

IN THE SUPREME COURT OF SIERRA LEONE

CR. APP. 1/2012

BETWEEN:-

EZZAT BASMA

APPELLANT

AND

THE STATE

RESPONDENT

CORAM:-

HON. MR JUSTICE VALESIUS V. THOMAS, JSC

HON. MRS JUSTICE V.A.D. WRIGHT, JSC

HON. MRS JUSTICE A. SHOWERS, JA

COUNSEL:-

N. D. TEJAN-COLE ESQ. for the Appellant

D. J. SOYEI ESQ. for the Respondent.

JUDGMENT DELIVERED ON THE 21st DAY OF January 2014.
Thomas, J.S.C.

This is a criminal appeal from the Court of Appeal (Criminal Division) to this Court following the grant of leave to appeal made by the Court of Appeal dated 7th June 2012. The application for leave to appeal against the decision of the Court of Appeal delivered on the 3rd May 2012 was made by Notice of Motion dated 14th May 2012 disclosing the several grounds of appeal on which the application was granted. These grounds of appeal are as follows:

1. The Court of Appeal in its ruling of 3rd May 2012 used "Appellant and Respondent" as the title though it agreed with Counsel that the correct title is "State v Wellington ex parte Ezzat Basma" thus creating doubt as to the correct title.

2. The Court of Appeal erred in law when it held that the Notice of Appeal at Pages 53 and 54 had been abandoned and acted on it as such in its Ruling without compliance with the mandatory provision of Rule 46(1) Court of Appeal rules 1985 – PN.29 of 1985 and Criminal form 9 of Appendix C to the Court of Appeal Rules – Public Notice No. 29 of 1985..

3. The Court of Appeal erred in law when it held that "...December 2011" is a date that the notice of Appeal at page 55 and 56 was prepared and to compare it with the date i.e. 22nd November 2011

the signature of the Appellant was notarized. It is submitted that a date is the day of the month or year as specified by a number. In the absence of a number it is submitted it is not a date.

4. An Appeal to an Appellate Court is a rehearing. An application against a conviction by a Magistrate to the High Court is to that Court not in its original Jurisdiction but appellate Jurisdiction. Thus an application by Certiorari in a criminal matter may arise from lack or excess of Jurisdiction, error of law, misdirection and/or non direction. Thus Certiorari under Section 19 of the Courts Act 1965 – Act 6 of 1991 as amended is an appeal. And it is an alternative under Section 42 of the Courts Act 1965 as amended.

5. For the Honourable Supreme Court to declare for future guidance;

(a) the use of Certiorari in criminal cause to quash a conviction in a Magistrate's Court is an alternative to an appeal under section 42 of the Courts Act 1965 as amended.

(b) the date of appeal from the High Court on Certiorari to the court of Appeal of Sierra Leone is the date of the pronouncement of the decision of the High Court and not the date of the conviction in the Magistrate's Court.

(c) that since the hearing in the Court of Appeal is a rehearing whether the grounds of appeal on Certiorari must be grounds of the refusal and not the grounds of wrong conviction i.e. the lack or excess of Jurisdiction, errors of law, misdirection and/or direction in the Magistrate's Court.

Background

The Appellant was convicted before His Worship the late J.O. Wellington (the learned trial Magistrate) sitting in Magistrate Court No.2 on the 31st October 2011. The Appellant was convicted of the offences of Trespass contrary to section 15 (1) (b) of the Public Order Act 1965 and Assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861 and sentenced to "one month in prison without alternative on both counts to run concurrently." He was discharged on Count 3 which had charged him with Larceny contrary to section 2 of the Larceny Act, 1916. The Appellant was not present in Court when he was convicted and sentenced by the learned trial Magistrate. Since the said conviction and sentence, the Appellant has not served one day in prison as he has made himself unavailable.

Solicitor for the Appellant filed a Notice of Motion with supporting affidavit dated the 1st November 2011 in the High Court for *inter alia* Writ of Certiorari to quash the conviction and sentence ordered by the said learned trial Magistrate for certain irregularities. The application came up before the Honourable Mr. Justice N. C. Browne-Marke JA who delivered his judgment on the 17th November

2011 refusing all the reliefs sought by the applicant, the Appellant herein. It is pertinent to note that the Writ of Certiorari was abolished by Section 19 of the Courts Act 1965 and replaced by an Order of Certiorari. Section 134 of the Constitution of Sierra Leone 1991 (the Constitution) provides that the High Court of Justice has supervisory jurisdiction over all inferior courts to issue orders of certiorari, mandamus and prohibition as it may consider appropriate. The High Court does not have jurisdiction to issue a Writ of Certiorari as requested by the applicant in his application dated 1st November 2011. The appropriate proceeding for the grant of an Order of Certiorari today is governed by Order 52 of the High Court Rules 2007, Constitutional Instrument No.8 of 2007 (the High Court Rules 2007) which states *inter alia* in sub-rule 1 of rule 1 that an application for an order of mandamus, prohibition or certiorari shall be made by way of an application for judicial review in accordance with this Order. The rest of the provisions of this Order are relevant in determining the proper procedure for an applicant to pursue in order to obtain an Order of Certiorari. This procedure was not followed in the application for a Writ of Certiorari that was before the Hon. Mr. Justice N. C. Browne-Marke, JA.

Two Notices of Appeal were subsequently filed in the Court of Appeal following the conviction and sentence in the Magistrate Court and the application for *inter alia* a Writ of Certiorari in the High Court. They are respectively numbered CR.APP. 23/2011 dated 21st November 2011 (filed on the 22nd November 2011) and CR.APP. 24/2011 which was apparently signed by the Appellant on an unstated day in December 2011 but notarized on the 28th November 2011. It is relevant to observe that the Notice of Appeal CR.APP.24/2011 was filed in the Court of Appeal on the 6th December 2011. Additional grounds of appeal in the latter Notice of Appeal were dated and filed on the 3rd February 2012.

The Notice of Appeal CR.APP. 23/2011 (found on pages 81 and 82 of the records) addressed to the Registrar of the Court of Appeal states in its opening paragraph as follows:

"I, EZZAT BASMA being dissatisfied with the judgment/Ruling of the Honourable MR JUSTICE N. C. BROWNE-MARKE J.A. dated the 17th day of November, 2011 and being desirous of appealing against the said judgement DO HEREBY give you Notice of Appeal against my conviction/sentence on the grounds hereinafter set forth."

It is relevant to note that this Notice of Appeal was signed by A.E. MANLY-SPAIN as Solicitor for the Appellant.

The second Notice of Appeal CR.APP. 24/2011 (found on pages 83 and 84 of the records) also addressed to the Registrar of the Court of Appeal states in its opening paragraph as follows:

"I EZZAT BASMA being dissatisfied with my conviction of the offences of trespass contrary to section 15(b) of the Public Order Act 1965 as amended and Assault Occasioning Actual Bodily Harm contrary to Section 47 of the Offences Against the Persons Act 1861 and being now

Sandaiwalia Cky Republic of Guinea on medical grounds) do hereby give Notice of Appeal against my conviction of the said Offences (Particulars of which hereinafter appear) to the court on question of law,(emphasis added) that is to say,"

Following the said opening paragraph are 8 numbered paragraphs followed by a date of December 2011 and signed by the Appellant. This is followed by what purports to be a Notary's Certificate and the date of 28th November 2011. After stating that the Appellant's residential address is No.17 Goderich Street, Freetown, Particulars of Trial and Conviction are given followed by the signature of A.E Manly-Spain as Solicitor for the Appellant.

Submissions

N. D. Tejan-Cole Esq., Counsel for the Appellant submitted that the simple question for determination by the Court is whether an accused under section 101 of the Criminal Procedure Act 1965 as amended can be sentenced after an adjournment in his absence. He stated that as in this case which was tried by the learned trial Magistrate, such an accused cannot be so sentenced. Counsel then pointed out a number of issues on which the decision of the Court is required such as the correct title for the proceedings before the Court of Appeal. Relying on the case of R v Cole ex parte Suma & Ors [1964-66] ALR SL 484 and the English case of R v Westminster Assessment Committee ex parte Grosvenor House (Park Lane) Ltd., [1940] 3 All E.R 241, he submitted that the correct title in the case before the Court of Appeal is "The State v Wellington ex parte Ezzat Basma." He further argued that the reliance made in the ruling of the Court of Appeal on a criminal appeal that had been abandoned (namely CR.APP.23/2011) as part of the reasons for striking out the appeal, was wrong. Counsel submitted that a correct interpretation of section 101 of the Criminal Procedure Act 1965 as amended is necessary in order to determine the legality or otherwise of the learned trial Magistrate's decision to convict and sentence the Appellant in his absence. Counsel finally submitted that the appeal should be upheld and the conviction and sentence quashed.

In his reply Counsel for the Respondent, G. J. Soyei Esq., made the following submissions:

1. That the correct title of the appeal in the Court of Appeal is "Ezzat Basma v The State" and not otherwise, as the learned trial Magistrate, late Magistrate J. O. Wellington was not a party in the proceedings.
2. That CR.APP. 24/2011 was not an appeal from a decision of the High Court and consequently this Court should not entertain this appeal as the correct route for such an appeal from a magistrate court has not been followed. Counsel further submitted that since CR.APP. 23/2011 was abandoned in the Court of Appeal, the subsequent Notice of Appeal filed namely CR.APP. 24/2011 collapses as it was out of the time within which it should be filed. Counsel also made submissions dealing with the incomplete date on the face of CR.APP. 24/2011.

Issues

It is against the background as summarized *supra* that the Court of Appeal delivered its ruling dated 3rd May 2012, which is the subject of the appeal to this Court on the grounds of appeal as earlier stated. The following issues arise for determination by this Court:

1. Can an appeal against conviction and sentence in a Magistrate's Court be filed directly in the Court of Appeal (as was done in CR.APP. 24/2011) without such an appeal being first filed and heard in the High Court? In my judgment, the answer is clearly in the negative. Section 129 of the Constitution describes the appellate jurisdiction of the Court of Appeal as limited to any judgment, decree or order of the High Court as may be conferred by the Constitution or any other law. It is the Courts Act 1965 as amended which deals in detail with the route to be followed in challenging decisions of magistrates on appeal. The relevant provisions are sections 42 to 46 of the Courts Act 1965 as amended. Section 42 (1) of the said Act provides *inter alia* that any person aggrieved by a decision of a Magistrate in criminal proceedings may appeal from the decision to the High Court. In my opinion, there is no provision for any appeal in criminal proceedings from a magistrate court to be filed directly in the Court of Appeal without that appeal first being filed and heard in the High Court. It is from a decision of the High Court in its appellate jurisdiction (and not a decision of a magistrate court) that an appeal may be filed in the Court of Appeal. CR.APP. 24/2011 mentioned above, in my judgment, was an appeal against conviction and sentence in the Magistrate Court that was filed in the Court of Appeal. Section 53 (2) of the Courts Act 1965 (as amended) states:

"An appeal shall lie to the Court of Appeal, but on questions of law only, against the decision of the High Court in an appeal from, or on a case stated by, a Magistrate in criminal proceedings:"

2. The Proceedings in the High Court.

Were the proceedings in the High Court before the Hon. Mr. Justice Browne-Marke JA which were instituted by Notice of Motion dated 1st November 2011 praying *inter alia* for a Writ of Certiorari, an appeal against the decision of the learned trial magistrate dated the 31st October 2011? The answer is definitely in the negative as it was in essence an application for judicial review to the High Court exercising its supervisory jurisdiction. In my judgment, a decision of a magistrate's court can be challenged by one of three methods under our laws, namely:

(a) appealing directly to the High Court in its appellate capacity pursuant to section 42 of the Courts Act, 1965 as amended. When this is done it is a re-hearing of the matter with all the powers of the Magistrate Court available to the High Court.

(b) on the application of any party concerned or on its own motion, a magistrate may by way of case stated reserve for the consideration of the High Court, any question of law which may arise

before that magistrate in any particular case. The jurisdiction of the High Court in such a case is to hear and determine any such question. See section 51 of the Courts Act 1965 as amended.

(c) applying to the High Court for a judicial review of the magistrate's decision complained of pursuant to Order 52 of the High Court Rules 2007.

A defendant convicted in a magistrates' court who wants to challenge that court's decision must decide which of the above-mentioned alternative routes is appropriate in his particular case. These alternatives are separate and distinct and the title of the appeal or application reflects the distinction. In the case of an application for judicial review the correct title is the State versus the appropriate Magistrate ex parte the applicant. Consequently, it is indeed correct that in the certiorari application before the High Court, the title is "State v. Wellington ex parte Ezzat Basma". This title should also be used in the Court of Appeal if there is an appeal against that decision on certiorari from the High Court.

The appellant and his legal advisers decided to challenge the Magistrate's decision by way of an application for judicial review filed in the High Court to review the lawfulness of that decision and not to exercise the appellant's statutory right of appeal to the High Court under Section 42 of the Courts' Act 1965. Given the nature of his complaint, his choice is one in which he did not have to exhaust the alternative avenue of a criminal appeal: see R. v. Hereford Magistrates' Court, ex p. Rowlands [1997] 2 Cr App R 340. The decision whether or not to grant relief of certiorari by way of judicial review is a discretionary one which is dependent on many factors. In this particular case, the relief was refused and the appeal numbered CR. APP. 23/2011 which was filed to challenge that decision in the Court of Appeal has been abandoned and not pursued in the Court of Appeal. Counsel for the appellant admitted this fact before this Court on the 19th September 2011.

In my judgment there were no proceedings in the High Court in its appellate capacity challenging the decision of the learned trial Magistrate by way of an appeal pursuant to section 42 of the Courts' Act 1965. Such an appeal ought to have been filed within 21 days from the date on which the decision complained of was given by the Magistrate, namely 31st October 2011. See section 42 (4) of the Courts Act 1965 (as amended). It is in proceedings of this nature that the appropriate parties to the appeal will be described as "Appellant" and "Respondent" respectively, unlike in the case of judicial review applications. The separateness between an application for certiorari and a criminal appeal against the decision of a magistrate court was recognized in the case of R v Cole ex parte Suma & Ors [1964-66] ALR SL 484 where it was held that certiorari will lie to quash the decision of a magistrate's court for want of jurisdiction, and the applicant will not be left to seek relief by way of appeal, if the question is one of settled law and the record shows that the magistrate proceeded in a manner which

completely deprived him of jurisdiction. In the Nigerian Federal Court of Appeal case of State v. Boundary Settlement Commissioner & Others [1985] 3 NWLR.(Pt. 12) 335, it was held that when a Superior Court of Record is considering whether or not an order of certiorari would issue against an inferior tribunal, one of the principles that should guide that Superior Court is that it is acting not in an appellate capacity but in a supervisory capacity. This principle in my judgment is applicable in Sierra Leone and I hold that when the reliefs sought in the application by way of Notice of Motion dated 1st November 2011 were refused, the Court was exercising its supervisory jurisdiction.

Given the absence of any criminal appeal to the High Court challenging the decision of the learned trial magistrate, (which High court appeal could have been pursued in the Court of Appeal if the decision was against the appellant) the appeal numbered CR. APP. 24/2011 was out of place and consequently struck off by the Court of Appeal in its ruling of the 3rd May 2012. From the opening paragraph of his Notice of Appeal, the appellant was appealing the decision of the learned trial Magistrate in the Court of Appeal without laying the foundation of a previous appeal to the High Court which will give the Court of Appeal jurisdiction to hear his appeal. See section 53 (2) of the Courts Act 1965 as amended *supra*.

The foundation that is absent in his Notice of Appeal numbered CR. APP. 24/2011 is a decision of the High Court in its appellate jurisdiction which was an appeal from a magistrate in criminal proceedings. The judicial review proceedings in the High Court before the Hon. Mr. Justice Browne-Marke JA was not such a decision of the High Court exercising its appellate jurisdiction.

Conclusions

In answer to the various grounds of appeal filed the Court responds as follows:

1. The correct title of an appeal depends on the nature of the matter that is before the court. In the judicial review application for an order of certiorari in criminal proceedings challenging the decision of the magistrate as in this case, the correct title is "State v Wellington ex parte Basma". This title should have been part of the title in CR. APP. 23/2011. This appeal was abandoned. In so far as the Court of Appeal was dealing with CR. APP. 24/2011 which had not been abandoned, the title using "Appellant" and Respondent" as descriptions of the parties was correct.
2. In view of Learned Counsel's (N. D. Tejan-Cole Esq.) admission to this Court that he had abandoned the Notice of Appeal CR. APP. 23/2011 (found on pages 53 and 54 of the Records in the Court of Appeal and on pages 81 and 82 of the Records before this Court) and that he had informed the Court of Appeal of this fact, there was no error in law on the part of the Court of Appeal when it held that the particular appeal had been abandoned. There is no merit in this complaint in ground 2.

3. The complaint in ground 3 based on the fact that the Notice of Appeal CR.APP.24/2011 does not have a complete date, in that the day in December 2011 is not stated and that the document was apparently notarized on the 28th (or 22nd as stated in the grounds of appeal) November 2011, is not material in view of our decision on the whole appeal. It is the opinion of the Court that this appeal was incorrectly filed in the Court of Appeal as the appellant in this Notice of Appeal purported to "...give Notice of Appeal against my conviction of the said offences to the Court on question of law..." when such a criminal appeal had not been filed in the first place in the High Court. A criminal appeal to the Court of Appeal must be from a decision on a criminal appeal from the High Court exercising its appellate jurisdiction.

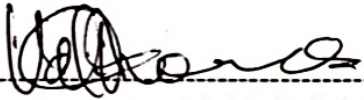
4. A criminal appeal from a decision of a magistrate court to the High Court in its appellate capacity pursuant to the provisions of the Courts Act 1965 as amended is separate and distinct from an application for judicial review (an order of certiorari) to the High Court in its supervisory capacity. These are separate avenues of redress with their peculiar requirements. While an application for certiorari is an alternative to a criminal appeal under section 42 of the Courts Act 1965 as amended, (as was decided in R v Cole ex parte Suma & Ors [1964-66] ALR SL 484), it is not an appeal in the terms of that section. The application by Notice of Motion dated 1st November 2011 that was the subject-matter of the decision of the High Court dated 17th November 2011 was an application for certiorari *simpliciter* and for bail pending the determination of the said application. It was not a criminal appeal from a magistrate court to the High Court in terms of section 42 of the Courts act 1965 as amended.

An appellant in a criminal appeal or an applicant for certiorari is at liberty to pursue both remedies at the same time which said distinct remedies are not mutually exclusive. This was so held in the Ghana Supreme Court case of Republic v High Court, Cape Coast ex parte Ghana Cocoa Board (Apotoi 111 Interested Party) [2009] SCGLR 603. The separateness of the three remedies for challenging a decision of a magistrate court as stated *supra* is amply analyzed in Taylor on Criminal Appeals, 2nd edn., page 1-8. At page 71, the learned editor states under the rubric of "Alternative methods of challenge" that "Practically it is advisable for an applicant (for judicial review) to safeguard his position by lodging an appeal against a conviction from the Magistrates' Court.....". This practical advice was not followed in the matter that is before us after the decision of the learned trial Magistrate.

5. In our judgment it is not necessary for us to make the declarations requested in these present proceedings in view of what has been decided so far. In any case the appeal from the High Court

on certiorari to the Court of Appeal has been abandoned and the appeal that is before us is in respect of the Ruling of the Court of Appeal dated 3rd May 2012.

In the premises, and for the several reasons advanced *supra*, the appeal is dismissed with no order as to costs.



HON. MR JUSTICE V. V. THOMAS, JSC.

I agree



HON. MRS JUSTICE V. A. WRIGHT, JSC.

I agree



HON. MRS A. SHOWERS, JA