IN THE SEYCHELLES COURT OF APPEAL

Mohamed Sayid **Appellant**

v

Republic **Respondent**

SCA 2 of 2011

[Before: MacGregor, President, Fernando and Twomey JJA]

Counsel: *Alexia Amesbury for the Appellant*

Shenaz Muzaffer for the Respondent

Date of hearing: *28th November 2013*

Date of judgment: *6th December 2013*

JUDGMENT

Mathilda Twomey, JA

[1] On 27th March 2010, nine Somali nationals were charged with three counts of committing acts of piracy on the high seas. The particulars of the first count were that the accused, together with eight other persons, with common intention committed an illegal act of violence or detention or an act of depredation for private ends on the high seas, against persons on board another ship namely the *Al-Ahmadhi*, an Iranian vessel by unlawfully taking control of the ship whilst armed with firearms. The second count was in relation to similar acts against the *Galate*, a Seychellois fishing vessel in the Seychelles Exclusive Economic Zone and the third count was in relation to the accused persons unlawfully discharging firearms at the *Topaz*, a Seychellois patrol vessel which had come to the rescue of the two vessels.

[2] After a lengthy trial, all the accused including the Appellant were found guilty on all charges and the learned trial judge imposed a term of eleven years imprisonment on the first count, a term of eleven years imprisonment to run

consecutively to the first sentence on the second count and on the third count a term of 10 years imprisonment to run concurrently to the other sentences, hence a total of 22 years imprisonment. All the convicts began their terms of imprisonment during which they filed notices of appeal solely against sentence. Eight of the nine convicts meanwhile accepted a repatriation offer to Somalia under a bilateral agreement between Seychelles and Somalia. The Appellant proceeded with his appeal.

[3] The only ground of appeal originally filed read as follows: "The learned judge erred in making the second term consecutive to the first sentence, as the offences for which the Appellants were convicted was a continuing act (sic) or one transaction and therefore all sentences should have been made to run concurrently."

[4] Before the hearing of the appeal took place, the Court of Appeal having perused the transcript of the trial proceedings and having noticed on the "application for further holding suspects" filed by the police and also on the original charge sheet (later amended) that there were seven children ranging in ages from 13 to 16 invited Counsel to make submissions in relation to the provisions of the Children Act 1982 as amended. These provisions concern the conviction and sentencing of children and young adults.

[5] Before we consider this appeal we wish to place on record that we are somewhat dismayed by the fact that the Court of its own volition had to raise the issue of the provisions of the Children Act. Our intervention in this case is permitted under Rules 31 (1) and (3) of the Seychelles Court of Appeal Rules 2005. We cannot understand how charges were preferred against a number of children ranging from the ages of 13 to 16 without Counsel for either party, nor for that matter the trial judge bringing their attention to the provisions of the Children Act. These are grave criminal offences but this serious lapse cannot be condoned by the highest court and court of last resort in Seychelles whose duty it is to see that the rights of accused persons as protected by the Constitution are upheld and that justice is done, especially so when the Appellant in this case is a vulnerable young person.

[6] Spurred on by our intervention the Appellant moved the Court for an amendment to his grounds of appeal which was granted. The amended grounds of appeal submitted are:

"Against sentence

1. The Learned Judge erred in making the third term of imprisonment consecutive to the 1st sentence, as the offences for which the Appellant was convicted was a continuing act or one criminal enterprise and therefore he could have exercised his judicial discretion in favour of the Appellant and ordered that all sentences run concurrently.

2. The learned judge failed to take into consideration the fact that the Appellant was a 16 year old child at the time of the commission of the offences and disregarded the totality principle and imposed a "crushing sentence" of 22 years imprisonment on him.

3. The learned judge failed to consider the available options under section 95 (1) (a) – (j) of the children Act as possible sentences for the Appellant who was a child as defined under the said Act at the time of the commission of the offence.

4. The learned judge failed to individualise the sentence to reflect the level of criminal culpability of the Appellant who was a juvenile on the high seas and not in control of, nor the leader of the operation.

Against conviction

1. The conviction was unsafe and unsatisfactory as the learned judge erred when he failed to ensure that the Respondents had the Attorney-General's instructions/consent before prosecuting the Appellant who was a child at the time the offences were committed as is required under section 92 of the Children Act."

[7] We have decided to consider the ground against conviction first as is the normal practice. The Children Act of 1982 as amended imposes a number of restrictions on the conviction and sentence of children. It defines a child in section 2 as

> *"except where used to express a relationship and except in sections 9 to 14, means a person under 18 years of age and includes a young person"*

The most relevant provisions of the Children Act in relation to this case are the following:

> *"Section 92(1) No child shall be prosecuted for any offence except-*
>
> *(a) the offence of murder or an offence for which the penalty is death; or*

(b) on the instructions of the Attorney-General…

Section 94 (2) No young person shall be sentenced to imprisonment if he can be suitably dealt with in any other way provided for under this Act."

Section 95(1) then outlines the ways in which a child or young offender can be dealt with if the court is satisfied of his guilt. These include conditional discharges, probation orders, and committal orders to Juvenile Centers but also imprisonment.

[8] Despite the fact that no certificate of birth was tendered by the Appellant, his age was never disputed. It was in fact entered by the Attorney General or his subordinate officers on pretrial documents in relation to the Appellant's detention in police custody, on the Appellant's statement and also on the original charge. The Appellant was also given the assistance of a Probation Officer during the interview process as is usual in Seychelles when a child is interviewed without a parent being available.

[9] The Appellant's Counsel submits that the *fiat* of the Attorney General is required for the prosecution of children under section 92(1) of the Children Act (supra). She relied on the case of *Javon William v R (unreported) SC 86/2013* in which McKee J, in the case of a sixteen year old child charged jointly with an adult for burglary stated:

"[34] I take into account the precise wording of section 92…In my opinion these words mean exactly what they say…

[35] Section 92 of the Children Act is quite clear; it means exactly what it says. In the present matter the prior written instruction of the Attorney General was required for the prosecution of the Appellant. No such instruction was obtained by the Prosecution."

McKee J was also of the opinion that the fact that a child is charged jointly with an adult in a criminal case rather than separately makes no difference in terms of the requirement of the *fiat* of the Attorney General under the provisions of the Children Act.

[10] Counsel for the Respondent submitted that it has been the norm for the Attorney General to sign a document entitled *"Sanction of the Attorney General"* pursuant to section 92 of the Children Act, sanctioning the prosecution of a child for a particular offence. She concedes that no such document exists in this case. She stated however that there is no statutory requirement for such a document.

[11] She also submitted that the Children Act came into force in 1982 and that the Constitution was promulgated in 1993 and since article 76(4) (a) empowers the Attorney General to *"institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person*," it therefore supersedes the Children Act, permitting the Attorney General or his subordinate officers without any further requirements or caveats to prosecute any person, including a child for any offence. She stated that were the Court not to find favour with this submission, the very fact that this case was prosecuted implies that the *fiat* of the Attorney General was given. She added that if her submissions were not accepted, the proviso of section 344 of the Criminal Procedure Code should be applied as the objection could have been raised earlier.

[12] One of the difficulties in relation to criminal trials in our jurisdiction is the fact that there are no separate offices of Attorney General and Director of Public Prosecutions. This sometimes leads to situations where the Attorney General is called upon to exercise two distinct functions potentially in conflict with one another. In this particular case the Attorney General or his subordinate officers instituted the proceedings against the Appellant. However, since the Appellant was also a child, the Attorney General had to acquit himself of his duties as Amicus Curiae for children, especially so as in this case the accused had neither a parent nor a guardian in Seychelles. It was therefore incumbent on him to guard the interests of the child and to ensure a fair prosecution. A child's rights as those of other individuals are guaranteed under the Charter of Fundamental Rights and Freedoms in the Constitution. These include the right to a fair hearing and special rights as a minor under article 31 which is particularly relevant to this case as it states:

> *"The State recognizes the right of children and young persons to special protection in view of their immaturity and vulnerability …"*

[13] It is therefore especially ironic that Counsel for the Respondent submitted that the Attorney General's constitutional functions supersede the law. That argument is in any case both dangerous and flawed. Applying a literal interpretation to the constitutional provisions would result in legislation being thwarted and that was certainly not the aim of the drafters of the Constitution. Article 76(4) (a) grants power to the Attorney General to institute and undertake criminal proceedings and Article 76(10) makes it clear that in the exercise of these powers he is not subject to the direction or control of any other person or authority. However nothing in Article 76 places the Attorney General above the law in the exercise of his powers. He is permitted to bring prosecutions but he does so according to law; including the law that predated his constitutional functions. In any case the provisions of the Children Act are not inconsistent with his powers of prosecution.

[14] A similar issue was raised before this court in the case of *Re Section 342A of Criminal Procedure Code (SCA 1/2000)* which also concerned the trial of a child of sixteen years. On that occasion the Court of Appeal had to decide whether there existed an inconsistency between section 225 of the Criminal Procedure Code which provides that in cases of murder the accused shall be tried by the Supreme Court with a jury and Section 93 of the Children Act which provides for the trial of child offenders in the Juvenile Court. It decided that*:*

> *"[B]oth provisions of law should be read together. When so read, it is our view that the application of the general provision contained in section 223 of the Criminal Procedure Code is restricted, inasmuch, as it does not extend to the trial of a "child" within the meaning of the Children Act…In other words, section 93(1) and (2) of the Children Act limits the applicability of the general words of wide import in section 225 of the Criminal Procedure Code."*

[15] Similarly, I am of the view that the wide import of the provisions of the Constitution as regards the prosecuting powers of the Attorney General is limited by the provisions of the Children Act insofar as they indicate how the power of prosecution has to be exercised in relation to a child or young person. This assertion stems from fairly basic canons of statutory interpretation:

(1) the principle of legality as expressed by Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at page 131:

> *"the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."*

(2) *generalia specialibus non derogant* summarised in Halsbury's Laws of England, 4th ed, vol 44(1), para 1300 as:

> *"It is difficult to imply a repeal where the earlier enactment is particular, and the later general. In such a case the maxim generalia specialibus non derogant (general things do not derogate from special things) applies. If Parliament has considered all the circumstances of, and made special provision for, a particular case, the presumption is that a subsequent enactment of a purely general character would not have been intended to interfere with that provision; and therefore, if such an enactment, although inconsistent in substance, is capable of reasonable and sensible*

application without extending to the case in question, it is prima facie to be construed as not so extending. The special provision stands as an exceptional proviso upon the general."

[16] In any case, the exercise of the powers of the Attorney General, being those of the executive branch of government is subject to review by the courts. Further section 8(a) of Schedule 2 made under Article 6 of the Constitution containing the principles of interpretation makes it clear that the provisions of the Constitution shall be interpreted in such a way to give it *"their fair and liberal meaning."* The purport of the Children Act was to safeguard and promote the welfare of children even in circumstances where they have committed criminal offences. It was in recognition of the special status that children have within our community. An interpretation of Article 76 of the Constitution to rob children of the most basic protection in relation to criminal proceedings would neither be liberal nor fair.

[17] Further, the provisions of section 92(1) (b) of the Children Act would be devoid of meaning if we were to imply that the *fiat* of the Attorney General is implied by his very prosecution of a child or young person. I am however, not of the same view as McKee J that only written instructions of the Attorney General in such cases will suffice. The provisions of section 92(1) (b) do not exclude the possibility that the authorisation of the Attorney General could be communicated orally at the initiation of criminal proceedings. The authorisation, written or oral, are required to show that the Attorney General is aware that a child is being indicted and that his instructions have been sought for such prosecution and granted. In this case, nothing in the transcript of proceedings indicates that the Attorney General was aware of this fact; the matter was raised only at appeal by the Court itself.

[18] This is a case where both the trial and sentence process was defective. Archbold states:

"If an indictment is founded on an invalid committal it will be liable to be quashed and any proceedings upon that indictment will be a nullity: R v Gee [1936] 2 KB 442… A failure to follow the prescribed procedure may render a committal invalid, especially if the failure relates directly to the rights of the accused: See R. v Barnet Magistrates' Court, exp. Wood [1993] Crim. L. R. 78...Where some consent is required to the institution of proceedings is not obtained, the whole of any trial that takes place, including the committal proceedings is a nullity and a conviction which occurs in such circumstances will be quashed. R v Angel, 52 Cr. App. R. 280,CA; R v Pearce, 72 Cr. App. R. 295, CA …" (Archbold on Criminal Pleadings, Evidence and Practice 2012 edn, 1-283 – 1-286).

Neither Counsel for the parties, nor the trial judge were aware of the defect until this Court raised the issue in the present appeal. We have given anxious consideration as to whether the conviction should be set aside. Section 344 of the Criminal Procedure Code provides that where an error, omission or irregularity occasions a failure of justice, no finding of sentence or order passed by a court shall be reversed or altered on appeal if the objection could have been raised earlier. We have outlined in this judgment the reasons why this objection could not have been raised earlier. In view therefore of the serious failure of justice occasioned in this case, we have decided allow the ground of appeal on conviction.

[19] In view of our decision in relation to the ground on conviction, it would be purely academic to consider the grounds of appeal on sentence. The appeal is therefore allowed and the Appellant's conviction is hereby quashed.

Mathilda Twomey
Justice of Appeal

I concur

Francis MacGregor
President, Court of Appeal

I concur

Anthony T. S. Fernando
Justice of Appeal

Delivered at Ile du Port, Mahé, Seychelles, this 6th day of December 2013