

AAB Gaye

IN THE SUPERIOR COURTS OF THE GAMBIA



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CIVIL SUIT NO: SC 003/2016

BETWEEN:

OUSAINOU DARBOE & 19 OTHERS **Plaintiffs**

AND

INSPECTOR GENERAL OF POLICE **1st Defendants**

DIRECTOR GENERAL OF NATIONAL INTELLIGENCE AGENCY **2nd Defendant**

THE ATTORNEY GENERAL - **3rd Defendant**

Delivered 23rd November, 2017.

CORAM:

THE HON. MR. JUSTICE H B JALLOW, CHIEF JUSTICE

THE HON. MR. JUSTICE A D YAHAYA, JSC

THE HON. MR. JUSTICE N C BROWNE-MARKE, JSC

THE HON. MR. JUSTICE C S JALLOW QC, JSC

THE HON. MRS. JUSTICE M.Y. SEY, JSC

COUNSEL:

MR. A A B GAYE, with him H S Sabally, M S Tambadou, Neneh MC Cham, Yassin Senghore and Miss Combeh Gaye for the Plaintiffs

MR. ABOUBACARR TAMBADOU Attorney General, with him Mr. BINGA D for the Defendants

JUDGMENT

HASSAN B. JALLOW CHIEF JUSTICE: By a writ of summons issued by this court on **8th June 2016** at their instance the plaintiffs invoked the original jurisdiction of the Supreme Court pursuant to **Section 127 of the Constitution of the Republic of the Gambia** seeking various declarations and orders. To wit that:-

- (a) the requirement of a licence for any public procession under Section 5 of the Public Order Act Cap.22.01 is illegal and unconstitutional as it violates Section 25 (1) (d) and Section 25 (2) of the Constitution;
- (b) Section 5 of the Public Order Act Cap.22.01 Laws of The Gambia which requires permit or any other authority for the convening or holding of public processions in any part of The Gambia is illegal, unconstitutional and made in excess of legislative authority having regard to Section 25 of the Constitution of the Republic of The Gambia;
- (c) Section 5 of the Public Order Act Cap.22.01 Laws of The Gambia is inconsistent with Section 25 (1) (d) and 25 (2) and void to the extent of the inconsistency pursuant to Section 4 of the Constitution of The Republic of The Gambia;
- (d) an order striking out Section 5 of the Public Order Act Cap.22.01 Laws of The Gambia on the grounds that it is unconstitutional, null and void and was made in excess of legislative authority;
- (e) Section 69 of the Criminal Code is void for lack of certainty and vagueness;
- (f) an order striking out Section 69 of the Criminal Code for its inconsistency with 25 (2) of the Constitution and for its vagueness;
- (g) Such further or other orders this Honourable Court may deem fit to make.

The plaintiffs simultaneously filed with the writ, their statement of case on the **26th of May 2016**. On the **17th of August 2016** the 3rd defendant Attorney General for himself and the other two defendants filed a statement of case submitting that this court should dismiss the plaintiff's claim and praying the court to declare the relevant provisions of the **Public Order Act (Cap:22)** is consistent with the Constitution.

When the case came up for hearing before the full court on **26th May 2017** the new learned Attorney General acting for the defendants indicated that they were no longer

contesting the claims of the plaintiffs; that the prayers sought by the plaintiffs are in accordance with the relevant provisions of the Constitution. The defendants' application for leave to abandon their statement of case was granted and the statement was accordingly struck out by this court. The application of the plaintiffs for judgment in their favour in view of the admissions of the defendants was dismissed by the court in its ruling of **29th May 2017** for the reasons therein stated and which need not be repeated here.

Accordingly the court proceeded to hear the submissions of **Mrs. H. Sisay Sabally** learned Counsel for the plaintiffs and reserved its judgment. Learned Counsel in a nutshell submitted that **Section 5 of the Public Order Act** is unconstitutional and a contravention of the right to freedom of assembly guaranteed by **Section 25** Of the Constitution; that to make a licence a requirement for the enjoyment of a constitutional right is not reasonably justifiable in a democratic society; that to leave the exercise of the right to the Inspector General of Police as the licensing authority renders enjoyment of the right unpredictable and subject to abuse. She urged the court to strike out **Section 5 of the Public Order Act (hereafter the Act)** as inconsistent with **Section 25** of the constitution, made in excess of authority and therefore null and void. Learned Counsel relied in her submissions on the cases of **Nigerian Inspector General of Police V. All Nigerian Peoples Party & Ors(2007 LP ELR – 8217 Ca)**, **New Patriotic Party V. Inspector General of Police (2001) All LR 138 (CLSC 1993) Ghana** and on the case of **Attorney General V. Jobe (1985 LRC)** on appeal to the Judicial Committee of the Privy Council from the Gambia. Counsel further submitted that **Section 69 of the Criminal Code** fails the test of constitutional validity to the extent that it is alleged to be vague and not an offence creating provision for indicting the plaintiffs. The defendants, as earlier indicated concurred with these submissions by the Plaintiffs Counsel.

This case revolves essentially around **Section 25 of the Constitution and Section 5 of the Public Order Act (Cap. 22:01.)**. **Section 25 of the Constitution** provides:-

- (1) **Every person shall have the right to:**
 - (a) freedom of speech and expression, which shall include freedom of the press and other media;

- (b) freedom of thought, conscience and belief, which shall include academic freedom;
 - (c) freedom to practise any religion and to manifest such practice;
 - (d) freedom to assemble and demonstrate peaceably and without arms;
 - (e) freedom of association, which shall include freedom to form and join associations and unions, including political parties and trade unions;
 - (f) freedom to petition the Executive for redress of grievances and to resort to the Courts for the protection of his or her rights.
- (2) Every person lawfully within The Gambia shall have the right to move freely throughout The Gambia, to chose his or her own place of residence within The Gambia, and to leave The Gambia;
- (3) Every citizen of The Gambia shall have the right to return to The Gambia;
- (4) The freedoms referred to in subsections (1) and (2) shall be exercised subject to the laws of The Gambia in so far as that law imposes reasonable restrictions on the exercise of the rights and freedoms thereby conferred, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of The Gambia, national security, public order, decency or morality, or in relation to contempt of court.

More particularly at issue is the freedom to assemble provided for under **Paragraph (d) of Section 25 (1)**.

The provisions of **Section 5** of the Act which are in issue read as follows:-

5. Control of processions

- (1) The Inspector-General of Police in the City of Banjul or the Kanifing Municipality or, in any of the Regions, the Governor or other person authorised by the President may direct the conduct of all public processions and prescribe the route by which and the times at which any procession may pass.

- (2) A person who is desirous of forming any public procession shall first make application for a licence to the Inspector-General of Police or the Governor of the Region, or other person authorised by the President, as the case may be, and if the Inspector-General of Police or the Governor of the Region or other person authorised by the President is satisfied that the procession is not likely to cause a breach of the peace, he or she shall issue a licence specifying the name of the licensee and defining the conditions on which the procession is permitted to take place;
- (3) A condition restricting the display of the flags, banners, or emblems shall not be imposed under subsection (2) of this section except such as are reasonably necessary to prevent risk of a breach of the peace.

In a nutshell these provisions empower the first defendant Inspector General of Police in the City of Banjul or in the Kanifing Municipality or the Governors in the regions to direct and prescribe the conduct of public processions and require first the obtaining of a licence from the said officers by anyone desirous of forming such a procession.

The issues for the determination by the court are whether the requirement of a licence under **Section 5 of the Act** amounts to a violation of the right to assembly guaranteed by **Section 25 of the Constitution** and whether **Section 5** is accordingly null and void; whether the power under **Section 5 (3)** of the Act to place restrictions on the display of flags, banners or emblems in a procession interferes with the freedom of expression similarly guaranteed by **Section 25 of the Constitution**; and whether **Section 69 of the Criminal Code** is vague and therefore unconstitutional.

Section 4 of the Constitution provides for the supremacy of the Constitution over all other laws to the extent that any law that is inconsistent with the Constitution is void to the extent of its inconsistency. **Chapter IV of the Constitution** providing for the protection of fundamental rights and freedoms and within which **Section 25** falls is an

entrenched chapter of the Constitution whose alteration as per **Section 226** of the Constitution requires a special procedure including inter alia a special majority in the National Assembly.

Section 25 of the Constitution provides for various fundamental rights viz freedom of speech, of thought, of religion, of assembly, of association, of petition to the Executive of movement within the Gambia and for citizens right of return to the Gambia. The enjoyment of these rights is not however absolute. With the exception of the right of return by citizens, the exercise of the enumerated rights is, pursuant to **Sub-Section (4) of Section 25 of the Constitution** subject to the laws of the Gambia.

“in so far as that law imposes reasonable restrictions on the exercise of the rights and freedoms thereby conferred, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of the Gambia, national security, public order, decency or morality, or in relation to contempt of court.

Thus the Constitution permits the imposition of restrictions on the exercise of these rights under specified circumstances. It is worth noting that similar language is continued in **Article 21 of the International Convent on Civil and Political Rights** to which the Gambia is a party. **Article 11 of the Banjul Chapter on Human and Peoples Rights** which the Gambia has signed and ratified and to which it is thus a state party, provides as follows:-

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

Under the Constitution any restrictions must satisfy three conditions for them to be lawful. They must be:-

- i. reasonable;
- ii. necessary in a democratic society; and;
- iii. imposed for one or more of the purposes set out in **Section 25 (4) of the Constitution**

Section 5 of the Act by requiring a licence issued by the **Inspector General of Police (IGP)** for a procession places restrictions or limitations on the exercise of the right to assembly guaranteed by **Section 25 (1) (d)** of the Constitution. It is worth emphasising that the Act in particular places restrictions on the right; it does not purport to abolish or absolutely deny the exercise of the right; it imposes conditions or procedures for the exercise of the right i.e the issue of a licence by the Inspector General of Police. Whilst the Inspector General of Police has the discretion to refuse to grant a licence, he can only do so on grounds of a potential breach of the peace i.e. on public order or public security grounds. The long title of the Act itself also indicates its object to be inter-alia the "preservation of public order on the occasion of public processions." Under **Section 25 (4)** of the Constitution these are permissible and legitimate grounds for restricting the right of assembly guaranteed by the constitution.

The right to assembly, as with other individual or collective rights, is usually exercised within the public space. As a result its exercise by one may conflict with the exercise of the same right by others or with the exercise or enjoyment of other rights by other persons or with the needs for the maintenance of public order and security. Hence the need for some regulation or restrictions on the exercise of the right. Such restrictions on the grounds set out in **Section 25 (4)** of the Constitution and **Section 5 of the Act** are thus reasonably justifiable in any democratic society. So long as they remain restrictions or limitations only and not purported abolitions of the right or are not such as would render illusory the enjoyment of the protected right. The requirement of a licence from the Inspector General of Police for the holding of a public procession and the authority granted to the Inspector General Police to impose conditions restricting the display of flags, banners or emblems in order to prevent a breach of the peace are reasonable

limitations on the right to assembly and to free expression. They too are also justifiable in a democratic society.

The plaintiffs have also buttressed their submissions with the alleged or potential abuse of the discretion granted to the Inspector General of Police by the Act in respect of the grant of a licence for a procession. As the Judicial Committee observed in the Jobe case in relation to the exercise of **magistrates powers under the special criminal court Act (Act No:10 of 1979)**.

“for the purpose of determining the constitutionality of the Act itself it must be presumed that judicial officers will do what the Act requires them to do; if in a particular case they fail to do so the person aggrieved has a remedy in the form of an application under **section 28 of the constitution.**”

Furthermore the Judicial Committee held in the Jobe case in relation to the delay in bringing a person to trial that

“the actual delay that occurred in a particular case cannot have any effect on the constitutionality of **Section 7 of the Act** itself.”

This court adopts the findings of their Lordships mutatis mutandis. An actual or potential abuse of the discretion granted to the Inspector General of Police in relation to the issue of a licence cannot have any effect on the constitutional validity of **Section 5 of the Act** itself. The Inspector General of Police, (IGP) must however exercise his discretion properly and for the purposes set out by **Section 5 of the Act** and of **Section 25 (4) of the Constitution**. The court will presume that the IGP will do what the Act requires him to do; if in a particular case he fails to do so the person aggrieved has a remedy now provided for under **Section 37 of the Constitution**. The courts will remain vigilant against any abuse of administrative discretion and violations of fundamental rights and will not hesitate to provide appropriate remedies for established abuses and violations.

The plaintiffs have urged this court to adopt the reasoning and conclusions of the cases of **IGP VS ANPP (2007 Nigeria)** and of **NPP VS IGP (2001 Ghana)**. In both cases their Lordships upon consideration of the local law and constitutions held that the local enactments requiring a permit or licence for the holding of a public procession were inconsistent with the right to assembly guaranteed by the relevant constitution and were therefore held to be null and void to the extent of the inconsistency. These two judgments are only of persuasive value; they are not binding on this court. With all due respect this court cannot adopt them in the face of contrary provisions in our laws i.e., the Act and the constitution. We find nothing also in the Jobe case which would support the submissions of the plaintiffs on the alleged constitutional invalidity of **Section 5 of the Act**.

Accordingly this court finds and holds that the requirement for a licence for a procession and the power granted to the IGP to "restrict the display of flags banners or emblems" under **Section 5 of the Act** in order to prevent risk of a breach of the peace are not inconsistent with the exercise of the right to assemble or other rights guaranteed by **Section 25 of the Constitution**; that the limitations or restrictions under **Section 5 of the Act** on the exercise of these rights are reasonable, constitutionally legitimate and permissible under **Section 25 (4) of the Constitution** and that such limitations or restrictions are reasonably justifiable in any democratic society. The provisions of **Section 5 of the Act** are consistent with the Constitution of the Republic of the Gambia. The plaintiffs claims to the contrary thus fail and are accordingly dismissed.

The plaintiffs also sought per the writ an order from this court "striking out **Section 69 of the Criminal Code** for its inconsistency for **Section 25 (2) of the Constitution** and for its vagueness."

Section 25 (2) of the Constitution guarantees the right of every person lawfully within the Gambia "to move freely throughout the Gambia, to choose his or her own place of residence within the Gambia, and to leave the Gambia."

In their statement of case and in the oral submissions of learned Counsel, the plaintiffs argue that **Section 69 of the Criminal Code** "being a definition Section" under which the plaintiffs were charged "is vague and lacks sufficient legal certainty" and thus fails to satisfy the criteria for lawfulness of limitations to rights. In support of their allegation of vagueness of **Section 69** the plaintiffs submit that the wording of the section "leaves room for speculation as to who determines the intention of the persons who are assembled together." They further submit that the alleged error of the state in charging the plaintiffs under a definition section such as **Section 69** renders the section so uncertain as to deprive it of the status of "law", they accordingly pray that **Section 69** be struck out as being void.

Certainty in the law, is highly desirable, and necessary particularly in the criminal law. It is however not always easily attainable. Seemingly certain and unambiguous provisions have often been the subject of different interpretations. The threshold of vagueness or uncertainty in the law must clearly be very high for it to affect the constitutional validity of the law in question, if at all. The plaintiff's allegations of vagueness of **Section 69** do not meet this threshold, being themselves unsubstantiated, unspecific and in respect of the determination of "intent" in the section being of no merit.

Furthermore, the alleged error of the defendants in charging the plaintiffs under a wrong section of the law does not have the effect of rendering that law unconstitutional and void. We find nothing in **Section 69 of the Criminal Code** that is inconsistent with the Constitution. Any errors in the use or application of that provision does not have the effect of rendering the provision itself unconstitutional and void. The claim of the plaintiffs in respect of **Section 69 of the Criminal Code** is accordingly hereby dismissed.

Accordingly, the claims of the plaintiffs as per the writ are dismissed in their entirety. There will be no order as to costs.

**SGD: HON. HASSAN B. JALLOW
CHIEF JUSTICE**

I AGREE: SGD: HON. JUSTICE A.D. YAHYA (JSC)

I AGREE: SGD: HON. JUSTICE N.C. BROWNE-MARKE (JSC)

I AGREE: SGD: HON. JUSTICE C.S. JALLOW (JSC)

I AGREE: SGD: HON. JUSTICE M.Y. SEY (JSC)



COUNSEL
MR. A. A. B. GAYE, with Mr. H. S. Sabaly, M. S. Tambadou, Neneh MC Chem, Yassou
Sanyang and also Mr. Othman Gaye for the Plaintiffs

MR. ABONBACARE TAMBADOU Attorney General with Mr. SIVCA D for the
Defendants