

The Attorney General

Appellant

v.

Momodou Jobe

Respondent

FROM  
THE COURT OF APPEAL OF THE GAMBIA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 26TH MARCH 1984

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*Present at the Hearing:*

LORD DIPLOCK  
LORD ELWYN-JONES  
LORD KEITH OF KINKEL  
LORD SCARMAN  
LORD BRIGHTMAN

*[Delivered by Lord Diplock]*

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This is an appeal against a judgment of the Court of Appeal of The Gambia declaring sections 7, 8, 9 and 10 of the Special Criminal Court Act 1979 ("the Act") to be null and void because, although these sections of the Act were in conflict with the provisions contained in Chapter III of the Constitution of the Republic of The Gambia, the Act had not been passed by the House of Representatives and submitted to and approved at a referendum in the manner required by section 72 of the Constitution.

The purpose of the Act, as its long title states, is:-

"to establish a Special Criminal Court to deal with offences involving misappropriation and theft of public funds and public property."

The enacting sections of the Act are preceded by two recitals. The first of these refers to section 94(1) of the Constitution, which empowers Parliament to establish courts subordinate to the Supreme Court with such jurisdiction and powers as may be conferred on them by any law. As a subordinate court the Special Criminal Court is subject to the supervision of the Supreme Court under section 94(2) of the

Constitution which, so far as is relevant to this appeal, provides:-

"94. ....

(2) The Supreme Court shall have jurisdiction to supervise any.....criminal proceedings before any subordinate court .... and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court...."

The second recital to the Act itself is also worth setting out in full:-

"And Whereas in the opinion of Parliament it is expedient to establish such a subordinate court to deal effectively and expeditiously with certain offences considered detrimental to the economic interest of the Republic of The Gambia."

Speed in bringing offenders to trial is thus one of the stated purposes of the Act.

The Act does not make criminal any conduct that was not already a criminal offence before the Act was passed. Broadly speaking, what it does is (1) to provide that offences of dishonesty which affect public funds or public property (expressions to which wide definitions are given by the Act) are to be punished by a mandatory sentence of imprisonment for a maximum of seven and a minimum of five years; and (2) to establish the Special Criminal Court presided over by a magistrate assigned to it by the Chief Justice, with jurisdiction to hear and determine all charges of such offences.

The respondent to the Attorney General's appeal to the Judicial Committee, Momodou Jobe, has not appeared at the hearing by their Lordships. Since the judgment of the Court of Appeal delivered on 11th May 1981, Jobe has been tried and convicted in the Special Criminal Court on two charges, one of stealing public funds in the sum of D595,791,34 and the other of false accounting. For these offences he is currently serving a sentence of imprisonment; and against his conviction there is no appeal before their Lordships. The only matters in issue in this appeal are the constitutionality of certain pre-trial procedures for which the Act provides. These were applied against Jobe.

Jobe was arrested on 9th August 1979 on suspicion of having committed the offences of which he has since been convicted. On 18th August he appeared before the magistrate assigned to preside over the Special Criminal Court and was remanded in custody. On 12th September 1979 Jobe applied to the Supreme Court under section 28 of the Constitution for

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redress for breach of his constitutional rights under sections 15(1)(e), 18, 20 and 25 of the Constitution. He claimed that sections 6, 7, 8, 10, 12, 13 and 17 of the Act conflicted with one or other of the above-mentioned provisions of Chapter III of the Constitution and accordingly were *ultra vires* and void.

After a number of procedural vicissitudes into which it is unnecessary to enter, this application was converted into an action commenced by writ issued on 23rd November 1979 claiming a declaration that the Act violated the constitutional rights of Jobe and was *ultra vires* of the Constitution of the Republic of The Gambia. At the hearing of the action, however, the attack on the constitutionality of the Act was confined to the seven sections which had been the subject of challenge from the outset; and in the Court of Appeal the attack on section 17 was not persisted in; so what were left at issue were sections 6, 7, 8, 10, 12 and 13 of the Act.

While this civil action was pending before Bridges C.J. the criminal trial of Jobe was proceeding in the Special Criminal Court. The same constitutional questions as were the subject of the civil action were raised on behalf of Jobe in the criminal trial, and on 6th March 1980, the magistrate acting under the powers conferred upon him by section 93(1) of the Constitution referred them to the Supreme Court. It was ordered by the Chief Justice that this reference should abide the result of the civil action.

Although the hearing of the civil action took place early in March 1980, the judgment of the Chief Justice was not delivered until 29th July. He upheld the validity of all of the impugned sections of the Act and dismissed Jobe's action.

From the Chief Justice's judgment Jobe appealed to The Gambia Court of Appeal by notice dated 1st August 1980. The judgment of the Court of Appeal (Forster A.P., Luke and Anin J.J.) was delivered on 11th May 1981. The appeal was allowed as respects sections 7, 8, 9 and 10 of the Act which were held to be *ultra vires* the Constitution and void. Sections 6, 12 and 13 were held to be constitutional.

For the purposes of the Attorney General's appeal to the Judicial Committee, it is sufficient to summarise the effect of those sections of the Act that were not struck down by the judgment of the Court of Appeal. Sections 1 to 5 establish the Special Criminal Court and confer on it the jurisdiction mentioned earlier in this judgment. Section 6 deals with matters of procedure; it provides that the Special Criminal Court shall ordinarily apply the provisions of the Criminal Procedure Code, but

liberates the Court from the more technical shackles of the rules of evidence and of criminal procedure as respects irregularities on the face of the charge and submissions of no case. The constitutionality of these provisions was, correctly in their Lordships' view, upheld by the Court of Appeal.

Section 7 which deals with bail needs to be set out verbatim:-

"7.(1) Any person who is brought to trial before the Court shall not be granted bail unless the Magistrate is satisfied that there are special circumstances warranting the grant of bail.

(2) Before bail is granted under this Act the accused shall be ordered -

(a) to pay into court an amount equal to one third of the total amount of moneys alleged to be the subject matter of the charge or pledged properties of equivalent amount as guarantee; and

(b) to find at least two sureties who shall pay into court an amount equal to one third of the total amount alleged to be the subject matter of the charge or pledge properties of equivalent amount as guarantee.

(3) Any money or property paid into court or pledged under this Act shall be forfeited to the State in the event of the accused jumping bail."

The relevant provisions of the Constitution relating to remand in custody and release on bail are to be found in Section 15 of the Constitution and they are as follows:-

"15(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say:-

.....

(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia;

(3) Any person who is arrested or detained -

....

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia; and who is not released, shall be brought without undue delay before a court.

(4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a court.

(5) If any person arrested or detained as mentioned in subsection 3(b) of this section is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

There is thus nothing in the Constitution which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence, provided that he is brought to trial within a reasonable time after he has been arrested and detained. Section 7(1) of the Act which prohibits release on bail, not totally but subject to an exception if the magistrate is satisfied that there are special circumstances warranting the grant of bail, cannot in their Lordships' view be said to be in conflict with any provision of the Constitution.

Section 7(2) of the Act determines the amount and form in which bail must be ordered as a condition of release pending trial where the magistrate is satisfied that exceptional circumstances exist. These conditions are likely to be difficult to satisfy where, as in the instant case, the amount involved in the charges is large; but the evident policy, which underlies the requirement for at least two sureties to provide in cash or pledge of property a sum equal to one-third of the amount which is the subject of the charge against the accused, is to ensure that in a country of the geographical shape of The Gambia, where everyone lives within 15 miles of the nearest frontier, there shall be two persons who will have a strong financial interest in making sure that the accused does not flee the country to avoid trial.

The Court of Appeal took the view that section 7(2) of the Act was contrary to section 99(2) of the Criminal Procedure Code which provides that the amount of bail shall not be excessive. This may well be so; The Gambia Court of Appeal are in a better position than the Judicial Committee to judge what bail would be excessive in the circumstances as they exist in The Gambia. This, however, is beside the point. The Criminal Procedure Code does not form part of the Constitution of the Republic of The Gambia. Parliament can validly amend the Criminal Procedure Code by an ordinary law making specific provision for the amount of bail which may be ordered in particular cases. This it has effectively done by section 7(2) of the Act.

Section 15(5) of the Constitution does not come into operation unless the person who has been

arrested upon reasonable suspicion is not tried within a reasonable time. There is nothing in the Act which authorises unreasonable delay in bringing a suspected person to trial. On the contrary, the second recital makes plain the parliamentary intention that offences made triable by the Special Criminal Court shall be dealt with expeditiously. To permit unreasonable delay in bringing an accused to trial before the Special Criminal Court would be a breach of the magistrate's judicial duty under the Act and the supervisory power of the Supreme Court under section 94(2) of the Constitution is available in reserve to ensure that the magistrate performs his official duty. For the purpose of determining the constitutionality of the Act itself it must be presumed that judicial officers will do what the Act requires them to do; if in a particular case they fail to do so the person aggrieved has a remedy in the form of an application for redress under section 28 of the Constitution.

What is a reasonable time between arrest and trial must depend upon the circumstances of each case. In the instant case by the time the Court of Appeal came to deliver their judgment on 11th May 1981 some 21 months had elapsed since Jobe's arrest on 9th August 1979; but there was no suggestion that the trial in the Special Criminal Court was not begun within a reasonable time. It was the civil proceedings initiated by Jobe himself on 12th September 1979 followed by the magistrate's reference of the constitutional questions made under section 93(3) of the Constitution in the course of the trial on 6th March 1980 together with the long intervals between hearing and judgment in both the Supreme Court and The Gambia Court of Appeal that were the main causes of delay.

The actual delay that occurred in a particular case, however, cannot have any effect on the constitutionality of section 7 of the Act itself. In their Lordships' view this section of the Act does not conflict with any provision of the Constitution. It is a valid law made by Parliament in the exercise of the legislative power of the Republic vested in it by section 56 of the Constitution; and their Lordships would allow the appeal as respects section 7 of the Act.

Their Lordships now turn to section 8 of the Act in conjunction with section 10 which is consequential on sub-sections (1) and (2) of section 8. The provisions of these two sections are:-

"8.(1) Where a complaint is lodged to the Police to investigate any person suspected of having committed an offence in respect of which public fund or public property is affected, the police



shall immediately apply to a magistrate for an order to be made freezing any accounts operated in the name of the person being investigated or in any other name or an account of which he is a signatory.

(2) The police may also apply to a magistrate to freeze the account of any other person suspected of operating an account on behalf of the person being investigated.

(3) The police may also seize any property of the suspect or any other property held by any person on his behalf.

(4) Any property seized by the police under this section shall be returned to any claimant who satisfies the court that he acquired that property lawfully.

(5) Any person -

(a) who fails to come forward to prove that a property seized from him was acquired lawfully; or

(b) who fails to satisfy the court that he acquired the property seized from him lawfully

commits an offence and is liable on summary conviction to a term of imprisonment of not more than seven years and of not less than five years.

10(1) Where any account is frozen under this section, no bank shall pay out any moneys from that account unless the Inspector General of Police by writing under his hand approves any such payment.

(2) No person shall pay any money owed to any person whose account has been frozen under this section except through the bank.

(3) Any person who contravenes the provisions of this section commits an offence and is liable on summary conviction to a fine not exceeding D10,000,00 or to a term of imprisonment not exceeding five years or to both."

It is convenient to dispose first with the constitutionality of the freezing of bank accounts for which section 8(1) and (2) and section 10 provide. It was submitted on behalf of Jobe and so held by the Court of Appeal that this was contrary to the general prohibition on the compulsory taking possession of or acquisition of any right or interest in property which section 18(1) of the Constitution imposes in the following terms:-

"18(1) No property of any description shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of The Gambia except by or under the provisions of a law that -  
 (a) requires the payment of adequate compensation therefor; and

(b) gives to any person claiming such compensation a right of access, for the determination of his interest in the property and the amount of compensation to the Supreme Court."

The Attorney General contends that the provisions of the Act which deal with freezing of bank accounts fall within the exception for which sub-section (2)(a)(vii) of section 18 of the Constitution provides. The words of this sub-section on which he relies are:-

"18(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of sub-section (1) of this section -

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right

- .....

(vii) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required and has without reasonable excuse refused or failed to carry out), and except so far as that provision or as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; ..." (Emphasis added).

The functions of a magistrate under the Act are purely judicial. In making a freezing order the magistrate is exercising a judicial discretion. He has discretion to refuse the police application for such an order or to grant it upon such terms and subject to such conditions as he thinks just and appropriate, and he may vary it from time to time upon application by any party affected by the order. All this, in their Lordships' view, is implicit in the judicial nature of the power, which is clearly recognised also by the provision in section 16 of the Act empowering the Rules Committee established under section 54 of the Courts Act to make rules prescribing the procedure and other matters for giving full effect to the purposes of the Act. Their Lordships have been informed that this power has not so far been exercised. This may well be because the validity of important pre-trial procedural sections of the Act has remained uncertain since the attack upon them in the instant case was first launched soon

after the Act had been passed. With the judgment of the Judicial Committee in the instant appeal the uncertainty will be removed; and their Lordships regard it as most desirable that the power to make rules dealing *inter alia* with the procedure to be followed in relation to the making, variation and discharge of freezing orders, should be exercised without any further delay.

The absence of rules prescribing such procedure does not, however, deprive the magistrate of the wide discretion to which their Lordships have referred. In the absence of express rules made by the Rules Committee he must adopt whatever procedure he, or the Supreme Court in the exercise of the supervisory jurisdiction over him conferred upon it by section 94(2) of the Constitution, "may consider appropriate for the purpose of ensuring that justice is duly administered by [the Special Criminal] Court".

Freezing orders in the form of what has now become known in England as a Mareva injunction, or in civil law countries as *saisie conservatoire*, are common practice in civil litigation in a democratic society. In their Lordships' view they do not fall within the exception to section 18(2)(a)(vii) for which the final words of that sub-paragraph provide.

Section 10(1) of the Act, if it were to be read in isolation, might be construed as conferring upon the Inspector General of Police an executive discretion to decide what payments out of a frozen bank account should be permitted. If upon its true construction this were its effect it would, in their Lordships' view, involve a contravention of section 18 of the Constitution.

A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction. "Property" in section 18(1) is to be read in a wide sense. It includes choses in action such as a debt owed by a banker to his customer. The customer's contractual right against his banker to draw on his account (i.e. to claim repayment of the debt or any part of it on demand) is embraced in the expression "right over or interest in" the debt, while compulsory "acquisition" of any right over or interest in property includes (as is evident from section 18(2)(a)(vii)) temporary as well as permanent requisition. To confer upon a member of the public service, in the exercise of the executive powers of the State, a power at his own executive discretion to prevent the bank's customer from exercising his contractual right against the bank to draw on his account on demand would, in their Lordships' view, amount to a compulsory acquisition of a right over or

interest in the customer's property in the debt payable to him by his banker, and a law which provided for the exercise of such an executive discretion would contravene section 18 of the Constitution. It would be *ultra vires* and therefore void.

Section 10(1) of the Act, however, cannot be read in isolation, but as if it were an integral part of section 8. Indeed the survival in section 10(1) of the words "is frozen under this section" suggests that it formed part of section 8 in an earlier draft of the Act. Although section 10(1) has the consequence that, if a magistrate makes an order freezing an account which provides for any payments out of the account, he must incorporate in the order a provision that every such payment out shall be vouched for by the written approval of the Inspector General of Police, this does not alter the essentially judicial nature of the freezing order. It is for the magistrate in the exercise of his discretion to direct, either in the initial freezing order or subsequently upon application, what payments out of the account, if any, are to be authorised and it is then the duty of the Inspector General of Police to give or withhold his written approval to the payment out in accordance with such directions.

Similar considerations apply to section 8 sub-sections (3) and (4) of the Act which deal with the seizure by the police of property of the suspect whether held by him or by some other person on his behalf. "Seize" in relation to property is a verb that is appropriately applied only to tangible moveable property, particularly in a context which provides for the property to be "returned" to a claimant in specified circumstances. To "seize" property means to take possession of it compulsorily and thus *prima facie* falls within the ambit of section 18 of the Constitution. Seizure of tangible moveable property by the police may precede the bringing of the suspect for the first time before a magistrate assigned to preside over a Special Criminal Court and, unlike a freezing order, it does not need to be authorised by a prior order by the magistrate. Section 8(4) of the Act, however, plainly confers upon the Special Criminal Court jurisdiction to hear and determine claims to the return of property seized by the police on the ground that the person making the claim had acquired that property lawfully and since the expression "any claimant" in the sub-section is wide enough to include the suspect himself, their Lordships would so construe it. So retention of possession of tangible moveable property by the police without the consent of the person claiming to be entitled to have it returned to him is subject to judicial process. It is for the magistrate in the exercise of his judicial functions to determine whether the continued

retention of possession of the property by the police is necessary for any of the purposes referred to in the words of section 18 (2)(a)(vii) of the Constitution that have been cited earlier in this judgment.

The draftsmanship of those provisions of sections 8 and 10 of the Act, which their Lordships have just been examining, is characterised by an unusual degree of ellipsis that has made it necessary to spell out explicitly a great deal that is omitted from the actual words appearing in the sections and has to be derived by implication from them. In doing so their Lordships have applied to a law passed by the Parliament in which, by the Constitution itself, the legislative power of the Republic is exclusively vested, a presumption of constitutionality. This presumption is but a particular application of the canon of construction embodied in the latin maxim *magis est ut res valeat quam pereat* which is an aid to the resolution of any ambiguities or obscurities in the actual words used in any document that is manifestly intended by its makers to create legal rights or obligations. In passing the Act by the procedure appropriate for making an ordinary law for the order and good government of The Gambia without the formalities required for a law that amended Chapter III of the Constitution the intention of Parliament cannot have been to engage in the futile exercise of passing legislation that contravened provisions of Chapter III of the Constitution and was thus incapable of creating the legal obligations for which it purported to provide. Where, as in the instant case, omissions by the draftsman of the law to state in express words what, from the subject matter of the law and the legal nature of the processes or institutions with which it deals, can be inferred to have been Parliament's intention, a court charged with the judicial duty of giving effect to Parliament's intention, as that intention has been stated in the law that Parliament has passed, ought to construe the law as incorporating, by necessary implication, words which would give effect to such inferred intention, wherever to do so does not contradict the words actually set out in the law itself and to fail to do so would defeat Parliament's intention by depriving the law of all legal effect.

With the notable exception of section 8(5) their Lordships have found no difficulty in construing sections 8 and 10 of the Act as incorporating by necessary implication provisions which prevent these portions of the Act from contravening any of the provisions of Chapter III of the Constitution. They would therefore allow the appeal so far as section 8(1) to (4) and section 10 are concerned. Section 9, being merely incidental to section 8(1) and (2), calls for no special mention. It too is valid.

Section 8(5), however, stands on a different footing from the four earlier sub-sections. In the first place it does not deal with the pre-trial procedure in the prosecution of a person charged with an offence of dishonesty affecting public funds or public property. (In dealing with section 8(5) it is convenient to call such a person "the principal suspect"). In the second place, and more importantly, what it does is to create a separate and brand new criminal offence which can be committed not only by the principal suspect himself but also by any other person whose property has been seized by the police in purported exercise of the power conferred on them under sub-section (3). The offence so created attracts the same mandatory sentence of imprisonment, for a maximum of seven and a minimum of five years, as that imposed by section 11 of the Act upon the principal suspect if he is convicted of the offence of dishonesty affecting public funds or public property.

The sub-section creates two offences, one under paragraph (a), the other under paragraph (b). Their Lordships will deal first with the case of a person, other than the principal suspect, who has had property seized from him by the police. He commits an offence under paragraph (a) if he "fails to come forward to prove" that the property that has been seized was acquired lawfully. In the context of paragraph (b) this must mean if he fails to appear before the Special Criminal Court upon his own initiative; while if he does so, or if he is arrested and brought before the Court on a charge of having committed an offence under paragraph (a), paragraph (b) places upon him the onus of proving his innocence.

In their Lordships' view this is a plain and flagrant infringement of section 20(2)(a) of the Constitution: viz -

"20 (2) Every person who is charged with a criminal offence -

(a) shall be presumed to be innocent until he is proved or has pleaded guilty."

While the wording of sub-section (5) is inapt to cover the case of a principal suspect who has already been brought before the court, since he can hardly be described as failing to "come forward", it would apply to a principal suspect whose tangible moveable property the police had managed to seize although they had not been able to find him inside the frontiers of The Gambia in order to arrest him. This would have the arbitrary and unjust consequence that by seizing the principal suspect's property but making no effort to arrest him the police could avoid the onus of proof which would otherwise lie upon them

of proving that the principal suspect had been guilty of dishonesty which affected public property.

Section 8(5) of the Act contravenes the Constitution; it is *ultra vires* and therefore void.

It is, however, in their Lordships' view severable from the remaining provision of the Act. It complies with the test of severability laid down in *Attorney General for Alberta v. Attorney General for Canada* [1947] A.C.503, 518:-

"The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all."

Section 8(5) of the Act is odd man out both in the section itself and in the Act as a whole. It can, in their Lordships' view be confidently assumed that the Parliament of The Gambia would have enacted the remainder of the Act without enacting section 8(5) at all.

For these reasons their Lordships allow this appeal against the judgment of The Gambia Court of Appeal except in so far as it declared section 8(5) of the Special Criminal Court Act *ultra vires* and void.







