SC CR. APP. 1/2010

IN THE SUPREME COURT OF SIERRA LEONE

CHANG YOUNG CHI & 10 ORS APPELLANTS

AND

THE INSPECTOR GENERAL OF POLICE RESPONDENT

Coram:

The Hon Mr Justice A.H Charm, CHIEF JUSTICE
The Hon Ms Justice G. Thompson, JSC
The Hon Mrs N. Matturi-Jones, JSC
The Hon Mr Justice R.S. Fynn, JA
The Hon Mr Justice D. B. Edwards JA:

C.F. Margai Esq. for the Appellants

O.I. Kanu Esq. Principal State Counsel, for the Respondent

Judgment Delivered the day of March, 2018

G. THOMPSON, JSC

1. This is an appeal against the ruling of the Court of Appeal (E.E. Roberts JA, (as he then was) S.A. Ademosu JA, A. Showers JA (as she then was)) on the following grounds:

   i. *The Learned Judges of the Court of Appeal erred in law in coming to the conclusion that the application contained in the Notice of Motion dated 24th day of September 2010 had previously being (sic) made orally and refused.*
   ii. *The Learned Judges of the Court of Appeal were palpably wrong in law in holding "that the judgment of the Magistrate's Court dated 4th September 2009 was not on appeal before this Court and since it is not still on appeal, we cannot entertain the present application, the result is that the application is accordingly refused."*

2. The Appellants, all foreign nationals, were convicted in the Magistrates Court, Magistrate Steven Conteh presiding, of the following offences, which are reproduced here as originally drafted:

   Count 1 – Unlawful (*sic)* entering Fishery Waters of Sierra Leone contrary to Section 2 (1) of the Fishery (Management & Development) Act 2008.

   Count II – Unlawfully using a foreign fishing vessel for the purpose (sic) of Fishing of the Fishery (Management and Development) Act 2008

   Count III – Illegally engaging in Fishing within the Fishery Waters of Sierra Leone contrary to section 21 (1)(b) of Fishery (Management and Development) Act 2008

3. All the accused persons (now Appellants) pleaded guilty to all the charges on the 4th September 2009 and were fined US$50,000 each or equivalent in Leones in respect of the first two charges and US$5,000 each or equivalent in Leones in respect of the third charge.

4. I should at this stage state that these badly drafted charges are based on a non-existent legislation. There is simply no Fishery (Management and Development) Act 2008 in this jurisdiction. The relevant legislation dealing with the illegal fishing by foreign vessels in Sierra Leone is the Fishery (Management and Development) Act 1998 as amended by the Fishery (Management and Development) (Amendment) Act 2007. This Court has been provided with no explanation as to how such a serious and fundamental error occurred or why no steps were taken to correct it. This error was self-evidently fatal to the sustainability of the charges as drafted.

5. A further order was made for the travelling documents of the accused persons and their fishing vessel to be released.

6. On the 9th September 2009 on an application by the Learned Director of Public Prosecutions (DPP), "to correct certain irregularities", the Learned Magistrate varied the sentences imposed and in addition, ordered the confiscation of the fishing vessel. By this time the fines imposed on the 4th had been paid

in full. Even if they had not been paid, the proceedings on the 9th were most unusual and irregular. Quite frankly the application should not have been entertained by the court. I can find no legal basis for it.

7. By a letter dated 9th October 2009, C.F. Margai and Associates, solicitors acting for the Appellants wrote to the then Chief Justice, seeking a summary review of proceedings before the Magistrates Court pursuant to the Summary Review Act Chapter 17 of the Laws of Sierra Leone 1960 (Cap 17). The reasons given were as follows:

    i. That there is no Fishery (Management and Development) Act 2008 which created the offences specified in the charge sheet.
    ii. That section 53 (1) of the Criminal Procedure Act 1965 was breached in that the consent of the Attorney General had not been obtained before the commencement of the proceedings given, that the Appellants (the accused persons then) are foreign nationals.

8. By a letter dated 11th October 2009, the Master and Registrar replied to the solicitors informing them that the Learned Chief Justice was of the view that the complaints stated in the letter of the 9th October 2009 were not ones for review under Cap 17.

9. By an Originating Notice of Motion dated 17th November 2009, the Appellants applied to the High Court *"for an order of Certiorari and Mandamus and any other consequential orders and directions to issue against His Worship Steven Conteh, presiding Magistrates Court Number 1, Freetown in the trial of the case of Inspector General of Police vs Chang Young and 10 others and the judgement and sentences following thereunder respectively dated the 4th and 9th September 2009 to be removed from the said Magistrate Court into the High Court and thereunder to be quashed on the grounds that the trial was a nullity as the said charges are unknown to the Laws of Sierra Leone contrary to section 23 (7) of the Constitution of Sierra Leone Act No 6 of 1991 as well as non-compliance with section 53 of the Criminal Procedure Act No32 of 1965.*

That the verdict and sentences be set aside.

Any other consequential order and/or directions which may appear appropriate in the circumstances to be made by the court."

10. On the 8th January 2010, N.C. Browne-Marke JA as he was then, sitting as a High Court Judge delivered his judgement refusing the Appellants' application and ordered as follows:

    i. *That the Application dated 17th November 2009 is refused.*
    ii. *Leave to appeal against the decision of His Worship Steven Conteh's judgements dated 4th and 9th September 2009 is granted.*
    iii. *Applicants to file Notice of Appeal within 7 days of this order otherwise leave granted above will expire.*

11. The Learned Judge stated that Judicial Review is a remedy of last resort. Further that the arguments by the Applicants (now Appellants) had considerable force which ought to have been presented to an Appellate Tribunal. (See page 94-95 of the Records)

12. The Appellants chose not to pursue the appeal against the convictions for which leave had been granted by the Learned Judge, but instead, filed a Notice of Appeal to the Court of Appeal dated 10th March 2010 on the following grounds:

    That the Learned Judge erred in law in refusing the Order for Certiorari on the basis that the applicants should have exhausted their statutory rights of appeal before seeking an order for certiorari.

13. On the 9th April the Appellants filed amended grounds of Appeal as follows:

    i. *That the Learned Trial Judge erred in law in not granting the Order of Certiorari on the basis that "it is my considered opinion that the Appellants appropriate remedy is an appeal".*
    ii. *That wherever it appears in the Notice and Grounds of Appeal filed on the 10th day of March 2010, the words that the "Appellants should exhaust other remedies available to them such as an appeal before seeking an Order of Certiorari" should be replaced by the words "it is my considered opinion that the Appellants' appropriate remedy is an appeal"*

14. On the 1st July 2010, E. E. Roberts JA (as he was then) delivered the judgement of the court allowing the appeal. The Court's view was that "*the Learned Judge erred in stating or suggesting that Judicial Review is a remedy of last resort or that the Appellants have a remedy of appeal open to them and so would not be granted judicial review.*"

15. Let me say at this point that it is settled law that Judicial Review is a remedy of last resort and the question of whether to grant Judicial Review is a discretionary one. In exercising that discretion the existence of an alternative remedy especially an unused right of appeal will be taken into consideration. Contrary to the view expressed by the Court of Appeal, Browne-Marke JA (as he was then) was entitled to take into account the available remedies before deciding whether to exercise his discretion in favour of granting the application for judicial review. Where there is an unused right of appeal, Judicial Review should only be entertained in exceptional circumstances.

16. That said, the legal and procedural irregularities in this case are such that there are indeed exceptional circumstances that should persuade a Court to allow an application for judicial review notwithstanding the Appellants' failure to exhaust other available remedies.

17. The irregularities are:

    a. the charging of the Appellants with offences not known in law;
    b. the failure of the Magistrate to deal with the issue of the Consent of the Attorney General, pursuant to S53 of the Criminal Procedure Act 1965, the absence of which is fatal to the proceedings (which was incidentally filed as Exhibit AFSK 1 attached to the Attorney General's affidavit of the 24th August 2010 filed in respect of another application);
    c. the variation of the sentences on the 9th September 2009; and
    d. the fact that having paid the fines, all the Appellants were then re-arrested and kept in custody.

The matters complained of are so grave that if they are upheld they would vitiate the proceedings in the Magistrates Court.

18. Lord Bingham CJ in R v Hereford Magistrates Court, ex parte Rowlands [1998] QB 110, was of the view that a party complaining of procedural unfairness or bias in the magistrates court should not be denied leave to move for judicial review. However at page 124 Lord Bingham CJ stated: "*Two notes of caution should however be sounded. First leave to move should not be granted unless the applicant advances an apparent plausible complaint which, if made good, might arguably be held to vitiate the proceedings in the magistrate's court. Immaterial or minor deviations from best practice would not have that effect, and the court should be respectful of discretionary decisions of magistrates' courts as of all other courts. This court should generally be slow to intervene and, should do so only where good (arguably good) grounds for doing so are shown. Secondly, the decision whether or not to grant relief by way of judicial review is always, in the end, a discretionary one. Many factors may properly influence the exercise of discretion, and it would be both foolish and impossible to seek to anticipate them all.*"

19. In the circumstances of this case, whilst all of those matters complained of are good grounds of appeal, Judicial Review was in my view a quicker and more effective remedy for the Appellants.

20. Having allowed the appeal, the Court of Appeal accepted the submissions of Counsel for the Appellants that they ought not to remit the application to the High Court but to deal with it under Rule 32 of the Court of Appeal Rules 1985. The Court therefore made the following orders:

i. *That the Order of the Magistrate made on the 9th September 2009, varying or revising the fines already imposed is hereby quashed*
ii. *That the Appellants shall be released from detention or custody immediately*
iii. *That the boat belonging to the Appellants be released forthwith*
iv. *That all travel and other documents taken from the Appellants be returned to them immediately.*

21. On the 24th September 2010, the Appellants filed a motion before the same court for consequential orders to wit:

    i. *That a consequential order made by this Honourable Court consequent upon the court's judgment delivered on the 1st day of July 2010 upholding the Applicants' appeal on the terms that the fine of Le 558, 849, 400.00 (Five Hundred and Fifty Eight Million, Eight Hundred and Forty Nine Thousand Four Hundred Leones) paid by the Applicants, then Accused, as per the judgement of the Magistrate dated 4th September, 2009 and revisited on the 9th September 2009, be refunded to the Applicants.*
    ii. *That the proceeds of the consignment of fish seized from the Applicants on the vessel Yu Feng 102 and sold to Sierra Fisheries Company be refunded to the Applicants as the Judgment of the Court of Appeal negates such seizure and subsequent sale and thereby restores the Applicants to the status quo ante*
    iii. *Such other or further relief to be granted to the Applicants as the Justice of the case may be demanded.*

22. On the 21st October 2010, in a ruling delivered by S.A. Ademosu, JA the court refused the application on the basis that the judgement of the 4th September 2009 was not an appeal before the court and that since it was still not an appeal the court could not entertain the application.

23. The Appellants being dissatisfied with this Ruling of the Court of Appeal appealed to this court on the grounds stated in paragraph 1 of this judgement.

24. The Appellants seek the following reliefs:
    i. *That the decision of the Court of Appeal be set aside and one substituted in favour of the Appellants*
    ii. *That such further or other Orders be granted as the justice of the case may demand.*

25. Counsel for both sides submitted to this Court a synopsis of their arguments, which I have found very helpful. Both Counsel declined to add any thing more by way of oral submissions to their respective synopsis.

26. In summary, Counsel for the Appellants argued that the conclusion of the Learned Justices that the judgement of the 4th September 2009 of the Magistrate was not an appeal before the Court of Appeal, called into question the correctness of their refusal to consider the application for a supplemental order. He further argued that natural justice demands that where an Appellant is successful, he/she should be returned to the status quo ante respecting all sums paid by him/her by way of fine and/or costs if any. He concluded that the present case was not an exception.

27. Counsel for the Respondent argued that the Court of Appeal was correct to say that the judgement of the 4th September 2009 was not an appeal before the Court of Appeal. He accepted that by deciding not to remit the matter back to the High Court, the Court of Appeal was sitting as a trial court. Further he argued that having delivered its ruling on the 21st October 2010, the court cannot be forced to make consequential orders and the only remedy open to the Appellants if they are dissatisfied is to appeal against the decision of the Court of Appeal in its entirety. He concluded that there must be an end of litigation and litigation cannot be conducted *ad infinitum* simply because a party disagrees with the court's decision on an issue. The status quo ante he submits is the sentence of 4th September 2009.

28. The question which now falls to be decided by this Court, is whether the Court of Appeal having allowed the appeal and then gone on to grant reliefs pursuant to Rule 32 supra and Section 129 (3) of the Constitution of Sierra Leone, should have granted the consequential orders prayed for by the Appellants.

Rule 32 states as follows:

"The Court shall have the power to give any judgement and make any order that ought to have been made, and to make such further order as the case may require including any order as to costs. ………………"

Section 129 (3) of the Constitution of Sierra Leone, 1991 states as follows:

For the purposes of hearing and determining any appeal within its jurisdiction and the amendment, execution or enforcement of

any judgement or order made on any such appeal and for the purposes of any other authority expressly or by necessary implication given to the Court of Appeal by the Constitution or any other law, the Court of Appeal shall have all the powers, authority and jurisdiction vested in the Court from which the Appeal is brought.

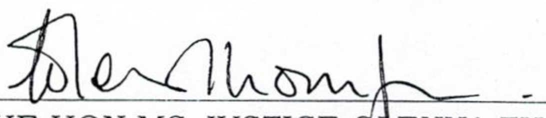
29. I should state here that in the circumstances of this case, the Court of Appeal was right to deal with the matter under Rule 32 and section 129 (3) supra. I have set out above the details of the Appellants' application before the High Court. It included not only an application for an Order declaring the proceedings in the Magistrates Court a nullity, but also an application for an Order for the court to set aside the verdict and sentences. The Court of Appeal could have granted such orders as the High Court should and could have done. It would seem however that the Court of Appeal only dealt with the proceedings of the 9th September 2009. In my view, having allowed the appeal and gone on to exercise such powers as the High Court could have done, the Court of Appeal should have dealt with the consequences of granting an order for certiorari in the way that the High Court could have under Order 52 R 8 (1) of the High Court Rules 2007. In the case of Satria Dwipayana and 14 Others v The Inspector General of Police (8th July 2010 Misc App 3/2010, unreported) which was a similar appeal before the same court,the court ordered inter alia that the trial in the Magistrates Court leading to the judgment as well as the judgement and sentence be quashed. There is no basis for distinguishing between the two cases and the approach adopted in the latter is the correct approach.

30. In respect of Ground 1, the recollections of both Counsel differ. However, I can find no record of an oral application having been made by Counsel for the Appellant for the consequential orders prayed for and/or the same having been refused.

31. In respect of Ground 2, it is my view that the issue cannot simply be dismissed on the basis that the matter before the Court of Appeal was not an appeal against the Magistrate's judgement. The result of the Court's decision in this case (having dealt with the matter under Rule 32 supra) was that

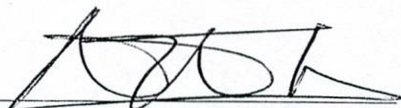
the trial before the Magistrate was now a nullity. There can therefore be no legal basis for the fines imposed to be retained by the State. It hardly needs stating that the sentences cannot stand on the basis of a trial now nullified. I therefore uphold the appeal and order that the fines totalling Le 558, 849, 400.00 (Five Hundred and Fifty Eight Million, Eight Hundred and Forty Nine Thousand Four Hundred Leones) paid by the Appellants then Accused persons as per the judgement of the Magistrate dated 4th September, 2009 and revisited on the 9th September 2009 be returned to the Appellants.

32. In so far as the second relief sought in the application to the Court of Appeal, is concerned, I am of the view that the Appellants were clearly found within the territorial waters of Sierra Leone and were not licensed to fish within the exclusion zone. To grant this relief would be an affront to justice and contrary to the public interest. The second relief is therefore refused and the money derived from the sale of the fish will remain forfeited to the State. There shall be no order as to costs.



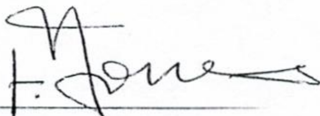
THE HON MS JUSTICE GLENNA THOMPSON, JSC

I AGREE



THE HON MR JUSTICE A H CHARM, CJ

I AGREE

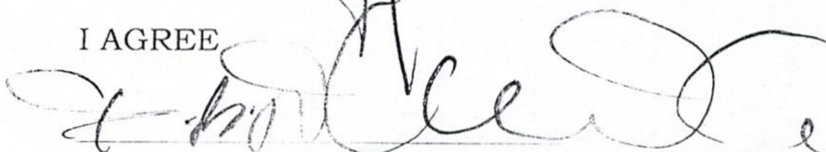


THE HON MRS JUSTICE N MATTURI-JONES, JSC

I AGREE

THE HON MR JUSTICE R S FYNN, JA

I AGREE



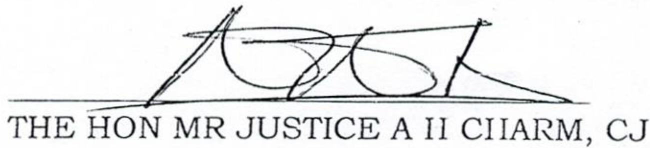
THE HON MR JUSTICE D B EDWARDS, JA

JUDGEMENT

THE HON MR JUSTICE A H CHARM, CJ

My Lords, My Ladies,

I have had the privilege of reading before hand the judgement of my learned sister Glenna Thompson JSC. I totally agree with her reasoning and conclusion reached. I need only to emphasize as succinctly stated by my learned sister in her judgment that when a trial is declared a nullity, or an appeal is upheld, the parties should be returned to the status quo ante, i.e if in a criminal trial a person has been sentenced, the sentence should be quashed and if any amount is paid as a way of a fine, the amount should be returned.



THE HON MR JUSTICE A H CHARM, CJ