[SUPREME COURT]

Freetown
Oct. 22,
1962

Bankole Jones
Ag.C.J.

SALIM ANTHONY AND MUCKTAR DEEN-SIE . . . *Appellants*

v.

THE COMMISSIONER OF POLICE . . . . . *Respondent*

[Mag.App. 29/62]

Criminal Law—Procedure—Joint trial—Second accused joined after trial of first accused had begun—No plea taken from second accused—Whether trial a nullity—Whether retrial should be ordered—Criminal Procedure Act (*Cap.* 39, *Laws of Sierra Leone*, 1960), *s.* 44.

The first accused (second appellant) was charged before a police magistrate with stealing 80 bags belonging to Paramount Chief Kanja. At the trial, the paramount chief testified as follows: "As a result of information given me, I questioned the accused and he admitted stealing 80 empty bags and said he lent them to one Anthony at night. . . . I sent for Salim Anthony and asked him whether the bags were given to him."

At this point, the magistrate interrupted the paramount chief's evidence and ordered that Salim Anthony be joined and tried together with the first accused as a receiver. Anthony was thereupon joined and became the second accused (first appellant). There was no indication that the second accused was called upon to plead to any charge, although a charge of receiving was written on the charge sheet. When both accused were convicted and sentenced they appealed to the Supreme Court.

Held, allowing the appeal, (1) that the fact that there was a joinder of the two accused after the trial of the first accused had begun and that no plea was taken from the second accused nullified the entire trial; and

(2) That there should be a retrial.

The court said, obiter, "If I may venture to give guidance to magistrates when a situation such as is disclosed in this case arises, I would recommend that the magistrate ought to stop the case and discharge the accused and call upon the prosecution to consider the provision laid down in section 44 of Cap. 39 dealing with joinder of charges and offenders."

Cases referred to: *Archibong and another* v. *Commissioner of Police* (1946) 12 W.A.C.A. 1; *Arisah and another* v. *Commissioner of Police* (1948) 12 W.A.C.A. 297; *Oke* v. *Inspector-General of Police* (1954) 14 W.A.C.A. 645.

Berthan Macaulay for the first appellant.

A. Joseph Kowa for the second appellant.

Albert Metzger for the respondent.

BANKOLE JONES AG.C.J. This is an appeal against convictions and sentences made and passed on both appellants by the learned police magistrate sitting at Kenema in the provinces on April 9 and 11, 1962, respectively.

The facts were that the first accused, who is the second appellant in this court, was charged with stealing 80 empty bags valued at £10, the property of Paramount Chief Kanja, contrary to section 12 of Cap. 37 of the Laws of Sierra Leone. During his trial it transpired that the first witness, Paramount Chief Kanja, deposed as follows: "As a result of information given me, I

questioned the accused and he admitted stealing 80 empty bags and said he lent them to one, Anthony, at night, . . . I sent for Salim Anthony and asked him whether the bags were given to him."

Interrupting his evidence, the learned magistrate ordered that Salim Anthony, who presumably was in court, be joined and tried together with the accused as a receiver. This was the learned magistrate's note: "At this stage the court orders a joinder of the alleged receiver, as requested by prosecution."

Salim Anthony was thereupon joined and became the second accused and the first appellant in this court. There was no note on the record that the learned magistrate called upon this second accused to plead to any charge whatever, though I find that a charge of receiving the 80 bags knowing the same to have been stolen was written on the charge sheet, albeit in a different kind of ink. The inference is obvious. Mr. Kowa, on behalf of both appellants, filed several grounds of appeal on their behalf and was prepared to argue them. At this stage Mr. Berthan Macaulay appeared for the first appellant and Mr. Kowa stated that he now appeared for only the second appellant.

However, the court of its own motion invited counsel to argue a point of law which appeared apparent on the record, namely, whether the fact that the second accused was joined after the first accused's trial had begun, and no plea taken from him did or did not operate to nullify the entire trial.

Counsel for the appellants as well as Crown counsel conceded that on the authority of *Thomas Archibong, Henry Inokon* v. *Commissioner of Police* (1946) 12 W.A.C.A. 1 and *Jonah Arisah, Lawrence Egbunike* v. *Commissioner of Police* (1948) 12 W.A.C.A. 297, as distinguished from *Adikun Oke* v. *Inspector-General of Police* (1954) 14 W.A.C.A. 645, the trial before the learned magistrate must be nullified because of such substantial irregularity which went to the very root of it. I find myself in complete agreement with this proposition and I hold that the entire trial was a nullity.

It was urged, among other things, that the evidence taken before the magistrate did not disclose legal proof of the offence in the case of the first appellant and that, therefore, this court should quash the conviction and sentence and refuse to order a retrial. I do not intend to express an opinion upon the merits of the case but I think this is a fit and proper case for a retrial to be ordered. If I may venture to give guidance to magistrates when a situation such as is disclosed in this case arises, I would recommend that the magistrate ought to stop the case and discharge the accused and call upon the prosecution to consider the provision laid down in section 44 of Cap. 39 dealing with joinder of charges and offenders.

The appeal is allowed and appellants ordered to be tried by another magistrate. Their convictions and sentences are quashed.