

10/84

O N A P P E A L

FROM THE COURT OF APPEAL IN THE GAMBIA

B E T W E E N :

THE ATTORNEY GENERAL

Appellant

- and -

MOMODOU JOBE

Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal from a judgment of the Court of Appeal of The Gambia (Forster S.J., Livesey Luke and Anin J.J.A.) dated 11th May 1981 allowing in part the Respondents' appeal from a judgment of Bridges C.J., in the Supreme Court of The Gambia dated 29th July 1980, upholding the Constitutionality of the Special Criminal Court Act (no. 10 of 1979). p.51  
P.23
2. On the 9th August 1979 the Respondent appeared before the Special Criminal Court on one charge of stealing by a clerk or servant the sum of D 595, 791.34, the property of The Gambia Commercial and Development Bank, his employer, contrary to sections 252 and 258 of the Criminal Code and on one charge of fraudulent false accounting contrary to section 303(c) of the same code; the Respondent was remanded in custody. p.23/11  
24-33
3. While the above criminal charges were pending the Respondent issued a writ dated 23rd November 1979 against the Appellant seeking a declaration that the provisions of Act No. 10 of 1979 (hereinafter referred to as "the Act") and particularly sections 6,7,8,10,12,13 and 17 thereof were ultra vires Chapter 3 of Act No.1 of 1970 (hereinafter referred to as "the Constitution") and particularly sections 15(1) (e), 18, 20 and 25 thereof and were accordingly null and void. p.13
4. By his judgment dated 29th July 1980, the learned Chief Justice held that nothing in the Act was inconsistent with any relevant section of the Constitution, dismissed the Respondent's claim and entered judgment for the Appellant with costs. pp.23-44
5. On appeal by the Respondent against the whole of the learned Chief Justice's judgment (save as to section 17 of the Act) the Court of Appeal by a unanimous judgment dated 11th May 1981: pp.51-80

	<u>Record</u>
(a) Upheld the learned Chief Justice's judgment insofar as sections 6, 12 and 13 of the Act were found to be valid and not to offend any section of the Constitution	p.59 11 39-54 p.78 11 38-40
(b) Reversed the learned Chief Justice's judgment insofar as sections 7,8,9 and 10 of the Act were found to be null and void and of no effect. More particularly it was held that:	p.79 11 40-50
(i) Section 7 of the Act contravened the letter and spirit of the Constitution and in particular sections 15 and 20 thereof	p.68-70
(ii) Section 8 of the Act violated sections 18 and 20 of the Constitution	p.74/30- 78/38
(iii) Section 10 of the Act offended against Sections 18 and 20 of the Constitution	p.76/8-33 78/9-37

6. In the respectful submission of the Appellant the Court of Appeal erred in law in finding that Sections 7,8,9 and 10 of the Act contravened the Constitution. The Appellant contends in this appeal that, on a true and proper construction of the Act and the Constitution, the Act does not offend the Constitution and is valid and of full effect.

7. The relevant statutory provisions are set out hereunder -

THE SPECIAL CRIMINAL COURT ACT 1979

7.(1) Any person who is brought to trial before the Court shall not be granted bail unless the Magistrate is 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 subect 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."

- "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 funds 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 signatory.
- (2) The Police may also apply to a Magistrate to freeze the account of any 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."
- "9. (1) The Inspector General of Police shall publish in the Gazette the names of all persons whose accounts have been frozen under this Act."
- "10. (1) Where any account is frozen under this section, no bank shall pay out any monies 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 of not more than seven years and of not less than five years."

THE CONSTITUTION OF THE REPUBLIC OF THE GAMBIA

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 -
  - (a) for the purpose of bringing him before a Court in execution of the order of a Court; or
  - (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 on 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."

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.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (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 ...

20. (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

- (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;
  - (b) shall be given adequate time and facilities for the preparation of his defence.

(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial

(11) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of -

- (a) subsection (2) (a) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts.

(13) In this section "criminal offence" means a criminal offence under the law of The Gambia."

8. In the respectful submission of the Appellant, the Court of Appeal in holding that section 7 of the Act was inconsistent with the accused's constitutional right to pre-trial release, and was contrary to the letter and spirit of the constitution, proceeded on the erroneous view that section 15, and the Constitution in general contained "generous constitutional provisions" granting a right to bail.

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9. The Appellant respectfully submits that on a true and proper construction of the Act and the Constitution:

- (a) No right to bail is granted by the Constitution save in the limited circumstances of section 15(5) of the Constitution, whereby a constitutional right to bail is guaranteed, when the accused having been arrested or detained, is not tried within a reasonable period

- (b) Other than under section 15(5) of the Constitution, the power to grant bail and the terms upon which bail is to be granted is regulated by section 99 of Chapter 39. Such legislation confers no constitutional right to bail, nor are the terms upon which bail may be granted guaranteed. In the circumstances, it is within the competence of the legislature to alter the grounds by subsequent legislation and/or terms upon which bail may be granted, whether generally or in respect of specific offences.

(c) Alternatively, where as is the case, under section 99 of Chapter 39, the decision to grant and or refuse bail is a matter for judicial discretion, it is in accordance with the Constitution and one of the correct and proper legislative functions to regulate and guide the exercise of that discretion:-  
see Hinds v The Queen 1977 AC 195 at p.227.

(d) Section 7(1) and section 7(2) of the Act constitute what the legislature of The Gambia views as necessary in the light of a specific social mischief. Questions of what is reasonably required in the interests of public safety and public order lie primarily with the legislature. The Courts in considering the constitutionality of the provisions should start with the presumption that the circumstances existing in The Gambia are such that the statutory provisions in question are reasonably required for the protection of the State. In respect of section 15(5) the circumstances in which a constitutional right to bail arises hereunder, constitute on a true and proper construction of the Act a "special circumstance" within section 7(1) of the Act. In the premises, the restrictions on the right to the grant of bail contained in section 7(1) of the Act have no application in the circumstances envisaged by section 15(5) of the Constitution.

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(e) Whereas section 7(2) of the Act will apply in the circumstances envisaged by section 15(5) of the Constitution it is respectfully submitted that in determining whether conditions as to bail are "reasonable" and "reasonably necessary to ensure that the accused appears at the date named for his trial" as provided by section 15(5) of the Constitution, due consideration must be given, inter alia, to the gravity with which the particular offence is treated by the legislature together with the reasons therefore, and of the inducement to abscond which those factors may present to the accused; and that in the present case, the Court of Appeal erred in failing to give any or sufficient weight to these factors, and in finding the conditions in section 7(2) were excessive.

9.(2) In the premises it is respectfully submitted subsections 7(1) and 7(2) of the Act do not conflict with the provisions of sections 15 and/or 20 of the Constitution, and/or the spirit of the Constitution.

10.(1) In respect of section 8 the Court of Appeal held that the powers of freezing and seizure contained in the above section were unlimited in purpose, duration and scope, and thus contravened section 18 of the Constitution and did not fall within any of the exceptions thereto. The Court further held that in any event even a temporary confiscation of property prior to a criminal trial presumes the guilt of the accused and is therefore contrary to the constitutional presumption contained in section 20(2)(a) of the Constitution. Section 8(4) of the Act was found to be contrary to the constitutional presumption of innocence (section 20(2)(a)) whereas

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section 8(5)(a) of the Act was stated to have destroyed the accused's constitutional right of silence, (section 20(7)) in that silence on the part of the accused was said to make the accused "automatically liable to a serious criminal offence".

10.(2) In the respectful submission of the Appellant, the Court of Appeal in holding that subsections 8(1) 8(2) and 8(3) of the Act contravened sections 18 and 20 of the Constitution, and that subsections 8(4) and 8(5) violated section 20 of the Constitution erred in the construction of the relevant provisions.

11. With regard to section 8 of the Act it is the respectful submission of the Appellant that -

(i) Whereas the freezing and seizing powers conferred by subsections 8(1), 8(2) and 8(3) are unconditional and not expressly limited in any way, on a true and proper construction of those subsections and of the Act as a whole the powers of freezing and seizure shall only be invoked for the purposes of the investigation, trial or inquiry as to the suspects rights to the property as is envisaged by subsections 8(4) and 8(5). Accordingly the aforementioned subsections fall within the ambit of section 18 (2)(a)(vii) of the Constitution and are valid.

(ii) Further and in the alternative although the obligation upon the police to apply for a freezing order subsequent to a complaint is an absolute one, on the true construction of the statute and/or according to common law, the Magistrate will only grant the order upon the submission of evidence reasonably founding a suspicion against the suspect, and the order will only encompass assets to the extent justified by the suspicions against the suspect

(iii) In that subsections 8(1), 8(2) and 8(3), on a true and proper construction, only permit the freezing and seizure of assets for the purpose of the investigation, trial or enquiry as to the suspect's rights to the property, as provided for by subsections 8(4) and 8(5), it is submitted that the freezing and seizure does not itself bear on the guilt or innocence of the accused, but is rather directed to the preservation of public funds and property reasonably believed by a Magistrate to be in the possession or control of the suspect. Accordingly the provisions of subsections 8(1), 8(2) and 8(3) do not contravene the constitutional presumption of innocence contained in section 20(2)(a) of the Constitution.

(iv) Nothing in subsections 8(4) and 8(5) contravenes or offends the presumption of innocence in section 20(2)(a) of the Constitution, but falls within the exception provided by section 20(11)(a) of the Constitution, in that

(a) on a true construction, subsections 8(4) and 8(5) enact a rebuttable presumption that property seized by the police under section 8(3) is public property unlawfully acquired. The enactment of such a presumption is permitted by section 20(11)(a) of the Constitution, and that

(b) in accordance with the established principles of the common law once the police have tendered to the court of inquiry such facts justifying seizure under subsections 8(1), 8(2) or 8(3) above, the burden placed upon the accused is to prove on the balance of probabilities that the property was not acquired pursuant to an offence against public property. Accordingly the imposition of the burden is in accordance with section 11(a) of the Constitution.

(v) Nothing in subsection 8(5) of the Act violates the accused's constitutional right to remain silent as guaranteed by section 20(7) in that no penalty is imposed upon a failure to give evidence, but only upon failure to prove lawful acquisition. Insofar as proof of legal ownership can be provided by witnesses and or by any other means the suspect may remain silent and no penalty may be imposed.

12. The Appellant further respectfully submits that in holding that section 10 of the Act contravened sections 18 and 20 of the Constitution the Court of Appeal erred in law.

13. On the true and proper construction of the Act and the Constitution

(i) Nothing in section 10 of the Act is such as to be capable of interfering with the constitutional right to a full hearing within a reasonable time by an independent court as guaranteed by section 20

(ii) By reason of the true and proper construction of the freezing and seizure powers as alleged in paragraph 9 above, and insofar as the powers in section 10 of the Act on a true and proper construction, are subject to the same limitations as section 8 of the Act, nothing in section 10 of the Act contravenes the Constitution

14. In respect of section 9 whereas the Court of Appeal found the power to be invalid due to the unconstitutionality of sections 7, 8, and 10, the Appellant respectfully submits that insofar as the Court of Appeal is found to have erred and that sections 7, 8 and 10 of the Act are found to be valid, section 9 as incidental to section 8 of the Act and a necessary pre-requisite for the effective operation of section 10 of the Act should likewise be held to be fully effective

15. On 4th February 1982 the Judicial Committee of the Privy Council granted special leave to appeal to their Lordships of the Judicial Committee. The Appellant respectfully submits that the appeal should be allowed with costs for the following among other



REASONS

1. BECAUSE on a true and proper construction of section 7 of the Act and the Constitution, section 7 does not offend the Constitution.
2. BECAUSE on a true and proper construction of section 8 of the Act and the Constitution, section 8 does not violate the Constitution.
3. BECAUSE on a true and proper construction of section 10 of the Act and the Constitution section 10 is consistent with the Constitution.
4. BECAUSE section 9 of the Act as incidental to the above sections of the Act is constitutionally acceptable.
5. BECAUSE sections 7, 8, 9 and 10 of the Act are within the scope of the legislature's competence.
6. BECAUSE the judgment of the Supreme Court of The Gambia was correct and ought to be upheld.

GEORGE NEWMAN

JONATHAN HARVIE

No. 37 of 1983

IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE COURT OF APPEAL IN THE GAMBIA

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B E T W E E N :

THE ATTORNEY GENERAL Appellant

- and -

MOMODOU JOBE Respondent

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CASE FOR THE APPELLANT

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