Registry

Misc App No 13/2020

IN THE SUPREME COURT OF SIERRA LEONE

IN THE MATTER OF AN APPLICATION BY WAY OF JUDICIAL REVIEW TO PROHIBIT THE HIGH COURT PRESIDED OVER BY THE HON MR JUSTICE M M SESAY, JA SITTING ITS CRIMINAL JURISDICTION FROM PROCEEDING WITH THE MATTER TITLED:

THE STATE v AMADU MAKAH JALLOH

AND TO QUASH ANY DECISION JUDGMENT OR ORDER EMANATING FROM THE SAID PROCEEDINGS

AND

IN THE MATTER OF SECTIONS 125 AND 23 OF THE CONSTITUTION OF SIERRA LEONE, 1991 - ACT NO 6 OF 1991

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW MADE PURSUANT TO RULE 98 OF THE SUPREME COURT RULES, 1982 - STATUTOTRY INSTRUMENT No. 1 OF 1982 AND ORDER 52 RULES 1 - 8 OF THE HIGH COURT RULES, 2007

BETWEEN:

AMADU MAKAH JALLOH - ACCUSED/APPLICANT

AND

THE ATTORNEY-GENERAL & MINISTER OF JUSTICE - RESPONDENT

CORAM:

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE M F DEEN-TARAWALLY
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE A S SESAY
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE SENGU M KOROMA
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MS JUSTICE M M SAMBA
JUSTICE OF THE SUPREME COURT

COUNSEL:
M P FOFANAH ESQ & H KAMARA ESQ for the Accused/Applicant
OSMAN KANU ESQ, Principal State Counsel, A J M BOCKARIE ESQ State Counsel & J A K SESAY, ESQ, State Counsel for the State/Respondent

JUDGMENT DELIVERED THIS 16th DAY OF JUNE, 2021

BROWNE-MARKE, JSC

INTRODUCTION

1. The Accused/Applicant has applied to this Court for a Judicial Review of the decision taken by MONFRED SESAY, JA to continue to hear and to proceed with the criminal matter pending before him titled: THE STATE v AMADU MAKAH JALLOH. In that criminal matter, the Accused/Applicant (hereafter, the Applicant) is facing a 15 Count Indictment, alleging the commission of various offences: three Counts of Conspiracy to Defraud; 4 Counts of Obtaining Money by False Pretences contrary to section 32(1) of the Larceny Act, 1916; 1 Count of Cheating the Public Revenue; 10 Counts of Money-Laundering contrary to section 15(1)(c) of the Anti-Money Laundering and Combating of Financing of Terrorism Act, 2012. The trial is in progress before the Learned Trial Judge, but for the reasons advanced in the Application, the Accused wants this Court to stay those proceedings.

SUPERVISORY JURISDICTION OF THE SUPREME COURT

2. The Supreme Court has supervisory jurisdiction over all other Courts and tribunals in our jurisdiction. It is a jurisdiction conferred by section 125 of the Constitution of Sierra Leone, 1991. It reads: "*The Supreme Court shall have supervisory jurisdiction over all other Courts in Sierra Leone, and over any adjudicating authority; and in exercise of its supervisory jurisdiction, shall have power to issue such directions, orders or writs including writs of habeas corpus, orders of certiorari, mandamus and prohibition as it may consider appropriate for the purpose of enforcing or securing the enforcement of its supervisory powers.*"

3. Part XV of the Supreme Court Rules, 1982 - S.I. No. 1 of 1982, provides for the manner in which this jurisdiction could be exercised in a particular manner: i.e. when there is a complaint that a judgment has been reserved for three months or more by a subordinate Court. But this piece of subordinate legislation is evidently limited in its scope, and cannot be applied to the circumstances of this case. Therefore, the Rules Committee made provision for the general exercise of the Court's supervisory jurisdiction in Rule 98: "*Where no provision is expressly made in these Rules relating to the Original and the Supervisory Jurisdiction of the Supreme Court, the practice and procedure for the time being of the High Court shall apply mutantis mutandis.*" This Rule permits this Court to utilise the Rules applicable in the High Court, to applications invoking this Court's supervisory powers over the High Court. The applicability of the High Court Rules in these circumstances, has been affirmed in cases which have come to this Court before now, cases which have been cited by Counsel for the Applicant. The relevant Order is Order 52 High Court Rules, 2007 - HCR, 2007.

ORDER 52 HIGH COURT RULES, 2007

4. Where an applicant seeks an order of Prohibition, he should come by way of an application for Judicial Review. Reliefs can be claimed in the alternative. The application should be made within three months of the occurrence of the event giving grounds for making the application. The application should be made by way of Originating Notice of Motion. The Motion should be supported by an affidavit which shall include, inter alia, the relief or remedy sought, and the grounds on which he seeks such remedy or relief. Where the application pertains to the conduct of a Judge, the motion should be served on that judge. Within 7 days of filing the application, the applicant should file a statement of his case, setting out fully his arguments and relevant enactments or decided cases he wishes the court to consider. Within 7 days of the service on him of a statement of case, the respondent is likewise obliged to file and serve his statement of case containing the same matters as that of the applicant's. The Applicant in the matter herein complied with these Rules.
5. On the hearing of the application for judicial review the Court may grant any of the three prerogative reliefs: Prohibition, Certiorari, or, Mandamus - Rule 7. What I do not believe this Court can do, is to grant bail in an on-going trial in which the Learned Trial Judge has refused bail,

even though the order for prohibition may be denied the applicant. To do that would constitute undue interference in the way in which a judge conducts a criminal trial, and would adversely affect the conduct of such trials in general. This Court is also mindful that there are no interlocutory appeals in criminal matters. Any application which would tend towards achieving that object, ought to be rejected. Section 79 of the Criminal Procedure Act, 1965 provides, in a limited manner, a remedy if one trial Judge has refused bail. Limited in the sense that in a criminal trial, the proceedings cannot be severed. The preferment of an indictment, vests a criminal court with jurisdiction to try an accused person. The granting or refusal of bail during the course of the trial is not a separate issue, nor is it a separate triable issue. It is part and parcel of the same trial. It follows therefore that another Judge sitting in the High Court will not have jurisdiction to grant bail, where the trial Judge has refused to do so. The High Court is one and indivisible. At the same time, the provisions in the Bail regulations, 2018 are binding on all Courts, and Judges must ensure due compliance with them.

6. On the other hand, if the Order for Prohibition is granted, it would be quite proper to consider, if necessary in all the circumstances of the case, the issue of bail. But the most likely outcome in the majority of cases would be that the trial would be brought to an end.

FACTS OF THE CASE

7. I shall now turn to the facts supporting the Application herein. These appear on the face of the motion paper, the affidavit in support thereof, and in the statement accompanying the notice of motion. The Applicant contends that the proceedings pending before MONFRED SESAY, JA sitting as a High Court Judge, do not conform with, and do infringe the provisions of section 136(1) CPA, 1965 in that the Applicant is facing trial on the same facts and charges before A I SESAY, JA in another Court room. In other words, the Applicant has been put in '*double jeopardy*'. Additionally, it is contended that no separate preliminary proceedings were taken before the trial commenced before MONFRED SESAY, JA. As such, MONFRED SESAY, JA has no jurisdiction to conduct a trial of the Applicant. The third contention is that it is wrong for MONFRED SESAY, JA to have continuously refused to grant the Applicant bail, whilst, A I SESAY, JA has granted him bail in the matter which is before him. In the premises, the Applicant seeks an order quashing any judgment

or order which may be delivered or made by MONFRED SESAY, JA. He is also asking for a stay of the criminal proceedings pending before MONFRED SESAY, JA. He also asked for bail pending the hearing and determination of the Application herein, but that relief was refused at the hearing.

AFFIDAVIT OF MR M P FOFANAH

8. The Application is supported by the affidavit of Mr Fofanah deposed and sworn to on 17 December, 2020. Several allegations are made therein about the manner in which MONFRED SESAY, JA has been conducting the proceedings. In his paragraph 2, Mr Fofanah deposes that the Applicant was actually facing his trial before A I SESAY, JA. This is a matter I shall turn to later. To support this claim are exhibits A and B, respectively.

EXHIBIT A

9. Exhibit A, is the drawn up Order of Court dated 17 March, 2020. It is rightly headed Misc Appl 16/2020 as the Indictment had not yet been preferred. It refers to Public Notice No 42 of 1969. However, since the Constitutional and Statutory Instruments Act, 1999, all Public Notices should now be described as Statutory Instruments in conformity with the provisions of sections 170 & 171 of the Constitution of Sierra Leone, 1991. I shall set out the full contents.
10. BEFORE HONOURABLE MR JUSTICE A I SESAY (JA)
    DATED TUESDAY THE 17TH DAY OF MARCH, 2020
    UPON HEARING A FISHER
    THIS COURT FURTHER ORDER (sic) as follows:
    1. That Amadu Makah Jalloh be served with the indictment containing the charges found forthwith and without delay.
    2. That the said Amadu Makah Jalloh stand his trial at the law courts building, Siaka Stevens Street, Freetown.
    3. That the trial is fixed for the 2nd day of April, 2020
    4. That such trial commence not less than 7days from today's date.
    5. That the said Amadu Makah Jalloh will remain in custody at the Male Correctional Centre, Freetown
    6. That the matter is adjourned to the 2nd April, 2020.
11. From what follows later, this Order was the second one made in the S. 136 application which came before A I SESAY, JA. There is an apparent

inconsistency between paragraphs3 and 4. Paragraph 3 fixes the date of trial as 2 April, 2020. Paragraph 4 fixes it at not less than 7 days from 17 March, 2020. Paragraph 4 was quite unnecessary as 2 April, was clearly more than 7 days away from 17 March.

EXHIBIT B

12. Exhibit B contains the minutes of the proceedings before A I SESAY, JA. I shall reproduce them here.

"THE HIGH COURT OF SIERRA LEONE
CRIMINAL JURISDICTION
THE STATE
Vs
AMADU MAKAH JALLOH
Before the Hon Justice Ivan Sesay JA
16th day of March, 2020
Case called
A Fisher appears for the State. A Fisher moves Ex Parte originating Notice of Motion.
This is an application by way of ex parte notice of motion dated the 16th day of March, 2020 for the consent in writing for preferment of eighteen (18) count indictment against the Respondent (Amadu Makah Jalloh) for the offences of Conspiracy to Defraud, obtaining money by false pretences contrary to section 32(1) of the Larceny Act, 1916, Cheating of Public Revenue contrary to Law, and Money Laundering contrary to Section 15(1)(c) of the Anti-Money Laundering and Combating the Financing of Terrorism Act, 2012.
This application is made pursuant to Section 136(1) of the Criminal Procedure Act, No 32 of 1965 as amended by the Criminal Procedure Act No. 1 of 1970, and the Indictment ex officio information Procedure Rules PN 42 of 1969 on the grounds that a speedy, fair and impartial trial may be heard (sic) and that the interest of justice may be served.
And also for an order that a warrant of arrest be issued to the Sheriff of the High Court for the apprehension of the said Amadu Makah Jalloh in respect of the said criminal offences.
In support of the application is the affidavit of Vivian Esther Kabia sworn on the 16th of March, 2020. Attached to the said affidavit are the undermentioned exhibits, namely:-

Exhibit VEAK 1 - A copy of the proposed indictment for which amount (I believe this should read: 'consent') is sought
Exhibit VEAK 2 - proofs of evidence of the witnesses whom it is proposed to call in support of the charges.
Further reliance is placed upon 'on' (I believe this should read: 'a' or 'the') statement accompanied (should be: 'accompanying the notice of motion') by the Ex Parte Originating Notice of Motion and for the warrant of arrest to be returnable tomorrow the 17/3/20.
That is all.

RULING

Upon hearing A Fisher counsel for the Applicant on an ex parte originating notice of motion dated the 16th day of March, 2020 and with the affidavit sworn on the same date together with the exhibits attached thereto:
It is today ordered as follows:-

1. *I hereby grant my consent in writing pursuant to section 136(1) of the Criminal Procedure Act No 32 of 1965 as amended.*
2. *I hereby order an arrest warrant be issued and directed to the Sheriff of the High Court for the apprehension of Amadu Makah Jalloh for the offences contained on the face of the originating Notice of Motion dated the 16th day of March, 2020.*
3. *The Arrest Warrant is returnable on the 17th day of March, 2020.*
   Sign - 16/03/2020"

Tuesday 17th March, 2020 before the Hon Mr Justice Ivan Sesay JA
Case called
Accused person is absent. A Fisher appears for the State. Arresting Officer led in evidence in chief
AO1 - (SOB) - My names are Robert Kemokai. I live at Grafton Village. I am detective police constable 13858 Kemokai R *attached to Transnational Organised Crime Unit at Rogbangba Junction, Hastings. On the 17/3/20 at 14.30 hours, a team of TOCU personnel comprising of D/Insp A Kargbo, D/Sgt 7810 and myself DPC 13858 executed a warrant of arrest DATED 17/03/20 at the Pademba Road Correctional Centre outside the gate on Amadu Makah Jalloh and I endorsed the said warrant of arrest on the accused person marked Exhibit A. The said Amadu Makah Jalloh has been sufficiently identified. That is all.*

Upon sufficient identification of the Respondent Amadu Makah Jalloh, I hereby apply for an order pursuant to the order of the 16/03/20 for the preferment of Eighteen (18) Counts indictment and for a date to be set for trial and that date is the 2/4/20. That's all.

RULING

Having heard Detective Police Constable 13858 attached to the transnational organised crime unit who arrested Amadu Makah Jalloh and he having sufficiently identified him in court and relying on the endorsement on the warrant of arrest.

It is hereby ordered as follows:-

1. *That Amadu Makah Jalloh be served with the indictment containing the charges found therein forthwith and without delay.*
2. *That the said Amadu Makah Bah ('Jalloh', I presume) stand his trial at the Law Courts Building, Siaka Stevens Street, Freetown*
3. *That the trial is fixed for the 2nd April, 2020*
4. *That such trial commence not less than seven days from today's date.*
5. *That the said Amadu Makah Bah ('Jalloh', I presume) will remain in custody at the Male Correctional Centre, Freetown.*
6. *That the matter is adjourned to the 2nd day of April, 2020.*

Sign - 17/03/2020

ASSESSMENT OF EXHIBITS A & B

4. I have set out in its entirety the proceedings of 16 and 17th March, 2020 to show how easy it is to depart from laid down rules and procedure.
5. I shall start with the initial oral application itself. In his Ruling delivered on 16 March, 2020, A I SESAY, JA did not specifically say he had given his consent for the preferment of the Indictment which was exhibited to Ms Kabia's affidavit. He merely said: "*I hereby grant my consent in writing pursuant to section 136(1) of the Criminal Procedure Act No 32 of 1965 as amended.*" The Order has to be specific, and not general in form and in substance. The Learned Justice should make it clear that he has seen and read the charges in

the Indictment in respect of which he is giving his consent. A judge cannot give his blanket consent to the preferment of just any indictment. This is the import of Rule 2 of the Indictment & Ex-Officio Indictment Rules, 1969 - S I 42 of 1969 as amended by S I 25 of 1976. It reads: "*No indictment which by law may be preferred by the direction of, or with the consent in writing of, a judge, shall be filed in the High Court without the express order of a judge of the High Court made in open Court.*"

6. There is nothing in the extract quoted from the Learned Justice's order which shows that His Lordship was giving his consent for the preferment of the specific indictment in question. If the order had been taken out of the file, an enquirer wouldn't know to which case it applied. To support this assessment, one only needs to quote the order following the one just quoted, i.e. order numbered 2. It reads: "2. *I hereby order an arrest warrant be issued and directed to the Sheriff of the High Court for the apprehension of Amadu Makah Jalloh for the offences contained on the face of the originating Notice of Motion dated the 16th day of March, 2020.*" Consent can only be given to the charges in a proposed indictment; and not to charges which appear on the face of a motion paper. The motion stated there were 18 counts charging several offences in the Indictment. The oral application did not set out, which it ought to have done, the number of different offences constituting the several counts. As such, the Learned Judge did not actually give his consent to the preferring of an indictment containing the several charges constituting the indictment. Suppose for one moment, one of the offences charged amounted to no offence in law. The Learned Judge would have been right to refuse his consent for the preferment of such a count in an indictment. It seems to me that no consent was actually given.
7. The proceedings taken on 17 March, 2020 provide further evidence of non-compliance with the Rules. The minutes recorded by the Learned Justice have been set out above. The first minute recorded is: "*Accused person is absent*" During the course of the hearing Learned Counsel on behalf of the Respondent urged this Court to infer that the accused must have been present in light of the later minutes of the Learned Justice. We declined to so infer. In our view, if that minute had been inaccurate, or, had been typed inaccurately,

it was the duty of Counsel for the Respondent to bring before the Court, the handwritten minutes of the Learned Justice. He did not do so, though the Respondent filed an affidavit in opposition. No valid proceedings could be taken in the absence of the accused. Rule 10 of the 1969 Rules states: "10. *The High Court shall, on proof on oath that the person brought before it is the person charged and named in such Indictment, without further inquiry or examination, fix the place, time and date of the trial which shall not be less than seven days from the date of such appearance.*" It follows that the person charged and named in the indictment has to be present.

In the relevant minutes quoted above, the proceedings taken on 17 March, 2020 have been set out. DPC 13858 Kemokai was not shown the indictment containing the charges which authorised the issuing of a warrant to arrest the Applicant. In other words, he did not provide proof that the person brought before the Court was the same person charged and named in such indictment. The words "*The said Amadu Makah Jalloh has been sufficiently identified*" appear immediately after DPC Kemokai is recorded as tendering in evidence the warrant of arrest as exhibit A. It is not clear whether these words were said by him, or, by Learned Counsel for the State. Later in the extract, the Learned Justice records in his minutes: "*.....Having heard Detective Police Constable 13858 attached to the transnational organised crime unit who arrested Amadu Makah Jalloh and he having sufficiently identified him in court and relying on the endorsement on the warrant of arrest.*" If, as Counsel for the Respondent has claimed in this Court, the Applicant must have been present, it would have been unnecessary for His Lordship to note as His Lordship did that: "*.....he having sufficiently identified him in Court and relying on the endorsement on the warrant of arrest...*" The warrant of arrest was spent at that point in time. If the accused was present in Court there would be no need for the Learned Justice to rely on the endorsement on the warrant of arrest. The purported arrest had been effected pursuant to an order of Court. This, in addition, buttresses the conclusion this Court has reached that the Applicant was probably not in Court on 17 March, 2020. His Lordship's first minute clearly confirms this.

8. Counsel for the State in the High Court is recorded as saying: "*Upon sufficient identification of the Respondent Amadu Makah Jalloh, I*

hereby apply for an order pursuant to the order of the 16/03/20 for the preferment of Eighteen (18) Counts indictment and for a date to be set for trial and that date is the 2/4/20. That's all." If preferment of the indictment had been ordered the day before, it would be quite unnecessary to re-apply for it to be preferred on the next day.

9. In any event, the Learned Justice adjourned the hearing to 2 April, 2020 for trial to commence. On that day, or, as appears at the middle of page 6 of the same exhibit, 14 April, 2020, the charges in the indictment, so-called, for the time being, were put to the Applicant, and he pleaded not guilty to all of them. He was granted bail. Hearing was adjourned to 28 April, 2020. There was no sitting on the latter date. At a hearing on 25 June, 2020, the Learned Justice recorded that Ms M K Conteh had been given a Fiat by the DPP to conduct the prosecution. She informed the Court that the accused and his relatives had promised to settle the matter by at least making part payment. The Learned Justice records that he warned the accused and his Solicitor to take that part, i.e. the repayment, seriously, otherwise the bail granted to the accused person would be estreated. So, the criminal court was here being used to exercise coercion on an accused person who had pleaded not guilty, to get him to make, what is described as part payment. That is obviously not the purpose of a criminal trial. If what the complainant in the matter had wanted was his money back, he could have instituted proceedings in the Civil Court. To threaten incarceration for failure to meet the demands or requests of a victim/complainant amounts to a clear abuse of the process of a criminal court. Hearing was later adjourned to 2 July, 2020. It appears, there was no hearing on 2 July, 2020. No reason is given for this. The next hearing was on 16 July,2020. Ms Conteh informed the Court that she had two witnesses present, but could not proceed as the services of a French interpreter were needed. Hearing was therefore adjourned to 21 July, 2020.

10. On the latter date, i.e. 21 July, 2020. Ms Conteh, J Gbloh and A Turay are recorded by the Learned Justice as appearing for the State. The Fiat granted by the DPP has not been exhibited, but if it was only granted to Ms Conteh, the other Counsel had no authority to appear on behalf of the State if they were not employed as State

Counsel. There were further adjournments to 28 July, then to 2 August, and then, 11 August, 2020. The proceedings taken on 11 August, 2020 are recorded on pages 8 - 9 of exhibit B.

PROCEEDINGS TAKEN ON 11 AUGUST, 2020

11. I shall quote verbatim from those pages: "*Case is called. Accused person is present. M K Conteh appears for the State. J M Jengo appears for the accused person. Prosecuting witnesses are present but interpreter is absent. At this stage, Prosecutor brings to the attention of the Court that the previous Counsel in this matter (A Fisher) did not comply to (sic) the orders granted this Honourable Court on the 17th March, 2020. This came to my knowledge when a Fiat was granted to me to prosecute this matter. When I searched the file and realised that this order of this court was not perfected. However, the orders have now been perfected and filed herein. Furthermore, the indictment is now filed to be serve on the accused person. COURT: This matter will be adjourned until my orders are fully complied with. This matter will be adjourned to the 2/9/20.*"
12. The sum total of what was said and done on 11 August, 2020 is that the whole proceedings had become a nullity. An accused person cannot be tried on a draft indictment. He has to be tried on the indictment in respect of which a Judge has given his consent. Since no such Indictment had been filed as of 11 August, 2020, all that transpired before the Learned Justice between 2 or 14 April, 2020 and that day had no legal basis. The best that could have been done was for the Learned Justice to have directed that the Applicant be discharged on the Indictment on which his pleas had been taken on 2 (or 14) April, 2020, and to order that the indictment as filed be read out to him, and his pleas taken afresh. In addition, all the Orders made by the Learned Justice on 17 March, 2020 had been flouted. No indictment had been served as ordered; no proofs of evidence of the witnesses the prosecution intended to call had also been served on the Applicant. In the premises, the Learned Justice lacked jurisdiction to proceed with the matter before him. In any event, he adjourned hearing to 2 September, 2020. There was no hearing on 2 September, and no reason has been given for this. The next hearing was on 26 October, 2020. On page 9 of exhibit B, the Learned Justice records the following minutes: "*Accused person is absent.*

The Court is informed that the accused person has been charged with the same offence and he is before another Judge. The judge has remanded him in custody. I order for production order (sic) and for him to be brought before this court at the next adjourned date. Matter is adjourned to 29/10/20."

13. There was clearly a reason why the Applicant could not appear before the Learned Justice on 26 October, 2020. For, on 30 September, 2020, the Learned Chief Justice had assigned the trial to MONFRED SESAY, JA. This, the Learned Chief Justice was entitled to do. The assignment appears on one of the pages of the Respondent's statement of case. So, contrary to the contentions raised by Mr Fofanah, Counsel for the Applicant, the Applicant was not as of 30 September, 2020 appearing before two Judges on the same charges in the same indictment. He was only duty bound to appear before M M SESAY, JA.

EXPLANATION OF THE S 136 PROCEDURE

14. The ways by which an accused could be brought before the High Court on indictment, are clearly spelt out in s. 136 CPA, 1965. The usual way for that to be done, is by way of committal proceedings. During committal proceedings, an accused is able to test the strength of the prosecution's case against him. He hears the evidence against him, and can then instruct Counsel, if he has one, on how to present his case in the High Court. On the other hand, when one is charged on an indictment preferred by or with the consent of a Judge, all of these advantages are lost. An accused is suddenly presented with charges which in the usual case, carry a sentence to a term of imprisonment exceeding 5 years, the usual maximum sentence a Magistrate can impose. Ten days after he has appeared in Court for the first time to be identified, he probably has to appear in court again for his trial. Witnesses he may have, may have travelled out of the jurisdiction, or, may have, sadly passed away. He has to instruct Counsel on his behalf. True, committal proceedings could be dilatory. And this is the usual raison d'etre for applying for the consent in writing of a judge for the preferment of an indictment. But there must be strict compliance with the provisions relating to such an application.

15. The history of how the section 136 procedure for applying for the consent in writing of a judge, came into existence is explained by SIR SAMUEL BANKOLE JONES, P and MARCUS-JONES, JA n MACAULEY v ACTING ATTORNEY-GENERAL [1968-69] ALR SL, 365 at page 371, and at page 376 respectively. Both Learned Justices cited with approval, LORD HODSON's dictum in SECRETARY OF STATE v WARN [1968] All ER, 300 at page 303, where the Learned Law Lord said: "*Procedural sections are usually mandatory and there is nothing which points to the contrary in this case. Procedural provisions are, as here, often inserted for the protection of accused persons*". Macauley's case was that S.136 before the amendment in 1970, did not authorise the preferment of an indictment for Treason without first going through a preliminary investigation. As the law stood at the time, only indictments brought under the Vexatious Indictments Act, 1859 could be tried in the High Court without first going through a preliminary investigation. Strict compliance with statutory provisions which protect the rights of an accused person in a criminal trial, is mandatory.
16. Our Court of Appeal also stressed the importance of procedural provisions in the case of **LANSANA v R [1970-71] ALR SL 189** to the extent that the Court quashed the convictions of all the Appellants without going into the merits of the case against them, for violation of procedural Rules, namely, Insufficiency or absence of Fiat, and for Duplicity.

PROCEEDINGS BEFORE MONFRED SESAY, JA

17. Minutes of the proceedings before MONFRED SESAY, JA have been attached to the Respondent's statement of case. They show that the Applicant first appeared before the Learned Justice on 15 October, 2020. The charges in the indictment were read over to him, and he pleaded not guilty to all of them. The Indictment was dated 19 August, 2020 and was filed in the May Sessions of the High Court, when, as a matter of fact, consent had been given for its preferment in the January sessions of the High Court, and ought to have been filed during those sessions. Mr J A K Sesay appeared for the State. Now, the DPP had given his Fiat to Ms Michaela Sesay to prosecute the matter. There is no evidence that the Fiat was revoked or withdrawn. The Fiat was granted by the Learned DPP pursuant to

powers conferred upon him in that behalf by section 66(5) of the Constitution of Sierra Leone, 1991. Section 66(4) sets out the powers of the DPP. He can institute criminal proceedings. He can take over and continue criminal proceedings instituted by any person or authority, i.e. private prosecutions. He can discontinue criminal proceedings instituted or undertaken by himself or, by any other person or authority. It seems to this Court, that having granted his Fiat to Ms Conteh, the best he could have done, was to have withdrawn his Fiat, before instructing Mr Sesay, a State Counsel to take over again the prosecution. It seems to this Court, that Mr Sesay had no locus in this matter, as Ms Conteh had been given sufficient authority to prosecute. That authority had not been specifically withdrawn. Of course, and this Court accepts, that the DPP could have discontinued the proceedings even though he had given his authority to Ms Conteh to prosecute.

18. In any event, the trial proceeded before MONFRED SESAY, JA. After the charges had been read out to the accused on that day, the evidence of the first witness Dawa Salim was taken. At the end of that day's hearing, the Learned Justice merely noted: "*Application for adjournment granted as prayed. Matter adjourned to Thursday 22 October, 2020. Accused to be remanded in custody.*"

19. It is the view of this Court that in all criminal matters, it is the duty of a trial judge to consider the issue of bail, even if it has not been raised by the defence. Since the passing of the Bail Regulations, 2018, this has become mandatory, and in our view, the High Court should set the pace, for the edification of the Magistrates' Courts. It is the duty of the Judge to grant bail. If the prosecution objects to bail, it must file an affidavit deposing to its reasons for so objecting before the trial commences. We have tried as best as possible to relegate to history, the '*ambush*' *strategy* through which *an accused could come to Court, and without any warning, be told that* he is likely to jump bail, and is therefore remanded in custody. Further, the Court is obliged to state for the record, its reasons for refusing bail. These reasons, written down, should be given to the accused person, if he applies for them. Furthermore, the issue of bail has to be considered at each hearing of the case. In this case, nothing, it appears, was said to the effect that prosecuting Counsel was opposing bail. We think that in this respect, the Applicant's

complaint that he was refused bail is justified. The Learned Justice was duty bound to state in writing his reasons for refusing bail. However, we do not find it necessary to give any directions in this respect because we have come to the conclusion that as the proceedings were initiated or instituted in an irregular manner, the proceedings before MONFRED SESAY, JA were also, regretfully, a nullity. No steps had been taken by the prosecution to rectify the errors which arose during the application stage before A.I. SESAY, JA.

20. It is inconceivable to this Court how it is that an Order made in March, 2020 was only complied with in August, 2020. Granted, the Learned Justice, A I SESAY's first order of 17 March, 2020 was elastic, to say the least, to wit: "*That Amadu Makah Jalloh be served with the indictment containing the charges found therein forthwith and without delay.*" It was his duty to state clearly and unequivocally that the accused should be served with the indictment, and with copies of the proofs of evidence, not less than a number of days before the date fixed for the commencement of the trial. Rule 10 of S I 42 of 1969 states that the first appearance for trial shall not be less than seven days from the date of when the accused appeared before the Judge who gave his consent. S 140 (a) CPA, 1965 states: "*in any such case where an indictment is signed and filed without previous investigation and committal for trial, the accused shall be entitled to at least seven days notice as aforementioned.*" This is a provision a Judge hearing a section 136 application should be mindful of. Rule 17 S I No. 42 of 1969 also empowers the Judge hearing the s.136 application to order that proofs of evidence should be served on the accused at the same time as service of the indictment. In the instant case, the Order of 17 March, 2020 says nothing about service of the proofs of evidence. We do not even know whether they were eventually served on the Applicant. The proofs of evidence take the place of depositions arising from committal proceedings. They apprise the accused person of the nature and strength of the case against him. MONFRED SESAY, JA has not also said anything in his minutes about whether this was done or not. This Court holds the view that the lack of any evidence that there was full compliance with the Rules in S I No. 42 of 1969, provides sufficient evidence that the subsequent trial has been a nullity.

21. The cases cited by Counsel on both sides do not really bear on the issues we have highlighted. That the Supreme Court has supervisory jurisdiction over all other subordinate Courts is quite clear. That this Court can also make orders quashing or prohibiting the continuation of a criminal trial, is also clear. However, this Court does not treat lightly the need to ensure that there is as little interference with the course of a criminal trial as possible. Trials will only be stopped before conviction or acquittal, when this Court concludes that there has been a serious departure from the rules, which departure might lead to prejudice to an accused person. This Court did so in the case of S C No 1 /2017 - ABRAHAM LAVALY & OTHERS v THE STATE, judgment delivered July, 2020, when this Court set free several accused persons who had been tried, but had been awaiting judgment for several years with no prospect of the same being delivered.

22. The leading case in this area of the Law is **ROTHFIELD [1937] 4 All ER 320 CCA**. The Judgment of the Court was delivered by HUMPHREYS, J. At page 321 para G, he said: "*Now, it cannot be made too plain, or stated too definitely, that this Court will not inquire into the exercise of the discretion of a Judge who is sitting and dealing with an application under the Administration of Justice (Miscellaneous Provisions) Act,1933, and say that he was wrong, if it is clear that he had jurisdiction to entertain the application.*" The issue before that Court was whether, where the Bill of Indictment did not accompany the application for the Judge's consent, but had been lodged in the Crown Office of the King's Bench Division of the High Court, and was therefore before the Judge, this amounted to an irregularity. The Court of Criminal Appeal held that it was not an irregularity.

23. The case of **RAYMOND [1981] 2 All ER (CA)** 246 is also instructive, though the point dealt with there, was whether the audi alteram partem Rule, applied to what we in this jurisdiction refer to as the "Section 136" Application. The Court of Appeal there said this was not the case. The accused person had no right to be heard where the prosecution had applied for a judge's Consent to prefer a Bill of Indictment.

24. Another case in point is **MORAIS [1988] 3 All ER 161 CA**. There, the complaint was that the Indictment which had been preferred with the consent of a Judge, had not been signed by the proper Officer, and that the Application had merely been initialled by the Judge who heard the Application . LORD LANE, LCJ said at para g that the proper approach of the Court when faced with such a situation is to find out the intentions of the draftsman. He said further, "*...we have come to the conclusion therefore that it is not merely a comparatively meaningless formality that the proper officer's signature should be appended, but it is.....a necessary condition precedent to the existence of a proper indictment at all that the bill should be signed and only then and thereupon does it become an indictment. Therefore, in the present case there was no valid indictment, and there was no valid trial, no valid verdict and no valid sentence.*" The convictions in that case were quashed because of this irregularity.

25. Since **MORAIS**, the Court of Appeal has held that the proper approach to procedural failures in relation to Indictments should be as stated by FULFORD,J in **ASHTON[2006] EWCA Crim 794** where he said at paras [4] and [5] "*.....In our Judgment ...whenever a Court is confronted by failure to take a required step, properly or at all, before a power is exercised ('a procedural failure'), the Court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the Court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk, the Court must decide whether it is just to allow the proceedings to continue. On the other hand, if a Court acts without jurisdiction - if, for instance, a magistrates' court purports to try a defendant on a charge of homicide- then the proceedings will usually be invalid.*"

26. What this Court can distil from the cases cited, is that it can only quash the Indictment and the ensuing trial at this stage, i.e. before verdict, on the basis that the Court presided over by MONFRED SESAY, JA has no jurisdiction to proceed with the trial as a result of procedural failures in the process by which the matter was

brought before His Lordship. These are failures of which he could not have been cognisant. As HUMPHREYS,J pointed out in **ROTHFIELD**, the English Court of Appeal would not interfere in the exercise of the power of a Judge to give his consent to the preferment of an Indictment, if he had jurisdiction to entertain the application. The emphasis in all the cases, is not so much on whether, the procedure to be followed was mandatory or directory, but whether the procedural failure deprives the Court of jurisdiction. We have come to the conclusion that the failure by A I SESAY, JA to follow the procedure laid down in S I No. 42 of 1969, has deprived the High Court of all jurisdiction to try the Appellant on that indictment. The best the prosecution can do is to start afresh.

27. This Court notes that the Applicant's Counsel approached this Application on the basis of alleged wrong-doing by MONFRED SESAY, JA. We have not found any wrong-doing in the way His Lordship has handled the trial, save that we are of the view that he should have given serious consideration to the issue of bail. Where the prosecution does not oppose bail by way of affidavit evidence, a Judge will find himself in an invidious position, if, suo moto, he himself decides the issue. What was the evidence before him that the accused would jump bail? A judge cannot rely on his, as it were, 'gut' feeling to decide the issue, as it concerns the liberty of an individual. We must pay heed to legislation which seeks to protect the liberty of the individual.

28. This Court also notes that the Respondent's Counsel has focused on the propriety of the trial before MONFRED SESAY, JA without focusing on the trial's antecedents before A I SESAY, JA. In the exercise of its supervisory jurisdiction, this Court, of necessity seeks to find out whether there has been, in the first place, an error on the face of the record; and if none, whether there has been due compliance with the rules of natural justice, and the Constitutional safeguards provided an accused person facing trial.

29. In the words of FULFORD, J in the ASHTON case cited above, we have come to the conclusion that there has been a procedural failure, and that failure will result in prejudice to the Applicant if the trial is allowed to proceed to conclusion. It is our view that if the prosecution is convinced it has a case, it can very well start the whole

process again. The Applicant has not been convicted, yet. One cannot tell whether he may be convicted.

30. In the result, this Court has come to the decision that the only sensible conclusion it can come to, is to quash the proceedings before A I SESAY, JA on 16 and 17 March, 2020 and on subsequent days. Consequently, the proceedings before MONFRED SESAY, JA being based on the Orders made respectively on 16 & 17 March, 2020, are a nullity, and ought to be quashed. But in order to ensure that if the prosecution wishes to proceed on another indictment pursuant to one of the Orders we are going to make, the Applicant will be at hand, we will in the exercise of this Court's powers, put him on bail, rather than release him unconditionally.

31. The Orders of the Court are as follows:

(1) Pursuant to Order 52 Rule 7 of the High Court Rules, 2007, this Honourable Court grants an Order of Certiorari and quashes the Orders made by A I SESAY, JA on 16th and 17th March, 2020, respectively.

(2) Consequently, the trial before MONFRED SESAY, JA is a nullity, and these proceedings are stayed. The Applicant herein is discharged on the Indictment on which he is being tried.

(3) The prosecution is at liberty to institute fresh criminal proceedings against the Applicant if it so desires as the Applicant has not been convicted of the offences charged in the Indictment dated 19 August, 2020.

(4) In order to ensure that if the prosecution wishes to institute fresh proceedings, the Applicant will be readily available, he will not be released unconditionally. He will be released on terms. Therefore, this Honourable Court grants bail to the Applicant with effect from the date of this Judgment, on the following terms:

(i) Bail is granted to the Applicant in the total sum of Le1billion.

(ii) The Applicant shall provide two Sureties who shall enter into Recognisances in the sum of Le500million each. Each Surety shall be resident in the Western Area and shall provide proof of such residency. Each Surety shall be the owner of real property in the Western Area of a value not less than Le500million.

(One Billion Leones) (Five Hundred Million Le)

Proof of this shall be provided to the Master & Registrar, not the Registrar of this Court, as a fresh criminal prosecution can only be re-instituted in the High Court.

(iii) The Applicant shall report to the Master & Registrar every Monday, Wednesday and Friday for a period of 4 weeks only commencing from the date of this Judgment. Before the end of that 4 week period, the prosecution should have decided whether it wishes to re-institute a criminal prosecution against the Applicant.

(5) There shall be no Order as to Costs.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE JSC

THE HONOURABLE MR JUSTICE M F DEEN-TARAWALLY, JSC

THE HONOURABLE MR JUSTICE ALUSINE SESAY, JSC

THE HONOURABLE MR JUSTICE SENGU M KOROMA, JSC

THE HONOURABLE MS JUSTICE M M SAMBA, JSC

SUPREME COURT OF SIERRA LEONE REGISTRY