IN THE HIGH COURT OF SIERRA LEONE

THE STATE

V

1. HAMZA SESAY
2. SARAH FINDA BENDU

COUNSEL:

C. MANTSEBO, Esq Counsel for the State

R S V WRIGHT Esq for 1ST Accused

E E C SHEARS-MOSES Esq and S K KOROMA Esq for 2nd Accused

JUDGMENT

INTRODUCTION

1. The two accused persons are jointly charged in a 10 Count Indictment with various offences under the Anti-Corruption Act,2008. Both accused persons are charged in Count 1 with the offence of Misappropriation of Public Funds, to wit, the sum of Le419,200,000, Contrary to Section 36(1) of the Act; and in Count 2, with the offence of Misappropriation of Public Revenue, to wit, the sum of Le606,400,000 contrary to Section 36(1) of the Act. In Counts 3,4,5,6 & 7, the 2nd Accused alone, being the Acting Executive Director of the Sierra Leone Road Transport Authority (SLRTA), is charged with various offences under Section 48 of the Act. These offences deal with the manner in which the 2nd accused, in her capacity as Acting Executive Director, and thus the Professional and Administrative Head of the SLRTA dealt with the procurement of two tow trucks from Mabella Industries Limited, of which the 1st accused is Managing Director. Particulars of the Rules allegedly breached by the 2nd accused, were filed by the prosecution on 26 October,2009. In Counts 8,9 and 10 of the Indictment, both accused persons are charged with Conspiracy offences contrary to Section 128(1) of the Act. In Count 8, the prosecution alleges that both accused persons conspired to misappropriate the sum of Le419,200,000; in Count 9, that both accused

persons conspired to misappropriate the sum of Le606,404,000; and in Count 10, that both accused persons "on divers dates between 1st April,2008 and 18th September,2009 at Freetown in the Western Area of Sierra Leone, conspired to make an excessive and fraudulent payment out of public revenues for sub-standard and defective goods, to wit, payment out of the funds of the Sierra Leone Road Transport Authority, in the sum of Le1,025,600,00 to HAMZZA ALUSINE SESAY, Managing Director of MABELLA INDUSTRIES LIMITED, as part payment for the supply of two sub-standard and defective tow truck to the said Sierra Leone Road Transport Authority.

THE INDICTMENT

2. This Indictment is dated 30 October,2009 and was the third one filed by the Prosecution. The first one was undated, and thus had to be abandoned. The second one was dated 28 September,2009 but had to be abandoned as well as a result of several objections taken to it by Defence Counsel relating to the Temporal Jurisdiction of the charges: that some of them were laid on dates prior to the passing of the 2008 Act. The third one, dated 30 October,209 was the one on which the accused persons were eventually tried, after once more, some amendments had been made to Counts 8,9 and 10. The accused persons' respective pleas to the charges in this Indictment were taken on 3 November,2009.
3. Prior to this, I had on 28 October,2009 Ordered that the accused persons be tried by Judge alone, instead of by Judge and Jury, pursuant to the written Application of the Attorney-General and Minister dated 19 October,2009 and the oral Application in Court, of Mr Mantsebo.

PROSECUTION'S CASE

4. The prosecution called 12 witnesses , and closed its case on 4 December,2009. I was about to put the accused persons to their election, when Defence Counsel intimated me that they intended to make No-Case submissions on behalf of their respective clients. Both Mr Wright and Mr Shears-Moses addressed the Court orally, and also submitted written arguments in support of their various contentions.
5. Before dealing with these several submissions, I shall first set out the case the prosecution has presented through its witnesses, and the

exhibits tendered in evidence. The Ministry of Transport and Aviation decided that there was a need for the purchase of Tow trucks to help ease the traffic congestion in Freetown. Already, the SLRTA had included in its Budget for 2008, and had proposed buying one Tow truck and twenty wheel clamps for the same purpose, but the Ministry suggested purchasing, four tow trucks, and 100 wheel clamps. SLRTA decided on buying at first, two trucks, and the 100 wheel clamps. The process for purchasing these vehicles was conducted by the Procurement Committee of the SLRTA. This Committee was headed by the 2nd accused, and PW3 MOHAMED TEJAN KELLA, the SLRTA's Head of Finance who signed the contract with Mabella Industries Limited, was a member. The Ministry, through its Permanent Secretary, PW1 gave its approval, for the procurement, and as stated in exhibit 3, dated 13 May,2008, urged the 2nd accused to use her "good offices to fast track this programme so as to enhance road safety". But in an earlier letter, exhibit 1 dated 25 April,2008, in response to 2nd accused's own letter of 22 April,2008, S A KARGBO signing on behalf of the Permanent Secretary, PW1, had asked for "strict adherence to the procurement procedures...."

6. On 23 April,2008 according to PW2 KELFALA AHMED YANSANEH, the current Acting Executive Director of SLRTA, then the Acting Deputy Executive Director, he was called upon by the 2nd accused to provide specifications for the purchase of a tow truck. He submitted the specification to her. That document was tendered by him as exhibit 4. When the two tow trucks arrived at the quay, he was again called upon by the 2nd accused to inspect them. He did so, and prepared a Report which he tendered as exhibit 5. He took photographs of the tow trucks, and had them printed at A Genet & Co. Under cross-examination by Mr Shears-Moses, he said he became worried when he saw the condition of the tow trucks. Curiously, even though PW2 only submitted his specification on 23 April,2008 on that very day, the contract between SLRTA and Mabella, i.e. exhibit 7, was signed. Further, payment in the sum of Le419,200,000 for one tow truck, and for an unspecified number of wheel clamps, which presumably were 20 in number on a perusal of exhibit 11, was made to Mabella by PW3 that very day, even though the Payment Voucher which one would have thought should come first, was only prepared on 30 April,2008.

7. Correspondence between the Authority and Mabella only arose thereafter, between 12 and 13 May,2008, though there is reference in the contract to a proposal submitted by Mabella on 7 April,2008. Those pieces of correspondence relate to the procurement of the second tow truck and presumably for 80 wheel clamps. That second transaction was based on exhibit 11, 2nd accused's letter dated 12 May,2008 addressed to Mabella's Director. In that letter, 2nd accused refers to sub-clause 3(3) of the conditions of contract in exhibit 7 which, it seems authorises an addition to the original order without invalidating the contract. The importance of the date of this letter, is that it comes a day before PW1 gave his approval for the purchase of "a minimum of four heavy duty towing vehicles and one hundred wheel clamps." MR KARGBO's letter, dated 25 April,2008, exhibit 1, only gave approval for the procurement described by 2nd accused in exhibit 2. i.e approval for the purchase of "...a heavy duty towing vehicle and wheel clamps."
8. Payment for the second order, that is for the additional tow truck and eighty wheel clamps, in the sum of Le606,400,000 was made on 14 May,2008 though, again, the payment voucher (exhibit 15) was only prepared on 19 May,2008. According to PW3, he received 3 quotations, exhibits 17 a,b, & c respectively; and all three of them were considered at a Management Meeting, where the decision was taken to award the contract to Mabella, it's bid being the "most responsive."
9. Another witness, PIUS JOSEPH MBAWA explained the procurement process at the SLRTA. He was, until he retired on 30 September,2008, Procurement Officer at the SLRTA, but he was not, according to him, involved in the procurement of the tow trucks; he said also that the Procurement Committee could meet without him as he could appoint someone to represent him. PW7, ALFRED HERBERT KANDEH, the Chief Executive Officer of the National Public Procurement Agency, spelt out the duties of his Agency, and the manner in which procurement involving large sums of money should be carried out. He said the procurement of the two tow trucks was not referred to his Agency.
10. Lastly, in terms of importance, was the testimony of Mr DENNIS NICOL, an Automobile Engineer carrying on business as Denco Motors at Madongo Town. He was asked by the Anti-Corruption Commission to examine and report on the two tow trucks. He tendered his two Reports as exhibits 18

A&B respectively. He also opined in answer to a question put to him in cross-examination by Mr Wright, that he could smell the paint, grease and oil which indicated that the vehicles had been recently repaired, and that one of the vehicles was very old, probably 25 years old, and only fit for the dumping ground.

11. This is essentially the case for the prosecution. The Defence case so far, as presented in the respective recorded interviews given by both accused persons, is that the procurement process was regular, and that there was no criminality involved in the same; further, the 1st accused contends that the contract was not for the supply of new tow trucks, but for second hand ones, thus the price; SLRTA was not, and ought not to have expected tow trucks in a pristine condition. In any event, SLRTA still owed his company an outstanding balance in respect of the procurement.

MR WRIGHT'S ARGUMENTS

PUBLIC REVENUE

12. The arguments of Mr Wright deal with the propriety of the charges, and the evidence led. As to the argument that the use of the words "public revenue" in Counts 2,3,4,5,6 and 10 is erroneous and therefore makes those charges bad and insupportable, the short answer is that the revenue or funds of the SLRTA are not made up solely of funds appropriated by Parliament from the Consolidated Fund, but also of fees collected from members of the public by way of Licence fees, and Fines levied for various infractions of the provisions of the Road Traffic Act,2007. I do not agree with him, that when such fees or fines are paid to the SLRTA, they cease to be public revenue, and automatically become public funds. Even if I were to agree with him, in my view, Misappropriation of Public Funds or of Public Revenue are, in the case of a body such as the SLRTA, one and the same type of activity. I should at the same time point out that in the case of Count 2, only the Statement of Offence refers to "public revenue." The Particulars of Offence refer to "Public Funds." It is a matter I shall have to return to, depending on the decision I would reach.

ABSENCE OF THE WORD "FRAUDULENT"

13. I agree with Mr Wright in his argument that the word "Fraudulent" is missing from Counts 3&4 and that they ought to be there. Clearly, those Counts have not been inelegantly drafted. I agree also, that that word encapsulates the mens rea required for a conviction of the offences in both Counts. As I have repeatedly stated in all the Anti Corruption cases over which I have presided, I have no intention of convicting any person, where the prosecution has not been able to prove dishonesty or fraudulent conduct as the case may be. I am satisfied that the absence of the word "fraudulent" does not prejudice the case against the 2nd accused who faces the charges in Counts 2&3, and that she does not run the risk of conviction of those offences, if the prosecution does not prove beyond reasonable doubt that her conduct was fraudulent.

MEANING OF MISAPPROPRIATION

14. Mr Wright has also argued that in the circumstances of the case, 1st accused could not have misappropriated the sum of Le419,200,000 as alleged in Count 1, since, the moment that sum was credited to the account of Mabella, it ceased to be the property of SLRTA. Further, that Misappropriation entails the application of another's property to one's own use. Whilst these concepts may be applicable to the Law of Larceny, they are not, in my considered Judgment, applicable to the offence of Misappropriation of Public Funds or Revenue under the Anti-Corruption Act,2008. There is Misappropriation of public Funds or Public Revenue, where, according to Section 36(2) of the Act, a person commits an act, whether by himself, with or through another person, by which a public body is deprived of any revenue, funds, or other financial interest or property belonging or due to the public body. In the case of THE STATE v WELLINGTON & ANOTHER, I explained, just as I had done in THE STATE v MANNEH & ANOTHER, what misappropriates means. "Misappropriate" is not in my view, a term of art. It is much wider than "appropriation" in the United Kingdom Theft Act,1968. Appropriation in that Act involves the assumption of the rights of the owner by the Accused. Here, the wilful commission of any act which results in the owner losing funds belonging to it, amounts to misappropriation. There is Misappropriation also whether the owner of the funds consented or not to the deprivation of funds." There is no requirement that an accused

must necessarily be employed by the public body which loses funds or revenue. Anybody who causes a public body such as the SLRTA, to lose funds or revenue could be held culpable of the offence.

15. As to the date of the Misappropriation, Mr WRIGHT argues that no misappropriation took place on the 23rd of July,2009. That is quite true. The evidence led, shows that the sum of le419,200,000 was transferred to the account of Mabella on 23 April,2008. But in criminal jurisprudence and procedure, what matters is that the offence must be stated to have occurred on a date or dates before the date of the Indictment. The time of the commission of the offence is usually only important when an accused person raises an alibi. Then, it would be absolutely imperative that the prosecution be tied down to a particular date or dates. Here, alibi is not in issue.

DECISION TO PROCURE TOW TRUCKS

16. Mr WRIGHT argues also, that there is no evidence that the 2nd accused authorised, of her own volition, the payment to Mabella of the sum of Le419,200,000; that the decision to do so, was taken by a Committee of which she was the head. The complaint of the prosecution vis-a-vis the 2nd accused, as I understand it, is that the procedures laid down in the Public Procurement Act were not followed, and that she was ultimately responsible to ensure that they were followed; that the failure to ensure that they were followed resulted in the supply of two tow trucks which were well below the respective amounts paid for them, and which were in the words of PW4, fit for the dumping yard.
17. The rest of Mr WRIGHT's arguments deal with the issues of whether excessive payment was made to Mabella, and whether the tow trucks supplied by the 1st accused were indeed defective or sub-standard.

THE LAW

18. At this stage of the proceedings, proof beyond a reasonable doubt is not required of the prosecution; what is required is that I should be satisfied that the 1st accused has a case to answer; i.e. that I should call upon him to present his defence. The principles applicable to a No-Case submission have been well set out by me in THE STATE v ARCHILLA & OTHERS and in THE STATE v BAUN & OTHERS. "When a No-Case submission is made

at the conclusion of the prosecution's case, the burden imposed on the prosecution is less than that imposed on it at the end of the trial. At this stage, the true test to my mind, is that set out by *LORD LANE, LCJ in the Court of Appeal Criminal Division in GALBRAITH [1981] 1 WLR 1039 at 1042B-D: "....If there is no evidence that the crime alleged has been committed by the Defendant, there is no difficulty. The Judge will of course stop the case.....where the Judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.....where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury...."* The Learned Editors of BLACKSTONE'S CRIMINAL PRACTICE 2002 Edition have succinctly summarised the position at paragraph D14-27 page 1431. "*if there is no evidence to prove an essential element of the offence a submission must obviously succeed; if there is some evidence which - taken at face value - establishes each essential element, then the case should normally be left to the jury. The Judge does however, have a residual duty to consider whether the evidence is inherently weak or tenuous.....*"

19. GALBRAITH has been further explained by the Privy Council in DALEY v R [1994] 4 All ER, 86 per LORD MUSTILL at page 94 g&h: "*a reading of the judgment in R v Galbraith as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which, as Lord Widgery CJ had put it, was not his job.*" Our Court of Appeal in a Magisterial Appeal, SIAKA STEVENS & ANOR v COMMISSIONER OF POLICE [1960-61] Vol 1 SLLR 208 at 212 per AMES,P has held that where there is just a mere scintilla of evidence, the accused person should be acquitted on a No -Case Submission.

20. Though I am trying this case by Judge alone, the principles set out above apply here also. If I hold the view, that on one possible view of the facts, I could at the end of the day, come to the conclusion that the 1st accused or the 2nd accused is or are guilty of the offences with which he or they are charged, it will be my duty to call upon the accused persons to present a defence.

CONSPIRACY

21. As to the arguments about the propriety of the Conspiracy charges in Counts 8,9 & 10, my view is, and I have consistently said so in this Court, that Conspiracy could properly be charged with substantive offences. If at the end of the day, I find that the substantive offences have been proved, and that they establish the full extent of the crimes committed, it would then be unnecessary for me to go on and consider the charges of Conspiracy. I also hold that in each Count, only one Conspiracy has been alleged, and that the evidence led, goes to prove only one Conspiracy in each Count. I agree with Mr WRIGHT that for a charge of Conspiracy to succeed, the prosecution must either prove the agreement, or prove overt acts establishing the agreement. Here, I hold that the prosecution has led evidence through, particularly, PW2,4, 5 & 8, sufficient to establish that there was an agreement to Misappropriate public funds, and to make excessive payment. Whether they have done so beyond a reasonable doubt will be dealt with at the end of the trial.

MR SHEARS-MOSES' ARGUMENTS

22. I now turn to MR SHEARS-MOSES's submission on behalf of the 2nd accused. I have dealt with all the legal points canvassed by him, in dealing with Mr WRIGHT's submission above. In fact, at some stage, whilst reading through Mr Wright's submission, it appeared he was arguing on behalf of both accused persons. But I suppose, he argued in this manner on the basis that for him to succeed in his fight for the 1st accused, he must first demolish the case against the 2nd accused. Mr SHEARS-MOSES has argued forcefully, that the decision to procure the tow trucks was not taken by his client alone, but by a Committee; that she did not even sign the contract with Mabella; this was done by PW3; and that in any event, in April,2008 Section 48 was not yet part of our Laws, so

that failure to follow the Rules of procurement laid down in the Public Procurement Act,2004 and in its 2006 Rules was not punishable as a criminal offence. The answer to this is that, notwithstanding the breach of these Rules, if the tow trucks which were eventually delivered by the 1st accused, where in accordance with the specification prepared by PW2, and had secured the approval of PW4, there would hardly have been a need for a criminal trial. The prosecution's complaint is that the transaction was fraudulent from the word go; that the payments made to the 1st accused were far in excess of that required for two second hand tow trucks, which were in any event, delivered considerably later than agreed; and that the criminality of the whole enterprise only became apparent when they were delivered in that state. Thus, the non-publicising of the bids in the manner required by the NPPA; the signing of the contract even before the specification prepared by PW2 had been studied; and the clear attempt at contract-splitting i.e. apparently making an additional order after the first one, and making two payments in respect of one contract, in a bid to bring the payments between the threshold permitted by the Rules of procurement. In any event, according to PW8, the upper threshold for transactions of this sort, was Le600m. The second payment to Mabella exceeded Le600m.

PAYMENT TO MABELLA NOT PAYMENT TO 1ST ACCUSED

23. I have noted Mr WRIGHT's argument that payment to Mabella, was not the same as payment to 1st accused. Attractive though that argument may be, for present purposes, all I would say, is that, Mabella being merely a juristic person in Law, acts through natural persons, one of them being the 1st accused.

24. The No-Case submissions made on behalf of both accused persons are overruled. The accused persons have a case to answer, and they are now called upon to present their separate defences. The prosecution is called upon to synchronise the words used in the Statement of Offence and in the particulars of Offence in Count 2 of the Indictment.

N C BROWNE-MARKE, Justice of Appeal

1 March,2010.