

IN THE SUPREME COURT OF SIERRA LEONE

IN ITS SUPERVISORY JURISDICTION

IN THE MATTER OF A CASE STATED BY THE HON. JUSTICE ADRIAN FISHER J.

PURSUANT TO PART XVII, RULE 99 OF THE SUPREME COURT RULES, 1982 C. I. INSTRUMENT NO.1 OF 1982

BETWEEN:

THE HON. JUSTICE ADRIAN FISHER - APPLICANT  
JUSTICE OF THE HIGH COURT OF SIERRA LEONE  
LAW COURT BUILDING  
FREETOWN, SIERRA LEONE

AND

THE STATE - 1<sup>ST</sup> RESPONDENT  
C/O LAW OFFICERS DEPARTMENT  
GUMA BUILDING  
FREETOWN, SIERRA LEONE

AND

IKUBOLAJE NICOL - 2<sup>ND</sup> RESPONDENT  
C/O CORRECTIONAL CENTER  
PADEMBA ROAD, FREETOWN

Coram: -

HON. JUSTICE D. B. EDWARDS CJ.  
HON. JUSTICE V. M. SOLOMON JSC  
HON. JUSTICE M. DEEN-TARAWALLY JSC  
HON. JUSTICE A. S. SESAY JSC  
HON. JUSTICE J. E. L. KING JA.

Counsel:

MR. O. I. KANU DPP, A. J. M. BOCKARIE ESQ

UMLS

AND P. J. WILLIAMS for the State

MR. R.S.V. WRIGHT ESQ. M. BAH ESQ

AND MS. PRISCILLA WRIGHT for the 2<sup>ND</sup> Respondent

.....  
HON. JUSTICE V. M. SOLOMON JSC.

30<sup>th</sup> January 2024

RULING:

BACKGROUND:

1. The brief facts of the matter herein are imperative in the deliberations of the present application herein. The accused herein referred to as the 2<sup>nd</sup> Respondent stands charged with the offence of murder on the 18<sup>th</sup> day of April 2023. It is alleged that on the 15<sup>th</sup> October 2022 and other divers dates at Leicester Village Freetown he conspired with other persons' unknown to murder Sinnah Kai Kargbo. The Magistrate's Court conducted a preliminary investigation into the matter and committed it to the High Court. The matter was subsequently assigned to the Hon. Mr. Justice Adrian Fisher J. The 2<sup>nd</sup> Respondent herein was arraigned and he entered a plea of not guilty. Subsequently, the State herein referred to as the 1<sup>st</sup> Respondent filed and applied to the court that the 2<sup>nd</sup> Respondent herein be tried by Judge alone instead of by a Judge and Jury, pursuant to Section 144(2) of the Criminal Procedure Act 1965 (as amended) (hereinafter referred to as "CPA") and pursuant to the Abolition of the Death Penalty Act 2021 Act No. 6 of 2022 (hereinafter referred to as "ADPA").
2. Counsel for the 2<sup>nd</sup> Respondent objected to this application on 2 (two) grounds to wit: that the application should be brought in by a notice of motion and that the offence alleged to have been committed includes murder, a fortiori, that it is mandatory that he be tried by a Judge and

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Jury and not by Judge alone. Counsel for the 1<sup>st</sup> Respondent herein filed the motion paper and proceeded with its application.

3. Counsel for the 2<sup>nd</sup> Respondent submitted inter alia that the charge of murder is one which ought to be tried by a Judge and Jury and not by Judge alone and that he has a constitutional right to that form of trial by virtue of Section 23(1) of the Constitution 1991 (hereinafter referred to as the "Constitution"). Counsel for the 1<sup>st</sup> Respondent submitted inter alia that the rights of the 2<sup>nd</sup> Respondent to a fair trial will still be upheld even though he will be tried by Judge alone, and that since the passing of the ADPA in 2021 and the mandatory sentence for the offence is imprisonment of 30 years and not the death penalty, the 1<sup>st</sup> Respondent by hand of the Attorney General can file such an application as of right. The trial Judge, the Applicant herein delivered his ruling on the 19<sup>th</sup> June 2023 and posed several questions for consideration by this court which are the subject matter herein.

#### QUESTIONS FOR THE SUPREME COURT:

4. The Applicant herein posed the following questions in His ruling at paragraph 103 thereof to wit:
  1. Whether the application by the Attorney General to have the Accused tried by judge alone as opposed by judge and jury is manifestly discriminatory, arbitrary, and departs from the established norm since the abolition of the death penalty and violates the right of the Accused to a fair hearing as constitutionally guaranteed by Section 23(1) of the Constitution? If the answer to the above is in the affirmative, what effect would that have on the Accused and/or the trial in the High Court?
  2. Whether on a true and proper construction of Section 23(1) of the Constitution, the Accused could not be guaranteed of a fair hearing by virtue of the Attorney General's application to have the Accused being tried for murder without a jury, when such prerogative powers had never been used by the Attorney General



as a matter of norm since the enactment of the Abolition of the Death Penalty Act 2021 and in the absence of any guidelines and/or regulation as to its use for the purpose of objectivity, thereby preventing the Accused from equal protection of the laws to have a fair trial? If the answer is in the affirmative, whether that renders a breach of Section 23(1) of the Constitution and the resultant effect on the Accused and/or trial at the High Court?

3. Whether, the pre-existing powers as contained in Section 144(2) of the Criminal procedure Act 1965 will now automatically apply to murder, treason or robbery with aggravation in the absence of any guidelines or principles, particularly as such a power is of a subjective nature but ought to be exercised in an objective and consistent manner to ensure that the Accused's constitutional right to a fair hearing under Section 23(1) of the Constitution is not arbitrarily violated? If the answer is in the negative, what is the effect of it on the trial of the Accused's rights?
4. Whether the Attorney General in the exercise of his prosecutorial powers under Section 64(3) of the Constitution will violate Section 23 (1) of the Constitution if, in the absence of any parameters, definitions, guidelines to be applied to determine what constitutes the interest of justice can simply proceed suo moto and subjectively to apply those powers to the case of the Accused and any other future cases of murder, treason or robbery with aggravation? If the answer is in the affirmative, what will be the resultant effect on the trial of the Accused?
5. Whether as a matter of public policy, the exercise of powers of the Attorney General under Section 144(2) of the Criminal Procedure Act 1965 following the Abolition of the Death Penalty Act 2021, to prevent the Accused from being tried with a jury in a case of murder etc., infringes the constitutional right of every accused person charged with these offences to have a fair trial as guaranteed by Section 23(1) of the Constitution?



5. These questions are now posed to this Court for its determination and directions as to the conduct of this murder trial and other murder trials pending in the High Court. Both counsel submitted written submissions and authorities in respect of their respective cases and also made oral submissions.

SUBMISSIONS FOR THE 2<sup>ND</sup> RESPONDENT:

6. Counsel submitted that the arguments proffered by Counsel for the 1<sup>st</sup> Respondent is the same as the High Court, and that he had failed to address the questions as posed in paragraph 4 supra. The question in issue is Section 144(2) of the CPA, and Section 23(1) of the Constitution vis-à-vis the ADPA and how this impacts the 2<sup>nd</sup> Respondent. He submitted that his client is entitled to a fair trial and that other murder trials have been tried by Judge and Jury why should his client be treated differently? He submitted that the offences of murder and treason are not affected by the ADPA and that it is mandatory that for these offences accused persons should be tried by Judge and Jury and never by a Judge alone. The power given to the Attorney General in Section 144(2) of the CPA is subjective and ought to be exercised objectively and not arbitrarily. The question is what is in the interest of justice and that his client is entitled to equal treatment before the law.

SUBMISSIONS FOR THE 1<sup>ST</sup> RESPONDENT:

7. Counsel submitted that the issue of a fair trial is for the Judge to determine. He submitted that the Attorney General has absolute discretion which is unquestionable in relation to his application under Section 144(2) of the CPA. He submitted that there are no pending murder trials in the High Court in which accused persons are tried by Judge alone and referred the Court to 2 (two) pending High Court trials which offences are robbery with aggravation cases. He referred this Court to Sections 27(2) and 27(8) of the Constitution. He finally submitted that the offence of treason is unique and is covered by the provisions of the

Treason and State Offences Act 1963 and the Attorney General has no discretion to apply that such trials be conducted by Judge alone.

THE LAW PRE-CRIMINAL PROCEDURE ACT 1965:

8. I must start with the provisions existing immediately before the coming into force of Section 144 of the CPA. This would give us a better understanding of whether it is true, the distinguishing feature as regards criminal trials for murder and like offences, is the penalty, rather than the seriousness of the offence. For, if it is true that the trial of the aforementioned offences was determined by the penalty flowing from a conviction, then, the abolition of the death penalty would mean that these offences could be tried in the same way as any other offences.
9. Further, it must be borne in mind that prior to independence in 1961, Jury trials were confined to the then Colony of Sierra Leone, now described as the Western Area. Criminal trials in the then Protectorate of Sierra Leone, now described as the Provinces, were conducted by a Judge with the aid of Assessors. Jury trial only became country-wide with the passing of the CPA. The principal provision dealing with the manner in which criminal trials should be conducted was the Jurors and Assessors Act, Chapter 38 of the Laws of Sierra Leone, 1960 as amended.
10. But, the discourse should start with the Courts' Act, Chapter 7 of the Laws of Sierra Leone, 1960 (hereinafter referred to as "Cap 7"). Section 14 thereof makes it quite clear, that criminal trials for offences carrying the death penalty should be tried by a Judge with a Jury in the then Colony. For other lesser offences, Section 14(1) provided for a trial with the aid of Assessors if the person accused so elected, or, the Court should have so ordered; and Section 15 thereof provided that criminal trials in the then Protectorate should be conducted by a Judge sitting with two or more Assessors. In Section 15, no distinction was drawn between trials of offences carrying the death penalty, and with other lesser offences. Clearly, there was no jury trial in the then Protectorate. There was no provision for a criminal trial to be conducted by a Judge sitting alone.



11. The next relevant statutory provision was the Jurors and Assessors Act Cap 38 (hereinafter referred to as "Cap 38"). Section 27(1) thereof stipulated that the trial of any offence carrying the death penalty should be conducted by a Judge sitting with a Jury, and that the verdict of the jury in such a case should be unanimous. Section 27(2) provided for the acceptance of a majority verdict in the case of offences not carrying the death penalty. Section 39 provided for an accused charged with an offence not carrying the death penalty, to elect to be tried by a Judge sitting with Assessors, rather than by a Judge and Jury. Section 40 of Cap 38 provided for the Attorney-General to apply to the Court for an Order that such an accused person be tried by a Judge sitting with Assessors, rather than a Judge sitting with a Jury. There was no provision in that Act for trial by Judge alone.
12. I now come to the Criminal Procedure Act, Chapter 39 of the Laws of Sierra Leone, 1960 (hereinafter referred to as "Cap 39"). This Act did not provide for the mode of trial of an accused on an Indictment filed, clearly because, such provision had been made in the Courts' Act, Cap 7.
13. In February, 1960 came the first abrogation of the right of an accused charged with any offence, to trial by Judge and Jury. This was The Courts (Amendment) Act, 1960 – Act No. 2 of 1960. The amendment to Section 14 therein conferred on the accused the dubious right of electing to be tried by a Judge alone. This is the import of the amended Section 14(1)(iii) and (3). However, Section 14(1) of Act No 2 of 1960 retained the existing provision that trials for offences carrying the death penalty, should, in the still existing Colony (this was pre- 27<sup>th</sup> April, 1961) be tried by Judge and Jury. Indeed, the amended Section 14(9) thereof stipulated expressly that:

*"Nothing in this section contained shall be deemed to confer any right upon the prosecution to elect that an accused person be tried by a Judge alone."*

Since what was a clearly dubious right had been conferred on an accused in a trial for a non-capital offence, it was only fair that the same right, in due course, would be conferred on the prosecuting side.

14. Just over a month before independence in April, 1961, Part IV of Cap 38 was amended. Part IV thereof was amended to read "Trials with Assessors or by Judge alone" instead of just "Trial with Assessors". Section 41 of Cap 38 was amended by the addition of a new section 41A. It provided as follows:

*"3. The Principal Ordinance (now Act) is hereby amended by the insertion immediately after section 41 thereof, of the following new section 41A*

*(1) In any case where any person is charged with a criminal offence at any sessions of the Supreme (now High) Court held in the Colony (now Western Area) and there is reason is to believe that a fair trial cannot be obtained either with a judge and jury, or, with a judge and assessors, the Attorney-General may, except in the case of a capital offence, apply to the Chief Justice by summons in chambers for the case to be tried by the judge alone.*

*(2) A copy of the summons shall be served on the accused and any solicitor who shall have appeared for him at least seven clear days before the date fixed for the hearing of the case.*

*(3) If at the hearing of the summons the Chief Justice is satisfied that there is good reason to believe that a fair and impartial trial cannot be had either with a judge and jury or, with a judge and assessors, he may order that the case be tried by the judge alone and in any such case the accused shall no longer be entitled to elect to be tried by the Court with the aid of assessors under the*



provisions of section 40 and any election he may already have made shall be of no effect.

4. Section 14 of the Courts' Act as replaced by the Court' (Amendment) Ordinance (now Act), 1960 is hereby amended – (a) by the substitution of a semi-colon and the word "or" for the full stop at the end of sub-paragraph (iii) of paragraph of subsection (1) thereof; (b) by the addition of the following new sub-paragraph (iv) – "(iv) the Chief Justice shall have ordered such person to be tried by the judge alone in accordance with the provisions of section 41A of the Jurors and Assessors Ordinance (Act); and (c) by the deletion of the words "by the Court with the aid of Assessors" in the second line of subsection (2) thereof."

15. This new amendment was soon put to the test. The case was R v Siaka Stevens and C. A. Kamara-Taylor (1960-61) SLLR, 80 HC. J. H. Smythe, then Solicitor-General, appeared for the Crown. Mr Berthan Macaulay appeared for the Defendants. The Presiding Judge was the Chief Justice Benka-Coker. At page 82 of the Report, Benka-Coker, CJ is recorded as saying, inter alia:

*".....For the Chief Justice to make an order herein, he must be satisfied from some evidence that there is good reason to believe that fair and impartial trial cannot be had either with a judge and jury or with judge and assessors."*

*(Emphasis mine)*

The Learned Chief Justice at the end of the day came to the conclusion that due to the personalities who it was alleged had been defamed, that is, the then Prime Minister Dr. M. A. S. Margai, and his Minister of Finance M. S. Mustapha; with the persons accused being leaders of the opposition party, the Attorney General (hereinafter referred to as the "AG") had made

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out a case for trial by Judge alone. The decision is important in view of counsel arguing against the granting of the Order for trial by Judge alone. Thereafter, he became AG and was in that office when the new CPA, 1965 was made law, and Section 144(2) thereby came into existence, making it perfunctory and apparently obligatory that once an application for trial by Judge alone had been filed by the AG, it was mandatory for the court to grant the order without further enquiry.

16. The next case dealing with the amended Section 14 of the Jurors and Assessors Act, was also political in nature and content. This was the case of Mohamed Bash-Taqi v R (1960) SLLR 195 CA, AMES, P, Bankole Jones Ag CJ, Marke, J. Once again Mr. Berthan Macaulay appeared for the Appellant, and Mr. J. H. Smythe appeared for the Respondent. There, the argument raised by Mr. Macaulay against Mr. Bash-Taqi's conviction in the High Court was that the offence was committed before the coming into force of the Section 14 amendment. In that case, the amendment actually came into force before the commencement of the trial in the High Court. Mr. Macaulay's argument in favour of the Appellant was more subtle. It was that at the time of the committal for trial, that provision conferring a right on the AG to apply for trial by Judge alone, had not come into force. As such, to make use of it was to deprive the Appellant of his vested right to be tried by Judge and Jury. Inter alia, the Learned President Ames said at page 199 of the Report:

*".....Every person has a right to a fair trial. In England since the days of the Norman Kings, it has considered that was best secured by trial by jury. The same right exists in Sierra Leone. It is the right of both parties to a criminal trial to have the issue, the guilt or innocence of the accused, determined at a fair trial...."*

More importantly, he said at page 201:



*".....Section 41A does not prevent anyone from attempting to show that a trial with a judge and jury or with a judge and assessors would not be likely to be unfair or, impartial. If he succeeds in doing so, an order would not be made. At the hearing of the summons, the appellant attempted this but was unsuccessful...."*

The importance here, is that an accused pre-1965 would be given an opportunity to challenge the application for a trial by Judge alone. That right was taken away in 1965, and it, so appears, and became mandatory for the Court to accede to any applications filed by an AG, and subsequent to the 1978 Constitution which established the office of the DPP.

### THE CRIMINAL PROCEDURE ACT 1965

17. This legislation was enacted to consolidate and amend the law relating to criminal procedure in Sierra Leone. It was enacted after Sierra Leone gained its independence and came into effect on 7<sup>th</sup> October 1965. By Sections 44 and 45 of the CPA the AG is empowered to enter a nolle prosequi in respect of criminal matters. The DPP is also empowered by Section 66(4) of the Constitution to continue or discontinue proceeding a fortiori, enter a nolle prosequi in respect of certain criminal matters. By Section 144(2) of the CPA the AG can apply for a criminal offence not punishable by death to be tried by Judge alone and not by Judge and Jury and by Section 145 it is provided thus:

*"145. Any person charged with a criminal offence not punishable by death may at the time of being committed or referred for trial by the Supreme Court, or at any time thereafter up to two clear days at least before the trial of such person, elect to be tried by a Judge alone and if any person so elects he shall be tried by a Judge alone instead of being tried by a Judge and Jury and in every*

*such trial by a Judge alone, the Judge shall record in writing his decisions and reasons therefor."*

By this provision the accused can also apply to be tried by Judge alone instead of by Judge and Jury. These provisions gave both the AG as the prosecutor and the accused the right to apply for trial by Judge alone instead of by Judge and Jury which is the issue for determination by this Court. At the time of its passing, the death penalty was still in force. The Judge would sum up the case to the jury and the latter will deliver their verdict which should be unanimous except in certain circumstances. See Sections 194-201 of the CPA. The appendix to the legislation also provided the forms on various charges/indictments and other criminal procedural matters.

18. It is worth noting that this legislation has not been repealed by any Act of Parliament and only a slight amendment made to it. Section 144(2) has been replaced by Section 3 of the Criminal Procedure Amendment Act 1981, Act No. 11 of 1981 and it provides thus:

*"(2) Notwithstanding anything contained in section 143, in any case where a person is charged at any sessions of the High Court with a criminal offence not punishable by death the Attorney-General and Minister of Justice or Director of Public Prosecutions, if he is of the opinion that the general interest of justice would be served thereby, may make an application to the Court for an order, which shall be made as of course, that any person or persons shall be tried by the Court with the aid of assessors, or by a Judge alone, instead of by a Judge and Jury".*

*(Emphasis mine)*

This amendment has not changed Section 144(2) of the CPA but has added the positions of Minister of Justice and DPP in making the application. The intendment of Parliament is that the AG or DPP could apply in criminal offences which do not carry the death penalty to be tried by Judge alone



instead of by Judge and Jury with the caveat "*the general interest of justice would be served thereby*". The jury system is still in operation and is a part of the criminal law process notwithstanding attempts to replace it with a new act which has not been passed into law by Parliament. Suffice to say that Courts cannot repeal provisions of any Act and do not pass laws. That is the domain of the legislature.

#### ISSUES FOR DETERMINATION:

19. Prior to the Abolition of Death Penalty Act 2021, the punishment on a conviction for murder was death. The right to jury trial for capital offences was in part because of the consequences on conviction. Whilst the ADPA 2021 abolished the death penalty, it did not abolish any of the procedures for the trial of such offences. The replacement of the sentence to life imprisonment with a minimum of 30 years, is by no means a soft option. It is rightly a harsh and draconian sentence. It effectively means that a young person may spend the prime years of their life in prison before becoming eligible for parole and a person of mature years may die in prison or have very few years ahead of them if paroled. The consequences and ramifications of a life imprisonment or a minimum 30 years' sentence is therefore to deprive the convicted of their freedoms and rights in much the same way as the death penalty did with the self-evident distinction that it does not deprive them of their right to life. It follows that there should be no erosion of the safe guards and rights that were guaranteed to an accused facing the most serious of offences in the criminal calendar. The issue of how an accused facing such offences is tried is therefore a constitutional issue that goes to the heart of a person's constitutional and human rights.
20. I now turn to whether the AG's application for a trial by judge alone violates the rights of the accused to a fair trial and is discriminatory. The AG is the sole prosecutor in the name of Sierra Leone and is so empowered by the constitution. By Section 64(3) of the Constitution which reads thus:

*"All offences prosecuted in the name of the Republic of Sierra Leone shall be at the suit of the Attorney-General and Minister of Justice or some other person authorised by him in accordance with any law governing the same."*

He has the discretion to apply for a criminal trial to be tried by Judge alone instead of by Judge and Jury by applying to the High Court pursuant to Section 144 (2) of the CPA which states as follows:

*"Notwithstanding anything contained in section 143, in any case where a person is charged at any sessions of the Supreme Court with a criminal offence not punishable by death the Attorney-General, if he is of the opinion that the general interest of justice would be served thereby, may make an application to the Court for an order, which shall be made as of course, that any such person or persons shall be tried by such Court with the aid of assessors, or by a Judge alone, instead of by a Judge and jury."*

*(Emphasis mine)*

He has relied on this provision and Sections 27(8) and 108(7) of the Constitution which provides thus:

Section 27(8):

*"The exercise of any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person under or by this Constitution or any other law shall not be enquired into by any Court on the grounds that it contravenes the provision of subsection (2)."*



(Emphasis mine)

By Section 108(7):

*"No Act of Parliament shall be deemed to amend, add to or repeal or in any way alter any of the provisions of this Constitution unless it does so in express terms."*

21. These provisions must be juxtaposed with Section 23(1) and 27(2) of the Constitution. Section 27(2) reads thus:

*"Subject to the provisions of subsections (6), (7), and (8), no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or any public authority."*

(Emphasis mine)

It follows that the exercise of discretion cannot be challenged simply on the grounds that it has been exercised in a discriminatory way. That does not however mean that the discretion is unfettered. Discretion though subjective should be exercised judiciously and not arbitrarily. A fortiori it should be exercised with caution considering all the circumstances, fairly and reasonably. The right to a fair trial is entrenched in Section 23(1) of the Constitution which states:

*"Whenever any person is charged with a criminal offence he shall unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."*

(Emphasis mine)

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It is axiomatic that the exercise of discretion in capital cases must be reasonable and based on the objective criteria. In the *Wednesbury* test see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp* (1948 1 KB 223) it lays down the test as follows:

- *Whether in making that decision, the corporation took into account factors that ought not to have been taken into account, or*
- *The corporation failed to take account factors that ought to have been taken into account, or*
- *The decision was so unreasonable that no reasonable authority would ever consider imposing it.*

To the above tests was added 'proportionality' by Lord Diplock in the case of *Civil Service Union v Minister for Civil Service*, [1984] 3 All ER 935; [1985] AC 374. His Lordship set out the grounds for Judicial Review to wit:

The first is '*illegality*' - the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

The second is '*irrationality*' - '*Wednesbury unreasonableness*' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it and

The third is '*procedural impropriety*'.

22. The enforcement of every act of Parliament or Statute falls within the purview of one or more government agency/ministry. The head of the government agency/ministry may be changed but that does not affect the enforcement of the act of parliament or statute. When there's a change

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or the department is re-modelled the functions are transferred to the new head of the agency/ministry. Decisions by heads of an agency/ministry/department are subject to judicial review by the courts. Though its powers are limited but it can intervene when the head of the agency/ministry/department has acted in bad faith or there's an error in his judgment. It is the duty of the courts to assert jurisdiction to prevent the abuse of executive power. I refer to the case of *R (on the application of Mullen) v Secretary of State for Home Department* 3 ALL ER 65 (2005).

23. The role of the Attorney General in all common law countries is similar and enacted in Statute and the Constitution. He is in charge of all public prosecutions in the name of the State and he has 2 (two) constitutional roles to wit: '*his governmental role*' and '*his role as the guardian of the public interest*'. In his governmental role he is the principal and sole legal adviser to the government. In his role as the guardian of the public interest I refer to the case of *Brookers v DPP of Jamaica* (1994) 1AC 568. In this case a doctor was charged with carnal abuse of a girl under the age of 12. The Magistrate after a preliminary hearing dismissed the information holding that no prima facie case had been made out against the Appellant. The DPP, whose power under Section 94(3)(a) of the Constitution of Jamaica was not subject to the direction or control of any other person or authority, applied to a Judge under Section 2(2) of the Criminal Justice Administration Act for a voluntary bill of indictment against the applicant for the same offence without giving him any notice. The doctor was later arrested and charged accordingly. He then appealed to the Privy Council. Lord Woolf at page 579 had this to say:

*"In giving effect to section 94(6) it must be remembered that until section 2(2) of the Criminal Justice (Administration) Act was amended in 1962 by the Constitution (Transfer of Functions) (Attorney-General to Director of Public Prosecutions) Order 1962, on the*

creation by the Constitution of the office of D.P.P. now has, were exercised by the Attorney-General. In performing those powers, the Attorney-General, as is the case with his English counterpart, would not be operating in his governmental role but in his role as the guardian of the public interest".

(Emphasis mine)

He went further at page 580 thereof:

*"It was in the interests of the applicant and it demonstrates a proper respect for a decision by a member of the judiciary if, before such an exceptional course is taken, the D.P.P. seeks the approval of a more senior judge than the resident magistrate to the course which he was proposing to take."*

He said further to wit:

*"By seeking that approval, the doctrine of separation of powers was not offended in any way. The D.P.P. is not a part of government, or a government official. If he wishes to bring proceedings inevitably there must come a stage when the manner in which he undertakes those proceedings is subject to control by the court."*

24. In his role as the guardian of the public interest the AG superintends prosecutions. I refer to the case of *A-G v Blake (Jonathan Cape Ltd, third party)* (1998) 1 ALL ER 833 at 847 in which Lord Woolf MR said thus:

*"He has a particular role and a particular responsibility. The role extends well beyond the field of criminal law, for example to the fields of contempt of court, charities and coroners' inquisitions. Its source in some instances is*



*derived from statute. However, in relation to other functions, the role is an inherent part of his ancient office. It is the inherent power flowing from his office which enables the Attorney General either to bring proceedings ex- officio himself or to consent to the use of his name, so as to enable proceedings to be brought by another party clothed with his authority in what are known as relator proceedings for the protection of the public interest in the civil courts ... He has the overall responsibility for the enforcement of the criminal law."*

Lord Woolf MR said at 848 thereof to wit:

*'the Attorney General is the person who is primarily responsible for the enforcement of the law'.*

He should prevent the criminal law being flouted. The AG may not be able to prosecute all offences committed at any one time but he is to be guided by two principles to wit: that on the evidence there must be a reasonable prospect of securing a conviction and that it is in the public interest to prosecute. Decisions to prosecute or not prosecute or to continue or discontinue a prosecution or an abuse of process are subject to judicial review. See Bennion on Statutory Interpretation 6<sup>th</sup> edition at page 67.

25. The oft-trumpeted view that this discretion is an unfettered discretion is plainly wrong. Pursuant to Section 144(2) that discretion can only be exercised if *'he is of the opinion that the general interest of justice would be served thereby.....'* The central question to be answered is what is the general interest of justice here? Has it been identified? If it has not as is clearly the case here, then the discretion has been exercised unlawfully. Each case must turn on its particular facts. However, this court has been provided with no evidence that similar applications have been made in

other murder cases since the passing of the ADPA in 2021. Nor has any distinction been made between this case and others that have preceded it in the period post abolition of the death penalty. Counsel for the 1<sup>st</sup> Respondent has exhibited 'AJ4 and AJ5' respectively. These are 2 (two) applications made by the Director of Public Prosecutions (hereinafter referred to as the "DPP") dated 28<sup>th</sup> February and 24<sup>th</sup> May 2023 respectively. These 2 (two) applications were in respect of the crimes of robbery with aggravation and not murder.

26. No discretion bestowed on any public officer is unfettered. I refer to Bennion on Statutory Interpretation 6<sup>th</sup> edition at page 98 and the case of *Ramsden v Lee* (1992) 2 ALL ER 204 at 211 in which it is stated that the mere fact that a statutory power is in terms unfettered does not prevent the courts from laying down judicial guidelines as to its exercise. As Lord Denning said in a ruling against an Attorney General in the Court of Appeal case of *Gouriet v Union Post Office Workers* (1977) 2WLR 310 'Be you ever so high the law is above you.' The power in Section 144(2) of the CPA is fettered as canvassed above. We must consider the use of discretionary powers and accused's right to a fair trial and balancing that with protecting the public. In doing so the court must guard against discretionary powers being wrongly exercised or otherwise abused.
27. In the present circumstances, the 2<sup>nd</sup> Respondent herein is entitled to the same treatment as others who have faced a murder charge since the abolition of the death penalty by the ADPA in 2021. This Court has not been made aware of any greater risk to the public, any greater need to a trial by Judge alone, any issue which requires a more specialist inquiry than a lay man could make, any risk or actual incident of jury tampering. In short there is no or no demonstrable risk to the administration of justice. In the absence of such evidence the decision appears to be arbitrary. This court has received no evidence and heard no submissions as to what distinguishes this case and what makes it one in which a jury



should not be used. These courts are used to dealing with high profile criminal trials including murder and treason and with managing juries in those trials. To now seek to treat the trial of this accused differently without any reasonable justification is to deny him his rights under the constitution.

28. The duty of this Court under the provisions of Section 127 of the Constitution is to determine whether the current provision in Section 144(2) of the CPA, contravenes rights vested in an accused person to be tried by his peers for the offence of murder. It must be pointed out at this stage that Section 23(1) provides that inter alia that an accused is to be afforded a fair hearing within a reasonable time by an independent and impartial court. I refer to paragraph 21 supra. A fair trial for murder prior to the passing of the abolition of the death penalty Act in 2021 would have meant a trial by Judge and Jury. That right has not been abrogated by the ADPA Act. All it has done is to abolish the sentence, and not the mode of trial for that special category of offences. The application by the AG unsupported by any rationale and advanced purely on the assertion that the CPA gives him the power to do so and that the Constitution says it cannot be enquired into, is misconceived and unsustainable.
29. I now turn to whether the decision was proportional in all the circumstances of the case. The test for proportionality as set out in *Civil Service Union v Minister for Civil Service* (supra) essentially requires the means employed by the decision-maker to be '*no more than is reasonably necessary*' to achieve his legitimate aims. The aim of any prosecution in a criminal trial is to present the case to the court by assisting the court to arrive at the truth and achieve justice for the victim and the community. Prosecutors also have a role in ensuring that the rights of all, that is, the accused and the victim are recognised and protected. There is clearly no necessity here that justifies the decision to exclude from this accused and from any other person facing a life sentence the right to be tried by a Judge

and their peers. It should be stated that it is not the role of a prosecutor to seek a conviction at all costs. It is imperative that prosecutors act in a manner that guarantees a fair trial and maintains public confidence in the rule of law. That means that an application for trial by Judge alone should only be made if there are compelling reasons for doing so. As I have said above the fact is that the replacement sentence i.e. life imprisonment, significantly and severely curtails a person's freedom and adversely impacts on their life.

30. The right to jury trial is a fundamental right at common law. Even where parliament sought to limit that right, it retained it for some offences, murder being one of them and inserted a safeguard of the general interest of justice. There is no doubt that Section 144(2) of the CPA confers a discretion on the AG to apply for trial by Judge alone. The constitution confers extensive powers on the AG. The discretion and extensive powers must be exercised fairly, reasonably and lawfully. It is my view that it is within the court's jurisdiction to ensure that that discretion is used reasonably and lawfully. In doing so the court is bound to recognise, develop and enforce the rights of the accused including that of a right to a jury trial. There would have to be justifiable reasons for the court to endorse the use of discretionary powers so wide without more. Such discretionary powers must be exercised in the public interest and for the public good. If Parliament wanted to curtail the right to jury trial and grant the AG the discretion he now seeks to exercise for these offences, it would have done so.
31. It is my view that in the interest of justice the 2nd Respondent herein will not receive a fair trial were I to accept that he can be tried by Judge alone. To do otherwise will set a dangerous precedent. The interest of justice is best served when all prosecutions are conducted and seen to be conducted objectively, fairly, impartially and with integrity to help secure justice for victims, witnesses, accused persons and the general public. Those who

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are charged before the courts should expect that the prosecutorial decisions which underpin their case were arrived at fairly and objectively. They must also be assured that despite the seriousness of the offence with which they have been charged, the safeguards that ensure public trust in our criminal justice system are not eroded by the abolition of the death penalty. Further, it defeats the ends of justice if there is an appearance that decisions are made solely for the purpose of obtaining a conviction. That is because a prosecutor has a duty to ensure that the rights of the accused are protected just as he/she seeks justice for the victim. This duty does not stop because the accused is charged with such a serious offence. The interest of justice is the thread that should run through the entire proceedings.

32. I now turn to whether the accused belongs to a class of people discriminated against under Section 27(2) of the Constitution. Section 27(3) states that:

*"In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject, or are accorded privileges or advantages which are not accorded to persons of another such description."*

There is no evidence to suggest that the decision taken by AG is because of the race, tribe, gender, sex or any of the categories stated in Section 27(3). The argument that he has been discriminated against is therefore unsustainable, particularly when one takes into consideration the provisions of Section 27(8) of the Constitution.

## CONCLUSION:

33. On the basis of the above, this court rules that the right to a jury trial is in place for all those offences which once carried the death penalty. The AG ought not to exercise the discretion given to him in Section 144(2) of the CPA to have the accused tried by judge alone. As stated earlier that discretion where it is to be exercised must demonstrably be for the service of the general interest of justice and not just a blanket application without reasons. That requirement in Section 144(2) was clearly put there for a reason. I should add that the AG's powers under Sections 27(8) and 64(3) of the Constitution are unaffected by this. The argument that because of these two sections his discretion under Section 144(2) of the CPA cannot be enquired into is untenable.
34. I shall now consider the 5 (five) questions:
1. The answer is in the positive as it breaches the accused's right to a fair trial. I refer to paragraphs 19, 25, 28, 31 on the discourse on fair trial and discrimination.
  2. The answer is yes. I refer to paragraphs 29, 30, 31 prior to the abolition of the ADPA 2021. The accused has a right to jury trial.
  3. The answer is in the negative. Section 144(2) of the CPA will now not automatically apply to murder, treason or robbery with aggravation cases. The accused is entitled to the same treatment as those who faced a murder charge since the abolition of the death penalty in the ADPA 2021. I refer to paragraphs 22, and 23 supra.
  4. The answer is in the negative. Section 144(2) of the CPA has a qualification which is to be fulfilled which is the general interest criteria. This criterion must be fulfilled. This qualification means that the AG'S discretion can be challenged. I refer to paragraph 23 supra.
  5. The answer is in the positive. I refer to paragraphs 22, and 23 dealing with fair trial.



35. Finally, it will be remiss of me if I do not mention that the title of this application is defective. I note that the Learned Trial Judge has been named as the Applicant. This is wrong. Whilst the Judge states the case for the Supreme Court, he is not and never a party to the proceedings. If he is, who represents him and does he have a voice in these proceedings? The answer of course is no. A Judge is never a party in an application in a case in which he is or was presiding and is in his official capacity. The simple heading here should have been as is usual the court, and then "In the Matter of a Case Stated..." pursuant to the relevant constitutional and statutory provision and then the parties as they appear in the original case which in this case will be The State v Ikubolaje Nicol. I will say the same for the practice which has developed in applications for bail in the High Court which leaves some with the mistaken belief that the Magistrate or Judge needs to file papers defending their decision, where the court file will do.

I therefore direct that this be amended now and that all reports of this case be as follows:

Sc.Misc.App.01/2023

In the Supreme Court of Sierra Leone

In its Supervisory Jurisdiction

In the Matter of a Case Stated pursuant to Section 124(2) of the Constitution of Sierra Leone 1991 and Rule 99(1) of the Supreme Court Rules; 1982 Public Notice No. 1 of 1982.


Between:

The State

V

Ikubolaje Nicol

36. In view of the foregoing this matter between The State v Ikubolaje Nicol is hereby remitted to the High Court for trial by Judge and Jury.

  
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HON. JUSTICE V. M. SOLOMON JSC

I agree:

  
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HON. JUSTICE M. DEEN-TARAWALLY JSC

I agree:

  
.....

HON. JUSTICE A. S. SESAY JSC

I agree:

  
.....

HON. JUSTICE J.E.L. KING JA

OMS