

10/84

No. 37 of 1982

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 OF 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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RECORD OF PROCEEDINGS

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Charles Russell & Co.,  
Hale Court  
Lincoln's Inn  
London WC2A 3UL

Solicitors for the Appellant

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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B E T W E E N:

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- and -

MOMODOU JOBE Respondent

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF THE GAMBIA

B E T W E E N :

THE ATTORNEY GENERAL Appellant

- and -

MOMODOU JOBE Respondent

RECORD OF PROCEEDINGS

10

PLEADINGS

No. 1

In the Supreme Court of the Gambia

NOTICE OF MOTION

No. 1  
Notice of Motion

B E T W E E N :

MOMODOU JOBE Applicant

12th September 1979

- AND -

THE STATE 1st Respondent  
THE ATTORNEY GENERAL 2nd Respondent

20

In the matter of an Application of Act No. 1 of 1970 (The Constitution of The Republic of The Gambia)

- AND -

In the matter of The Special Criminal Court Act 1979 (Act No. 10 of 1979)

TAKE NOTICE that the Honourable Court sitting as the Supreme Court, Banjul in the Republic of The Gambia, will be moved on the Friday, 14th day of September, 1979 at 9.30 o'clock in the forenoon or soon thereafter as Counsel may be heard by Counsel on behalf of

In the Supreme  
Court of  
the Gambia

No. 1  
Notice of  
Motion

12th September  
1979

(continued)

the Applicant for a determination of the  
questions following and Orders respectively.

1. Whether the provisions of Act No. 10 of 1979 (hereinafter referred to as the "Act") particularly Sections 6, 7, 8, 10, 12, 13 and 17 thereof do not infringe Chapter 3 of Act No. 1 of 1970 (hereinafter referred to as the "Constitution" more particularly Sections 15 (1)(e) 18, 20 (contrast Section 20(4) with Section 17 of the Act, and Section 25 of the Constitution in as much as the said Act impliedly repeals the said sections of the Constitution without first complying with the provisions in Section 72 of the Constitution for their repeal. 10
2. That assuming that the said question is determined in the affirmative would this not have the effect in law of making the repugnant sections in the Act null and void and of no effect. 20
3. Assuming that Sections 6, 7, 8, 13 and 17 of the Act are null and void and of no effect ought not the Court to make a declaration and or orders to that effect.
4. Is not the Act an attempt to interfere with the powers of the Judiciary?
5. Further, or in the alternative that the Honourable Court be pleased to pronounce that the said Sections, to wit Sections 6, 7, 8, 12, 13 and 17 of the Act and ultra vires the Constitution for impliedly repealing the sections other than in conformity with Section 72 of the Constitution. 30
6. That the Court may be pleased to grant such further order or consequential order or relief as the said Honourable Court may seem just.

AND FURTHER TAKE NOTICE that at the hearing of this application the Applicant will seek leave of the Court that this matter be heard during the long vacation as one which is sufficiently urgent, grave and weighty to be so heard. 40

AND FURTHER TAKE NOTICE that at the hearing of this Application the Applicant will use the affidavits of Counsel and himself sworn to on the 12th day of September, 1979.

Dated at Banjul this 12th day of September, 1979.

(Sgd) S.K. O'Brien Coker,

SOLICITOR FOR APPLICANT

In the Supreme  
Court of  
the Gambia

No. 1  
Notice of  
Motion

12th September  
1979

(Contd.)

In the Supreme  
Court of  
the Gambia

No. 2

AFFIDAVIT OF S.K. O'BRIEN COKER

No. 2  
Affidavit  
of S.K.O'Brien  
Coker

APPEAL NO. 58/79

12th September  
1979

B E T W E E N :

MOMODOU JOBE

APPLICANT

- AND -

THE STATE 1ST RESPONDENT  
THE ATTORNEY GENERAL 2ND RESPONDENT

A F F I D A V I T

I SHORNU KINTY O'BRIEN COKER make oath  
and say as follows:-

10

1. That I am a Gambian citizen and a  
Barrister and Solicitor of The Supreme  
Court of The Gambia.
2. That I am the Solicitor for Momodou  
Jobe the Applicant herein.
3. That Momodou Jobe is charged with  
stealing and fraudulent false accounting.
4. That the applicant is in remand in  
prison custody without the option of  
bail.
5. That I verily believe that the provisions  
of the constitution have been  
contravened by Act No. 10 of 1979.
6. That I have filed a motion asking for  
the Court to make an order that Act  
No. 10 of 1979 is ultra vires the  
constitution.

20

(Sgd) S.K.O. Coker  
DEPONENT

SWORN AT BANJUL  
this 12th day of September, 1979

30

Before me

(Sgd) ????

(COMMISSIONER FOR OATHS)

No. 3

AFFIDAVIT OF MOMODOU JOBE

In the Supreme Court of the Gambia

IN THE SUPREME COURT OF THE GAMBIA

No. 3 Affidavit of Momodou Jobe

APPEAL No.58/79

13th September 1979

B E T W E E N :

MOMODOU JOBE

Applicant

- AND -

THE STATE

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

10

A F F I D A V I T

I, Momodou Jobe a remand prisoner presently in Mile 2 Prison make oath and say as follows:-

1. That I am a Gambian Citizen
2. That I was charged with stealing and fraudulent false accounting and remanded in custody without the option of bail.
3. That I am informed by my solicitor and I verily believe that I am being tried in the case pursuant to the provisions of Act No. 10 of 1979.
4. That I am informed by my solicitor and verily believe that Act No. 10 of 1979 is ultra vires the constitution of the Republic of The Gambia.

20

(Sgd) M. Jobe

D E P O N E N T

Sworn at Banjul  
this 13th day of September, 1979

Before me

30

(Sgd) Y.B. John  
COMMISSIONER FOR OATHS



In the Supreme  
Court of  
the Gambia

No. 4

SUMMONS

No. 4  
Summons

17th October  
1979

IN THE SUPREME COURT OF THE GAMBIA

APPEAL NO. 58/79

B E T W E E N :

MONODOU JOBE

Applicant

- AND -

THE ATTORNEY GENERAL

1 Respondent

In the matter of an Application of Act  
No. 1 of 1970 (The Constitution of the  
Republic of The Gambia) 10

- AND -

In the matter of The Special Criminal  
Court Act 1979 (Act No. 10 of 1979)

Let the Attorney General of The Gambia  
within eight days after service of this  
Summons on him, inclusive of the day of such  
service, cause an appearance to be entered  
for him to this summons which is issued upon  
the application of Momodou Jobe of The Central  
Prisons, Mile II Banjul for the determination 20  
of the following questions:-

1. Whether the provisions of Act No. 10 of  
1979 (hereinafter referred to as the  
"Act") particularly Sections 6, 7, 8, 10,  
12, 13 and 17 thereof do not infringe  
Chapter 3 of Act No. 1 of 1970 (herein-  
after referred to as the "Constitution"  
more particularly Sections 15(1) (e) 18,  
20 (contrast Section 20(4) with Section 30  
17 of the Act, and Section 25 of the  
Constitution in as much as the said Act  
impliedly repeals the said Sections of  
the Constitution without first complying  
with the provisions in Section 72 of the  
Constitution for their repeal.
2. That assuming that the said question is  
determined in the affirmative would this

not have the effect in law of making the repugnant sections in the Act null and void and of no effect.

In the Supreme  
Court of  
the Gambia

3. Assuming that Sections 6, 7, 8, 13 and 17 of the Act are null and void and of no effect ought not the Court to make a declaration and or orders to that effect.
- 10 4. Is not the Act an attempt to interfere with the powers of the Judiciary? (separation of power).
5. Further, or in the alternative that the Honourable Court be pleased to pronounce that the said Sections, to wit Sections 6, 7, 8, 12, 13 and 17 of the Act are ultra vires and Constitution for impliedly repealing the sections other than in conformity with Section 72 of the Constitution.
- 20 6. That the Court may be pleased to grant such further order or consequential order or relief as the said Honourable Court may seem just.

No. 4  
Summons

17th October  
1979

(continued)

Dated at Banjul this 17th day of  
October, 1979.

(Sgd) S.K. O'Brien Coker

SOLICITOR FOR APPLICANT

No. 5  
Mr Darboe  
Preliminary  
Objection

Mr Darbo - PRELIMINARY OBJECTION

Friday 14th September, 1979

14th September  
1979

Before His Lordship the Hon. Mr W.G.  
Grante Ag. C.J.

In Chambers

Mr. S.K. O'Brien Coker for Applicant  
Mr. A.N.M.O. Darboe and Miss Mariam Jack  
for 1st and 2nd Respondents.

10

Mr. Darboe asks to make a preliminary objection.

That the matter referred to in the Motion particularly paragraphs 2 - 5 are in the nature of questions which are properly put in constitutional reference. And a constitutional reference can be made to the Supreme Court under Section 93(1) of the Constitution, and such a reference can only be made by a subordinate court to the Supreme Court. The procedure adopted by counsel is wrong. The reference should emanate from the subordinate court and not from counsel. Even if counsel's argument is based on Section 28(3) of the Constitution the procedure is still wrong. Similarly also if the applications is based on Section 28(1) of the Constitution, the procedure is still wrong.

20

It is submitted that the procedure in allegation to contravention of human right provisions can be challenged under Section 28(1) of the Constitution by a person alleging such contravention. If he issue a writ of summons seeking a declaration that his rights are being interfered with; and not by way of summons. (Refers to Steele v Attorney General of Sierra Leone 1967/68; African Law Report page).

30

Mr. Coker:

10 Steele v Attorney General of Sierra Leone was an originating action alleging the Government to introduce a one party state. The present case is an interlocutory matter for which it is prescribed in Order 25 Rule I page 1036. It would appear that counsel for the respondents do not understand your motion.

This motion is challenging the whole fabric of Act No. 10 of 1979. If one refers to Section 28(1) of the Constitution one would say that any person may bring an action in the Supreme Court.

20 The Act i.e. Act No. 10 of 1979 is ultra vires. If applicant is allowed to be tried by the magistrate his legal right would be contravened. Therefore Section 28(1) of the Constitution is the applicable section for this section. Refers to Section 93 of Constitution. Not asking for constitution to be interpreted. Therefore Section 93 is inapplicable.

Refers I.G.P. v Sahore (1971)

I.G.P. v Dennis N'Jie (1974)

Sub-section 2 of Section 28 of Constitution is referred to.

30 Submits that the whole Act i.e. Act No.10 is null and void and so therefore interferes with the fundamental rights of the applicant.

O R D E R

No. 7  
Order

14th September  
1979

It is observed that the application before me touches on the Special Criminal Court Act i.e. Act No. 10 of 1979. To answer certain pertinent question Sections 6, 7, 8, 10, 12 and 13 thereof whether they do not infringe the Constitution of 1970.

At the time when this Act was being passed, I was acting in the capacity of Director of Public Prosecutions and therefore was directly involved in putting into motion the drafting of the law.

10

Under the circumstances therefore it is only right and proper and I be disqualified from hearing this matter before me since I would be prejudiced in one way or the other.

That being the case I ask that I be disqualified from hearing the matter. This matter to be brought during next term.

(Sgd) W. G. Grant

14/9/79

20

PROCEEDINGS BEFORE THE  
HON. SIR PHILIP BRIDGE C.J.

No. 8

MR DARBOE PRELIMINARY OBJECTION

Saturday the 15th day of November, 1979  
Before the Hon. Sir Phillip Bridges C.J.

N I L

Saturday the 17th day of November, 1979  
Before the Hon. Sir Phillip Bridges C.J.

10 S.K. O'Brien Coker for applicant

A.N.M.O. Darboe for the respondent - State.

Coker: Action under Section 28 of the  
Constitution. My client has been charged  
and is in remand and has not been tried.

Darboe: I have a preliminary objection.

Court: We shall deal with the objection.

20 Darboe speaks to his motion. Steele & Ors  
v Attorney General & Ors 1967/68. This  
matter should be commenced by a Writ of Summons  
not an originating summons.

Coker: My clients are denied bail by the  
Special Criminal Court Act 1979 - Bail is beyond  
his reach.

In the Supreme  
Court of  
the Gambia

No. 8  
Mr Darboe  
Preliminary  
Objection

17th November  
1979

In the Supreme  
Court of  
the Gambia

No. 9  
O R D E R

---

No. 9  
Order

17th November  
1979

Court: This is a case brought under Section 28 of the Constitution in effect to test the Constitutional validity of a provision of the Special Criminal Court Act 1979.

I am of the opinion that the proper procedure to be followed is for a writ of summons seeking a declaration to be filed and the matter to proceed with pleadings as a Civil Action in the ordinary way.

10

Leave to withdraw the originating summons is given to enable a new action to begin.

(Sgd) Phillip Bridges

CHIEF JUSTICE

17th November, 1979.

No. 10  
WRIT OF SUMMONS

In the Supreme  
Court of  
the Gambia

IN THE SUPREME COURT OF THE GAMBIA

Civil Suit No. 1979-A-417

No. 10  
Writ of  
Summons

23rd November  
1979

B E T W E E N :

MOMODOU JOBE Plaintiff

- AND -

THE ATTORNEY GENERAL Defendant

10 To: The Attorney General,  
of The Quadrangle,  
Banjul.

YOU ARE HEREBY COMMANDED IN THE NAME OF  
THE REPUBLIC OF THE GAMBIA to attend this Court  
at Banjul on Monday the 28th day of January,  
1980 at 9 o'clock in the forenoon to answer  
a suit by of the Gambia  
against you.

20 The Plaintiff claims that the Special  
Criminal Court Act (Act No. 10 of 1979)  
violates his constitutional rights and is ultra  
vires of the Constitution of the Republic of  
The Gambia.

Issued at Banjul this 23rd day of  
November, 1979.

(Sgd) Phillip Bridges  
CHIEF JUSTICE

30 TAKE NOTICE: 1. That if you fail to attend  
at the hearing of this suit or at any  
continuation or adjournment thereof, the Court  
may allow the Plaintiff to proceed to judgment  
and execution.

2. If you have a counter-claim or set  
off against the Plaintiff you must lodge with the  
Registrar FOUR CLEAR DAYS before the return  
day a notice in original, with as many duplicates  
thereof as there are Plaintiffs, containing  
your name and address and a concise statement  
of the grounds of such counter-claim or set-off



In the Supreme  
Court of  
the Gambia

and pay such Court Service fees as may be payable therefor.

CERTIFICATE OF SERVICE BY BAILIFF

No. 10  
Writ of  
Summons  
  
23rd November  
1979

Upon the            day of            19  
this summons was served by me on  
defendant. This I did by serving a copy of  
the above summons (and the Particulars of  
Claims) on the said defendant personally.

(continued)

BAILIFF OR OFFICER OF SUPREME COURT

No. 11  
Statement  
of Claim  
  
21st November  
1979

No. 11

10

STATEMENT OF CLAIM

IN THE SUPREME COURT OF THE GAMBIA

Civil Suit No. 1979-A-417

B E T W E E N :

MOMODOU JOBE

Plaintiff

- AND -

THE ATTORNEY GENERAL

Defendant

STATEMENT OF CLAIM

1. The plaintiff is a remand prisoner at the Central Prisons Mile II, Banjul. 20
2. The State is the Republic of The Gambia represented by the Attorney General.
3. On the 23rd day of May, 1979 the President of The Republic of The Gambia assented to an Act called the Special Criminal Court Act (Act No. 10 of 1979).
4. On the 9th day of August 1979 the Plaintiff was arrested and charged with stealing and fraudulent false accounting.

5. The plaintiff was kept in police custody till the 18th August 1979 before being taken to the Magistrate. In the Supreme Court of the Gambia
6. On the said date the Magistrate remanded the plaintiff to Mile II Prison but the police refused to take him there and kept him in police cells till the 22nd August, 1979. No. 11 Statement of Claim  
21st November 1979
- 10 7. On the 22nd August 1979 plaintiff's solicitor complained to the Magistrate about the behaviour of the police and the Magistrate had to take the unusual step to have to send the plaintiff directly to the Central Prisons on the Judicial Landrover and then made a formal complaint to the Chief Justice. (continued)
8. The plaintiff has now been in remand for three months without any trial of his case.
- 20 9. The said Act under which the plaintiff is to be tried is a flagrant violation of his constitutional rights.
10. The said Act (Act No. 10 of 1979) is a legislative plan designed ex post facto to facilitate and ensure the conviction and enhanced punishment of the plaintiff.
11. Act No. 10 of 1979 purports ex post facto to create aggravated crimes and alter in fundamental matters the general rules of evidence which would facilitate the proof of guilt. 30
12. The said Act makes it impossible to obtain bail and directs the judiciary as to the conduct of a trial under the said Act.
13. The plaintiff says that the Special Criminal Court Act (Act No. 10 of 1979) is ultra vires the constitution and invalid.

Dated at Banjul this 21st day of November,  
1979.

40 (Sgd) S. K. O'Brien Coker  
SOLICITOR FOR THE PLAINTIFF

STATEMENT OF DEFENCE

No. 12  
Statement of  
Defence

IN THE SUPREME COURT OF THE GAMBIA

Civil Suit No. 1979-A-417

6th February  
1980

B E T W E E N :

MOMODOU JOBE

Plaintiff

- AND -

THE ATTORNEY GENERAL

Defendant

STATEMENT OF DEFENCE

1. The defendant admits the contents of paragraphs 1, 2 and 3 of the plaintiffs statement of claim. 10
2. The defendant admits that in the month of August 1979 the plaintiff was arrested and charged with stealing and fraudulent false accounting.
3. The defendant cannot admit or deny the contents of paragraphs 5, 6 and 7 of the plaintiff's statement of claim and puts the plaintiff to strict proof thereof. 20
4. The defendant admits that the plaintiff has now been in remand for three months but denies that the trial of the plaintiff's case has not commenced.
5. The defendant denies the contents of paragraphs 9, 19(sic), 11, 12 and 13 of the plaintiff's statement of claim.
6. The defendant states that the Special Criminal Court Act (Act No. 10 of 1979) is intra vires the constitution and valid. 30

Dated at Banjul this 6th day of February,  
1980.

(Sgd) H. B. Jallow  
SOLICITOR FOR THE DEFENDANT

For: Service on  
Mr. S. K. O'Brien Coker,  
10A Cameron Street,  
Banjul.  
SOLICITOR FOR THE PLAINTIFF

PROCEEDINGS ON WRIT

No. 13

Mr M'BOOB ASKING FOR PLEADINGS

Monday 28th January, 1980

Before the Hon. Mr. A.A. B. Gaye - Ag.Master

S.K.O. Coker for plaintiff present.  
I.S.B. M'Boob for the State present.

M'Boob: We are asking for Pleadings.

In the Supreme  
Court of  
the Gambia

No. 13

Mr M'Boob  
Asking for  
Pleadings

28th January  
1980

No. 14

ORDER FOR FILING OF DEFENCE

Pleadings order: Statement of Claim deemed  
filed.

Statement of Defence within 14 days.

Case adjourned to 19/2/80.

(Sgd) A.A.B. Gaye.

No. 14  
Order for  
Filing of  
Offence

28th January  
1980

No. 15

ORDER CLOSING PLEADINGS

Tuesday 19th February, 1980

Before the Hon. Mr. A.A.B. Gaye - Ag. Master

Resumed.

S.K.O. Coker for Plaintiff present  
I.S.B. for A.G. present.

Court: Pleadings are closed. Suit is ready  
for trial and is remitted to Court No. 1 for  
trial.

(Sgd) A.A.B. Gaye

No. 15  
Order Closing  
Pleadings

19th February  
1980

10

20

No. 16  
Mr Coker  
Opens Case

Friday the 29th day of February, 1980

29th February  
and 4th  
March 1980

Before the Hon. Sir Phillip Bridges - C.J.

S.K.O. Coker for plaintiff  
H.B. Jallow for defendant with him  
Miss Mariam Jack.

Coker: Act 10 of 1979 violates his constitutional right - 20 of Constitution is violated. Creation of courts governed by Section 94. Trial of only a class of people contrary to Section 25, Sub-Section 2 of the Act. Discremination as to fund stolen is wrong. Section 5 of Act. 10

6 (3) and (4) unwarranted interference with the judiciary - written constitution. Executive - Legislature - Judiciary. Interpretation assigned to Court.

7. Discretion to grant bail faltered. Parliament has no power to restrict bail. 20

Section 8 offends against Section 18 (constitution) just based on suspicion. Section 4 of 8 puts onus of proof on the accused. Section 8 (5) - fetters discretion of magistrate.

Criminal Procedure Code 266. Liyanage v Queen 1967 1 AC P. 259. Privy Council case from Ceylon : reads - Gratiaen's argument - "act wholly bad" - "..... and substance to secure conviction and enhance the punishment" Section 252 Criminal Code. 30

Alternations of judiciary - special magistrate - deprivation of normal discretion of judges - minimum sentence - unconstitutional - no validity to acts which infringe the constitution. Indira Ghandi's Act.

Adjourned to 4th March, 1980

(Sgd) Phillip Bridges.

Tuesday the 4th day of March, 1980  
Before the Hon. Sir Phillip Bridges - C.J.

In the Supreme  
Court of  
the Gambia

As before.

No. 16  
Mr Coker  
Opens Case

Special Courts Bill 1978 All India Reports  
1979 SC No. 478:- Summarized in Commonwealth  
Law Bulletin P. 53.

29th February  
and 4th  
March 1980

10

British Parliament Supreme - purported  
to amend chapter. Special Court - courts  
for everybody. Parallel court offends the  
constitution. Commonwealth Law Bulletin -  
continues. (15 20 25 contravened) Section 7  
of Act contravenes Section 15 of Constitution.  
Section 99 Criminal Procedure Code purported  
to be amended. Constitution 15(2). Bail  
not to be excessive - Act says 1/3rd of sum  
alleged to be stolen. Police have acted on  
mere suspicion but property must be pledged.

(continued)

20

Local cases - Camara case appeal founded  
on technicality - Gomez's case - Liyarage v  
Q: p.2 & 3 offends 6 (2) (3) (4).

1. Magistrate interfered with
2. Presupposes guilt
3. Bail excessive.

Graetien at 275. International Commission of  
Jurists pamphlet read 26.

30

Act ultra vires of the constitution. Deprives  
offender of his ordinary legal rights and should  
be declared invalid. Bribery Commission v  
Ranasinghe 1965 AC 172. 72 affronted should  
been a referendum. It was in effect an  
amendment of the constitution. Discriminatory  
against acts - not only persons:

Submits Special Act is ultra vires.  
Violates rights of Momodou Jobe: alterations  
not intended for generality of citizens (p.209).

No evidence called.

Adjourned to 6th March, 1980.

(Sgd) Phillip Bridges

No. 17  
Mr Jallow  
replies

6th March 1980

Before the Hon. Sir Phillip Bridges C.J.

6th March  
1980

H.B. Jallow: Two observations:

1. Request for a reference - not relevant.
2. Statement of Claim divisible.
  1. That action of police in paragraphs 5, 6 & 7 violates rights of plaintiff. 10
  2. Remainder of Statement of Claim alleges violation of rights before of the Act

My friend relied very heavily on Graetien's argument in Ceylon case. Friend says Act is against certain fundamental principles of justice.

Before 1865 (Colonial Laws Validity) position different Colonial Law Act provided invalidity of a colonial act only if conflicted with an English Act. 20

At Gambian Independence it was provided Section 2 of Sch.I G.I. Act 1964 - Legislative powers of The Gambia. Ceylon decision effect that Act could only be challenged for offending against specific provisions - but not against general principles.

Test of Special Criminal Court Act does it offend against any specific provision of the Constitution. Constitution is supreme. 30

Parliament supreme subject constitution. Shell Co. of Australia v Federal Commission of Taxation 1931 AC 275 at p. 298 "true expression of natural will" ordinary natural meaning of constitution.

Said that Act 10 of 79 offends sections of court. 94(1) - "Subordinate courts". Submits Parliament can create court and call it anything it wants - submits Act does not 40

alter 94(1).

Separation of powers defined by academics.  
Hooill - Phillip (Wade & Phillip) 6th Edition  
p. 22 reads - 3 different things.

Mohamed Kariappan v Winesinha 1968 AC 717  
(Ceylon to PC) later in time than Liyanage  
at 734.

10 Comings v State of Missouri Act 10 of  
79 involves none of these considerations.  
Who is guilty is left to courts. No safeguards  
removed. Page 738 (Cariappa) - Act can be  
amended - act does not speak like a court order  
provide method of trying certain offences.

Test - Act is not ultra vires therefore  
it does not perform a judicial function.

Submission Constitution 25(3) definition  
of "discriminatory" "wholly or mainly" no  
violation of Section 25.

20 "Fettering of courts discretion" raised  
by Mr. Coker Bail Section 99 Criminal Procedure  
Code and 166.

Later act takes precedence - Special law  
not to derogate for general - Lex Specialis  
Act No. 10 even if inconsistent with 'previous  
Act still not "special" law. Cariappa at  
741 A - intention to amend.

30 Facts in Liyanage's case quite different  
from here. There declaration in white paper  
of guilt followed by ex post facto legislation  
in Ceylon act altered law of evidence. 10 of  
79 alters nothing and gives courts no power  
they did not have before. Section 6(2)  
same as 291 Criminal Procedure Code.

Contended Section 17 ultra vires - case  
was not pending when act was passed. 17 is  
any way a spent provision. Bribery Commission  
case - magistrate assigned by CJ.

40 Plaintiff was charged in August stealing  
Commercial & Development Bank - retroactive  
effect does not arise. Cokers assertion that  
Section 8 offends against Section 18  
constitution.

Submits 18 relates to lawful possession -  
18 (2) (vii) "democratic society".

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Complaints about 6(4) do not go to  
roots of the act - any way finger must be  
pointed at specific provision violated.

Submits - using Criteria of Lord Sankay  
in Shell Company of Australia case and  
without straining the language of the  
constitution - the Act is intra vires.

JUDGMENT DELIVERED BY THE HON. SIR PHILLIP BRIDGES C. J.

No. 18 Judgment Delivered by the Hon. Sir Phillip Bridges C.J.

IN THE SUPREME COURT OF THE GAMBIA

Civil Suit No. 1979-A-417

29th July 1980

B E T W E E N :

MOMODOU JOBE Plaintiff

- AND -

ATTORNEY GENERAL Defendant

10 Before the Hon. Sir Phillip Bridges, C.J.

S.K. O'Brien Coker for plaintiff
H. B. Jallow for defendant with him
Miss Mariam Jack.

J U D G M E N T

20 This is an action in which the plaintiff seeks a declaration that "the Special Criminal Court Act 1979 (Act No. 10 of 1979) violated his constitutional rights and is ultra vires of the Constitution of the Republic of The Gambia."

Before I go further I shall set out the chronological steps which have brought this case before the Court.

30 The plaintiff Mr. Momodou Jobe was charged before the Special Criminal Court on one charge of stealing by a clerk or servant the sum of D595,791.34, 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 Code.

The Court was presided over by his Worship Mr. M.A. Ceesay a magistrate of the First Class duly assigned to the Court. Before the learned Magistrate there were two accused; Mr. Jobe charged as I have indicated above and

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one other charged with receiving. At the close of the prosecution counsel for the accused made submissions of "No case"; that in respect of the receiving charge was upheld and that accused acquitted. The submission in respect of the charges against Mr. Jobe was rejected and there the case rests at this moment.

The submission of no case to answer was made on 24th March 1980.

10

On the 12th September 1979 Mr. S.K. O'Brien Coker, who appears for Mr. Jobe had filed a Notice of Motion in the Supreme Court in the following terms:-

"TAKE NOTICE that the Honourable Court sitting as the Supreme Court, Banjul in the Republic of The Gambia, will be moved on Friday the 14th day of September 1979 as counsel may be heard by counsel on behalf of the applicant for a determination of the questions following and Orders respectively:

20

- (1) Whether the provisions of Act No. 10 of 1979 (hereinafter referred to as the "Act") particularly Sections 6, 7, 8, 10, 12, 13 and 17 thereof do not infringe Chapter 3 of the Act No. 1 of 1970 (hereinafter referred to as the "Constitution" more particularly Sections 15 (1) (e) 18, 20 (contrast Section 20(4) with Section 17 of the Act, and Section 25 of the Constitution in as much as the said Act impliedly repeals the said sections of the Constitution without first complying with the provisions in Section 72 of the Constitution for their repeal. 30
- (2) That assuming that the said question is determined in the affirmative would this not have the effect in law of making the repugnant sections in the Act null and void and of no effect? 40
- (3) Assuming that Sections 6, 7, 8, 13 and 17 of the Act are null and void and of no effect ought not the Court to make a declaration and or orders to that effect?

(4) Is not the Act an attempt to interfere with the powers of the Judiciary?

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(5) Further, or in the alternative that the Honourable Court be pleased to pronounce that the said Sections, to wit Sections 6, 7, 8, 12, 13 and 17 of the Act are ultra vires the Constitution for impliedly repealing the sections other than in conformity with Section 72 of the Constitution.

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(6) That the Court may be pleased to grant such further order or consequential Order or relief as the said Honourable Court may seem just."

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and this came before the court (Grante Ag. C.J.) on 14th September 1979.

Learned Counsel for the Antorney General argued on a preliminary point that the matters referred to in the Motion paper were in the nature of questions properly put in a Constitutional Reference under Section 93 (1) of the Constitution of the Republic of The Gambia (Act No. 1 of 1970) and that such a reference can only be made by a subordinate court to the Supreme Court. Section 93(1) reads as follows:-

"Where any question as to the interpretation of this Constitution arises in any proceedings in any subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court."

Counsel further objected that, even if it was a question which might attract the attention of Section 28(3) of the Constitution, the procedures then being pursued were wrong. He further objected that were the application made under Section 28 (1) of the Constitution it would still be an irregular process - and that properly the action should commence in the Supreme Court by writ of summons. Mr. Coker replied.

Sections 28(1) and 28(3) of the Constitution provide as follows:-

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"28. (1) If any person alleges that any of the provisions of Sections 13 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress. 10

"(3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of Sections 13 to 27 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court unless, in his opinion the raising of the question is merely frivolous or vexatious." 20

It was at this stage however, that the learned judge rescued himself on the grounds that at the time of the passing of the Special Criminal Courts Act he had been the Director of Public Prosecutions and had in fact been actively engaged in the drafting process. 30

On 17th October 1979, however, the plaintiff issued an originating summons directed against the Attorney General in precisely the same terms as those of the notice of motion and the originating summons came before the court (Bridges C.J.) on 17th November 1979. Once again counsel for the Attorney General objected that the matter should properly be brought before the court by writ of summons and cited, as he had when the motion had been considered the Sierra Leone case of Steele v Attorney General of Sierra Leone 1967 ALR p.1. 40

The court gave leave to withdraw the originating summons to enable a new action to begin.

The writ was issued on 23rd November 1979 claiming the declaration set out at the head of this judgment.

On 23rd May 1979 the Presidential Assent had been given to the Special Criminal Court Act 1979, (Act No. 10 of 1979). It was gazetted on 15th June 1979 and commenced with the following preamble:-

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"Whereas by subsection (1) of section 94 of the Constitution Parliament may establish courts subordinate to the Supreme Court;

10 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;"

20 there following seventeen sections none of which is very prolix - it is not a long act. The plaintiff objects to seven of the sections as affecting his constitutional rights, so I shall set them out thus:

"6. (1) Subject to subsections (2) (3) and (4) of this section the Court shall ordinarily apply the provisions of the Criminal Procedure Code (Cap 39).

30 (2) Notwithstanding the provisions of the criminal Procedure Code (Cap 39) the Court shall dispense with any technicality relating to the law of evidence unless the Court is of the opinion that by so doing there may be a miscarriage of justice.

(3) The proceedings of any trial under this Act shall not be adversely affected by such defect as duplicity or any other irregularity on the face of the charge.

40 (4) Where in any trial under this Act there is a submission of no case the Court shall forthwith give a ruling on the matter without necessarily assigning any reason therefore.

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

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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 of pledge 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 of pledge properties of equivalent amount as guarantee.

10

(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 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.

20

(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.

30

(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.

40

(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.

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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 approved any such payment.

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

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(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.

20 12. (1) In addition to the punishment imposed under section 11 of this Act the Magistrate shall order the person to pay to the Accountant General the total sum of moneys for which he was found guilty of having stolen or return the stolen property to the appropriate body.

30 (2) Where a person ordered to pay any sum or return any property under this section fails to do so within one month of such an order the Court shall order that -

(a) any property he owns shall be sold and the proceeds paid to the Accountant General.

(b) any moneys kept in any bank in The Gambia shall be paid to the Accountant General.

40 (3) Where after making the orders prescribed in Section 12 there is still some amount outstanding in respect of the properties or moneys affected by the conviction, the Court shall make a further order that any person, holding any moneys such as gratuities, awards, pensions or other similar moneys to which the person is entitled, shall pay such moneys to the Accountant General.



13. (1) Where after exhausting all the provisions under Section 12 of this Act there is still some outstanding amount to be paid by the person convicted, that amount shall be considered to be a debt due to the Government.

(2) The Attorney General may at any time bring an action in the Supreme Court for recovery of such amount.

(3) This section shall not be affected by any law of limitation for the time being in force.

10

17. (1) Where on the coming into force of this Act any case relating to the subject matter of the offences specified in section 5 of this Act is pending before any court, that court shall for the purposes of that case be deemed to be a Special Criminal Court, and all the provisions of this Act shall apply in the determination of that case.

20

(2) Any dispute as to whether a case pending before any court at the time of the coming into force of this Act is a proper subject for the determination of a Special Criminal Court, shall be referred to the Chief Justice whose decision on the matter shall be final.

(3) The Chief Justice shall have the power to transfer any case pending before any court, the subject matter of which is affected by this Act to the Special Criminal Court."

30

His constitutional rights that are said to be affected are those contained in the following sections of the Constitution namely 15 (1) (e), 18, 20 and 25 and I shall now set these out:-

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

40

.....

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

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 -

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- (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 sub-section (1) of this section -

20

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

30

- (i) in satisfaction of any tax, rate or due;
- (ii) by way of penalty for breach of the law; whether under civil process or after conviction of a criminal offence under the law of The Gambia;

40

- (iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;
- (iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;
- (v) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants;

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- (vi) In consequence of any law with respect to the limitation of actions; or
- (vii) for so long only as may be necessary for the purposes of any examination, investigations, 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 reasonable justifiable in a democratic society; or
- (b) to the extent that the law in question makes provision for the taking of possession or acquisition of any of the following property (including an interest in or a right over property) that is to say:-
- (i) enemy property;
- (ii) property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;
- (iii) property of a person adjudged bankrupt or a body corporate in liquidation,

for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or

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- 10 (iv) property subject to a trust for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or by order of a court, for the purpose of giving effect to the trust.

20 (3) Nothing contained in or done under the authority of any Act of Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the Act in question makes provision for the compulsory taking of possession of any property, or the compulsory acquisition of any interest in or right over property, where that property, interest or right is held by a body  
30 corporate established by law for public purposes in which no moneys have been invested other than moneys provided by parliament.

(4) The provision of this section shall apply in relation to the compulsory taking of possession of property of any description and the compulsory acquisition of rights over and interests in such property by or on behalf of the Republic.

40 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 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;

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- (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;
- (c) shall be given adequate time and facilities for the preparation of his defence;
- (d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice; 10
- (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and 20
- (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge;

and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence. 30

(3) When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person or any record of the proceedings made by or on behalf of the court. 40

(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, constituted 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.

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(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

20

(6) No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.

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

30

(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

40

(9) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.

50

(10) Nothing in subsection (9) of this section shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority-

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(a) may by law be empowered to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or, in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or 10

(b) may by law be empowered or required to do in the interests of defence, public safety or public order.

(11) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of - 20

(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;

(b) subsection (2)(d) of this section to the extent that the law in question prohibits legal representation in proceedings before a court; by whatever name called administering customary law or before another court on appeal from such a court; 30

(c) subsection (2)(e) of this section to the extent that the law in question imposes reasonable conditions that must be satisfied with witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds; or 40

(d) subsection (5) of this section to the extent that the law in question authorised a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and

conviction or acquittal of that member under the disciplinary law of that force, so, however, that any court so trying such a member and convicting him shall in sentencing him to any punishment awarded him under that disciplinary law.

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10 (12) In the case of any person who held in lawful detention the provisions of subsection (1), paragraphs (d) and (e) of subsection (2) and subsection (3) of this section shall not apply in relation to his trial for a criminal offence under the law regulating the discipline of persons held in such detention.

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

25. (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

30 (2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a disciplinary manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

40 (3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, 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.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision -



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- (a) for the appropriation of public revenues or other public funds;
- (b) with respect to persons who are not citizens of The Gambia;
- (c) for the application, in the case of persons of any such description as is mentioned in subsection (3) of this section (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description; 10
- (d) for the application of customary law with respect to any matter in the case of persons who, under that law, are subject to that law; or 20
- (e) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society. 30

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to race, tribe, place of origin, political opinions, colour or creed) to be required of any person who is appointed to or to act in any office in the public service, any office in a disciplined force, any office in the service of a local government authority or any office in a body corporate established by law for public purposes. 40

(6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or subsection (5) of this section.

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(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that that law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 19, 21, 22, 23 and 24 of this Constitution being such a restriction as is authorised by section 19 (2), section 21 (5), section 22 (2) section 23 (2) or paragraph (a) or paragraph (b) of section 24 (3), as the case may be.

20

30

(8) Nothing in subsection (2) of this section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.

40

50

I must first consider under which provision of the Constitution the action is brought and it seems to me that Section 28 (3) and 93(1) have no relevance here, since both these sections are applicable only when a matter is referred to the Supreme Court by a Subordinate Court. In this case it is true that a reference was made by the learned magistrate on 6th March 1980 when counsel for the first accused (the present plaintiff) raised the question of the validity of the Special Criminal Courts Act. By this time, however, the present action was already proceeding, the writ having been issued on 23rd November 1979, pleadings closed and the case ordered by the Master for trial by the Supreme Court on 19th February 1980. The Chief Justice directed that this reference, being later in time than the writ, although seeking determination of the same question namely the validity of the Act, should abide the determination of the present suit. It

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would clearly be most undesirable to have two separate suits concerning the same parties and the same subject matter running concurrently in the same court.

It follows, therefore, that this action comes under Section 28(1) of the Constitution which I have already set out above.

I now turn to the substance of the plaintiff's complaint, namely that the Special Criminal Courts Act violates his constitutional rights.

10

In his argument Mr. Coker objected firstly that Section 20 of the Constitution had been violated in respect of his client and contrasted the provisions of Section 20 (4) of the Constitution and Section 17 of the Act. I confess that I do not see the conflict between these provisions in this case. Admittedly the offences were alledged to have been committed between March and August 1979 and the Act only came into force on 15th June 1979 that is to say during the relevant period. Section 17, however, is concerned with transitional provisions in cases which "were pending before any court" at the effective date of the Act. In this case the accused was charged by the police on 17th August 1979 and came before the court on 18th August when pleas were taken. In other words the case was not pending when the Act came into force and the transitional provisions cannot affect this case.

20

30

Secondly Mr. Coker argues that the creation of the Special Criminal Court offends against Section 94 of the Constitution. Subsection (1) of the Section is the relevant one and reads thus:-

"94. (1) Parliament may establish courts subordinate to the Supreme Court and courts-martial, and any such court shall, subject to the provisions of this Constitution, have such jurisdiction and powers as may be conferred on it by any law."

40

The Section confers on Parliament the power to create courts subordinate to the Supreme Court and this it seems to me is precisely what Parliament has done in passing the Act. Such a court may have powers and

jurisdiction which are subject to the Constitution but the creation of the court is not in my view ultra vires of Section 94.

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10 Thirdly Mr. Coker objects that the Act deals with only a special class of people - those who steal public property as defined in Section 2 of the Act - and is therefore discriminatory and offends against the provisions of Section 25 of the Constitution. Now discrimination under this section relates to different treatment to different persons attributable to their respective description by "race, tribe, place of origin, political opinions, colour or creed" and I do not see how this Act is in conflict with this Section of the Constitution. The Act does not discriminate between people as to their colour, creed and so on but in respect of the offences they commit. All criminal law is discriminatory - it discriminates against criminals. A simple theft is not treated as severely as theft by for example a clerk or servant - but that does not mean that the clerk or servant is discriminated against vis-a-vis a thief who is not a clerk or servant or his victim. This act provides that anyone who steals public property will be dealt with in accordance with the Act in addition to the criminal code regardless of his race, creed or colour. A man who forges a Will may find himself sentenced to life imprisonment whilst a man who forges an official document cannot be imprisoned for more than seven years. Nobody has ever suggested that it is an improper distinction, and I do not think that a man who steals public property is treated unconstitutionally merely because if he had stolen private property he would have been less severely dealt with. Criminals should be selective in what they forge or steal!

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No. 18  
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(continued)

50 Fourthly, Mr. Coker argues that Section 6 (3) and (4) of the Act constitutes an unwarranted interference with the judiciary. This section must be applied by the court with due regard to the stipulation that no miscarriage of justice occurs and is no more offensive than the proviso to Section 279 (1) of the Criminal Procedure Code which provides that, notwithstanding that a point raised in appeal might be decided in favour of the appellant, the court shall dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

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(continued)

Fifthly Mr. Coker takes issue on the question of grant of bail by the court. He submits that Parliament has no power to restrict bail. If this is so, Section 99 (1) of the Criminal Procedure Code which deals with bail, is ultra vires of the powers of Parliament in so far as it purports to deny bail absolutely in the case of a person accused of an offence punishable by death. Section 7 of the Act does indeed fetter the court's powers in regard to bail but it does not constitute an absolute denial of the grant of bail. 10

Sixthly Mr. Coker argues that in relation to his client Section 8 of the Act offends against Section 18 of the Constitution in that the magistrate must act on the mere suspicion of the police, that subsection (4) puts the onus upon a claimant that that property seized is his and that subsection (5) fetters the magistrate's discretion. I see no merit in this argument. The so called "freezing of accounts" is no more stringent a provision than an order of interim attachment in a civil action; the constitutional validity of a provision of the law as to onus of proof against an accused is specifically provided for in Section 20 (11) (a) of the Constitution and I cannot see how subsection (5) fetters the magistrate's discretion to decide a point arising thereon one way or the other. In any event as Mr. Jallow pointed out in his argument to the Court Section 18 (2)(a)(vii) which is set out above and which I will not therefore repeat, makes legal the impounding/seizure of the property under Section 8 (5) of the Act. 20 30

Mr. Coker in closing his argument cited the Privy Council case of Liyanage v the Queen 1 AC 259 and read at length from the arguments of the late Mr. Graetien as summarized in the report of the case. With respect I do not see the relevance of Liyanage's case to this case. The case concerned the conviction of certain persons who had been involved in an abortive coup d'etat and legislation namely the Criminal Law (Special Provisions) Act No. 1 of 1962 and the Criminal Law Act No. 31 of 1962 had been passed specially to deal ex post facto with those who had taken part in the abortive coup. The Privy Council held that the Acts were directed to the trial of particular persons, charged with particular 40 50

10 offences on a particular occasion and involved a usurpation and infringement by the legislature of judicial powers inconsistent with the written constitution of Ceylon and were ultra vires and void. I do not think we have the same situation here. The Act does not apply, and certainly not ex post facto to specific acts of particular people; it relates to anyone without limitation who commits offence against a provision of the general law whether Common Law or Criminal Code in respect of public funds. The Act is an exercise of the legislative powers and not the judicial powers.

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(continued)

20 The case of the Bribery Commissioner v Pedrick Ranasinghe 1965 AC 172 (a decision of the Privy Council also on appeal from the fertile jurisdiction of the Supreme Court of Ceylon) was really concerned with the validity of the appointment of members of the Bribery Tribunal of Ceylon. There is no attempt here, it seems to me, to impugn the appointment of magistrates to the Court. The Act provides that the Chief Justice may assign a Magistrate to preside over the Court; this means in effect that the Chief Justice may only assign to the Court a person who has been validly appointed a magistrate by the Judicial Service Commission under Section 100 of the Constitution.

30 The Act in dealing with the assignment of Magistrates to the Court does not, in effect, amend Section 94 of the Constitution as contended by Mr. Coker and Section 72 of the Constitution (which deals with procedures to be followed in such amendment) has not therefore in my opinion been affronted.

40 Mr. Coker also adverted to the case of In re The Special Courts Act 1978 ALR 1979 Supreme Court 478 in the Supreme Court of India. The full report was not before the Court and Mr. Coker did not read to the Court any passage from the Commonwealth Law Bulletin Vol. 6 Number 1 January 1980 which concerns the Special Courts Bill and it seems to me that the decision in that case uphold the legislative power of the Legislature to legislate and the judicial powers of the Supreme Court and High Courts to pronounce upon the constitutional validity of

50 legislation in accordance with the Indian Constitution. With respect I do not see the relevance of the Indian decision to this case.

In the Supreme  
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Mr Jallow who with Miss Jack appeared for the Attorney General submitted that the test in this case should be "Does the Act offend against any specific provision of the Constitution and he went on to the assert the supremacy of Parliament subject to the Constitution and quoted from the judgment of the Privy Council in Shell Company of Australia Limited v Federal Commissioner of Taxation 1930 AC 275 at page 298 when in a judgment delivered by Lord Sankay their Lordships Board cited with approval the words of Isaacs J (as he then was) in the High Court of Australia when he said "unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will".

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Mr. Jallow also based his argument on the decision again, in the Privy Council on appeal from Ceylon in Kariapper v Wijesinha 1968 AC 717 a decision later than Liyanage's case, which was concerned with the effect vis-a-vis the Constitution of Ceylon of the Imposition of Civil Disabilities (Special Provisions) Act 1965 of the Parliament of Ceylon.

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This Ceylon Act was greatly more limited in scope than the Special Criminal Courts Act which we are considering here and the only precept relevant to this case, it seems to me is that the intention of a statute was to be gathered from its operation and that an inconsistent law amended the enactment with which it was inconsistent. Here I have already held that the Act is not inconsistent with any relevant provision of the Constitution and helpful though Kariappa v Wijesinha might be in a general way I do not consider it of direct application in this case.

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The judgment of the Court in this case is that there will be no declaration that the Special Ciminal Court Act (Act No. 10 of 1979) violates the constitutional rights of the plaintiff or that the Act is ultra vires of the Constitution of The Gambia.

The claim is dismissed and judgment is entered for the defendant with costs.

(Sgd) Phillip Bridges  
CHIEF JUSTICE

50

29th July, 1980

NOTICE AND GROUNDS OF APPEAL

In the Court  
of Appeal of  
The Gambia

IN THE GAMBIA COURT OF APPEAL

Civil Appeal No. 12/80

No. 19  
Notice and  
Grounds of  
Appeal

1st August 1980

B E T W E E N :

MOMODOU JOBE

Appellant

- AND -

THE STATE

Respondent

10 TAKE NOTICE that the Appellant being  
dissatisfied with the decision of The Supreme  
Court contained in the judgment of The Learned  
Chief Justice dated the 29th day of July,  
1980 doth hereby appeal to The Gambia Court of  
Appeal upon the grounds set out in paragraph 3  
and will at the hearing of the appeal seek the  
relief set out in paragraph 4.

20 And the Appellant further states that the  
names and address of the person directly  
affected by the appeal is that set out in  
paragraph 5.

2. Whole decision of the Lower Court complained  
of.

GROUND OF APPEAL:

- (1) That the learned Chief Justice erred in  
law when he held that the Special Criminal  
Court Act, 1979 (Act No. 10 of 1979) did  
not violate the constitutional rights of  
the Appellant.
- 30 (2) The Learned Chief Justice erred in law in  
holding that S7 of Act No. 10 of 1979  
does not contravene the constitutional  
rights of the Appellant.
- (3) That the Learned Chief Justice wrongly  
took into consideration matters that  
were not placed before him.



In the Court  
of Appeal of  
The Gambia

No. 19  
Notice and  
Grounds of  
Appeal

1st August  
1980

(continued)

(4) RELIEF SOUGHT FROM THE GAMBIA COURT OF  
APPEAL

That the judgment of the Learned Chief  
Justice be set aside and judgment entered  
for the Appellant.

(5) PERSONS DIRECTLY AFFECTED BY THE APPEAL

The Attorney General.  
The Quadrangle.  
Banjul.

DATED this 1st day of August, 1980.

10

(Sgd) Momodou Jobe

A P P E L L A N T

Application for leave to appeal

In the Court  
of Appeal of  
The Gambia

IN THE GAMBIA COURT OF APPEAL  
GENERAL SITTING HOLDEN AT BANJUL -  
NOVEMBER, 1980

No. 20  
Application  
for leave to  
appeal

CIVIL APPEAL NO. 12/80

CORAM:

HON. S.J. FORSTER - PRESIDING JUSTICE  
OF APPEAL

HON. E. LIVESEY LUKE - JUSTICE OF  
APPEAL

10 HON. P.D. ANIN - JUSTICE OF APPEAL

BETWEEN:

MOMODOU JOBE APPELLANT

vs

THE STATE 1st RESPONDENT

THE ATTORNEY GENERAL 2nd RESPONDENT

26th November, 1980

Mr. S.K. O'Brien Coker for Appellant  
H.B. Jallow (with him Mr. Harding  
and Miss M. Jack) for the Respondents

20 Adjourned to 9 a.m. tomorrow

(Sgd.) S.J. Forster

27th November, 1980

Jallow: Respondent filed Notice of  
Objection - 12th November  
1980. I am not pressing  
this objection as counsel  
for Appellant furnished us  
with copy of Amended  
Grounds.

30 O'Brien Coker: I am applying for leave to  
file amended grounds of  
appeal; I've furnished  
copy to Respondent and to  
the Court. Filed 19th  
November, 1980.

Application granted; but ground 4  
is struck out.

No. 20  
Application  
for leave  
to appeal

(continued)

O'Brien Coker: This appeal does not challenge Parliament's right to pass laws but to remind Parliament that laws passed must conform with the Constitution. 23rd May, 1979 the President of the Republic of The Gambia assented to the Special Criminal Court Act 1979 - Act No. 10 of 1979. 10

Ground I Act No. 10 of 1979 Section 6(1), (2), (3), (4), Section 13 of Act No. 1 of 1970 - preservation of certain Fundamental Rights - Chapter III Section 6 of Act 10 of 1979 deprives him of any technicality and if duplicity Act No. 10 of 1979 deprives him of the advantage of the defence; 6(4) "without necessarily assigning any reason therefore?" Any criminal trial reasons must be given for any ruling decision or judgment. 20

Ground II Section 7 of Act 10 of 1979.

Adjourned few minutes. 30

Resumed - Same representation.

O'Brien Coker: Reasons must of necessity be given. Provisions erroneous and excessive - Accused person to deposit one-third of alleged amount and two sureties deposit two-thirds; as far back as Bill of Rights, bail must not be excessive. Section 15(5) of Act 1 of 1970 all entrenched; continued detention wrong - Section 20(2)(a). Appellant says his rights under Section 15 and 20 of 1 1970 violate these rights. Page 13 Statement of Claim paragraphs 4, 5,6,7 and page 15 paragraphs 3 and 4. 40

	Ground III	Page 26/9szz to Page 27/30; Section 18 of 1 of 1970 at page 28/30 szz. Section 17 of 1 of 1970 not in ground of appeal; freezing of assets - Section 8 (Page 26/9 and Section 10 page 22/30).	In the Court of Appeal of <u>The Gambia</u>  No. 20 Application for leave to appeal  (continued)
10		Section 12 (page 27/9szz) - from time person suspected assets frozen - See 18D(2) (a)(ii)  Liyanage v The Queen (1967) 1 - A.C. P.C. 259 Hinds v. The Queen (1967) 2 WLR p.366.  Brief adjournment.  <u>Resumed:</u>  O'Brien Coker resumes - Page 388 B - 389B 390C.	
20	Jallow:	Common ground - Parliament supreme.	
30	Ground I	Section 13 nature of recital - preamble. Section 13 does not create the right - Sec 6 of Act No. 10 does not contravene Sec. 13 of 1/70. The right listed in the subsequent sections not violated by Section 6 of 10 - Page 25 - 6(2) not contrary entrenched rights in Constitution. No new powers given to Court in addition to its existing powers - almost identical with Section 279 and 291 of the Criminal Procedure Code - which are not ultra vires the Constitution. Same argument for 6(3) of Act No.10 - even 6(4) emphasises on necessarily.	
40			
50	Ground II	Provisions for bail in Section 15(2) of Constitution does not regulate conditions for granting bail; Section 99 C.P.C. page 1418 - Act No. 10 merely limits scope of Section 99 of the C.P.C. - not in conflict with the provisions in Section 15 of the Constitution.	

In the Court  
of Appeal of  
The Gambia

No. 20  
Application  
for leave to  
appeal

(contined)

Rights of citizen depends wholly  
on Constitution and not on any  
other law - not even the Common  
Law. I do not share view that  
continued detention deprives  
detainee of presumption on  
innocence.

By Court:

Section 15(1) (a)

Ground III

Section 8, 10 and 12 of Act No.  
10 - Section 18(2) (a) (vii)  
limited purposes - Section 15(1)  
complies with or is not conflict  
with Section 18(2) (a) (vii) -  
freezing not permanent; onus of  
proving reasonably justifiable  
democratic society on challenger  
because of use of negative in  
phrase. Rights under Section 13  
of 1 1970 made subject to rights  
of the public. Second preamble  
to Act No. 10 of 1979.  
Liyanage's case different from  
what we are faced with in this  
case; re Hines on severability -  
not so in this case.

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O'Brien Coker

I do not wish to add to what  
I've already said.

Cur ad vult  
(Sgd.) S.J. Forster

IN THE GAMBIA COURT OF APPEAL  
GENERAL SITTING HOLDEN AT BANJUL - MAY 1981

Civil Appeal No. 12/80

No. 21  
Judgment  
Delivered by  
Mr Justice  
P.D. Anin J.A.

11th May 1981

CORAM:

MR. JUSTICE S.J. FORSTER .... AG. PRESIDENT  
MR. JUSTICE E. LIVESEY LUKE.. JUSTICE OF APPEAL  
MR. JUSTICE P. D. ANIN .... JUSTICE OF APPEAL

10 B E T W E E N :

MOMODOU JOBE Appellant

- AND -

THE ATTORNEY GENERAL Respondent

S. K. O'Brien Coker for Appellant

Hassan B. Jallow, with him M.A. Harding  
and Miss Mariam Jack for the Respondent.

J U D G M E N T

Judgment delivered on the 11th day of May,  
by PATRICK D. ANIN - JUSTICE OF APPEAL

20 The Appellant has been remanded in custody  
without the option of bail since 9th August 1979  
when he appeared before the Special Criminal  
Court on one charge of Stealing by a Clerk or  
Servant the sum of D595,791.34 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.

30 During the pendency of the criminal case,  
he commenced a civil action in the Supreme  
Court to enforce his fundamental rights and  
freedoms guaranteed under Chapter III of the  
Constitution of the Republic of The Gambia  
(No. 1 of 1970), hereinafter referred to  
simply as 'the Constitution'.

In the Writ of Summons issued on 23rd

In the Court  
of Appeal of  
The Gambia

No. 21  
Judgment  
Delivered by  
Mr Justice  
P.D. Anin J.A.  
11th May 1981  
(continued)

November 1979, he claims that "the Special Criminal Court Act (Act No. 10 of 1979) - hereinafter called simply "the Act" - violates his constitutional rights and is ultra vires the Constitution of the Republic of The Gambia.

After hearing legal argument from counsel for both parties, the learned Chief Justice in a judgment dated 29th July 1980, dismissed Plaintiff's claim and entered judgment for the Defendant with costs on the main ground that the Act is not inconsistent with any relevant section of the Constitution. 10

Being dissatisfied and aggrieved with that judgment, the Appellant has appealed to this Court; and has through learned Counsel renewed his attack on the Act for having contravened his fundamental rights and freedoms enshrined in Sections 13 to 27 (inclusive) of the Constitution. Since both learned counsel in their full and interesting legal arguments have traversed virtually the same ground as they covered in the Court below, I would not overburden this judgment with a re-capitulation of their earlier arguments and the learned judge's detailed reasons, save where necessary. I would rather concentrate on the arguments actually canvassed before us at the hearing of this appeal. 20

First Ground - "Section 6 of the Act violates Section 13 of the Constitution". 30

The first ground of appeal argued by Mr. Coker, learned counsel for the Appellant was that 'the learned Chief Justice erred in law when he held that Section 6 of the Act did not contravene Section 13 of the Constitution'. For the sake of clarity and ease of reference, I reproduce both enactments verbatim:

The Act

"6. (1) Subject to subsections (2), (3) and (4) of this section the Court shall ordinarily apply the provisions of the Criminal Procedure Code (Cap 39). 40

(2) Notwithstanding the provisions of the Criminal Procedure Code (Cap 39) the Court shall dispense with any technicality relating to the law of evidence unless the Court is of the opinion that by so doing there may be a miscarriage of justice. 50

(3) The proceedings of any trial under this Act shall not be adversely affected by such defect as duplicity or any other irregularity on the face of the charge.

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(4) Where in any trial under this Act there is a submission of no case the Court shall forthwith give a ruling on the matter without necessarily assigning any reason therefor".

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The Constitution

"13. Whereas every person in The Gambia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:-

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- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

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the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest".

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In support of his first ground, Mr. Coker conceded Parliament's power under the Constitution to legislate; but he stressed that any law passed by Parliament must conform to the Constitution; otherwise, it must be struck down as null and void for its contravention of the Supreme law of the land. In his contention,



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the Act herein ought to be impugned as a nullity for having violated the citizen's constitutionally protected fundamental rights and freedoms. Comparing the two enactments, he first submitted that the Section 6 (2) and (3) of the Act deprive an accused person like his client of the benefit of any technicality relating to the law of evidence and of such defect as duplicity or any other irregularity in the charge in his criminal trial- while Section 6 (4), dispenses with reasons being given in support of a ruling on a submission of no case to answer during the trial. In his submission, it is a mandatory requirement of natural justice that reasons shall be given for any ruling, order or judgment made in a criminal trial. The statutory exceptions made by Section 6 (2) and (3) of the Act favour the prosecution and militate against the interest of the accused person. They violate the citizen's fundamental right to life, liberty, security of the person and erode the protection of the law under Section 13 (a) of the Constitution and were accordingly illegal, null and void.

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In reply, Mr. Jallow, learned counsel for the Respondent, submitted that Section 13 of the Constitution contained only a recital of the various fundamental rights and freedoms created by Sections 14 to 27 inclusive. Since Section 13 of the Constitution did not itself create those rights and freedoms, it is wrong to state that Section 6 of the Act contravenes Section 13 of the Constitution. In any event, Mr. Jallow continued, the ensuing sections 14 to 27 of the Constitution conferring the said fundamental rights and freedoms had not in fact been violated by Section 6 of the Act. In particular, Section 6 (2) and (3) have not created any new powers not already possessed by the courts in this jurisdiction. For example, Section 6 (2) of the Act and 291 of the Criminal Procedure Code (Cap 39) Section 279 (1) of Cap 39, it will be recalled, empowers the Supreme Court on any appeal against conviction to allow the appeal if in its view the judgment appealed from is unreasonable or cannot be supported having regard to the evidence or that it should be quashed if it is wrong in law and if such decision has in fact caused a miscarriage of justice; with the proviso that notwithstanding the fact that the point raised in the appeal might be decided in favour of the appellant,

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the Court shall dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred. And Section 291 of Cap. 39 enacts that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or review on account:

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10 (a) of any error, omission or irregularity in the complaint, summons, warrant charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the Code; or

11th May 1981

(continued)

(b) of the omission to revise any list of assessors or jurors; or

20 (c) of any misdirection, unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice.....

The policy of the said subsections to Section 6 of the Act was, in Mr. Jallow's submission, not different from the above quoted sections of the Criminal Procedure Code. Both enactments emphasise the need for substantial justice to be done unimpeded by mere technicalities and procedural irregularities.

30 With respect to Section 6 (4), Mr. Jallow stressed that the sub-section did not entirely dispense with reasons being embodied in the final judgment. It merely gave the trial Magistrate a discretion to reserve his reasons for the interlocutory 'no case' ruling until later at the end of the evidence when writing the final judgment. The operative word in the sub-section was "necessarily"; the no case ruling need not 'necessarily' be given but it may of course be supported with reasons.

40 Incidentally, the learned Chief Justice also rejected Mr. Coker's objection to Section 6 of the Act by referring to Section 279 (1) of the Criminal Procedure Code and observing that the section of the Act is no more offensive than the proviso to Section 279 (1).

In my opinion, the constitutional issues raised in this appeal cannot be satisfactorily determined by a literal interpretation or by

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textual comparison of both enactments only.  
A better approach would be to have due regard  
to the rationale of both enactments.

The raison d'etre of the Act is contained  
in the long title and preamble:

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

WHERE by subsection (1) of Section 10  
94 of the Constitution Parliament may  
establish courts subordinate to the  
Supreme Court;

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;"

The Act was passed for the express purpose of 20  
providing an effective and expeditious machinery  
for combating offences involving misappropriation  
and theft of public funds and public property  
considered by Parliament to be detrimental to  
the economic interest of The Gambia. The felt  
social need animating the Act was the concern  
of Parliament for the alarming upsurge in  
offences involving theft of public funds and  
public property, which was depleting the national  
exchequer and imperilling the national economy 30  
and well-being of the Republic. An effective  
and quick check to these rampant social evils  
could, in parliament's view, be attained through  
the instrumentality of a specialist court, not  
begged down by arid legal technicalities and  
procedures, striving for substantial justice  
and eschewing miscarriages of justice. Freed  
from other less important cases, such a court  
could dispose of these theft cases quickly.

Can it be fairly said that the aims and 40  
objectives of the Act are not in consonance  
with the riders to the provisions in the  
sections 13 to 27 of the Constitution  
entrenching fundamental rights and liberties?  
In my considered judgment, the aims and  
rationale of the Act are not inconsistent with  
the important riders, "subject to respect  
for the rights and freedoms of others and  
for the public interest" tagged on to the  
constitutional freedoms and rights as 50

indispensable safeguards and conditions for the enjoyment by the individual of his fundamental rights and freedoms. If his liberty is not to degenerate into licence, he must not trample over the rights and freedoms of his neighbour and he must not steal or misappropriate public funds and property to the prejudice of his tax-paying neighbours and the Republic at large. The constitution has entrusted to the Courts the awesome responsibility of protecting and enforcing the fundamental rights and freedoms, not only from violation by individuals but also from possible abuse by Executive power and also from any unconstitutional excesses by the legislature itself. Just as it is necessary to protect the community at large against crime, so it is necessary to protect the individual citizen in a democratic state against abuse of Executive or legislative power.

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I do not agree with Mr. Coker that the procedure outlined in Section 6 of the Act constitutes a violation of Section 13 of the Constitution. Apart from exceptions made in 6 (2) (3) and (4), the Special Criminal Court is mandated to apply ordinarily the Criminal Procedure Code (Cap 39) in its entirety - see Section 6 (1). As Mr. Jallow rightly points out, sections 279 and 291 of Cap 39 contain virtually the same rules as those in sub-sections 2 and 3 of Section 6 of the Act; and both aim at achieving substantial justice in practice. I would add that an undue obsession with dry technicalities may in practice lead to a miscarriage of justice. Again, the developing common law, even in the field of criminal law, discounts mere technicalities and procedural irregularities in favour of substantial justice. Even where, on appeal a legal ground founded on a mere technicality or irregularity not occasioning a miscarriage of justice is established, the courts have consistently shown a readiness to "apply the proviso" and dismiss the appeal notwithstanding the correctness of the legal ground canvassed. In this context a substantial miscarriage of justice within the meaning of the proviso occurs where by reason of the mistake, technicality or irregularity complained of in the trial, the appellant has lost a chance of acquittal which was fairly open to him.

In Furlong & Others 34 Criminal Appeal R.79 for example, it was held that every

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irregularity is not necessarily a ground for quashing a conviction; and that the court must consider whether or not it is an irregularity which goes to the root of the case.

Reference may also be made to *R v. McVittie* (1960) 2 QB 483, where the appellant was convicted on an indictment which was not bad in law, but was defective in that it described a known offence with incomplete particulars, and the appellant had not been embarrassed or prejudiced by the technical irregularity, the appellate court held that it was not prevented from applying the proviso and dismissing the appeal by any fetter on its discretion or by case law.

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Turning to subsection 6 (4) of the Act, it is clear that it is designed to expedite the trial. The trial is to proceed after the magistrate has decided the issue whether or not there is a case for the accused to answer without his necessarily assigning reasons there and then. Of course, he may do so if he wishes, but he is not debarred from reserving and incorporating those reasons in his final judgment. Here again, I would remark that this practice is fairly common in most commonwealth jurisdictions and it is not peculiar to the Special Criminal Court under the Act.

20

Mr. Coker sought to base his insistence on the indispensability of reasons for every judicial ruling or judgment on natural justice. However, as Lord Denning, M.R. observed in *R v. Gaming Board for Great Britain ex parte Banaim and another* (1970) 2 All E.R. 528, 534 - 535a, it has never been a principle of natural justice that reasons should be given for decisions.

30

Furthermore, that great tribunal of fact, the jury, does not as a rule give reasons for its findings, even in murder cases.

40

Admittedly, it is desirable for reasons to be given for decisions by a magistrate or judge except where the reason for a decision is quite obvious, e.g. in interlocutory matters. See *Salawu Atunde v. C.O.P.* (1952) 14 WACA 171, 173 for an obiter dictum along the same lines when the Court was examining an enactment which permitted the transmission of reasons with the copy of the proceedings when there is an appeal. Reference may also be made to the following relevant observation of Buckley L.J. in Capital and Suburban

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(continued)

10 "there are some sorts of interlocutory  
applications mainly of a procedural kind,  
on which a judge exercising his discretion  
on some such question as whether a  
matter should be expedited or adjourned  
or extra time should be allowed for a  
party to take some procedural step  
should have been granted or refused, can  
properly make an order without giving  
reasons. This being an application  
involving questions of law is in my  
opinion clearly not such a case.  
Litigants are entitled to know on what  
grounds their cases are decided. It is  
of importance that the legal profession  
should know on what ground cases are  
decided, particularly when questions of  
20 law are involved. And this court is  
entitled to the assistance of the judge  
of first instance by an explicit statement  
of his reasons for deciding as he did".

30 Nobody would quarrel with this salutary  
restatement of the general rule concerning the  
desirability for reasoned decisions. However,  
as Denning M.R. reminded us in the Benaim  
case earlier quoted, there is no general  
natural justice requirement for reasons in  
support of decisions of magistrates. In any  
event Section 6(4) of the Act does not dispense  
altogether with reasons: it merely gives the  
magistrate an option, at his discretion,  
either to state his reasons when he rules on a  
no-case submission or to defer and incorporate  
them in his final judgment. I can see no  
valid objection either in legal theory or  
practice to that statutory provision.

40 To sum up, I do not find that the  
procedure contained in Section 6 of the Act  
infringes either the letter or spirit of the  
constitution. The three amendments it  
introduces into the Criminal Procedure Code  
(Cap. 39) were designed to expedite trials.  
They virtually reproduce existing law in Cap 39  
(Sections 279 and 291); and they conform to  
the modern common law practice of setting a  
premium on substantial justice and playing down  
technicalities and procedural irregularities  
50 provided these do not occasion miscarriage of  
justice. I would accordingly uphold Section  
6 of the Act as being not inconsistent with the  
Constitution.

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Second Ground - "Section 7 of the Act violates  
Sections 15 (5) and 20 of the Constitution"

Entirely different considerations,  
however, apply to the revolutionary changes  
introduced into the existing law and  
practice as to bail by Section 7 of the Act.  
This new enactment is reproduced fully:

"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. 10

(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 pledge properties of  
equivalent amount as guarantee; 20

(b) to find at least two  
sureties who shall pay into  
court an 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 of pledged under this Act shall  
be forfeited to the State in the  
event of the accused jumping bail." 30

Section 20 of the Constitution, made up  
of thirteen sub-sections, contain important  
provisions to secure protection of law for  
persons charged with criminal offences. The  
entire section has been reproduced in the  
judgment of the court below; and I would only  
here set out a few of the more relevant  
subsections for our present purpose:

"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 reasonable time by  
an independent and impartial court  
established by law. 40

(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;

10 (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.

20 (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:-

30 (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".

40 I would additionally reproduce the all-important section 15 (1) (e), (3), (4) and (5) of the Constitution which protect the individual's right to personal liberty and regulate the arrest and detention of an accused person; his expeditious arraignment before a court; and his release either unconditionally or upon reasonable condition if he "is not tried within a reasonable time.

"15. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following

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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 10
  - (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. 20

(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". 30 40

In support of ground 2, Mr. Coker contended that Section 7 of the Act imposed onerous and excessive conditions for the grant of bail by the magistrate. It was a clear violation of Section 99 (2) of Cap. 39 -

"The amount of bail shall be fixed with

due regard to the circumstances of the case and shall not be excessive".

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10 Section 7 of the Act was also in flagrant  
contravention of Section 15 (5) of the  
Constitution which empowers the release of an  
arrested or detained person "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".  
Furthermore, he submitted, the continued  
detention of the Appellant since 13th  
September 1979 rebuts the constitutional  
presumption of innocence under Section 20 (2)(a).  
There can be no doubt, he added, that Section  
7 of the Act completely erodes constitutionally  
protected right of the Appellant to liberty;  
and his right to a fair hearing predicated  
20 upon his presumed innocence. It is punitive  
in effect and detrimental to his inalienable  
rights and freedoms.

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30 In reply, Mr. Jallow first pointed out  
that Section 15 of the Constitution does not  
prescribe conditions for bail- and that  
those conditions are rather contained in  
Section 99 of Cap. 39. Section 7 of the Act  
merely restricts Section 99 in so far as  
persons accused of stealing under the Act  
are concerned. There was in fact no conflict  
between the Act and the Constitution. The  
Gambia Parliament was no longer fettered by  
the Colonial Laws Validity Act 1865 and its  
Acts cannot be held, like a colonial law, to  
be in any respect repugnant to an Act of the  
Imperial Parliament and ipso facto  
null and void. He disagreed that the  
continued detention of the Appellant displaced  
the presumption of innocence guaranteed by the  
40 Constitution. On the contrary, he argued, the  
Constitution itself (Section 15 (1)(e) authorises  
the detention of any person upon reasonable  
suspicion of his having committed a crime.

#### Bail

50 By way of an introduction to our evaluation  
of the rival arguments under Ground 2, I would  
first touch on the existing rules governing bail  
in an ordinary criminal trial under Cap 39 and  
then consider the relevant canons for the  
construction of the sections of the Gambian  
Constitution now under consideration.

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Bail or bailors are sureties taken by a person duly authorised, who bind themselves by a pecuniary penalty for the appearance of an accused person at a certain day and place, to answer and be justified by law. The condition of the recognisance, as respects the sureties, is performed by the appearance of the accused person in court. The prisoner leaves the custody of the law and is placed in the custody of his bail. The bail or bailors may re-seize him if they suspect he will bolt away, and bring him before a magistrate, who will commit him in discharge of the bail. It is then competent for the prisoner to find new sureties - see generally Archbold's Criminal Practice (36th Edition) page 71.

10

When a judicial officer admits a prisoner to bail during the trial, he exercises a judicial discretion. The fundamental principle is that bail is not to be withheld merely as a punishment, and the requirements as to bail are merely to secure the attendance of the prisoner at the trial: R v Rose (1898) 67 LJQB 289 and R v Scaife (1841) 9 Dowl. 553 which also laid down the principle that the grant of bail is founded on the probability of his appearing to take his trial and not on his supposed guilt or innocence. In deciding whether or not to grant bail in a particular case, the following matters are usually taken into consideration: the nature of the accusation, the nature of the evidence in support; the severity of the punishment attracted by the offence; and the fact whether the sureties are independent or indemnified by the accused person; see Re Robinson 23 LJQB 286.

20

30

Section 99 (2) of Cap. 39 provides that the amount of bail shall not be excessive. In an English case, for instance, it was held by the Divisional Court that if the amount fixed by the justices is so excessive that the prisoner cannot avail himself of it, application may be made for a writ of habeas corpus on the ground that the imposition of such excessive bail amounts to a grant of no bail and contravenes the Bill of Rights 1689, and thus makes the applicant's imprisonment unlawful; ex parte Thomas (1956) Crim. L.R. 119.

40

It is against this background of the common law as to bail that the local enactments should be viewed. Sections 100 to 109 of Cap 39 contain elaborate provisions as to

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recognisances; but the grant of bail by courts is covered by Section 99.

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10 "99. (1) When any person, other than a person accused of an offence punishable with death, appears or is brought before any court on any process or after being arrested without a warrant, and is prepared at any time or at any stage of the proceedings to give bail, such person may in the discretion of the Court be released upon his entering in the manner hereinafter provided into a recognisance, with or without a surety or sureties, conditioned for his appearance before such court at the time and place mentioned in the recognisance.

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(2) The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.

20 (3) Notwithstanding anything contained in this section or in Section 22 the Supreme Court may in any case direct that any person be admitted to bail or that the bail required by a subordinate court or police officer be reduced".

30 At this juncture, I would like for my part to correct an unfortunate error in the judgment of the court below where it is stated that Parliament has denied bail "absolutely" in the case of a person accused of an offence punishable by death. That statement, with respect, is only true of Section 99 (1); but it is incorrect when Section 99 (1) is read, as it must, in conjunction with Section 99 (3). The true legal position, in my respectful view, reading the two subsections together is that a Court subordinate to the Supreme Court is incompetent to grant bail to a person accused of an offence punishable with death. However, it is open to such a person to apply instead to the Supreme Court to admit him to bail, no matter the offence with which he is charged, whether it carries the death penalty or not. And the Supreme Court exercises its discretion to either admit him to bail or order a reduction in the bail being required of him either a subordinate court or the police. The powers of the Supreme Court under Section 99 (3) underscore the fundamental rule - contained in Section 99 (2) - that the amount of bail shall

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not be excessive; and the Supreme Court can  
in appropriate cases reduce excessive bails.

The basic rule that bail shall not be  
withheld as a means of punishment has received  
its stalwart defenders in the U.S.A. The  
Founding Fathers inherited bail rules from  
England and entrenched the Bill of Rights 1689  
proviso that excessive bail shall not be  
required in the VIIIth Amendment to their  
Constitution, which became effective on 3rd 10  
November 1791. The attitude of the U.S.A.  
courts to the denial of pre-trial release of a  
prisoner as a form of punishment can be seen  
in the judgment of Jackson J. (with whom  
Frankfurter J. concurred) in Stack v Boyle  
(1951) 341 U.S. 2 at pp. 7 - 8 coram the U.S.  
Court of Appeal for the Ninth Circuit:

"The practice of admission to bail,  
as it has evolved in Anglo-American law,  
is not a device for keeping persons in 20  
jail upon mere accusation until it is  
found convenient to give them a trial.  
On the contrary, the spirit of the  
procedure is to enable them to stay out  
of jail until a trial has found them  
guilty. Without this conditional  
privilege, even those wrongfully accused  
are punished by a period of imprisonment  
while awaiting trial and are handicapped 30  
in consulting counsel, searching for  
evidence and witnesses and preparing a  
defence".

Vinson C.J. was equally forthright:

"Federal law has unequivocally  
provided that a person arrested for non-  
capital offence shall be admitted to  
bail. This traditional right to  
freedom before conviction permits the  
unhampered preparation of a defence, 40  
and serves to prevent the infliction of  
punishment prior to conviction. See  
Hudson v Parker 156 U.S. 277....  
Unless this right to bail before trial  
is preserved, the presumption of  
innocence, secured only after centuries  
of struggle, would lose its meaning.....  
the fixing of bail for any individual  
defendant must be based upon standards  
relevant to the purpose of assuring the  
presence of that defendant" - ibid. p 44. 50

I now turn my attention to some pertinent dicta of the Privy Council in its recent decision in Minister of Home Affairs & another v Fisher and another (1979) 3 All E.R. 21, where their Lordships construed a Bermudan enactment and held that an illegitimate child was a 'child' of a person possessing Bermudan status and deemed 'to belong to Bermuda'. In delivering the opinion of the Board, Lord Wilberforce made important general pronouncements on the relevant canons for the construction of fundamental rights and freedoms entrenched in a written constitution. Those will be found in full at pages 25f to 26f; but the headnote at page 21 contains an adequate summary for our purpose: Held,

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"(1) A constitutional instrument was a document sui generis, to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.

(2) Provisions in a constitutional instrument dealing with individual rights were therefore to be interpreted according to the language used and the traditions and usages which had influenced that language. Having regard to the broad and ample style of chapter 1 of the Constitution of Bermuda which laid down principles of width and generality in regard to the protection of fundamental rights and freedoms of the individual, and to the fact that the constitution was influenced by both the United Nations Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Freedoms, the provisions in Chapter 1, including Section 11, were to be generously interpreted to give full recognition and effect to the fundamental rights and freedoms referred to.

(3) Accordingly, the question whether the children were each a child, which was deemed to belong to Bermuda, notwithstanding that they were illegitimate, was to be approached with an open mind unfettered by presumptions as to legitimacy arising in ordinary legislation dealing with property, succession or citizenship".

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In construing the relevant words of both enactments, I would bear in mind the need for a generous construction; remembering also the common law traditions and usages behind them; the broad scheme of Section 15 of the Constitution in particular, and of Chapter III, in general, which are both intended to protect the right to personal liberty; and the fundamental rights and freedoms respectively and have their origins in the United Nations Universal Declaration of Human Rights which has been ratified by The Gambia.

10

In the first place, Parliament's legislative power to establish the Special Criminal Court as subordinate to the Supreme Court is enshrined in Section 94 (1) of the Constitution. However, it is therein coupled with an important qualification; "any such (Subordinate) court shall, subject to the provisions of this Constitution, have such jurisdiction and powers as may be conferred on it by any law". (Italics supplied). It is therefore ultra vires Parliament to confer on a subordinate court like the Special Criminal Court any jurisdiction and powers which contravene any provision of the Constitution. If any such unconstitutional jurisdiction or powers are in fact conferred on the subordinate court, they are null and void notwithstanding the fact that they are contained in an Act of Parliament.

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30

In the second place, Section 15 (1) (c) of the Constitution clearly provides that '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 .....(c) Upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of The Gambia". Then subsection 15(3)(b) enjoins that "any person who is arrested or detained 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". When he is duly "brought before a court.....upon suspicion of his having committed or being about to commit an offence", Section 15 (4) stipulates that "he shall not be thereafter held in custody in connection with those proceedings or that offence save upon the order of a court". In

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10 other words, after the suspect's arrest or  
detention and first appearance in court, he  
shall not - note the mandatory terms - I  
repeat, he shall not be further incarcerated  
unless the Court makes a specific order that  
he shall be remanded in custody. Even then,  
Section 15 (5) comes to the rescue of the  
accused; for if he is not tried within a  
reasonable time, then without prejudice to  
any further proceedings that may be brought  
against him, he shall be released. Note,  
subsection 15 (5) orders his mandatory release  
if there is no prospect of his trial taking  
place within a reasonable time. And 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 the  
date named for his trial". It is noteworthy  
20 that the conditions for his pre-trial release  
are to be reasonable - surely, an abbreviation  
for 'not excessive' - and only necessary to  
ensure his appearance in court on the  
adjourned date. In other words, bail is not  
to be denied the suspect either as a  
punishment or from consideration of any  
extraneous matters e.g. his guilt or  
innocence, since Section 20 (2)(a) of the  
Constitution presumes his innocence until he  
30 is proved or has pleaded guilty. The fact  
should also not be overlooked that the  
Constitution states that a person charged with  
a criminal offence shall be given adequate  
time and facilities for the preparation of  
his defence Section 20 (2)(c). The accused  
person's pre-trial release under Section 15(5)  
assists him to prepare his defence in  
compliance with Section 20 (2)(c).

40 If we compare these generous  
constitutional provisions, designed to  
protect personal liberty and secure the  
protection of law for an accused person and  
afford him the privilege of a fair hearing  
within reasonable time, with Section 7 of the  
Act we find that the Act, with its restriction  
of bail to special circumstances only within  
the discretion of the magistrate and upon the  
basis of harsh, burdensome and excessive  
50 conditions contained in Section 7 (2), clearly  
derogates from, and is inconsistent with, the  
accused's constitutional right to pre-trial  
release, where, as in this case, his trial  
is not proceeded with within a reasonable time.  
Section 7 of the Act, in my judgment, offends

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against the Constitution both in letter and spirit and is clearly inconsistent with it. The inescapable conclusion is that Section 7 of the Act in its entirety is ultra vires the Constitution and I would accordingly declare it null and void and strike it down as unconstitutional and a nullity.

It is a matter for regret that the Appellant has been in custody since 9th August 1979 and that his trial is still uncompleted. His continued detention in custody is indefensible and amounts to a violation of Section 15 (5) of the Constitution.

10

Ground 3 - "Section 8, 10 and 12 of the Act contravene Sections 17 and 18 of the Constitution"

Mr. Coker's final ground of appeal alleges that the learned Chief Justice erred in law when he held that Sections 8, 10 and 12 of the Act do not violate Sections 17 and 18 of the Constitution. The respective provisions of both enactments are here set out in full (save Section 18 of the Constitution which is reproduced in part):

20

The Act

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.

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(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.

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(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 satisfied the Court that he acquired that property lawfully.

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(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.

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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.

20

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.

30

(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.

40

12. (1) In addition to the punishment imposed under Section 11 of this Act the Magistrate shall order the person to pay to the Accountant General the total sum of moneys for which he was found guilty of having stolen or return the stolen property to the appropriate body.

(2) Where a person ordered to pay any sum or return any property under this section fails to do so within one month of such an order the Court shall order that -

(a) any property he owns shall be sold and the proceeds paid to the Accountant General;

(b) any moneys kept in any bank in

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(3) Where after making the orders prescribed in Section 12 there is still some amount outstanding in respect of the properties or moneys affected by the conviction, the Court shall make a further order that any person, holding any moneys such as gratuities, awards, pensions or other similar moneys to which the person is entitled to, shall pay such moneys to the Accountant General.

10

Sections 17 and 18 of the Constitution

17. (1) No person shall be subjected to torture or inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in The Gambia on 23rd April, 1970.

20

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 -

30

- (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 -

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- (a) to the extent that the law in question makes provision for the taking of possession or

acquisition of any property,  
interest or right -  
x x x x ((i) to (vi)  
omitted);

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(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 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;  
x x x ((b) to (4)  
omitted)

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The gravamen of Mr. Coker's argument  
was that it is unreasonable, inhuman and  
even unconstitutional to confiscate the  
property and freeze the accounts of a  
suspect before his trial and conviction  
of a criminal offence. These excessive  
powers given to the Police to seize  
properties of the suspect and to freeze  
his accounts derogate from, and even  
cancel out, the constitutional provisions  
in Section 18 for the protection from  
deprivation of property save in  
exceptional cases. The exceptions therein  
were inapplicable to the Appellant.

For the Respondent, Mr. Jallow  
relied heavily on the exceptions contained  
in Section 18 (2) (a) (vii), supra, as a  
constitutional justification for such  
confiscation and deprivation of the  
individual's property 'for so long as may

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be necessary for the purposes of any examination, investigation, trial or inquiry'. He pointed out that under Section 8 (4) of the Act, any property seized by the Police is returnable to any claimant who satisfied the Court that he acquired the property lawfully. The seizure is therefore only temporary. Furthermore it conforms to the provisions in Section 13 of the Constitution that protection for the individual's property and the general prohibition of confiscation of property without compensation are subject to the rights and freedoms of others or the public interest; and the Act is designed to protect the economic interest and well-being of the Republic.

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Among the reasons given in the judgment of the Court below for the rejection of Mr. Coker's argument under this ground is that the "so-called freezing of accounts" is no more stringent than an order of interim attachment in a civil action; "Section 20 (11) (a) of the Constitution gives validity to the casting of the onus of proof against an accused", that subsection 8 (5) of the Act does not fetter the magistrate's discretion to decide the issue (of ownership of the confiscated property); and that Section 18(2) (a) (vii) of the Constitution makes legal the impounding/seizure of the property under Section 8 (5) of the Act.

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With respect, I do not find any of the above reasons of the Court below to be either an answer to the constitutional objections raised to Section 8 of the Act or even tenable. In the first place, interlocutory proceedings in civil actions between two parties contesting a civil action on equal footing are a far cry from the peremptory seizure of property and freezing of accounts of a suspect at the behest of the prosecutor or his agent, the Police, before the start of the criminal trial, when the Constitution itself presumes the accused person's innocence until he is proved or has pleaded guilty. (Section 20 (2)(a).) Such arbitrary confiscation of property whether it be temporary or permanent, and the indiscriminate freezing of accounts in practice destroy the accused's presumed innocence and amount to infliction of punishment on him prior to conviction.

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Secondly, the fundamental criminal rule - or golden thread discernible throughout the

web of the English (and of course The Gambian) criminal law - is that the prosecution must prove the guilt of the prisoner and no attempt to whittle it down can be entertained - see per Sankey, L.C. in Woolmington D.P.P. (1935) AC 462, 481, 482. The onus of proving the general issue of guilt to the charge laid rests with the prosecutor; while the onus of proving particular defences such as insanity and certain facts under specific enactments are cast on the accused. However, the general burden of proof rests on the prosecution throughout the criminal trial and never shifts to the accused; and it is discharged by proof beyond reasonable doubt; whereas the onus of proof of particular defences and facts incumbent on the accused is light and is discharged by only the civil standard of proof, i.e. on the balance of probabilities. See Sodeman v R (1936) 2 All E.R. 1138 at p. 1140, P.C. (per Lord Hailsham L.C.); R v Carr-Briant (1943) 1 KB 607; R v Elias Banin 12 WACA 8. It is therefore erroneous to hold, as was done inferentially in the Court below, that the onus cast on the Accused by Section 20 (11) (a) of the Constitution is the onus of proof of the general issue of guilt. That constitutional provision rather deals with the exception to the general rule where a statute casts on the accused the onus of proving particular facts and is in accord with the common law just restated.

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In the third place, Section 8 (5) (a) of the Act destroys at a stroke the Accused's constitutional privilege of remaining silent. Section 20 (7) of the Constitution states unequivocally: "no person who is tried for a criminal offence shall be compelled to give evidence at the trial". And yet the Act creates in Section 8 (5) an offence punishable on summary conviction to a 5 - 7 years term of imprisonment for any person "who either fails to come forward to prove that a property seized from him was acquired lawfully; or who fails to satisfy the court that he acquired the property seized from him lawfully". In other words, the inaction or silence of a person in suffering the arbitrary confiscation of his property or in failing to prove to the satisfaction of the court his lawful acquisition of the said property makes him automatically liable to a serious criminal offence. And this penalty is incurred by him even before his main trial for stealing or

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misappropriation under Section 5 of the Act. By contrast, in a civil case in this jurisdiction, when an ex parte interim preservation order is made pendente lite with respect to the disputed property, the aggrieved party is entitled to apply for a review of the order or even appeal therefrom.

The accused person's constitutional right to a 'fair hearing within reasonable time by an independent and impartial court' under Section 20 (1) has been eroded by the Act to all intents and purposes if regard is had to the draconian powers conferred on the police, i.e. the prosecutor's agent, under Sections 8, 9 and 10. For instance, in Section 10 (1) the Inspector General of Police takes over completely from the magistrate as the sole arbiter of when and what, disbursements may be made from a frozen account, even though the original freezing order is made by a magistrate upon police application. Section 10(1) of the Act clearly amounts to usurpation by the Inspector General of Police of judicial power. It may perhaps be charitable but poor comfort no doubt, to comment in passing that the subsection mirrors the all too familiar arrangement in vogue in a military-cum-police state after a coup d'etat; and that it is wholly alien to a democratic, non-totalitarian Republic like The Gambia blessed with a liberal Constitution guaranteeing to every person in the land fundamental rights and freedoms.

Fourthly, it is contended by learned counsel for the Respondent and the judgment of the court below also states - that Section 18 (2)(a)(vii) of the Constitution makes legal the impounding and seizure of property under Section 8 (3) of the Act. But does it? With respect, I think not! Paragraph (vii), supra contains two important riders or conditions precedent for the coming into being of the exception to the constitutional rule against arbitrary deprivation of property. In the first place, the legislation should authorise acquisition of property only to the extent, i.e. "for so long as only" as may be necessary for the purposes of any examination, investigation, trial or inquiry". I construe the phrase "for the purposes of" to mean "for purposes exclusively referable to or connected with". The acquisition of property is permissible only to the extent that it may be

necessary for purposes connected with or exclusively referable to any examination, investigation, trial or inquiry. The acquisition is for a limited purpose and duration and is aimed at assisting an examination, investigation, trial or inquiry. Under Section 8 (3), however, the seizure is not limited in its purpose, duration or scope. It is true Section 8 (4) orders the seized property to be returned to the owner if he satisfied the court of his lawful acquisition of same. However, if he refuses to be a party to the inquisitorial trial prescribed under Section 8 (5) by refusing to come forward to assert on oath his acquisition of the seized property and elects to remain silent, he forfeits, without more, his liberty by being imprisoned for a minimum period of five years and he suffers additionally forfeiture of the disputed property. Thus by a stroke of the pen, Section 8 (4) replaces our traditional accusatorial system, in which the accused is constitutionally presumed innocent until proved guilty or he himself pleads guilty, with the inquisitorial system reminiscent of the old discredited Star Chamber of early Stuart England in which the accused is coerced into taking the oath and is presumed guilty until he shoulders the general onus probandi; and is able to establish his innocence. Undoubtedly, Section 8 (5) is repugnant to, and is wholly inconsistent with, Section 20 (7) of the Constitution which entrenches the privilege against self-incrimination. For that reason, it is unconstitutional, null and void.

The fact should incidentally not be overlooked that the Criminal Code contains elaborate provisions for the offences of theft, stealing by a clerk or servant, and for dealing with persons suspected of having in their possession property suspected to have been stolen or misappropriated:- see Chapters XXVI to XXX and XXXII of the Code.

In this connection, attention may be drawn to Section 5 (1) of the Special Criminal Court Act, 1979 which confers jurisdiction on the Special Court to hear and determine "offences specified in chapters 26 - 30 and 32 of the Criminal Code (Cap 37) which affect any public funds or public property". There is consequently no possibility of these serious offences going unpunished by default

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if Section 8 (5) of the Special Criminal  
Court Act, 1979 is jettisoned for being  
unconstitutional.

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The second additional rider or condition  
for the validity of any legislation authorising  
acquisition or seizure of property under  
Section 18 (2)(a)(vii) of the Constitution is  
that the provision or act done thereunder must  
be shown "to be reasonably justifiable in a  
democratic society". While this political  
phrase may be incapable of exact legal  
definition, nevertheless to me it connotes the  
absence of tyranny or a police state. In my  
view, this second condition is infringed if a  
law empowers the Police to seize properties  
and freeze accounts and then empowers the  
Inspector General of Police to allow subsequent  
disbursements from the frozen accounts at his  
unfettered discretion; and to publish in the  
Gazette the names of all persons whose accounts  
have been frozen at his instance (see Section  
9 of the Act). Such a state of affairs is  
alien to a liberal democracy with  
constitutionally entrenched fundamental  
rights and freedoms and a rule of law - at  
any rate in the absence of a state of public  
emergency. 10

Applying the dual constitutional test in  
Section 18 (2) (a)(vii) to sections 8 to 10 of  
the Act, I hold that the said provisions of  
the Act violate the constitutional provisions  
already discussed in this part of the judgment  
for reasons already stated. I would  
accordingly declare the said sections of the Act  
unconstitutional and strike them down as a  
nullity. 20 30

Sections 12 and 13 of the Act

Finally, I come to Sections 12 and 13  
of the Act. I can see nothing unconstitutional  
or wrong about either of them. They impose  
additional penalties by way of restitution of  
a stolen property to its owner after conviction.  
It will be noticed that Section 12 of the Act  
commences with the words "in addition to the  
punishment imposed under Section 11....."  
Section 11 is the main penalty section; and it  
prescribes a term of five to seven years  
imprisonment for any person convicted of a  
crime under Section 5. As a matter of fact  
Section 12 conforms to Section 18 (2)(a)(ii) 40 50

of the Constitution, which preserves any penalty imposed for breach of law whether under civil process of after conviction of a criminal offence under the law of The Gambia. I would accordingly uphold both Sections 12 and 13 of the Act. There can be surely no objection to such a deterrent penalty which incidentally advances the laudable aims and objectives of the Act in checking the rampant theft of public property and funds. Besides, the restitution orders are invoked only after conviction following a fair hearing. In this way, the entrenched fundamental rights and freedoms are not violated; and the inherent rights of innocent citizens are duly protected.

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Speaking for myself, the penalty described under Section 11 of the Act would seem to be an insufficient deterrent. It represents no change from Section 258 of Cap 37, which prescribes seven years imprisonment for stealing by a clerk. A longer prison term for a convict of say ten to fifteen years, coupled of course with the restitution orders under Sections 12 and 13 may be a more potent and effective deterrent than temporary, unconstitutional and arbitrary seizures of property and freezing of accounts. In the meantime, the accused person should be afforded his constitutional rights to a fair trial; pre-trial release; adequate time and facilities for the preparation of his defence etc. But once convicted after a fair hearing, he must be made to face the full penalty of the law. In that way, the message will be conveyed to the rest of society that crime does not pay and that public property and funds are not for grabbing and looting.

#### Conclusion

In conclusion, I would reiterate that for the reasons already stated, Sections 7, 8, 9 and 10 (inclusive) of The Special Criminal Court Act 1979 are unconstitutional. They are hereby declared null and void. I would accordingly strike them down as unconstitutional, null and void and of no legal effect whatsoever. I would however uphold Sections 6, 12 and 13 of the said Act as valid and not unconstitutional. For the reasons already given, I would unhesitatingly admit the Appellant to bail and release him from custody forthwith upon his entering into a recognisance for the sum of

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D50,000 with two sureties each in like sum to be justified by the Senior Registrar of this Court, such sureties to be owners of freehold property of like value within the City of Banjul or the Kombo Saint Mary Division conditioned for his appearance before the Special Criminal Court for the continued hearing of the said pending criminal case brought under the said Act at a time and place to be specified in the recognisance. As a condition for bail, he shall forthwith surrender and deposit any passport or travel document in his possession to the Immigration Authorities pending the trial and disposal of the said criminal case. A second condition for bail is that the Appellant must report at the nearest Police Station once daily; and it is hereby so ordered.

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.....  
(Sgd) P.D. Anin  
JUSTICE OF APPEAL

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I concur .....  
(Sgd) S.J. Forster  
AG. PRESIDENT

I concur .....  
(Sgd) E. Livesey Luke  
JUSTICE OF APPEAL

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 22

ORDER GRANTING SPECIAL LEAVE TO APPEAL  
TO THEIR LORDSHIPS OF THE JUDICIAL COMMITTEE

AT THE COUNCIL CHAMBER WHITEHALL

The 4th day of February 1982

BY THE RIGHT HONOURABLE THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL

In the  
Judicial  
Committee of  
the Privy  
Council

No. 22  
Order Granting  
Special Leave  
to Appeal to  
Their Lordships  
of the Judicial  
Committee

4th February  
1982

10 WHEREAS by virtue of The Gambia Appeals  
to Judicial Committee Order 1970 there was  
referred unto this Committee a humble Petition  
of the Attorney General in the matter of an  
Appeal from the Court of Appeal of The Gambia  
between the Petitioner and Momodou Jobe  
Respondent setting forth that the Petitioner  
prays for special leave to appeal from a  
Judgment of the Court of Appeal of The Gambia  
dated 11th May 1981 allowing in part an Appeal  
by the Respondent from a Judgment of the  
20 Supreme Court of The Gambia dated 29th July  
1980 upholding the constitutionality of the  
the Special Criminal Court Act 1979: And  
humbly praying the Lords of the Judicial  
Committee of the Privy Council to grant him  
special leave to appeal against the Judgment  
of the Court of Appeal of The Gambia dated  
11th May 1981 or for further or other relief.

30 THE LORDS OF THE COMMITTEE in obedience  
to the said Order have taken the humble  
Petition into consideration and having heard  
Counsel in support thereof no one appearing  
at the Bar on behalf of the Respondent Their  
Lordships do grant special leave to the  
Petitioner to enter and prosecute his Appeal  
against the Judgment of the Court of Appeal of  
The Gambia dated 11th May 1981.

40 AND THEIR Lordships do further order  
that the proper officer of the said Court of  
Appeal be directed to transmit to the Registrar  
of the Privy Council without delay an  
authenticated copy of the Record proper to be  
laid before the Judicial Committee on the hearing  
of the Appeal upon payment by the Petitioner of  
the usual fees for the same.

E. R. MILLS  
Registrar of the Privy Council

No. 37 of 1982

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 OF 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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RECORD OF PROCEEDINGS

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