of corroboration of the evidence of Sunday Kargbo implicating the appellants. The case of *R v Baskerville* (1916) 12 Cr App Rep 81 was referred to. In that case Reading LCJ, in delivering the judgement of the court said (at p 88):

> "If after the proper caution by the Judge the Jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the Jury would convict in such circumstances. In considering whether or not the conviction should stand, this Court will review all the facts of the case, and will bear in mind that the Jury had the opportunity of hearing and seeing the witnesses when giving their testimony. But this Court, in the exercise of its power, will quash a conviction even when the Judge has given to the Jury the warning or advice above-mentioned if this Court, after considering all the circumstances of the case, thinks the verdict "unreasonable", or that it "cannot be supported having regard to the evidence".
>
> "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which conforms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. ...
>
> "The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. ...
>
> "The corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connection with the crime. ...
>
> "Were the law otherwise many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice."

It is not disputed that in the present case before us the trial judge administered the appropriate warning. Counsel's submission, as far as I understand it, is that the trial judge was under a duty to direct the jury that there was no independent evidence corroborating in a material particular that of the accomplice, and his failure to do so has resulted in the appellant(s) thereby losing the protection afforded them by the law. But this argument is based on two wholly false premises. In the first place it presupposes that there is no corroborative evidence, which is not quite correct as will be seen in a moment. It also presupposes in the second place that corroboration is necessary (and the case before us is not one of those governed by statutory provision); if we accept the proposition that a jury can convict on the uncorroborated evidence of an accomplice provided adequate warning is given them by the trial judge, in what circumstances then can we say that a duty is imposed on him to direct the jury that there was no evidence of corroboration? It is only on those cases where statute expressly requires corroboration, and there, in the absence of such corroborative evidence, the trial judge must stop the case at the close of the prosecution and direct the jury to acquit the accused. Where no such statutory provision applies (as in the present case) and the evidence adduced on behalf of the prosecution consists of the uncorroborated evidence of an accomplice, the judge should leave the case to the jury after giving them the necessary caution. In the case of *R v Anslow* (1962) Crim LR 101 which was cited before us, the appellant's appeal was allowed because, although the trial judge had given the appropriate warning about

the danger of convicting on the evidence of an accomplice alone, he had unfortunately used words implying that there was in that case some material which could properly be regarded as corroboration when in fact such was not the case and the jury was misled thereby.

On the question of corroboration, whilst it is conceded that apart from Sunday Kargbo's there is no direct positive evidence implicating any of the appellants, on the other hand, taking the totality of evidence which was before the court, there is, at least as far as the first appellant is concerned, strong circumstantial evidence from other independent witnesses corroborative of Sunday Kargbo's story and which implicates him (first appellant) with the commission of the crime. The evidence of the Road Transport Department driver Dupigny (who was detailed to drive the first appellant) who stated that on the 14th of April 1972, the first appellant drove off with his fitter in his red Volkswagen car and that he was absent from his house from between say 4.30 pm to about 11 pm when he returned in the same red Volkswagen car; the evidence of the ferry-men who stated that sometime in April 1972 first and fourth appellants crossed the ferry in a red car towards the evening hours and that they headed for Sendugu and that subsequently in the night they crossed back in the same red car, and that it was after this they heard of the disappearance of the deceased; the evidence of Bomwarra Kamara, the wife of the Paramount Chief of Senda Magbolonte, who stated that in April 1972, two weeks before the disappearance of the deceased was reported to her husband, the first appellant met her at Sendugu and gave her money to prepare a meal for him, that she prepared the meal and that the first appellant returned afterwards on the same day and ate the food, that he was in his car; the evidence of Pa Foray Kamara, the Headmen of Halal Village who stated that "towards the end of the dry season and the commencement of the rainy season" of 1972 first appellant and another man went to him in his house at Halal Village and bought a sheep from him that he told him he was going to Kadelay Village which is in the vicinity where the crime was committed (this has not been challenged) that after a long while he returned and collected the sheep and placed it in his vehicle and went away, that 26 days later the police went to his Village and informed him that the deceased had been killed; and lastly the statement which the first appellant himself made from the dock in his defence confirming that he did buy sheep from Pa Foray Kamara, that Bomwarra Kamara did prepare a meal for him, although he stated that it was on 17th December 1971 that all this happened and not 14th April 1972. All these pieces of evidence are so compelling as to make the inference irresistible that first appellant was at the scene of the crime.

The first appellant was the Parliamentary representative at the time for the area where the murder was committed and he himself had stated in his statement to the police that there was nothing to stop him visiting his constituency day or night but as there was a certain faction opposed to him there he had last visited that particular area on 17th December 1971 when he went to buy sheep for his Christmas preparations. By the verdict which the jury returned they must have rejected his alibi, to wit that he was nowhere near the vicinity of crime; but I must hasten to add that the fact that his story was rejected, ipso facto does not amount to corroboration of the accomplice's story; mere proof of opportunity alone does not amount to corroboration. In *R v Chapman* (supra) Roskill LJ stated (at page 630) that:

> "If the defence is an alibi and the alibi breaks down the Jury must be told that they may convict merely because the alibi has broken down, but they are entitled to ask themselves the single question, "Why has a false alibi been tendered?" If there is only one possible answer to that question they are entitled to give their answer by their verdict. Similarly in a case such as the present if the accused are found to have given evidence which is incapable of belief or otherwise unreliable, the Jury are entitled to ask the single question, "Why has this evidence which we have rejected been tendered to us?" If there is only one possible answer – that the accomplice though uncorroborated, was telling the truth – again they are entitled to give their verdict, provided, of course, that the trial Judge has

properly warned them of the dangers of acting on the accomplice's uncorroborated evidence."

In Ground 5(c) it was submitted that trial judge failed to indicate to the type or nature of the evidence actually given at the trial which if believed could amount to corroboration and that this failure might well have led the jury to treat irrelevant matters as corroboration. Counsel for the respondent contended that the only duty cast on the trial judge was to explain to the jury what is the nature of corroboration and submitted that the trial judge, after he had given the appropriate warning, went on to explain what is meant in law by corroboration.

In the case of *R v Goddard* (1921) 16 Cr App Rep 156 which was cited before us, Parker LCJ stated (at page 161):

"In the general run of cases, where there is evidence capable of mounting to corroboration, the duty of the Judge must depend upon the exact facts of the case, bearing in mind that he certainly would not be expected to refer to every piece of evidence which is capable of amounting to corroboration but, in general, in the judgment of this Court he should give a broad indication of the evidence which the jury, if they accept it, may treat as corroboration".

The Lord Chief Justice was here stating the principle which has been established in a long line of cases the most notable of which is *R v Finch* (1916) 12 Cr App Rep 77 to wit, that it is not sufficient merely to direct the jury on the law of the case; they are entitled to the Judge's assistance on the facts.

We are of the opinion that the criticism that the trial judge failed to indicate to the jury the type or nature of the evidence given at the trial – as far as the first appellant is concerned – is not without foundation, but equally so we are of opinion that the trial judge's failure to give such an indication does not necessarily render the conviction invalid. On the State evidence which was before the Court and bearing in mind the warning which the trial judge gave to the jury as regards the danger of convicting on the uncorroborated evidence of an accomplice, the direction given to the jury of what type of evidence could be regarded as corroboration, and also the charge given as regards the burden of proof (concerning which counsel himself admitted was a proper one) it cannot be said that the non-direction of particular pieces of evidence capable of amounting to corroboration has resulted in a misdirection.

This was a gruesome murder and the evidence of the medical officer and witnesses who first saw the body reveal that certain parts of the body were absent confirming in a way Sunday Kargbo's evidence that after the slaying certain organs were removed from the body of the deceased. This at once places a peculiar tinge on the offence. The jurymen who were all citizens of the State as they watched and listened to the witnesses give their own knowledge of the type of case they were dealing with and from their verdict which they returned they must have elected to believe the story of Sunday Kargbo despite the fact that he was an accomplice and despite the fact that he had made previous inconsistent statements. We find nothing to disturb their verdicts as far the first, second and third appellants are concerned.

As regards the fourth appellant however, this court has before it Exhibit "H", the records of the case, *Sunday Kargbo and Four Others v The State* where on his own admission both in his statement to police and in his unsworn statement from the dock before the court which tried him, one Ansumana Kamara had admitted that he was the one and only person who killed the deceased Marie Dumbuya by cutting off her throat with a knife, for which he was convicted of the offence of murder and sentenced to death. This court is also not unmindful of its own decision confirming the said conviction and sentence of said Ansumana Kamara when the matter was brought before it on appeal. In the circumstances therefore we cannot support the verdict of the jury as far as the second count is concerned with respect to the fourth appellant

(who incidentally was found not guilty by them on the first count charging him with dealing in person) and hold that it will be a miscarriage of justice to sustain his conviction.

While Mr Macaulay was replying to the submission of counsel for the respondent he raised a point concerning the judgement of this court in the case of *Sunday Kargbo and Four Others v The State*. That case was decided by this court (Tejan, Agnes Macaulay and Beccles Davies JJA) on the 15th day of February 1974. Sunday Kargbo was the ninth prosecution witness in trial which is now the subject of this instant appeal.

The substance of Mr Macaulay's observation was that justice would not appear to be done by Tejan JA (and for that matter Beccles Davies JA) hearing this appeal as Tejan JA had made up his mind as to certain issues in that case which have a direct connection with this appeal. We will now consider briefly whether there is ground for such a disqualification.

Mr Macaulay has urged in support of his contention the dictum of Hewart LCJ in *R v Sussex JJ; ex parte McCarthy* [1924] 1 KB 256 that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." It is true that Tejan JA delivered the judgement of the Court in *Sunday Kargbo and Four Others v The State* but that to my mind, is insufficient to entitle the first appellant to raise the issue of bias.

In order to disqualify Tejan and Beccles Davies JJA from hearing the instant appeal, a real likelihood of bias must be shown. Slade J delivering the judgement of the Divisional Court of the Queens Bench in *R v Camborne Justices, ex p Pearce* [1954] 2 All ER 850 at p 855 said:

> "... In the judgement of Court, the right test is that prescribed by Blackburn J in *R v Rand* LR 1 QB 233, namely that to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown. This Court is, further, of the opinion that a real likelihood of bias must be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries. The Constitution prohibits judges of the Judicature from hearing appeals against their individual judgements or those delivered by a bench of judges of which anyone of them was a number. Section 66(7) reads: "Neither the Chief Justice nor any Justice of the Court of Appeal or of the Supreme Court or Judge of High Court may take any part in the hearing of an appeal from his own judgement or a bench of judges of which he was a member."

Section 95(1) of the Constitution (Act No.6 of 1971) and section 4(1) of the Constitution (Consequential Provisions) Act 1971 provide for the preservation of existing law and enactments notwithstanding the repeal of the Sierra Leone (Constitution) Order in Council 1961. The law and enactments are to continue with the necessary modifications as if they had been enacted in pursuance of the Constitution of 1971. Those provisions therefore preserved the Courts Act 1965 (Act No 31 of 1965). Section 38 of the Courts Act contains in essence the restriction imposed by section 66(7) of the Constitution. Section 38 states that the Court (ie the Court of Appeal) shall not sit as a judge on the hearing of an appeal (a) from any judgement given by himself or any judgement given by any Court of which he was a member; (b) against a conviction or sentence if he was the Judge before when the appellant was convicted or sentenced.

Neither under the Constitution of Sierra Leone nor the Courts Act is there to be found the type of disqualifications on judges of the Court of Appeal, which has been urged on us by Mr. Macauley.

Having considered the common law and statutory positions, we do not think a case worthy of disqualification has been made out on behalf of the first appellant.

In view of all the foregoing, the appeal of the fourth appellant is allowed and his conviction and sentence is quashed.

The appeal of the first, second and third appellants is dismissed and their conviction and sentence affirmed. As regards the mode of execution of sentence passed by the Lower Court, section 18(1)(d) of the Interpretation Act No 8 of 1971 provides that:

> "The repeal or revocation of an Act, unless a contrary intention appears, shall not affect any penalty, forfeiture or punishment incurred in respect of any offence committed thereunder."

The provisions therefore of Section 1 of the Criminal Procedure (Amendment) (No 3) Act 1973 relating to the execution of sentence of death by shooting in a public place by a firing squad, which only came into force on first November 1973, do not apply, since the offence for which the three appellants have been convicted was committed on 14th April 1972. Accordingly, we vary the mode of the execution of sentence of death passed on each of the first, second and third appellants to the extent that each shall be hanged by the neck until he is dead.

Reported by Anthony P Kinnear and Victoria Jamina