SESAY & KAMARA v THE STATE

SC

SUPREME COURT OF SIERRA LEONE, Supreme Court Criminal Appeal 7 of 1982, Hon Mr Justice Livesy Luke CJ, Hon Mr Justice CA Harding JSC, Hon Mrs Justice AVA Awunor-Renner JSC, Hon Mr Justice OBR Tejan JSC, Hon Mr Justice S Beccles Davies JSC, 12 December 1984

[1] Criminal Law & Procedure – Evidence – Involuntary statement – Obligation of judge to hold voir dire to determine voluntariness and admissibility

[2] Criminal Law & Procedure – Sentencing – Death sentence – Whether mandatory – "Shall be liable" – "Liable" imports element of discretion – Death sentence discretionary – Larceny Act 1916 s 23(1)(a)

[3] Criminal Law & Procedure – Sentencing – Aggravated robbery – Exercise of discretion – 90 years imprisonment manifestly excessive

[4] Courts – Stare decisis – Exceptions to principles of stare decisis not applicable to Court of Appeal in Sierra Leone – Critical to stability and development of the rule of law that the Court of Appeal follow its previous decisions and that of the Supreme Court unless distinguishable – Constitution of Sierra Leone 1978 ss 102(2), 107(3)

[5] Words and Phrases – "Liable" – "Shall be liable" – Larceny Act 1916 s 23(1)(a)

The appellants were convicted by a jury of aggravated robbery contrary to s 23(1)(a) of the Larceny Act 1916 and other offences under the Offences Against The Person Act 1861. The first appellant was sentenced by Williams J to 90 years' imprisonment and the second appellant was sentenced to 50 years' imprisonment. On appeal, the Court of Appeal dismissed the appeals against conviction, set aside the sentences of imprisonment on the aggravated robbery charge and substituted the death sentence against both appellants, against which the appellants appealed to the Supreme Court. The first issue was the admissibility of the second appellant's signed statement to the police, as he claimed at the trial that he did not make the statement and was forced to sign it. The second issue was whether the Court of Appeal was right to hold that the death sentence was mandatory for a conviction under s 23(1)(a) of the Larceny Act 1916. The third issue was whether the words "shall be liable" provided the trial judge with a discretion as to whether the death sentence should be applied.

Held, per Livesy Luke CJ, dismissing the appeal of the first appellant against conviction, but allowing the appeal against sentence, and allowing the appeal of the second appellant against conviction and sentence:

1. The second appellant did not formally object to the admissibility of his statement to police as he was not represented by counsel at the trial. The failure of an accused person or his counsel to take a formal objection to the admissibility of a statement did not absolve a trial judge of his duty of determining the issue of voluntariness of a statement if it is raised. During the trial the second appellant indicated that he did not make the statement and that he was forced to sign the statement. These assertions by the second appellant clearly raised the issue of voluntariness of the statement and consequently challenged its admissibility.

2. As the second appellant had challenged the authorship of his statement and the voluntariness of his signature, the trial judge was under a well-established duty to hold a trial within a trial (voir dire) in order to determine the issue of voluntariness of the statement and to rule thereon. Therefore, the judge wrongly admitted the statement complained of. As the second appellant's statement was the only evidence submitted against him by the prosecution against him, the verdicts could not be supported and the convictions against him were quashed and the sentences set aside. *The State v Turay & Ors* (Supreme Court Criminal Appeal 2/81, unreported, 13 July 1982) and *Ajodha v The State* [1982] AC 204, [1981] 2 All ER 193, [1981] 3 WLR 1 followed.

3. The issue in this case was identical to that determined by the Court of Appeal in *Fornah's case*, which decided that the words "shall be liable" in the Treason and State Offences Act 1963 provided the judge with discretion as to whether a death sentence should be passed. As such, under s 107(3) the Constitution 1978, the decision in *Fornah's case* was binding on the Court of Appeal, which erred in holding that the sentence of death was mandatory under s 23(1)(a) of the Larceny Act 1916. *Fornah & 14 others v The State* [1974-82] 1 SLBALR 48 followed.

4. Even if the exceptions to the general principles of stare decisis that existed in England are applicable in Sierra Leone, the Court of Appeal could only overrule a previous decision if satisfied that the case comes within one of the recognised exceptions. In the instant case the Court of Appeal did not even consider or refer to *Fornah's case*, nor did they give any consideration to the question whether the case came within one of the recognised exceptions. In any event, the circumstances in the present case did not show that any of the recognised exceptions were present to justify the Court of Appeal departing from its previous decision. *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, *R v Taylor* [1950] 2 KB 368 and *R v Gould* [1968] 1 All ER 849 distinguished.

5. However, exceptions to the principle of *stare decisis* were not applicable to the Court of Appeal. Section 107(3) of the Constitution was clear and unambiguous. It says in simple language that the Court of Appeal shall be bound by its previous decisions. In contrast, under s 102(2) of the Constitution the Supreme Court may in certain circumstances depart from its own previous decisions. In view of the position occupied by the Court of Appeal in our hierarchy of courts, it is of the utmost importance that its decisions on the same question of law be consistent. The Justices sit in panels and the panels change from time to time, and sometimes from case to case. If each panel is allowed to reach its own decision on the same point of law, in total disregard of a previous decision of the court, then the result would be chaos. Conflicting decisions on the same point of law would be given by the same court resulting in uncertainty in the law. Such a state of affairs would not be good for the development of the law or for the public that come before the courts for redress in both civil and criminal matters. It is of the utmost importance that the Judges of the Court of Appeal should loyally follow not only previous decisions of the Supreme Court but also previous decisions of the Court of Appeal; even if they disagree with the previous decisions, unless they can distinguish them from the case before them. *Farrell v Alexander* [1977] AC 59 applied.

6. The plain and ordinary meaning of the word "liable" is "exposed to possibility or risk," "exposed or open to." Therefore, when it is provided that a convicted person shall be liable to a specified punishment, it means that he runs the risk of that sentence being passed on him, or he exposes himself to or leaves himself open to that sentence. It does not mean that the sentence will be passed on him. He merely exposes himself to that sentence and runs the risk of or opens himself to that sentence being passed on him. "Liable" imports the element of discretion and confers a discretion on the trial judge as to whether or not the death sentence should be imposed. *James v Young* (1884) 27 Ch D 652 and *Re Loftus-Otway* (1895) 2 Ch 235 applied.

7. The words "shall suffer death" or "shall pronounce the sentence of death" provide for a mandatory death sentence, whilst the words "shall be liable to suffer death" provide for a discretionary death sentence. In the former case the trial judge must pass the death sentence. But in the latter case, the judge has a discretion whether to impose the death penalty or not. *Opoya v Uganda* (1967) EA 752 applied.

8. Therefore, the proper construction to be put on s 23(1)(a) of the Larceny Act 1916 is that it provides for a discretionary death sentence. It gives the judge a discretion as to whether to pass the death sentence or not. Of course, in exercising his discretion, the judge needs to take into consideration all the relevant circumstances of the case. If the judge decides not to impose the death penalty he will have to decide, in the exercise of his discretion, what other punishment, warranted in law, to pass and the extent of such punishment. So, if he decides to impose a custodial sentence, he will have to decide the length of such sentence.

In the present case, it had not been suggested that the trial judge had exercised his discretion wrongly in imposing a custodial sentence. *Fornah & 14 others v The State* [1974-82] 1 SLBALR 48 affirmed.

9. Taking into consideration all the circumstances, there could be no doubt that the sentence of 90 years imprisonment imposed on the first appellant was manifestly excessive as it would amount to more than life imprisonment. This was a proper case in which the court should interfere with the sentence. The sentence on count (1) was therefore reduced to 30 years' imprisonment, and each of the other counts to 25 years' imprisonment, both to run concurrently.

[Editorial note: this case highlights the criticality of law reporting in Sierra Leone. The ability of courts to adhere to and apply the principles of stare decisis depend on the availability of reported decisions. In this case, the failure of the Court of Appeal to consider Fornah's case*, which was unreported at the time, led to the Court of Appeal incorrectly holding that the death sentence was mandatory and imposing the death sentence on the appellants.]*

Cases referred to
Ajodha v The State [1982] AC 204, [1981] 2 All ER 193, [1981] 3 WLR 1
Director of Public Prosecutions v Ping Lin [1975] 3 All ER 175, [1976] AC 574
Farrell v Alexander [1977] AC 59
Fornah & 14 others v The State [1974-82] 1 SLBALR 48
Ibrahim v The King (1914) AC 599
James v Young (1884) 27 Ch D 652
Loftus-Otway, Re (1895) 2 Ch 235
Miliangos v George Frank (Textiles) Ltd [1975] 1 QB 487
Opoya v Uganda (1967) EA 752
R v Gould [1968] 1 All ER 849
R v Taylor [1950] 2 KB 368
The State v Turay & Ors (Supreme Court Criminal Appeal 2/81, unreported, 13 July 1982)
Young v Bristol Aeroplane Co Ltd [1944] KB 718

Legislation referred to
Dockyards etc. Protection Act 1772
Constitution of Sierra Leone 1978 ss 101(1), (2), 107(3)
Imperial Statutes (Criminal Law) Adoption (Amendment) Act 1971 s 2
Larceny Act 1916 ss 23(1)(a) 24, 25
Piracy Act 1837 s2
Offences Against The Person Act 1861 ss 2, 11,14, 18
Treason and State offences Act 1963 s 3(1)

Other sources referred to
Halsbury's Laws of England [3rd Ed] Vol 10 para [888] pp 486-487

Appeal
This was an appeal against a decision of the Court of Appeal on 15 November 1982 to dismiss the appellants' appeals against conviction, set aside their sentences of imprisonment and substitute the death sentence. The facts appear sufficiently in the judgment of Livesey Luke CJ.

Mr Ade Renner-Thomas for the appellants.
Mr MT Ngobeh for the State.

Livesey Luke CJ: The appellants, Abdulai Sesay (alias Ibrahim Kamara) and Abdulai Kamara (alias Blackie), were in November 1980 tried in the High Court sitting in Freetown for offences alleged to have been committed in Koidu Town in the Kono District in October 1979. The trial was by William J with a jury. The indictment on which the appellants were tried contained six counts:

Count 1: Robbery with aggravation contrary to s 23(1)(a) of the Larceny Act 1916, as amended by s 2 of Act No 16 of 1971.

Count 2, 3, 4: Wounding with intent to murder contrary to s 11 of the Offences Against The Person Act 1861.

Count 5: Shooting with intent to murder contrary to s 14 of the Offences Against The Person Act 1861.

Count 6: Wounding with intent contrary to s 18 of the Offences Against The Person Act 1861.

The trial concluded on 12 November 1980 when the jury returned a unanimous verdict of guilty on all six counts against the first appellant, along with a unanimous verdict of guilty on counts 1, 2, 3, 4 and 6 against the second appellant. The jury returned with a not guilty verdict on count 5 against the second appellant. The first appellant was accordingly sentenced: count 1: 50 years' imprisonment; count 2: 25 years' imprisonment; count 3: 25 years' imprisonment; count 4, 25 years' imprisonment; count 5: 40 years' imprisonment and count 6: 25 years' imprisonment. Count 1 and 5 were to be served consecutively, counts 2, 3, 4 and 6 would run concurrently with the sentence for count 1 and 5.

The second appellant was sentenced to 25 years of imprisonment on each of the 5 counts, count 1 and 2 were to run consecutively and counts 3, 4 and 6 were to run concurrently with the sentence for count 1 and 2. The result therefore was that the first appellant was sentenced to serve a total of 90 years in jail, whilst the second appellant was sentenced to serve a total of 50 years in jail.

Both appellants appealed to the Court of Appeal against their respective convictions and sentences. The appeals were heard by the Court of Appeal (During, Warne and Navo JJA) in September 1982. Judgment was delivered on 15 November 1982, dismissing the appeals against convictions, and setting aside the sentences of imprisonment imposed in respect of the convictions on count 1 and substituting therefore a sentence of death against both appellants.

It is against that decision that the appellants have appealed to this court.

The facts of this case make gruesome reading and it is necessary to set them out briefly. Hassan Hussein Srour (Hassan for short), a business man and diamond dealer, lived with his wife and two daughters at No 31 Yengema Road, Koidu Town in the Kono District. On the night of 25 October 1979 Hassan and his family retired to bed at about 11pm. Early on the following morning, they were all aroused from sleep by a loud noise. Hassan got out of bed to find out what was happening. He discovered that the front door of his house was being hit from outside and that the door had already been cracked. He tried to hold on to the door while raising an alarm. His children were also shouting "thief". He then heard a gunshot from outside. The shot penetrated one of the windows near where the children were standing.

The front door was then broken open and five men forced their way into the house. All the five men were masked and armed with a shot gun, a pistol, a wooden pestle and a crow bar. They rushed at Hassan and demanded the key to his safe. He told them that he did not have the key with him. Whereupon the intruder armed with the matchet hit him on the head, a result of which he sustained a wound on the head, and he fell to the ground with blood oozing from the wound. He became dizzy, but the intruders continued to demand the key. The intruder armed with the matchet and the one armed with the pestle rushed at the wife who was about 4 months pregnant at the time. The intruder holding the matchet attempted to hit the wife with it, but one of daughters (Rima) went to the mother's rescue. The intruder then turned on Rima and hit her on the head with the matchet. As a result she fell to the floor and became unconscious. The wife begged the intruders not to hit her husband, but she also suffered the same fate. They demanded the key to the safe from her and then proceeded to beat her all over her body with the pestle and to strike her on the head with the matchet, as a result of which she collapsed, and fell to the floor. The intruders then turned their attention to Hassan. One of the intruders held a pistol to his (Hassan's) back, whilst the others pushed him around the house hitting him all over the body with the pestle and the crow bar. In the process the intruders broke open the doors of three rooms in search of the safe.

They then broke open the door of a fourth room. That room was the office and the safe was located therein. The intruder armed with the crow bar then hit Hassan on his right side which caused him to fall to the ground. In his semi-conscious state, he heard one of the intruders saying to the others that they should "shoot and finish" the occupants of the house. He soon became unconscious. Hassan's brother, one Khalil, who lived next door, heard the cries for help of his brother's family. He attempted to go to their rescue. He heard shooting and noise outside. He heard his brother's children shouting that they were being killed. He went outside and almost immediately he was shot at, as a result of which he sustained injuries in both legs. Fortunately, two police constables who were on patrol duty that night heard the sound of gun shots coming from the direction of Yengema Road. They informed another constable on patrol duty. They then boarded a vehicle and went to Yengema Road. They heard the sound of gunshot coming from 31 Yengema Road. They ordered the driver to stop the vehicle. The driver stopped the vehicle but left the headlights on. The constables then saw armed masked men dressed in black coming from 31 Yengema Road. They gave chase and succeeded in apprehending one of them, the first appellant. He was holding a gun while running but he dropped it before he was caught. He was still masked when he was apprehended. The constables took off the mask. The constables took the first appellant to 31 Yengema Road. A doctor was summoned to the scene. He arrived there within a short time. On entering the house he found that several of the inmates were wounded and also saw blood all over the house. He examined Hassan, his wife, his daughter (Rima) and Khalil. He found that all four of them were bleeding profusely from wounds recently inflicted. In his opinion the wounds sustained by each of the victims were very serious. All the four victims were taken to a private hospital in Kono where they received emergency treatment.

Later that day the doctor took the victims to Freetown by plane, and had them admitted at the Military Hospital at Wilberforce. All the four victims later went abroad for further medical treatment.

The main issues raised in this appeal may be summarized thus:

Ground (1): Whether the trial judge had misdirected the jury in his summing up.

Ground (2): Whether the statement to the police of the second appellant (exhibit "O") was properly admitted in evidence at the trial.

Ground (3): Whether the verdicts of the jury against the first and second appellants were unreasonable and could not be supported having regard to the evidence.

Ground (4): Whether the Court of Appeal was right in law in holding that the sentence prescribed by section 23(1)(a) of the Larceny Act 1916, as amended by s 2 of Act No 16 of 1971, was a mandatory death sentence.

Ground 1

With regards to the first issue stated above, I think that it is sufficient to say that I find no merit in any of the misdirections alleged.

Ground 2

With regard to the second issue, the statement complained of was tendered in evidence by Police Detective Sergeant Sonny Albert Macfoy (PW12). He testified that he obtained a voluntary statement from the second appellant on 12 April 1980. When he attempted to produce the statement, the trial judge Judge made the following record of what transpired:

"At this stage the second accused states that he did not make any statement. The second accused is shown the statement and he identifies his signature thereon. He states further that he was forced to sign the document but he did not say anything to the witness."

Court: The statement is admitted in evidence and marked exhibit "O". Statement read."

Mr Renner-Thomas submitted that in view of what was said by the second appellant the learned judge should have held a trial within a trial to determine whether the statement was

admissible in evidence or not; and that the judge not having adopted that course, the statement was wrongly admitted in evidence. It is true that there no formal objection by the second appellant to the admissibility of the statement. This is understandable since he was not represented by counsel. But the failure of an accused person or his counsel to take a formal objection to the admissibility of a statement does not absolve a trial judge of his duty of determining the issue of voluntariness of a statement if it is raised. In the instant case the second appellant did not only state that he did not make the statement, but he also added that he was forced to sign the statement. In my opinion, those assertions by the second appellant clearly raised the issue of voluntariness of the statement and consequently challenged its admissibility.

It is pertinent to refer to *The State v Turay & Ors* (Supreme Court Criminal Appeal 2/81, unreported, 13 July 1982) where I said, inter alia:

> " … It has long been an established rule of English law that to render a confession by an accused person admissible at his trial the confession must be proved by the prosecution to be voluntary in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. … That rule has been stated and restated over the years by the English Courts and has been transported from English soil and transplanted in many Commonwealth countries all over the globe, where in most cases, it has taken firm root. … Where the admissibility of a statement is challenged on the ground that it was not made voluntarily, it is the duty of the judge to determine that issue. The proper course is for the judge to hold a trial within a trial (or *voir dire*) to try the issue."

It is also relevant to refer to *Ajodha v The State* [1982] AC 204, [1981] 2 All ER 193, [1981] 3 WLR 1 where the question for determination was almost identical to the issue now under consideration. The question was stated by Lord Bridge who delivered the opinion of the Board as follows, [1981] 3 WLR 1 at p 5:

> "The primary question for their Lordship's decision in these appeals can be stated in its simplest form as follows: when the prosecution proposes to tender in evidence a written statement of confession signed by the accused and the accused denies that he is the author of the statement but admits that the signature or signatures on the documents are his and claims that they were obtained from him by threat or inducement. does this raise a question of law for decision by the judge as to the admissibility of the statement?"

His Lordship answered the question posed at pp 10-12 of the report. After citing the famous dictum of Lord Sumner in *Ibrahim v The King* (1914) AC 599 at 609, and referring to *Director of Public Prosecutions v Ping Lin* [1975] 3 All ER 175, [1976] AC 574, he said at pp. 10-11:

> "Given this deeply entrenched principle it seems to their Lordships clear beyond argument that, if the prosecution tender in evidence a statement in writing signed in one or more places by the accused, they are relying on the signature as the acknowledgment and authenticator by the accused of the statement as his own, and that from this it must follow that, if the voluntary character of the signature is challenged, this inevitably puts in issue the voluntary character of the statement itself.
>
> In all cases where the accused denies authorship of the contents of a written statement but complains that the signature or signatures on the document which he admits to be his own were improperly obtained from him by threat or inducement, he is challenging the prosecution's evidence on both grounds and there is nothing in the least illogical or inconsistent in his doing so."

And His Lordship continued at p 12:

> "It may be helpful if their Lordships indicate their understanding of the principles applicable by considering how the question should be resolved in four typical situations most likely to be encountered in practice … (2) The accused, as in each of the instant appeals, denies authorship of the written statement but claims that he signed it involuntarily. Again, for the reasons explained, the judge must rule on admissibility, and,

if he admits the statement, leave all issues of fact as to the circumstances of the making and signing of the statement for the jury to consider and evaluate."

In the instant case, according to the judge's record of proceedings (quoted above) the second appellant first denied the authorship of the contents of the statement and secondly alleged that his signatory appearing on the statement was improperly obtained from him by force.

In my opinion the second appellant was in those circumstances challenging the prosecution's evidence on both grounds, namely, the authorship of the statement and the voluntariness of his signature. In those circumstances, the trial judge was under a duty to hold a trial within a trial to determine the issue of voluntariness of the statement and to rule thereon. It is beyond argument that the trial judge failed to follow that course which as indicated earlier, is based on well-established principles of fundamental importance. In my judgment therefore the learned judge wrongly admitted the statement complained of.

Ground 3

I shall now deal with the third issue which can be disposed of very briefly. The evidence led by the prosecution has been summarized above. The first appellant gave evidence on oath at the trial denying participation in the crime. The jury returned a unanimous verdict of guilty against him in respect of all the counts of the indictment. In the course of their judgment, the Court of Appeal said inter alia that the evidence against the first appellant was overwhelming. I wholeheartedly agree. The evidence against the first appellant was indeed overwhelming. I therefore find no justification for this court to interfere with the verdict of the jury on any of the counts and the resultant convictions thereon. With regard to the second appellant, apart from the statement complained of (i.e., exhibit 'O') the prosecution led no other evidence against him. He gave evidence on oath denying participation in the crime. I have already ruled that the statement (exhibit 'O') was wrongly admitted in evidence. Therefore, its contents should not have been left to the jury at all. If the statement had not been left to the jury, then, as indicated earlier, there would have been no other evidence against the second appellant on which to found a conviction on any of the counts laid against him in the indictment. In the circumstances, the irresistible conclusion which I come to is that the verdicts against the second appellant in respect of all the counts against him were unreasonable and could not be supported having regard to the evidence. It follows that the convictions against the second appellant must be quashed, and the sentences set aside.

Ground 4

I shall now turn my attention to the fourth and final issue. Under count (1) of the indictment both appellants were convicted of robbery with aggravation contrary to s 23(1)(a) of the Larceny Act 1916, as repealed and replaced by Act No 16 of 1971. Section 23 of the Larceny Act 1916, as repealed and replaced by s 2 of the Imperial Statutes (Criminal Law) Adoption (Amendment) Act 1971 (Act No. 16 of 1971) reads as follows:

"23(1) Every person who:

(a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob any person;

(b) robs any person and, at the time of or immediately before or immediately after such robbery, uses any personal violence to any person:

shall be guilty of felony and on conviction thereof liable to suffer death.

(2) Every person who robs any person shall be guilty of felony and on conviction thereof liable to imprisonment for life.

(3) Every person who assaults any person with intent to rob shall be guilty of felony and on conviction thereof liable to imprisonment for a term not exceeding ten years."

As stated earlier the trial judge sentenced the appellants to terms of imprisonment in respect of the convictions under Count (1) of the indictment. But the Court of Appeal, as stated

earlier, set aside the sentences of imprisonment imposed by the trial judge and passed sentences of death on both appellants. The reason the Court of Appeal gave for taking such an extreme course was that in their view, the sentence prescribed for offences against the amended section 23(1)(a) of the Larceny Act, 1916 was a mandatory death sentence, and that there was no discretion to pass a sentence of imprisonment.

It seems to me that the course adopted by the Court of Appeal raises questions of constitutional law and the interpretation of statutes. The constitutional question may be stated thus: is the Court of Appeal bound by its own previous decisions. The answer to the question is provided by s 107(3) of the Constitution of Sierra Leone 1978. The sub-section is in the following terms:

> "Subject to the provisions of sub-sections (1) and (2) of section 101 of this Constitution, the Court of Appeal shall be bound by its own previous decisions and all courts inferior to the Court of Appeal shall be bound to follow the decisions of the Court of Appeal on questions of law."

The provisions of subsections (1) and (2) of s 101 of the Constitution are not relevant for the purposes of this appeal.

Mr Renner-Thomas referred us to a previous decision of the Court of Appeal on the issue, namely *Fornah & 14 others v The State* [1974-82] 1 SLBALR 48. He submitted that that decision was binding on the Court of Appeal. In that case the Court of Appeal construed s 3(1) of the Treason and State Offences Act 1963.

The subsection, so far as relevant, reads:

> "3(1) A person is guilty of treason and shall on conviction be liable to suffer death who either within Sierra Leone or elsewhere …".

The Court of Appeal in that case by a majority, held that the words "shall be liable" in the subsection import a discretion; and the sentence of death under s 3 of the Treason and State Offences Act 1963 is discretionary and not mandatory; and that a judge has a discretion as to whether to pass the death sentence or not. The words construed by the Court of Appeal in *Fornah's* case were "shall on conviction be liable to suffer death." The words which the Court of Appeal had to construe in the instant case were "shall … on conviction thereof liable to suffer death." It is quite clear to me that the words used in both statutes are identical and indistinguishable. In those circumstances, the previous decision of the Court of Appeal was binding on it in the instant appeal. And the fact that the previous decision was a majority decision does not in the least detract from its binding force. It is not clear whether the decision in *Fornah's* case was brought to the attention of the Court of Appeal during the hearing of the appeal in the instant case. Be that as it may the decision in *Fornah's* case was still binding on it. It may be argued that in England from where we derive our system of jurisprudence, the Court of Appeal although normally bound by its previous decision, may in certain exceptional circumstances depart from it. The position has been authoritatively stated in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 where the exceptions are spelt out, and in *Miliangos v George Frank (Textiles) Ltd* [1975] 1 QB 487. It is also well settled in England that in criminal appeals, the Court of Appeal is not limited to the exceptions specified in *Young v Bristol Aeroplane Co Ltd*, supra, in departing from a previous decision. It is now accepted that if the Court of Appeal is of the opinion that the law has been either misapplied or misunderstood in a decision and that on the strength of the decision an accused person has been sentenced and imprisoned, it is the duty of the court to reconsider its previous decision. Thus, in *R v Taylor* [1950] 2 KB 368 Lord Goddard CJ, delivering the judgment of the Court of Criminal Appeal consisting of seven judges, said inter alia at p 371:

> "I desire to say a word about the reconsideration of a case by this court. The Court of Appeal in civil matters usually considers itself bound by its own, previous decisions or by decisions of a court of coordinate jurisdiction. The court however has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that in the opinion of a full court assembled for that purpose, the law has been either misapplied or

misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned, it is the bounden duty of the court to reconsider the earlier decision with a view to see whether that person had been properly convicted. The exceptions which apply in civil cases ought not to be the only ones applied in such a case as the present".

This principle was restated in *R v Gould* [1968] 1 All ER 849 where Diplock LJ (as he then was) said, inter alia, at p 851:

"In its criminal jurisdiction, which has been inherited from the Court Criminal Appeal, the Court of Appeal does not apply the doctrine of stare decisis with the same rigidity as in its civil jurisdiction. If on due consideration we were to be of opinion that the law had been either misapplied or misunderstood in an earlier decision of this Court or its predecessor the Court of Criminal Appeal, we should be entitled to depart from the view as to the law expressed in the earlier decision notwithstanding that the case could not be brought within any of the exceptions laid down in *Young v Bristol Aeroplane Co Ltd* as justifying the Court of Appeal in refusing to follow one of its own decisions in a civil case."

Even if the exceptions to the general principle just stated are applicable in this jurisdiction, the Court of Appeal can only overrule a previous decision if satisfied that the case comes within one of the recognised exceptions. In the instant case the Court of Appeal did not even consider or even refer to the previous decision, nor did they give any consideration to the question whether the case came within one of the recognised exceptions. In my opinion the circumstances do not show that any of the recognised exceptions were present in this case to justify the court departing from its previous decision.

But it is doubtful whether the exceptions are now applicable to our Court of Appeal.

In my opinion sub-section (3) of section 107 of the Constitution is quite clear and unambiguous in its terms. It says in simple language that the Court of Appeal shall be bound by its own previous decisions.

It seems that that provision admits of no exception. And according to its terms it is applicable to all previous decisions, civil as well as criminal. I think that this view is further re-enforced when the subsection is contrasted with subsection (2) of section 102 of the Constitution. That subsection provides as follows:

"(2) The Supreme Court may, while treating its own previous decision as normally binding, depart from a previous decision when it appears right so to do; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law."

It seems clear therefore that while the Supreme Court may in certain circumstances depart from its own previous decision, the Court of Appeal may not. In view of the position occupied by the Court of Appeal in our hierarchy of courts, it is of the utmost importance that its decisions on the same question of law be consistent. The Justices sit in panels and the panels change from time to time, and sometimes from case to case. If each panel is allowed to reach its own decision on the same point of law, in total disregard of a previous decision of the court, then the result would be chaos. Conflicting decisions on the same point of law would be given by the same court resulting in uncertainty in the law. Such a state of affairs would not be good for the development of the law or for the public that come before the courts for redress in both civil and criminal matters. I think that it is of the utmost importance that the Judges of the Court of Appeal should loyally follow not only previous decisions of the Supreme Court but also previous decisions of the Court of Appeal; even if they disagree with the previous decisions, unless they can distinguish them from the case before them. In this connection it is pertinent to recall the words of Lord Simon of Glaisdale in *Farrell v Alexander* [1977] AC 59 at p 92:

"The Court of Appeal occupies a crucial position in our judicial system. Most appeals stop there. It handles an immense volume of business. It sits in a number of divisions. Unless it follows its own decisions, as the law directs, litigation will be a gamble on which division of the court is to handle the appeal and what Law will be declared there. Most actions

> which are threatened or begun are settled by agreement — to the great advantage of the public generally and the litigants in particular. They are settled on the basis of a prognostication of the applicable law. If the law becomes unpredictable, changing from court to court and from case to case, it will be failing the public."

In my judgment therefore the Court of Appeal erred in failing to follow the decision in *Fornah's* case which was binding on it. The court was therefore wrong in holding that the sentence prescribed by s 23(1)(a) of the Larceny Act 1916, as amended by s 2 of Act No 16 of 1971, was mandatory and in setting aside the sentences of imprisonment passed by the trial judge and in imposing sentences of death.

The Supreme Court is of course not bound by the decision in *Fornah's* case. And the first Appellant has appealed against sentence.

Therefore, it is necessary to consider the question of interpretation of statutes raised by the course adopted by the Court of Appeal. The question may be formulated thus: Is the sentence prescribed by s 23(1)(a) of the Larceny Act 1916, as amended by s 2 of Act No 16 of 1971, a mandatory death sentence or does a trial judge have a discretion in imposing the death sentence or not? In order to determine this question, it is necessary to construe the subsection. The subsection has been set out above. In my opinion, the important words as far as the penalty is concerned, are "shall be liable". It seems to me that the word "liable" must have some meaning and significance in the context in which it appears. It could not have been used by the draftsman in vain. It must be read with the other words in the context.

In my opinion the plain and ordinary meaning of the word "liable" is "exposed to possibility or risk," "exposed or open to." Therefore, when it is provided that a convicted person shall be liable to a specified punishment, it means that he runs the risk of that sentence being passed on him, or he exposes himself to or leaves himself open to that sentence. It does not mean that the sentence will be passed on him. He merely exposes himself to that sentence and runs the risk of or opens himself to that sentence being passed on him. It will be useful to refer to two English Cases in which phrases where the word "liable" appeared were construed. In *James v Young* (1884) 27 Ch D 652, North J said, inter alia, at p 55:

> " … but when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced."

In *Re Loftus-Otway* (1895) 2 Ch 235, Stirling J said, inter alia, at p 240:

> "The words are not merely 'be deprived' but 'be deprived or be liable to be deprived' and there is a contrast between being deprived and being liable to be deprived. The words "be liable to be deprived' are meant to add something to that which goes before. It seems to me that the latter words must be read as including acts which, so far as the person who committed them is concerned would put it out of his power to have any voice in the matter, and would leave it with a Court of Justice to say whether or not he is to be deprived".

In my opinion therefore the use of the word "liable" imports the element of discretion. It will be helpful to refer to a few statutory provisions in which he word "liable" is used. Section 24 of the Larceny Act 1916 provides that a person convicted of the offence created by that section (i.e., Sacrilege) "*shall be liable* to penal servitude for life" (emphasis supplied). Also, s 25 of the same Act provides that a person convicted of the offence created by that section (i.e., Burglary) "shall be liable to penal servitude for life" (emphasis supplied). It should be noted that "panel servitude" has been abolished and in its place should be substituted "life imprisonment". I do not think that there is any dispute that the courts in England as well as in Sierra Leone have never considered the life imprisonment prescribed in those two sections as mandatory. Trial judges have always had a discretion as to whether a person convicted of those offences should be sentenced to life imprisonment or to a lesser term of imprisonment. Similarly, if a statute provides that a person convicted "shall be liable" to ten years imprisonment, it is not mandatory that the person convicted should be sentenced to the ten years imprisonment prescribed by the statute. The trial judge will have a discretion as to whether he imposes the maximum sentence

or a lesser sentence. In my opinion therefore, when a statute provides that a convicted person be "liable to suffer death", what it means is that the convicted runs the risk of the death sentence being passed on him. It does not mean that he must be sentenced to death. In my opinion the "liable" in that context confers a discretion on the trial judge as to whether the death sentence should be imposed or not. This is in accordance with the policy of our system of law which has always allowed trial judges a wide discretion in imposing sentence except in those cases where the sentence is fixed by law. In *Halsbury's Laws of England* [3rd Ed] Vol 10 para [888] pp 486-487, it is stated:

> "In all crimes except those for which the sentence of death must be pronounced, a very wide discretion in the matter of fixing the degree of punishment is allowed to the judge who tries the case. The policy of the law is, as regards most crimes, to fix a maximum penalty, which is intended only for the worst cases, and to leave to the discretion of the judge the determination of the extent to which in a particular case the punishment awarded should approach to or recede from the maximum limit. The exercise of this discretion is a matter of prudence and not of law."

On the other hand, where the legislature intends to fix a mandatory punishment, it uses words which put it beyond doubt that that is the intention. For instance if it is provided that a convicted person "shall be sentenced to ten years imprisonment" or "shall be sentenced to death", there could be no doubt that a mandatory sentence of ten years imprisonment was intended in the former case, and a mandatory sentence of death was intended in the latter case. A reference to a few statutes should illustrate this point.

Section 2 of the Offences against the Person Act 1861 provides as follows:

"Upon every conviction for murder the court shall pronounce the sentence of death … ."

Section 2 of the Piracy Act 1837 provides, inter alia, that a convicted person: "shall suffer death as a felon".

And s 1 of the Dockyards etc. Protection Act 1772 provides, inter alia, that a convicted person: "shall suffer death, as in case of felony."

In my considered opinion each of these three statutory provisions makes it abundantly clear that the punishment for the respective offences is death. In the one case, the court "shall pronounce the sentence of death", in the other two cases, the convicted person shall suffer the death sentence in each of those cases. The punishment is mandatory, and the judge does not have any discretion in the matter.

In my opinion therefore the words "shall suffer death" or "shall pronounce the sentence of death" provide for a mandatory death sentence, whilst the words "shall be liable to suffer death" provide for a discretionary death sentence. In the former case the trial judge must pass the death sentence. But in the latter case, the judge has a discretion whether to impose the death penalty or not. Two East African cases which support this view were cited in the majority judgment in *Fornah's* case. I need refer to only one of them, namely *Opoya v Uganda* (1967) EA 752 where the East African Court of Appeal held, inter alia, that the words "shall be liable on conviction to suffer death" provide a maximum sentence only and that the courts have a discretion to impose a sentence of death or of imprisonment. Sir Clement De Lestang VP, who delivered the judgment of the court, said, inter alia, at p 754:

> "We consider such to be the correct approach to the construction of the words 'shall be liable on conviction to suffer death' especially when contrasted with the words of s 184 which are "shall be sentenced to death." Consequently construing s 273(2) in the ordinary meaning of the word used therein free from authority we would have no hesitation in holding that the sentence of death which it prescribes is discretionary and not mandatory. To hold otherwise would be to give an unnatural meaning to the words of the section and we see no compelling reason to do so".

In my judgment therefore the proper construction to be put on s 23(1)(a) of the Larceny Act 1916, as amended by s 2 of Act No 16 of 1971, is that it provides for a discretionary death sentence. It gives the judge a discretion as to whether to pass the death sentence or not. Of course, in exercising his discretion, the judge would have to take into consideration all the relevant circumstances of the case. If the judge decides not to impose the death penalty he will have to decide, in the exercise of his discretion, what other punishment, warranted in law, to pass and the extent of such punishment. So if he decides to impose a custodial sentence, he will have to decide the length of such sentence.

In the instant case, the trial judge imposed a custodial sentence. It has not been suggested that he exercised his discretion wrongly in imposing a custodial sentence. Indeed, Mr Ngobeh, learned counsel who appeared for the State, conceded that s 23(1)(a) of the Larceny Act 1916, as amended, confers a discretion on a trial judge as to whether to pass the death sentence or not. And he did not argue or even suggest that the trial judge did not exercise his discretion properly in deciding not to pass the death, sentence. However, Mr Renner-Thomas submitted that the custodial sentences imposed on the first appellant were excessive. As stated earlier the trial judge sentenced the first appellant to serve a total of 90 years in jail.

I think that it is well-settled that an appellate court will generally not interfere with the sentence passed at the trial unless the sentence is one not warranted in law or unless it is manifestly excessive or wrong in principle. There is no suggestion that the sentence passed in this case was not warranted in law or was the wrong sentence in principle. The complaint of the first appellant is that the sentence passed by the trial judge is manifestly excessive. The age of the first appellant is not known, but there is no dispute that he is an adult. Taking into consideration the normal life expectancy and even allowing for remission of sentence, the first appellant would in all probability die in jail before he completes the sentence passed on him. The sentence imposed would in these circumstances amount to more than life imprisonment.

Taking all the circumstances into consideration, there could be no doubt that the sentence imposed is manifestly excessive. I therefore think that this is a proper case in which this court should interfere with the sentence.

In the result I would dismiss the appeal of the first appellant against conviction, I would allow his appeal against sentence and would in all the circumstances reduce the sentence passed on Count (1) to 30 years' imprisonment, and on each of the other counts to 21 years' imprisonment, all the sentences to run concurrently from the date of conviction.

I would allow the appeal of the second appellant against conviction on all the counts in respect of which he was convicted, quash the convictions, and set aside the sentences imposed on him.

Hon Mr Justice CA Harding JSC: I agree. **Hon Mrs Justice AVA Awunor-Renner JSC**: I agree. **Hon Mr Justice OBR Tejan JSC**: I agree. **Hon Mr Justice S Beccles Davies JSC**: I agree.

Reported by Victoria Strasser-King and Anthony P Kinnear