IN THE SUPREME COURT OF SIERRA LEONE

CORAM:

The Honourable Mr. Justice E. Livesey Luke, C.J. - Presiding

The Honourable Mr. Justice C.A. Harding - J.S.C.

The Honourable Mr. Justice O.B.R. Tejan - J.S.C.

The Honourable Mrs. Justice A.V. Awunor-Renner - J.S.C.

The Honourable Mr. Justice S. Beccles Davies - J.S.C.

CRIMINAL APPEAL NO. 1/81

BETWEEN:

SAMUEL LOMBA - APPELLANT

AND

THE STATE - RESPONDENT

CHARLES MARGAI, ESQ., for Appellant

N.D. TEJAN-COLE, ESQ., D.P.P. for Respondent

J U D G M E N T

Delivered on 24th day of February, 1982.

BECCLES DAVIES, J.S.C.:- The Appellant was first arraigned before the High Court in Bo on 5th February, 1979. He had been arraigned for the offence of murder. A jury had been empanelled and sworn to try him on 21st February, 1979. He was given in charge of the jury. Prosecuting Counsel called six witnesses, after which he applied to the trial judge on 2nd March, 1979 for an adjournment to the following sessions as he had encountered some difficulty in locating a vital witness for the prosecution. The trial judge granted the application with considerable reluctance.

The case was not tried at the immediately succeeding sessions. It was on 29th May, 1979, again adjourned to the succeeding sessions which were to commence on 18th September, 1979.

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On 2nd October, 1979, during the currency of the September 1979 sessions, the appellant was again arraigned. A fresh jury were empanelled, and he was given in their charge. Eight witnesses testified for the prosecution. Prosecuting Counsel then applied for an adjournment of the trial to the following sessions as his last witness was still inavailable. The trial judge granted the adjournment with the same reluctance he had expressed on the first occasion.

Then came the November sessions. The end of the road was in sight. The appellant was arraigned for the third time. The third jury were empanelled on 26th November 1979. The trial of the appellant was gone through without any impediment. The jury found the appellant not guilty of murder. He was however found guilty of manslaughter and sentenced to imprisonment for life.

The appellant presented appeals against his conviction and sentence respectively, to the Court of Appeal. Five grounds of appeal were before the Court of Appeal. The fifth ground emerged as a result of the Director of Public Prosecutions' intimation to the Court of his view that the third arraignment, trial and conviction of the appellant were a nullity. Counsel for the appellant in consequence of the Director of Public Prosecutions' intimation to the Court formulated a ground of appeal in these terms -

> "That the trial in the Court below was a nullity as the Court had no jurisdiction to entertain trial."

That was the only ground of appeal argued before that Court. Counsel for the appellant abandoned the other grounds and accepted before us that he had done so. The Court of Appeal

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(Warne, Davies and Short JJ.A.) delivered a written judgment on the issue. Warne, J.A. in delivering the judgment of the Court had said -

> "The jury sworn on the 21st February, 1979 was never discharged and as such the trial which commenced on that date was still pending.
>
> In my view the Court had no jurisdiction to start a new trial with a fresh jury on the 18th September, 1979. This trial in law is a nullity.
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> The appeal therefore must needs succeed and the appeal is allowed.
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> However, the provision of S.59(5) of Act No.31 of 1965 in my opinion is applicable. S.59(5) states 'Where the Court of Appeal is of opinion that the proceedings in the trial Court were a nullity, either through want of jurisdiction or otherwise, the Court may order the appellant to be tried by a Court of competent jurisdiction.'
>
> The Court will not order the appellant to be tried by a Court of competent jurisdiction because the trial which started on 21st February, 1979 is incomplete.
>
> The appellant is remanded in custody."

The appellant was dissatisfied with the last two paragraphs quoted above by which the Court of Appeal had ordered him to be remanded in custody, while declining to order his trial before a court of competent jurisdiction, because in their view, the trial of 21st February was still pending.

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At the two trials preceding that at which the appellant was convicted, prosecuting counsel had experienced difficulty in securing the attendance of a vital witness for the prosecution. The presiding judge at those trials upon granting the application for an adjournment had ordered that the trial was "adjourned to next sessions". There was no order discharging the jury. It is an established rule that when an accused is put in charge of the jury, they must return a verdict unless they are discharged from giving a verdict by the trial judge. (See R. v HEYES 1950 2 All E.R.587).

The Court of Appeal had placed reliance on Section 181 of The Criminal Procedure Act 1965 in support of its view that the trial which commenced with a jury on 5th February, 1979 and was adjourned was still pending. Section 181 provides -

> "If a trial is adjourned, the jurors shall be required to attend at the adjourned sitting and at every subsequent sitting until the conclusion of the trial."

Reading that section in isolation would give the impression that when once a jury are empanelled 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 delivery of a 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 Section 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

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of the jurors in the list, resident at and near the district, to be written on separate cards or pieces of paper of equal 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, except those who may have served at the last preceding session, shall be returned to the ballot boxes, and, when required the names shall be re-drawn in manner aforesaid." (Emphasis mine).

"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." (Emphasis mine).

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A juror therefore cannot serve at any session immediately succeeding that at which he had 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 empanelled, then such adjournments with the jury are to be done within the sessions for which they are summoned for service. By a fiction of law the duration of a session (like an Assize) is one legal day divided into several natural days. (See DOE v HERSEY 3 Wils. 274). 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.

I have used the expression 'or any other judge sitting in his stead' because of a reference which was made by counsel during the course of argument to a decision of the Court of Appeal. The decision was DAUDA KAMARA v THE STATE Cr.App.5/76 (unreported) delivered on 22nd October, 1976. The point raised in that case was the same as in this appeal. The Court had held that the jury had to be discharged by the judge before whom they had been empanelled before adjourning the hearing to the subsequent sessions and not the judge who presided over the subsequent sessions. The Court had said -

> "When Kutubu J. adjourned the case against the appellant to the next sessions of the Court and ordered the appellant to be kept in custody he should there and then have discharged the jury as they had not given a verdict.

It was Kutubu J. who put the accused in charge of the jury and who should have in the circumstances discharged the jury and not the Judge before whom the Appellant was subsequently arraigned. This was an unfortunate mistake and in our view the trial was void ab initio. The Appellant ought not to have been arraigned a second time before Okoro-Idogu J. in the absence of a discharge of the jury by Kutubu J. In our view there was no trial of the Appellant. There was certainly a mistrial. The proceedings before Okoro-Idogu were void ab initio."

It is not the judge who formally puts an accused in the charge of the jury. It is the Registrar of the Court. The Registrar addresses them thus -

"Ladies and Gentleman 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 true verdict thereon."

The right to discharge the jury is not personal to a trial judge. Any judge of the High Court sitting in his stead could do it. To hold otherwise would cause untold inconvenience in the administration of justice. Suppose a trial judge before whom an accused had been given in charge took ill

suddenly or died during the trial? If such a restricted view is taken on the subject, the only course open to the prosecution would be to enter a nolle prosequi against the accused, before a recommencement of the trial could be achieved.

Okoro-Idogu J. was right in discharging the jury at the sessions immediately following those at which they had served. The provisions of S. 162 had operated to relieve them of further service immediately the sessions at which they had served had ended. What the judge did in effect was to place on record that they had been discharged by reason of the operation of the provisions of S.162. In view of the foregoing, in my judgment, DAUDA KAMARA v THE STATE supra was wrongly decided and ought not to be followed. I would therefore overrule it.

Returning to the present appeal, I would hold that the trial judge should have discharged the jury on 2nd March,1979 before adjourning the indictment to the following sessions. Trial judges would be well advised when they find that they cannot against the end of a session, complete cases (in which juries had been empanelled 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 that jury could not have been selected and summoned for service at the immediately succeeding sessions. A fresh jury would have had to be empanelled as was eventually done in this case. The appellant's eventual 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 therefor an order dismissing the appeal in the Court of Appeal and in this Court.

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(Hon.Mr.Justice S. Beccles Davies, JSC)

I agree .....
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(Hon. Mr. Justice E. Livesey Luke)
Chief Justice

I agree .....
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(Hon. Mr. Justice C.A. Harding, JSC)

I agree .....
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(Hon. Mr. Justice O.B.R. Tejan, JSC)

I agree .....
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(Hon.Mrs.Justice A.V. Awunor-Renner,JSC)