Point 1. Order 27, r. 4, of the Supreme Court Rules is as follows: "Affidavits sworn in Sierra Leone shall be sworn before a judge, commissioner to administer oaths or officer empowered under these rules to administer oaths." No officer has been so empowered under the rules.

The Courts Act (Cap 7) does, however, make the following provisions: by section 2—"Master" means the Master and Registrar of the Supreme Court and includes the Assistant Master or other person lawfully performing the duties of Master and Registrar. By section 9 of the Act the duties of the Master shall be:—

(a) to perform all such acts as he may be required by law to do and such acts as he may be required by a judge to do;
(b) to tax all bills of costs submitted for taxation or referred to him by the Supreme Court or judge thereof;
(c) subject to rules of court to receive applications for and to seal probate and letters of administration in all cases where the right to such grant is not contested.

In the performance of his duties the Master shall have power to administer oaths and to take solemn affirmations and declarations in lieu of oath.

It has been submitted by Mr. Candappa that Mr. R. A. Woode, before whom the document in question purported to have been sworn, was not authorised to administer the oath, his appointment being that of Acting Senior Registrar and not of Assistant Master.

There are numerous arguments on both sides which come to mind, but in view of my decisions on the other points I do not find it necessary to rule on this point.

I do, however, think the matter could well be clarified by appointment under Order 27, r. 4. This question has not arisen until now, because previous holders of the office of Assistant Master and Registrar and latterly of the office of Senior Registrar have been personally appointed commissioners for oaths.

I hold that, for the reasons given above, rule 19 of the Petitions Rules has not been complied with, and following the decision given by the Sierra Leone Court of Appeal in the *Kamanda Bongay* case, I order that the petition be struck out with costs to the respondent to be taxed.

[SUPREME COURT]

Freetown
August 13, 1962
Bankole Jones J.

PARAMOUNT CHIEF TAMBA S. M'BRIWA . . . . *Petitioner*

v.

PARAMOUNT CHIEF DUDU B. BONA . . . . . *Respondent*

[E.P. 13/62]

Election Petition—Service of notice of presentation of petition—Whether objection to lack of service merely formal or technical—Whether there can be waiver of requirements of rules 15 *and* 19 *of House of Representatives Election Petition Rules* (*Vol. VI, Laws of Sierra Leone,* 1960, *p.* 407)*—Filing of affidavit of time and manner of service.*

Petitioner filed an election petition on June 12, 1962. On June 22, he served on respondent's solicitor's clerk a copy of the petition, a notice of motion for order for security for costs, a notice of appointment of petitioner's agent and the appointment of petitioner's agent. On June 29, respondent's solicitor told petitioner's solicitor that he had accepted service of the petition and he filed an entry of appearance for the respondent. Respondent also applied for and obtained further particulars from petitioner. On July 3, petitioner filed an affidavit stating that "the above entitled petition and other papers connected therewith" had been served.

On July 31, respondent filed an application that the petition be struck out for failure to comply with rules 15 and 19 of the House of Representatives Election Petition Rules.

Rule 15 provides: "Notice of the presentation of a petition . . . accompanied by a copy of the petition shall be served by the petitioner on the respondent within 10 days after such presentation. . . ."

Rule 19 provides: "The petitioner or his agent shall, immediately after notice of the presentation of a petition shall have been served, file with the master an affidavit of the time and manner of service thereof."

Petitioner argued, first, that respondent's objections were merely formal and, therefore, should not be allowed to defeat the petition and, second, that respondent had waived the requirements of rules 15 and 19 by applying for and obtaining further particulars.

Held, striking out the petition, (1) that the requirements of rules 15 and 19 of the House of Representatives Election Petition Rules are mandatory and cannot be waived; and

(2) That, even if petitioner had complied with rule 15, the affidavit filed was out of time and was not the kind of affidavit contemplated by rule 19.

Note: This decision was reversed by the Sierra Leone Court of Appeal on November 14, 1962 (Civil Appeal 21/62).

Cases referred to: *The Shrewsbury Petition Case* (1868) 19 L.T. 499; *Kanagbo and others* v. *Bongay*, Sierra Leone Court of Appeal, July 27, 1962, Civil Appeal 14/62; *Williams* v. *The Mayor of Tenby* (1879) 49 L.J.Q.B. 325; 42 L.T. 187; *Paramount Chief R. B. S. Koker* v. *Paramount Chief Abu Baimba III*, Sierra Leone Supreme Court, August 9, 1962, E.P. 7/62; *Macfoy* v. *United Africa Co. Ltd.* [1961] 3 W.L.R. 1405.

John E. R. Candappa for the petitioner.
Zinenool L. Khan for the respondent.

BANKOLE JONES J. The application here is to strike out the petitioner's petition on the ground that rules 15 and 19 of the House of Representatives Election Petition Rules (P.N. 97 of 1951), made applicable to these proceedings by the Electoral Provisions Act (No. 14 of 1962), have not been complied with.

Rule 15 reads as follows: "Notice of the presentation of a petition . . . accompanied by a copy of the petition shall be served by the petitioner on the respondent within 10 days after such presentation, exclusive of the day of presentation."

The petition in this case was presented to the master on June 12, 1962. No document containing the notice of the presentation of the petition and accompanied by a copy of the petition was ever served on the respondent within 10 days or at all.

Mr. Candappa contends that as all the petition rules are procedural, any objection as to their rigorous compliance is merely technical and formal and

he cites *The Shrewsbury Petition Case* (1868) 19 L.T. 499, a case which he said might have turned the scales in *Kanagbo and Ors.* v. *Kamanda Bongay*, Court of Appeal, July 27, 1962, Civil Appeal 14/62. In this case, that is, the *Shrewsbury Petition Case*, I find that, even if Mr. Candappa has rightly extracted a principle which appears to support his contention, I am hesitant to apply it to the present case, because, in the first place, with respect, no reasons were given by Martin B. in his very short judgment and, in the second place, there are later decisions which run contrary to his views, if those in fact were his views; e.g., *Williams* v. *The Mayor of Tenby and ors.* (1879) 42 L.T. 187 is one such case which was decided 10 years after the *Shrewsbury Petition Case* and by two judges at that. By this, I do not at all mean it to be inferred that all later decisions on any matter in issue are necessarily the right ones and have greater force than earlier decisions. All I want to say is that I prefer to accept this later decision as against the earlier one, if indeed the earlier one conflicts with the later decision.

Mr. Candappa, therefore, argues that if a solicitor accepts service of the petition, enters an appearance (an unnecessary step, he concedes) but also applies for and obtains further particulars (a fresh step) from the other side, as is the case here, then that solicitor is the last person to be heard to say that the lack of service on him of a formal document like the notice of the presentation of the petition ought to throw the petitioner's petition out of court. This cannot be so in all fairness, he says, because the subsequent behaviour of the respondent acts as a waiver and rule 59 can, therefore, be invoked, a rule which reads as follows: "No proceedings under the House of Representatives (Elections) Regulations, 1957, shall be defeated by any formal objection."

Now, in a ruling I gave on the 9th of this month in the case of *Paramount Chief R. B. S. Koker* v. *Paramount Chief Abu Baimba III*, Supreme Court, August 9, 1962, E.P. 7/62, I adverted to the question of the construction of the rule now under consideration, and this was what I said:

> "Rule 15, in my view, ought to be construed in its ordinary grammatical sense and in the context of all the other rules dealing with 'notices.' So construed, I think that the notice of presentation must be subsequent to the presentation of the petition to the master, that is, the filing or the presentation must precede the notice of presentation. The expression 'accompanied by' a copy of the petition . . . means that the document containing the notice of presentation must be served together with the copy document of the petition filed. The law, therefore, envisages two documents. . . ."

Later in the same ruling, I said: "Rule 15 is not only mandatory in language but peremptory and obligatory as to its compliance."

No compelling authorities have been produced to persuade me to change the views I expressed in the above case. It seems to me, therefore, that no inference from the service of other documents nor any fresh step taken by the respondent can cure the obligatory demands of rule 15. If the required documents contemplated by this rule are not served on the respondent, and that within the prescribed time, then not even rule 59 can breathe new life into that which is dead. By the non-compliance with the provisions of rule 15, the petition becomes dead and merely awaits burial at my hands.

As to rule 19, Mr. Candappa advanced the same arguments as he did in the case of rule 15 and cited several cases and textual authorities, none of which convinces me that in all the circumstances of this case this rule should not be

construed in the mandatory manner in which the Court of Appeal construed it in *Bongay's* case. It is important to remind ourselves of this never-to-be-forgotten rule. It reads: "The petitioner or his agent shall, immediately after notice of the presentation of a petition shall have been served, file with the master an affidavit of the time and manner of service thereof."

In this case, as I have pointed out, the petitioner did not serve the notice of the presentation of the petition as required by rule 15. It is true that on July 3 he filed an affidavit, stating, among other things, that he had caused to be served on the respondent on June 22, 1962, the petition and "other papers connected therewith." But even if it is said that service of the petition and other papers connected therewith amounts by inference to the service of the notice of the presentation of the petition, the affidavit filed was hopelessly out of time, and, besides, it is not the kind of affidavit contemplated by rule 19: see *Paramount Chief R. B. S. Koker* v. *Paramount Chief Abu Baimba III*, E.P. 7/62, August 9, 1962. This disposes of the submission relating to rule 19, and I hold that there has not been compliance with this rule.

But Mr. Candappa most strenuously argued, almost to the point of conviction, that any fresh step taken by a respondent constitutes in law a waiver of the non-compliance with the rules in question. Unfortunately, he did not support this general proposition with any authority and, regretfully, I received little assistance from the other side. The question of waiver was considered by the appeal court judges in *Bongay's* case and although they may have treated it as obiter, yet the learned Chief Justice had this to say of rule 19 and I make bold to say that he would have said it also of rule 15: "This, however, is a statutory mandatory obligatory provision as to procedure and cannot be waived by the respondent."

It seems to me, therefore, that, when once there has been a breach of the mandatory provisions of rules 15 and 19, any fresh step taken by a respondent, as, for example, in this case, the application for and supply of further particulars, is automatically null and void and without more ado. And if I may only borrow the language of Lord Denning in the Privy Council case of *Benjamin Macfoy* v. *U.A.C. Ltd.* [1961] 3 W.L.R. 1405, 1409, I would say:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad . . . and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Whatever the purpose of our legislature relating to the Electoral Provisions Act (No. 14 of 1962) may be, that purpose is brought to nought, when there is a complete disregard of provisions which are mandatory so far as their compliance goes. It, therefore, follows, for the reasons given, that I must order that the petition in this matter be struck out with costs, and I so order.

[SUPREME COURT]

Freetown
August 24,
1962

Bankole Jones
J.

IN THE MATTER OF AN APPLICATION BY THOMAS J. T. DIXON FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI

[C.C. 253/62]

Certiorari—Police court of inquiry—Denial of natural justice—Conference between adjudicating officer and witness in absence of accused.
Police Rules (*Vol. VII, Laws of Sierra Leone*, 1960, *p.* 1095), *r.* 19.

Acting under rule 19 of the Police Rules, the Commissioner of Police appointed a Deputy Superintendent of Police (Seisay) to act as a court of inquiry to inquire into the bank statement of a Sub-Inspector of Police (Dixon). As a result of the findings of this court, Dixon was dismissed from the Police Force. He then moved for an order of certiorari to quash the findings of the court on two grounds, the second of which was " that the inquiry was not free from bias and was against the principles of natural justice."

Dixon alleged that, during the course of the inquiry, Seisay took him to the office of the Commissioner for the purpose of obtaining the Commissioner's evidence; that, when they arrived at the Commissioner's office, Seisay left him standing outside while he entered; that he remained outside for 10 minutes while Seisay conferred with the Commissioner; that, when he entered the office, he found Seisay and the Commissioner sitting at the same table conferring together; and that, after the Commissioner had given his evidence, he (Dixon) was asked to leave, which he did, leaving the Commissioner and Seisay once more alone together.

Held, granting the application, that the fact that the adjudicating officer conferred with a witness in the absence of the accused amounted to an infringement of the principles of natural justice.

Cases referred to: *Duncan* v. *Cammell, Laird & Co. Ltd.* [1942] A.C. 624; [1942] 1 All E.R. 587; *Rex* v. *Wandsworth JJ., Ex parte Read* [1942] 1 All E.R. 56; *Kanda* v. *Government of the Federation of Malaya* [1962] 2 W.L.R. 1153.

Cyrus Rogers-Wright and *Claudius Doe-Smith* for the applicant.
John H. Smythe (Ag. Attorney-General) for the respondent.

BANKOLE JONES J. In these proceedings, counsel moves on behalf of the applicant, Thomas John Torboh Dixon, recently Sub-Inspector of Police, for an order of certiorari to quash the findings of a court of inquiry held into the bank statement of the applicant resulting in his dismissal from the Sierra Leone Police Force.

The grounds on which he relies are two in number, namely:

(1) " That the Commissioner of Police purported to exercise the jurisdiction vested in him under Cap. 150, s. 19, of the rules by holding an inquiry into the bank statement of the applicant which is not one of the offences for which the Commissioner of Police is empowered to hold or appoint an inquiry and, therefore, it was a wrongful exercise of his jurisdiction."

(2) " That the inquiry was not free from bias and was against the principles of natural justice."

It was strongly urged by the learned Acting Attorney-General, Mr. J. H. Smythe, that as the record of the inquiry containing the decision complained of is not before this court, no order can be made quashing it, and he referred me to Order 59, r. 8 (1), of the English rules, which reads as follows:

> "In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion or summons he has lodged a copy thereof verified by affidavit in the Crown Office . . . or accounts for his failure to do so to the satisfaction of the court or judge hearing the motion or summons."

The *note* to this rule reads: "The order must be in writing and should be exhibited to an affidavit. They should be lodged before the application for leave."

Mr. Rogers-Wright contended that as the respondent took an unchallengeable objection to the production of the record, by claiming Crown privilege, relying on the authority of *Duncan* v. *Cammell, Laird & Co. Ltd.* [1942] 1 All E.R. 587, it hardly lies in his mouth now to say that the applicant had not produced the record containing the findings of the court of inquiry which resulted in his dismissal. This is an explanation, he says, which accounts for its non-production, and one which in the circumstances, speaking for myself, I find satisfactory. Apart from this, I think the law is that if there has been an allegation of the violation of the principles of natural justice, as in this case, the court is entitled to look at the applicant's affidavit in order to examine the facts. In the case of *Rex* v. *Wandsworth JJ., Ex parte Read* [1942] 1 All E.R. 56 at p. 57, Viscount Caldecote L.C.J. in his judgment said the following:

> ". . . and the only way in which that denial of justice could come before the court in these proceedings (certiorari) is by way of affidavit, and the court for that reason is entitled—and, indeed, is bound, if justice is to be done—to look at the affidavit, just as it would look at an affidavit if it were an ordinary case of excess of jurisdiction. . . . The court will look at the affidavit to see what the facts are, and, if there has been a denial of natural justice, then I think that the court is in a position to interfere and say that the conviction, in those circumstances, is not to stand."

This is, therefore, a convenient and, I think, an appropriate stage for me to consider the applicant's second ground first. In paragraph 7 of his affidavit, the applicant alleged that, in the course of conducting the inquiry, Solomon Seisay, Deputy Superintendent of Police, who had been appointed by the Commissioner of Police to constitute the court of inquiry, took him to the office of the Commissioner for the purpose of obtaining the Commissioner's evidence. It would appear that the evidence of all other witnesses in Freetown was taken at the Criminal Investigation Department. This was not done in the case of the Commissioner. However, when they got to the Commissioner's office, Seisay left him, the applicant, standing outside whilst he entered. He remained outside for ten minutes, during which time it was alleged Seisay conferred with the Commissioner. Not only was there not filed any affidavit controverting this allegation, but the learned Acting Attorney-General, by the conduct of his cross-examination of the applicant, admitted the allegation. Also, under cross-examination, the applicant deposed that when he was called into the Commissioner's office, he found Seisay and the Commissioner sitting at the

same table conferring, with Seisay writing. He continued writing until the Commissioner was called upon to give his evidence. The Commissioner signed his written evidence, but after this the applicant was asked to leave, which he did, leaving behind him the Commissioner and Seisay.

The applicant's complaint is that the procedure adopted by his tribunal was an infringement of the principles of natural justice in that, in the first place, there was an admitted conference between the adjudicating officer and a witness in his absence before the witness gave evidence, admittedly in his presence, and this witness was none other than the Commissioner of Police, who instituted the inquiry and to whom a report was to be made. In the second place, in the course of his evidence, the applicant heard the witness ask the adjudicating officer if he had taken the evidence of another witness, to which he said " yes " ; and, in the third place, after the Commissioner had signed his written evidence, the applicant was asked to leave, leaving behind him his judge and the witness. There is a long string of authorities, even without mentioning them, which condemns such a procedure. I do not for myself conceive, nor would I believe, that the Commissioner brought any pressure to bear upon the adjudicating officer in order to bias the proceedings against the applicant, when they were twice together in the absence of the applicant. However, there are fundamental principles which govern judicial or quasi-judicial inquiries, and one of these, I opine, is that an adjudicating officer must not be closeted with a witness in the absence of an accused person, either immediately before the witness gives his evidence or immediately after he has given it. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case or against whom an unfavourable decision is given will believe he has been fairly treated if, in the course of his trial, a witness has had access to his judge in his absence and a witness at that who, as in this case, was the superior officer of the lowly judge. It seems to me, therefore, that the procedure, unwittingly no doubt, adopted by Seisay in obtaining the evidence of the Commissioner of Police, both before and after such evidence was given, did not make it plain and manifest that justice was done; see *Kanda* v. *The Government of the Federation of Malaya* [1962] 1 W.L.R. 1153 at pp. 1161–1162.

On this ground alone, therefore, it is my considered view that the applicant must succeed. As to ground (1), considerable argument was addressed to me as to whether the Commissioner of Police wrongfully exercised his jurisdiction by proceeding under the Police Act (Cap. 150) and the rules made thereunder. I find it unnecessary to examine such argument, but the argument was to the effect, on the one hand, that the Commissioner rightly and properly exercised his jurisdiction under the Act, and on the other hand, that the Commissioner's exercise of his jurisdiction was either in conflict with or repugnant to the Constitution which came into operation on Independence Day, namely, April 27, 1961, in that the latest expression of the will of Parliament ought always to prevail. It may be that the Commissioner of Police was right in pursuing the procedure laid down by the Police Act because these provisions, I was told, do not conflict with the Constitution. I am not saying that he was right, and I confess that the state of the argument on both sides leaves me in great doubt about it. But whether an order of certiorari can issue from this court, even if the Commissioner was in breach of the Constitution, is a matter on which I would not like to hazard an opinion.

It is enough to say that, having come to the clear conclusion which I have reached, namely, that there was an infringement of the principles of natural justice, it is unnecessary to go further into the matter. Accordingly I would grant the application with costs to be taxed against the respondent.

Freetown
Sept. 7,
1962
Bankole Jones
Ag.C.J.

[SUPREME COURT]

RODERICK MACKENZIE . . . . . *Appellant*

v.

COMMISSIONER OF POLICE . . . . . *Respondent*

[Mag.App. 17/62]

Criminal Law—Careless driving—Ability to control car—Whether sufficient evidence to support verdict—Effect of breach of Highway Code.

Road Traffic Act (*Cap.* 132, *Laws of Sierra Leone*, 1960), *ss.* 43 (1), 61—*Highway Code, rr.* 36, 37—*Road Traffic Regulations*, 1960 (*P.N.* 77 *of* 1960), *s.* 39 (1) (*s*).

At about 2 p.m. on February 18, 1962, appellant was driving his car about 30 m.p.h. along the main Hill Station Road from Wilberforce to Hill Station. Complainant's car was on Hill Cot Road approaching Hill Station Road. When appellant first saw complainant's car 50 to 60 yards away, appellant applied his brakes slightly and complainant's car appeared to stop. When the cars were about 30 yards apart, complainant suddenly turned into Hill Station Road proceeding about 10–15 m.p.h. Appellant immediately applied his brakes, reducing the speed of his car to about 5 m.p.h. The cars then collided.

Appellant was charged in the Magistrates' Court with driving his car without due care and attention contrary to section 43 (1) of the Road Traffic Act. He was convicted and sentenced to a fine of £15 or three months' imprisonment with hard labour. The trial magistrate concluded: "I have . . . come to the conclusion that the accused was driving at such a high speed that he could not control the car. . . ."

Against his conviction, appellant appealed on three grounds:

"(1) The learned magistrate was wrong in law in purporting to find the accused guilty of an offence for which he was not before the court.

"(2) The learned magistrate was wrong in law in not applying regulation 39 (1) (*s*) of the Road Traffic Regulations, 1960, to the facts of the case.

"(3) The verdict cannot be supported having regard to the evidence."

Held, allowing the appeal, (1) that there was no substance in appellant's first and second grounds of appeal; but

(2) That the magistrate's finding that appellant was driving at such a high speed that he could not control his car was not supported by the evidence; and

(3) That complainant's failure to observe rules 36 and 37 of the Highway Code could be relied on by appellant as tending to negative his liability.